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WORKING PAPER

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From:	DE delegation
To:	Working Party on Technical Harmonisation (Explosives Precursors)
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the marketing and use of explosives precursors, amending Annex XVII to Regulation (EC) No 1907/2006 and repealing Regulation (EU) no 98/2013 on the marketing and use of explosives precursors - Comments from the DE delegation on WK 11040/2018 (Presidency compromise proposal)

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Comments by the Federal Republic of Germany
on the
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL on the marketing and use of explosives precursors, amending
Annex XVII to Regulation (EC) No 1907/2006 and repealing Regulation (EU) No
98/2013 on the marketing and use of explosives precursors
(Presidency compromise proposal)
WK 11040/2018

Germany suggests the following modifications of the proposal to be made. **Please note** that Germany reserves the right to add further comments at a later stage.

General Comments:

Germany shares the Commission's standpoint that the measures to be taken for harmonisation and a stricter implementation need to go beyond the existing legal framework.

The existing Regulation (EU) 98/2013 restricts the availability to the general public (in particular final consumers and private persons) of substances that can be misused for the illicit manufacture of explosives. The revision of the Regulation should not lead to the burden of further unnecessary bureaucratic requirements for the chemical industry.

Germany believes that clear definitions are an important prerequisite for defining the requirements in the supply chain. These must take into account the real conditions in the chemical industry, which usually has no contact with members of the general public.

In Germany's view, it should therefore be considered whether a closer alignment with the REACH Regulation could be made in such a way that the individual participants in the supply chain (manufacturer, importer, downstream user or distributor) are more clearly defined. The definition of "professional user" is only helpful if it draws a clear borderline between industrial manufacture/processing and downstream trade levels.

Furthermore, as far as the inclusion of farmers in the definitions of the draft regulations is concerned, there is, in Germany's view, a certain inconsistency present in the current draft:

While recital 10 (still) uses the formulation "including agricultural activity, either full time or part time and **not necessarily related to the size of the land area**", the wording of Art. 3 (8) reads "including

agricultural activity, either full time or part time and **regardless of the size of the land area**". Germany would suggest that the wording of recital 10 should be used in Art. 3 (8) as well, as this would also ensure consistency with the REACH Regulation.

Article 3 (10)

"online marketplace means a provider of an intermediary service that allows economic operators on the one hand, and members of the general public **and** professional users on the other hand, to conclude transactions regarding regulated explosives precursors via online sales or service contracts, **whereas the transactions are processed by the online market place operator.**"

Comment:

It is not evident how the last two lines contribute to the definition of an online marketplace. Due to the obligations that the regulation imposes on online marketplaces, it is necessary that the definition is precise. So far no example was given for what the second alternative, "...transactions regarding regulated explosives precursors via online sales on an economic operator's website that uses computing services provided by the online marketplace" means in practice. By adding "whereas transactions are processed by the online marketplace operator" as suggested above, it becomes clear that the online marketplace has a certain degree of insight in the transactions / control over the transactions, which is necessary to fulfil the duties in Art. 8.

Article 3 (12)

"regulated explosives precursor" means a substance listed in Annexes I or II and includes a mixture or other substance in which a substance listed in those Annexes is present; ~~excluding mixtures of more than 5 ingredients in which the concentration of each substance listed in Annexes I or II is below 1 % w/w~~ **excluding mixtures of more than five ingredients unless a substance listed in Annex I or II is the dominant ingredient in the mixture and excluding mixtures where the concentration of any precursor is below 1 % (or 3 % N by weight for nitrogenous fertilisers).**"

Comment:

It does not make sense to set exceptions for concentration limits below 1% if higher concentration limits are specified in Annex I, while Annex II does not set any limit values at all. The proposed wording is in the sense with the current provisions in the guidelines for the Regulation (EU) 98/2013.

Article 6 (8)

“Information on previous criminal convictions in other Member States as referred to in paragraph 1, point (c), **which are directly relevant to the assessment of the applicant’s competence or reliability**, shall be obtained **in accordance with** Council Framework Decision 2009/315/JHA11. Responses to requests for such information shall be provided by the **competent** authorities referred to in Article 3 of that Framework Decision within 20 working days from the date the request was received.”

Comment:

Germany reiterates its criticism of the envisaged provision in Article 6 (8), which stipulates that the ECRIS system should be used for exchanging information on previous criminal convictions, but without the prerequisites and limitations set down in the ECRIS Framework Decision, as regards requests for information, being applicable – e.g. via full reference to this Decision. Germany rejects the unrestricted access to information only afforded to public prosecution offices and courts for criminal law purposes, as well as a limited number of selected authorities. At present, information would be provided by the German registry authority through the means of a certificate of good conduct for official purposes.

Furthermore, in our view, the current wording: “Information [...] shall be obtained through the system established by Council Framework Decision 2009/315/JHA” only serves to describe the technical means of obtaining information, but does not indicate the applicability of the Framework Decision itself.

In addition – unlike in the case of criminal justice cooperation – requests for information for granting licences in connection with explosive substances should, in terms of content, be limited to their specific purpose. Information should only be provided if it is directly relevant to the assessment of the applicant’s reliability (“which are directly relevant to the applicant's competence or reliability”, cf. e.g. the Services Directive). If full reference to the ECRIS Framework Decision were to be made, this point could be disregarded.

Moreover, responsibility for the transmission of information should lie not with the registry authority but rather with the competent authority under the Regulation. It is not acceptable that the registry authority should provide the relevant information. The registry authority has neither the competence nor the expertise to decide on requests for information in the context of licensing procedures for the use of explosives precursors. This is a matter for the competent authority. The registry authority simply provides the requested entries from the Federal Central Criminal Register.

Art. 8 (2):

Text of the Presidency Compromise Proposal:

“For the purpose of verifying that a prospective customer is a professional user or another economic operator, ~~an~~ the economic operator who makes available a restricted explosives precursor to a professional user or ~~a farmer~~ another economic operator shall for each transaction request the following, unless such a check for that recipient-prospective customer has already occurred within a period of one year and the transaction does not significantly deviate from previous transactions: (...)”

Proposed new text:

“For the purpose of verifying that a prospective customer is a professional user, the economic operator who makes available a restricted explosives precursor to a professional user shall for each transaction request the following, unless such a check for that prospective customer has already occurred and the transaction does not significantly deviate from previous transactions: (...)”

Comment:

We believe that the supplement “another economic operator” is a mistake. Number 2 should regulate the making available on professional users (including farmers). An obligation to verify in each transaction the same uses and already known economic operator would cause a major extra burden for chemical companies in B2B trade.

Art. 10:

“(1) Member States shall ensure the provision of adequate resources for the training **by competent authorities** for law enforcement, first responders and customs authorities to recognise regulated explosives precursors substances and mixtures during the course of their duties and to react in a timely and appropriate manner to suspicious activity.

(2) Member States shall organise, at least once a year, awareness-raising actions **by competent authorities**, targeted to the specificities of each different sector using regulated explosives precursors.”

Comment:

The addition of “by competent authorities” is required for clarification and to ensure an unambiguous allocation of responsibility to one entity.

Annex 1:

The listing of sulphuric acid in Annex I with corresponding maximum concentrations between 15 % and 40 % can have drastic consequences for the chemical industry. An assessment of the possible economic consequences of the inclusion of sulphuric acid in Annex I is currently not foreseeable. Sulphuric acid is a widespread basic chemical - in Germany alone more than 3 million tonnes were produced in 2016. In our opinion, an appropriate impact assessment would be necessary here, especially the availability of high-percentage sulphuric acid is available via the products car batteries.