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### **WORKING PAPER**

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### **WORKING DOCUMENT**

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| From:    | DE delegation                                                                                                                                                                                                                                                                                                        |
| To:      | Working Party on Technical Harmonisation (Explosives Precursors)                                                                                                                                                                                                                                                     |
| Subject: | Comments from the German delegation 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 |

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**Comments and suggestions 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

The Federal Republic of Germany reserves the right to add further comments at a  
later date.

Suggested modifications of the proposal are printed **red and bold**.

*Article 3*

**Definitions**

For the purposes of this Regulation the following definitions shall apply:

- (1) 'substance' means a substance within the meaning of point (1) of Article 3 of Regulation (EC) No 1907/2006;
- (2) 'mixture' means a mixture within the meaning of point (2) of Article 3 of Regulation (EC) No 1907/2006;
- (3) 'article' means an article within the meaning of point (3) of Article 3 of Regulation (EC) No 1907/2006;
- (4) 'making available' means any supply, whether in return for payment or free of charge;
- (5) 'introduction' means the act of bringing a substance into the territory of a Member State whether from another Member State or from a third country;
- (6) 'use' means any processing, formulation, storage, treatment or mixing, including in the production of an article, or any other utilisation;
- (7) 'member of the general public' means any natural or legal person who has a need for a restricted explosives precursor for purposes that are not connected with their trade, business, craft or profession;
- (8) 'professional user' means any natural or legal person **who is not a downstream user within the meaning of point (13) of Regulation (EC) No 1907/2006** and who has a demonstrable need for a restricted explosives precursor for purposes connected with their trade, business, craft or profession which exclude making that restricted explosives precursor available to another person.



- (9) 'economic operator' means any natural or legal person or public entity or group of such persons and/or bodies which delivers regulated explosives precursors or services related to regulated explosives precursors, on the market, either off- or online and including **on** online marketplaces;
- (10) 'online marketplace that acts as an intermediary' means a provider of an intermediary service that allows economic operators on the one hand, and members of the general public, professional users or farmers on the other hand, to conclude transactions regarding regulated explosives precursors via online sales or service contracts with economic operators either on the online marketplace's website or on an economic operator's website that uses computing services provided by the online marketplace;
- (11) 'restricted explosives precursor' means a substance listed in Annex I, in a concentration higher than, or, in the case of ammonium nitrate, in a concentration equal to or higher than the corresponding limit value set out in column 2 therein and includes a mixture or another substance in which such a listed substance is present in a concentration higher than, or, in the case of ammonium nitrate, in a concentration equal to or higher than the corresponding limit value;
- (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 in which the concentration of any such substance is below 1 %, and mixtures containing more than five ingredients**;
- (13) 'agricultural activity' means 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 94 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council<sup>1</sup>;
- (14) 'farmer' means a natural or legal person, or a group of natural or legal persons, regardless of the legal status granted to such group and its members by national law, whose holding is situated within the territorial scope of the Treaties, as defined in Article 52 TEU in conjunction with Articles 349 and 355 TFEU, and who exercises an agricultural activity.

## Comments:

*Concerning point (8):*

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<sup>1</sup> Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ L 347, 20.12.2013, p. 549).



To avoid that an undue burden is placed on the chemical industry, it is appropriate to exclude 'downstream users' in the sense of the REACH regulation from the scope of the definition of 'professional user', regardless of whether or not they make available restricted precursors to another person.

*Concerning point (9):*

Article 3 point (9) defines "economic operator". How is "including online marketplaces" at the end of the sentence to be understood? Typically, an online marketplace is a platform where a product or service is provided by multiple third parties, whereas transactions are processed by the marketplace operator, the intermediary. Therefore, does A) economic operator include online marketplace (operators), or B) does it refer to where the transaction takes place, i.e. where the explosives are delivered by the economic operators on the market, whether this is off or online and also on online marketplaces. If it is to be understood as B), we suggest the wording as included in the document.

Moreover, Article 3 point (9) refers to "online marketplace". Is this different from "online marketplace that acts as an intermediary" as defined in Article 3 point (10)?

*Concerning point (10):*

This definition is too vague given the obligations imposed on online marketplaces under the Regulation. The range of the regulation in this respect is unclear. The definitions of "service contracts with economic operators" and "computing services" should be clarified.

