

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 2002

relating to national provisions on limiting the importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine notified by France pursuant to Article 95(5) of the EC Treaty

(notified under document number C(2002) 5113)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/1/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 95(6) thereof,

Whereas:

I. FACTS

1. Community legislation

1.1. Directive 76/116/EEC relating to fertilisers

- (1) Council Directive 76/116/EEC of 18 December 1975 on the approximation of the laws of the Member States relating to fertilisers ⁽¹⁾, as last amended by Directive 98/97/EC of the European Parliament and of the Council ⁽²⁾, aims to remove barriers to trade resulting from differences between Member States with regard to legislation on fertilisers. To achieve this, it has already established, at Community level, requirements that fertilisers must meet if they are to be placed on the market under the designation 'EC fertiliser' ⁽³⁾, such as provisions regarding designation, definition, composition, labelling and packaging of the most important straight and compound fertilisers in the Community.
- (2) Annex I to Directive 76/116/EEC defines the designation of the type of EC fertiliser and the corresponding requirements, in particular with respect to its composition, that every fertiliser marked EC fertiliser must fulfil. Annex I classes EC fertilisers by category according to

the content of the primary nutrients, i.e. nitrogen, phosphorus and potassium, with these three elements being represented by the letters N, P and K, respectively. In particular, it distinguishes between straight fertilisers, which contain only one of the three fundamental nutrients, and compound fertilisers, which contain two or three.

- (3) Straight primary nutrient fertilisers include, in particular:
 - in the list of nitrogenous fertilisers, ammonium nitrates, produced chemically, and which include as an essential component ammonium nitrate with an N-nutrient content of at least 20 %,
 - in the list of potassium fertilisers, potassium chloride, which is obtained from crude potassium salts and which includes as an essential component potassium chloride with a K-nutrient content, measured as potassium oxide (K₂O), of at least 37 %.
- (4) As for compound fertilisers with primary nutrients, which are products obtained chemically or by blending without addition of organic nutrients of animal or vegetable origin, they are subdivided into four subcategories according to their composition: NPK, NP, NK and PK fertilisers. Thus, NPK fertilisers must have a minimum total nutrient content of 20 %, with a minimum content for each of the nutrients of 3 % of nitrogen, 5 % of phosphorus measured as phosphorus pentoxide (P₂O₅) and 5 % of potassium measured as potassium oxide (K₂O), respectively. As for NK fertilisers, they must have a minimum total nutrient content of 18 %, with a minimum content for each of the nutrients of 3 % of nitrogen and 5 % of potassium measured as potassium oxide.

⁽¹⁾ OJ L 24, 30.1.1976, p. 21.

⁽²⁾ OJ L 18, 23.1.1999, p. 60.

⁽³⁾ The term 'EEC fertiliser' set out in Directive 76/116/EEC was replaced by the term 'EC fertiliser' by Directive 97/63/EC (OJ L 335, 6.12.1997, p. 15).

- (5) Pursuant to Article 2, the designation 'EC fertiliser' can only be used for fertilisers belonging to one of the fertiliser types listed in Annex I and meeting the requirements laid down by Directive 76/116/EEC and Annexes I to III thereto.
- (6) Article 7 introduces a free movement clause by stating: 'Without prejudice to the provisions of other Community directives, Member States may not on grounds of composition, identification, labelling or packaging, prohibit, restrict or hinder the marketing of fertilisers marked "EC fertiliser" which comply with the provisions of this Directive and the Annexes thereto.'
- (7) Lastly, Article 8 concerns the official checks that Member States may carry out to ensure that fertilisers placed on the market under the description 'EC fertiliser' comply with the provisions of Directive 76/116/EEC and Annexes I and II thereto.

1.2. *Council Directive 80/876/EEC relating to straight ammonium nitrate fertilisers of high nitrogen content*

- (8) Given the particular nature of straight ammonium nitrate fertilisers covered by Directive 76/116/EEC, and to the resulting requirements regarding public safety, health, and protection of workers, Council Directive 80/876/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to straight ammonium nitrate fertilisers of high nitrogen content⁽⁴⁾ laid down additional Community rules for these fertilisers. In the interest of public safety, the characteristics and properties distinguishing straight ammonium nitrate fertilisers of high nitrogen content from varieties of ammonium nitrate used in the manufacture of products used as explosives have been determined at Community level.
- (9) Pursuant to its Article 1, Directive 80/876/EEC applies to straight ammonium nitrate fertilisers of high nitrogen content placed on the market in the Member States of the Community, without prejudice to the application of Directive 76/116/EEC. The term 'fertilisers' means ammonium nitrate-based products manufactured chemically for use as fertilisers and containing more than 28 % by weight of nitrogen, which may contain inorganic additives or inert substances such as ground limestone or ground dolomite, calcium sulphate, magnesium sulphate and kieserite, with it being specified that the other inorganic additives or inert substances which are used in the compounding of the fertiliser must not increase its sensitivity to heat or its tendency to detonate.
- (10) Directive 80/876/EEC lays down that straight ammonium nitrate fertilisers of high nitrogen content should conform to certain characteristics to ensure that they are harmless. Annex I specifies the characteristics and limits for straight ammonium nitrate fertilisers of high nitrogen content, which include, among other

things, the maximum chlorine content, which is set at 0,02 % by weight. Moreover, Member States may require that such fertilisers be subjected to the test of resistance to detonation described in Annex II before or after they are placed on the market.

2. Recasting the Community legislation on fertilisers

- (11) On 14 September 2001, the Commission adopted a proposal for a regulation of the European Parliament and of the Council relating to fertilisers⁽⁵⁾, which recasts Council and Commission Directives on the approximation of the laws of the Member States relating to fertilisers.
- (12) The aim of this proposal is to simplify the legislation relating to fertilisers by incorporating in a single text in the form of a regulation, Directives 76/116/EEC, 80/876/EEC, 87/94/EEC and 77/535/EEC, together with the various amendments and adaptations to technical progress of these Directives. All the technical specifications have been included in the Annexes. Common provisions have been separated from specific provisions, the latter being ordered according to the main groups of fertilisers that are currently included in the legislation. The technical annexes have been compiled from the original Directives and rearranged, and some minor changes have been introduced, though without making any changes to technical specifications on nutrient contents.
- (13) Title II of the proposal for a regulation, entitled 'Provisions applicable to specific types of fertilisers', includes a Chapter IV on ammonium nitrate fertilisers of high nitrogen content⁽⁶⁾, which is largely based on the provisions of Directive 80/876/EEC, whose scope was partially expanded to cover compound ammonium nitrate fertilisers of high nitrogen content to take into account the new market situation. Under the old legislation, compounds would not have been subject to tests of resistance to detonation, which would have created a loophole that Member States wanted to avoid for safety reasons. As a result of this recasting, the test of resistance to detonation can now also be required by Member States for compound ammonium nitrate fertilisers of high nitrogen content.
- (14) For this purpose, section 2 of Annex III to the proposal, which contains the technical provisions for ammonium nitrate fertilisers of high nitrogen content, describes the test of resistance to detonation for ammonium nitrate fertilisers of high nitrogen content which may be used for all ammonium nitrate fertilisers, straight and compound, of high nitrogen content. In contrast, section 1 of Annex III, which takes over the rules set out in Annex I to Directive 80/876/EEC only describes the characteristics of, and limits for, straight ammonium nitrate fertilisers of high nitrogen content.

(4) OJ L 250, 23.9.1980, p. 7.

(5) COM(2001) 508 final (OJ C 51 E, 26.2.2002, p. 1).

(6) See Articles 25 to 28 of the proposal for a regulation.

