

# DECISIONS

## 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 <sup>(1)</sup>.

#### 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 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.'

<sup>(1)</sup> Regulation (EU) 2019/1009 of the European Parliament and of the Council of 5 June 2019 laying down rules on the making available on the market of EU fertilising products and amending Regulations (EC) No 1069/2009 and (EC) No 1107/2009 and repealing Regulation (EC) No 2003/2003 (OJ L 170, 25.6.2019, p. 1).

## 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 <sup>(2)</sup> 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<sub>2</sub>O<sub>5</sub>)-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 <sup>(3)</sup>, EC fertilisers with a phosphorus content of at least 5 % P<sub>2</sub>O<sub>5</sub> 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.

<sup>(2)</sup> Regulation (EC) No 2003/2003 of the European Parliament and of the Council of 13 October 2003 relating to fertilisers (OJ L 304, 21.11.2003, p. 1).

<sup>(3)</sup> See Commission Decisions of 3 January 2006: 2006/347/EC on the national provisions notified by the Kingdom of Sweden under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, para. 41 (OJ L 129, 17.5.2006, p. 19), 2006/348/EC on the national provisions notified by the Republic of Finland under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, para. 40 (OJ L 129, 17.5.2006, p. 25) and 2006/349/EC on the national provisions notified by the Republic of Austria under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers (OJ L 129, 17.5.2006, p. 31).

- (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<sub>2</sub>O<sub>5</sub>-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<sub>2</sub>O<sub>5</sub>. For other fertilisers, other limit values apply, and are expressed not as mg/kg P<sub>2</sub>O<sub>5</sub>, 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.
- (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<sub>2</sub>O<sub>5</sub>-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<sub>2</sub>O<sub>5</sub>. For fertilisers other than artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3 % P<sub>2</sub>O<sub>5</sub>-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 <sup>(4)</sup> 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 <sup>(5)</sup> 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<sub>2</sub>O<sub>5</sub>-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<sub>2</sub>O<sub>5</sub>-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.
- (30) Further, the Commission published a notice regarding the notification in the *Official Journal of the European Union* <sup>(6)</sup> in order to inform interested parties of the Kingdom of Denmark's national provisions, as well as of the grounds invoked to support the notification. No comments were received following the publication of the notice.

<sup>(4)</sup> In particular Article 95 (ex. 100a) of the Treaty establishing the European Community (Consolidated version 2002) (OJ C 325, 24.12.2002, p. 33).

<sup>(5)</sup> Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 109, 26.4.1983, p. 8).

<sup>(6)</sup> OJ C 124, 17.4.2020, p. 19.

- (31) By letter of 6 April 2020, the Commission also informed the other Member States about the notification and gave them the opportunity to submit comments thereon within 30 days. The Commission received comments within the time-limit set from Belgium, the Slovak Republic, Hungary and Malta. The three first mentioned Member States mentioned that they did not have any comments as regards the notification. Malta noted that they have no objection to the Kingdom of Denmark maintaining its national limit values for cadmium content in fertilisers.

## 2. ASSESSMENT

- (32) As a preliminary remark, the Commission notes that it flows clearly from the case-law of the Court of Justice of the European Union ('the Court'), that the procedure laid down in Article 114(4)-(6) TFEU is intended to ensure that no Member State may apply national rules derogating from the harmonised rules without obtaining confirmation from the Commission. A Member State is not authorised to apply the national provisions unilaterally without having notified them and without having obtained a decision from the Commission confirming them <sup>(7)</sup>.
- (33) The Commission also notes that Article 3(2) of Regulation (EU) 2019/1009 only applies to derogations from Article 5 of Regulation (EC) No 2003/2003 granted before 14 July 2019 on the basis of notifications made under Article 114(4) TFEU.
- (34) The Commission considers that the abovementioned notification of the draft made by the Kingdom of Denmark under Directive 83/189/EEC on 19 January 1988 is not comparable to a procedure under Article 114(4) to (6) TFEU, as the purpose of that procedure is to prevent technical barriers to trade and not to aim at a derogation of existing national provisions from the Union harmonisation measure. In the present case, it is uncontested that the Kingdom of Denmark has not notified the Order pursuant to Article 114 TFEU before 14 July 2019 and the Commission has not approved it.
- (35) Consequently, the Kingdom of Denmark does not benefit from a derogation from Article 5 of Regulation (EC) No 2003/2003. It can thus also not benefit from Article 3(2) of Regulation (EU) 2019/1009.

### 2.1. Admissibility

- (36) Pursuant to Article 114(4) and (6) TFEU, a Member State may, after the adoption of a harmonisation measure, maintain its more stringent national provisions on grounds of major needs referred to in Article 36 TFEU, or relating to the protection of the environment or the working environment, provided that it notifies those national provisions to the Commission and the Commission approves those measures.
- (37) To ascertain the admissibility of the notification, the Commission has to assess if the notified national provisions concerned are a pre-existing measure derogating from the newly introduced Union harmonisation rule and if they are more stringent.
- (38) The Order has applied in Denmark since 1989. Therefore it already existed in substance at the time of adoption of Regulation (EU) 2019/1009.

