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 (Text with EEA relevance)

REGULATION (EU) No 98/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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on the marketing and use of explosives precursors

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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) Certain substances and mixtures are explosives precursors and can be misused for the illicit manufacture of explosives. The European Union Action Plan on Enhancing the Security of Explosives, adopted by the Council on 18 April 2008, called on the Commission to establish a standing committee on precursors to consider measures and prepare recommendations concerning the regulation of explosives precursors available on the market, taking into account their cost-benefit effects.

(2) The Standing Committee on Precursors, established by the Commission in 2008, identified various explosives precursors that are susceptible to being used to commit terrorist attacks and recommended that appropriate action be taken at Union level.

(3) Some Member States have already adopted laws, regulations and administrative provisions regarding the placing on the market, making available and possession of certain explosives precursors.

(4) Those laws, regulations and administrative provisions, which are divergent and liable to cause barriers to trade within the Union, should be harmonised in order to improve the free movement of chemical substances and mixtures within the internal market and, to the extent possible, to remove distortions of competition, while ensuring a high level of protection of the safety of the general public. Other rules relating to certain substances covered by this Regulation have also been laid down at national and Union level regarding the safety of workers and the protection of the environment. Those other rules are not affected by this Regulation.

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(5) In order to ensure the greatest degree of uniformity for economic operators, a regulation is the most appropriate legal instrument to regulate the marketing and use of explosives precursors.

(6) Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures[(3)] provides that substances and mixtures classified as hazardous are to be correctly labelled before being placed on the market. It further provides that economic operators including retailers are either to classify and label such substances or to rely on the classification made by an up-stream actor in the supply chain. It is therefore appropriate to provide, in this Regulation, that all economic operators, including retailers, which make available substances restricted by this Regulation to members of the general public, ensure that the packaging indicates that the acquisition, possession or use of that substance or mixture by members of the general public is subject to a restriction.

(7) In order to attain, at national level, protection against the illicit use of explosives precursors that is similar to or higher than that envisaged by this Regulation at Union level, some Member States already have laws, regulations and administrative provisions in force in respect of some substances susceptible of illicit use. Some of those substances are already listed in this Regulation, while others might be restricted at the level of the Union in the future. Since it would be contrary to the aims of this Regulation for measures at the level of the Union to diminish protection, it is appropriate to provide for a mechanism by which such national measures could remain in force (a safeguard clause).

(8) The illicit manufacture of explosives should be made more difficult by laying down concentration limit values in respect of certain explosives precursors. Below those limit values, the free movement of those explosives precursors is ensured, subject to a safeguard mechanism; above those limit values, the access of the general public to those explosives precursors should be restricted.

(9) Members of the general public should therefore not be able to acquire, introduce, possess or use those explosives precursors at concentrations above the limit values. However, it is appropriate to provide for members of the general public to be able to acquire, introduce, possess or use such explosives precursors for legitimate purposes, only if they hold a licence to do so.

(10) Furthermore, in view of the fact that some Member States already have well-established registration systems, which are used to control the making available on the market of some or all of the substances restricted by this Regulation which are not to be made available to members of the general public, it is appropriate to provide in this Regulation for a system of registration applicable to some or all of those substances.

(11) Hydrogen peroxide, nitromethane and nitric acid are widely used for legitimate purposes by members of the general public. It should therefore be possible for Member States to provide for access to those substances within a given range of concentrations by applying a registration system under this Regulation rather than a licensing system.

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(12) Given its very specific subject matter, the objective of this Regulation can be achieved whilst, in accordance with the principles of subsidiarity and proportionality, leaving the Member States the flexibility to choose whether to grant limited access for members of the general public in accordance with this Regulation.

(13) In order to pursue legitimate objectives of public security whilst still ensuring the least disruption to the proper functioning of the internal market, it is appropriate to provide for a licensing system in accordance with which a member of the general public who has acquired a substance restricted by this Regulation which is not to be made available to members of the general public, or a mixture or substance containing it, in a concentration above the limit value would be able to introduce it from another Member State or from a third country into a Member State which allows access to that substance in accordance with any of the systems provided for in this Regulation.

(14) In order to implement efficiently the provisions concerning the introduction of explosives precursors, Member States are encouraged to ensure that the restrictions applicable to the introduction of substances restricted by this Regulation which are not to be made available to members of the general public are brought to the attention of international travellers. For the same reason, Member States are also encouraged to ensure that the general public is made aware that those restrictions also apply to small consignments to private persons and to consignments ordered at a distance by final consumers.

(15) Information provided by Member States to industry, particularly to small and medium-sized enterprises (SMEs), could be a valuable means of facilitating compliance with this Regulation, having regard to the importance of minimising administrative burdens for SMEs.

