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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. General context

Illicit drug trafficking and drug abuse are major threats to the health and safety of individuals and to societies in the EU. They affect the social and economic fabric and undermine the quality of life of individuals, as well as the security of the Member States. Although consumption of substances controlled under the UN Conventions on drugs¹, such as cocaine, ecstasy or cannabis ('controlled drugs'), seems to have stabilised in recent years², albeit at high levels, a major challenge is to address new substances that emerge on the market at a rapid speed.

New psychoactive substances, which imitate the effects of controlled drugs and are often marketed as legal alternatives to them because they are not subjected to similar control measures, and which have numerous uses in the industry, are increasingly available in the Union. Between 1997 and 2012, Member States reported around 290 substances, with more than one new substance notified every week in 2012. The number of reported substances tripled between 2009 and 2012 (from 24 to 73).

A growing number of individuals, in particular young people, consume new psychoactive substances. However, these substances can cause harms to individuals' health and safety, and can put burdens on society, just like controlled drugs do. The risks that new psychoactive substances can pose have prompted national authorities to submit them to various restriction measures. However, such national restriction measures have limited effectiveness, since these substances can be moved freely in the internal market - around 80% of the substances notified were detected in more than one Member State.

The Commission Communication "Towards a stronger European response to drugs"³, adopted in October 2011, identified new psychoactive substances as one of the problems requiring a firm response at the EU level.

Council Decision 2005/387/JHA of 10 May 2005⁴ provides a mechanism for addressing the risks posed by new psychoactive substances, which can lead to the submission of substances to control measures and criminal penalties across the Union. To address more sustainably the frequent emergence of new psychoactive substances and their rapid spread across the Union, the Commission proposed stronger rules, under [*Regulation (EU) No .../... on new psychoactive substances*].

To effectively reduce the availability of harmful new psychoactive substances, which pose severe health, social and safety risks to individuals and society, and to deter trafficking in these substances as well as the involvement of criminal organisations in their production or distribution, along with controlled drugs, it is necessary to cover new psychoactive substances by criminal law provisions.

Council Framework Decision 2004/757/JHA of 25 October 2004⁵ provides a common approach to the fight against illicit drug trafficking. It sets out minimum common rules on the

¹ The 1961 United Nations Single Convention on Narcotic Drugs (as amended by the 1972 Protocol) and the 1971 United Nations Convention on Psychotropic Substances.

² European Monitoring Centre for Drugs and Drug Addiction, The state of the drugs problem in Europe, Annual Report 2012. <http://www.emcdda.europa.eu/publications/annual-report/2012>

³ COM(2011) 689 final.

⁴ OJ L 127, 20.5.2005, p. 32.

⁵ OJ L 335, 11.11.2004, p. 8.

definition of drug trafficking offences and sanctions to avoid that problems arise in cooperation between the judicial authorities and law enforcement agencies of Member States, owing to the fact that the offence or offences in question are not punishable under the laws of both the requesting and the requested State. However, while these provisions apply to substances covered by the UN Conventions and to synthetic drugs submitted to control under Joint Action 97/396/JHA of 16 June 1997⁶, they do not apply to new psychoactive substances.

In order to streamline and clarify the legal framework applicable to drugs, the most harmful new psychoactive substances should be covered by the same criminal law provisions as substances controlled under the UN Conventions.

It is, therefore, necessary to extend the scope of application of Framework Decision 2004/757/JHA to new psychoactive substances subjected to control measures under Council Decision 2005/387/JHA as well as to those substances subjected to permanent market restriction measures under *[Regulation (EU) No .../... on new psychoactive substances]*.

A legislative proposal on illicit drug trafficking was foreseen in the Commission's 2012 Work Programme.

1.2. Grounds for and objectives of the proposal

This proposal amends Framework Decision 2004/757/JHA to include new psychoactive substances posing severe risks within its scope of application.

This proposal accompanies the proposal for a *[Regulation (EU) No .../... on new psychoactive substances]*. The two proposals are linked, so that new psychoactive substances that pose severe health, social and safety risks and are therefore submitted to permanent market restriction under that Regulation are also subjected to the criminal law provisions on illicit drug trafficking set by the Framework Decision 2004/757/JHA.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT

2.1. Stakeholders' consultation

Broad stakeholder and expert consultations and a web-based public consultation have informed the preparatory work for this proposal.

The Commission consulted all Member States in the assessment of the functioning of Framework Decision 2004/757/JHA and Council Decision 2005/387/JHA. Moreover, in the context of external studies on illicit drug trafficking and new psychoactive substances, the Commission collected and examined the views of a broad range of stakeholders, practitioners and experts, including EU agencies involved in the implementation of these instruments.

The Commission also organised two experts' meeting on illicit drug trafficking, on 10 November 2011 and 29 February 2012, and two experts' meetings on new psychoactive substances, on 15 December 2011 and 1 March 2012. During these meetings, academic experts and practitioners stressed the importance of criminal law provisions in helping clamp down and deter illicit drug trafficking, and tackling the spread of harmful new psychoactive substances. At the same time, they pointed out that legislation on new psychoactive substances should be proportionate and calibrated to the different levels of risks that they pose.