*Concerning point (12):*

To ensure that the monitoring duties imposed by the Regulation on economic actors are not disproportionate, those mixtures that do not constitute a threat should be excluded from its ambit. This is the case in products where a certain precursor is so diluted that it would be easier to obtain it by other means than to extract it from the product. The exceptions suggested above are already part of the "Guidelines by the European Commission and the Standing Committee on Precursors relating to Regulation (EU) No 98/2013". To enhance regulatory clarity and legal certainty, it is suggested above to include these exceptions in the text of the Regulation itself.

(...)



## Article 6

### Licences

1. Each Member State which issues licences to members of the general public with a legitimate interest to acquire, introduce, possess or use restricted explosives precursors shall lay down rules for granting the licence provided for in Article 5(3). When considering whether to grant a licence, the competent authority of the Member State shall take into account all relevant circumstances, in particular:
  - (a) the legitimacy of the intended use of the substance;
  - (b) the availability of lower concentrations or alternative substances that would achieve a similar effect;
  - (c) the background of the applicant, including information on previous criminal convictions of the applicant anywhere within the Union;
  - (d) the proposed storage arrangements to ensure that the restricted explosives precursor is kept securely;
2. The licence shall be refused if there are reasonable grounds for doubting the legitimacy of the intended use or the intentions of the user to use it for a legitimate purpose.
3. The competent authority may choose how to limit the validity of the licence, through permitting single or multiple use for a period not exceeding three years. The competent authority may oblige the licence holder to demonstrate, until the designated expiry of the licence, that the conditions under which the licence was granted are still fulfilled. The licence shall mention the restricted explosives precursors in respect of which it is issued.
4. The competent authorities may require applicants to pay a licence application fee. Such a fee shall not exceed the cost of processing the application.
5. The competent authority may suspend or revoke the licence where there are reasonable grounds for believing that the conditions under which the licence was granted are no longer fulfilled.
6. Appeals against any decision of the competent authority, and disputes concerning compliance with the conditions of the licence, shall be heard by an appropriate body responsible under national law.
7. A Member State with a licensing regime referred to in Article 5(3) may recognise licences granted by other Member States.

Member States may use the format for issuing a licence provided for in Annex III.

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 exchanged in accordance with the rule set out in Article 7 (2) of -shall**



~~be obtained through the system established by~~ Council Framework Decision 2009/315/JHA<sup>2</sup>. Responses to requests for such information shall be provided by the **central competent** authorities ~~referred to in Article 3 of that Framework Decision~~ within 20 working days from the date the request was received.

9. Licences issued by a Member State in accordance with Article 7 of Regulation (EC) No 98/2013 which are still valid on [*the day of entry into application of this Regulation*] shall lose their validity on that date. Each Member State may decide, upon request of the licence holder, to confirm, renew or prolong such licences issued in that Member State if the restricted explosives precursors can be subject to a license in accordance with the limit values set out in column 3 of Annex I and if the competent authority considers that the requirements for granting the licence as referred to in paragraph 1 are met. Such confirmation, renewal or prolongation should respect the time limit set in paragraph 3 of this Article.

#### **Concomitant modification of the Recitals:**

(COM-proposal, p. 13):

“Article 6: Licenses – This provision sets out rules governing the criteria and procedures for issuing and granting licenses. Regulation (EU) No 98/2013 requires the competent authorities to take into account all relevant circumstances, and in particular the legitimacy of the intended use. The proposed Regulation makes more specific what other relevant circumstances are to be taken into account, namely the availability of lower concentrations or alternative substances that would achieve a similar effect, the proposed storage arrangements to ensure that the restricted explosives precursor is kept securely and the background of the individual applying for a licence, including his or her criminal records.

Information on criminal records is to be exchanged under Council Framework Decision 2009/315/JHA of 26 February 2009<sup>28</sup>. The usage of this European Criminal Records Information System (ECRIS) system for obtaining information on previous convictions will ensure that when issuing licenses, the authorities of the Member States will not only take account of convictions rendered in their own Member State, but also those handed down in other Member States. This will ensure that all relevant available information on previous convictions will be taken into account when deciding whether or not to grant a license. In addition, the provision ensures that all Member States will

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<sup>2</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23).



be obliged to respond to requests for such information **in accordance with their national law, irrespective of the provisions of their national law on this point.**

#### Comments:

The proposed modification of the wording of the Draft Regulation makes clear that the exchange of information regarding previous criminal convictions should ensue in full compliance with the conditions set out in the Council Framework Decision 2009/315/JHA.

