

Regulation (EU) 2019/1148 on the marketing and use of explosives precursors
Additional guidance on ‘Verification upon sale’

The additional guidance provided below aims to assist actors in the chemical supply chain and the competent authorities in the implementation of Article 8 of Regulation (EU) 2019/1148 concerning ‘Verification upon sale’ on top of the Guidelines published by the European Commission (OJ 24.6.2020, C210/1)

It has been developed by experts from the private sector, competent authorities of the EU Member States and the European Commission in the context of the Standing Committee on Precursors. This guidance is not legally binding and does not interpret the provisions of Regulation (EU) 2019/1148. Only the Court of Justice of the European Union has the power to issue a legally binding interpretation of EU legislation. Neither the European Commission, the above-mentioned private sector or the competent authorities of the EU Member States, nor any person acting on their behalf is responsible for the use which might be made of this document.

1. Legal basis for verifying the proof of identity

1.1 Sales to members of the general public

According to Article 8(1) an “economic operator who makes available a restricted explosives precursor to a member of the general public in accordance with Article 5(3) shall for each transaction verify the proof of identity and licence of that member of the general public in compliance with the licensing regime established by the Member State where the restricted explosives precursor is made available and record the amount of the restricted explosives precursor on the licence”.

This means that for each sale¹ to a member of the general public the proof of identity (and the licence) needs to be verified.

1.2 Sales to economic operators or professional users

Article 8(2) states that “For the purpose of verifying that a prospective customer is a professional user or another economic operator, the economic operator who makes available a restricted explosives precursor to a professional user or another economic operator shall for each transaction request the

¹ The correct legal term to be used here, and further in the document, should in principle be ‘making available’ instead of ‘sale’. However, this is done to increase the readability of the document. Also the ‘seller’ and ‘buyer’ should be interpreted in this light.

following information, unless such a verification for that prospective customer has already occurred within a period of one year prior to the date of that transaction and the transaction does not significantly deviate from previous transactions:

(a) proof of identity of the individual entitled to represent the prospective customer;

(b) the trade, business, or profession together with the company name, address and the value added tax identification number or any other relevant company registration number, if any, of the prospective customer;

(c) the intended use of the restricted explosives precursors by the prospective customer.

Member States may use the template of the customer's statement set out in Annex IV."

Although this Article refers to "request" also in this case verification of the proof of identity is required because:

- the title of the article dealing with the concerned provisions is "**Verification upon sale**"

- the paragraph in question starts with "**For the purpose of verifying that a prospective customer...**"

- the purpose or spirit of the legislation is to prevent that explosives precursors fall in the wrong hands and are misused for the illicit manufacture of explosives. This therefore strongly suggests that "verification" is needed; otherwise this provision has no added value.

De facto this means that there is no difference as to the proof of identity obligation between sales to the members of the general public or to economic operators/professional users.

This interpretation is confirmed by the Guidelines which state that:

"For sales to any person, professional or not, the economic operator is required to verify the proof of identity of the prospective customer. In case of legal persons, this verification concerns the individual entitled to represent the prospective customer."

However, it is important to note that in the context of sales to economic operators or professional users an exception is provided for - see Article 8(2) - if "*such a verification for that prospective customer has already occurred within a period of one year prior to the date of that transaction and the transaction does not significantly deviate from previous transactions*". This is an important facilitation which can greatly reduce the administrative burden for the economic operators concerned.

2. Difference between verifying the proof of identity and recording of the verification activities or results

It is important to distinguish between the obligation to verify the proof of identity and the recording of the verification activities or results. These are two distinct aspects which are linked to different obligations.

The recording of the verification activities is important for two reasons (see also recital (13)) as it assists the authorities of the Member States to:

- prevent, detect, investigate and prosecute serious crime committed with homemade explosives (on the basis of the recorded information)
- check whether the seller has fulfilled its legal obligations and carried out the verification upon sale.

The Guidelines state the following:

“With a view to facilitate investigations and inspections, economic operators are required to record each transaction and retain that information for 18 months from the date of transaction (Article 8(4)).

i. In the case of sales to members of the general public

“As a minimum, economic operators should record the name on the proof of identity and licence, and the document numbers of both documents.”

ii. In the case of sales to professional users or other economic operators

“For 18 months from the date of transaction, the economic operator is required to retain the information regarding:

— the proof of identity of the individual entitled to represent the prospective customer”

This means that economic operators should record the name on the proof of identity and the document number for each transaction. However, *if such a verification for that prospective customer has already occurred within a period of one year prior to the date of that transaction and the transaction does not significantly deviate from previous transactions, the verification upon sale and recording is not necessary for each transaction.*

What kind of proof of identity is acceptable in practice?

It is up to the national competent authorities to determine which documents or procedures can be used or accepted as proof of identity taking into account national legislation and (business) practices.

The most obvious example of a proof of identity is a passport or a national identity card. Member States may also accept other documents or procedures such as a driving licence or official electronic identification methods. For remote sales, including in a business-to-business environment, Member States may also accept that the verification takes place via video conferencing as long as it allows for an adequate control (e.g. good quality of the vision of the person and the proof of identity, good quality of the sound, etc.)

