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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	12 February 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Delegations will find attached document COM(2019) 77 final.

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EUROPEAN
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Brussels, 12.2.2019
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2019/0037 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the sixty-second session of the Commission on Narcotic Drugs on the addition to the list of substances in the Tables of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Commission on Narcotic Drugs (CND) in connection with the envisaged adoption of changes to the Tables of the United Nations (UN) Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 on the basis of recommendations of the International Narcotics Control Board (INCB).

2. CONTEXT OF THE PROPOSAL

2.1. The United Nations (UN) Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

The United Nations (UN) Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ('the Convention') aims to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

The Convention entered into force on 11 November 1990.

The EU[1] and its Member States are parties to the Convention.

2.2. The Commission on Narcotic Drugs (CND)

The CND is a commission of the UN Economic and Social Council (ECOSOC) and its functions and powers are *inter alia* set out in the Convention. It is made up of 53 UN Member States elected by ECOSOC. 11 Member States are currently members of the CND with the right to vote. The Union has an observer status in the CND.

The CND, taking into account the comments submitted by the Parties and the comments and recommendations of the INCB, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in the Tables of the Convention.

2.3. The envisaged acts of the CND

On 14 to 22 March 2019, during its sixty-second session, the CND is to adopt scheduling-decisions on the addition of four substances in the Tables of the Convention ('the envisaged acts') namely 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) and hydriodic acid.

According to the Convention decisions of the CND become binding, unless a Party has submitted the decision for review to ECOSOC within the applicable time-limit[2]. The decisions of ECOSOC on the matter are final. The envisaged acts will become binding on the

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1 Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (OJ L 326 of 24/11/1990, p.56).

2 Article 12(7) of the 1988 UN Convention

Parties in accordance with Article 12 of the Convention, which provides as follows in its relevant parts:

Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary General, together with all relevant information upon which the request for review is based.

The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.'

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The Commission has been informed on 19 December 2018 that the INCB recommends to add three substances, namely 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) in Table I of the Convention. As to a fourth substance, namely hydriodic acid, the INCB recommends to not place it under control of the Convention.

According to the assessment of the INCB, three substances, 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) are frequently used in the illicit manufacture of, respectively, MDMA and related substances; of 3,4-MDP-2-P and subsequently MDMA and related substances; and amphetamine and methamphetamine. There is evidence that the volume and extent of the illicit manufacture of these narcotic drugs and psychotropic substances poses serious public health or social problems so as to warrant the placing of these substances under international control. As to the fourth substance, namely hydriodic acid, the INCB is of the view that international control would not be effective in reducing the availability of illicitly manufactured methamphetamine and amphetamine.

Illegal manufacture of MDMA - and related substances - and methamphetamine and amphetamine is a serious problem in the Union. These illegally manufactured narcotic drugs and psychotropic substances cause significant public health and social problems in the Union. Additionally, organised crime groups in the Union are also illegally exporting these narcotic drugs and psychotropic substances to third countries.

The Member States of the Union should thus express the position in the CND in favour of adding 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) to Table I of the Convention and to not place hydriodic acid under control of the Convention.

Changes to the Tables of the Convention have direct repercussions for the scope of application of Union law in the area of drug precursor control as substances added to the

Tables of the Convention are to be incorporated into the Union law[3]. The Commission has been empowered to adopt delegated acts in order to ensure this.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement[4].

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[5].

4.1.2. Application to the present case

The Commission on Narcotic Drugs is a body set up by an agreement, namely the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The acts which the Commission on Narcotic Drugs is called upon to adopt constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and are capable of decisively influencing the content of EU legislation namely Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors and Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors. This is because the changes to the Tables of the Convention have direct repercussions for the scope of application of Union law in the area of drug precursor control as substances added to the Tables of the Convention are to be incorporated into the Union law.

The envisaged acts do not supplement or amend the institutional framework of the agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged acts in respect of which a position is taken on the Union's behalf. If the envisaged acts pursue two aims or have two components and if one of

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3 COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors (OJ L 22, 26.1.2005, p. 1) and 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).

4 Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

5 Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61to 64.

those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged acts relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 of the Treaty on the Functioning of the European Union.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACTS

As the acts of the Commission on Narcotic Drugs will amend the Tables to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ('the Convention') entered into force on 11 November 1990 and was concluded on behalf of the European Economic Community by Council Decision 90/611/EEC[6].

(2) Pursuant to Article 12(2) to (7) of the Convention, substances may be added to the Tables of the Convention in which drug precursors are listed.

(3) The Commission on Narcotic Drugs should, during its sixty-second session from 14 to 22 March 2019 in Vienna, take a decision on the addition of four new substances to the Tables of the Convention.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Commission on Narcotic Drugs should, during its sixty-second session from 14 to 22 March 2019 in Vienna, as the decisions will be binding on the Union and capable of decisively influencing the content of Union law, namely Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors[7] and Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors.[8]

(5) According to the assessment of the International Narcotics Control Board, three substances, 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) are frequently used in the illicit manufacture of, respectively, MDMA and related substances; of 3,4-MDP-2-P and subsequently MDMA and related substances; and amphetamine and methamphetamine. There is evidence that the volume and extent of the illicit manufacture of these narcotic drugs and psychotropic substances poses serious public health or social problems so as to warrant the placing of these substances under international control. As to the fourth substance, namely hydriodic

6 OJ L 326, 24.11.1990 p. 56
7 OJ L 22, 26.1.2005, p. 1
8 OJ L 47, 18.2.2004, p. 1

acid, the International Narcotics Control Board is of the view that international control would not be effective in reducing the availability of illicitly manufactured methamphetamine and amphetamine. Illegal manufacture of MDMA - and related substances - and methamphetamine and amphetamine is a serious problem in the Union. These illegally manufactured narcotic drugs and psychotropic substances cause significant public health and social problems in the Union. Additionally, organised crime groups in the Union are also illegally exporting these narcotic drugs and psychotropic substances to third countries.

(6) The Union's position is to be expressed by the Member States of the Union that are members of the Commission on Narcotic Drugs,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the sixty-second session of the Commission on Narcotic Drugs shall be the following:

- 3,4-MDP-2-P methyl glycidate ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and alpha-phenylacetoacetamide (APAA) are to be included in Table I of the Convention;

- hydriodic acid is not to be placed under control of the Convention.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the Commission on Narcotic Drugs.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President