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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the application of, and delegation of power under, Regulation (EU) 98/2013 of the
European Parliament and of the Council on the marketing and use of explosives
precursors**

1. INTRODUCTION

Regulation (EU) No 98/2013¹ on the marketing and use of explosives precursors ('the Regulation') entered into force on 1 March 2013 and became applicable on 2 September 2014. It establishes harmonised rules on the making available, introduction, possession and use of chemical substances and mixtures which can be misused for illicitly manufacturing home-made explosives. The Regulation's controls and restrictions apply to the substances listed in its Annexes and to mixtures and substances containing them.

Article 18(1) of the Regulation calls on the Commission to present a report to the European Parliament and to the Council, by 2 September 2017, examining any problems arising from the application of this Regulation, as well as the desirability and feasibility of proposing legislative changes that could further strengthen and harmonise the system. These include the possibility of extending the scope of the Regulation to cover professional users and including non-scheduled explosives precursors in Annex II.

In addition, Article 14(2) requires the Commission to draw up a report in respect of the delegation of power, conferred on it for a period of five years from 1 March 2013, 'not later than nine months before the end of the five-year period,' i.e. by 1 June 2017.

This report aims to fulfil the requirements set out in the above two articles. In the interest of simplifying the reporting exercise, and given that the delegation of power is a tool for legislative change, the Commission considers it beneficial and pertinent to consolidate both reports into one. This report also seeks to communicate information that would improve compliance with the Regulation's provisions by economic operators and national authorities, and to enhance the transparency of the Commission's policy-making process.

The Commission has prepared this report on the basis of the discussions and consultations in the Standing Committee of Precursors (SCP), a Commission expert group² comprising the competent authorities of the EU Member States and non-EU countries in the EEA and representatives of the chemical and retail supply chains, and on the basis of the Commission's own considerations.

2. BACKGROUND

2.1. Status of compliance with the Regulation

As of 1 January 2017, most Member States were in compliance with the requirements of the Regulation:

- All Member States have set up one or more national contact points with a clearly identified telephone number and e-mail address for reporting suspicious transactions and significant disappearances and thefts (Article 9(2));
- 23 Member States are in full compliance, having laid down rules on penalties (Article 11), regularly disseminated the guidelines prepared by the SCP (Article 9(6)) and, where applicable, notified the Commission of measures taken to

¹ OJ L 39, 9.2.2013, p.1.

² Group reference E03245, see under

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3245&NewSearch=1&NewSearch=1>.

implement exceptions under a licensing or registration regime (Articles 4(4)) or of pre-existing regimes (Article 13(4));

- Five Member States are in partial compliance, having not laid down rules on penalties.

In an effort to ensure full compliance by Member States with the Regulation, the Commission has established bilateral discussions on compliance concerns and initiated infringements procedures³ with some Member States, and will continue to hold these discussions as needed.

The Regulation is EEA-relevant and therefore also applicable to Iceland, Liechtenstein and Norway. The EFTA Surveillance Authority (ESA) is competent for monitoring the application of the Regulation in those countries. Whereas Norway and Liechtenstein are in compliance with the Regulation, on 17 November 2016 ESA brought Iceland before the EFTA Court for that State's failure to take the measures necessary to make the Regulation part of its internal legal order.⁴

Finally, Switzerland is not bound by the provisions of the Regulation but is nevertheless considering adopting measures controlling and restricting explosives precursors at national level. It has already designated a national contact point for the reporting of suspicious transactions and significant disappearances and thefts.

2.2. National implementing measures

Under Article 4(1), the Regulation bans the making available, introduction, possession and use of restricted explosives precursors (listed in Annex I of the Regulation) to members of the general public. Member States can nevertheless establish and maintain licensing and/or registration regimes through which the restricted explosives precursors can be made available, in a controlled way, to members of the general public (Article 4(2) and (3)).

As of 1 January 2017, 16 Member States had licensing and/or registration regimes in place while the remaining 12 Member States maintain bans.⁵ The application of the Regulation to date thus shows that there is no EU-level consensus over whether restricted explosives precursors should be banned or made available in a controlled way.