(15) The Member States have already had the opportunity to examine this proposal, and, on 30 September 2002, the Council came to unanimous political agreement with a view to adopting the common position ⁽⁷⁾. As for the provisions which apply to ammonium nitrate fertilisers of high nitrogen content, the amendments put forward by the Member States were solely concerned with making the test of resistance to detonation obligatory for all fertilisers of high nitrogen content, with the person placing it on the market responsible for proving that the fertilisers had successfully passed this test of resistance to detonation, and adding an additional traceability requirement for which the person placing it on the market was also to be responsible. On the other hand, the text of Annex III was not changed.

3. National provisions notified

(16) France has notified new national provisions ⁽⁸⁾ intended to prohibit the importation and placement on the market of NK fertilisers with a nitrogen content resulting from ammonium nitrate of over 28 % by weight and chlorine content over 0,02 % by weight. A decree signed by the competent ministers is to make it obligatory to remove these fertilisers from the market, at the expense and under the responsibility of those who have them in their possession. The decree is accompanied by a memorandum concerning how to render such fertilisers inert.

(17) The notified decree, which bans the import and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine, is intended to suspend, in France, for a one-year period, the importation, placement on the market either free of charge or in return for a fee, and the holding for the purposes of sale or free distribution of NK fertilisers containing over 28 % by mass of nitrogen from ammonium nitrate and having a chlorine content of over 0,02 % (Article 1 of the draft decree).

(18) In addition to the ban, there will be a requirement for the person responsible for first placing these fertilisers on the French market to withdraw them from all places they are present under their responsibility and at their expense (Article 2 of the draft decree).

(19) Lastly, the notified decree states that products which have been withdrawn in this way cannot be placed on the French market again until they have been recognised as being in conformity with the legislation in force, following the addition of an inert charge which makes it

possible to change the NK content (Article 3 of the draft decree).

(20) Moreover, in order to implement the provisions of Article 3, the regulatory framework will be complemented by a ministerial circular on rendering inert NK fertilisers with a nitrogen content resulting from ammonium nitrate of over 28 % and chlorine content over 0,02 %. The purpose of the circular will be to describe the procedures for rendering the fertilisers inert.

4. Justifications put forward by France

(21) Given the potential danger posed by certain fertilisers, the French authorities consider it necessary to introduce special provisions for NK fertilisers (nitrogen-potassium) of high nitrogen content (N) from ammonium nitrate (NH₄NO₃) and with a potassium (K) content, measured as potassium oxide (K₂O), of 5 %, with potassium in the form of potassium chloride (KCl). These national measures derogate from the provisions of Directive 76/116/EEC for NK fertilisers marked 'EC fertiliser'.

(22) The French authorities have put forward the reasons which led them to feel the introduction of the said provisions was desirable, arguing that, with regard to NK fertilisers, France is certainly in a situation which enables it to take advantage of the derogation allowed for under Article 95(5) of the EC Treaty. Their argument can be summed up as follows.

(23) To begin, the French authorities emphasise that, although Directive 76/116/EEC defines EC NK fertilisers, it does not specify the form under which the potassium can be included. From this, they infer that there is nothing to prohibit EC NK fertilisers being manufactured by mechanically blending a straight ammonium nitrate fertiliser of high nitrogen content, or even pure ammonium nitrate, i.e. a product with a nitrogen content resulting from ammonium nitrate of over 28 %, together with potassium chloride, a potassium salt.

(24) The French authorities then point out that, since 1995, a series of Council regulations ⁽⁹⁾ has established anti-dumping duties on imports of straight ammonium nitrate fertilisers of high nitrogen content originating in Russia, Ukraine and Poland. The French authorities state that some producers impacted by this measure came up with the idea of blending ammonium nitrate fertilisers of high nitrogen content with potassium chloride in such a way that the potassium content of the mixture, measured as potassium oxide, is at least equal to 5 %. As the French authorities note 'if the potassium content of the mixture was less than 5 %, the product could no longer be considered to be an EC NK fertiliser, but only a straight ammonium nitrate fertiliser of high nitrogen content, and would then have to pay anti-dumping duties' ⁽¹⁰⁾.

⁽⁷⁾ Council Document No 12179/02.

⁽⁸⁾ Following the notification, France adopted and published the planned measures. This measure is the subject of a separate procedure.

⁽⁹⁾ The first of these regulations was Regulation (EC) No 2022/95 (OJ L 198, 23.8.1995, p. 1) imposing anti-dumping duties on ammonium nitrate originating in Russia. Currently, Regulation (EC) No 132/2001 (OJ L 23, 25.1.2001, p. 1) imposing anti-dumping duties on ammonium nitrate originating in Poland and Ukraine and Regulation (EC) No 658/2002 (OJ L 102, 18.4.2002, p. 1) imposing anti-dumping duties on ammonium nitrate originating in Russia are in force.

⁽¹⁰⁾ See page 2 of the French argument.

- (25) According to the French authorities, these NK fertilisers, which are in theory mixtures of straight ammonium nitrate fertilisers of high nitrogen content and potassium chloride, have two features: firstly, they do not require payment of anti-dumping duties and, secondly, they are not subject to the requirements of Directive 80/876/EEC. The French authorities are of the opinion that, as a result, there is nothing to prevent replacing this straight ammonium nitrate fertiliser of high nitrogen content with a product which does not comply with Directive 80/876/EEC, or even with pure ammonium nitrate, also known as technical-grade ammonium nitrate, which is used in the production of industrial explosives.
- (26) The French authorities examined these fertilisers from two different perspectives: firstly, their theoretical and actual conformity with the specifications set by Community legislation, in order to determine whether these NK fertiliser mixtures can be designated 'EC fertilisers', and secondly, whether they are dangerous. This was determined, in particular, through the analysis by the Directorate-General for Competition, consumer affairs and fraud prevention (DGCCRF) ⁽¹¹⁾ of samples taken from imported batches.
- (27) Given the results of these analyses ⁽¹²⁾, the French authorities questioned the merits of the designation 'EC fertiliser 32-0-5' used for marketing these products. As for 'EC fertiliser 33-0-5', the designation under which some of these NK fertilisers arrive, the French authorities are of the opinion that the actual nitrogen content can never match the declared content, since the minimum nitrogen content of these fertilisers should be 35,449 %, even if a tolerance of $\pm 1,1$ % is applied, which, pursuant to Article 8(3) of Directive 76/116/EEC, cannot be done systematically. From this, they deduce that these products do not have the claimed nutrient content.
- (28) Having made this observation, the French authorities addressed the problem of the potential danger of these NK fertilisers in the following words: 'In addition to the observed deviations between the stated nutrient content and the actual content, there is the problem of the
- potential danger posed by these products, particularly in terms of risk to the environment and in the workplace, issues which are not addressed at all by Directive 76/116/EEC. Following the catastrophe in Toulouse, and given the fact that ammonium nitrate is added to potassium chloride, determining whether such products might be dangerous is a real issue' ⁽¹³⁾.
- (29) According to the French authorities, NK fertilisers may have slight explosive properties similar to those of certain straight nitrogen fertilisers, although this is only a risk with fertilisers which have a relatively high ammonium nitrate content ⁽¹⁴⁾. As these NK fertilisers have a high ammonium nitrate content, the French authorities are of the opinion that 'there is a risk of explosion which, although low, is definitely real given that the potassium is present in the form of potassium chloride' ⁽¹⁵⁾.
- (30) On this subject, the French authorities point out that:
- it is well known that chlorine is a sensitising agent with regard to the decomposition of ammonium nitrate, which explains the 0,02 % limit by weight on chlorine content for straight ammonium nitrate fertilisers of high nitrogen content, pursuant to point 5 of Annex I to Directive 80/876/EEC,
 - when this question was referred to the Committee on Explosive Substances ⁽¹⁶⁾ in 2001, it issued a recommendation ⁽¹⁷⁾ 'designating "NK fertilisers with an ammonium nitrate content of over 90 %, i.e. a total nitrogen content of over 28 %, with a high chloride content in the form of potassium chloride" as "accidental explosives"' ⁽¹⁸⁾,
 - these mixtures of potassium chloride and ammonium nitrate may produce heat, generally without posing any safety problems ⁽¹⁹⁾,
 - however, with chlorine acting as a catalyst, a reaction may occur, triggering a self-sustained decomposition which releases toxic smoke and poses a risk which should not be ignored ⁽²⁰⁾, given the considerable amounts of ammonium nitrate in the mixtures.

