



COMMISSION EUROPÉENNE
SECRÉTARIAT GÉNÉRAL

Direction G
SG-G-1
Affaires horizontales et GRI (Groupe des Relations Interinstitutionnelles)

Bruxelles, le 13 octobre 2018

SI(2018) 522

<p>GRI du 12 octobre 2018 point 3.1.</p>

NOTE À L'ATTENTION DE MMES MM. LES MEMBRES DU GRI

Objet: Proposition de règlement établissant les règles relatives à la mise sur le marché des fertilisants porteurs du marquage CE et modifiant les règlements (CE) n° 1069/2009 et (CE) n° 1107/2009 – 2016/0084 COD (17.03.16) – rapport TURCANU

Mmes et MM. les membres du GRI trouveront en annexe une fiche préparée par la DG GROW sous l'autorité du cabinet de Mme BIENKOWSKA et en accord avec le cabinet de M. KATAINEN.

Annexe 1

GRI MEETING OF 12 OCTOBER 2018

NOTE TO THE MEMBERS OF THE GRI

Subject: **Proposal for a Regulation on the making available on the market of CE marked fertilising products and amending Regulations (EC) No 1069/2009 and (EC) No 1107/2009**

The fiche is proposed to prepare the Commission's position in view of the forthcoming political trilogue on 22 October 2018

Ref.: COM(2016) 157; 2016/0084(COD)

Procedure: Ordinary legislative procedure

Council: Working Party on Technical Harmonisation; COREPER I

Rapporteur(s): Mihai ȚURCANU (EPP/RO), Elisabetta GARDINI (EPP/IT), Jan HUIITEMA (ALDE/NL)

Lead parliamentary committee: Internal Market and Consumer Protection (IMCO)

Associated parliamentary committees: ENVI (contaminant limits including cadmium)
AGRI

Former GRI fiches: SP(2017) 528, SI(2018) 15/2, SI(2018) 169/2, SI(2018) 248, SI(2018) 320

PURPOSE OF THIS FICHE

- The purpose of this fiche is to prepare the Commission's position **in the forthcoming political trilogue on 22 October on cadmium limit values in phosphate fertilisers**, which remains the key political issue in this file.
- This trilogue is likely to be the only opportunity to close the file under the Austrian Presidency, and therefore probably under this Commission's mandate. Therefore, **the Commission should continue facilitating a compromise between the two co-legislators** within the range of their two existing mandates, in order to secure an agreement on the file and thus move away from *status quo* where phosphate fertilisers with uncontrolled contaminant limits, including cadmium, which in some cases by far exceed all the limit values contained in those mandates, circulate freely on the single market by virtue of existing EU harmonisation legislation.
- In particular, the **Commission should actively argue in favour of what currently appears like the best realistically achievable compromise** for the sake of protecting human health and the environment. This implies:
- as of the date of application of the Regulation, an initial limit value of **60 ppm**, followed by
- a recital recalling **Member States' prerogatives in accordance with Article 114(4) TFEU to notify to the Commission existing national provisions** in view of maintaining those provisions for fertilisers produced in the Member States or originating from other Member States if necessary on

grounds relating to the protection of human health or the environment, and to make recourse to Article 114(5) to introduce new national provisions.

In addition, the commission could in the spirit of compromise, while recalling public health concerns, support

- a limit value of 40 ppm, applicable by default as of 6 years after the date of application, and with a **requirement for the Commission to check the feasibility of applying the 40 ppm limit** well before the date of application of it, and to put forward a legislative proposal to amend it in the event that the outcome of the feasibility check should be negative; and accompanied by
- a **labelling threshold of 20 ppm applicable as of the date of application, i.e. as of 2020 at the earliest should also be promoted. This would imply that fertilisers with no more than 20 ppm cadmium** would be eligible for a voluntary new harmonised “low cadmium”-label indicating that the fertiliser has a cadmium content below 20 ppm. **Farmers would thus be encouraged to use cleaner products.**
- It is suggested to the GRI to endorse the line as suggested in the present fiche.

1. BACKGROUND

- Please see the previous GRI fiches for this file with references:
 - i) SP(2017) 528, prepared in view of the EP plenary debate and vote on 24 October 2017;
 - ii) SI(2018) 15/2, prepared in view of the first political trilogue on 25 January 2018;
 - iii) SI(2018) 169/2, prepared in view of the second political trilogue on 11 April 2018;
 - iv) SI(2018) 248, prepared in order to prepare the Commission's position in view of the forthcoming political trilogues and technical tripartite meetings;
 - v) SI(2018) 320 prepared in view of the third political trilogue on 19 June 2018, as well as subsequent technical tripartite meetings.