#### Article 7

##### Informing the supply chain

1. An economic operator who makes available a **regulated explosives precursor** to another economic operator shall inform that economic operator that the acquisition, possession or use of that **restricted** explosives precursor by members of the general public is subject to a restriction as set out in Article 5(1) and (3), **or that the explosives precursor is subject to the reporting obligations as set out in Article 9.**
2. An economic operator who makes available regulated explosives precursors to a professional user or to a member of the general public in accordance with Article 5(3) shall ensure and be able to demonstrate to the competent authorities referred to in Article 11 that their personnel involved in the sale of regulated explosives precursors is:
  - (e) aware of the fact that products that it offers and contain regulated explosives precursors;
  - (f) instructed regarding the obligations pursuant to Articles 5 to 9 of this Regulation.
3. An online marketplace that acts as an intermediary shall take measures to ensure that its users, when making available restricted explosives precursors through its services, are informed of their obligations pursuant to this Regulation.

#### Comments:

##### *Concerning paragraph 1:*

It seems problematic that the information obligations within the supply chain pursuant to Art. 7 (1) and (3) of the draft VO only apply to "restricted explosive precursors", i.e. Annex I substances above the concentration limits. In order to enable retailers to fully





comply with their reporting obligations with respect to suspicious transactions, it would be necessary to include all regulated explosives precursors.

*Concerning paragraph 3:*

We would like to ask the Commission for clarification of the wording "pursuant to this Regulation" in Article 7 paragraph 3. It is unclear whether the obligation to provide information also extends to the obligations under the law of the respective Member States. We also ask for an explanation of the term 'users'. This term is not defined and differs from the terminology used elsewhere in the Regulation.

(...)

#### *Article 9*

#### **Reporting of suspicious transactions, disappearances and thefts**

1. For the purpose of detecting and preventing the illicit manufacture of explosives, economic operators shall report transactions concerning regulated explosives precursors, including transactions involving professional users, where there are reasonable grounds for suspecting that the substance or mixture is intended for the illicit manufacture of explosives.

Economic operators shall report such suspicious transactions after having regard to all the circumstances and in particular where the prospective customer displays one or more of the following:

- (a) appears unclear about the intended use of the regulated explosives precursors;
  - (b) appears unfamiliar with the intended use of the regulated explosives precursors or cannot plausibly explain it;
  - (c) intends to buy regulated explosives precursors in quantities, combinations or concentrations uncommon for legitimate use;
  - (d) is unwilling to provide proof of identity, place of residence or, where appropriate, status as professional user or economic operator;
  - (e) insists on using unusual methods of payment, including large amounts of cash.
2. Economic operators **and online marketplaces that act as an intermediary**, ~~other than online marketplaces that act as an intermediary~~, shall have in place procedures to detect suspicious transactions, targeted to the environment in which the regulated explosives precursors are offered.





3. Economic operators may refuse the suspicious transaction and shall report the suspicious transaction or attempted transaction **without undue delay** ~~within 24 hours~~, including if possible the identity of the customer, to the national contact point of the Member State where the suspicious transaction was concluded or attempted.
4. Each Member State shall set up one or more national contact points with a clearly identified telephone number and e-mail address for the reporting of suspicious transactions. The national contact points shall be available on a 24/7 basis.
5. Economic operators and professional users shall report significant disappearances and thefts of regulated explosives precursors to the national contact point of the Member State where the disappearance or theft has taken place. In deciding whether a disappearance or theft is significant, they shall take into account whether the amount is unusual in all circumstances of the case.
6. Members of the general public that have acquired restricted explosives precursors in accordance with Article 5(3) shall report significant disappearances and thefts of restricted explosives precursors to the national contact point of the Member State where the disappearance or theft has taken place.

## Comments:

### *Concerning paragraph 2:*

The suggestions that “online marketplaces that act as an intermediary” should be exempt from monitoring obligations is not acceptable, as its adoption would create a significant security gap. As police experience amply demonstrates, such online marketplaces have, in the past, frequently been used to acquire explosives precursors for planned terrorist attacks. At the same time, it would even be easier for online marketplaces to comply with the monitoring obligations than for stationary retailers, as such online platforms already heavily rely on algorithms to analyze user conduct. Therefore, this exception should not be adopted.