⁽¹³⁾ See page 8 of the French argument.

⁽¹⁴⁾ See Louis Médard, *Les explosifs occasionnels*, (translated as *Accidental Explosives*), Techniques et documentation, 1979, p. 664 (See recital 34 of this Decision).

⁽¹⁵⁾ See page 8 of the French argument.

⁽¹⁶⁾ The Committee on Explosive Substances was created by a 1961 decree and is made up of representatives from the various administrative bodies concerned and individuals appointed due to their competence in the field of explosives. One of its tasks is to draw up opinions or recommendations on any questions regarding explosive substances which are referred to it by the Minister for Industry.

⁽¹⁷⁾ The Committee on Explosive Substances' recommendation is attached to the French argument.

⁽¹⁸⁾ See page 9 of the French argument.

⁽¹⁹⁾ See Louis Médard, *op. cit.*, p. 665.

⁽²⁰⁾ See Louis Médard, *op. cit.*, p. 664.

⁽¹¹⁾ One of the tasks entrusted to this body is to ensure that products placed on the market comply with the regulations in force.

⁽¹²⁾ In 2000 and 2001, in its Bordeaux laboratory, the DGCCRF analysed 126 samples of 'NK fertiliser 32-0-5' (the designation under which the large majority of these NK fertilisers is imported). Of these 126 samples, the nitrogen and potassium content of only three matched that stated by the importer, within the tolerances set by Directive 76/116/EEC. The average nitrogen content was 29,94 %, with actual content varying from 24,10 % to 33 %, with a standard deviation of 1,413 %. Average potassium content was 7,24 %, with actual content varying from 3,3 % to 21,3 %, with a standard deviation of 2,714 %. Lastly, the potassium content of 13 of the 126 samples was below 5 %, the minimum required content for compound EC NK fertilisers.

In the opinion of the French authorities, these risks of explosion and decomposition explain why the precautions taken when transporting NK fertilisers, either by land or by sea, are stricter than those which apply to the transport of straight ammonium nitrate fertilisers of high nitrogen content.

(31) The French authorities point out that, on this subject, Article 1(3) of Directive 80/876/EEC relating to straight ammonium nitrate fertilisers of high nitrogen content states that inorganic additives or inert substances, other than those mentioned in paragraph 2, which are used in the compounding of the fertiliser must not increase its sensitivity to heat or its tendency to detonate. The French authorities feel that, since potassium chloride cannot be considered to be an inert substance with regard to ammonium nitrate, given that mixing ammonium nitrate and potassium chloride can, under certain conditions, result in an exothermic reaction which may trigger self-sustained decomposition. From this, the French authorities conclude that 'although the products placed on the French market are unquestionably EC fertilisers, at least when they comply with the regulations, they also have the characteristic of being NK fertilisers, that is, compound fertilisers, with a nitrogen content resulting from ammonium nitrate of over 28 % and a stated chlorine content of 3,78 %' ⁽²¹⁾.

(32) The French authorities also note that the nitrogen content from ammonium nitrate of these NK fertilisers is significantly higher than that found in NK fertilisers marketed up to now. In their opinion, the lack of knowledge regarding these fertilisers, which did not exist when Directive 76/116/EEC was adopted, requires that a prudent approach be taken given the experience acquired since the mid-1950s, a time since when the nitrogen content from ammonium nitrate of compound fertilisers has increased considerably. Therefore, the French authorities are of the opinion that 'as the chlorine content of these straight fertilisers must be lower than 0,02 % by weight, it seems logical that the same upper limit should be set for the chlorine content of these NK fertilisers' ⁽²²⁾.

(33) Within the framework of the procedure mentioned above ⁽²³⁾, the French authorities submitted some additional observations concerning notification under Article 95(5) of the EC Treaty, which the Commission took into account in its assessment. The French authorities consider that Article L.255-1 of the farm laws, introduced by Law 79-595 of 13 July 1979 relating to the organisation of checks on fertilisers, allows them to prohibit the placement on the market of NK fertilisers marked 'EC fertilisers'. They concede that Directive 76/116/EEC undeniably includes harmonisation measures concerning in particular the composition, identification,

labelling and packaging of fertilisers. However, the French authorities consider that there are no provisions in Community legislation as it currently stands regarding the intrinsic safety of all compound fertilisers marked 'EC fertiliser'. According to them, certain advertisements ⁽²⁴⁾ make it clear that these NK fertilisers are no more than 'high-dosage ammonium nitrate based fertilisers' to which the required minimum amounts of potassium chloride have been added so that they may be marketed as 'EC fertilisers'. The French authorities state that, although the decision to ban these products was mainly based on safety concerns, the checks carried out by the authorities ⁽²⁵⁾, which led them to question whether the ban truly related to EC fertilisers, were also a factor. The deviations observed between the stated nutrient content and the actual content caused the French authorities to conclude that these fertilisers did not meet the specifications described in Directive 76/116/EEC. They feel that it is difficult to maintain that the free movement clause in Article 7 of Directive 76/116/EEC should apply to these fertilisers simply because they are designated 'EC fertilisers'.

New scientific evidence concerning the protection of the environment or the working environment

(34) To support their request, in addition to the arguments repeated above, the French authorities provided a number of documents, more specifically, Chapter 25, entitled 'Ammonium Nitrate-based Fertilisers' of Louis Médard's *Les explosifs occasionnels*, Techniques et documentation, 1979, and the Committee on Explosive Substances' recommendation, without providing the additional scientific information which was the basis of this recommendation. They also refer to the scenarios looked at as part of the investigation of the explosion of the AZF Factory in Toulouse, without providing any documentation on it. Other than a number of theoretical calculations included in their argument, the French authorities did not provide any other documents or information concerning the risk posed by these NK fertilisers.

(35) The French authorities note that, as the compound fertilisers placed on the market up to the mid-1950s contained considerably less nitrogen, particularly in the form of nitrogen from ammonium nitrate, than those which have been manufactured since then, self-sustained decomposition was practically unknown. They point out that, from the mid-1950s, an increase in nitrogen content from ammonium nitrate initially led to spectacular accidents caused by the decomposition of compound fertilisers.

⁽²¹⁾ See page 14 of the French argument.

⁽²²⁾ See page 14 of the French argument.

⁽²³⁾ See footnote 8 of this Decision.

⁽²⁴⁾ See recital 41 of this Decision and, in particular, footnote 32.

⁽²⁵⁾ See, in particular, recital 27 of this Decision and footnote 12.