Among those Member States that maintain licensing regimes, there is significant variation in the processes for requesting licences, the criteria on which they are granted or refused, and the length and type of validity. Some Member States take the view that requests for a licence should be granted unless there is a stated reason not to, while others apply the opposite approach, refusing licences unless there is a specific reason to grant them. As a result, the percentage of licences granted and denied in Member States that have shared information with the Commission differs greatly. There are no known instances, to date, of Member States mutually recognising each other's licenses.

Some Member States do, whenever possible, propose alternative substances or concentration levels which can be used for legitimate purposes. The experiences reported by Member States suggest that alternatives exist for many, if not most, known legitimate uses.

³ Under Article 258 of the Treaty on the Functioning of the European Union.

⁴ EFTA Court Case E-18/16.

⁵ A list of measures is available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/explosives/explosives-precursors/index_en.htm.

Some Member States have gone beyond the minimum requirements determined in the Regulation and adopted measures which, e.g., require economic operators to register with the competent authorities and to periodically declare all transactions, including imports, extend the scope of the Regulation to cover professional users, determine conditions for storage, foresee the exchange of relevant cross-border information with other Member States, or establish a role for customs authorities.

In addition, some Member States apply restrictions and controls to non-listed explosives precursors, or tighter restrictions to substances that are listed. In all current cases, Member States had the restrictions and controls in place prior to the adoption of the Regulation.

In parallel to the adoption and enforcement of their national measures, most Member States have reportedly conducted awareness-raising campaigns targeting the economic operators involved in the supply chain of the listed explosives precursors. Campaigns aim to increase awareness about both the obligation to restrict and to report suspicious transactions. Some Member States actively engage online suppliers and marketplaces.

It is still too early to draw conclusions from the data obtained on licences, registration, reports of suspicious transactions and enforcement. In the future, the Commission will aim to collect and analyse relevant data to identify at EU level threat trends, good practices and potential areas that can be strengthened or harmonised.

2.3. The Standing Committee on Precursors (SCP)

Since the SCP was established under the 2008 EU Action Plan on Enhancing the Security of Explosives,⁶ it has been actively working to enhance protection in Europe against the use of explosives precursors for manufacturing homemade explosives.

Since the Regulation was adopted in 2013, the SCP has met regularly to facilitate and monitor its implementation. Most importantly, the SCP provides a platform for Member States and representatives of the economic operators in the supply chain to exchange information and views on the Regulation and its practical implementation.

Other SCP achievements include the adoption and regular review of Guidelines⁷ and the preparatory work for three delegated acts which added threat substances to Annex II (see Section 4). The SCP has also enabled greater cross-border exchange of information on reports of suspicious transactions, disappearances and thefts, and the granting and refusal of licences, and has supported awareness-raising efforts by the chemical industry and retail sector. In 2013-2015, four SCP Members co-led the EU-funded Security of Sales of High Risk Chemicals project, which developed guidance materials for retailers, both in physical locations and on the internet, and for competent and law enforcement authorities.

3. REVIEW

‘Home-made explosives remain a preferred weapon of terrorists, along with conventional firearms, because of their availability, simplicity and effectiveness,’ according to Europol’s 2016 EU Terrorism Situation and Trend Report. Nevertheless, this report and its 2015, 2014 and 2013 versions all noted a decline in the use of improvised or home-made explosives in relation to the use of firearms and/or incendiary devices.

⁶ Council Document 8311/08.

⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/explosives/explosives-precursors/docs/guidelines_on_the_marketing_and_use_of_explosives_precursors_en.pdf.

The entry into force of the Regulation has contributed to reducing the threat posed by explosives precursors in Europe. From meetings and consultations of the SCP, and a study carried out by independent expert consortium,⁸ it emerges that:

- **The amount of explosives precursors available on the market has decreased.** This is partly because many economic operators are applying the restrictions and partly because, voluntarily, some manufacturers have stopped making them and some economic operators have stopped selling them. The supply chain has not reported any significant disturbances or economic losses as a result of this. Also, in some Member States that maintain licensing regimes, authorities have reported that the number of licence applications is currently significantly lower than it was during the first year of application of the Regulation. This suggests that members of the general public have successfully adopted alternative (non-sensitive) substances for continuing with their legitimate non-professional activities.
- **The capacity of competent and law enforcement authorities to investigate suspicious incidents involving explosives precursors has increased.** Member States have reported an increase in the number of reported suspicious transactions, disappearances and thefts due to greater awareness among economic operators who handle explosives precursors. In addition, some Member States have, on an *ad hoc* basis, exchanged information on reports and refused licences. Finally, the competent authorities in Member States that maintain licensing regimes have a better understanding of which members of the general public are in possession of restricted substances and the purpose they intend to use them for.

