



Back

Federal Supreme  
Court Tribunal fédéral  
Tribunale federale  
Tribunal federal



**2C\_341/2023**

**Judgement of 30 April 2025**

**II. Public law department**

Cast  
Federal Judge Aubry Girardin, President, Federal Judge  
Donzallaz,  
Federal Judge Hänni, Federal  
Judge Ryter, Federal Judge  
Kradolfer, Court Clerk Zollinger.

Party to the  
proceedings  
Greenpeace  
Switzerland,  
Badenerstrasse 171, 8004  
Zurich, complainant,  
represented by Adrian Ettwein and/or Cordelia Bähr,  
lawyers,

*against*

A. \_\_\_\_\_ AG,  
Respondent,  
represented by Prof Dr Isabelle Häner and/or Dr  
Anja Josuran-Binder,  
Women lawyers,

Federal Office  
for Food Safety and Veterinary Matters,  
Schwarzenburgstrasse 155, 3003 Bern.

Object  
Extension of the authorisation to place a plant protection product on the market,

Appeal against the ruling of the Federal Administrative Court, Division II, of 1  
May 2023 (B-3487/2020).

**Facts of the case:**

**A.**  
The A. \_\_\_\_\_ AG with its registered office in U. \_\_\_\_\_ (AG) is the holder of a marketing  
authorisation for the plant protection product B. \_\_\_\_\_. This contains the active ingredient tefluthrin.  
Tefluthrin belongs to the group of pyrethroids (synthetic insecticides).

**A.a.** The authorisation was first granted on 4 April 2012 (version 1) and 11 April 2012 (version 2). According to the  
authorisation last renewed on 7 November 2018, the authorisation authority for plant protection products permitted the  
placing on the market of the plant protection product B. \_\_\_\_ subject to certain conditions for use on fodder and sugar  
beet against wireworms, moss beetles and millipedes with an application rate of 60 ml/100,000 pills. The authorisation  
was limited until 30 April 2022. In a letter dated 8 January 2015, the  
A. \_\_\_\_\_ AG submitted an extension application to the Federal Office for Agriculture and requested authorisation  
to place B. \_\_\_\_\_ for the additional areas of application mentioned in the letter.

**A.b.** In the years 2015-2020, the procedure for extending the authorisation to place the plant protection product on the  
market was ongoing. In this context, the Swiss Federal Agricultural Research Station Agroscope prepared various  
expert reports, in particular on 5 August 2010 (pre-existing) regarding the environmental behaviour of the active  
substance tefluthrin in product B. \_\_\_\_\_, on 7 April 2015 concerning the environmental behaviour and residues, on  
28 September 2015 concerning the danger to bees, on 7 June 2017 concerning the effect in vegetable cultivation, on  
25 July 2017 concerning the environmental behaviour and residues, on 5 September 2019 concerning the  
environmental risks and on 16 September 2019 concerning the effect in field cultivation.

**A.c.** In a notice published in the Federal Gazette on 29 October 2019, the Federal Office for Agriculture informed the organisations entitled to lodge an appeal under the Federal Act of 1 July 1966 on the Protection of Nature and Cultural Heritage (NCHA; SR 451) about the ongoing procedure to extend the authorisation to place the plant protection product on the market. The Greenpeace Switzerland Foundation applied for party status on 7 November 2019, requested access to the files and commented on the ongoing authorisation procedure in a letter dated 24 January 2020.

**B.**

By decision dated 4 June 2020, the Federal Office for Agriculture partially approved the application of A.\_\_\_\_ AG was partially approved. The authorisation for the placing on the market of the plant protection product B.\_\_\_\_ dated 7 November 2018 was revoked and replaced by the authorisation dated 2 June 2020 (dispositive item 1). The application to extend the authorisation to place the plant protection product B.\_\_\_\_ in maize against leafhoppers, in oilseed rape against earth fleas and in chicory for the production of coffee substitute against wireworms and cockchafer was rejected (dispositive no. 2). It follows from the recitals of the ruling that the Federal Office for Agriculture, in its authorisation of 2 June 2020, approved the use of B.\_\_\_\_ as a seed treatment for cereals, maize and chicory with partial efficacy against certain pests as follows and adapted the existing authorisation as a seed treatment for fodder and sugar beet with partial efficacy against certain pests as follows:

- Chicory (partial effect: wireworms and cockchafer; application rate: 25 ml/100,000 seeds);
- Fodder beet and sugar beet (partial effect: wireworms, moss beetles and millipedes; application rate: 60 ml/100,000 pills);
- Cereals (partial effect: fallow fly and wireworms; application rate: 100 ml/100 kg seed);
- Maize (partial effect: wireworms; application rate: 50 ml/50,000 maize kernels).

These applications of the plant protection product were each authorised subject to certain conditions.

**B.a.** The Greenpeace Switzerland Foundation lodged an appeal against the decision of 4 June 2020 with the Federal Administrative Court on 8 July 2020. It essentially requested that the authorisation of 2 June 2020 for the placing on the market of the plant protection product B.\_\_\_\_ should be cancelled. The complainant argued, among other things, that it was necessary to prohibit the placing on the market of the plant protection product in order to implement the precautionary principle. The active substance contained in the plant protection product B.\_\_\_\_ was to be classified as a POP (persistent organic pollutant), PBT (persistent, bioaccumulative, toxic) and vPvB (very persistent and very bioaccumulative) substance. It should not have been authorised at all. The Greenpeace Switzerland Foundation is therefore contesting the entry of tefluthrin as an accessory pesticide active substance and is requesting its cancellation. Greenpeace Switzerland Foundation also argued that the effects on the environment should be assessed both individually and collectively and according to their interaction. Such an assessment had not been carried out. The use of the pesticide B.\_\_\_\_ as a seed treatment endangered protected birds and mammals, beneficial arthropods and non-target arthropods as well as aquatic organisms and fish.

**B.b.** As of 1 January 2022, the assignment of the authorisation authority for plant protection products changed from the Federal Office for Agriculture to the Federal Food Safety and Veterinary Office. The instructing judge of the Federal Administrative Court requested various technical reports in the course of the appeal proceedings. The Federal Office for the Environment commented on the environmental aspects in the technical reports of 9 February 2021, 28 July 2022 and 21 September 2022. In addition, the Federal Office for Agriculture, as the specialist authority, commented on the effects of B.\_\_\_\_ on non-target arthropods.

**B.c.** In its judgement of 1 May 2023, the Federal Administrative Court dismissed the appeal insofar as it accepted it. It essentially considered that the procedure for the approval of active substances should be distinguished from the procedure for the authorisation or extension of the existing authorisation of a specific plant protection product. When examining the application for an extension of the authorisation to place a plant protection product on the market, the authorisation body was not required to re-examine ex officio whether the active substances contained in the plant protection product met the authorisation criteria. It is sufficient that the active substances are authorised. Furthermore, the environmental law requirements would not prevent the extension of the authorisation to place the plant protection product on the market. The regulatory requirements for the extension of the authorisation were met.

**C.**

The Greenpeace Switzerland Foundation appealed to the Federal Supreme Court on 12 June 2023 in matters of public law.