(36) According to the French authorities, 'nothing currently allows us to assert that these new NK fertilisers, which, first of all, contain over 80 % ammonium nitrate or ammonium nitrate fertiliser of high nitrogen content, and, second of all, at least 7,93 % potassium chloride, will not undergo complex reactions resulting in large-scale accidents' ⁽²⁶⁾. They believe that this is even more likely, given that potassium chloride is not an inert substance with regard to ammonium nitrate, and that the analyses of the samples taken from these fertilisers have shown considerable differences between the stated nutrient content and the actual content.

(37) The French authorities also point out that it should not be forgotten that on 21 September 2001, an explosion at the Grande Paroisse factory in Toulouse, which manufactured technical-grade ammonium nitrate and straight ammonium nitrate fertilisers of high nitrogen content, killed 30 people, including 22 employees, and caused considerable environmental damage. 'This explosion occurred in a warehouse where non-compliant products of high nitrogen content from ammonium nitrate were mixed. This concerned, firstly, ammonium nitrate which could not be marketed as straight fertiliser since it did not meet the specifications of either Directive 80/876/EEC or the French standard NF U 42-001, and, secondly, technical-grade ammonium nitrate that did not meet the specifications set by the clients' ⁽²⁷⁾. The French authorities point out that, not far from the explosion, a considerable amount of straight ammonium nitrate fertiliser of high nitrogen content suffered only material damage (broken and scattered sacks), while the product itself remained intact.

(38) The French authorities state that 'up to now, the causes of this explosion are still unknown, and no theories as to them have yet been definitively ruled out' ⁽²⁸⁾. They specify that one of the theories put forward to explain the catastrophe is that waste containing chlorine was mistakenly placed in a warehouse used to store ammonium nitrate. In the opinion of the French authorities, 'it would therefore seem reasonable, as an application of the precautionary principle, to take measures to prevent the placement on the market of NK fertilisers which are mixtures of considerable quantities of ammonium nitrate or ammonium nitrate fertiliser of high nitrogen content with substances that increase the

sensitivity to heat and tendency to detonate of ammonium nitrate' ⁽²⁹⁾. They emphasise that, although it is measured as potassium oxide, the potassium is present in the form of a salt, potassium chloride, and that it is well known that potassium chloride is not inert with regard to ammonium nitrate.

Specific characteristics of the problem

(39) The French authorities feel that 'due to its size, the French market for straight ammonium nitrate fertilisers of high nitrogen content differs from the market in the other Member States of the Community. In fact, the French market alone accounts for 40 % of the total EU market for this type of fertiliser. Most of the fertiliser is imported, and imports from non-EU member countries account for 23,4 %' ⁽³⁰⁾.

(40) Thus, over the last several years, the French authorities have witnessed considerable growth in imports of NK fertilisers with a stated nitrogen content resulting from ammonium nitrate of over 28 % and a stated potassium content, in the form of potassium chloride, and measured as potassium oxide, equal to 5 %. According to the figures provided by the French authorities, imports of these types of products were as follows: in 1997-1998: 0 tonnes; in 1998-1999: 20 000 tonnes; in 1999/2000: 40 000 tonnes; in 2000/2001: 88 000 tonnes; and in the 2001 calendar year alone, 76 000 tonnes were unloaded in French ports.

(41) The French authorities then point out that these NK fertilisers appeared on the French market shortly after anti-dumping duties on imports of ammonium nitrate were established ⁽³¹⁾, for the purpose of avoiding them, as can be seen from the advertising done by certain importers of ammonium nitrate-based fertilisers originating in Russia ⁽³²⁾. According to the French authorities, 'the specialist press' ⁽³³⁾, which reflects the market, considers this product to be more of a variant of a straight ammonium nitrate fertiliser of high nitrogen content than a compound NK fertiliser' ⁽³⁴⁾.

5. General information on the potential dangers posed by compound fertilisers of high nitrogen content (NPK fertilisers)

(42) The following information is taken from Chapter 25, 'Ammonium nitrate-based fertilisers', of Louis Médard's *Les explosifs occasionnels*, Techniques et documentation, 1979, which was included with the French authorities' notification to support their request for a derogation ⁽³⁵⁾.

⁽²⁹⁾ See pages 15 and 16 of the French argument.

⁽³⁰⁾ See page 3 of the French argument.

⁽³¹⁾ See recital 24 of this Decision.

⁽³²⁾ The French authorities attached a web page of advertising from WCIB — France Appro Fertiliser and Pesticide World Market which includes among the items for sale: 'blend NPK fertilisers on basis of ammonium-nitrate 34,5 % with add of P or K in order to not pay anti-dumping duty. Standard formulation 32/00/05.'

⁽³³⁾ The French authorities refer specifically to the following publications: "The FMB Fertiliser Europe Report", 16 February 2000, p. 2; "Fertiliser Europe", 22 January 2001, p. 2; "FMB Consultants", 11 January 2002, p. 2.

⁽³⁴⁾ See page 4 of the French argument.

⁽³⁵⁾ This book is a summary of work carried out on the subject. It should be pointed out that, when developing his arguments, Louis Médard uses 'NPK fertilisers' as a generic term, i.e. it covers the various types of compound fertilisers, with NK fertilisers thus treated as a subcategory of NPK fertilisers.

⁽²⁶⁾ See page 15 of the French argument, where, with regard to this point, the French authorities refer to Louis Médard, *op. cit.*, p. 666.

⁽²⁷⁾ See page 15 of the French argument.

⁽²⁸⁾ See page 15 of the French argument.

Nature of the potential dangers posed by NPK fertilisers

- (43) According to Louis Médard, almost all solid NPK fertilisers contain ammonium nitrate and, depending on their composition and partly on their structure, they may pose the following dangers:
- fertilisers with a relatively high ammonium nitrate content may have slight explosive properties similar to those of certain straight nitrogen fertilisers,
 - when heated sufficiently, certain NPK fertilisers may undergo nitrogen decomposition similar to that in warm NO_3NH_4 solutions. This is an autocatalytic reaction which, once it has been triggered, will affect all of the substance present. Chlorides favour decomposition,
 - in many fertilisers which include both ammonium nitrate and a chloride in their composition, a special type of deflagration can be triggered if sufficient heat is applied to one point of the substance. This deflagration spreads very slowly from the point where it was started and is known as 'self-sustained decomposition', or alternatively 'cigar-burning' of the fertiliser. The catalytic reaction of the chloride ions in the fertiliser makes it easy to trigger the decomposition,
 - certain fertilisers are liable to heat spontaneously while being stored, often by approximately 40 degrees from the ordinary temperature, and if the temperature reached is high enough, it may lead to the nitrogen decomposition referred to in the second indent ⁽³⁶⁾.

Spontaneous heating of NPK fertilisers

- (44) This phenomenon of spontaneous heating by 20 degrees to 30 degrees may occur in particular due to the presence of organic matter, for example, in phosphate deposits when the fertilisers are stored in large piles. This heating of fertilisers which contain organic matter should not be confused with the very moderate rise in temperature of approximately 10 degrees which may be seen with certain compound fertilisers which do not contain any organic matter. Such slight rises are caused by the formation of new salts as a result of the redistribution of anions and cations, and do not pose a danger ⁽³⁷⁾.

Characteristics of 'cigar-burning' in NPK fertilisers

- (45) 'Cigar-burning' may occur in NPK fertilisers which contain both chloride and ammonium nitrate (or salts which include nitrate ions and ammonium ions, such as KNO_3 and NH_4Cl). Moreover, in most NPK fertilisers, potassium is present in the form of potassium chloride. However, a different, insufficiently purified, potassium salt obtained from potassium chloride would provide chloride ions. No more than 0,5 % chloride is needed in a fertiliser for such decomposition to be possible. If a large, solid residue (skeleton) can form, this fosters the propagation of the decomposition. For this reason, cigar-burning is more likely with fertilisers that contain calcium phosphate than with those that contain ammonium phosphate.