It is not yet possible to assess in more detail the impact of the Regulation. However, a number of incidents reported by Member States suggest that the application of the Regulation has contributed to their efforts towards preventing terrorist attacks involving home-made explosives.

3.1. Challenges that have arisen from the application of the Regulation

Despite the overall positive impact of the Regulation in reducing access to, and increasing control over, explosives precursors, its application has given rise to several problems and challenges. The examples mentioned in this section do not necessarily reflect the experiences of all or most Member States and economic operators. However, they have had a wide enough impact for them not be attributable to the special circumstances of any individual Member State or operator.

The main challenge for **Member State competent authorities** is the large number of operators affected by the restrictions and controls of the Regulation. Because many of the chemical substances and mixtures concerned by the Regulation are household products, the supply chain is significantly larger than that of other products subject to specific control provisions (e.g. drug precursors). Consequently, it has been challenging for competent authorities to reach all economic operators in the supply chain of explosives precursors to inform them of their duties. However, competent authorities have, in collaboration with the associations that represent the chemical industry and retail sector, conducted awareness-

⁸ Preparatory Study on the implementation of Regulation (EU) 98/2013 on the marketing and use of explosives precursors (November 2016). Coordinated by ENCO for the European Commission under the Framework Service Contract HOME/2014/ISFP/PR/CBRN/0025 – Lot 1.

raising campaigns and engaged with a wide range of operators — from manufacturers to retailers, big companies to small independent stores, and internet sellers to marketplaces.

Another challenge for Member State authorities is to enforce the restrictions and controls on internet sales, imports and intra-EU movements. Products having a large volume are often transported and sold in greater quantities (e.g. fertilisers), and are therefore relatively easier to identify and control. Conversely, other products are sold in small quantities and volumes, and are thus more difficult to intercept when they are shipped or transported into and across Europe. To address this problem, law enforcement and customs authorities are increasing their efforts to identify cases of illegal acquisition and possession by, for example, increasing inter-agency cooperation and exchanging information at EU level.

A main challenge for **economic operators**, particularly those in the retail sector, has been to identify products that fall under the scope of the Regulation. Products containing restricted explosives precursors must be labelled accordingly. When that is not done early on in the supply chain, it is difficult for operators at retail level to properly verify that the label is affixed and that the restriction applies. In addition, the explosives precursors listed in Annex II of the Regulation that are not restricted do not have to be labelled. Economic operators, particularly those with high staff turnover, need to devote considerable time resources to identifying products of concern and training their staff appropriately.

Economic operators that conduct business across intra-EU borders also face the challenge of having to adapt to the specific nature of the different regimes in each Member State. The Regulation allows Member State authorities to define key aspects of its application in their territory. Consequently, economic operators must be aware of the type of regime that applies in the specific Member State the product is destined for, and must register the sale, verify a licence or ban the sale, accordingly. Some companies have robust due diligence internal procedures which facilitate compliance with complex regulatory frameworks. However, for companies without such procedures, often smaller companies, this is a time-consuming process.

Finally, economic operators who sell to both members of the general public and other type of end-users have reported difficulty in assessing, with a reasonable degree of certainty, whether the person acquiring a restricted substance is acting for purposes connected with his trade, business or profession, or otherwise. Indeed, the Regulation does not specify criteria for evaluating what qualifies as professional or for checking professional credentials. These considerations are down to Member State authorities and, as a result, criteria may differ across different territories.

A continuous challenge for **the Commission** is to keep abreast of the evolving security threat. In order to adapt the Regulation to the use of new chemical substances, or of new concentrations of the listed substances, the Commission relies on information and data from Member States. In 2016, efforts channelled through the SCP have led to three threat substances being added to Annex II (see Section 4).

Addressing the above-mentioned challenges is a matter of priority for the Commission. In close cooperation with the SCP, the Commission will use the tools at its disposal (including legislative acts, guidance documents and practical support) to improve the capacity of Member State authorities and economic operators to carry out their responsibilities in full confidence.

