Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013 (Text with EEA relevance)

REGULATION (EU) 2019/1148 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Regulation (EU) No 98/2013 of the European Parliament and of the Council[(3)] established harmonised rules concerning the making available, introduction, possession and use of substances or mixtures that could be misused for the illicit manufacture of explosives, with a view to limiting their availability to the general public, and ensuring the appropriate reporting of suspicious transactions throughout the supply chain.

(2) Although Regulation (EU) No 98/2013 has contributed to reducing the threat posed by explosives precursors in the Union, it is necessary to strengthen the system of controls on precursors that can be used for manufacturing homemade explosives. Given the number of changes needed, it is appropriate to replace Regulation (EU) No 98/2013 for the sake of clarity.

(3) Regulation (EU) No 98/2013 restricted access to, and the use of explosives precursors by, members of the general public. Notwithstanding that restriction, Member States were, however, able to decide to grant members of the general public access to those substances through a system of licences and registration. Restrictions and controls on explosives precursors in the Member States have therefore been divergent and liable to cause barriers to trade within the Union, thus impeding the functioning of the internal market. Furthermore, the existing restrictions and controls have not ensured sufficient levels of public security, as they have not adequately prevented criminals from acquiring

explosives precursors. The threat posed by homemade explosives has remained high and continues to evolve.

(4) The system for preventing the illicit manufacture of explosives should therefore be further strengthened and harmonised in view of the evolving threat to public security caused by terrorism and other serious criminal activities. Such strengthening and harmonisation should also ensure the free movement of explosives precursors in the internal market and should promote competition between economic operators and encourage innovation, for example, by facilitating the development of safer chemicals to replace explosives precursors.

(5) The criteria for determining which measures should apply to which explosives precursors include the level of threat associated with the explosives precursor concerned, the volume of trade in the explosives precursor concerned, and whether it is possible to establish a concentration level below which the explosives precursor could still be used for the legitimate purposes for which it is made available while making it significantly less likely for that precursor to be used for the illicit manufacture of explosives.

(6) Members of the general public should not be permitted to acquire, introduce, possess or use certain explosives precursors at concentrations above certain limit values, expressed as a percentage by weight (w/w). However, members of the general public should be permitted to acquire, introduce, possess or use some explosives precursors at concentrations above those limit values for legitimate purposes, provided that they hold a licence to do so. Where the applicant is a legal person, the competent authority of the Member State should take into account the background of the legal person and of any person acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person.

(7) For some restricted explosives precursors at concentrations above the limit values provided for in this Regulation, there exists no legitimate use by members of the general public. Therefore, licensing should be discontinued for potassium chlorate, potassium perchlorate, sodium chlorate and sodium perchlorate. Licensing should only be permitted for a limited number of restricted explosives precursors for which there exists a legitimate use by members of the general public. Such licensing should be limited to concentrations that do not exceed the upper limit value provided for in this Regulation. Above that upper limit value the risk of the illicit manufacture of explosives outweighs the negligible legitimate use of those explosives precursors by members of the general public, given that alternatives to, or lower concentrations of, those precursors can achieve the same effect. This Regulation should also determine the circumstances which the competent authorities should, as a minimum, take into account when considering whether to issue a licence. Together with the format of a licence set out in Annex III, this should facilitate the recognition of licences issued by other Member States.

(8) It should be possible for the mutual recognition of licences issued by other Member States to be done bilaterally or multilaterally, in order to achieve the objectives of the single market.

(9) In order to apply the restrictions and controls of this Regulation, those economic operators selling to professional users or to members of the general public who hold a licence should be able to rely on information made available upstream in the supply chain. Each economic operator in the supply chain should therefore inform the recipient of regulated explosives precursors that the making available, introduction, possession or use of those explosives precursors by members of the general public is subject to this Regulation, for example, by affixing an appropriate label to the packaging, by verifying that an appropriate label is affixed to the packaging, or by including that information in the safety data sheet compiled in accordance with Annex II to Regulation (EC) No 1907/2006 of the European Parliament and of the Council[(4)].

(10) The difference between an economic operator and a professional user is that the economic operators make an explosives precursor available to another person, whereas professional users acquire or introduce an explosives precursor only for their own use. Economic operators selling to professional users, other economic operators or members of the general public who hold a licence should ensure that their personnel involved in the sale of the explosives precursors are aware of which of the products they make available contain explosives precursors, for instance by including information that a product contains an explosives precursor in the barcode of the product.

(11) The distinction between professional users, to whom it should be possible to make restricted explosives precursors available, and members of the general public, to whom they should not be made available, depends on whether the person intends to use the explosives precursor concerned for purposes connected with that person's specific trade, business, or profession, including forestry, horticultural and agricultural activity, conducted either on a full-time or part-time basis and not necessarily related to the size of the area of land on which that activity is conducted. Economic operators should therefore not make restricted explosives precursors available either to natural or legal persons who are professionally active in areas in which the specific restricted explosives precursors tend not to be used for professional purposes or to natural or legal persons who are engaged in activities that are not connected to any professional purpose.