- (46) With fertilisers which form an unconfined mass, at one atmosphere of pressure, cigar-burning has the following characteristics, among others:

1. it is triggered by local heating, following a certain induction period. The temperature which must be reached to trigger the cigar-burning depends on the kind of fertiliser. If the source of heat has a low temperature (120° to 160°), it will require a considerable length of time, up to a few hours, to trigger the propagation of the decomposition. As a rule, the heating must concern a considerable amount of fertiliser. If it is restricted to an extremely small area, the resulting decomposition of the fertiliser will not be sufficient to propagate itself beyond the heated area;
2. for NPK fertilisers, the speed of the cigar-burning deflagration can vary from 3 cm/h to 150 cm/h;
3. the temperature profile at the deflagration front (which is approximately 1 dm wide) shows a preheating zone (often from 2 cm to 3 cm wide) where the temperature of the substance is raised to 120° to 135° , followed by a zone where the temperature increases rapidly (100° or more per mm), reaching a peak in temperature, beyond which the temperature gradually drops back;
4. certain trace elements, particularly copper, are remarkable catalysts ⁽³⁸⁾;
5. sulphur contamination in NPK fertilisers has the effect of facilitating cigar-burning ⁽³⁹⁾.

Deflagration dangers posed by NPK fertilisers

- (47) The speed of unconfined deflagration of NPK fertilisers, which are susceptible to it, is still very low (100 to 1 000 times less than common pyrotechnic compositions). It does not, therefore, have any destructive mechanical effects. The damage caused by cigar-burning in NPK fertilisers results, above all, from the temperature reached by the substance, which is high enough to burn

⁽³⁸⁾ With a copper content of only 0,01 % to 0,03 %, fertilisers which are not subject to cigar-burning without copper can propagate the deflagration at 6 cm/h to 10 cm/h. A fertiliser containing 0,3 % copper can reach speeds of 50 cm/h to 100 cm/h. This raises the question of whether it is wise to add copper to NPK fertilisers, with the exception of those which contain practically no chlorine. See Louis Médard, *op. cit.*, p. 669.

⁽³⁹⁾ See Louis Médard, *op. cit.*, p. 667 to 669.

⁽³⁶⁾ See Louis Médard, *op. cit.*, p. 663 and 664.

⁽³⁷⁾ See Louis Médard, *op. cit.*, p. 664 and 665.

wood. The gases produced do not have any particular combustive effect and, consequently, cannot increase the speed of development of fire ⁽⁴⁰⁾.

Preventing the decomposition of NPK fertilisers

(48) According to Louis Médard, when storing fertilisers, it is crucial to avoid anything that might trigger decomposition. He states that studies of accidents ⁽⁴¹⁾ have revealed that the main triggers are: incandescent lamps left on in contact with the fertiliser; leaving the fertiliser in contact with a warm object undergoing a repair which involves the use of a flame, or subsequent to such a repair; using defective electrical equipment which allows hotspots to touch the fertiliser; and the presence of pipes containing hot liquids in the room or the ship's hold where the fertiliser was brought.

(49) Therefore, during both storage and transport, an effort should be made to ensure that none of the above sources of heat come into contact with the fertiliser, and also that any substances which might begin a fire be placed far away from the fertiliser, as the risk is less a function of the quantity of the combustible material than of its proximity to the fertiliser. Placing substances which might react dangerously or substances of which one is unsure of the composition near the fertiliser must also be avoided. Lastly, explosives must be strictly prohibited ⁽⁴²⁾.

II. PROCEDURE

(50) In a letter dated 12 June 2002 and notified to the Commission on 19 June 2002, the French Permanent Representation to the European Union informed the Commission that, in accordance with Article 95(5) of the EC Treaty, France intended to introduce national provisions regarding certain NK fertilisers of high nitrogen content and containing chlorine beyond those provided for in Directive 76/116/EEC.

(51) For this purpose, the French authorities notified a draft decree banning the importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine, together with a draft circular on rendering such fertilisers inert and a document setting out the arguments in justification of their request for derogation.

(52) By a letter dated 31 July 2002, the Commission informed the French authorities that it had received the notification under Article 95(5) of the EC Treaty and that the six-month period for its examination pursuant

to Article 95(6) had begun on 20 June 2002, the day after the notification was received.

(53) By a letter dated 2 August 2002, the Commission informed the other Member States of the request received from the French Republic. The Commission also published a notice regarding the request in the *Official Journal of the European Communities* ⁽⁴³⁾ to inform the other parties concerned of the draft national measures that France intended to adopt ⁽⁴⁴⁾.

III. LEGAL ANALYSIS

1. Consideration of admissibility

(54) The notification submitted by the French authorities on 19 June 2002 is intended to obtain approval for the introduction of new national provisions which are incompatible with Directive 76/116/EEC, a measure concerning the approximation of the laws, regulations and administrative provisions of the Member States, aiming at the establishment and operation of the internal market.

(55) Article 95(5) of the Treaty reads as follows: 'If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions 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 the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.'

(56) Directive 76/116/EEC covers fertilisers marked 'EC fertiliser'. Certain types of fertilisers, such as organic fertilisers, are still currently subject to national regulations, rather than Directive 76/116/EEC. This Directive harmonised at Community level the rules on the types of EC fertilisers listed in its Annex I. Therefore, EC fertilisers listed in Annex I to Directive 76/116/EEC are governed solely by the provisions of that Directive, particularly with regard to designation, definition, composition, labelling and packaging, and the free movement clause should therefore apply to them, provided that they comply with the requirements of Directive 76/116/EEC. Only straight ammonium nitrate fertilisers of high nitrogen content must, if they are to be placed on the market as fertilisers, also comply with the additional Community rules laid down in Directive 80/876/EEC.

⁽⁴⁰⁾ See Louis Médard, *op. cit.*, p. 673.

⁽⁴¹⁾ In his book, Louis Médard describes the first accidents caused by self-sustained combustion of NPK fertilisers, prior to coming to the conclusion that these accidents demonstrate that many types of NPK fertilisers are subject to easily-triggered 'cigar-burning'. See Louis Médard, *op. cit.*, p. 666 and 667.

⁽⁴²⁾ See Louis Médard, *op. cit.*, p. 674 and 675.

⁽⁴³⁾ OJ C 188, 8.8.2002, p. 3.

⁽⁴⁴⁾ In the meantime, France had introduced the notified national measures into its internal law, without waiting for the Commission to adopt a decision regarding the French request for a derogation. The Commission is examining this situation under a separate procedure.

(57) When comparing the provisions of Directive 76/116/EEC and the national measures notified, it emerges that the latter are more restrictive than those contained in the Directive in the following aspects:

1. the importation and placement on the market of NK fertilisers with a nitrogen content resulting from ammonium nitrate of over 28 % by weight and a chlorine content of over 0,02 % will be prohibited;
2. NK fertilisers with a nitrogen content resulting from ammonium nitrate of over 28 % and a chlorine content of over 0,02 % will be immediately withdrawn from the market.

(58) As required by Article 95(5) of the EC Treaty, France notified the Commission of the exact wording of the provisions going beyond those set out in Directive 76/116/EEC, including with the request an explanation of the reasons which, in its opinion, justify the introduction of those provisions.

(59) The notification submitted by France in order to obtain approval for the introduction of national provisions derogating from the provisions of Directive 76/116/EEC is therefore to be considered admissible under Article 95(5) of the EC Treaty.

