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From: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 March 2015

To: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

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Subject: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT  
AND THE COUNCIL pursuant to Article 18 of Regulation (EU) No 98/2013  
of the European Parliament and of the Council of 15 January 2013 on the  
marketing and use of explosives precursors, examining the possibilities to  
transfer relevant provisions on ammonium nitrate from Regulation (EC) No  
1907/2006

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Delegations will find attached document COM(2015) 122 final.

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Brussels, 12.3.2015  
COM(2015) 122 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**pursuant to Article 18 of Regulation (EU) No 98/2013 of the European Parliament and  
of the Council of 15 January 2013 on the marketing and use of explosives precursors,  
examining the possibilities to transfer relevant provisions on ammonium nitrate from  
Regulation (EC) No 1907/2006**

## 1. INTRODUCTION

Article 18(2) of Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors<sup>1</sup> states that: ‘By 2 March 2015, the Commission shall present a report to the European Parliament and to the Council examining the possibilities to transfer relevant provisions on ammonium nitrate from Regulation (EC) No 1907/2006 into this Regulation.’

Ammonium nitrate (CAS RN 6484-52-2) is a chemical substance widely used as a fertiliser in the European Union. It can act as an oxidising agent and explodes when mixed with certain other chemicals. For this reason, ammonium nitrate fertilisers with a high nitrogen content are subject to technical requirements.<sup>2</sup> Because of these properties, ammonium nitrate fertilisers have been misused for the illicit manufacture of explosives. To protect against such misuse, access by members of the general public to ammonium nitrate as a substance or in mixtures is restricted and controlled.

At present, there are provisions on ammonium nitrate in both Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)<sup>3</sup> and Regulation (EU) No 98/2013 on the marketing and use of explosives precursors (Regulation on Explosives Precursors). REACH restricts the supply of ammonium nitrate as a substance (or in mixtures containing 16% or more by weight of nitrogen in relation to ammonium nitrate) to users and distributors licensed under Council Directive 93/15/EEC, farmers, and professional users. The Regulation on Explosives Precursors subjects the supply of ammonium nitrate to a mechanism for reporting suspicious transactions, and also enables Member States, via a safeguard clause, to put in place further restrictions if there are reasonable grounds for doing so.

The Regulation on Explosives Precursors aims to enhance public security by making it more difficult to illicitly manufacture explosives, whereas the main focus of REACH is on ensuring substances are used safely, based on their intrinsic properties, and on balancing the free circulation of chemicals in the internal market with a high level of protection for human health and the environment from the risks posed by chemicals.

The Commission therefore considers that the provisions on ammonium nitrate belong in the Regulation on Explosives Precursors. This report will present the findings of the Commission’s examination of the feasibility of transferring the provisions from REACH to the Regulation on Explosives Precursors.

## 2. BACKGROUND

### 2.1. Inclusion of ammonium nitrate in REACH

Entry 58 of Annex XVII to REACH prohibits the supply of ammonium nitrate, in concentrations above a specific threshold, to members of the general public. The restriction

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<sup>1</sup> OJ L 39, 9.2.2013, p.1.

<sup>2</sup> See Annexes III and IV to 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, which detail characteristics of and limits for straight ammonium nitrate fertilisers of high nitrogen content, describe resistance to detonation tests, and list methods for checking compliance and other requirements related to traceability and packaging.

<sup>3</sup> OJ L 396, 30.12.2006, p.1.

was transferred to REACH from Directive 76/769/EEC,<sup>4</sup> which was repealed by REACH with effect from 1 June 2009.

The entry in Annex XVII reads as follows:

*'58. Ammonium nitrate (AN)*

*CAS No 6484-52-2*

*EC No 229-347-8*

*1. Shall not be placed on the market for the first time after 27 June 2010 as a substance, or in mixtures that contain more than 28% by weight of nitrogen in relation to ammonium nitrate, for use as a solid fertiliser, straight or compound, unless the fertiliser complies with the technical provisions for ammonium nitrate fertilisers of high nitrogen content set out in Annex III to Regulation (EC) No 2003/2003 of the European Parliament and of the Council (\*).*

*2. Shall not be placed on the market after 27 June 2010 as a substance, or in mixtures that contain 16% or more by weight of nitrogen in relation to ammonium nitrate except for supply to:*

*(a) downstream users and distributors, including natural or legal persons licensed or authorised in accordance with Council Directive 93/15/EEC (\*\*);*

*(b) farmers for use in agricultural activities, either full time or part time and not necessarily related to the size of the land area.*

*For the purposes of this subparagraph:*

*(i) 'farmer' shall mean a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law, whose holding is situated within Community territory, as referred to in Article 299 of the Treaty, and who exercises an agricultural activity;*

*(ii) 'agricultural activity' shall mean the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established under Article 5 of Council Regulation (EC) No 1782/2003 (\*\*\*);*

*(c) natural or legal persons engaged in professional activities such as horticulture, plant growing in greenhouses, maintenance of parks, gardens or sport pitches, forestry or other similar activities.*

*3. However, for the restrictions in paragraph 2, Member States may until 1 July 2014, for socioeconomic reasons, apply a*

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<sup>4</sup> OJ L 262, 27.9.1976, pp. 201–203 – Repealed by REACH on 31.5.2009.