2. STATE OF PLAY OF TRILOGUE NEGOTIATIONS

- Between the endorsement of the latest GRI fiche on 8 June 2018 and the time of preparation of the current one:
 - A **political trilogue** took place on **19 June 2018** and reconfirmed that on all issues *except* cadmium, positions are close, and a landing zone acceptable to all parties appears to be achievable;
 - **In technical tripartite meetings of 25 June, 25 and 27 September 2018** with the European Parliament's IMCO Committee and the Austrian Council Presidency, the co-legislators reached an agreement on most outstanding technical issues. In particular, the European Parliament indicated willingness to drop a number of technical amendments of concern to the Council and the Commission, or to revise them to the satisfaction of the other two institutions.

- **In the technical meeting on 26 September 2018** with the European Parliament's ENVI Committee and the Austrian Presidency, contaminant limits were discussed with a particular focus on cadmium based on a non-paper listing different regulatory options which could be considered in order to reach a compromise (see below under section 4).
- The abovementioned non-paper was also discussed in **the Council Working Party of 28 September 2018**. The Austrian Presidency has asked Member States for written comments on the non-paper by 4 October, and is preparing new bilateral meetings with Member States.
- The **ENVI Committee had a Shadows meeting on 9 October**.
- A **political trilogue** is scheduled for **22 October 2018** where the outstanding political issues will be discussed. Besides the limit values for cadmium contamination, the co-legislators will also discuss the delegation of powers and the Regulation's application to industrial by-products.
- **On 24 October 2018, in COREPER**, depending on the outcome of the political trilogue meeting of 22 October, the Austrian Presidency could submit their proposed compromise for approval.

3. CADMIUM – GENERAL CONTEXT AND STATUS QUO

- Cadmium is a toxic chemical. Food is the main source of exposure to cadmium in the general population,¹ and the **dietary exposure to cadmium of the European citizen is often close to or above tolerable intake levels**². Once absorbed by the human body, cadmium is efficiently retained and accumulates in the body throughout life³. **It may cause cancer and damage to organs** (in particular kidney dysfunction and skeletal damage)⁴, and is suspected of causing genetic defects and of damaging fertility and the unborn child⁵. The negative impacts of cadmium on human health are gradual, and could appear only after 50 years of exposure.
- **Fertilisation with phosphate fertilisers is by far the main cause of cadmium-contamination of agricultural soils in the EU.**⁶ Cadmium is of no benefit to plants, and its presence in phosphate fertilisers is only the result of use of contaminated phosphate rock in the production process. The fertilisers sector is the **last major source of cadmium pollution for which cadmium limits have not yet been established**. A recital to the existing EU harmonisation legislation on

¹ See the United Nations Environment Programme's Final review of scientific information on cadmium of 2010, hereinafter 'UNEP 2010', published at http://www.unep.org/hazardoussubstances/Portals/9/Lead_Cadmium/docs/Interim_reviews/UNEP_GC26_IN_F_11_Add_2_Final_UNEP_Cadmium_review_and_appendix_Dec_2010.pdf

² See the scientific report of the European Food Safety Authority on Cadmium dietary exposure in the European population of 2012, hereinafter 'EFSA 2012', published at https://www.efsa.europa.eu/sites/default/files/scientific_output/files/main_documents/2551.pdf

³ See EFSA 2012.

⁴ See UNEP 2010.

⁵ See ECHA's substance information published at <http://echa.europa.eu/substance-information/-/substanceinfo/100.028.320>.

⁶ See the study 'Revisiting and updating the effect of phosphate fertilizers to cadmium accumulation in European agricultural soils' by Erik Smolders & Laetitia Six, commissioned by Fertilizers Europe in 2013, published at http://ec.europa.eu/health/scientific_committees/environmental_risks/docs/scher_o_168_rd_en.pdf

fertilisers announces that the Commission intends to address the issue of cadmium and other contaminants sometime in the future.