#### 2.1.1. On the pre-existence of the notified national provisions

- (39) There are two factors which need to be examined in order to establish whether the notified national provisions, introduced in 1989 and applying in their current form since 1998, are pre-existing for the purpose of Article 114 (4) TFEU.
- (40) First, Regulation (EU) 2019/1009 will replace Regulation (EC) No 2003/2003, which in turn replaced the Directive that was generally applicable to fertilisers when the notified national provisions were introduced, i.e. Council Directive 76/116/EEC <sup>(8)</sup>.
- (41) This raises the question whether the notified national provisions can be considered as maintained in force and notifiable to the Commission in accordance with Article 114(4) TFEU with respect to Regulation (EU) 2019/1009, while having regard to the harmonisation established by Directive 76/116/EEC and Regulation (EC) No 2003/2003.

<sup>(7)</sup> Case C-41/93, *French Republic vs Commission of the European Communities*, para. 23-30.

<sup>(8)</sup> Council Directive 76/116/EEC of 18 December 1975 on the approximation of the laws of the Member States relating to fertilizers (OJ L 24, 30.1.1976, p. 21).

- (42) On the one hand, Article 3(2) of Regulation (EU) 2019/1009 extends past derogations from Article 5 of Regulation (EC) No 2003/2003 to Article 3(1) of Regulation (EU) 2019/1009, thus allowing existing national measures lawfully applying, on the basis of notifications under Article 114(4) TFEU and Commission decisions under Article 114(6) TFEU, to fertilisers covered by the scope of harmonisation provided for by Regulation (EC) No 2003/2003 to also apply to EU fertilising products which will fall within the newly extended scope of harmonisation for the first time by virtue of Regulation (EU) 2019/1009. That confirms that Regulation (EU) 2019/1009 is a continuation of the harmonisation stemming from Regulation (EC) No 2003/2003.
- (43) On the other hand, Recital 11 of Regulation (EU) 2019/1009 confirms that the legislator, by paraphrasing Article 114(4) TFEU, regarded that Regulation (EU) 2019/1009 should be considered for the purpose of assessments under Article 114(4) TFEU:
- ‘Several Member States have in place national provisions limiting cadmium content 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 national provisions after the adoption of harmonised limit values under this Regulation, and until those harmonised limit values are equal to or lower than the national limit values already in place, it should notify them to the Commission in accordance with Article 114(4) TFEU. Furthermore, in accordance with Article 114(5) TFEU, if a Member State deems it necessary to introduce new national provisions, such as provisions limiting cadmium content in phosphate fertilisers, 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 should notify the Commission of the envisaged provisions as well as the grounds for introducing them. [...]’.
- (44) This interpretation is further supported by the difference in the regulatory regime and material scope of Regulation (EU) 2019/1009 compared with Directive 76/116/EEC and with Regulation (EC) No 2003/2003, as well as the fact that Regulation (EU) 2019/1009 imposes a harmonised limit value for cadmium for the first time.
- (45) It can also be noted that in past cases where a new harmonisation measure had replaced an existing one, the Court, has referred only to the newly adopted harmonisation measure as the one that should be considered for the purpose of assessments under Article 114(4) TFEU <sup>(9)</sup>.
- (46) In conclusion, since Regulation (EU) 2019/1009 is the harmonisation measure that should be considered for the purpose of the notified national provisions under Article 114(4) TFEU, it is for the Commission to ascertain whether the notified national provisions were pre-existing to that Regulation, in accordance with the requirement of Article 114(4) TFEU.
- (47) Second, the notified national provisions have never been notified to the Commission under Article 114 TFEU or its predecessor provisions before, neither as a derogation from Directive 76/116/EEC, nor as a derogation from Regulation (EC) No 2003/2003.
- (48) This raises the question whether they can nevertheless be regarded as pre-existing to Regulation (EU) 2019/1009 for the purpose of Article 114(4) TFEU, rather than a new national provisions which should be notified pursuant to Article 114(5) TFEU. In order to determine this question, it is important to look to the purpose of the distinction between Article 114(4) and (5) TFEU.
- (49) This distinction has been addressed by case-law of the Court. In the case C-3/00 *Denmark v Commission*, the Court concluded with respect to Article 95 TEC, which corresponds to Article 114 TFEU:

‘The difference between the two situations envisaged in Article 95 is that, in the first, the national provisions predate the harmonisation measure. They are thus known to the Community legislature, but the legislature cannot or does not seek to be guided by them for the purpose of harmonisation. It is therefore considered acceptable for the Member State to request that its own rules remain in force. To that end, the EC Treaty requires that such national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. By contrast, in the second situation, the adoption of new national legislation is more likely to jeopardise harmonisation. The Community institutions could not, by definition, have

<sup>(9)</sup> See C-360/14 P *Germany v European Commission*.

taken account of the national text when drawing up the harmonisation measure. In that case, the requirements referred to in Article 30 EC are not taken into account, and only grounds relating to protection of the environment or the working environment are accepted, on condition that the Member State provides new scientific evidence and that the need to introduce new national provisions results from a problem specific to the Member State concerned arising after the adoption of the harmonisation measure' <sup>(10)</sup>.