*limit of up to 20% by weight of nitrogen in relation to ammonium nitrate for substances and mixtures placed on the market within their territories. They shall inform the Commission and other Member States thereof.*

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(\*) *OJ L 304, 21.11.2003, p. 1.*

(\*\*) *OJ L 121, 15.5.1993, p. 20.*

(\*\*\*) *OJ L 270, 21.10.2003, p. 1.'*

Annex XVII to REACH does not provide for licensing or registration regimes. Under REACH, the supply of ammonium nitrate as a substance, or in mixtures that contain 16% or more by weight of nitrogen in relation to ammonium nitrate, to members of the general public, is banned.

## **2.2. Inclusion of ammonium nitrate in the Regulation on Explosives Precursors**

The Commission's 2010 proposal for a regulation on the marketing and use of explosives precursors<sup>5</sup> recommended that: *'For simplification purposes, existing provisions related to ammonium nitrate should be included in the present Regulation and paragraphs 2 and 3 of entry 58 to Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) should be deleted.'*

The aim was to transfer the restrictions on ammonium nitrate from REACH to the Regulation on Explosives Precursors. Consequently, ammonium nitrate (CAS RN 6484-52-2) was included in the proposed Annex I with a limit value of 16% by weight of nitrogen in relation to ammonium nitrate. The proposal explicitly exempted farmers from the restrictions on ammonium nitrate and mixtures containing it. Including ammonium nitrate in the proposed regulation would also make it automatically subject to the mechanism for reporting suspicious transactions, which had no equivalent in REACH. The proposed transfer, however, would have meant that, if Member States set up licensing or registration regimes, they could supply the chemical to the general public. As a result, the proposed transfer could potentially have been less strict than the complete ban on supplying to the general public under REACH.

The proposed transfer was not approved by the Council's Working Party on Technical Harmonisation (Dangerous Substances). While some Member States supported the Commission's reasoning, others felt the transfer would weaken security, as existing restrictions on ammonium nitrate would be relaxed.

It was then suggested that the provisions be transferred with the same level of restriction as in REACH. This alternative would have involved the creation of a third regime in the proposed regulation exclusively for ammonium nitrate, exempting the substance from the licensing and registration rules. It would also have been necessary to add a specific article on ammonium nitrate (containing paragraphs 2 and 3 of entry 58 to Annex XVII), and to include ammonium nitrate in Annex II, to ensure the reporting of suspicious transactions.

The Council's Working Party met on ten occasions between January and October 2011 to examine the Commission's proposal, and concluded that the provisions contained in

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<sup>5</sup> COM(2010) 473 final.

REACH should not be amended but should be complemented by the requirement to report suspicious transactions under the proposed regulation. Nonetheless, the Working Party noted that several Member States supported the transfer, and therefore proposed that the Commission re-examine this issue at a later date, with a view to preparing a legislative proposal, if appropriate.

In preparation for the first ‘informal triologue’ (discussions between the Commission, the European Parliament and the Council), the Council accordingly suggested the following amendments to the Commission’s proposal:

- amendment of the recital to remove the transfer of the provisions on ammonium nitrate;
- inclusion of ammonium nitrate in Annex II;
- addition of a provision requiring an early review by the Commission of the feasibility of transferring the provisions.

The European Parliament’s position at first reading, as tabled for plenary on 11 September 2011,<sup>6</sup> corresponded with the Council’s. The Commission subsequently agreed to maintain the Council text relative to ammonium nitrate.

The Regulation on Explosives Precursors was adopted on 15 January 2013 with the following recital:

*‘(24) By virtue of Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)<sup>(1)</sup> the supply to members of the general public of ammonium nitrate that could be readily misused as an explosive precursor is prohibited. However, the supply of ammonium nitrate to certain professional users, in particular farmers, is permitted. That supply should therefore be subject to the reporting mechanism for suspicious transactions established by this Regulation, since there is no equivalent requirement in Regulation (EC) No 1907/2006.’*

Ammonium nitrate (CAS RN 6484-52-2) [in concentrations of 16 % by weight of nitrogen in relation to ammonium nitrate or higher] was included in Annex II, listing ‘substances on their own or in mixtures or in substances for which suspicious transactions shall be reported.’ In addition, Article 18(2) required a review of the possibility of transferring the relevant provisions on ammonium nitrate from Regulation (EC) No 1907/2006 to Regulation (EU) No 98/2013 to be carried out by 2 March 2015.

