

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

Ref. 18-2786

10 August 2018

SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA COMMENT

on the Proposal for a Regulation of the European Parliament and of the Council on the marketing and use of explosives precursors – COM(2018) 209

1. EXECUTIVE SUMMARY

- *The EEA EFTA States support the current proposal in general.*
- *The EEA EFTA States are of the view that the current proposal will contribute to a safer and more secure Europe since it will further limit the possibility of misuse of explosives precursors.*
- *The EEA EFTA States consider that the proposal could be more ambitious in relation to actual harmonisation.*
- *The EEA EFTA States find that the current proposal needs to be clarified and adjusted, in particular with regard to the main restriction in connection with the definitions and the introduction of “legal person” as a “member of the general public”, as this opens a possible security gap.*
- *The EEA EFTA States consider that the intended impact of introducing a new limit value and an upper limit value for nitromethane should be clarified.*

2. INTRODUCTION

1. The EEA EFTA States have continuously and with interest followed the European Union's work on regulating the availability of explosives precursors on the market. Following the adoption of the 2008 EU Action Plan on Enhancing the Security of Explosives¹, the European Commission established a Standing Committee on Precursors, an expert group that brings together experts from Member State authorities and stakeholders from the chemicals industry and retail. Based on the recommendations of the Standing Committee on Precursors and the outcomes of an impact assessment², the Commission adopted a proposal for a Regulation on explosives precursors in 2010³. On 15 January 2013, Regulation (EC) No 98/2013 on the marketing and use of explosives precursors was adopted. The EEA EFTA States have actively participated in the Standing Committee on Precursors, and have, through this participation and with much effort, taken part in the revision work initiated by the European Commission⁴.

3. GENERAL REMARKS

2. The EEA EFTA States share the assessments, as stated in the Explanatory Memorandum to the current proposal, that, overall, Regulation (EC) No 98/2013 has been effective in contributing to limiting the availability of explosives precursors to the general public. However, the EEA EFTA States also share the view that there are certain areas where Regulation (EC) No 98/2013 could be improved. The main restriction of the Regulation aims to limit the access to explosives precursors, but it does not cover or clearly define all relevant stakeholders. Also, the fragmentation of control regimes across the EU has created challenges with regard to compliance of economic operators and poses a security concern.
3. In this context, the EEA EFTA States welcome the Commission's current proposal which aims to address the identified weaknesses and achieve a more efficient and more harmonised legislation. The proposed discontinuation of the registration regime in today's Regulation (EC) No 98/2013 is particularly welcome in this regard.
4. As a general remark, the EEA EFTA States would like to emphasise the importance of having clear and unambiguous legislation to make it user friendly for all stakeholders concerned, especially when it comes to restrictions.

¹ Council of the European Union, 'EU Action Plan on Enhancing the Security of Explosives', 8109/08

² Commission Staff Working Document: Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on the Marketing and Use of Explosives Precursors, SEC(2010) 1041 final of 20.9.2010.

³ Proposal for a Regulation of the European Parliament and of the Council on the marketing and use of explosives precursors, COM(2010)0473 final of 20.9.2010.

⁴ 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, COM(2017)103 final of 28.2.2017.

4. DEFINITIONS AND LICENCES

5. The EEA EFTA States welcome the ambition of the current proposal to cover and clearly define all stakeholders concerned.
6. Nevertheless, considering the purpose of closing identified security gaps, the EEA EFTA States are of the view that the proposed definitions of relevant stakeholders, in combination with the main restriction, are not sufficiently clear and can cause unnecessary ambiguity. Therefore, the EEA EFTA States have some reservations about giving their full support to this proposal.
7. The EEA EFTA States question the value of extending the definition of "member of the general public" in Article 3(7) to also include "legal person who has a need for a restricted explosives precursor for purposes that are not connected with their trade, business, craft or profession". The EEA EFTA States are of the view that it is likely that the proposed definition will create legal and logical issues. Firstly, from a linguistic viewpoint, it is uncommon to include legal persons as members of the general public. Secondly, "legal person" is also a part of the definitions of other actors in Articles 3(8) and 3(9), which raises the issue of sufficient coherence and clarity. The EEA EFTA States also fear that the introduction of "legal person" without a professional need for restricted explosives precursors could make it more difficult to determine who is entitled to restricted explosive precursors and who is not, especially as the definitions are directly linked with the main restriction in Article 5(1) of the current proposal. On this note, the EEA EFTA States would like to emphasise that a legal definition should seek to be an exact statement or description of the nature, scope, or meaning of the actors in the supply chain, so that subsequently one can apply the relevant legal restrictions to the actor defined. The concern of the EEA EFTA States is that the proposed definition of "member of the general public" does not fully meet this aim when it comes to legal persons without a professional need for restricted explosives precursors. The phrase "who has a need for a restricted explosives precursor for purposes that are not connected with their trade, business, craft or profession", contains two elements – "a need for" and "not connected with" – that would require making quite broad assessments that would bear more resemblance to a legal restriction than a definition.
8. The EEA EFTA States are concerned that the definition in Article 3(7) of the current proposal will be difficult to use in practice, both for the businesses who are required to be in compliance and for law enforcement and competent authorities. Such a definition may result in less harmonisation as the different stakeholders and authorities may have different assessments of similar cases. As the question of extending the definition of "member of the general public" to also include legal persons without a professional need for restricted explosives precursors has not been an issue prior to the introduction of the current proposal, the EEA EFTA States question whether the definition in Article 3(7) of the current proposal has been subjected to an impact assessment. The definition does not seem to be commented on in the Explanatory Memorandum.
9. Furthermore, with regards to to the proposed definition of "member of the general public" including legal persons, the EEA EFTA States find reasons to question the rationality of Article 5(3) in the current proposal which indicates that legal persons without a professional need for a restricted explosives precursor can apply for, and be

