



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Consumer, Environmental and Health Technologies
Chemicals

Brussels, 17 October 2017

NOTE FOR THE FILE

**Subject: Fertilising Products Regulation
Report of a meeting of the Council Working Party of 6 October 2017**

1. INFORMATION FROM THE PRESIDENCY

The Presidency (Pcy) announced its intention to go through several amendments made to the Council text and to present and discuss two Pcy position papers on delegated acts and limit values for cadmium.

2. POINTS DISCUSSED DURING THE LAST MEETING AND FOLLOW-UP

The following issues were discussed:

2.1. Biodegradability criteria

Pcy explained that the wordings of Article 42 and CMC 10 have been improved to reflect the comments made by France at the last meeting.

On Article 42 (4a) - delegation to COM to develop biodegradability criteria – Pcy took on board the FR suggestion to include a reference to the non-accumulation of polymer coatings in the environment. FR replied that a more specific reference to non-toxic substances released in the environment should be made. FR will send concrete comments in writing.

On CMC 10 and the inclusion of a sunset clause if the COM cannot deliver on its legal obligation to introduce biodegradability criteria: FR asked why the application of the sunset clause has been delayed from 3 to 7 years.

2.2. CMC 2

FR requested to maintain the reference to 'non-processed or mechanically processed' in the title of CMC 2 but to remove any reference to chemically processes in the list of authorised processing techniques.

AT, EL, DE, PT supported the FR comment. COM clarified that supercritical CO₂ extraction is used to extract essential oils. This is not a mechanical process but not a process altering the chemical composition neither. COM informed that CMC 1 provisions could apply to recall that the chemical processes now mentioned under CMC 2 will in any event be allowed under CMC 1, subject to the extended REACH registration obligations mentioned there.

FR, ES will examine the appropriateness of maintaining the supercritical CO₂ process in the list of permissible processes. CZ mentioned that the logic of the COM proposal should be followed and that chemical treatments should be left out of the scope of CMC 2. CZ confirmed that the last sentence referring to alkali and acid treatment is their biggest concern in this regard.

2.3. Total chromium

Pcy explained that the Council text has been revised in light of the latest discussion in the CWP. The provision requiring producers to record the maximum quantity and source(s) of total chromium in the technical documentation has been transformed into an obligation to label the maximum concentration of total chromium if above 200 mg /kg dry matter.

HU, DK, EL, BE, FR, SK still favour a limit value for total chromium. However, FR and BE as well as ES mentioned that they are still examining the Pcy proposal.

SE, PT reported preference to a limit value but would be ready to compromise and accept the Pcy proposal.

UK, AT, LT, LV, CZ, DE, FI, PL commented that the Pcy proposal is a balanced compromise between the need to inform farmers about the presence of contaminants and the reservations expressed by some Delegations.

IT repeated its opposition to the introduction of any legal requirement concerning maximum limits related to total chromium in fertilising products on the ground that the legislation on organic farming includes only a limit for Cr (VI).

COM explained that it is unlikely that ingredients contaminated with total chromium will find their way into Annex II in its current version. However, the COM intends to expand the scope of Annex II notably through the introduction of animal by-products, struvite, biochar and ash-based products. In developing recovery rules, JRC will verify whether those materials are sufficiently safe to be used in the manufacture of CE marked fertilising products.

Pcy asked Member States to send their final position in writing before Friday 13.10.2017.

2.4. Naturally occurring microorganisms

FR recalled its request to only allow the collection of naturally occurring microorganisms in fertilising products. Pcy answered that a reference to Directive 2001/18/EC in the 'without prejudice list' of Article 1 would address the French concerns. FR explained that some microorganisms obtained through new breeding techniques are exempted from the scope of that Directive. Therefore, a mere reference to that Directive would not be sufficient. COM replied that the revision of the Fertiliser Regulation should not be used to stretch the definition of GMOs. Pcy agreed and recalled its proposal to include a reference to Directive 2001/18/EC.

3. DELEGATED ACTS

Pcy introduced its compromise option on delegated act. The objective of the Pcy was to restrict as far as possible the possibility for the COM to amend the Annex I of the Regulation while maintaining the possibility for the COM to include new component materials categories in Annex II. The COM could only modify the content of Annex I as a consequence of the addition of component materials in Annex II. In such a case, the proposal suggests that the COM shall request the scientific opinion of the European Food

Safety Authority. The table below summarizes the outcomes of the discussion. Where necessary the positions of the Delegations are clarified after the table.