(12) Personnel of economic operators who are involved in the making available of explosives precursors should be subject to the same rules under this Regulation as apply to members of the general public when using such explosives precursors in their personal capacity.

(13) Economic operators should retain transaction data to substantially assist the authorities in preventing, detecting, investigating and prosecuting serious crime committed with homemade explosive devices and in verifying compliance with this Regulation. The identification of all actors in the supply chain and all customers is essential for this purpose, be it members of the general public, professional users or economic operators. As the illicit manufacture and use of homemade explosives might occur only a significant amount of time after the sale of the explosives precursor, the transaction

data should be retained for as long as is necessary, proportionate and appropriate to facilitate investigations, taking average inspection periods into account.

(14) This Regulation should also apply to economic operators that operate online, including those that operate on online marketplaces. Therefore, economic operators that operate online should also train their personnel and should also have in place appropriate procedures to detect suspicious transactions. Furthermore, they should only make restricted explosives precursors available to a member of the general public in Member States that maintain or establish a licensing regime in accordance with this Regulation, and only after verifying that that member of the general public holds a valid licence. After having verified the identity of the prospective customer, for instance through mechanisms provided for in Regulation (EU) No 910/2014 of the European Parliament and of the Council[(5)], the economic operator should verify that a licence has been issued covering the intended transaction, for instance through a physical inspection of the licence at the time of delivery of the explosives precursor or, with the consent of the prospective customer, by contacting the competent authority of the Member State that issued the licence. Economic operators that operate online, like those operating offline, should also request end-use declarations of professional users.

(15) Online marketplaces act as mere intermediaries between economic operators on the one side, and members of the general public, professional users or other economic operators, on the other side. Therefore, online marketplaces should not fall under the definition of an economic operator and should not be required to instruct their personnel involved in the sale of restricted explosives precursors regarding the obligations under this Regulation or to verify the identity and, where appropriate, the licence of the prospective customer, or to request other information from the prospective customer. However, given the central role which online marketplaces play in online transactions, including as regards the sales of regulated explosives precursors, they should inform their users who aim to make regulated explosives precursors available through the use of their services of the obligations under this Regulation in a clear and effective manner. In addition, online marketplaces should take measures to help ensure that their users comply with their own obligations regarding verification, for instance by offering tools to facilitate the verification of licences. Given the increasing significance of online marketplaces for all kinds of supply and the importance of this procurement channel, including for terrorist purposes, online marketplaces should be subject to the same detection and reporting obligations as economic operators, although procedures to detect suspicious transactions should be properly adapted to the specific online environment.

(16) The obligations on online marketplaces under this Regulation should not amount to a general monitoring obligation. This Regulation should lay down only specific obligations for online marketplaces with respect to the detection and reporting of suspicious transactions that take place on their websites or that use their computing services. Online marketplaces should not be held liable, on the basis of this Regulation, for transactions that were not detected despite the online marketplace having in place appropriate, reasonable and proportionate procedures to detect such suspicious transactions.

(17) This Regulation requires economic operators to report suspicious transactions, regardless of whether the prospective customer is a member of the general public, a professional user or an economic operator. The obligations that relate to regulated explosives precursors, including the obligation to report suspicious transactions, should apply to all substances listed in Annexes I and II, irrespective of their concentration. However, products that contain explosives precursors only to such a small extent and in such complex mixtures that the extraction of the explosives precursors is technically extremely difficult should be excluded from the scope of this Regulation.

(18) To improve the application of this Regulation, both economic operators and public authorities should provide for adequate training with respect to the obligations under this Regulation. Member States should have inspection authorities in place, should organise regular awareness-raising actions that are adapted to the specificities of each of the different sectors, and should maintain a permanent dialogue with economic operators at all levels of the supply chain, including economic operators that operate online.

(19) The choice of substances used by criminals for the illicit manufacture of explosives can change rapidly. It should therefore be possible to bring additional substances under the reporting obligation provided for by this Regulation, where necessary as a matter of urgency. In order to accommodate possible developments in the misuse of substances as explosives precursors, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending this Regulation by modifying the limit values above which certain substances that are restricted under this Regulation are not to be made available to the members of the general public, and by listing additional substances in respect of which suspicious transactions are to be reported. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[(6)]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(20) In order to deal with substances not already listed in Annex I or II, but in respect of which a Member State discovers reasonable grounds for believing that they could be used for the illicit manufacture of explosives, a safeguard clause for an adequate Union procedure should be provided. Moreover, in view of the specific risks to be addressed in this Regulation, it is appropriate to allow Member States, in certain circumstances, to adopt safeguard measures, including in respect of substances already subject to measures under this Regulation. Furthermore, Member States should be allowed to maintain national measures of which they have already informed or notified the Commission in accordance with Article 13 of Regulation (EU) No 98/2013.

(21) The regulatory framework would be simplified by integrating the relevant security-oriented restrictions on the making available of ammonium nitrate from Regulation