### **3. CONSULTATIONS WITH MEMBER STATES**

The Standing Committee on Precursors (SCP), where all EU Member States are represented, has played a leading role in drafting the proposal and assessing the risk management measures for ammonium nitrate from the very beginning. This expert group was created

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<sup>6</sup> Report: Jan Mulder (A7-0269/2012), Report on the proposal for a regulation of the European Parliament and of the Council on the marketing and use of explosives precursors (COM(2010) 0473 – C7-0279/2010 – 2010/0246(COD)), Committee on Civil Liberties, Justice and Home Affairs.

following recommendations in the 2008 EU Action Plan on Enhancing the Security of Explosives, which called for restrictions on the sale of ammonium nitrate fertilisers to the general public. In 2008, the SCP carried out preparatory work for the inclusion of ammonium nitrate in Directive 76/769/EEC (repealed by REACH in 2009) in the absence of a regulation specifically restricting substances posing a threat to public security. Later, the SCP also carried out preparatory work for the Regulation on Explosives Precursors.

The Commission sent a questionnaire to the members of the SCP on 27 May 2014, asking them to forward it to the authorities responsible for implementing the Regulation on Explosives Precursors. Question 23 concerned Article 18 and asked ‘*Would your Member State support the transfer of relevant provisions on ammonium nitrate from Regulation (EC) No 1907/2006 into this Regulation?*’

A total of 19 authorities out of 30 possible respondents<sup>7</sup> replied to the questionnaire and to Question 23 in particular. The replies showed that the positions of Member States were still widely divergent. However, responders noted that they would welcome further discussions and a draft legislative proposal before taking a definitive position.

The replies to the questionnaire were discussed at the SCP meeting on 8 October 2014, but no consensus was reached on this particular point.

The Commission also raised the transfer issue at the 16th Meeting of Competent Authorities for REACH and the CLP<sup>8</sup> (CARACAL) on 10 November 2014.

During and after both meetings, Member States were invited to express their consolidated positions. Opinions continued to diverge, and some Member States were undecided.

Following the consultations with the Member States, the Commission notes the main arguments for and against transferring the relevant provisions on ammonium nitrate from REACH to the Regulation on Explosives Precursors:

- Member States in favour of the transfer argue that the restrictions on ammonium nitrate relate directly to public security, but only indirectly to the protection of human health. They were included in REACH by default as there was no other suitable regulatory tool available at the time. Now there is tailor-made legislation, so the transfer would harmonise and simplify EU law in line with the Commission’s ‘better regulation’ principle. It is also argued that keeping the ammonium nitrate provisions in REACH causes confusion for businesses, given the different nature of the risks involved.
- Member States that object to the transfer argue that it would weaken security around ammonium nitrate, as it may allow national competent authorities to make the substance available to the general public via licensing or registration regimes, which they are entitled to set up under Regulation (EU) No 98/2013.

This consultation did not touch on the possibility of creating a third regime for ammonium nitrate under the Regulation on Explosives Precursors. Moreover, no reference was made to the legal feasibility of the transfer, or to any excessive costs potentially arising from it.

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<sup>7</sup> The United Kingdom appointed separate authorities for Great Britain and Northern Ireland; Norway is also implementing the Regulation on Explosives Precursors.

<sup>8</sup> Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures.

#### 4. SUMMARY AND CONCLUSIONS

The EU Action Plan on Enhancing the Security of Explosives called in 2008 for restrictions on the sale of ammonium nitrate fertilisers to the general public. There is thus a general agreement that the marketing and use of ammonium nitrate poses serious security concerns.

The Commission considers that as the risks relate to public security, the restrictions on ammonium nitrate are better placed in the Regulation on Explosives Precursors and would support the transfer of the relevant provisions from REACH, as originally intended in its 2010 proposal. The main objective of REACH remains to ensure public safety, health and protection of workers and the Regulation does not refer to public security. With the transfer of ammonium nitrate to the Regulation on Explosives Precursors, safety concerns of ammonium nitrate would continue to be covered by the Regulation (EC) No. 2003/2003 relating to fertilisers.

However, given the continuing lack of consensus from one of the co-legislators, i.e. the Council, on this issue, both in terms of the desirability of the transfer itself and the exact form it would take (i.e. whether ammonium nitrate would simply be transferred to Annex I, or whether separate arrangements would be made), a legislative proposal to transfer the provisions would probably not garner enough support in Council.

In addition, the Commission notes that the competent authorities in Member States have had little time to gather relevant experience from implementing the Regulation on Explosives Precursors, as it only entered into force on 2 September 2014. It is therefore reasonable that Member States may want to examine the costs and benefits of the transfer at a later date.

Consequently, the Commission does not at present intend to propose legislation to transfer the relevant provisions on ammonium nitrate from Regulation (EC) No 1907/2006 to Regulation (EU) No 98/2013. Instead, it will re-examine the possibility and the exact nature of such a transfer as part of a larger review planned for 2017 under Article 18(1) of the latter Regulation.