3. Verification upon sale and verification upon delivery

The legislation refers to 'verification upon sale'. In the vast majority of cases, in particular of transactions between professionals², distinction can be made between the moment of purchase - and the actors involved – and the moment of delivery – and the actors involved.

This triggers a number of questions on the verification upon sale obligation.

A sale can be broken down in three steps:

- first, the negotiation of the price, quality, delivery method, etc. and the reaching of the sales agreement (in many cases this will lead to the signature of a sales contract);
- second, the physical transport, delivery or handover of the goods;
- third, the payment.

This means that the verification upon sale obligation comprises the delivery or handover moment. Also a purposive interpretation of the legislation – in other words an interpretation that gives effect to the aim or spirit of the legislation – supports this interpretation.

In the Guidelines a number of explicit references are made to verification upon delivery.

In the context of specific recommendations for remote sales for professionals the Guidelines state that:

- *"The proof of identity could additionally be verified in person upon delivery or through other means, for instance through mechanisms provided for in Regulation (EU) No 910/2014). It is important to note that the verification responsibility stays with the economic operator, even if delivery services are instructed to verify documents."* This recommendation clarifies that the verification upon sale (of the first part of the sales process) has to be done at the latest before the physical handover (the second part of the sales process)

But the Guidelines also deal with the second phase of the sales process.

- *"It is also recommended to request a proof of delivery of the restricted explosives precursor and an identifiable signature of the person acting on behalf of the customer to help identify all actors in the supply chain."*

This provision recommends that the supplier (or the transporter acting on his/her behalf) requests a 'proof of delivery' from the person receiving the goods on behalf of the customer. This is actually a

² "professionals" means 'professional users' and 'economic operators' further to Article 3(9) and 3(10) respectively.

standard business practice and the document used for is it usually the CMR³-waybill (international transport) or the freight note or Bill of Lading (national transport).

The Guidelines furthermore specify in the box on 'Steps to take by the economic operator' that suppliers (or transporters acting on his/her behalf) should also:

"Check whether the person receiving the goods is authorised to receive restricted explosives precursors on behalf of their company or institution."

This provision is the logical extension of the verification upon sale principle and flows from the purpose and spirit of the legislation. It places responsibility upon the seller to ensure that there is compliance with the Regulation when delivering restricted explosives precursors so as to ensure that the person receiving these goods is authorised to receive them. This is needed because even if the first part of the sales process has been done in compliance with the legislation, a seller should for instance never deliver the restricted explosive precursors somewhere where there is no appropriate supervision. That would undermine the purpose of the verification upon sale obligation.

The Guidelines do not specify how in practise this should be checked. Once again it is up to the national competent authorities to determine which documents or procedures can be used or accepted for this taking into account national legislation and (business) practices. An example may be that the restricted explosives precursors are delivered in a closed warehouse of the buyer with entry/exit control via Radio Frequency Identification badges and that the receiver's behaviour was in conformity with business practice⁴.

In practice this means that the buyer also has certain responsibilities. This includes in the first place that a proof of identity is shown by the buyer, whether s/he is a member of the general public or a representative of an economic operator or a professional user. Moreover, once the purchase has been completed, i.e. the first part of the sales process (including the verification upon sale), the buyer should take the appropriate measures to ensure that the restricted explosives precursors will be received by a staff member which is authorised (and has the appropriate knowledge and competences) to receive

³ See the 'CMR Convention' (Convention on the Contract for the International Carriage of Goods by Road).

⁴ A concrete example could be: Company A (the customer) placed an order with Producer B, a chemical factory. John works as a delivery driver for producer B and he knows the strict protocol that comes with each delivery. He had received his instructions from B in advance, including the date and time slot for the delivery. Arriving at the customer's site, John had to go to the gate and indicate that he was there for the delivery. A security guard would then check John's identification and confirm his purpose for being on the site.

When John's delivery arrived, an employee (normally an authorized person) from the customer site would sign the Bill of Lading. The document is kept by John and shared with producer B, the chemical factory. If the product was delivered in bulk, it was transferred directly from the iso tank to the storage tank. However, if the product was delivered in packaging, it would be stored in secured warehouses within the customer's perimeter.

the goods. In other words, the verification upon delivery becomes a shared responsibility between the seller and the buyer from that moment.

The situation at sites of chemical factories or companies

Generally speaking, security measures (gates, security guards, surveillance cameras, etc.) are in place at chemical sites to prevent theft, and no one can enter the site without proper authorization. Employees need to always wear their identification badges visibly to show that they are authorized to be on site. Visitors must be announced, receive a temporary badge, and show their ID cards to obtain the temporary badge. They also keep a driver database that contains detailed information about each driver, including their ADR qualification (which is valid for two years), their driving license, and their ID. Before a delivery is made, the chemical company should check the database to confirm that the driver meets all the necessary requirements⁵.

⁵ Some of these aspects are addressed in voluntary industry initiatives like Responsible Care/Product Stewardship, Code of Conducts, Safety and Quality Assessment System (SQAS), etc.