**C.a.** The appellant requests that the judgement of 1 May 2023 and the order of 4 June 2020 be set aside and, in the alternative, that the matter be referred back to the lower instance with instructions for reassessment in accordance with the grounds of appeal. In procedural terms, the appellant requested the following:

- "1. the files of the lower court should be consulted.
2. The present appeal should be granted suspensive effect and at the same time the proceedings should be suspended until the Swiss Fisheries Association's application for a targeted review of all plant protection products containing artificial pyrethroids, namely tefluthrin, has been concluded.
3. The application submitted by the Swiss Fisheries Association to the Federal Office for Agriculture on 4 May 2020 regarding the targeted review of plant protection products, application for participation in the procedure and extension of the targeted review and revocation of plant protection products containing artificial pyrethroids, namely tefluthrin, should be added to the files.
4. The letter from the FOAG to the Swiss Fishing Association dated 14 May 2020 regarding the targeted review of authorised plant protection products containing pyrethroids should be added to the file.
5. The application submitted by the Swiss Fisheries Association to the Federal Office for Agriculture on 2 June 2020 regarding the application for participation in the procedure and extension of the targeted review and revocation of plant protection products containing artificial pyrethroids, namely tefluthrin, should be added to the files.
6. The e-mail correspondence between the undersigned legal representative and the lawyer Dr iur.\_\_\_\_ and the President of the Swiss Fishing Association dated 17 and 19 May 2023 should be placed on file."

**C.b.** In a ruling dated 19 July 2023, the President of the Second Public Law Division rejected the request for suspension and granted the appeal suspensive effect.

**C.c.** While the respondent requests that the appeal be dismissed insofar as it is upheld,

the Federal Food Safety and Veterinary Office and the Federal Department of Home Affairs conclude that the appeal should be dismissed. The lower instance and the Federal Office for Agriculture waive a hearing. The appellant replied in a submission dated 26 October 2023, whereupon the respondent submitted a further statement on 9 November 2023.

#### Considerations:

##### 1.

The Federal Supreme Court examines its jurisdiction and the further conditions for admission ex officio (Art. 29 para. 1 BGG) and with free cognition (see **BGE 147 I 89 E. 1; 146 II 276 E. 1**).

**1.1.** The petition submitted in due time (Art. 100 para. 1 BGG) and form (Art. 42 BGG) concerns a matter of public law (Art. 82 lit. a BGG). The appeal is admissible as an appeal in matters of public law, as there are no grounds for exclusion (Art. 83 FSCA; see judgments 2C\_1034/2022 and 2C\_1035/2022 of 23 May 2023 E. 1). The appellant was already rightfully involved as a party in the Federal Administrative Court proceedings (see Art. 12 para. 1 lit. b of the Federal Act of 1 July 1966 on the Protection of Nature and Cultural Heritage [NCHA; SR 451] in conjunction with para. 23 of the Annex. No. 23 of the Annex to the Ordinance of 27 June 1990 on the Designation of Organisations Entitled to Lodge Complaints in the Field of Environmental Protection and the Protection of Nature and Cultural Heritage [VBO; SR 814.076]; **BGE 144 II 218 E. 3-7**). It is also entitled to appeal to the Federal Supreme Court on the basis of Art. 89 para. 2 lit. d BGG (see also judgement 1C\_283/2021 of 21 July 2022 E. 3).

**1.2.** Insofar as the appellant requests the annulment of the ruling of 1 May 2023, it is directed against a ruling of the Federal Administrative Court that concludes the proceedings (Art. 90 BGG) (Art. 86 para. 1 lit. a BGG). However, the Federal Office for Agriculture's ruling of 1 May 2023 is not the subject of the Federal Supreme Court proceedings. The ruling has been replaced by the judgement of the lower court and is deemed to be contested in terms of content (devolutive effect; see **BGE 134 II 142 E. 1.4**). To this extent, the appeal is not recognised. Moreover, the appellant only requests that the contested judgement be set aside and, if necessary, that the matter be referred back to the lower court. This is generally permissible in the case of onerous decisions despite the reformatory nature of the appeal (see judgments 2C\_561/2022 of 23 April 2024 E. 1.3; 2C\_266/2022 of 7 October 2022 E. 1; 2C\_397/2021 of 25 November 2021 E. 1.3).

**1.3.** The appeal in public law matters must therefore be upheld insofar as it is directed against the judgement of 1 May 2023.

##### 2.

New facts and evidence may only be presented in federal court proceedings to the extent that the decision of the lower court gives rise to them (Art. 99 para. 1 BGG).

**2.1.** Just because the lower court did not follow the legal opinion of the appellant does not mean that the contested judgement gives rise to the admission of new evidence. To do so, the lower instance would have to have applied substantive law in such a way that certain factual circumstances would become legally relevant for the first time as a result of the lower-instance judgement (see judgements 2C\_344/2022 of 29 March 2023 E. 3.1; 2C\_582/2020 of 10 December 2020 E. 3). Genuine novelties, on the other hand, are inadmissible in any case. Consequently, facts and evidence that only arose after the contested judgement and therefore could not have been caused by it are not taken into account (see **BGE 143 V 19 E. 1.2; 133 IV 342 E. 2.1**).

**2.2.** In its submission of 26 October 2023, the appellant refers to a documentary film, stating the URL address. However, to the extent that the documentary film is a non-genuine novelty, she does not explain why she did not already submit it in the proceedings before the court of first instance and what she wishes to derive from it. As a genuine novelty, it would not be admissible from the outset. Accordingly, the novum remains irrelevant in the federal court proceedings (see also E. 5.6 below).

##### 3.

In particular, the appeal may allege a violation of federal law (Art. 95 lit. a BGG). The Federal Supreme Court applies the law ex officio (Art. 106 para. 1 BGG), whereby - taking into account the general obligation to give notice of defects and reasons (Art. 42 para. 2 BGG) - it generally only examines the asserted arguments, provided that any further legal deficiencies are not obvious (see **BGE 147 I 73 E. 2.1; 142 I 135 E. 1.5**). The Federal Supreme Court will only examine the violation of constitutional rights if such a complaint has been raised and sufficiently substantiated in the appeal (Art. 106 para. 2 BGG; see **BGE 147 II 44 E. 1.2; 143 II 283 E. 1.2.2**). This qualified obligation to submit a complaint and provide reasons in accordance with Art. 106 para. 2 BGG requires that the complaint clearly and in detail sets out the extent to which constitutional rights are alleged to have been violated on the basis of the considerations of the contested decision (see **BGE 149 I 105 E. 2.1; 143 I 1 E. 1.4**).

##### 4.

Subject to special transitional provisions, those legal principles that are applicable at the time of fulfilment of the facts to be legally regulated or that lead to legal consequences are generally decisive in terms of time (see **BGE 150 II 390 E. 4.3; 149 II 187 E. 4.4; 144 V 210 E. 4.3.1; 139 II 263 E. 6**). The situation is different with the procedural innovations than with the substantive provisions of the ordinance. In the absence of any transitional provisions to the contrary, these are immediately and fully applicable from the date of entry into force (see **BGE 149 II 187 E. 4.4; 144 II 273 E. 2.2.4; 132 V 215 E. 3.1.2**).

