



Brussels, 30.11.2016
C(2016) 7657 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 30.11.2016

**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**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Explosives precursors are chemicals which may be used for the illicit manufacture of home-made explosives. Regulation (EU) No 98/2013¹ establishes harmonised rules on the making available, introduction, possession and use of substances or mixtures that could be misused for the illicit manufacture of explosives. The aim is to limit their availability to the general public and ensure the appropriate reporting of suspicious transactions throughout the supply chain.

The Regulation contains two Annexes listing a total of 15 chemical substances. Substances listed in Annex I are restricted explosives precursors and cannot be made available to, or introduced, possessed or used by, members of the general public. In addition, economic operators who place these chemical substances on the market must report suspicious transactions, significant disappearances and thefts to the designated national contact point(s) in each Member State. It follows that substances listed in Annex II are subject only to the reporting obligation, not to the restriction.

The empowerment to adopt delegated acts to add new substances to Annex II is laid down in Article 12. This provision enables the Commission to update the Regulation by means of a delegated act, so that it reflects developments in the misuse of substances as explosives precursors. Metal powders such as aluminium and magnesium are high-risk explosives precursor chemicals. Aluminium powder has been used in the production of homemade explosives in Europe, notably in Norway in 2011 and outside Europe. It is regularly seized from individuals who are found to be in possession of other explosives precursors that are banned.

Since 2010, the World Customs Organisation's Programme Global Shield has been monitoring worldwide shipments of aluminium powder and flakes. In 2012 alone, it reported seizing 525 kg of this substance. Due to its misuse, aluminium powder needs to be added to Annex II. Magnesium powder and alloys of both substances are realistic alternatives to aluminium in this context. Therefore, the inclusion of magnesium powder in Annex II as a preventive measure would be both coherent with the aims and scope of Regulation 98/2013. The particle size threshold (< 200 µm) and percentage limit (70 % by weight or higher) follow those used in the Danish Government Order on Precursors to Explosives. Denmark already requires that only members of the general public who hold a licence can access magnesium powder.

Article 12(2) requires each delegated act to be based on an analysis showing that the burden of the amendment on economic operators or consumers is unlikely to be disproportionate to the objectives it is intended to achieve. Adding substances to Annex II allows increased control over the use of those substances, so as to prevent their diversion towards the illicit manufacturing of homemade explosives. This does not significantly increase the burden on economic operators or consumers.

Economic operators must take all measures necessary to ensure compliance with the obligation to report any suspicious transactions, disappearances and thefts to their national contact point. This represents some additional workload, but the economic impact from adding magnesium powder to Annex II is minimal.

¹ Regulation (EU) No 98/2013 on the marketing and use of explosives precursors - OJ L 39, 9.2.2013 p. 1-11.

The addition also represents some additional workload for the national competent authorities who must raise awareness among economic operators and take all measures necessary to ensure that rules on penalties applicable to infringements are implemented.

Overall, however, the delegated act does not add disproportionate burdens on any stakeholders and therefore, given the aim of seeking to reduce the use of chemical substances in the production of homemade explosives, adding magnesium powder to Annex II is justified.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In line with paragraph 4 of the Common Understanding on Delegated Acts between the European Parliament, the Council and the European Commission, appropriate and transparent consultations, including at expert level, have been carried out in the preparation of this delegated act. The relevant documents have been transmitted in a timely and appropriate manner to the European Parliament and to the Council.

Article 12(1) requires the Commission, as part of the preparation of the delegated acts, to 'endeavour to consult relevant stakeholders, in particular the chemical industry and the retail sector'. The Standing Committee on Precursors, a registered expert group of the Commission which brings together representatives of the national competent authorities and of the chemical industry and retail sector, was consulted in meetings held on 6-7 October 2015, 27-28 January 2016 and in writing between 2 June and 1 July 2016.

The draft Delegated Regulation was published online for feedback over a period of four weeks (4 October – 1 November 2016). No feedback was received.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

On the basis of Regulation (EU) No 98/2013 on the marketing and use of explosives precursors, the Commission is empowered to adopt delegated acts concerning the addition of substances to Annex II, where necessary to accommodate developments in the misuse of substances as explosives precursors.

Article 12(2) requires the Commission to adopt a separate delegated act in respect of each new substance added to Annex II.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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⁽²⁾, and in particular Article 12 thereof,

Whereas:

- (1) Annex II to Regulation (EU) No 98/2013 lists explosives precursors which are subject to harmonised rules concerning their availability to the general public and ensuring the appropriate reporting of suspicious transactions, disappearances and thefts throughout the supply chain.
- (2) Substances listed in Annex II are available to the members of the general public but are subject to the reporting obligation that covers both professional users throughout the supply chain and members of the general public.
- (3) Member States have demonstrated that aluminium powder has been used in, and acquired for, the production of homemade explosives in Europe. Magnesium powder is a substance with properties very similar to aluminium.
- (4) The marketing and use of aluminium and magnesium powders is currently not harmonised at Union level. However, at least one Member State already limits their availability to the general public, and the World Customs Organisation monitors the shipments of aluminium powder worldwide, to identify instances of illicit trade for the purpose of manufacturing improvised explosives precursors.
- (5) Developments in the misuse of aluminium and magnesium powders do not currently justify restricting access by the members of the general public, in view of the level of threat or the volume of trade associated with these substances.
- (6) Increased control is necessary to allow national authorities to prevent and detect the possible illicit use of these substances as explosives precursors, and this can be achieved through the reporting mechanism established under Regulation (EU) No 98/2013.
- (7) Aluminium powder is the subject of a separate delegated act which adds it to Annex II. This would leave magnesium powder as a realistic non-controlled alternative.
- (8) In the light of the risk posed by the availability of magnesium powder, and considering that the reporting obligation will have no significant impact on economic operators or

² OJ L 39, 9.2.2013, p. 1-11.

consumers, it is justified and proportionate to add this substance to Annex II of Regulation (EU) No 98/2013,

HAS ADOPTED THIS REGULATION:

Article 1

In the table in Annex II to Regulation (EU) No 98/2013, the following substance is added:

Magnesium, <i>powders</i> (CAS RN 7439-95-4) (*,**)	Ex 8104 30 00	
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Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30.11.2016

For the Commission
The President
Jean-Claude JUNCKER