A survey was conducted among young people (15-24 years' old) in 2011, through the Eurobarometer "Youth attitudes on drugs". Almost half of respondents (47%) thought that

⁶ OJ L 167, 25.6.1997, p. 1.

only those substances which are proved to pose risks to health should be restricted, while 34% held that all substances which imitate the effects of controlled drugs should be restricted.

2.2. Impact assessment

The Commission assessed the impacts of this proposal for an amendment to Framework Decision 2004/757/JHA in an impact assessment on new psychoactive substances. The analysis concluded that, as under the Council Decision 2005/387/JHA, harmful new psychoactive substances (those posing severe health, social and safety risks) should be subjected to criminal law provisions. It further concluded that they should, therefore, be subjected to the criminal law provisions on illicit drug trafficking. This represented part of the preferred policy option, which foresees a graduated set of restriction measures that are proportionate to the level of risks posed by new psychoactive substances, and which do not cause obstacles to legitimate trade in the internal market.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. The legal base

This proposal is based on Article 83(1) TFEU, which empowers the European Parliament and the Council to establish minimum rules concerning the definition of offences and sanctions in the area of illicit drug trafficking, by means of a Directive adopted in accordance with the ordinary legislative procedure.

3.2. Subsidiarity, proportionality and respect of fundamental rights

The EU is better placed than the Member States to take action to restrict the availability in the internal market of harmful new psychoactive substances for consumers, while simultaneously ensuring that legitimate trade is not impeded.

This is because individually Member States cannot address effectively and sustainably the rapid emergence and spread of these substances. Uncoordinated national action and the proliferation of diverse national regimes on new psychoactive substances can produce knock-on effects on other Member States (displacement of harmful substances) and can pose problems in cooperation between national judicial authorities and law enforcement agencies.

The proposal is proportionate and does not go beyond what is necessary to achieve the objectives because it only addresses through criminal law those new psychoactive substances that are a serious concern at the EU level.

This proposal indirectly impacts on certain fundamental rights and principles enshrined in the EU Charter of Fundamental Rights, because it expands the scope of application of the Framework Decision 2004/757/JHA, whose provisions impact on the following fundamental rights and principles: the right to liberty and security (Article 6), the right to property (Article 17), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right to defence (Article 48), and the principle of legality and proportionality of criminal offences and penalties (Article 49). These rights and freedoms can be subject to limitations, but only under the limits and requirements set by Article 52(1) of the EU Charter.

3.3. Choice of instrument

In accordance with Article 83(1) TFEU, a Directive is the appropriate instrument to ensure minimum harmonisation at the EU level in the area of illicit drug trafficking, while leaving flexibility to Member States when implementing the principles, rules and their exemptions at national level.

3.4. Explanatory documents accompanying notification of transposition measures

Member States are requested to communicate to the Commission the national measures adopted to comply with this Directive.

Member States are not requested to submit to the Commission explanatory documents (including correlation tables) accompanying the notification of national measures adopted for transposing the provisions of this Directive. This is not necessary because of the reduced scope of the proposed amendment. The submission of additional explanatory documents would add an unjustified administrative burden on Member States' competent authorities.

3.5. Main provisions

Article 1 – this provision lays down the amendments to the Framework Decision 2004/757/JHA, in relation to the definition of the term "drug", to the provision for covering by criminal law new psychoactive substances posing severe health, social and safety risks, and to the assessment of the implementation and impacts of the Framework Decision by the Commission.

Article 2 – this provision lays down the deadline for the transposition of the provisions of the Directive in national legislation.

Articles 3 and 4 – these provisions relate to the entry into force and addressees of the Directive.

4. BUDGETARY IMPLICATION

The proposal has no implications for the Union budget.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking⁷ provides a common approach to the fight against illicit drug trafficking, which poses a threat to the health, safety and quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States. It sets out minimum common rules on the definition of drug trafficking offences and sanctions, to avoid that problems may arise in cooperation between the judicial authorities and law enforcement agencies of Member States, owing to the fact that the offence or offences in question are not punishable under the laws of both the requesting and the requested State.
- (2) Framework Decision 2004/757/JHA applies to the substances covered by the 1961 United Nations Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, and the 1971 United Nations Convention on Psychotropic Substances ('UN Conventions'), as well as to the synthetic drugs subjected to control across the Union pursuant to Joint Action 97/396/JHA of 16 June 1997 concerning the information exchange, risk assessment and the control of new synthetic drugs⁸, which pose public health risks comparable to those posed by the substances scheduled under the UN Conventions.
- (3) Framework Decision 2004/757/JHA should also apply to the substances subjected to control measures and criminal penalties pursuant to Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk assessment and control of new psychoactive substances⁹, which pose public health risks comparable to those posed by the substances scheduled under the UN Conventions.

⁷ OJ L 335, 11.11.2004, p. 8.

⁸ OJ L 167, 25.06.1997, p. 1.

⁹ OJ L 127, 10.05.2005, p. 32.