- (50) In the light of the cited case-law, it should be considered that the purpose of the distinction between Article 114(4) and (5) TFEU is to impose higher justification requirements in cases where harmonisation is more likely to be jeopardised since the national provision in question was not known to the legislator at the time of the adoption of the harmonised measure and was therefore not taken into account when the harmonisation measure was drawn up.
- (51) As has already been established, the notified national provisions have been in force at their current state since 1998. Thus, they were in force at the time of drawing up Regulation (EU) 2019/1009 and therefore also predate that Regulation.
- (52) Further, it is evident from the Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council laying down the rules on the making available on the market of CE marked fertilising products <sup>(11)</sup> that the notified national provisions were known to the Union legislature when drawing up Regulation (EU) 2019/1009.
- (53) It can thus be concluded that the notified national provisions are a pre-existing measure derogating from the newly introduced harmonisation rule.

#### 2.1.2. On the stringency of the notified national provisions in relation to Regulation (EU) 2019/1009

- (54) Regarding the question whether the notified national provisions are also more stringent than the newly introduced harmonisation rule, the Commission notes that, although the Kingdom of Denmark intends to apply the national cadmium limit both to phosphate fertilisers as referred to in point 3(a)(ii) PFC 1(B) and point 2(a)(ii) PFC 1(C)(I) of Part II of Annex I to Regulation (EU) 2019/1009 and to certain other fertilisers regulated under that Regulation, the key concern which the notified national provisions seek to address is with the former category of fertilisers, which are inorganic and organo-mineral fertilisers with high phosphorus content.
- (55) The Commission also notes that it is only for phosphate fertilisers that the Danish cadmium limit value and the limit value laid down in Regulation (EU) 2019/1009 are expressed based on the same denominator, *i.e.* kg P<sub>2</sub>O<sub>5</sub> rather than kg dry matter of the entire product with all its components.
- (56) In other words, it is only for phosphate fertilisers that it is possible to compare the level of protection of human health and environment based on the Danish cadmium limit to that of the harmonised cadmium limit without knowing the exact composition of each product. Furthermore, phosphate fertilisers are by far the most pertinent products targeted by the notified national provisions. Therefore, for the purpose of assessing whether the notified national provisions are more stringent and protective than the newly introduced harmonisation rule, the Commission is only able to compare the two set of provisions with regard to phosphate fertilisers.
- (57) The cadmium limit for phosphate fertilisers established by point 3(a)(ii) PFC 1(B) and point 2(a)(ii) PFC 1(C)(I) of Part II of Annex I to Regulation (EU) 2019/1009 is 60 mg/kg P<sub>2</sub>O<sub>5</sub>. On the other hand, the cadmium limit established by the notified national provisions is 48 mg/kg P<sub>2</sub>O<sub>5</sub>.
- (58) The notified national provisions are therefore more stringent and more protective than the provisions of Regulation (EU) 2019/1009, at least insofar as they apply to phosphate fertilisers as referred to in that Regulation.
- (59) In the light of the foregoing, the Commission considers that the notification submitted by the Kingdom of Denmark is admissible under Article 114(4) TFEU, at least insofar as it concerns phosphate fertilisers as referred to in Regulation (EU) 2019/1009.

<sup>(10)</sup> C-3/00 *Denmark v Commission*, para. 58. Further confirmed in *e.g.* T-234/04 *Kingdom of the Netherlands v Commission*, para. 58, Joined Cases T 366/03 T-235/04 *Land Oberösterreich and Austria v Commission*, para. 62 and C-512/99 *Germany v Commission*, para. 41.

<sup>(11)</sup> See the impact assessment accompanying the Commission's proposal which was specifically devoted to the cadmium limit, SWD (2016) 64 final, PART 2/2; <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-64-F1-EN-MAIN-PART-2.PDF>; see in particular pages 5, 6, 25, 28, 29 and 32, and Annex I.

## 2.2. Assessment of merits

- (60) In accordance with Article 114(4) and first subparagraph of Article 114(6) TFEU, the Commission must ascertain that all the conditions enabling a Member State to maintain its national provisions derogating from a Union harmonisation measure provided for in that Article are fulfilled.
- (61) In particular, the Commission must assess whether or not the notified national provisions are justified by the major needs referred to in Article 36 TFEU or relating to the protection of the environment or the working environment and do not exceed what is necessary to attain the legitimate objective pursued. In addition, when the Commission considers that the national provisions fulfil the above conditions, it must verify, pursuant to Article 114(6) TFEU, whether or not the national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.
- (62) In the light of the timeframe established by Article 114(6) TFEU, the Commission, when examining whether the national provisions notified under Article 114(4) TFEU are justified, has to take as a basis the justifications put forward by the notifying Member State. The burden of proof lies with the notifying Member State that seeks to maintain its national provisions.
- (63) However, where the Commission is in possession of information in the light of which the Union harmonisation measure from which the notified national provisions derogate may need to be reviewed, it can take such information into consideration in the assessment of the notified national provisions.