3.2. Desirability and feasibility of further strengthening and harmonising the system

The threat posed by the use of explosives precursor chemicals in manufacturing homemade explosives by terrorists remains high and is continuously evolving. The Commission's priority, beyond full implementation of the existing provisions, is to consider what measures and actions could strengthen the system in the future.⁹

Changes to the Regulation may bring about additional burdens for public authorities, economic operators, and consumers. To ensure that burdens are not disproportionate to the objectives sought, the Commission will in 2017 assess the impact, as well as the costs and benefits for all stakeholders and any potential for simplification, of measures aiming to:

- **Tighten restrictions and controls, by adding new substances** of concern to the scope of the Regulation and by strengthening restrictions on substances that are already covered.
- **Increase the capacity of the Member State competent authorities to monitor the sale and possession of explosives precursors.** Competent authorities should know who are the economic operators that are making available explosives precursors on the market and which individuals are acquiring, possessing and using the restricted explosives precursors. These individuals include members of the general public and those acting for purposes connected with their profession. With this objective in mind, the Commission will examine the impact of measures such as requiring economic operators to register with their competent authority and to regularly submit their registry of transactions to the competent authorities. The Commission will also consider the impact of establishing common criteria for licences, to harmonise conditions for granting and refusing requests and to facilitate mutual recognition between Member States.
- **Increase the capacity of the Member State competent and law enforcement authorities to detect and investigate possible violations of the Regulation.** The Commission will consider measures to strengthen the system of reporting suspicious transactions, disappearances and thefts by, for example, ensuring that information which could have cross-border relevance is shared. The Commission will also consider measures to strengthen the system as regards the introduction of explosives precursors from third countries (i.e., import) and the operational role of the customs authorities at the external borders of the Union.
- **Increase the capacity of economic operators along the supply chain.** The Commission will consider measures to improve the transmission of information along the chemical and retail supply chain by, for example, re-assessing the labelling provision in the Regulation. Wherever possible, the Commission will also seek to reduce legal uncertainties for economic operators.

In parallel, the Commission will re-examine the transfer of ammonium nitrate-related provisions from REACH (EC 1907/2006)¹⁰ to the Regulation,¹¹ and, as indicated in its First progress report towards an effective and genuine Security Union,¹² will also examine the results of EU-funded research projects which have the potential to reduce the threat posed

⁹ COM(2015) 624 final.

¹⁰ OJ L 396, 30.12.2006, p. 1.

¹¹ The Commission's views on the transfer were requested under Article 18(2) of the Regulation and laid out in COM(2015) 122 final.

¹² COM(2016) 670 final.

by home-made explosives by, for example, neutralising the explosive properties of certain substances and products.

The Commission will also consider non-legislative actions which can further strengthen the system. It will do this, for example, by strengthening Europol's role, setting up *ad hoc* sub-groups of the SCP to discuss specific challenges (e.g. the availability and control of internet sales or the role of customs), facilitating meetings of national contact points and supporting efforts to improve cooperation at regional level.

3.3. Desirability and feasibility of extending the scope of the Regulation to cover professional users

The restrictions imposed by the Regulation apply only to 'members of the general public.' Persons acting for purposes connected with their trade, business or profession (commonly referred to as 'professional users') can continue to access restricted explosives precursors without restrictions.

The exemption awarded to professional users either 1) carries the assumption that this type of user would not make illicit use of explosives precursors to manufacture homemade explosives, and/or 2) considers it would be disproportionately burdensome for economic operators to extend the restrictions to this type of user.

The Commission nevertheless sees a possible security gap in the exemption of professional users from the restrictions imposed by the Regulation. The Commission will therefore consider the impact of new measures that extend the scope of the Regulation to cover professional users, while closely examining the burdens imposed on economic operators. For example, economic operators may have to register all transactions involving professional users and keep records available for inspection by the competent authorities.

The above would provide the competent and law enforcement authorities with a better picture of who is accessing which precursors and for what purpose. It would also facilitate early investigation into, and prosecution of, instances of alleged misuse.

In addition, the Commission will consider introducing a harmonised definition for 'professional user' and common criteria for determining who qualifies as professional or for checking professional credentials.

3.4. Desirability and feasibility of including non-scheduled explosives precursors in the provisions on the reporting of suspicious transactions, disappearances and thefts

The Commission does not envisage applying the provisions on the reporting of suspicious transactions, disappearances and thefts to the general category of 'non-scheduled explosives precursors.' Doing so would impose a disproportionate burden and an unjustified level of uncertainty on economic operators, who do not necessarily know which chemical substances can be used, at a given time, as explosives precursors.

