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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 - DE comments on Final Presidency compromise text (WK 13496/2018 REV 1)

14/11/2018

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
(Final Presidency Compromise Text)
WK 13496/2018 INIT

Germany suggests the following modifications to the proposal:

Article 3 (12)

Final Presidency Compromise Text:

“‘regulated explosives precursor’ means a substance listed in Annexes I or II and includes a mixture or another substance in which a substance listed in those Annexes is present; excluding homogeneous mixtures of more than 5 ingredients in which the concentration of each substance listed in Annex I or II is below 1 % w/w;”

Suggested alternative wording:

“‘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 homogenous 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 consistent with the current provisions in the guidelines for the Regulation (EU) 98/2013.

Article 6 (8)

Final Presidency Compromise Text:

“The competent authority shall obtain the information on previous criminal convictions of the applicant in other Member States as referred to in paragraph 1, point (c) shall be obtained through the system established by Council Framework Decision 2009/315/JHA11. The central authorities referred to in Article 3 of that Framework Decision shall, within 10 working days from the date the request was received shall provide responses to requests for such information.”

Suggested alternative wording:

“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 Final Presidency Compromise Proposal:

"For the purpose of verifying that a prospective customer is a professional user or **another economic operator**, ~~as the~~ economic operator who makes available a restricted explosives precursor to a professional user or a ~~former~~ **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: (...)**"

Suggested alternative wording:

"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 ~~or another economic operator~~ 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. 9 and Recital 12a:

Final Presidency Compromise Text:

(12a) This Regulation should lay down specific obligations for online marketplaces concerning the detection and reporting of suspicious transactions taking place on their website or using their computing services. These obligations should apply notwithstanding Article 15 of Directive 2000/31/EC, whilst at the same time ensuring, under certain conditions, that an online marketplace can benefit from the exemption of liability provided for by Article 14 of that Directive. Therefore, online marketplaces should not be held liable, on the basis of this Regulation, for transactions that were not detected despite the marketplace having in place appropriate, reasonable and proportionate procedures to detect such a suspicious transaction.

Suggested alternative wording:

(12a) This Regulation should lay down specific obligations for online marketplaces concerning the detection and reporting of suspicious transactions taking place on their website or using their computing services. These obligations should apply notwithstanding Article 15 of Directive 2000/31/EC, whilst at the same time ensuring, under certain conditions, that an online marketplace can benefit from the exemption of liability provided for by Article 14 of that Directive. ~~Therefore, online marketplaces should not be held liable, on the basis of this Regulation, for transactions that were not detected despite the marketplace having in place appropriate, reasonable and proportionate procedures to detect such a suspicious transaction.~~

Final Presidency Compromise Text:

2. Notwithstanding Article 15 of Directive 2000/31/EC, economic operators and online marketplaces shall have in place appropriate, reasonable and proportionate procedures to detect suspicious transactions, targeted to the specific environment in which the regulated

explosives precursors are offered. Online marketplaces shall not be held liable, on the basis of this provision, for transactions that were not detected despite their due diligence.

Suggested alternative wording:

2. Notwithstanding Article 15 of Directive 2000/31/EC, economic operators and online marketplaces shall have in place appropriate, reasonable and proportionate procedures to detect suspicious transactions, targeted to the specific environment in which the regulated explosives precursors are offered. ~~Online marketplaces shall not be held liable, on the basis of this provision, for transactions that were not detected despite their due diligence.~~

Comment:

It is unclear why it was added that online marketplaces shall not be held liable AT ALL, if they do not detect suspicious transactions albeit their obligation to do so. Already by applying the normal liability regime an online marketplace cannot be held liable without culpability. Making this change can have far reaching - and possibly not manageable - consequences. We cannot identify the specific danger that this change intends to protect against.

Art. 10:

Final Presidency Compromise Text:

„Training and awareness-raising

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

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

Suggested alternative wording:



“(1) Member States shall ensure the adequate resources for and the provision of 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.