granted, a licence where a licencing regime is in place. This arrangement should be subject to reconsideration as it is somewhat contradictory. Licences are assumed to be granted on the basis of a legitimate need. However, for legal persons as members of the general public, it is already established through the definition in Article 3(7) that the legal person in question has no need for the substance in the course of the trade, business, craft or profession. On the other hand, if the legal person assesses that it has a legitimate need for a restricted explosives precursor, the legal person will not apply for a licence. The EEA EFTA States question whether this is in line with the intention of increasing the level of security. The underlying fear is that by opening another access possibility, you thereby open a possible security gap. The EEA EFTA States point out that if the need for an explosives precursor is related to personal, domestic or hobby activities, the natural person can apply for a licence in countries where this is possible.

10. The EEA EFTA States underline that the majority of EEA States have implemented a ban on restricted explosives precursors and do not have a licencing regime. In the EEA States that practice a ban, neither natural persons nor legal persons with no professional need will be able to apply for a license. It seems unlikely that harmonisation will be promoted if businesses can also be granted a licence. If the current proposal is accepted, the EEA EFTA States worry that this may cause cross-border legal and logical issues, especially since many businesses operate across the EEA.
11. The EEA EFTA States propose that Article 3(7) is amended so that "legal person who has a need for a restricted explosives precursor for purposes that are not connected with their trade, business, craft or profession" is removed from the definition of "member of the general public". The proposed amendment will result in several benefits:
 - The proposed definition of "member of the general public" will only include natural persons, which is more in line with the term "member of the general public".
 - Natural persons will be clearly separated from all legal persons either with or without a professional need not for explosive precursors. Natural persons are consumers who use explosives precursors for hobbies and household purposes only.
 - Legal persons without a professional need for restricted explosives precursors cannot apply for a licence according to Article 5(1), thus a possible security gap will be closed.
 - Non-professional need by a legal person will be considered as a non-professional need by a natural person, and natural persons may apply for a license where applicable.
12. The EEA EFTA States welcome the introduction of a definition of "professional user" in Article 3(8) in the current proposal. This enables a legal distinction between the actors to whom restricted explosives precursors can be made available - members of the general public on the one hand, and economic operators and professional users on the other. This feature is missing in Regulation (EC) No 98/2013.
13. However, the EEA EFTA States believe there are uncertainties as to whether the proposed definition might create legal and logical issues. As mentioned in section 8, the use of the term "legal person" in the other definitions of actors in Articles 3(8) and 3(9), can, in itself, raise the issue of sufficient coherence and clarity. The proposed definition of "professional user" also seems to be excessively connected with the element of legal

person in the proposed definition of "member of the general public" in Article 3(7). This is unfortunate. As in section 8, the concern of the EEA EFTA States is that the proposed definition of "professional user" does not seem to fully meet the aim of a legal definition. The distinction between a "professional user", to whom restricted explosives precursors can be made available, and "a member of the general public", to whom they cannot, depends on whether the person intends to use that explosives precursor for purposes connected to their specific trade, craft or profession. In the view of the EEA EFTA States, too much rests on the criteria of intended use, which can be very difficult to establish and assess in particular for authorities and law enforcement. The distinction requires making quite broad assessments of the intended use, which can bear more resemblance to a legal restriction than a definition. When it comes to non-objective criteria in a definition, the EEA EFTA States would also like to point out that the definition of "professional user" in Article 3(8) in the current proposal, seems to differ from other EU Regulations concerning chemicals, e.g. the EU's chemical Regulation REACH.