Nonetheless, the Commission considers it essential to update Annex II, as often as necessary, to add specific substances which pose a threat as explosives precursors, and has already used its power to adopt delegated acts to do so (see Section 4).

In addition, the Commission will assess the relevance of adding categories of substances to Annex II. For example, it will assess the impact, including from an economic perspective, of including all hydrates of the listed nitrate salts in a similar way to what Regulation (EC) No

273/2004 does for drug precursor salts¹³, as well as all fertilisers with a high nitrogen content.

The above additions would close current gaps in the Regulation and may also facilitate the task of economic operators by simplifying the guidelines on which substances are of concern. The Commission will nonetheless assess the exact impact of the additions on the supply chain before adopting any proposal.

4. EXERCISE OF THE POWER TO ADOPT DELEGATED ACTS

In accordance with Article 12 of the Regulation, the Commission is empowered to adopt delegated acts concerning changes to 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. It can also adopt delegated acts concerning the addition of substances to Annex II, where it is necessary to accommodate developments in the misuse of substances as explosives precursors.

In 2016, the Commission exercised its power to adopt delegated acts to add three substances to Annex II:

- Commission Delegated Regulation (EU) amending Regulation (EU) No 98/2013 of the European Parliament and of the Council as regards adding aluminium powder to the list of explosives precursors in Annex II;¹⁴
- Commission Delegated Regulation (EU) amending Regulation (EU) No 98/2013 of the European Parliament and of the Council as regards adding magnesium nitrate hexahydrate to the list of explosives precursors in Annex II;¹⁵ and
- Commission Delegated Regulation (EU) amending Regulation (EU) No 98/2013 of the European Parliament and of the Council as regards adding magnesium powder to the list of explosives precursors in Annex II.¹⁶

The additions of the above-mentioned substances to Annex II were proposed to the SCP by Member States. When preparing the delegated acts the Commission consulted all relevant stakeholders, in particular the chemical industry and retail sector, as required under the Regulation, and presented an analysis demonstrating that the additions would not impose disproportionate burdens on economic operators or consumers. SCP members and observers discussed and broadly supported the additions. Before adoption, the Commission also submitted the draft delegated acts to a public consultation.¹⁷ Throughout the procedural and decision-making process, the Commission ensured the timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

During the period covered by this report, the Commission has not used its delegated power to change any of the limit values in Annex I.

¹³ Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, OJ L 47, 18.2.2004, p. 1.

¹⁴ C(2016) 7647 final.

¹⁵ C(2016) 7650 final.

¹⁶ C(2016) 7657 final.

¹⁷ As part of its better regulation agenda, the Commission welcomes feedback from the public to draft legislation published at https://ec.europa.eu/info/law/better-regulation/share-your-views_en.

Although the Commission has not, at the present moment, identified additional substances which should be subject to the reporting requirement or restricted explosives precursors whose limit value should be changed, such needs may arise in the future and would need to be addressed rapidly via delegated acts to safeguard public security. Therefore, the Commission is of the view that the power to adopt delegated acts conferred on it by the Regulation should be tacitly extended for a period of five years, in accordance with Article 14(2) of the Regulation.

5. CONCLUSION

The entry into force of Regulation (EU) 98/2013 has contributed to reducing access to dangerous explosive precursors which can be misused to manufacture homemade explosives, because it has introduced restrictions and controls on key substances of concern. The threat posed by homemade explosives, however, remains high and is continuously evolving. In a Union with free movement of persons, goods and services, European citizens and residents expect EU-level action against terrorism. Therefore, the Commission, Member States and the supply chain of explosives precursors in Europe must jointly step up their efforts to fully implement the existing provisions and identify measures and actions which strengthen the system around homemade explosives in the future.

The Commission, in close collaboration with the SCP, has already started revising the Regulation by adding three explosives precursor substances to Annex II. This is an important step to better controlling threat substances. However, the practical implementation experience gained since 2 September 2014, along with global developments, make it imperative to consider additional changes to the Regulation to increase the capacity of all actors involved in implementing and enforcing the restrictions and controls. With this objective in mind, the Commission will carefully assess the impact of a number of possible new measures which may be proposed in the near future.