2. Assessment of merits

(60) In accordance with Article 95 of the Treaty, the Commission must ensure that all the conditions enabling a Member State to avail itself of the possibilities of derogation provided for in this Article are fulfilled.

(61) The Commission must therefore assess whether the conditions provided for by Article 95(5) of the Treaty are met. This Article requires that when a Member State deems it necessary to introduce national provisions derogating from a harmonisation measure, that Member State should base the introduction on:

- (a) new scientific evidence relating to the protection of the environment or the working environment;
- (b) grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.

(62) Moreover, under Article 95(6) of the EC Treaty, the Commission is either to approve or reject the draft national provisions in question 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.

2.1. Evaluation of the position of France

(63) First of all, the Commission feels it must point out that the national measures to which Article 95(5) of the EC Treaty applies are those which introduce additional requirements on the basis of the protection of the environment or the working environment, on grounds of a

problem specific to that Member State arising after the adoption of the harmonisation measure.

(64) Therefore, the national provisions notified and the reasons given by the Member State are examined in light of the Community harmonisation measure from which they derogate, in this case, the provisions of Directive 76/116/EEC regarding NK fertilisers marked 'EC fertiliser', in so far as the draft decree imposes additional requirements on the placement on the market of EC NK fertilisers, particularly with regard to their composition, such as maximum nitrogen and chloride contents. Directive 76/116/EEC does not itself set any maximum limit on the nitrogen, potassium and chloride content of NK fertilisers. Annex I simply specifies, in the latter case, that the words 'low in chlorine' may be used only where the chlorine content does not exceed 2 %, and that guaranteeing a certain chlorine content is permitted. This clearly indicates that NK fertilisers may have a chlorine content of over 2 %. As a result, the national measures notified, which provide for banning NK fertilisers containing over 28 % by mass of nitrogen from ammonium nitrate and having a chlorine content of over 0,02 %, go beyond the Community provisions.

(65) The initial postulate is therefore that the NK fertilisers concerned by the draft decree meet the requirements of Directive 76/116/EEC, given that the designation 'EC fertiliser' can only be used for fertilisers belonging to one of the fertiliser types listed in Annex I and meeting the requirements laid down by the said Directive and Annexes I to III thereto. Member States may take all necessary measures to ensure that the designation 'EC fertiliser' can only be used for fertilisers belonging to one of the fertiliser types listed in Annex I and meeting the requirements laid down by the Directive. Moreover, Article 8 of Directive 76/116/EEC specifically provides for checks by Member States on the compliance of EC fertilisers with the requirements of the said Directive⁽⁴⁵⁾. The Commission therefore does not deny Member States the option of taking measures against fertilisers that do not meet the requirements of Directive 76/116/EEC. However, the Commission feels it must be pointed out that fertilisers with a total nutrient content (N + K₂O) of over 18 % by weight, as well as a nitrogen content of over 3 % and a potassium content of over 5 %, pursuant to Directive 76/116/EEC, fall within the definition of Community fertilisers designated 'EC NK fertilisers'. The free movement clause in Article 7 of Directive 76/116/EEC should therefore apply to them in so far as they comply with the requirements of Directive 76/116/EEC.

⁽⁴⁵⁾ See recital 7 of this Decision.

(66) It should also be pointed out that, up to now, the Court's case-law has been consistent in requiring that the conditions of admissibility for a derogation from the fundamental rules of Community law must be interpreted restrictively. As the provision in question creates an exception to the principles of uniform application of Community law and the unity of the market, Article 95(5) of the EC Treaty must, as with all measures relating to derogations, be interpreted in such a way that its scope is not extended beyond the cases for which it formally provides. As Article 95 is precisely the expression of such a derogation, it must be interpreted strictly and only be applied under strict conditions with regard to all of the justification required.

2.1.1. The burden of proof

(67) It has to be noted that, in the light of the time frame established by Article 95(6) of the EC Treaty, the Commission, when examining whether the draft national measures notified under Article 95(5) are justified, has to take as a basis 'the grounds' put forward by the Member State. This means that, under the Treaty, the responsibility of proving that these measures are justified lies with the Member State making the request. Given the procedural framework established by Article 95 of the EC Treaty, including in particular a strict deadline for a Decision to be adopted, the Commission normally has to restrict itself to examining the relevance of the elements which are submitted by the requesting Member State, without having to seek possible justifications itself.

2.1.2. New scientific evidence concerning the protection of the environment or the working environment regarding a problem specific to France arising after the adoption of the harmonisation measure

(68) The French authorities believe the explanations they have provided⁽⁴⁶⁾ demonstrate that 'these fertilisers were placed on the French market only recently, and as the French market is unique, this problem is, in fact, specific to France and arose after the adoption of the harmonisation measure'⁽⁴⁷⁾.

(69) The French authorities argue that Directive 76/116/EEC does not specify the form in which the potassium should be included in NK fertilisers, which makes it possible to use potassium chloride⁽⁴⁸⁾. In addition, they imply that such NK fertilisers, which are the result of physically mixing straight ammonium nitrate fertilisers of high nitrogen content (also called 'high-dosage

ammonium nitrate-based fertilisers') and adding potassium chloride, should really be considered straight fertilisers rather than compound EC fertilisers. It is true that Directive 76/116/EEC does not give the form in which the potassium should be added to NK fertilisers or to any type of compound fertiliser⁽⁴⁹⁾. On the other hand, it does specify that compound fertilisers are products obtained chemically or by blending without addition of organic nutrients of animal or vegetable origin⁽⁵⁰⁾. Directive 76/116/EEC therefore also covers compound fertilisers produced by blending. Moreover, Louis Médard specified that compound fertilisers are sometimes produced by blending two or three straight fertilisers⁽⁵¹⁾. The Commission therefore considers that if the NK fertilisers referred to in the national measures notified meet the requirements of Directive 76/116/EEC, they are considered to be compound NK fertilisers, and fall within the scope of the Community legislation.

(70) The French authorities provide data concerning the size of the French market for straight ammonium nitrate fertilisers of high nitrogen content and the proportion of it made up of imports from non-member countries. It therefore appears that they believe the appearance and growth in these NK fertilisers is a new problem that is specific to France. They state that the specialist press considers these ammonium nitrate NK fertilisers of high nitrogen content to be more a variant straight fertiliser⁽⁵²⁾ than a compound fertiliser. The Commission feels that three excerpts taken from journals cannot, on their own, be considered to be a reflection of the market. Moreover, contrary to the French authorities claim⁽⁵³⁾, reading these excerpts shows that the specialised press does actually distinguish between straight ammonium nitrate fertilisers (AN) and NK or NPK fertilisers⁽⁵⁴⁾. As a result, the characteristics of the French market for straight ammonium nitrate fertilisers of high nitrogen content cannot be deemed to show that there is a unique situation which justifies national derogations for certain compound fertilisers, unless it is accepted that the specific problem described is purely economic, and does not therefore have a direct link with the objectives of protecting the environment or the working environment.

⁽⁴⁶⁾ The explanations of the specific problem which are included in the French argument are repeated in their entirety in recitals 39 to 41 of this Decision.

⁽⁴⁷⁾ See page 14 of the French argument.

⁽⁴⁸⁾ See recital 23 of this Decision.

⁽⁴⁹⁾ It should be pointed out here that Directive 76/116/EEC does not specify the form in which nitrogen or phosphate should be included in compound fertilisers either.

⁽⁵⁰⁾ See recital 4 of this Decision.

⁽⁵¹⁾ See Louis Médard, *op. cit.*, p. 653.

⁽⁵²⁾ See recital 41 of this Decision.

⁽⁵³⁾ See recital 41 of this Decision.