**4.1.** With regard to the substantive provisions of the Ordinance of 12 May 2010 on the Placing of Plant Protection Products on the Market (Plant Protection Products Ordinance, PPPO; SR 916.161), the standards that were in force when the Federal Office for Agriculture issued its ruling of 4 June 2020 are authoritative. The Plant Protection Products Ordinance has been amended several times since then. However, as the lower court rightly considers, the relevant substantive provisions of the ordinance have remained unchanged. They are therefore cited below in the currently valid version (see E. 4.2.1 f. below). Reference is made to the provisions of the ordinance as amended on 1 January 2020, which were in force at the time the ruling of 4 June 2020 was issued, insofar as this is relevant ("aArt."). In contrast, the Plant Protection Products Ordinance has undergone various changes in connection with the procedure for the authorisation of plant protection products since the Federal Office for Agriculture issued its decree of 4 June 2020 (see RO 2021 760, p. 3 et seq.). These procedural provisions entered into force on 1 January 2022 (see RO 2021 760, p. 5). As the lower court rightly recognised, they were immediately and fully applicable in the absence of a transitional provision to the contrary (see E. 4.2.3 below).

**4.2.** Plant protection products are agricultural means of production. They are used for agricultural production (see Art. 158 para. 1 of the Federal Act of 29 April 1998 on Agriculture [Agriculture Act, LwG; SR 910.1]). In the Plant Protection Products Ordinance, the legislator has taken into account not only the provisions of the Agriculture Act, but also the provisions of other federal legislation - in particular the Federal Act of

15 December 2000 on protection against dangerous substances and preparations (Chemicals Act, ChemA; SR 813.1) and the Federal Act of 7 October 1983 on Environmental Protection (Environmental Protection Act, EPA; SR 814.01) (see **BGE 144 II 218 E. 3.3**; judgments 2C\_1034/2022 and 2C\_1035/2022 of 23 May 2023 E. 5.2).

**4.2.1.** According to Art. 2 para. 1 PPPO, the Ordinance on Plant Protection Products applies to products in the form supplied to the user that consist of or contain active substances, safeners or synergists (*plant protection products*) and are intended for one of the uses listed in a-e above. It applies to substances, including organisms (macro- and micro-organisms), with a general or specific action against harmful organisms on plants, parts of plants or plant products (*active substances*; cf. Art. 2 para. 2 PPPO). According to Art. 2 para. 3 PPPO, it also applies to substances or preparations that are added to a plant protection product in order to suppress or reduce the phytotoxic effect of the plant protection product on certain plants (*safeners*; lit. a) and to substances or preparations that have no or only a weak effect according to Art. 2 para. 1, but enhance the effect of the active substance or active substances in a plant protection product (*synergists*; lit. b). While the criteria and procedure for the approval of active substances, safeners and synergists are regulated in Art. 4 ff. PPPO, the relevant provisions for the authorisation to place a plant protection product on the market and the corresponding authorisation procedure can be found in Art. 14 ff. PPPO.

**4.2.2.** According to Art. 17 para. 1 PPPO, subject to Art. 34 PPPO, a plant protection product is only authorised if it fulfils the following requirements, among others, in accordance with the uniform principles set out in Art. 17 para. 5 PPPO (in conjunction with Annex 9 of the Plant Protection Products Ordinance): Its active substances, safeners and synergists are approved (lit. a) and it fulfils the requirements of Art. 4 para. 5 PPPO (lit. e), taking into account the latest scientific and technical findings. According to Art. 4 para. 5 PPPO, the plant protection product must fulfil the following requirements, among others, after use in accordance with good plant protection practice and under realistic conditions of use: It must be suitable for the intended use (lit. a). It must not have any immediate or delayed harmful effects on the health of humans, including particularly vulnerable groups of people, or animals (lit. b). It must not have any unacceptable effects on plants or plant products (lit. c). It must not cause unnecessary suffering or pain to the vertebrates to be controlled (lit. d). It must not have unacceptable effects on the environment, with particular regard to the following aspects, insofar as there are scientific methods recognised by the European Food Safety Authority (EFSA) for assessing such effects (lit. e): Fate and dispersal in the environment, in particular contamination of surface waters, including estuarine and coastal waters, groundwater, air and soil, taking into account locations at long distances from the place of use following long-distance dispersal in the environment (point 1); impact on non-target species, including the persistent behaviour of these species (point 2); impact on biodiversity and the ecosystem (point 3).

**4.2.3.** According to Art. 21 para. 1 PPPO, an applicant wishing to place a plant protection product on the market must submit an application for authorisation or an amendment to an authorisation to the authorisation authority either themselves or through a representative. Since 1 January 2022, the authorisation office has been assigned to the Federal Food Safety and Veterinary Office (see Art. 71 para. 1 PPPO). The Federal Office for Agriculture, which issued the contested decision, is no longer responsible for this (cf. aArt. 71 para. 1 PPPO). The tasks of the assessment bodies provided for in Art. 72 para. 1 lit. a-d PPPO - Federal Office for the Environment (FOEN), Federal Food Safety and Veterinary Office (FSVO), Federal Office for Agriculture (FOAG) and State Secretariat for Economic Affairs (SECO) - have also changed with regard to the authorisation of plant protection products (cf. Art. 72a-72d PPPO; cf. also Art. 73 PPPO; E. 5.4-5.7 of the contested judgement).

## 5.

The appellant criticises the fact that the approval of the active substance tefluthrin contained in the plant protection product was not reviewed in connection with the extension of the authorisation to place the plant protection product on the market. In addition to the unlawful failure to review the authorisation of the active substance, she also complains in this context of a manifestly incorrect determination of the facts, citing new facts and evidence.

**5.1.** The appellant submits that the Swiss Fisheries Association submitted an application to the Federal Office for Agriculture on 4 May 2020 requesting, among other things, that the authorised plant protection products containing artificial pyrethroids, namely tefluthrin, be immediately subjected to a targeted review and that the authorisations for plant protection products containing artificial pyrethroids as active substances be revoked. On 14 May 2020, the Federal Office for Agriculture issued a statement on this, but not on the applications relating to plant protection products containing artificial pyrethroids such as tefluthrin. On 2 June 2020, the Swiss Fishing Association therefore requested that a contestable ruling be issued in this regard. By the time of the contested ruling on 1 May 2023, the Swiss Fishing Association had not received a response. These circumstances are significant, as the Federal Office for Agriculture stated in the relevant ruling of 4 June 2020, against its better judgement, that there were no other ongoing administrative proceedings whose outcome was of precedential importance for the present proceedings. The appellant concludes that the lower instance was therefore manifestly incorrect in stating in recital 10.5 of the contested decision that no proceedings for the targeted review of all plant protection products containing artificial pyrethroids were pending at the time the contested decision of 4 June 2020 was issued. According to the appellant, it is obvious that the outcome of the review of the active substance requested by the Swiss Fishing Association would have had an influence on the question to be assessed in the present case as to whether the requested extension of the authorisation to place the plant protection product containing the active substance tefluthrin on the market could be approved.

**5.2.** The Federal Supreme Court bases its judgement on the facts established by the lower court (Art. 105 para. 1 BGG). The established facts can only be successfully challenged, corrected or supplemented if they are manifestly incorrect or based on a violation of the law within the meaning of Art. 95 BGG and the rectification of the defect may be decisive for the outcome of the proceedings (Art. 97 para. 1 BGG; Art. 105 para. 2 BGG; see **BGE 149 II 337 E. 2.3**; **142 I 135 E. 1.6**). If the appealing party complains that the facts of the case are obviously incorrect, its submissions must fulfil the requirements of Art. 106 para. 2 BGG (see **BGE 148 V 366 E. 3.3**; **147 I 73 E. 2.2**).