### 2.2.1. *The position of the Kingdom of Denmark*

- (64) Denmark's limit value for cadmium in artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3 % P<sub>2</sub>O<sub>5</sub>-equivalent by mass or more is motivated by the protection of human health and of the environment from exposure to cadmium in the environment.
- (65) In the notification submitted to the Commission, the Kingdom of Denmark states, that it has been applying the notified national provisions since 1989. The limit value currently in force has been applicable since 1998. The notified national provisions were introduced aiming at decreasing the contamination of agricultural land, which was identified in the national report conducted by the National Food Institute of the Technical University of Denmark ('DTU Fødevareinstituttet') on 'Cadmium contamination – a report on the use, occurrence and adverse effects of cadmium in Denmark' of 1980. Due to the conclusion that cadmium was continuously accumulating in Danish agricultural soil, the report recommended a reduction in the cadmium content in fertilisers, as such a reduction could lead to a significant decrease in contamination of agricultural land.
- (66) Referring to the fact that exposure to and the input of cadmium into agricultural soils are generally lower in Denmark than the Union average, it is the view of the Kingdom of Denmark that the measures taken to ensure the aim sought by the notified national provisions have been successful. Therefore, to ensure protection of human health and the environment also in the future, the Kingdom of Denmark asserts a need to maintain a reduced exposure level in its territory under Regulation (EU) 2019/1009. Further, the Kingdom of Denmark has, in its notification to the Commission, analysed the expected national effects of the limit value of 60 mg/kg P<sub>2</sub>O<sub>5</sub> set in Regulation (EU) 2019/1009. This limit value raised important concerns as regards the protection of human health and of the environment. The Kingdom of Denmark states that applying the limit values of Regulation (EU) 2019/1009 would lead to a reduced level of protection in Denmark.
- (67) In support of that, the Kingdom of Denmark bases its assessment on the anticipation that applying the limit value of 60 mg/kg P<sub>2</sub>O<sub>5</sub> set in Regulation (EU) 2019/1009 would result in an increase of cadmium input into Danish agricultural lands from fertilisers, due to the likelihood that fertilisers with a higher cadmium content will be marketed in Denmark.
- (68) In particular, the Kingdom of Denmark presents justification related to the risks to human health associated with exposure to cadmium via food. The Kingdom of Denmark refers to the need to reduce cadmium content of food produced in Denmark and thereby protect some more vulnerable sections of the population, in particular children and vegetarians, who are consuming cadmium in their food at levels exceeding the health-based limit values.



- (69) In support of that statement, the Kingdom of Denmark relies on a number of scientific studies. In particular, it refers to the European Food Safety Authority (EFSA) study <sup>(12)</sup> for the tolerable weekly intake (TWI) and compares it to a study performed by the Technical University of Denmark, with the conclusion that the dietary exposure to cadmium should be reduced. Further, the study performed by the Technical University of Denmark reveals that children are a high exposure group with the average exposure of small children exceeding the TWI. Vegetarians are also regarded as having a considerably higher cadmium intake than the average population. The greatest dietary exposure to cadmium comes from the consumption of cereals and vegetables. The consumed quantities by these groups lead to high exposure.
- (70) Additionally, the Kingdom of Denmark has a high degree of self-sufficiency in its food production of, among other things, cereals, potatoes and carrots. The exposure of the Danish population to cadmium is thus closely linked to the amount of cadmium added to the Danish farmland.
- (71) It should be noted that the soil conditions in Denmark vary from sandy soils in the west parts of the country, to clay soils in the east. As a result of the soil conditions, the accumulation of cadmium in the soils differ from higher levels in the clay soils on Zealand, Fyn and the most easterly parts of Jutland, while West Jutland has more sandy soils and generally lower cadmium levels. Further, the demographic information submitted by the Kingdom of Denmark shows that due to differences relating to agricultural efficiency factors deriving from the nature of soils, the agriculture cultivating plant crops are focused to areas where clay soils contain higher levels of cadmium.
- (72) Another factor which varies from the east to the west of Denmark is the amount of livestock farming and thus the availability of manure as an alternative to artificial fertiliser. Livestock farming is generally concentrated in Jutland, while the cultivation of crops without farm animals is localised on Zealand. Consequently, geographical differences in soil conditions and livestock production in Denmark mean that the use of artificial fertilisers is relatively greater in the east of Denmark, where farms cultivating plant crops without keeping farm animals are more widespread and the clay soils contain higher background levels of cadmium. The Kingdom of Denmark notes that 91 % of artificial fertilisers in Europe in 2014 was estimated to fall within a limit of 60 mg Cd/kg P<sub>2</sub>O<sub>5</sub>, while 68 % was estimated to fall within a limit of 40 mg Cd/kg P<sub>2</sub>O<sub>5</sub>. A large proportion of the fertilisers on the European market therefore already meets the Danish limit. Over the last two decades, the average level of cadmium in artificial fertilisers has been 10-20 mg Cd/kg P<sub>2</sub>O<sub>5</sub> in Denmark, while on the European market it is estimated to have been 32-36 mg Cd/kg P<sub>2</sub>O<sub>5</sub>.
- (73) Moreover, the Danish share of the European market of artificial fertilisers is between 2-3 %. The Kingdom of Denmark maintains that it has not experienced any problems in the supply of fertilisers complying with the limit value for cadmium currently in place, as of 1998 when it entered into force.
- (74) The notified national provisions are also of general application, applying both to Danish and to other firms selling fertilisers for use in Denmark. It should, in addition, be noted that Denmark does not have any natural deposits of phosphate rock, thus phosphate rock is not mined in Denmark.
- (75) Further, the Kingdom of Denmark has provided statistics proving a gradual increase of fertilisers imported from other Member States in the period 1988-2018. The Kingdom of Denmark argues that according to this economic data, the cadmium limit set in the notified national provisions have not prevented increased imports from the other Member States. On the contrary, data shows distinct progress in trade across different Member States. Nor are the notified national provisions an obstacle to the ability to export artificial fertilisers to other Member States.

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<sup>(12)</sup> Scientific Opinion of the Panel on Contaminants in the Food Chain on a request from the European Commission on cadmium in food. *EFSA Journal* 2009, 980, p. 1.

## 2.2.2. Evaluation of the position of the Kingdom of Denmark

### 2.2.2.1. Justification on grounds of major needs referred to in Article 36 TFEU or relating to the protection of the environment or the working environment

- (76) The notified national provisions aim to achieve a higher level of protection of human health and the environment than that provided in Regulation (EU) 2019/1009 with regard to exposure to cadmium and thereby further avoid the accumulation of cadmium in the soil. The means for achieving this objective is by maintaining lower maximum limit values of cadmium in fertilisers covered by the notified national provisions.
- (77) As regards the protection of human health, it should be noted that cadmium is a non-essential and toxic element for humans, and has no use for plants or animals. In particular, cadmium oxide has been classified as a carcinogen substance, category 2, under Regulation (EC) No 1272/2008 of the European Parliament and of the Council <sup>(13)</sup>.
- (78) The presence of cadmium in plants and cadmium intake from foodstuffs could eventually lead to adverse effects on human health in the longer term. Further, once absorbed by the human body, cadmium is efficiently retained and accumulates in the body throughout life <sup>(14)</sup>.
- (79) The general public is exposed to cadmium from multiple sources, including smoking and food intake. For the non-smoking population, food represents the most important source of cadmium intake. Cadmium is primarily toxic to the kidney, but can also cause bone demineralisation and has been statistically associated with increased risk of cancer in the lung, endometrium, bladder and breast <sup>(15)</sup>.
- (80) Cadmium can damage the kidneys, causing excess production of proteins in the urine. The duration and level of exposure to cadmium determines the severity of the effect. Skeletal damage is another critical effect of chronic cadmium exposure at levels somewhat higher than those where protein in the urine would be an early indicator. Mainly stored in the liver and kidneys, excretion of cadmium is slow, and it can remain in the human body for decades.
- (81) Further, health risks cannot be excluded for adult smokers and people with depleted iron body stores and/or living near industrial sources <sup>(16)</sup>.
- (82) Moreover, in addition to human health impacts, the Kingdom of Denmark aim to achieve a higher level of protection of the environment. The Kingdom of Denmark maintains that further cadmium accumulation in soils could have negative effects on soil biodiversity and therefore on soil functions (e.g. decay of organic matter) and on groundwater quality via leaching in soils. Both toxicity and bioavailability of cadmium are influenced by soil characteristics.
- (83) The differences in soil conditions and livestock production in Denmark result in a relatively greater use of artificial fertilisers in the east of Denmark, where farms cultivating plant crops without keeping farm animals are more widespread and the clay soils contain higher background levels of cadmium.
- (84) Concerns regarding the risks posed by cadmium to human health and the environment were referred to by the Council already in its Resolution of 25 January 1988 <sup>(17)</sup>. The Council emphasised the importance of reducing inputs of cadmium into soils from all sources including diffuse sources (e.g. atmospheric deposition, phosphate fertilisers, sewage sludge, etc.) by among others 'appropriate control measures for the cadmium content of phosphate fertilisers based on suitable technology not entailing excessive costs and taking into account environmental conditions in the different regions of the Community'.

<sup>(13)</sup> Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ L 353, 31.12.2008, p. 1).

<sup>(14)</sup> See the scientific report of the European Food Safety Authority on Cadmium dietary exposure in the European population of 2012, published at <https://efsa.onlinelibrary.wiley.com/doi/abs/10.2903/j.efsa.2012.2551>, *EFSA Journal* 2012;10(1).

<sup>(15)</sup> *EFSA Journal* 2012;10(1).

<sup>(16)</sup> EU Risk assessment report on cadmium and cadmium oxide, as quoted in SWD(2016) 64 final, p. 11.

<sup>(17)</sup> OJ C 30, 4.2.1988, p. 1.

- (85) In 2002, the Scientific Committee on Health and Environmental Risks concluded that a limit for 40 mg/kg P<sub>2</sub>O<sub>5</sub> or more would lead to cadmium accumulation in most Union soils. By contrast, a limit of 20 mg/kg P<sub>2</sub>O<sub>5</sub> or less was not expected to result in long-term soil accumulation over 100 years if other cadmium inputs are not considered.
- (86) In recital 15 of Regulation (EC) No 2003/2003, the Commission's intention to address the issue of unintentional cadmium content in mineral fertilisers was already announced.
- (87) In its proposal for Regulation (EU) 2019/1009 <sup>(18)</sup>, based on the scientific data available when assessing the impacts, the Commission has concluded that cadmium metal and cadmium oxide in general can pose serious risks to health and to the environment. The Commission proposed setting a limit value of 60 mg/kg P<sub>2</sub>O<sub>5</sub> in phosphate fertilisers and reducing gradually this limit value to 20 mg/kg P<sub>2</sub>O<sub>5</sub> in 12 years after the start of the application of the new Regulation.
- (88) It is also generally agreed that cadmium in fertilisers is by far the most important source of cadmium input to soil and to the food chain <sup>(19)</sup>.
- (89) Regulation (EU) 2019/1009 sets a limit value of 60 mg/kg P<sub>2</sub>O<sub>5</sub> applicable as of 16 July 2022. The vast majority of fertilisers available on the European market already comply with this limit value. While the introduction of this limit is a step in the right direction, based on available scientific data, it is not likely to significantly decrease the accumulation of cadmium in soils over long term.
- (90) Recognising the need for more ambitious harmonised limit values for cadmium in phosphate fertilisers in the future, Regulation (EU) 2019/1009 sets an obligation upon the Commission to reassess these limits with the purpose of lowering them if feasible.
- (91) Based on the above, it must be considered that the maximum limit value set out in the notified national provisions is justified by needs to protect human health and the environment.

#### 2.2.2.2. Absence of any arbitrary discrimination, any disguised restriction on trade between Member States or any obstacle to the functioning of the internal market

##### (a) Absence of arbitrary discrimination

- (92) Article 114(6) TFEU requires the Commission to verify that maintaining the notified national provisions are not a means of arbitrary discrimination. According to the case-law of the Court, in order for there to be no discrimination, similar situations must not be treated in different ways and different situations must not be treated in the same way unless objectively justified.
- (93) The notified national provisions apply to both domestic products and products imported from other Member States. In the absence of any evidence to the contrary, it can be concluded that the national provisions are not a means of arbitrary discrimination.

##### (b) Absence of a disguised restriction on trade of phosphate fertilisers

- (94) For assessing the condition pertaining to absence of a disguised restriction on trade, the Commission will first assess the notified national provisions insofar as they apply to those fertilisers for which the Commission has deemed the notification admissible, *i.e.* for phosphate fertilisers as referred to in Regulation (EU) 2019/1009.

<sup>(18)</sup> COM/2016/0157 final – 2016/084 (COD).

<sup>(19)</sup> 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 [https://ec.europa.eu/health/scientific\\_committees/environmental\\_risks/docs/scher\\_o\\_168\\_rd\\_en.pdf](https://ec.europa.eu/health/scientific_committees/environmental_risks/docs/scher_o_168_rd_en.pdf)

- (95) National provisions which set more stringent conditions for placing on the market of products than those laid down in Union law would normally constitute a barrier to trade. This is because some of the products that are lawfully placed on the market in the rest of the Union are not expected, as a result of the national provisions, to be placed on the market in the Member State concerned. The pre-conditions laid down in Article 114(6) TFEU are intended to prevent restrictions based on the criteria set out in paragraphs (4) and (5) of that Article from being applied for inappropriate reasons, and constituting in effect economic measures to impede the importation of products from other Member States, that is to say, a means of indirectly protecting national production <sup>(20)</sup>.
- (96) Given that the notified national provisions also impose stricter limit values as regards cadmium content in phosphate fertilisers to economic operators based in other Member States in an otherwise harmonised area, they are liable to constitute a disguised restriction on trade or an obstacle to the functioning of the internal market. It is recognised, however, that Article 114(6) TFEU must be read in the sense that only national measures constituting a disproportionate obstacle to the internal market may not be approved <sup>(21)</sup>.
- (97) In the absence of any evidence suggesting that the national provisions constitute in effect a measure intended to protect national production, it can be concluded that they are not a disguised restriction to trade between Member States. Therefore, it remains for the Commission to consider, whether the notified national provisions present an obstacle to the functioning of the internal market.

(c) Absence of obstacles to the functioning of the internal market for phosphate fertilisers

- (98) For assessing the condition pertaining to absence of obstacles to the functioning of the internal market, the Commission must first assess the notified national provisions insofar as they apply to those fertilisers for which the Commission has deemed the notification admissible, i.e. phosphate fertilisers as referred to in Regulation (EU) 2019/1009.
- (99) Article 114(6) TFEU obliges the Commission to verify whether or not maintaining the notified national provisions constitute obstacles to the functioning of the internal market. The condition cannot be interpreted in such a way that it precludes the approval of any national measure likely to affect the functioning of the internal market. Indeed, any national measure derogating from a harmonisation measure aimed at the establishment and operation of the internal market constitutes in substance a measure likely to affect the internal market. Consequently, in order to preserve the useful character of the procedure laid down in Article 114 TFEU, the concept of obstacle to the functioning of the internal market must, in the context of Article 114(6) TFEU, be understood as a disproportionate effect in relation to the pursued objective <sup>(22)</sup>.