⁽⁵⁴⁾ Thus, The FMB Fertiliser Europe Report dated 16 February 2000, p. 2, states that 'Traders have been importing a fair amount of blended Russian 32-0-5 but French customs are proving very tough on controlling the product with anything found to have less than 5% K₂O deemed to be AN and therefore subject to the full anti-dumping duty'. As for Fertiliser Europe dated 22 January 2001, p. 2, it states that 'At Muuga, the MV Aleksey Afanasjev completed loading with 1 604 t AN in big bags and another 1 403 t of NK 32-0-5 in big bags.'

- (71) Moreover, although it is true that this type of NK fertiliser only came on the market recently, following the adoption of the harmonisation measure, it is not limited to the French market. And France has not, in fact, demonstrated that these fertilisers were solely intended for the French market. The data provided by the French authorities do not make it possible to show that there is a problem specific to France as a result of the placement on the market of these NK fertilisers. No information concerning the existence and extent of similar events in the Member States has been provided. This would be needed to be able to assess the specific nature of the situation described by France. If the potential danger posed by these fertilisers, which was brought up by the French authorities as a way of justifying their national measures⁽⁵⁵⁾, is taken into account, one must also accept that the problem of transporting and storing such fertilisers is shared by all the Member States and can in no way be seen as a characteristic specific to France on which national derogations may be based.
- (72) The introduction of national measures that are stricter than Community standards needs to be justified by new scientific evidence concerning the protection of the environment or the working environment, with the latter covering only non-economic reasons related to the safety, health and hygiene of workers.
- (73) Whether the scientific evidence is new must be judged in light of developments in scientific knowledge. The purpose of Article 95(5) of the EC Treaty is to make it possible to use new scientific evidence to solve specific problems arising in Member States after harmonisation measures have been adopted.
- (74) It is therefore up to the Member State which has stated there is a need for a derogation to provide new scientific evidence, such as an assessment of the risk for the environment or the working environment, or scientific information and studies or other research in progress,
- while taking into account the effects of the Community measures which have already been adopted.
- (75) Taking this into consideration, it seems that the documentation and arguments put forward by the French authorities in support of their request for a derogation can in no way be considered to be new scientific evidence within the meaning of Article 95(5) of the EC Treaty.
- (76) In light of the above⁽⁵⁶⁾, particularly the excerpts from Louis Médard's work included with the French notification, it is clear that, although NK fertilisers of high nitrogen content did only come on the French market recently, the potential danger of such types of fertiliser of high nitrogen content, notably their slight explosive properties and self-sustained decomposition, were nonetheless known before Directive 76/116/EEC was adopted, as the French authorities themselves concede⁽⁵⁷⁾. Furthermore, according to this scientific literature, the various types of NPK fertilisers which contain both chloride and ammonium nitrate, that is, NK fertilisers and NPK or NP fertilisers, are all subject to self-sustained decomposition⁽⁵⁸⁾. As for preventive measures, they have also been highlighted for some time, with the crucial point being the avoidance of anything that might trigger decomposition⁽⁵⁹⁾ when storing such products.
- (77) As for the recommendation of the Committee on Explosive Substances referred to by France, the said Committee looked at the potential danger posed by NK fertilisers (nitrogen-potassium) with an ammonium nitrate content of over 90 %, i.e. a total nitrogen content of over 31,5 %, with a high chloride content in the form of potassium chloride, at its meetings of 23 January and 28 March 2001. In its recommendation, this committee expressed a desire to 'draw the attention of the competent authorities to this type of blend which, though it cannot be considered to be an explosive as generally understood, may occasionally have explosive properties'⁽⁶⁰⁾. Thus, contrary to what the French authorities maintain⁽⁶¹⁾, the Committee on Explosive Substances did not call NK fertilisers with an ammonium nitrate content of over 90 % 'accidental explosives', but only recognised that they might occasionally have explosive properties. It should be noted that this observation is not new⁽⁶²⁾ and that no new scientific evidence has been provided in support of this conclusion.

⁽⁵⁶⁾ See, in particular, part I, section 5, of this Decision.

⁽⁵⁷⁾ See recital 35 of this Decision.

⁽⁵⁸⁾ See in particular recital 45 of this Decision. With regard to this, it should be pointed out that the products which may react spontaneously when blended with ammonium nitrate are nitrites, in a sufficiently high concentration, or products such as old wood saturated with ammonium nitrate, or sawdust or metal shavings thoroughly mixed with ammonium nitrate. Other products, such as chloride ions, are merely sensitising agents, i.e. they lower the decomposition temperature and/or the amount of energy required to trigger it, but do not trigger the decomposition themselves. Under no circumstances can these sensitising agents trigger decomposition.

⁽⁵⁹⁾ See recital 48 of this Decision.

⁽⁶⁰⁾ See recital 34 of this Decision.

⁽⁶¹⁾ See the second indent of recital 30 of this Decision.

⁽⁶²⁾ It is already mentioned in Louis Médard's summary, where he describes the potential dangers of NPK fertilisers. He specifies that, 'the fertiliser may have slight explosive properties, similar to those of certain straight nitrogen fertilisers. This risk is only present in fertilisers which have a relatively high ammonium nitrate content.' See Louis Médard, *op. cit.*, p. 664.

⁽⁵⁵⁾ See in particular recitals 4 and 7 of the notified draft decree, which state:

'under unsuitable conditions of storage or transport, in particular those which foster an increase in humidity, chlorine may react with ammonium nitrate at room temperature to form nitrogen trichloride compounds with potentially explosive properties; such fertiliser blends are currently imported and placed on the market without any particular precautions being taken, particularly with regard to transport and storage.'

(78) The Commission considers that the French authorities have extrapolated from the conclusions of the Committee on Explosive Substances. What the Committee on Explosive Substances in fact recommended was 'that very close attention should be paid to the correct classification of NK fertilisers (nitrogen-potassium) with an ammonium nitrate content of over 90 %, i.e. a total nitrogen content of over 31,5 %, with a high chloride content in the form of potassium chloride with regard to transport, and that the relevant transport regulations be strictly applied' ⁽⁶³⁾. It expressed a desire that 'before any such product is imported or placed on the market, the person responsible for importing it or placing it on the market should be required to have samples taken from the product analysed so as to ensure that the product in question complies strictly with the regulations in force. More specifically, an analysis should be carried out by a well known laboratory established in the European Union to guarantee that samples taken recently from the product successfully passed the test of resistance to detonation described in Directive 87/94/EEC of 18 December 1986, as amended by Directive 88/126/EEC of 22 December 1987' ⁽⁶⁴⁾. Therefore, its recommendations refer only to NK fertilisers where the content is over 31,5 % — not 28 %. Moreover, the Committee on Explosive Substances simply recommended that there be a suitable classification of these fertilisers for transport purposes, and in order to verify that they comply strictly with the regulations, in particular by submitting them to the test of resistance to detonation described in Directive 87/94/EEC. It should be noted that Directive 76/116/EEC does not require this test. Up to now, the test of resistance to detonation has only been required for straight fertilisers of high ammonium nitrate content pursuant to Directive 80/876/EEC.