### *Concerning paragraph 3:*

A strict deadline of 24 hours seems too rigid to accommodate the specificities of various different businesses. Therefore, the wording “without undue delay”, which is also used in the present regulation, should be kept. In any event, it should be noted that there is an inconsistency between the English and German language versions of the current proposal: While the English and French versions refer to a deadline of 24

hours, the German version simply states that the suspicious transaction has to be reported “*unverzüglich*”, meaning “without undue delay”.

#### Article 10

##### Training and awareness-raising

1. Member States shall provide training 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 appropriate intervals, at least twice a year**, awareness-raising actions, targeted to the specificities of each different sector using regulated explosives precursors.

#### Comments:

##### *Concerning paragraph 2:*

The timeframe for conducting awareness-raising actions should be more flexible in order to accommodate the specificities of the situation in the various member states and economic sectors.

#### Article 14

##### Safeguard clause

1. Where a Member State has reasonable grounds for believing that a specific substance not listed in the Annex I or II could be used for the illicit manufacture of explosives, it may restrict or prohibit the making available, possession and use of that substance, or of any mixture or substance containing it, or it may provide that the substance be subject to the reporting of suspicious transactions in accordance with Article 9.
2. Where a Member State has reasonable grounds for believing that a specific substance listed in Annex I could be used for the illicit manufacture of explosives, at a concentration lower than the limit values laid down in column 2 or 3 of Annex I, it may further restrict or prohibit the making available, possession and use of that substance by imposing a lower concentration limit value.
3. Where a Member State has reasonable grounds for establishing a concentration limit value above which a substance listed in Annex II should be subject to the restrictions otherwise applying to restricted explosives precursors, it may restrict or prohibit the making available, possession and use of that substance by imposing a maximum permitted concentration.



4. A Member State restricting or prohibiting substances in accordance with paragraph 1, 2 or 3 shall immediately inform the Commission and the other Member States thereof, giving its reasons.
5. In the light of the information communicated pursuant to paragraph 4, the Commission shall immediately examine whether to prepare amendments to the Annexes in accordance with Article 15(1) or to prepare a legislative proposal to amend the Annexes. The Member State concerned shall, where appropriate, amend or repeal its national measures to take account of any such amendment to the Annexes.
- ~~6. Without prejudice to paragraph 5, the Commission may, after consulting the Member State and, if appropriate, third parties, decide that the measure taken by the Member State is not justified and request the Member State to withdraw it.~~

#### Comments:

##### *Concerning paragraph 6:*

The decision-making power of the COM provided for in Art. 14 (6) of the Draft Regulation would infringe the division of competences between the institutions of the Union, and thus the institutional balance set out in the European Treaties (Article 13 (2) TEU). In the case of an alleged infringement of EU law by Member States, the Commission is, as a matter of principle, limited to the infringement procedure under Article 258 TFEU, with a final judgment rendered by the ECJ. Within this framework, only the ECJ can make a binding decision on the compatibility of domestic legislation with EU law.

#### *Article 15*

##### **Amendments to the Annexes**

1. The Commission shall adopt delegated acts in accordance with Article 16 concerning ~~the addition of substances to Annex I and~~ changes of the limit values in Annex I to the extent necessary to accommodate developments in the misuse of substances as explosives precursors, or on the basis of research and testing, as well as concerning the addition of substances to Annex II, where necessary to accommodate developments in the misuse of substances as explosives precursors. The Commission shall, as part of the preparation of the delegated acts, consult relevant stakeholders, in particular the chemical industry and the retail sector.

Where, in the case of a sudden change in the risk assessment as far as the misuse of substances for the illicit manufacture of explosives is concerned, imperative grounds of urgency so require, the procedure provided for in Article 17 shall apply to delegated acts adopted pursuant to this Article.



2. The Commission shall adopt a separate delegated act in respect of **each addition of substances to Annex I and** each change of the limit values in Annex I and each new substance added to Annex II. Each delegated act shall be based on an analysis demonstrating that the amendment is not likely to lead to disproportionate burdens on economic operators or consumers, having due regard to the objectives sought to be achieved.

#### Comments:

The proposal to grant to the Commission the power to add new substances to Annex I by way of delegated acts is not acceptable. Placing new substances on Annex I has significant impacts on the lives of the citizens of Member States, because it implies a de facto ban on the use of such substances for private purposes. Such a significant amendment should only be possible by way of the ordinary legislative process. Moreover, even from the point of view of security authorities, there is no need for the introduction of delegated acts, as there have not yet been any such "emergency cases" in which wholly new, unregulated substances have suddenly been used as explosives precursors.