**5.3.** In essence, the appellant claims that the lower court failed to take into account that the Swiss Fishing Association had endeavoured to initiate a procedure to review the active substance tefluthrin and to specifically review plant protection products containing this active substance. In order to examine whether the complainant's objection to the facts can have an influence on the outcome of the proceedings (see E. 5.5 below), it is first necessary to assess the complainant's (legal) view that, in connection with the extension of the authorisation to place the plant protection product on the market to be assessed in the present case, the authorisation of the active substance tefluthrin contained therein and the authorisations of all other plant protection products containing this active substance must also be (specifically) reviewed (see E. 5.4 below).

**5.4.** The procedure for authorisation or extension of authorisation to place a product on the market

...

The authorisation of a plant protection product on the one hand and the procedure for approving active substances on the other are linked in that a plant protection product is only authorised if, among other things, the active substances it contains are approved (see Art. 17 para. 1 lit. a PPPO).

**5.4.1.** Annex 1 of the Plant Protection Products Ordinance contains a list (of active substances) of active substances approved for use in plant protection products. The Federal Department of Home Affairs (FDHA) maintains the list of active substances by adding a new active substance to the list of approved active substances (cf. Art. 5 para. 1 PPPO) or deleting it from the list of active substances (cf. Art. 10 para. 1 PPPO). The disputed active substance tefluthrin is also listed in Annex 1 Part A of the Plant Protection Products Ordinance and is therefore considered an approved active substance for use in plant protection products. It is true that the authorisation authority can review an approved active substance at any time (see Art. 8 para. 1 PPPO) and, if necessary, apply to the FDHA to revoke the approval (see Art. 8 para. 3 PPPO). However, the active substance approval is revoked by deleting the active substance from Annex 1 of the Plant Protection Products Ordinance, which requires an amendment to the ordinance and is usually accompanied by the adoption of a transitional provision (see Art. 86a ff. PPPO; judgments 2C\_1034/2022 and 2C\_1035/2022 of 23 May 2023 E. 4.2.2 and E. 6.3.1). As the Federal Supreme Court has already stated, the deletion of an active substance from Annex 1 of the Plant Protection Products Ordinance primarily takes place within the framework of a special mechanism of direct recognition (cf. Art. 160 para. 6 LwG). According to Art. 10 para. 1 PPPO, the FDHA deletes an active substance from Annex 1 of the Plant Protection Products Ordinance if the active substance is deleted from Implementing Regulation (EU) No. 540/2011 in the EU (see judgments 2C\_1034/2022 and 2C\_1035/2022 of 23 May 2023 E. 4.2 and E. 6.3.3).

**5.4.2.** In contrast, the procedure for authorisation or extension of authorisation for the placing on the market of a plant protection product does not require an approved active substance to be reviewed. It is true that a new active substance is usually reviewed in connection with a new application for authorisation of a plant protection product (see Art. 5 para. 1 PPPO). However, if a plant protection product to be authorised contains an active substance already listed in Annex 1 of the Plant Protection Products Ordinance and thus an active substance approved for use in plant protection products, Art. 17 para. 1 PPPO does not require a new review of the active substance approval. Accordingly, when examining an application for an extension of the authorisation to place a plant protection product on the market, the assessment authorities do not have to re-examine (ex officio) whether the active substances contained therein meet the approval criteria according to Art. 4 para. 2 PPPO. It is sufficient that the active substances are listed in Annex 1 of the Plant Protection Products Ordinance and are therefore deemed to be authorised (cf. Art. 17 para. 1 lit. a PPPO). Against this background, the lower court rightly considers that the authorisation or extension of the authorisation of a plant protection product on the one hand and the approval or review of an active substance on the other are two different procedures with partially different responsibilities. The main aspects of the review are located at the first level of active substance approval. The second level of this two-stage procedure - the authorisation of a specific plant protection product with an already approved active substance - only examines the specific composition of the active substances in a plant protection product and the effects under the specific proposed conditions of use (see E. 9.4 of the contested judgement; cf. e.g. para. 9BI-2.5.1.3 (1) Annex 9 PPPO ["under the proposed conditions of use"]; para. 9CI-2.5.2.4 Annex 9 PPPO ["when the plant protection product is used under the proposed conditions"]).

**5.4.3.** The application for authorisation or extension of the authorisation to place a plant protection product on the market therefore does not lead to a simultaneous procedure for the review of the active substances contained therein, insofar as the active substances are already listed in Annex 1 of the Plant Protection Products Ordinance. The clear separation of the procedures is not only evident in the authorisation or approval, but also in the subsequent review. While the review of the approval of an active substance is regulated in Art. 8 PPPO and is linked to the approval criteria of Art. 4 PPPO (cf. Art. 8 para. 3 PPPO), the review of the authorisation of a plant protection product is anchored in Art. 29 PPPO and requires indications that one of the authorisation requirements of Art. 17 PPPO is no longer fulfilled. The targeted review of all plant protection products with a specific active substance, safener or synergist in accordance with Art. 29a PPPO also requires a separate procedure if the requirements of Art. 29a para. 1 sentence 2 PPPO are met. However, if in the course of a procedure for authorisation or extension of authorisation for the placing on the market of a plant protection product there are indications that the authorisation criteria of Art. 4 PPPO or the requirements of Art. 17 PPPO are no longer fulfilled, an (independent) review procedure according to Art. 8 PPPO (active substance) or review procedure according to Art. 29 f. PPPO (plant protection product) must be initiated.

**5.4.4.** It follows from the above that the procedure for extending the authorisation to place the plant protection product on the market on the one hand and the procedure for reviewing the approval of the active substance tefluthrin on the other are not directly related. The initiation of the procedure to extend the authorisation does not automatically lead to a procedure to review the active substance. In the present case, the complainants' objections are primarily aimed at the specific conditions of use that are decisive for the placing of the plant protection product on the market following the requested extension of the authorisation (see E. 6 and E. 7 below).

**5.5.** In the light of the above, contrary to the complainant's view, it is not relevant to the outcome of the present proceedings that the Swiss Fisheries Association requested a specific review of the authorised plant protection products containing artificial pyrethroids, namely tefluthrin, from the Federal Office for Agriculture. The subject of the present matter is solely the extension of the authorisation to place the respondent's plant protection product on the market. In this context, neither the authorisation of the active substance tefluthrin listed in Annex 1 of the Plant Protection Products Ordinance is to be reviewed, nor is a specific review of all authorisations of plant protection products containing this active substance to be carried out. Insofar as the appellant demands a review of the authorisation of the active substance pursuant to Art. 8 para. 1 PPPO or a targeted review of the authorisations pursuant to Art. 29a PPPO with reference to the proceedings initiated by the Swiss Fisheries Association, its submissions are outside the scope of the dispute.

Moreover, in the present proceedings, the appellant cannot assert a denial of justice in favour of the Swiss Fishing Association by criticising the fact that the Federal Office for Agriculture did not respond to the association's request of 2 June 2020 for the issuance of an appealable ruling. The lower court's finding that the appellant itself did not submit such an application is not manifestly incorrect (see E. 10.5 of the contested judgement). The corresponding objections to the facts are therefore irrelevant to the decision. There is no violation of Art. 12 VwVG (SR 172.021), Art. 5 para. 3 BV and Art. 9 BV.