(79) Moreover, the new scientific evidence required under Article 95(5) of the EC Treaty must relate to the protection of the environment or the working environment. However, in this case, the French authorities have not provided any new scientific evidence which specifically concerns the protection of the environment or the working environment. Moreover, examination of the recitals of the draft decree ⁽⁶⁵⁾, which could have specified the justification for the notified measures, revealed that nothing was stated with regard to the requirements of protection of the environment and/or the working environment. Recitals 4 and 7 ⁽⁶⁶⁾, in particular, emphasise that such fertiliser blends are currently imported and placed on the market without any particular precautions

being taken, particularly with regard to transport and storage. This state of affairs presents a clear and immediate danger. It therefore appears that these concerns are related more to transport and storage of such fertilisers than they are to protection of the environment or the working environment. With regard to this, it should be noted that the French authorities have not demonstrated that there is a direct link between transport and storage, on the one hand, and protection of the environment or the working environment on the other. The Commission therefore considers that the concerns relating to transport and storage of fertilisers raised by France cannot be specifically regarded as protection of the environment or the working environment within the meaning of Article 95(5) of the EC Treaty.

(80) The only scientific evidence presented by France to support its request for derogation, particularly with regard to the potential danger of NK fertilisers, is excerpts from Louis Médard's 1979 book, which is a summary of work on the subject.

(81) The conclusion can therefore be drawn that the national measures notified are not justified, as France has not provided new scientific evidence relating to the protection of the environment or the working environment demonstrating the existence of a specific problem arising after the adoption of Directive 76/116/EEC, as required by Article 95(5) of the EC Treaty.

(82) As for the arguments drawn from the Toulouse catastrophe ⁽⁶⁷⁾, which, in the view of the French authorities, justifies recourse to the precautionary principle, the Commission must point out that 'recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty' ⁽⁶⁸⁾. The precautionary principle places an obligation on Member States to provide new data which raises serious doubts with regard to health or the environment, and which, in accordance with the common rules on the burden of proof, is serious and conclusive evidence and, without setting aside scientific uncertainty, makes it possible to justify taking precautionary measures. Moreover, it follows from the Community courts' interpretation of the precautionary principle ⁽⁶⁹⁾ that a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken. The grounds for a preventive measure cannot validly be a purely hypothetical approach to risk, based on mere hypotheses which have not yet been scientifically confirmed. The precautionary principle can therefore apply only in situations in which there is a risk, notably to human health and the environment, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated.

⁽⁶³⁾ See recital 34 of this Decision.

⁽⁶⁴⁾ See recital 34 of this Decision.

⁽⁶⁵⁾ Draft Decree notified to the Commission in accordance with Article 95(5) of the EC Treaty.

⁽⁶⁶⁾ See recital 71 of this Decision and, more specifically, footnote 55.

⁽⁶⁷⁾ See recitals 37 and 38 of this Decision.

⁽⁶⁸⁾ See the Commission communication on recourse to the precautionary principle (COM(2000) 1 final, 2.2.2000).

⁽⁶⁹⁾ See in particular the Court of First Instance's judgments of 11 September 2002 in Cases T-13/99 and T-70/99.

(83) To begin with, as the French authorities themselves recognise ⁽⁷⁰⁾, the products involved in the Toulouse explosion were straight ammonium nitrate fertilisers of high nitrogen content which did not meet the requirements of Directive 80/876/EEC or technical-grade ammonium nitrates, whose explosive properties are well known, and not NK fertilisers which complied with the requirements of Directive 76/116/EEC. It is therefore not possible to draw any causal link between the latter EC fertilisers and this accident. Lastly, the French authorities state that, up to now, no theories as to the causes of this explosion have yet been definitively ruled out, as the causes of the explosion are still unknown ⁽⁷¹⁾. Lastly, the French authorities admit that the theory relating to the possible role of products containing chlorine in triggering the Toulouse explosion is based on waste containing chlorine being mistakenly placed in a warehouse used to store ammonium nitrate, and not on the presence of chlorine in the form of potassium chloride in the make-up of the fertilisers ⁽⁷²⁾. The Commission considers that the allegations being made are too general and lack substance. They cannot even be considered scientific. As a result, it is the Commission's opinion that, in this case, there is no justification for applying the precautionary principle.

(84) As a theoretical point, the Commission feels it must mention that if measures are considered to be required, measures based on the precautionary principle must be justified with regard to the level of protection being sought. The Commission would like to point out that the legislation on fertilisers is currently under discussion, as it is being recast ⁽⁷³⁾. This proposal has taken the new market situation into account, in particular by extending the requirement for a test of resistance to detonation to compound ammonium nitrate fertilisers of high nitrogen content. Taking the above into consideration, the Commission therefore feels that only a measure making the placement of such NK fertilisers on the market subject to a requirement to submit them to a test of resistance to detonation could have put the French concerns to rest. The national measures notified, which, in addition to prohibiting the importation and placement on the market of certain NK fertilisers, also lay down a requirement to withdraw those fertilisers from the market at the expense and under the responsibility of those who have them in their possession, seem unjustified, given the potential danger posed by these fertilisers when they comply with Community legislation and meet the definition of EC fertilisers.

⁽⁷⁰⁾ See recital 37 of this Decision.

⁽⁷¹⁾ See recital 38 of this Decision.

⁽⁷²⁾ See recital 38 of this Decision. Moreover, on this subject, reference should be made to the 'Rapport de la commission d'enquête interne sur l'explosion survenue le 21 septembre 2001 à l'usine Grande Paroisse de Toulouse - Point de la situation des travaux en cours à la date du 18 mars 2002' (Report of the internal committee investigating the explosion which occurred on 21 September 2001 at the Grande Paroisse factory in Toulouse - Progress Report on work under way on 18 March 2002).

⁽⁷³⁾ See part I, section 2, of this Decision.

2.1.3. Summary

(85) Article 95(5) of the EC Treaty requires that three conditions must be met if national derogations from Community harmonisation are to be introduced: the national derogations must be founded on new scientific evidence in the given sectors, there must be a problem specific to the State making the request, and the problem must have arisen after the adoption of the harmonisation measure.

(86) In this case, after having examined the scientific aspects in light of the French request, the Commission considers that France has not demonstrated, on the basis of new scientific evidence relating to the protection of the environment or the working environment, that there is a specific problem within its territory which arose following the adoption of Directive 76/116/EEC relating to fertilisers, and which makes it necessary to introduce the notified national measures. Moreover, the Commission considers that the precautionary principle, invoked by France, cannot justify the national measures notified derogating from Directive 76/116/EEC.

(87) Consequently, the request from France for introducing national measures aimed at prohibiting the importation and placement on the market in France certain NK fertilisers of high nitrogen content and containing chlorine does not fulfil all the conditions set out in Article 95(5).

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

(88) Under Article 95(6) of the EC Treaty, the Commission is either to approve or reject the draft national provisions in question after verifying 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.

(89) Since the request made by France does not fulfil the basic conditions set out in Article 95(5) (see part II, section 2.1, of this Decision), the Commission is not obliged to verify whether or not the notified national provisions are a means of arbitrary discrimination or disguised restriction on trade between Member States, and whether or not they constitute an obstacle to the functioning of the internal market.

IV. CONCLUSION

(90) In light of the elements which it had available to assess the merits of the justifications put forward for the national measures notified, and in light of the considerations set out above, the Commission considers that France's request for introducing national provisions derogating from Directive 76/116/EEC with regard to the

importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine, which meet the definition of EC fertilisers and the requirements of Directive 76/116/EEC, submitted on 19 June 2002:

- is admissible,
- does not fulfil all the conditions set out in Article 95(5) of the EC Treaty, as France did not provide new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to it.

- (91) The Commission therefore has grounds to consider that the national provisions notified cannot be approved in accordance with Article 95(6) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The national provisions on limiting the importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine which meet the definition of EC fertilisers and the requirements of Directive 76/116/EEC notified by France pursuant to Article 95(5) of the EC Treaty are rejected.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 18 December 2002.

For the Commission

Erkki LIIKANEN

Member of the Commission