Scrutiny reservation or no firm opinion yet	Supportive of the Pcy proposal	Reject the Pcy proposal (the main reason is given in brackets)
LT	UK	NL/FI (The restriction is too strict and would not allow the COM to keep pace with innovation in the sector or to introduce rapidly new limit values for contaminants when new risks have been identified.)
MT	LU	HR
SK	LV	IT/ES (would rather support a more strict restriction of the COM delegation of power but would be ready to compromise and support the Pcy proposal)
CY/HU/SV (but looks positively in the Pcy proposal)	EL	
BE	IE	
SE	DK	
FI	PL	
RO	FR	
	PT	
	BG	
	EE	
	DE/AT/CZ expressed concerns about the role of EFSA in the evaluation of the risks to human health from contaminants present in fertilisers	

SK, EL, DK, CZ, DE, AT questioned the competence of EFSA to evaluate the risks for contaminants in fertilisers. SK, EL, DE asked whether the opinion of EFSA would be binding for the COM. DK remarked that EFSA would not be competent to address the risks of the presence of contaminants in fertilising products to the environment.

COM explained that EFSA is an Executive Agency organising the works of scientific advisory panels related to the safety of the food chain and that EFSA opinions are therefore not legally binding. However, COM relies heavily on EFSA opinions that identify risks for human health from the presence of contaminants in the food chain. EFSA will not assess similar risks for the environment. Therefore, if required to consult EFSA, COM would complement that consultation with another technical assessment, probably by JRC. The Pcy proposal is not far from how the COM envisages adapting the Annexes to technical progress by delegated acts. The COM had no intention in any event to amend Annex I unless there would be enough new scientific evidence. But the Commission's proposal is preferable, since it allows adaptation of the Annexes to emerging issues with existing component materials.

NL supported the views of the COM and recalled that COM should only use its empowerment based on solid risk assessments (Article 42 (4)). The COM shall also consult Member States experts under Article 43(3a). Therefore, NL still firmly supports the inclusion of Annex I in the COM delegation of power.

4. CADMIUM LIMITS

Pcy introduced its compromise option on cadmium in fertilisers. Member States would have to opt for one limit that would apply for their territory among a set of three possible regulatory limit values. The Member States would have to inform the COM of the applicable limit value. This information would be made available on a dedicated COM website. The proposal was aimed at satisfying the Member States that expressed concerns about the level of ambition and the Member States that expressed strong reluctance to include binding limit values below 60 mg Cd/kg P₂O₅.

The Council LS explained why the proposal is legally sound even if it would not achieve the objective of the full harmonisation in the short term. Article 114 specifies that the Council and the EU Parliament *shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*. The EU Court of Justice ruled in case C-491/01 that Member States and the EU Parliament keep a high level of discretion when harmonising the market for goods. In case C-547/14, the Court accepted that harmonisation could be reached in several steps. In light of the known Court cases, the Council LS concluded that the Council proposal is compatible with the Treaty but did not rule out the possibility that the Court may have a different opinion.

Pcy organised a tour de table the result of which is presented in the table below:

No official position yet or scrutiny reservation	In favour of the Pcy proposal	Against the Pcy proposal
MT, IE, CY, BE scrutiny reservation	LV, DK can support the proposal only if a gradual reduction of the content of cadmium in phosphate fertilisers is the target.	LU, LT would prefer the COM proposal
NL can probably support the Pcy proposal but would	HU, SE, CZ, SV, FI, AT would support the Pcy	PL, ES, PT, RO continue to support a unique limit of

have preferred the COM proposal	proposal as it seems impossible to reach a consensus on one- fits-all limit value. The Pcy is certainly better than status quo.	80 ppm. The proposal would fragment the EU fertiliser market. A review clause could be introduced.
UK formally issued a scrutiny reservation, but also expressed strong concerns about implementability	BG,EE	IT, EL, FR, DE, HR would only support a single limit value. Most probably between 60 and 40ppm but not below.

COM mentioned that this is not an encouragement for industry to develop decadmiation, although companies could somehow be encouraged to produce fertilisers with less than 20 ppm, as that would give them access to the Single Market. The COM recalled that the issue has been on the table for more than 30 years and that already the EU population is at risk of over-exposure to cadmium through their diet. In response to questions from delegations about legality and implementability, COM stated that its preliminary analysis concurs with that of the Council's Legal Service. In other words, the question whether to use this approach as a step towards harmonisation is a political choice not in contradiction with the article 114 of the Treaty.

Pcy took notes of the results of the consultation and mentioned that a new compromise text will be proposed by 13 October, based on the written inputs of the Member States. The Pcy had not yet decided whether to present a compromise text (including the limit value for cadmium) to COPERER before the end of October or to organise a last technical meeting. The Council WP on 23.10.2017 is already cancelled.

Speaking for the Commission:

