

EXPLANATORY LEGAL BRIEFING ON GLYPHOSATE

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Much of the current furore around the decision whether to renew the authorization of the use of glyphosate is happening in the absence of understanding of both the procedures and interests at stake. This brief memo fills that gap by providing a plain-speaking and independent analysis in view of the Monday 27 November's meeting of state representatives deciding the future of the substance.

The current licence for glyphosate expires on 15 December, after years of campaigning by NGOs and citizens about its harmful health effects and of the Commission struggling to win member state support for the license's renewal under the terms of EU Regulation 1107/2009 (the "Pesticide Regulation").

As expiry approaches, the Commission has put forward a proposal for a simple 5 year renewal of the license which will be considered by an 'appeal committee' of member state representatives on Monday 27 November.

There has been some confusion about legal basis on which the Commission is acting and the options which it has, including whether new ideas, amendments and proposals can be accepted for consideration at Monday's meeting and whether the Commission will be forced to adopt its current proposal unilaterally if, as expected, it fails to win sufficient member state support.

The situation is clear. The Commission's proposals for glyphosate are subject to the examination procedure set out in Regulation (EU) No 182/2011 (the "Comitology Regulation") laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.¹ Under such a regulatory framework, in the case of a 'no opinion' (i.e. no qualified majority vote in favour or against of the proposal) by the member states, the Commission 'may' adopt its current proposal after Monday's vote but it is not obliged to do so². The option of allowing the glyphosate licence to expire remains therefore open to Commission.

However, the Commission could avoid any difficult choice by seeking compromise with the member states before Monday's vote. Indeed, under Article 6(2), *"until an opinion is delivered, any member of the appeal committee may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it"* and that *"...[t]he chair shall endeavour to find solutions which command the widest possible support within the appeal committee"*.

While it does not explicitly provide for the member states to take into account the outcome of a European Citizen Initiative (such as the Stop Glyphosate's ECI which successfully collected more than 1 million signatures), the Comitology Regulation provides a basis on which the Commission might secure that greater support. It provides for a right of scrutiny by the European Parliament in which the Parliament can indicate its view that a draft implementing act exceeds the implementing powers provided for in the basic act.

¹ Regulation 182/2011 - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011R0182&from=EN>. See also the summary report of the relevant Standing Committee of 9 November 2017 confirming that the process being followed was an opinion of the Committee via the 'examination procedure' - https://ec.europa.eu/food/sites/food/files/plant/docs/sc_phyto_20171109_pppl_summary.pdf

² Article 6 of the Comitology Regulation.

The European Parliament did exactly this in its resolution of 24 October and it called for the Commission to consider improvements to the proposal. The resolution says that *“the Commission’s draft implementing regulation fails to ensure a high level of protection of both human and animal health and the environment, fails to apply the precautionary principle, and exceeds the implementing powers provided for in Regulation (EC) No 1107/2009”*³. The Parliament then called for specific measures to be introduced to the Commission proposal, including for:

- the Commission and the Member States neither to approve any non-professional uses of glyphosate, nor to approve any uses of glyphosate in or close to public parks, public playgrounds or public gardens after 15 December 2017;
- the Commission to adopt necessary measures to phase out the active substance glyphosate in the European Union no later than 15 December 2022, ensuring that no use of glyphosate is authorised after that date, which includes any possible extension period or period referred to in Article 32 of Regulation (EC) No 1107/2009;

Under the Comitology rules, it is possible for the Commission to respond to Parliament’s resolution by insisting on pressing ahead with its original proposal and this appears to be the Commission’s current stance - to renew the licence for glyphosate for 5 years without any additional protections or phase-out. However, it clearly has the power to take a more sensible and conciliatory approach. Indeed, the Comitology Regulation was introduced with the expectation that the Commission would do so and to solve previous difficulties with the Commission ignoring member states and Parliamentary views⁴. It replaces Commission Decision 1999/468/EC (the “Decision”) which did, indeed, restrict the Commission’s discretion on adoption of implementing acts. In certain circumstances the Commission was *required* to adopt implementing acts even if they failed to win sufficient member state support. While the Decision is part of the licence renewal process set out in the Pesticide Regulation⁵, it is no longer applicable today. It was replaced by the Comitology Regulation precisely in order to ensure that Member State ‘control’ of the Commission’s exercise of implementing powers was *“clear, effective and proportionate to the nature of the implementing acts.”*⁶

Member states and the Parliament have tried to exercise the control envisaged by the Comitology Regulation but this has, so far, fallen upon deaf ears at the Commission and prompted confusion about the precise legal basis and wide discretion the Commission enjoys in the current discussions. The European Parliament proposals are clear, effective and proportionate and largely reflect what millions of EU citizens have asked the Commission to do in the framework of the Stop Glyphosate ECI and petitions by campaign groups such as Avaaz and WeMove. There is still time for the Commission to listen. Indeed that is the expectation in the current process and it is open to it to respond with an improved proposal and, if that fails, to allow the glyphosate licence to expire.

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³ See - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0395+0+DOC+XML+V0//EN&language=EN>

⁴ Article 6 of the Comitology Regulation.

⁵ See article 79(3) as referred to in article 20

⁶ See Recital 5 of the Comitology Regulation