<sup>(20)</sup> Commission Decision of 8 May 2018 concerning national provisions notified by Denmark on the addition of nitrite to certain meat products, C/2018/2721, para. 54 (OJ L 118, 14.5.2018, p. 7), Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Finland under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/348/EC, para. 40 (OJ L 129, 17.5.2006, p. 25), Commission decision of 3 January 2006 on the national provisions notified by the Kingdom of Sweden under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/347/EC, para. 41 (OJ L 129, 17.5.2006, p. 19), Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Austria under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/349/EC, para. 41 (OJ L 129, 17.5.2006, p. 31).

<sup>(21)</sup> Commission Decision of 8 May 2018 concerning national provisions notified by Denmark on the addition of nitrite to certain meat products, C/2018/2721, para. 55, Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Finland under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/348/EC, para. 42, Commission decision of 3 January 2006 on the national provisions notified by the Kingdom of Sweden under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/347/EC, para. 43, Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Austria under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/349/EC, para. 43.

<sup>(22)</sup> Commission Decision of 8 May 2018 concerning national provisions notified by Denmark on the addition of nitrite to certain meat products, C/2018/2721, para. 55, Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Finland under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/348/EC, para. 42, Commission decision of 3 January 2006 on the national provisions notified by the Kingdom of Sweden under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/347/EC, para. 43, Commission Decision of 3 January 2006 on the national provisions notified by the Republic of Austria under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers, 2006/349/EC, para. 43.

- (100) When assessing whether the notified national provisions are appropriate and necessary for achieving the objective they pursue, a number of factors need to be taken into account. The Commission has to evaluate whether the level of protection stemming from the limit value for cadmium set in the notified national provisions achieve their objective, which is to protect the human health on the one hand, and the environment on the other hand.
- (101) The Commission notes, first, that the cadmium limit value in the notified national provisions is lower than the cadmium limit value for phosphate fertilisers laid down in Regulation (EU) 2019/1009. The notified national measures therefore provide a better level of protection for human health and the environment than the harmonisation measure does.
- (102) Regarding the proportionality of the notified national provisions for phosphate fertilisers, the Commission makes the following observations:
- (103) Firstly, the Kingdom of Denmark has not experienced any problems in the supply of fertilisers complying with the limit value for cadmium currently in place, which means that that limit does not pose major obstacles to the free movement on the internal market.
- (104) Secondly, the Kingdom of Denmark refers to the need to reduce cadmium content of food produced in Denmark and thereby protect some sections of the population, in particular children and vegetarians, who are consuming cadmium in their food at levels exceeding the health-based limit values. The EFSA study referred to by the Kingdom of Denmark <sup>(23)</sup> reveals that children are a high exposure group with the average exposure of small children exceeding the TWI. Vegetarians are also assessed as having a considerably higher cadmium intake than the average population. <sup>(24)</sup>
- (105) In addition, the fact that exposure to and the input of cadmium into agricultural soils are generally lower in Denmark than the Union average is an indication that the measures taken in order to ensure the protection of the Danish soil and population has been successful.
- (106) Concerning phosphate fertilisers, given the health and environmental benefits invoked by the Kingdom of Denmark in relation to the reduction of exposure to cadmium in the soil, and the fact that, on the basis of currently available information, trade hardly appears to be affected at all, the Commission considers that the notified national provisions may be maintained on grounds relating to the protection of health and the environment having regard to the fact that they are not disproportionate and, therefore, do not constitute an obstacle to the functioning of the internal market in the sense of Article 114(6) TFEU.
- (d) Absence of a disguised restriction on trade and of obstacles to the functioning of the internal market for fertilisers other than phosphate fertilisers
- (107) In addition to phosphate fertilisers as referred to in Regulation (EU) 2019/1009, the notified national provisions also cover other artificial fertilisers derived from mineral phosphate with a total phosphorus content of 2,3-5 % P<sub>2</sub>O<sub>5</sub>-equivalent by mass or more.
- (108) For the purpose of assessing whether the notified national provisions constitute a disguised restriction on trade or obstacles to the functioning of the internal market for those fertilisers within the meaning of Article 114(6), and thus whether they have a disproportionate effect in relation to the pursued objective, the Commission notes that the Kingdom of Denmark has confirmed that the primary concern is phosphate fertilisers as referred to in Regulation (EU) 2019/1009, and that the primary focus of the scientific assessment in the Danish notification has been on a certain category of phosphate fertilisers, namely inorganic mineral fertilisers with high phosphorus content.

<sup>(23)</sup> Scientific Opinion of the Panel on Contaminants in the Food Chain on a request from the European Commission on cadmium in food. *EFSA Journal* 2009, 980, p. 1.

<sup>(24)</sup> Scientific Opinion of the Panel on Contaminants in the Food Chain on a request from the European Commission on cadmium in food. *EFSA Journal* 2009, 980, p. 1.