- The existing EU harmonisation legislation on fertilisers (*status quo*) sets no limit for cadmium contamination. This means that **CE marked fertilisers with uncontrolled cadmium content, which in some cases by far exceed all the limit values discussed in the current regulatory procedure, can currently move freely within the EU** by virtue of European legislation.
- Three Member States have been allowed to impose limits for cadmium in harmonised phosphate fertilisers: Austria (75 ppm), Sweden (44 ppm), and Finland (22 ppm). Those Member States were granted derogation at the time of their EU-accession for restriction of phosphate fertilisers with cadmium content exceeding those limits. Because their national limit values were applicable before the EU accession, **the derogations were extended in time based on notifications approved by the Commission by virtue of what has now become Article 114(4) of the Treaty**.
- Without prejudice to the following paragraph, which concerns *non-harmonised phosphate fertilisers*, other **Member States wanting to limit cadmium contamination in harmonised phosphate fertilisers may no longer use Article 114(4) of the Treaty to derogate from the existing Fertilisers Regulation which dates from 2003, and are therefore allowed to do so only if the strict conditions for derogations in Article 114(5) of the Treaty** on the Functioning of the European Union are fulfilled. Only one request for such derogations has been submitted up to now: a request from Sweden to apply a lower limit than under their existing derogation based on Article 114(4) TFEU), which was however rejected by the Commission in the absence of new scientific evidence relating to the protection of the environment or working environment demonstrating that there is a specific problem within its territory.
- In addition, *for non-harmonised phosphate fertilisers*, the national legislations set:
 - **No limit** for cadmium contamination in 9 Member States (BG, ES, HR, IE, IT, LU, MT, PT, UK);
 - A limit **above 60 ppm** in 4 Member States (AT, BE, FR, SI);
 - A limit **between 40 ppm and 60 ppm** in 10 Member States (CY, CZ, DE, DK, EE, EL, LT, LV, RO, SE);
 - A limit **below 40 ppm** in 4 Member States (FI, HU, NL, SK), and
 - A **limit value expressed in a different unit**, which cannot meaningfully be translated into the unit included in other Member States' legislation or in the Commission's proposal, in one Member State (PL).
- In this context, **the Commission adopted a proposal** which, among other important measures, includes a legally binding limit of 60 ppm for cadmium contamination in phosphate fertilisers as of the date of application of the Regulation, which is progressively reduced to 40 ppm after three years and ultimately 20 ppm after 12 years from the date of application.

4. STATE OF PLAY OF NEGOTIATIONS ON CADMIUM

- **The European Parliament's position** on cadmium limits for phosphate fertilisers is closely aligned with the Commission's proposal, and introduces a limit of 60 ppm as of the date of application followed by 40 ppm after six years and an ultimate limit of 20 ppm after 16 years. **The Council**, on the other hand, has proposed a single limit value of 60 ppm after 8 years without any further reductions.
- **In the first half year of the trilogue discussions, during the spring of 2018, the cadmium limits on phosphate fertilisers were barely discussed**, either within or between the two institutions. Instead, the Bulgarian presidency firmly insisted that the Council position on cadmium was not negotiable, and that all its concessions to the European Parliament on other issues were subject to the Parliament agreeing with the Council position on cadmium.
- **In the political trilogue held on 19 June 2018, the IMCO Rapporteur attempted to strike a deal with the Council Presidency on cadmium which was very close to the Council's position** (a single limit value of 60 ppm without further reductions, applicable from the date of application of the Regulation). Following the ENVI Rapporteur's statement that she did not have any mandate for such an agreement on behalf of the ENVI Committee, the Chair of the meeting declared that the agreement was not valid.
- The technical level discussions on cadmium only really took off under **the Austrian Presidency**. They **have signalled and demonstrated a strong commitment to arriving at a compromise acceptable to both the ENVI Committee and a qualified majority of Member States**. They have, however, also consistently and clearly said that, due to other priorities, they will not have time to work on this file after the end of October, and will therefore give it only one attempt in political trilogue and COREPER.
- The revived discussions on cadmium were facilitated by **the abovementioned non-paper setting out a toolbox of regulatory solutions** that could be combined to address cadmium contamination in a manner satisfactory for both co-legislators.⁷ The non-paper is not indicating any limit values and lists seven elements, sometimes with different options, as follows:
 1. Flexibility as regards the timing of the application of the cadmium limit values could be considered;
 2. The intention at Union level to support decadmiation technologies and innovation could be announced in a recital;

⁷ See the Annex to this fiche. The non-paper is merely an informal basis for discussions, and the solutions suggested therein have not been endorsed by either the European Commission or the other institutions. In the discussions on the non-paper, question marks have been raised about the legal soundness of

- 1) allowing the Commission to postpone the date of application in a delegated act as under option 3 (as currently provided for by the European Parliament's mandate), and of
- 2) allowing Member States to opt for predefined limit values as under option 7A and, in particular, to grant unilateral derogations to Member States under option 7B.

3. The application of a lower cadmium limit value could be conditioned by a mandatory feasibility reporting by the Commission, and an obligation for the Commission to postpone the reduction or propose new limits if appropriate;
 4. A review clause announcing the intention to propose a reduction of the limit values in future;
 5. Different labelling thresholds;
 6. The possibility to impose restrictions in the use of fertilising products; and
 7. Some flexibility in the harmonised limit values by, for instance, allowing Member States to choose between three different predefined values.
- In addition to a large number of bilateral discussions, the compromise options have been discussed in two important meetings: **The technical tripartite** meeting between the ENVI Committee, the Austrian Presidency and the Commission on **26 September 2018**, and the **Council Working Party** meeting on **28 September 2018**.
 - It is **impossible to predict** at this stage what the final agreement between the ENVI Committee and the Council Presidency – if any – will be in the trilogue meeting of 22 October 2018.
 - Throughout the tripartite discussions, the Austrian Presidency has, based on their bilateral discussions with Member States, made it very clear to the European Parliament and the Commission that **the Council will never agree with a legally binding limit value of 20 ppm**.
 - Based on the Council Working Party meeting of 28 September 2018, we believe that the Austrian Presidency is trying to get qualified majority support in the Council for a compromise which would **retain the first limit of 60 ppm and introduce a second limit of 40 ppm somewhere in the future, subject to some kind of review clause or feasibility safeguard clause, or a combination of both (options 3 and 4 set out in the abovementioned non-paper)**. In their view, that would amount to something which is very close to the review clause already included in the Council's negotiation mandate, but with the difference that a second limit of 40 ppm would apply after a long transitional period, and by default unless the Council and the European Parliament would change it based on a proposal from the Commission before its date of application for reasons of feasibility. At this stage, however, **many Member States still strongly insist on a single limit of 60 ppm**, some arguing that this was already a compromise for them and that they would have preferred 80 ppm. Others – in particular those who have advocated low limits in the past – appear more open to accepting a compromise along the lines suggested by Austria. Others still believe that the solution lies in different limits throughout the EU, or national derogations from a nominally harmonised limit.
 - The **ENVI Committee** has taken note of the Presidency's exclusion of a 20 ppm limit, and signalled its willingness to examine various compromise options, without expressing any clear preference for either of them. In the abovementioned Shadows' meeting of 9 October, a suggestion was put forward by some of the Shadows for a new negotiation position which would contain a second limit value of 40 ppm only subject to a feasibility safeguard clause, and only a review clause

envisaging a possible future third limit of 20 ppm. The ENVI Rapporteur undertook to examine this proposal. We believe that they **may ultimately be ready to accept that 20 ppm is not included as a limit at all**, but used either as a threshold for a “low cadmium” label, or as an objective for future reductions in a recital or review clause, or both. The bottom line of the ENVI Committee appears to be that the legal text must provide for a future limit value which will lead to meaningful reductions of cadmium contamination of phosphate fertilisers. That would be the effect of a limit value of e.g. 40 ppm.

5. **PROPOSED COMMISSION POSITION ON CADMIUM LIMITS**

- In line with the position approved in note SI(2018) 320, **the Commission’s priority should be to facilitate an agreement on the file, in particular since the risk of stalemate, despite recent progress, is still tangible.** If the file would reach stalemate because of lack of agreement on the cadmium limits, there would be significant negative consequences:
 - **An important part of fertilisers' market would remain non-harmonised** – the organic fertilisers. They cover a share of around 50% of the whole fertilisers market in EU. The current proposal would remove significant market entry barriers for innovative organic fertilisers manufactured from biomass, by-products and recovered bio-waste available in abundance in Europe. The market for those organic fertilisers currently suffers from a competitive disadvantage in relation to fertilisers from mined and fossil raw materials, since only the latter benefit from free movement on the single market by virtue of existing European product harmonisation legislation.
 - **The harmonised phosphate fertilisers would continue to move freely on the single market not only without any limit for cadmium, but also without any limits for other contaminants** (arsenic, copper, zinc, mercury, etc.). The proposal on the other hand, once adopted, would introduce limits for other contaminants, too, which are not as controversial.
 - The alignment of the existent Regulation with the New Legislative Framework⁸ and therefore **the considerable simplification of the applicable legislation for mineral fertilisers, would be lost** or at least significantly postponed.
 - Being the **first deliverable of the Circular Economy Action Plan**, the stalemate of the file would affect the credibility of the Commission in implementing this Action Plan.
- The case for **introducing limit values for cadmium in phosphate fertilisers** remains clear. However, **the trilogue scheduled on 22 October 2018 is likely to be the last window of opportunity to close negotiations in the file** under the Austrian Presidency, and therefore probably under **the current Commission's mandate**. Therefore, the mandate of the Commission should allow it to support the European Parliament and the Council in finding any compromise within the range

⁸ Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and Decision 768/2008/EC on a common framework for the marketing of products.

of their current negotiation mandates on cadmium, since a suboptimal deal within that range is better than no deal at all.

- That is because **the current *status quo* is that harmonised phosphate fertilisers move freely on the single market with uncontrolled cadmium content, which in some cases by far exceed all the limit values contained in those negotiation positions**, despite the on-going cadmium accumulation in European agricultural soils. From this perspective a limit – even if of 60 ppm, which according to our latest best estimations would not be met by around 9% of the phosphate fertilisers currently sold in European Union⁹, and which is lower than the limit applied by 13 Member States for non-harmonised fertilisers – is better than no limit at all. It would, however, not affect the estimated 81 % of phosphate fertilisers with a contamination below that level, and therefore only have a limited effect in reducing cadmium contamination or incentivising the industry to invest in decadmiation technology.
- This being said, **the Commission should steer the discussions towards the best realistically foreseeable compromise**. The on-going discussions, in particular in the technical tripartite meeting on 26 September, clearly indicated that the introduction of a 20 ppm limit value as in the Commission's proposal is not a realistic option to reach a compromise. The Commission should therefore
 - recall the public health concerns resulting from the high exposure to cadmium of the European population, and particularly of children, which was confirmed by EFSA opinion
 - actively argue in favour of the introduction of a limit value applicable as of the date of application of the Regulation, which realistically means around three years after the adoption, *i.e.* as of 2022 at the earliest, and, in case of convergence of views of the co legislators, not oppose the 60 ppm,
 - actively argue that this first value should be followed by **an ultimate cadmium limit value of 40 ppm** after a transitional period of up to 6 years after the date of application, and, if needed, with the possibility of checking again the feasibility of the limit before applying it. Based on the current discussions, if necessary to achieve a compromise, agrees to a limit value of 40 ppm, this seems the compromise closest to the Commission's initial proposal.
- **The 40 ppm legally binding limit would imply a significant improvement compared to the current *status quo***. The *status quo* is that:
 - Harmonised phosphate fertilisers move freely without any cadmium contamination limit at all, in principle; out of the three Member States with a derogation allowing them to limit cadmium, only Finland has a limit lower than 40 ppm, *i.e.* 22ppm;
 - On non-harmonised phosphate fertilisers, only four Member States (FI, HU, SK and NL) apply limits lower than 40 ppm.
- A 40 ppm limit of cadmium **would require specific efforts by the EU fertiliser industry**, since it would affect 31 % of the currently available phosphate fertilisers

⁹ Study by Professor Smolders, Leuven University, 2016

http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595354/IPOL_IDA%282016%29595354_EN.pdf

in the market.¹⁰ Such a limit would therefore provide an incentive for further investments in the commercial use of available decadmiation technologies and their further developments. According to industry, some promising techniques have been developed at pilot scale, but still need to be fine-tuned to increase costs efficiency.

- Furthermore, a lower limit of 40 ppm may also be achieved by a mixture of phosphate rock from different sources and/or the blending of conventional mineral fertilisers with **organic fertilisers that are much less contaminated with cadmium, for instance recovered phosphates from waste water or treated livestock manure**. This would facilitate such a shift towards more sustainable fertilising products, which is a key objective of the Circular Economy Action Plan.
- The **40 ppm limit value could be applicable as of 6 years from the date of application of the Regulation**, which with the deferred application of the Regulation proposed by the European Parliament and the Council would mean around 9 years after the date of adoption, *i.e.* as of 2028 at the earliest. In order to have the intended effect of steering technology development towards cleaner products, the limit should be applicable by default. It could however be accompanied by a **feasibility safeguard clause** (see option 3 in the non-paper) or other similar clause.
- A **labelling threshold at 20 ppm, applicable as of the date of application, *i.e.* as of 2020 at the earliest** should also be promoted. This would imply that fertilisers with no more than 20 ppm cadmium would be eligible for a voluntary new harmonised “low cadmium”-label indicating that the fertiliser has a cadmium content below 20 ppm. Farmers would thus be encouraged to use cleaner products.
- Finally, in order to accommodate the concerns of the many Member States that have and wish to maintain national cadmium limit values for phosphate fertilisers below 60 ppm, which is the initial limit value in the positions of all three institutions, **the Commission should actively promote the introduction of a recital recalling Member States’ prerogative to make, if necessary, a notification to the Commission according to Article 114(4) TFEU about existing national provisions with a view to maintaining those provisions on grounds relating to the protection of human health or the environment**. The recital should also echo the possibility to make recourse to Article 114(5).
- Such a recital could read along the following lines: *“Several Member States have in place national provisions limiting the presence of cadmium in phosphate fertilisers on grounds relating to the protection of human health and of the environment. Should a Member State deem it necessary to maintain such provisions after the adoption of harmonised limits through this Regulation, and until the harmonised limits are equal to or lower than the national limits already in place, it could notify them to the Commission by virtue of Article 114(4) of the Treaty on the Functioning of the European Union for the Commission’s verifying according to Article 114(6) of the Treaty whether or not they are a means of arbitrary discrimination, a disguised trade restriction or an*

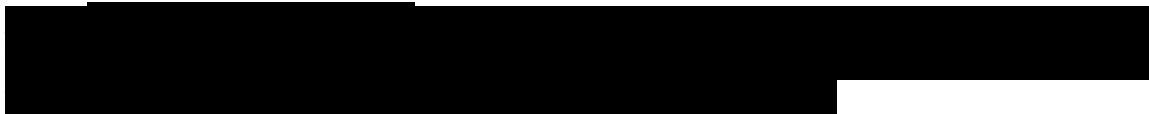
¹⁰ Study by Professor Smolders, Leuven University, 2016,
http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595354/IPOL_IDA%282016%29595354_EN.pdf

obstacle to the functioning of the internal market. Furthermore, based on the provision of Article 114 (5) TFEU, should a Member State deem it necessary to introduce new national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of this Regulation, it could notify the Commission of the envisaged provisions as well as the grounds for introducing them.”

