Commission Decision (EU) 2020/1205 of 6 August 2020 on the national provisions notified by the Slovak Republic pursuant to Article 114(4) of the Treaty on the Functioning of the European Union concerning the cadmium content in phosphate fertilisers (notified under document C(2020) 5285) (Only the Slovak text is authentic)

COMMISSION DECISION (EU) 2020/1205

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114(6) thereof,

Whereas:

1. **FACTS AND PROCEDURE**

(1) On 9 August 2019, the Slovak Republic notified the Commission, based on Article 114(4) of the Treaty on the Functioning of the European Union (TFEU), of its intention to maintain national provisions on cadmium content in phosphate fertilisers derogating from Regulation (EU) 2019/1009 of the European Parliament and of the Council[(1)].

1.1. **Union Legislation**

1.1.1. *Article 114(4) and (6) TFEU*

(2) Article 114, paragraphs 4 and 6 TFEU provide:

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

[…]

6 The Commission shall, within six months of the notifications referred to in paragraphs 4 […] approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised

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restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 […] shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

1.2. **Harmonisation rules in the field of fertilising products**

1.2.1. *Regulation (EC) No 2003/2003*

(3) Regulation (EC) No 2003/2003 of the European Parliament and the Council[(2)] applies to products which are placed on the market as fertilisers designated 'EC fertilisers'. A fertiliser belonging to a type of fertilisers listed in Annex I to Regulation (EC) No 2003/2003 and complying with the conditions laid down in that Regulation may be designated 'EC fertiliser' and move freely in the internal market.

(4) Annex I to Regulation (EC) No 2003/2003 sets an exhaustive list of types of fertilisers covered by the harmonisation rules. For each type of fertiliser there are specific requirements concerning, for instance, nutrient content, nutrient solubility or processing methods.

(5) Regulation (EC) No 2003/2003 applies mainly to inorganic fertilisers. Some of the types of fertilisers covered have a phosphorus content of 5 % phosphorus pentoxide (P_2O_5)-equivalent or more by mass.

(6) Article 5 of Regulation (EC) No 2003/2003 sets the principle of free circulation of EC fertilisers on the internal market, stating that Member States shall not, on grounds of composition, identification, labelling or packaging, and other provisions contained in that Regulation, prohibit, restrict or hinder the placing on the market of EC fertilisers which comply with that Regulation.

(7) Regulation (EC) No 2003/2003 sets no limit values for contaminants in EC fertilisers. Therefore, with a few exceptions based on the Commission Decisions in application of the respective TFEU provisions[(3)], EC fertilisers with a phosphorus content of at least 5 % P_2O_5 move freely in the internal market irrespective of their cadmium content.

(8) Nevertheless, the Commission's intention to address the issue of unintentional cadmium content in mineral fertilisers was already announced in recital 15 of Regulation (EC) No 2003/2003. According to it 'Fertilisers can be contaminated by substances that can potentially pose a risk to human and animal health and the environment. Further to the opinion of the Scientific Committee on Toxicity, Ecotoxicity and the Environment (SCTEE), the Commission intends to address the issue of unintentional cadmium content in mineral fertilisers and will, where appropriate, draw up a proposal for a Regulation, which it intends to present to the European

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Parliament and the Council. Where appropriate, a similar review will be undertaken for other contaminants'.

1.2.2. *Regulation (EU) 2019/1009*

(9) Regulation (EU) 2019/1009 sets harmonisation rules for 'EU fertilising products'. It repeals Regulation (EC) No 2003/2003 as of 16 July 2022.

(10) EU fertilising products are fertilising products, which are CE marked when made available on the internal market. An EU fertilising product must meet the requirements set out in Regulation (EU) 2019/1009 for the relevant product function category ('PFC') and component material category or categories, and be labelled in accordance with the labelling requirements laid down therein. There are seven PFCs for EU fertilising products, one of which covers fertilisers.

(11) Regulation (EU) 2019/1009 covers inorganic fertilisers in a more generic manner than Annex I to Regulation (EC) No 2003/2003, subject to some general requirements concerning their quality and safety. In addition, Regulation (EU) 2019/1009 applies to organic and organo-mineral fertilisers, which are outside the material scope of Regulation (EC) No 2003/2003.

(12) Regulation (EU) 2019/1009 introduces at Union level the notion of 'phosphate fertilisers' for organo-mineral fertilisers or inorganic macronutrient fertilisers with a phosphorus content of at least 5 % P_2O_5.

(13) Regulation (EU) 2019/1009 sets, for the first time at Union level, limit values for contaminants in EU fertilising products. Based on point 3(a)(ii) in PFC 1(B), Organo-mineral fertiliser, and point 2(a)(ii) in PFC 1(C)(I), Inorganic macronutrient fertiliser, of Annex I to that Regulation, the cadmium content in phosphate fertilisers must not exceed the limit value of 60 mg/kg P_2O_5.

(14) The principle of free movement is enshrined in Article 3(1) of Regulation (EU) 2019/1009, according to which Member States shall not impede, for reasons relating to composition, labelling or other aspects covered by that Regulation, the making available on the market of EU fertilising products which comply with that Regulation. However, in accordance with Article 3(2) of Regulation (EU) 2019/1009, a Member State which, on 14 July 2019, benefits from a derogation from Regulation (EC) No 2003/2003 in relation to cadmium content in fertilisers granted in accordance with Article 114(4) TFEU may continue to apply the national limit values for cadmium content in phosphate fertilisers until such time as harmonised limit values for cadmium content in phosphate fertilisers which are equal to or lower than the national limit value are applicable at Union level.

(15) In addition, by 16 July 2026, the Commission has an obligation to review the limit values for cadmium content in phosphate fertilisers, with a view to assess the feasibility of reducing these limit values to a lower appropriate level. The Commission has to take into account environmental factors, in particular in the context of soil and climatic conditions, health factors, as well as socioeconomic factors, including considerations of security of supply.

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1.2.3. *Optional regime*

(16) The EU market for fertilising products is only partly harmonised.

(17) Regulation (EC) No 2003/2003 aims to ensure the free circulation on the internal market of EC fertilisers. However, it does not affect 'the national fertilisers' placed on the market of the Member States in accordance with their respective national legislation. Manufacturers can choose to market fertiliser either as 'EC fertiliser' or as 'national fertiliser'.

(18) Regulation (EU) 2019/1009 maintains intact the optional regime. Thus, it ensures the free movement on the internal market of EU fertilising products and continues to allow the placing on the market of national fertilising products. The choice remains with the manufacturer.

(19) Based on both Regulation (EC) No 2003/2003 and Regulation (EU) 2019/1009, Member States must not impede the making available on the market of compliant EC fertilisers and, respectively, EU fertilising products, for reasons relating to, inter alia, cadmium content.

(20) However, Member States may maintain or introduce any limit values deemed appropriate for contaminants in national fertilising products. Every Member State is concerned to a greater or lesser extent by the threat that accumulation of cadmium poses to the long-term sustainability of crop production. The majority of Member States have already introduced rules limiting the cadmium content in national fertilising products with the objective of reducing emissions of cadmium in the environment and thereby the exposure of humans to cadmium. This Decision does not refer to this type of rules.

(21) Thus, Union harmonisation rules coexist with the national provisions applicable to fertilising products.

1.3. **National provisions notified**

(22) The national provisions notified by the Slovak Republic as regards cadmium limit values for phosphate fertilisers ('the notified national provisions') are contained in the Slovak Ministry of Agriculture Decree No 577/2005 laying down the types of fertilisers, the composition, packaging and labelling of fertilisers, analytical methods for testing fertilisers, risk elements and their limit values for individual groups of fertilisers, permitted deviations and limits for agricultural fertilisers for the purposes of Act No 136/2000 on fertilisers and Act No 220/2004 on the protection and use of agricultural land.

(23) Point 1 of Annex 3 to Decree No 577/2005 sets a limit value of 20 mg/kg P_2O_5 for cadmium. This limit value applies to three categories of fertilisers: phosphorous fertilisers, compound fertilisers and fertilisers containing also trace elements irrespective of their content of P_2O_5. The limit value is not applicable to EC fertilisers under Regulation (EC) No 2003/2003.

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(24) The Slovak Republic has made clear in its notification and the additional information submitted to the Commission that its notification covers only phosphate fertilisers covered by Regulation (EU) 2019/1009 and made available on the market in Slovakia. Such fertilisers are referred to in point 3(a)(ii) PFC 1(B) and point 2(a)(ii) PFC 1(C)(I) of Annex I of Part II to that Regulation, which apply to inorganic and organo-mineral fertilisers with a total phosphorus content that is equal or more than 5 % phosphorus pentoxide (P_2O_5) equivalent by mass.

(25) Additionally, the Slovak Republic has confirmed that it does not apply for any other derogations with regard to the placing on the market of fertilising products within the meaning of Regulation (EU) 2019/1009.

1.4. **Procedure**

(26) At the time of the adoption of Regulation (EU) 2019/1009, the Slovak Republic along with Hungary and the Czech Republic signed a political declaration expressing their regret as regards the low ambition of the final compromise on the cadmium limit value in phosphate fertilisers, and already indicating their support for national derogations from it based on Article 114(4) TFEU.

(27) By letter of 9 August 2019, the Slovak Republic notified the Commission of its intention to maintain national provisions on cadmium content in phosphate fertilisers derogating from Regulation (EU) 2019/1009. According to Article 114(4) TFEU read in conjunction with Article 36 TFEU, the Slovak Republic's justification is based on grounds of major needs relating to the protection of human health and the protection of the environment.

(28) By letter of 29 August 2019, the Commission acknowledged receipt of the notification and informed the Slovak authorities that the six-month period for its examination according to Article 114(6) TFEU ends on 10 February 2020.

(29) In support of their notification based on Article 114(4) TFEU, the Slovak authorities sent by letter of 27 September 2019 additional information to the Commission. That information provides some clarifications as regards the material scope of the notified national provisions that the Slovak Republic seeks to maintain, as well as detailed data on the Slovak fertilisers market.

(30) On top of this additional information, the Slovak Republic sent by letter of 8 November 2019 a study conducted by the French Agency ANSES concerning cadmium exposure and proposing ingestion Toxicity Reference Values (TRV), benchmark sanitary values in the body (for example in the blood and urine) and limit values for cadmium in fertilising products as well as crop supports in order to control the pollution of agricultural soils and the contamination of crop production[(4)].

(31) Further, the Commission published a notice regarding the notification in the *Official Journal of the European Union*[(5)] in order to inform interested parties of the Slovak Republic's intention to maintain its national provisions, as well as the grounds invoked to support the request. By letter of 19 November 2019, the Commission also