- (109) Regarding the pursued objective of protecting health and the environment, the Commission notes, as indicated in recitals 55 and 56 above, that it is only for phosphate fertilisers that it is possible to compare the protective nature of the Danish cadmium limit with that of the harmonised cadmium limit without knowing the exact composition of each product, since it is only for phosphate fertilisers that the Danish limit value and the limit value laid down in Regulation (EU) 2019/1009 are expressed based on the same denominator. In other words, for fertilisers other than phosphate fertilisers, it is not possible to determine whether the notified national provisions are more stringent than the newly introduced harmonisation rule. It can therefore also not be established whether the notified national provisions provide a better level of protection for human health and the environment than the harmonisation measure does.
- (110) Regarding the impact of the notified national provisions on the functioning of the internal market, the Commission notes that applying those provisions to CE marked fertilisers other than phosphate fertilisers as referred to in Regulation (EU) 2019/1009 would create serious administrative difficulties for economic operators wishing to place fertilisers on the market in Denmark. In order to ensure compliance with the notified national provisions, manufacturers would have to categorise their fertilisers not only according to Regulation (EU) 2019/1009 but also according to the notified national provisions. Furthermore, should a CE marked fertiliser constitute an artificial fertiliser derived from mineral phosphate with a total phosphorus content of 2,3 % P<sub>2</sub>O<sub>5</sub>-equivalent by mass or more under the notified national provisions, but *not* constitute a phosphate fertiliser under Regulation (EU) 2019/1009, the manufacturers would need to make two calculations of the cadmium content, one with kg P<sub>2</sub>O<sub>5</sub> as denominator for the purpose of compliance with the notified national provisions, and one with kg dry matter as denominator for the purpose of compliance with Regulation (EU) 2019/1009.
- (111) Considering the significant administrative barrier that applying the notified national provisions to fertilisers other than phosphate fertilisers would thus cause, together with the facts that it is impossible to establish whether they provide a higher level of protection than Regulation (EU) 2019/1009 and that cadmium pollution from them is not of any particular concern for the Kingdom of Denmark, the Commission considers that the notified national provisions, if applied to such fertilisers, would have a disproportionate effect on the functioning of the internal market in relation to the pursued objective.
- (112) In conclusion, the Commission considers that maintaining the notified national provisions constitutes an obstacle to the functioning of the internal market within the meaning of Article 114(6) TFEU insofar as they apply to fertilisers other than phosphate fertilisers. Therefore, and without it being necessary to take a decision whether the notification is admissible in that part, the notified national provisions should be rejected insofar as they apply to fertilisers other than phosphate fertilisers as referred to in Regulation (EU) 2019/1009.

#### 2.2.2.3. Limitation in time

- (113) In order to ensure that the notified national provisions, and the potential obstacle to the functioning of the internal market, are limited to what is strictly necessary to achieve the objectives pursued by the Kingdom of Denmark, the national derogation should be limited in time. The derogation would cease to be necessary if, in the future, the harmonised limit value would be set at or below the level of the Danish limit value.
- (114) The harmonised limit value could only be set at or below the level of the Danish limit value through a decision of the European Parliament and of the Council based on a proposal from the Commission, e.g. in the context of the review referred to in Article 49(b) of Regulation (EU) 2019/1009. The period for which the derogation is granted should therefore not be limited to a certain date, but be aligned with such a future decision by the co-legislators.
- (115) This would be in line with Article 3(2) of Regulation (EU) 2019/1009, which provides that derogations from Regulation (EC) No 2003/2003 in accordance with Article 114(4) TFEU in relation to cadmium content may continue to apply until harmonised limit values for cadmium content in phosphate fertilisers which are equal or lower than the national ones are applicable at Union level.
- (116) This Decision should apply until a revised harmonised limit value equal to or lower than the Danish limit value is applicable at Union level.

### 3. CONCLUSIONS

- (117) In the light of the foregoing, it should be concluded that the request by the Kingdom of Denmark for maintaining national legislation derogating from Regulation (EU) 2019/1009 as submitted on 27 January 2020 is admissible insofar as it covers phosphate fertilisers as referred to in Regulation (EU) 2019/1009.
- (118) Moreover, insofar as they apply to phosphate fertilisers as referred to in Regulation (EU) 2019/1009, the Commission finds that the notified national provisions:
- meet the needs on grounds of the protection of human health and the environment,
  - are proportionate to the objectives pursued,
  - are not a means of arbitrary discrimination,
  - do not constitute a disguised restriction on trade between Member States.
- (119) The Commission therefore considers that the notified national provisions can be approved insofar as they apply to such fertilisers.
- (120) However, insofar as the notified national provisions apply to fertilisers other than phosphate fertilisers as referred to in Regulation (EU) 2019/1009, the Commission finds that it would have a disproportionate effect on the functioning of the internal market in relation to the pursued objective. The Commission therefore considers that the measure must be rejected insofar as it applies to such fertilisers,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The national provisions notified by the Kingdom of Denmark pursuant to Article 114(4) of the Treaty on the Functioning of the European Union, derogating from Regulation (EU) 2019/1009 as regards cadmium content in phosphate fertilisers, namely the prohibition of the placing on the Danish market of fertilisers with a cadmium content exceeding 48 mg/kg, P<sub>2</sub>O<sub>5</sub>, are approved insofar as they apply to phosphate fertilisers referred to in 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, until a revised harmonised limit value equal to or lower than the Danish limit value is applicable at Union level.

#### *Article 2*

The national provisions notified by the Kingdom of Denmark are rejected insofar as they apply to fertilisers other than phosphate fertilisers referred to in 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.

#### *Article 3*

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 27 July 2020.

*For the Commission*  
Thierry BRETON  
*Member of the Commission*

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