6. RECOMMENDATION TO THE COMMISSION

- **It is suggested that the GRI recommends to the Commission to adopt on cadmium limit values in phosphate fertilisers the position reflected in this fiche, namely:**
- **Continue facilitating a compromise between the two co-legislators, in order to secure an agreement on the file within the range of their two existing mandates**, and thus move away from *status quo* where phosphate fertilisers with uncontrolled cadmium content, which in some cases by far exceed all the limit values contained in those mandates, circulate freely on the single market by virtue of existing EU harmonisation legislation.
- In particular **actively argue in favour of what currently appears like the best realistically achievable compromise** for the sake of protecting human health and the environment. This implies the following compromise:
 - as of the date of application of the Regulation, an initial limit value of **60 ppm**, followed by
 - a limit value of 40 ppm applicable by default as of 6 years after the date of application, and **with a requirement for the Commission to check the feasibility of applying the 40 ppm limit** well before the date of application of it, and to put forward a legislative proposal to amend it if the outcome of the feasibility check should be negative; and accompanied by
 - a **labelling threshold of 20 ppm, applicable as of the date of application, i.e. as of 2020 at the earliest should also be promoted. This would imply that fertilisers with no more than 20 ppm cadmium** would be eligible for a voluntary new harmonised “low cadmium”-label indicating that the fertiliser has a cadmium content below 20 ppm. **Farmers would thus be encouraged to use cleaner products.**
 - a recital recalling **Member States’ prerogative**, if necessary, **to make a notification to the Commission according to Article 114(4) TFEU about existing national provisions** with a view to maintaining those provisions on grounds relating to the protection of human health or the environment. **The recital should echo also the possibility to make recourse to Article 114(5).**

7. OFFICIALS RESPONSIBLE



Non-Paper Cadmium limits in phosphate fertilisers – different options

The proposal for a new Regulation¹¹ on fertilising products¹ includes setting **legally binding limit values for cadmium** that can be expected to meaningfully reduce the current pace of cadmium pollution of European Union soils by phosphate fertilisers.

The options are based on previous discussions in the legislative process, as well as solutions in other legislative files. The added value of some of the options below depends on the cadmium limit values agreed upon. Most of the options can, in theory, be combined.

To facilitate the conceptualisation of the ideas in this position paper, the letters X, Y and Z represent numbers for limit values, where X is a high number, Y is a lower number, and Z is the lowest number.

1. Flexibility on the timing for the application of different limit values

➤ Flexibility as regards the timing of the application of the various cadmium limit values could be considered (rows 558-560 and 597-599).

Annex I – PFC 1(B) and 1(C)(I):

Contaminants must not be present in the CE marked fertilising product by more than the following quantities:

(a) Cadmium (Cd)

(...)

(2) Where the CE marked fertilising product has a total phosphorus (P) content of 5 % phosphorus pentoxide (P₂O₅)-equivalent or more by mass ('phosphate fertiliser'):

- As of [Publications office, please insert [A] years after the date of entry into force of this Regulation]: [X] mg/kg phosphorus pentoxide (P₂O₅),
- As of [Publications office, please insert the date occurring [B] years after the date of application of this Regulation]: [Y] mg/kg phosphorus pentoxide (P₂O₅), and
- As of [Publications office, please insert the date occurring [C] years after the date of application of this Regulation]: [Z] mg/kg phosphorus pentoxide (P₂O₅).

2. Support for de-cadmiation

➤ The intention at Union level to support de-cadmiation technologies and innovation could be re-announced in a recital (see row 23) or in a declaration.

(8b) In order to facilitate the compliance of the phosphate fertilising products with the requirements of this Regulation and to boost innovation, sufficient incentives should be provided for the development of relevant technologies, particularly decadmiation technology, and for the management of cadmium-rich hazardous waste by means of relevant financial resources such as those available under Horizon Europe, LIFE programmes, the Circular Economy Finance Support Platform or through the European Investment Bank (EIB). Those incentives should target cadmium removal solutions that are economically viable on an industrial scale and allow appropriate treatment of the waste generated.

¹¹ 1 COM(2016)0157 – C8 – 0123/2016 – 2016/0084(COD).

3. Safeguard feasibility clause

- The application of an ultimate, low cadmium limit value could be conditioned by a mandatory feasibility reporting by the Commission, and an obligation for the Commission to postpone or even propose to undo the reduction if appropriate for reasons of feasibility (row 390).
- This kind of provision has already been used in the field of chemical legislation¹².
- A postponement could be made either through a delegated act, as proposed in row 390, or through the ordinary legislative procedure, while a repeal of the provision setting the ultimate limit value could be done via ordinary legislative procedure.

Article 42

Delegation of powers

The Commission shall be empowered to adopt delegated acts in accordance with Article 43 to postpone the date of application of the [Z] mg/kg limit referred to in Annex I, part II, PFC1(B), point 3, point (a), point 2 and Annex I, part II, PFC1(C)I, point 2, point (a), point 2, [with a period of up to [n] years] if, based on a thorough impact assessment, there are grounds to consider that the application of that limit would seriously jeopardise the supply of fertilising products to the Union.

Or:

Article 48a or separate paragraph in Article 48

1. By [Publications office, please insert the date occurring [C-5 years] after the date of application of this Regulation], the Commission shall evaluate whether the value limit of [Z] mg/kg set out in Annex I part II, PFC1(B), point 3, point (a), point 2 and Annex I, part II, PFC1(C)I, point 2, point (a), point 2 for phosphate fertilisers should be modified. That assessment shall include an analysis of the impact on the environment, human and animal health, as well as on industry and farmers of cadmium limit values in phosphate fertilisers above and below [Z] mg/kg, taking into account matters including accumulation of cadmium in soil caused by phosphate fertilisers, cost, availability of raw materials, and effectiveness of decadmiation technologies including waste management. The Commission shall submit that assessment to the European Parliament and to the Council.

2. In addition, if the Commission, on the basis of the assessment referred to in paragraph 1, considers that this limit value for cadmium in phosphate fertilisers requires revision, it shall, by [Publications office, please insert the date occurring [C-4] years after the date of application of this Regulation], present an appropriate legislative proposal. Unless the European Parliament and the Council, on the basis of such a proposal, decide otherwise by [Publications office, please insert the date occurring [C-2] years after the date of application of this Regulation], the limit value of [Z mg/kg] shall be applicable from the date set out in that Annex.

4. Review clause

If the ultimate limit value agreed upon in the course of this legislative procedure is higher than Z, the commitment to further reduce the cadmium limit value in the future could also be

¹² See Article 16(1) of Regulation (EC) No 468/2004 of the European Parliament and of the Council of 31 March 2004 on detergents (OJ L104 8.4.2004, p. 1).

included. This could be subject to a review carried out by the Commission by a certain date, and imply providing an obligation to propose the reduction if appropriate and feasible (rows 86, 443 and 447). Such a provision could set a clear direction towards further reductions as soon as lower limit values are achievable.

Article 47a

Review

By [Publication office, please insert the date [D years] after the entry into force of this Regulation], the Commission shall carry out a review of limit values for cadmium content in phosphate fertilisers, with a view to assessing the feasibility of reducing those limit values [to a lower appropriate level taking into account available scientific evidence on cadmium exposure and accumulation in the environment]/[towards [Z] mg/kg]. This review shall be accompanied, if appropriate, by a legislative proposal.

5. Labelling requirements

One or both of the following options below could be considered:

A. Mandatory labelling threshold

- The limit values X and Y ppm could be complemented by a labelling threshold at Z ppm meaning that any phosphate fertilisers with a cadmium contamination above Z ppm will need to expressly mention it on the label. In order to prevent that the manufacturer has to indicate the exact cadmium content in all his products, he could be allowed to indicate a cadmium content that his product certainly does not exceed, i.e. the “maximum” cadmium content.

Annex III, PFCs 1(B) and 1(C)(I):

Where the EU fertilising product has a total phosphorus (P) content of 5% phosphorus pentoxide (P₂O₅)-equivalent or more by mass (‘phosphate fertiliser’), the maximum cadmium (Cd) content in mg/kg phosphorous pentoxide (P₂O₅) shall be declared whenever it is higher than [Z] mg/kg.

B. Voluntary "Low Cadmium" Label (inspired by row 1223)

- The limit values X and Y ppm could be complemented by the possibility that any phosphate fertiliser with a cadmium contamination below Z ppm may have on the label the statement “Low cadmium (Cd) content”.

Annex III, PFCs 1(B) and 1(C)(I):

The information may contain the statement “Low cadmium (Cd) content” or similar, or a visual representation to that effect, only if the fertilising product has a content of cadmium (Cd) lower than [Z] mg/kg phosphorous pentoxide (P₂O₅).

6. General provision on the use of fertilisers

- Member States may maintain or adopt provisions in compliance with the Treaties concerning the use of EU fertilising products for the purpose of protecting human health and the environment – row 146. Limitations in the maximum amount of both mineral and organic fertilisers to be applied on land are already provided in Member States, for instance in application of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from

agricultural sources. However, such restrictions should not constitute an obstacle to the placing on the market or the circulation of compliant fertilising products.

Article 3

Free movement

This Regulation does not prevent Member States from maintaining or adopting provisions which are in compliance with the Treaties, concerning the use of CE marked fertilising products for the purpose of protecting human health and the environment, provided that those provisions do not require modification of CE marked fertilising products which are in compliance with this Regulation and provided that they do not influence the conditions for making them available on the market.

7. Flexibility of the harmonised limit values

To ensure that the limit values are adapted to the specific situation in each Member State, the one of the two options below could be considered:

A. The possibility to opt for predefined limit values

- The new Regulation could define a maximum level of X ppm for the entire EU, and Member States could be allowed to establish a lower limit by choosing from two possible values (Y or Z ppm). Fertilisers would be labelled with the information of which limit value they comply with and would circulate freely in all Member States which notify a limit value equal or higher.
- It could also be considered to set the normal upper limit for cadmium in phosphate fertilisers at Y ppm after an appropriate transition period and allow Member States to opt for setting a higher limit of X or a lower limit of Z.

Recital (8)

Contaminants in CE marked fertilising products, such as cadmium, can potentially pose a risk to human and animal health and the environment as they accumulate in the environment and enter the food chain. Their content should therefore be limited in such products. As regards cadmium in phosphate fertilisers, in view of the fragmentation of limit values for non-harmonised fertilisers throughout the European Union and the wide variety of desired limit values for harmonised fertilisers, and in order to approximate the rules as far as possible, Member States should choose between one of three limit values. The possibility for Member States to choose one of three limit values for cadmium content in phosphate fertilisers contributes to the elimination of obstacles to the free movement of fertilising products, and should be seen as a stage towards a single harmonised limit value at a later stage.

[The rest of the existing Recital 8 could be moved to a new Recital (8a)]

Article 3a

1. Where a CE marked fertilising product has a total phosphorus (P) content of 5% phosphorus pentoxide (P₂O₅)-equivalent or more by mass Member States shall set one of the following limit values for cadmium (Cd) content:

- a) [X] mg/kg phosphorus pentoxide (P₂O₅), or
- b) [Y] mg/kg phosphorus pentoxide (P₂O₅), or
- c) [Z] mg/kg phosphorus pentoxide (P₂O₅).

2. Member States shall notify to the Commission all measures setting the selected limit value for cadmium at least six months in advance of the applicability of the respective limit value.

3. The Commission shall make publicly available an updated list of the limit values for cadmium content applicable in each Member State as notified in accordance with paragraph 2.

Article 9

2a. Before making a CE marked fertilising product available on the market distributors shall verify that the cadmium content in the product does not exceed the limit value established in accordance with article 4 in the Member State in which the EU fertilising product is made available on the market.

Annex I, PFCs 1(B) and 1(C)(I):

Contaminants must not be present in the CE marked fertilising product by more than the following quantities:

(a) Cadmium (Cd)

(ii) Where the CE marked fertilising product has a total phosphorus (P) content of 5 % phosphorus pentoxide (P₂O₅)-equivalent or more by mass ('phosphate fertiliser'), the Cd content shall not exceed the limit value established in the Member State where the product is placed on the market in accordance with Article 3a.

Annex III, PFCs 1(B) and 1(C)(I):

2ca. Where the CE marked Fertilising product has a total phosphorus (P) content of 5% phosphorus pentoxide (P₂O₅)-equivalent or more by mass, the information of whether the product complies with the limit value for cadmium content of [X] mg/kg phosphorus pentoxide (P₂O₅) or [Y] mg/kg mg/kg phosphorus pentoxide (P₂O₅) or [Z] mg/kg mg/kg phosphorus pentoxide (P₂O₅).

B. Derogations for certain Member States

- Based on Article 114 TFEU directly, interested Member States are allowed to request derogations for maintaining or introducing lower limit values for cadmium contamination to CE marked phosphate fertilisers until the harmonised limits are equal or lower, taking into account their specific circumstances (such as soil or climate conditions). Derogations can however be granted only under the strict conditions in the Treaty and following the procedure set therein.
- The 4-column table includes different options on maintaining or introducing derogations to the harmonised limit value for cadmium in the Regulation itself:
 - Derogation for Member States which already have a derogation from the existing rules based on the Treaty – row 145;
 - Derogation for Member States which already apply stricter national limits – row 446.

However, it could be argued that a Regulation cannot automatically maintain or introduce derogations which normally are granted based on the Treaty, in the conditions and following the procedure set therein.