14. The EEA EFTA States propose that Article 3(8) is amended such a way that it more clearly makes a distinction between a "professional user", an "economic operator" and a "member of the general public". Together with the proposed change to Article 3(7) of the current proposal, as seen in section 12, the amendment will presumably make it easier to impose the correct restrictions. The EEA EFTA States propose that Article 3(7) of the current proposal is amended as follows: *'professional user' means any natural or legal person, other than 'economic operator' or 'member of the general public' or 'farmer', who has a demonstrable need for and uses a substance, either on its own or in a mixture, in the course of industrial or professional activities connected with trade or business not making the substance available to another person.*

5. THE MAIN RESTRICTION

15. The main restriction of the current proposal is to be found in Article 5(1). Through this provision, the access to restricted precursors is limited as it states who does *not* have access. This is the key restriction when it comes to limiting the availability of restricted explosives precursors. The identical restriction occurs in Article 4(1) of the existing Regulation (EC) No 98/2013.
16. As already pointed out, the EEA EFTA States would like to draw attention to the fact that the restriction is closely connected to the definitions in Article 3(7). In the view of the EEA EFTA States, as long as the proposed definitions are incoherent and unclear, this connection may lead to complexities that cause confusion as to who is entitled to restricted explosives precursors and who is not. In line with the purpose of the existing Regulation (EC) No 98/2013 and the current proposal, such a situation should be avoided. To some extent, this can be repaired by positively stating which actors in the supply chain do not have access to restricted precursors. This way of stating which actors have legal access to a substance is used in the REACH Regulation, e.g. the provisions on ammonium nitrate. The EEA EFTA States suggest that these provisions be transferred to the current proposal. The coherence of the current proposal would be increased if the restrictions for ammonium nitrate and the other restricted explosives precursors were to be modelled in the same way.

17. The EEA EFTA States propose that the following wording is added to article 5(1): *"Restricted explosives precursors shall only be made available to, or introduced, possessed or used by economic operators, professional users or farmers"*.
18. As an alternative, if it is not desirable to positively state which actors in the supply chain do not have access to restricted precursors, the EEA EFTA States propose that the following wording is added to Article 5(1): *"Restricted explosives precursors shall not be made available to, or introduced, possessed or used by members of the general public or legal persons with no demonstrable need for a restricted explosives precursor for purposes connected with their trade, business, craft or profession"*.
19. The EEA EFTA States envisage that this proposed amendment, together with the proposed amendments in chapter 4, will clarify the restriction so that it is easier to assess who has legal access to restricted explosives precursors. Furthermore, it will contribute to closing a possible security gap as legal persons with no professional need cannot apply for a license. The restriction will also be more harmonised with the existing restriction on ammonium nitrate in the REACH Regulation, which is advantageous since the provision on ammonium nitrate in REACH is proposed to be transferred to the new regulation in the current proposal.

6. SUBSTANCES LISTED IN ANNEX I

20. The EEA EFTA States would like to express support for the proposed transfer of sulphuric acid from Annex II to Annex 1 with a set concentration limit. The introduction of an upper limit value for the purpose of licensing under Article 5(3) in the current proposal is also welcome.
21. The EEA EFTA States also support the proposed introduction of new limit values for nitromethane.
22. However, the EEA EFTA States would like to express concern about the effects of the new limit values proposed for nitromethane, and would like clarification as to whether the impact is intentional or not. The substance is frequently used in different concentrations, both in motor sports and in model vehicles. According to the current proposal, as regards EEA States that have a ban in place, the consequence seems to be that nitromethane cannot be used as fuel for model vehicles for hobby purposes. According to our knowledge, nitromethane as fuel for model vehicles requires a minimum of 16 % nitromethane. In the EEA States that have a licencing regime in place, hobbyists may be granted a licence. The EEA EFTA States worry that this will decrease harmonisation in the EEA, as well as create further legal and logical issues cross-border.
23. Furthermore, the proposed new upper limit for nitromethane (40%) is likely to cause issues for persons who use highly concentrated nitromethane as fuel for motor vehicles, e.g. drag racing. In many EEA States, all motor sport that requires highly concentrated nitromethane (at least 80 %) as fuel, is done at a hobby level and the racing teams are rarely to be considered as professional users. The new proposed upper limit value for the purpose of licensing will as a consequence not make it possible to carry on with motor sports that require nitromethane fuel over 40 % at hobby level. The new upper

limit, as proposed, seems only to make drag racing, for instance, possible for professional users.

24. The EEA EFTA States kindly request clarification on whether the impact of introducing these limits for nitromethane as described and predicted, is intended.
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