(16) As it would be disproportionate to prohibit the use of explosives precursors in professional activities, the restrictions relating to the making available, introduction, possession and use of explosive precursors should apply only to the general public. Nevertheless, in view of the general aims of this Regulation, it is appropriate to provide for a reporting mechanism that covers both professional users throughout the supply chain and members of the general public involved in transactions which, by reason of their nature, or scale, are to be regarded as suspicious. To that end, Member States should set up national contact points for the reporting of suspicious transactions.

(17) Various transactions in respect of explosives precursors might be regarded as suspicious and therefore reportable. This is the case, for example, where the prospective customer (professional or non-professional) appears unclear about the intended use, appears unfamiliar with the intended use or cannot plausibly explain it, intends to buy unusual quantities, unusual concentrations or unusual combinations of substances, is unwilling to provide proof of identity or place of residence, or insists on using unusual methods of payment including large amounts of cash. Economic operators should be able to reserve the right to refuse such a transaction.

(18) In view of the general aims of this Regulation, the competent authorities are encouraged to inform the relevant national contact point of any refusal of an application for a

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licence where the refusal is based on reasonable grounds for doubting the legitimacy of the intended use or the intentions of the user. Likewise, the competent authorities are encouraged to inform the national contact point of the suspension or revocation of a licence.

(19) In order to prevent and detect the possible illicit use of explosives precursors, it is desirable that the national contact points keep records of reported suspicious transactions, and that the competent authorities take the necessary measures to investigate the concrete circumstances, including the genuineness of the relevant economic activity exercised by a professional user involved in a suspicious transaction.

(20) Where feasible, concentration limit values should be set, above which access to certain explosives precursors is restricted, whereas only the reporting of suspicious transactions should be provided for in respect of certain other explosives precursors. 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 the possibility of establishing a concentration level below which the explosives precursor could still be used for the legitimate purposes for which it is made available. Those criteria should continue to guide further actions which may be taken with respect to explosives precursors not currently covered by the scope of this Regulation.

(21) Concentration limit values on hexamine in fuel tablets are technically not feasible. In addition, there are many legitimate uses of sulphuric acid, acetone, potassium nitrate, sodium nitrate, calcium nitrate and calcium ammonium nitrate. A regulation at Union level restricting sales to the general public of those substances would result in disproportionately high administrative and compliance costs for consumers, public authorities and businesses. Nevertheless, in view of the aims of this Regulation, measures should be adopted to facilitate the reporting of suspicious transactions in respect of hexamine fuel tablets and in respect of those other explosives precursors for which there are not suitable and safe alternatives.

(22) Thefts of explosives precursors are a means of obtaining starting materials for the illicit manufacture of explosives. It is therefore appropriate to provide for the reporting of significant thefts and disappearances of substances subject to measures under this Regulation. In order to facilitate the tracing of the perpetrators and to alert the competent authorities of other Member States to possible threats, national contact points are encouraged, where appropriate, to make use of the Europol early warning system.

(23) Member States should lay down rules on penalties applicable to infringements of this Regulation. Those penalties should be effective, proportionate and dissuasive.

(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)[4] 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

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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.

(25) This Regulation requires the processing of personal data and their further disclosure to third parties in case of suspicious transactions. That processing and disclosure imply a serious interference with the fundamental rights to private life and the right to the protection of personal data. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(5)] governs the processing of personal data carried out in the framework of this Regulation. Accordingly, it should be ensured that the fundamental right to the protection of personal data of individuals whose personal data are processed in application of this Regulation is duly protected. In particular the processing of personal data that licensing, the registration of transactions and the reporting of suspicious transactions entail, should be carried out in accordance with Directive 95/46/EC, including the general data protection principles of data minimisation, purpose limitation, proportionality and necessity and the requirement to show due respect for the data subject's rights of access, rectification and deletion.

(26) The choice of substances used by terrorists and other criminals for the illicit manufacture of explosives can change rapidly. It should therefore be possible to bring additional substances under the regime provided by this Regulation, where necessary as a matter of urgency.

(27) In order to accommodate developments in the misuse of substances as explosives precursors, and provided that proper consultation with relevant stakeholders is carried out to take into account the potentially significant impact on economic operators, 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 to amend the concentration limit values above which certain substances restricted under this Regulation are not to be made available to the general public, and to list 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. The Commission, when preparing and drawing up delegated acts, should ensure the simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(28) The Commission should maintain under constant review the list of substances which are not to be made available to the general public above certain concentration limit values, and the list of substances in respect of which suspicious transactions are to be reported. The Commission should, where justified, prepare legislative proposals, in accordance with the ordinary legislative procedure, to add or delete entries in the former list, or to delete entries from the latter list, in order to accommodate developments in the misuse of substances as explosives precursors.

(29) In order to deal with substances not already restricted by this Regulation but in respect of which a Member State discovers reasonable grounds for believing that they could