**5.6.** It can therefore also be left open whether the (spurious) novelties submitted by the appellant before the Federal Supreme Court in this context are admissible (see E. 2 above). The procedural motions 3-6 filed by the appellant before the Federal Supreme Court must therefore be dismissed, unless they prove to be irrelevant in any case in light of the above.

## 6.

The complainant objects to the fact that drainage in arable land was not taken into account in the

Assessment of the effect of the pesticide on aquatic organisms.

**6.1.** The appellant argues that the lower court considered it admissible that the authorisation body did not take into account the water pollution from drainages in the Swiss arable land when assessing the effect of the plant protection product on aquatic organisms. The lower court justified this, among other things, with the fact that the drainage systems should not be taken into account due to the insufficient level of knowledge about the significance of this entry pathway. According to the appellant, this reasoning was taken from the technical reports of the Federal Office for the Environment, which were "unconvincing". Point 9BI-2.5.1.3 Annex 9 PPPO regulates the assessment of the fate and distribution in surface water and stipulates in point 9BI-2.5.1.3 para. 3 lit. d point 4 Annex 9 PPPO that run-off through drainage pipes must be taken into account. By ignoring the legally prescribed consideration of drainage pipes, the lower court disregarded federal law. Furthermore, the lower court violated the precautionary principle pursuant to Art. 1 para. 2 USG and its concretisation in Art. 8 USG.

**6.2.** According to Art. 17 para. 1 lit. e PPPO, a plant protection product is only authorised if it fulfils the requirements of Art. 4 para. 5 PPPO, taking into account the latest scientific and technical findings (see also E. 4.2.2 above). After use in accordance with good plant protection practice and under realistic conditions of use, the plant protection product must not have any immediate or delayed harmful effects on animal health or any unacceptable effects on the environment, taking particular account of its fate and spread in the environment, in particular the contamination of surface waters (cf. Art. 4 para. 5 lit. b and lit. e no. 1 PPPO).

According to para. 9BI-2.5.1.3(1) Annex 9 PPPO, the assessment authorities shall assess whether the plant protection product can enter the surface water under the proposed conditions of use. If this possibility exists, they shall use a suitable and recognised calculation model to assess the foreseeable short- and long-term concentration of the active substance and the metabolites, degradation and reaction products in the surface water of the proposed region of use after application of the plant protection product in accordance with the proposed conditions of use. According to para. 9BI-2.5.1.3 para. 3 lit. d Annex 9 PPPO, this assessment also takes into account possible routes of exposure (drift [para. 1]; run-off [para. 2]; spraying [para. 3]; run-off through drainage pipes [para. 4]; seepage [para. 5]; deposition via the air [para. 6]). If there is a possibility of exposure of aquatic organisms, authorisation shall not be granted if the ratio between toxicity and exposure for fish and Daphnia is less than 100 for acute exposure and less than 10 for long-term exposure (see para. 9CI-2.5.2.2 para. 1 lit. a Annex 9 PPPO).

**6.3.** Section 9BI-2.5.1.3 para. 1 sentence 1 Annex 9 PPPO requires, as a first step, that the assessment bodies assess whether the plant protection product can enter the surface water under the proposed conditions of use. The assessment of whether this is the case is a question of fact.

**6.3.1.** In this context, the lower court found in fact, without dispute (cf. Art. 105 para. 1 BGG), that the calculated TER values (Toxicity Exposure Ratio) for the entry pathways run-off/erosion and drainage were significantly below the threshold values specified in para. 9CI-2.5.2.2 para. 1 lit. a Annex 9 PPPO of at least 100 (short-term exposure) and 10 (long-term exposure) for fish and daphnia (see E. 17.10 of the contested judgement). Furthermore, according to the findings of the lower court, the active substance tefluthrin is strongly bound to the organic substances in the soil and sediment, which is why it is classified as immobile by the authorisation body and the assessment bodies. With reference to the EFSA investigations and the 2nd technical report of the Federal Office for the Environment, the lower court also stated that there were no indications that significant quantities of the active substance tefluthrin would enter surface waters via run-off or drainage (see E. 17.12 and E. 17.13 of the contested judgement).

**6.3.2.** Before the Federal Supreme Court, the appellant argues, among other things, that 25 % of agricultural land and around 50 % of arable land in Switzerland is drained. In addition, the appellant criticises the lower court's assessment of the evidence, according to which the active substance tefluthrin is strongly bound to the organic substances in the soil and in the sediment and is therefore immobile. Her criticism must be accepted: The respondent also argues in the proceedings before the court of first instance that it cannot be ruled out that the active substance could enter the waters through the superficial erosion of fine soil, to which the active substance is bound, in connection with heavy precipitation on sloping surfaces (cf. E. 17.12 et seq. of the contested judgement). The appellant demonstrates in a legally sufficient manner that the entry via drainage systems can occur not only from pesticide active substances that dissolve in the run-off water, but also from active substances that bind to soil particles. As explained above, the respondent also expressed the same view. Together with the appellant's indication that drainage systems are widespread and the undisputed finding of the lower court that drainage systems in Switzerland could represent an important pathway for plant protection products to enter water bodies (cf. E. 17.16 and E. 17.18 of the contested judgement), it must be assumed against this background that the plant protection product can enter surface water under the proposed conditions of use. Contrary to the assessment of evidence by the lower court, this possibility obviously cannot be ruled out. The objection that the active substance bound to particles is not biologically available to aquatic organisms does not change the fact that the plant protection product can enter the surface water under the proposed conditions of use, but concerns the assessment of this possibility to be made below in accordance with para. 9BI-2.5.1.3 para. 1 sentence 2 Annex 9 PPPO (cf. also E. 6.4 below).

**6.3.3.** Insofar as the appellant contests the findings of fact of the lower court with regard to the application of para. 9BI-2.5.1.3 para. 1 sentence 1 Annex 9 PPPO, it must therefore be accepted. Contrary to the lower court's assessment of the evidence, it is factually possible that the plant protection product enters the surface water under the proposed conditions of use (see Art. 97 para. 1 BGG; see also E. 5.2 above).

**6.4.** As soon as there are concrete indications that the plant protection product may enter the surface water under the proposed conditions of use (see para. 9BI-2.5.1.3 para. 1 sentence 1 Annex 9 PPPO), the subsequent (second) sentence of the ordinance provision becomes relevant (para. 9BI-2.5.1.3 para. 1 sentence 2 Annex 9 PPPO):

"Where this possibility exists, they shall assess, using an appropriate and recognised calculation model, the foreseeable short- and long-term concentration of the active substance and metabolites, degradation and reaction products in the surface water of the proposed region of use after application of the plant protection product in accordance with the proposed conditions of use."