#### Article 20

##### Reporting

1. Member States shall report to the Commission [*one year after the date of application*] and subsequently **at regular intervals on an annual basis**, the following information:
  - (f) the number of reported suspicious transactions, disappearances and thefts respectively;
  - (g) the number of licence applications received as referred to in Article 5(3), as well as the number of licences provided, and the most common reasons for refusing to grant licenses;
  - (h) information on awareness-raising actions as referred to Article 10(2);
  - (i) information on inspections carried out as referred to in Article 11, including the number of inspections and economic operators covered.
2. Member States shall, in submitting the information referred to in paragraph 1(a), (c) and (d) to the Commission, distinguish which reports, actions and inspections relate to on- and offline activities.

#### Comments:



The timeframe with respect to the reporting obligation under Article 20(1) should be more flexible.

(...)

### **ANNEX I - RESTRICTED EXPLOSIVES PRECURSORS**

Substances which shall not be made available to, or introduced, possessed or used by, members of the general public on their own, or in mixtures or substances including them, except if the concentration is equal to or lower than the limit values set out in column 2.

| 1. Name of the substance and Chemical Abstracts Service Registry number (CAS RN) | 2. Limit value                                                   | 3. Upper limit value for the purpose of licensing under Article 5(3) | 4. Combined Nomenclature (CN) code for a separate chemically defined compound meeting the requirements of Note 1 to Chapter 28 or 29 of the CN, respectively ( 1 ) | 5. Combined Nomenclature (CN) code for a mixture without constituents (e.g. mercury, precious or rare-earth metals or radioactive substances) which would determine classification under another CN code ( 1 ) |
|----------------------------------------------------------------------------------|------------------------------------------------------------------|----------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nitric acid (CAS RN 7697-37-2)                                                   | 3 % w/w                                                          | 10% w/w                                                              | ex 2808 00 00                                                                                                                                                      | ex 3824 99 96                                                                                                                                                                                                  |
| Hydrogen peroxide (CAS RN 7722-84-1)                                             | 12 % w/w                                                         | 35 % w/w                                                             | 2847 00 00                                                                                                                                                         | ex 3824 99 96                                                                                                                                                                                                  |
| Sulphuric acid (CAS RN 7664-93-9)                                                | <del>15</del> 40 % w/w                                           | <del>40%-w/w</del><br>N/A                                            | ex 2807 00 00                                                                                                                                                      | ex 3824 99 96                                                                                                                                                                                                  |
| Nitromethane (CAS RN 75-52-5)                                                    | 16 % w/w                                                         | 40% w/w                                                              | ex 2904 20 00                                                                                                                                                      | ex 3824 99 92                                                                                                                                                                                                  |
| Ammonium nitrate (CAS RN 6484-52-2)                                              | 16 % by weight of nitrogen in relation to ammonium nitrate ( 2 ) | N/A                                                                  | 3102 30 10 (in aqueous solution)<br>3102 30 90 (other)                                                                                                             | ex 3824 99 96                                                                                                                                                                                                  |
| Potassium chlorate (CAS RN 3811-04-9)                                            | 40 % w/w                                                         | N/A                                                                  | ex 2829 19 00                                                                                                                                                      | ex 3824 99 96                                                                                                                                                                                                  |
| Potassium                                                                        | 40 % w/w                                                         | N/A                                                                  | ex 2829 90 10                                                                                                                                                      | ex 3824 99 96                                                                                                                                                                                                  |



|                                                       |          |      |               |               |
|-------------------------------------------------------|----------|------|---------------|---------------|
| perchlorate<br>(CAS        RN<br>7778-74-7)           |          |      |               |               |
| Sodium<br>chlorate (CAS<br>RN 7775-09-9)              | 40 % w/w | N/A  | 2829 11 00    | ex 3824 99 96 |
| Sodium<br>perchlorate<br>(CAS        RN<br>7601-89-0) | 40 % w/w | N/AS | ex 2829 90 10 | ex 3824 99 96 |

**Comments:**

The limit value for sulphuric acid should be set at 40 %, as this substance is used for a variety of legitimate purposes, for many of which there is no alternative readily available.