Commission Decision (EU) 2020/1178 of 27 July 2020 on the national provisions notified by the Kingdom of Denmark pursuant to Article 114(4) of the Treaty of the Functioning of the European Union concerning cadmium content in fertilisers (notified under document C(2020) 4988) (Only the Danish text is authentic)

COMMISSION DECISION (EU) 2020/1178

of 27 July 2020

on the national provisions notified by the Kingdom of Denmark pursuant to Article 114(4) of the Treaty of the Functioning of the European Union concerning cadmium content in fertilisers

(notified under document C(2020) 4988)

(Only the Danish text is authentic)

THE EUROPEAN COMMISSION,

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

Whereas:

1. FACTS AND PROCEDURE

(1) On 27 January 2020, the Kingdom of Denmark 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 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.
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> […]
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> 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

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2020/1178. (See end of Document for details)*

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.

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 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) Through points 3(a)(ii) in PFC 1(B) and 2(a)(ii) in PFC 1(C)(I) in Annex I to Regulation (EU) 2019/1009, that Regulation 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-equivalent by mass.

(13) The Regulation sets, for the first time at Union level, limit values for contaminants in EU fertilising products. For phosphate fertilisers, the cadmium limit value is 60 mg/kg P_2O_5. For other fertilisers, other limit values apply, and are expressed not as mg/kg P_2O_5, but as mg/kg dry matter of the entire product with all its components.

(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 limit values applicable in the Member State concerned on 14 July 2019 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.

1.2.3. *Optional regime*

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

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

(18) Regulation (EU) 2019/1009 maintains unchanged the optional regime. Thus, it ensures the free movement in 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 Regulations (EC) No 2003/2003 and (EU) No 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, which are outside the scope of Regulation (EU) 2019/1009. 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 Kingdom of Denmark ('the notified national provisions') are enshrined in Order No 223 of 5 April 1989 on the cadmium content of fertilisers containing phosphorus (hereinafter the 'Order'), according to which the current limit value applies as of 1998.

(23) The Order regulates the sale for use in Denmark. It sets a limit value for cadmium in artificial fertilisers, derived from mineral phosphate, with a total phosphorus (P) content of 1 % or more by weight. A phosphorus (P) content of 1 % by weight equals 2,3 % P_2O_5-equivalent by mass. The limit value for cadmium in those fertilisers is 110 mg Cd/kg phosphorus (P), which is equivalent to 48 mg Cd/kg P_2O_5. For fertilisers other than artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3 % P_2O_5-equivalent by mass or more, the Order has no cadmium limit.

(24) The Kingdom of Denmark has been applying the limit value laid down in the Order to both national fertilisers and to fertilisers harmonised under Regulation (EC) No 2003/2003. The Order, which has applied in Denmark since 1989, has not been notified by the Kingdom of Denmark to the Commission pursuant to Article 114

TFEU or the predecessors of this Treaty provision[4] in respect of Regulation (EC) No 2003/2003. In the present notification in respect of Regulation (EU) 2019/1009, the Kingdom of Denmark has however pointed out that it notified the draft Order to the Commission on 19 January 1988 pursuant to Council Directive 83/189/EEC[5] and that it raised the envisaged national limit value before the Order was adopted to take into account objections raised by three other Member States following that notification.

(25) By the notification, the Kingdom of Denmark has requested the Commission's approval to apply the notified national provisions to artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3 % P_2O_5-equivalent by mass or more by derogation from the cadmium limits laid down in Regulation (EU) 2019/1009. In other words, the Kingdom of Denmark intends to apply the national cadmium limit both to phosphate fertilisers and to certain other fertilisers regulated under that Regulation. The present notification does not contain a request to approve any derogation from Regulation (EC) No 2003/2003.

1.4. **Procedure**

(26) By letter of 27 January 2020, registered on 29 January 2020, the Kingdom of Denmark notified the Commission of its intention to maintain national provisions on cadmium content in artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3 % P_2O_5-equivalent by mass or more, derogating from Regulation (EU) 2019/1009. According to Article 114(4) read in conjunction with Article 36 TFEU, the justification put forward by the Kingdom of Denmark is based on grounds of major needs relating to the protection of human health and the environment from exposure to cadmium in the environment.

(27) By letter of 30 January 2020, the Commission acknowledged receipt of the notification and informed the Kingdom of Denmark that the six-month period for its examination according to Article 114(6) TFEU ends on 30 July 2020.

(28) In support of its notification based on Article 114(4) TFEU, the Kingdom of Denmark submitted additional information to the Commission on 31 March 2020. That information provides some clarifications as regards the material scope of the national provisions that the Kingdom of Denmark seeks to maintain, as well as detailed data on the fertilisers market in Denmark.

(29) In the additional information, the Kingdom of Denmark clarified, inter alia, that the primary concern which the notified national provisions seek to address, and thus the primary focus of the scientific assessment in the Danish notification, is inorganic mineral fertilisers with high phosphorus content, as the highest cadmium load from fertilisers is associated with those fertilisers, and that a similar concern applies to organo-mineral fertilisers with a high content of inorganic mineral phosphorus. The Kingdom of Denmark also indicated that it would be willing to look into options for information or amending the legislation in relation to the product function categories and limit values of Regulation (EU) 2019/1009.