**6.4.1.** In this context, the lower court considers that, due to the lack of a validated calculation model and the still insufficient level of knowledge, the entry via drainage does not need to be discussed at all. It states that the 3rd technical report of the Federal Office for the Environment of 22 September 2022 shows that the decision of the Federal Office for Agriculture not to take into account the possible input via drainage in the absence of a calculation model available in Switzerland was in line with the then and now customary and, in the opinion of the Federal Office for the Environment, lawful procedure (see E. 17.13 of the contested judgement). The lower court

However, in doing so, it disregards the fact that para. 9BI-2.5.1.3 para. 1 sentence 2 Annex 9 PPPO requires the consideration of run-off through drainage pipes as a possible route of exposure in accordance with para. 9BI-2.5.1.3 para. 3 lit. d para. 4 Annex 9 PPPO without restriction as soon as there is a possibility that the plant protection product will enter the surface water under the proposed conditions of use (cf. para. 9BI-2.5.1.3 para. 1 sentence 1 Annex 9 PPPO). Section 9BI-2.5.1.3 para. 1 sentence 2 Annex 9 PPPO does not grant the assessment bodies any discretion as to whether they carry out a corresponding assessment. Rather, the assessment bodies must (compulsorily) carry out such an assessment with the aid of a (suitable and recognised) calculation model if the possibility according to para. 9BI-2.5.1.3 para. 1 sentence 1 Annex 9 PPPO exists.

**6.4.2.** This understanding of the ordinance provision results in particular from the precautionary principle in accordance with Art. 1 para. 2 of the Environmental Protection Act, according to which impacts that could become harmful or a nuisance must be limited at an early stage in the interests of precaution. If - as in the present case - there are concrete indications that the plant protection product with its active ingredient tefluthrin may enter the surface water, the associated effects must be assessed in order to be able to limit harmful effects at an early stage. The plant protection products must be assessed according to the principle of a holistic approach. According to Art. 8 USG, impacts are assessed both individually and collectively and according to their interaction. The principle of the holistic approach thus established takes into account the possibility that different environmental impacts only lead to serious adverse effects when they come together. In particular, cumulative and synergistic effects are possible, which is why impacts must also be assessed for their possible interaction or their conceivable multiple effects in the environment (see judgements 1C\_628/2019 of 22 December 2021 E. 3.3; 1C\_97/2017 of 19 September 2018 E. 2.1; 1C\_685/2013 of 6 March 2015 E. 6.3; see also **BGE 142 II 517 E. 3.3; 142 II 20 E. 3.1**). The necessary overall view is at best subject to scientific and technical limitations or lacks the necessary necessary instruments (see judgement 1C\_685/2013 of 6 March 2015 E. 6.3). In the light of the above, the authorisation body and the assessment bodies have no discretion as to whether they must carry out an assessment within the meaning of point 9BI-2.5.1.3 para. 1 sentence 2 Annex 9 PPPO. However, there is a technical discretion to be exercised in accordance with their duties as to how this assessment is to be carried out.

**6.5.** Accordingly, it is not admissible that the Federal Office for Agriculture did not take into account "the possible entry via drainage [...] in the absence of a calculation model validated in Switzerland" (cf. E. 17.13 of the contested judgement). According to the above, there is a violation of para. 9BI-2.5.1.3 Annex 9 PPPO. There are concrete factual indications that the plant protection product may enter the surface water under the proposed conditions of use (sentence 1), which is why the lower court wrongly categorised the omitted assessment (sentence 2) as lawful. In view of the above, it can be left open whether there are further violations of federal law or federal constitutional law in this regard.

Against this background, the authorisation authority must assess the foreseeable short- and long-term concentration of the active substance and the metabolites, degradation and reaction products in the surface water of the proposed region of use after application of the plant protection product in accordance with the proposed conditions of use pursuant to para. 9BI-2.5.1.3 Annex 9 PPPO. The question of whether a validated calculation model is required for this concerns the technical and dutiful discretion of the authorisation authority.

**7.**

The complainant also alleges legal violations in connection with the assessment of the effect of the plant protection product on beneficial arthropods other than honey bees.

**7.1.** The appellant takes the view that the "30 % rule" in para. 9CI-2.5.2.4 Annex 9 PPPO is aimed at ensuring that no more than 30 % of the beneficial arthropods are damaged by a plant protection product so that the surviving population can regenerate itself. Nevertheless, the lower court considered it compatible with the standard if all non-target arthropods and beneficial arthropods were killed by the use of the plant protection product, but the active substance was degraded to such an extent within a year that recolonisation from other, untreated areas could take place. According to the appellant, the lower court adopted this "recovery hypothesis" from the statements in Agroscope's expert reports. Agroscope's reports were in turn based on two documents cited by the European Commission in point 10.3.2 of its Communication 2013/C 95/02 of 3 April 2013. By relying on one of these documents, the lower instance and all the (specialised) authorities previously involved in the matter at hand violated the principle of legality of Art. 5 para. 1 BV. In the opinion of the complainant, this is not a technical directive, as it contains an assessment of environmental risks, which only the democratically legitimised legislator is entitled to do. Against this background, Art. 72 para. 2 PPPO in conjunction with Art. 24 para. 2bis PPPO are not sufficient as a legal basis.

The complainant also criticises the procedure in terms of content. The information provided in the context of point 9CI-2.5.2.4

The "recovery hypothesis" applied in Annex 9 PPPO, according to which the killing of all non-target and beneficial arthropods on arable land is acceptable if the active substance has degraded to such an extent within a year that recolonisation from other, untreated areas can take place, violates federal law. It violates the precautionary principle under Art. 74 para. 1 BV and Art. 1 para. 2 USG, contradicts the preservation of natural resources required by Art. 104 para. 1 lit. b BV as well as the protection of the environment from damage caused by the excessive use of chemicals enshrined in Art. 104 para. 3 lit. d BV and disregards Art. 18 para. 1 and para. 2 NHG, which codifies the protection of animal species.

**7.2.** According to Art. 17 para. 1 lit. e PPPO, a plant protection product is only authorised if it fulfils the requirements of Art. 4 para. 5 PPPO, taking into account the latest scientific and technical findings (see also E. 4.2.2 above). The plant protection product must not have any immediate or delayed harmful effects on animal health after use in accordance with good plant protection practice and under realistic conditions of use (cf. Art. 4 para. 5 lit. b PPPO). Similarly, according to Art. 4 para. 5 lit. e no. 2 PPPO, it must not have any unacceptable effects on the environment, insofar as there are scientific methods recognised by EFSA for assessing such effects, taking particular account of the effect on non-target species, including the persistent behaviour of these species.

If there is a possibility of exposure of beneficial arthropods other than honey bees, authorisation for use shall not be granted in accordance with para. 9CI-2.5.2.4 Annex 9 PPPO if more than 30 % of the test organisms are damaged in the lethal or sublethal test carried out in a laboratory at the highest proposed application rate, unless an appropriate risk assessment provides practical evidence that no unacceptable effects on the organisms concerned will occur when the plant protection product is used under the proposed conditions. Claims regarding selectivity and proposals for use in integrated control systems shall be substantiated accordingly.

**7.3.** The first step is to assess the complaint of a violation of the principle of legality.

**7.3.1.** The principle of legality under Art. 5 para. 1 BV states that a state act must be based on a substantive legal basis that is sufficiently defined and has been issued by the body responsible for this under constitutional law. It thus serves the democratic concern of safeguarding the constitutional order of competences on the one hand, and the constitutional concern of legal equality, predictability and

...

Foreseeability of state action (see **BGE 141 II 169** E. 3.1; **130 I 1 E.** 3.1; **128 I 113** E. 3c). The principle of legality enshrined in Art. 5 para. 1 BV is not a constitutional right, but a constitutional principle. This principle can be invoked directly and independently of a fundamental right in the context of an appeal in matters of public law (see **BGE 140 I 381** E. 4.4; judgement 2C\_910/2020 of 28 July 2021 E. 4.3.3; see also **BGE 148 II 475** E. 5; judgement 2C\_76/2023 of 14 November 2023 E. 8.1 i.f.).

**7.3.2.** According to Art. 72 para. 2 PPPO, the assessment bodies shall take into account the technical documents and other guidelines adopted in the EU when assessing plant protection products. In addition, Art. 24 para. 2bis PPPO stipulates that when assessing an application for authorisation or for an amendment to an authorisation in accordance with Art. 21 PPPO and when reviewing an authorisation in accordance with Art. 29 f. PPPO, the authorisation body and the assessment bodies shall adopt the assessment results of the EFSA and the considerations of the EU Commission on the approval of the active substances of the plant protection product if the EFSA has already assessed these substances. In this case, they do not carry out any further assessment of the substances. The considerations and decisions of the Member States on the authorisation of the plant protection product are taken into account if they are available to the authorisation body.

**7.3.3.** The Federal Supreme Court has already explained in detail with regard to Art. 10 para. 1 PPPO that the enactment of provisions in the Plant Protection Products Ordinance that provide for a mechanism of (direct) recognition complies with the principle of legality in the context of the preliminary review of standards (see judgments 2C\_1034/2022 and 2C\_1035/2022 of 23 May 2023 E. 5.5 and E. 6.3.2 f.). In view of the possibilities provided by law in Art. 160 para. 6 LwG and Art. 160a LwG to recognise foreign decisions on authorisation or revocation without an independent, substantive (examination) procedure, the two provisions of the ordinance objected to by the appellant - Art. 72 para. 2 PPPO and Art. 24 para. 2bis PPPO - cannot be objected to on a preliminary basis (for a preliminary or incidental review of standards in general, see e.g. judgment 2C\_397/2021 of 25 November 2021 E. 4).

**7.3.4.** According to point 10.3.2 of the Communication from the European Commission 2013/C 95/02 of 3 April 2013 (in the framework of the implementation of Commission Regulation [EU] No 284/2013 of 1 March 2013 laying down data requirements for plant protection products pursuant to Regulation [EC] No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market), the European Commission's Guidance Document on Terrestrial Ecotoxicology, Under Council Directive 91/414/EEC, SANCO/10329/2002 rev 2 [17 October 2002] (hereinafter: EU Guidance Document on Terrestrial Ecotoxicology) and the Guidance Document "Candolfi et al (2001). Guidance Document on Regulatory Testing and Risk Assessment Procedures for Plant Protection Products With Non-Target Arthropods: From the Escort 2 Workshop (European Standard Characteristics of Non-Target Arthropod Regulatory Testing). SETAC [Society of Environmental Toxicology and Chemistry] press, pp 46" (hereinafter: SETAC Guideline).

**7.3.5.** The SETAC guideline was developed as part of the ESCORT 2 workshop organised by the European Commission and SETAC Europe in 2000 (see cover page of the SETAC guideline). This workshop was attended by 53 scientists representing the regulatory authorities of the EU Member States, the OECD, industry and academia. The aim of the workshop was to develop an updated guideline for a testing and risk assessment scheme for beneficial arthropods (see SETAC Guideline, p. 4). The EU guideline on terrestrial ecotoxicology is based on the SETAC guideline and refers to it in various places for further details (see EU guideline on terrestrial ecotoxicology, p. 19 f.). The criticism voiced by the appellant in the Federal Supreme Court proceedings that the SETAC Guideline arose from a three-day workshop in the Netherlands in 2000, whose "main sponsors were agrochemical companies", remains unsubstantiated and, in the light of the above, proves to be an insufficiently substantiated objection to the facts (cf. Art. 106 para. 2 BGG). The extent to which the lower court should have violated the right to a fair hearing in this context, as the appellant criticises, is also not apparent due to a lack of sufficient substantiation.

**7.3.6.** Both guidance documents are, as the lower court rightly considers, technical documents and guidelines within the meaning of Art. 72 para. 2 PPPO, which the assessment bodies may take into account when examining the authorisation of plant protection products. It is not apparent why the position of the appellant, according to which there is no "technical guideline", contradicts this assessment. According to the above, the SETAC Guideline and the EU Guideline on Terrestrial Ecotoxicology concretise the scientific methods for the risk assessment of beneficial arthropods (also) applicable in Switzerland pursuant to Art. 17 para. 1 lit. e PPPO in conjunction with Art. 4 para. 5 lit. e PPPO and Art. 72 para. 2 PPPO. The guidance documents are therefore technical documents that are comparable to the national administrative ordinances (cf. E. 7.4.1 below). Contrary to the opinion of the appellant, the consideration of the SETAC Guideline does not constitute a violation of the principle of legality of Art. 5 para. 1 BV.

**7.4.** In a second step, the complainant's criticism of the content of the SETAC guideline and the "recovery thesis" formulated therein must be addressed (for the "recovery thesis", see E. 7.4.3.2 below).

**7.4.1.** Administrative ordinances are not legally binding for the courts. However, the Federal Supreme Court will not deviate from a lawful administrative ordinance without good reason, provided that it permits an interpretation of the applicable provisions that is appropriate and fair to the individual case and contains a convincing concretisation of the legal requirements (see **BGE 145 V 84** E. 6.1.1; **142 V 442** E. 5.2; judgments 2C\_76/2023 of 14 November 2023 E. 7.2.2; 2C\_191/2022 of 27 June 2023 E. 6.3.1; 2C\_450/2020 of 15 September 2020 E. 3.3.2). Furthermore, according to the established case law of the Federal Supreme Court, a court should - also within the scope of its unrestricted cognition (cf. Art. 49 lit. a-c VwVG) - exercise a certain restraint in pronounced technical questions and leave the specialised authority a certain scope of assessment if the aspects essential for the decision have been examined and the necessary clarifications have been carried out carefully and comprehensively (cf. **BGE 142 II 451** E. 4.5.1; **136 I 184** E. 2.2.1; **131 II 680** E. 2.3.2; judgements 2C\_405/2021 of 14 June 2022 E. 6.4; 2C\_388/2020 of 20 October 2020 E. 5.4.5).

**7.4.2.** On the one hand, the appellant correctly argues that, according to the findings of the lower court, an effect was observed in more than 30 % of the test arthropods at the relevant application concentrations in laboratory studies (cf. E. 18.8 et seq. of the contested judgement). Accordingly, the threshold value of 30 % specified in para. 9CI-2.5.2.4 Annex 9 PPPO is exceeded. On the other hand, the lower court rightly considers that exceeding the threshold value does not necessarily mean that the authorisation authority should have refused to extend the authorisation to place the plant protection product on the market (see E. 18.9 of the contested judgment). Rather, para. 9CI-2.5.2.4 Annex 9 PPPO provides that an authorisation can still be granted if a suitable risk assessment provides practical proof that the use of the plant protection product under the proposed conditions will not have any unacceptable effects on the organisms concerned.

**7.4.3.** In order to prove that no unacceptable effects occur, the lower court, confirming the approach of the authorisation and assessment bodies, refers to the methodological requirements of the EU Guideline on Terrestrial Ecotoxicology and the SETAC Guideline.

**7.4.3.1.** As the lower court rightly points out, both the EU guideline on terrestrial ecotoxicology and the SETAC guideline contain detailed explanations of the procedure, test and calculation methods for risk assessment for non-target arthropods and risk minimisation measures. According to the guideline documents, a separate assessment of the risks for arthropods in the treated area (in-field) and outside the area (off-field) is carried out. The guidelines provide for a tiered approach to the assessment. The first tier (Tier 1) includes glass plate tests with the two standard test species braconid wasp (*Aphidius rhopalosiphi*) and predatory mite (*Typhlodromus pyri*). If these tests indicate a higher risk, further studies (so-called higher tier tests) are necessary (see EU Guideline on terrestrial ecotoxicology, p. 19 ff., SETAC Guideline, p. 4 ff.; see also E. 18.4 of the contested judgement).

**7.4.3.2.** The guidance documents further provide that adverse effects on populations of non-target arthropods are acceptable if it is proven by field studies or other evidence that the populations recover (e.g. by recolonisation of the field) within one year at the latest (so-called "recovery hypothesis"; see EU Guidance on Terrestrial Ecotoxicology, p. 23; SETAC Guidance, p. 20; see also E. 18.5 of the contested judgement). The lower court also states that, according to the European Food Safety Authority, there are no adverse effects that would last longer than one year after the application of the active substance tefluthrin at application rates of up to 233 g active substance/ha (cf. E. 18.11 of the contested judgement with reference to EFSA, Conclusion on the peer review of the pesticide risk assessment of the active substance tefluthrin, EFSA Journal of 9 December 2010 [hereinafter: EFSA Conclusion], p. 55). The appellant does not sufficiently contest this finding of fact before the Federal Supreme Court (cf. Art. 106 para. 2 FSCA) and is therefore binding for the Federal Supreme Court proceedings (cf. Art. 105 para. 1 FSCA).

**7.4.4.** The application rate of 233 g active substance/ha investigated in the EFSA Conclusion is, as the lower court undisputedly states, significantly higher than the maximum authorised quantity of 44 g active substance/ha for the newly investigated applications of the plant protection product in the present case. In this light, the lower court considers that Agroscope and the Federal Office for Agriculture therefore rightly classified the risk to beneficial arthropods as acceptable in accordance with the guidelines and scientific methods applicable in the EU and Switzerland, as confirmed by the Federal Office for the Environment, since the active substance had degraded to such an extent within one year that recolonisation from other, untreated areas could take place (cf. E. 18.11 of the contested judgement).

**7.4.5.** This legal conclusion of the lower court must be assessed in a differentiated manner.

**7.4.5.1.** It is permissible to refer to the guidance documents in the sense of administrative ordinances insofar as the (technical) methodology explained therein and the resulting findings serve the specific application of para. 9CI-2.5.2.4 Annex 9 PPPO. However, this must not result in a change to the content of the ordinance provision by adopting it (see E. 7.4.1 above). In para. 9CI-2.5.2.4 Annex 9 PPPO, the legislator expressly authorises a suitable risk assessment for the purpose of demonstrating acceptable effects on the organisms concerned. Since such (practical) proof is open according to the clear wording of the ordinance provision, the lower court's reliance on the "recovery hypothesis" formulated in the guidance documents is not fundamentally objectionable from a methodological point of view.

**7.4.5.2.** According to the thesis, the negative effects on populations of non-target arthropods are acceptable if it is proven by means of field studies or other evidence that the populations recover (e.g. by recolonisation of the field) within one year at the latest (see E. 7.4.3.2 above). The EFSA Conclusion provides evidence that the treated areas can recover within one year after the application of the active substance tefluthrin in the sense of the thesis. The lower court's approach of recognising the EFSA's assessment results from the EFSA Conclusion as practical evidence also complies with the requirements of Art. 24 para. 2bis PPPO (see E. 7.3.2 above; see also Art. 4 para. 5 lit. e no. 2 PPPO). In view of the permissible judicial restraint in the review of pronounced technical questions, it is not objectionable that the lower court uses the "recovery hypothesis" proven by the EFSA Conclusion and accepted by the technical authorities in principle as a suitable risk assessment and practical evidence within the meaning of para. 9CI-2.5.2.4 Annex 9 PPPO.

**7.4.6.** However, this is not the end of the story.

**7.4.6.1.** Inherent in the adopted "recovery hypothesis" is that the treated areas must be adjacent to other, non-treated areas, as recolonisation is only possible in this case. In practice, the mere adoption of the "recovery hypothesis" does not guarantee that other, non-treated areas are actually available from which recolonisation of the treated areas can take place. Furthermore, from a spatial perspective, it is necessary to define the extent of the areas that may be treated with the plant protection product so that the treated areas can actually be recolonised over the entire area. The size ratios between the treated areas and the non-treated areas must also be taken into account. In this context, the complainant's objection that the fields treated with the active ingredient tefluthrin act as "biological sinks" that lead to a thinning out of the biodiversity and number of insects in a wide area around the treated fields must also be assessed.

**7.4.6.2.** The same applies to the time intervals that must lie between the exposure of the areas. A (complete) recolonisation in the sense of the "recovery thesis" is only possible if the regeneration of the treated areas is ensured in terms of time. It is not clear from the considerations of the judgement of the court of first instance (see E. 18.1-18.14 of the contested judgement) or from the conditions attached to the extension of the authorisation to place the plant protection product on the market (see B. of the contested judgement) how it can be ensured in terms of time that reintroduction from untreated areas can effectively take place.

**7.4.6.3.** What is considered sufficient in the sense of the "recovery thesis" must therefore be specified in terms of space and time. The complainant's criticism proves to be justified in this respect. Against this background, it must in any case be examined whether the use of the plant protection product with the active ingredient tefluthrin should be restricted in terms of space and time.

**7.5.** According to the above, the lower court is not sufficiently complying with the provisions of para. 9CI-2.5.2.4 Annex 9 PPPO. It can therefore be left open whether there are further violations of the requirements of federal law or federal constitutional law in this regard.

**8.**

As a result, the appeal proves to be well-founded, which is why it must be upheld insofar as it is upheld. The ruling of 1 May 2023 must be set aside. The matter is to be referred to the

Federal Food Safety and Veterinary Office (Art. 107 para. 2 BGG) and to remit the costs and compensation to the lower instance (Art. 67 BGG).

With this outcome of the proceedings, the respondent bears the court costs (Art. 66 para. 1 and para. 4 BGG). The respondent must pay the appellant compensation for the proceedings before the Federal Supreme Court (Art. 68 para. 1 and para. 3 BGG).

**Accordingly, the Federal Supreme Court recognises:**

**1.**

The appeal is upheld insofar as it is allowed. The ruling of the Federal Administrative Court of 1 May 2023 is set aside.

**2.**

The matter is referred back to the Federal Food Safety and Veterinary Office for assessment in accordance with the recitals.

**3.**

The matter is referred back to the Federal Administrative Court for reassignment of the costs and compensation consequences of the proceedings before the court of first instance.

**4.**

The court costs of CHF 3,000 are imposed on the respondent.

**5.**

The respondent must pay the appellant compensation of CHF 3,000 for the proceedings before the Federal Supreme Court.

**6.**

This judgement will be communicated to the parties to the proceedings, the Federal Administrative Court, Division II, the Federal Department of Home Affairs, the Federal Office for Agriculture and the Federal Office for the Environment.

Lausanne, 30 April 2025

On behalf of the Second Public Law Division of the  
Swiss Federal Supreme Court

The President: F. Aubry Girardin

The Clerk: M. Zollinger