- (4) New psychoactive substances, which imitate the effects of substances scheduled under the UN Conventions, are emerging frequently and are spreading fast in the Union. Certain new psychoactive substances pose severe health, social and safety risks, as ascertained by *[Regulation (EU) No .../... on new psychoactive substances]*. Under that Regulation, measures may be taken to prohibit the production, manufacture, making available on the market including importation to the Union, transport, and exportation from the Union of new psychoactive substances posing severe health, social and safety risks. To effectively reduce the availability of new psychoactive substances that pose severe risks to individuals and society, and to deter trafficking in those substances across the Union, as well as the involvement of criminal organisations, permanent market restriction measures adopted under that Regulation should be underpinned by criminal law provisions.
- (5) The new psychoactive substances subjected to permanent market restriction pursuant to *[Regulation (EU) No .../... on new psychoactive substances]* should, therefore, be covered by the Union criminal law provisions on illicit drug trafficking. This would also help streamline and clarify the Union legal framework, as the same criminal law provisions would apply to substances covered by the UN Conventions and to the most harmful new psychoactive substances. The definition of 'drug' in the Framework Decision 2004/757/JHA should, therefore, be amended.
- (6) In order to swiftly address the emergence and spread of harmful new psychoactive substances in the Union, Member States should apply the provisions of the Framework Decision 2004/757/JHA to new psychoactive substances posing severe health, social and safety risks within twelve months from their submission to permanent market restriction under *[Regulation (EU) No .../... on new psychoactive substances]*.
- (7) Since the objective of this Directive, namely to extend the application of the Union criminal law provisions that apply to illicit drug trafficking to new psychoactive substances posing severe health, social and safety risks, cannot be sufficiently achieved by the Member States acting alone, and can therefore be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objective.
- (8) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and notably the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the right not to be tried or punished twice in criminal proceedings for the same criminal offence and the principles of legality and proportionality of criminal offences.
- (9) [In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive.]

AND/OR

- (10) [In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of

the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by or subject to its application.]

- (11) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is therefore not bound by or subject to its application.
- (12) Framework Decision 2004/757/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Framework Decision 2004/757/JHA is amended as follows:

- (1) In Article 1, point 1 is replaced by the following:
- "'drug' means:
- (a) any of the substances covered by the 1961 United Nations Single Convention on Narcotic Drugs (as amended by the 1972 Protocol) and the 1971 United Nations Convention on Psychotropic Substances;
 - (b) any of the substances listed in the Annex;
 - (c) any new psychoactive substance posing severe health, social and safety risks, subjected to permanent market restriction on the basis of *[Article 13(1) of Regulation (EU) No .../... on new psychoactive substances]*;"
- (2) In Article 9, the following paragraphs 3 and 4 are added:
- "3. In respect of new psychoactive substances subjected to permanent market restriction on the basis of *[Article 13(1) of Regulation (EU) No .../... on new psychoactive substances]*, Member States shall bring into force the laws, regulations and administrative provisions necessary to apply the provisions of this Framework Decision to these new psychoactive substances within twelve months after entry into force of the permanent market restriction. They shall forthwith communicate to the Commission the text of those provisions.
- When Member States adopt those provisions, they shall contain a reference to this Framework Decision or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
4. By *[5 years after entry into force of this Directive and every 5 years thereafter]*, the Commission shall assess the extent to which the Member States have taken the necessary measures to comply with this Framework Decision and publish a report."
- (3) An Annex, as set out in the Annex to this Directive, is added.

Article 2

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*twelve months after entry into force*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

Entry into force

This Directive shall enter into force on [*the same day as entry into force of Regulation (EU) No .../... on new psychoactive substances*].

Article 4

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX

List of substances referred to in point (1)(b) of Article 1

- (a) P-Methylthioamphetamine or 4-Methylthioamphetamine, as referred to in Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties¹⁰.
- (b) Paramethoxymethylamphetamine or N-methyl-1-(4-methoxyphenyl)-2-aminopropane, as referred to in Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA¹¹.
- (c) 2,5-dimethoxy-4-iodophenethylamine, 2,5-dimethoxy-4-ethylthiophenethylamine, 2,5-dimethoxy-4-(n)-propylthiophenethylamine and 2,4,5-trimethoxyamphetamine, as referred to in Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2¹².
- (d) 1-benzylpiperazine or 1-benzyl-1,4-diazacyclohexane or N-benzylpiperazine or benzylpiperazine as referred to in Council Decision 2008/206/JHA of 3 March 2008 on defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions¹³.
- (e) 4-methylmethcathinone, as referred to in Council Decision 2010/759/EU of 2 December 2010 on submitting 4-methylmethcathinone (mephedrone) to control measures¹⁴.
- (f) 4-methylamphetamine, as referred to in Council Decision 2013/129/EU of 7 March 2013 on subjecting 4-methylamphetamine to control measures¹⁵.
- (g) 5-(2-aminopropyl)indole, as referred to in [*Council Decision 2013/.../JHA of ... on subjecting 5-(2-aminopropyl) indole to control measures*¹⁶].

¹⁰ OJ L 244, 16.09.1999, p.1.

¹¹ OJ L 063, 06.03.2002, p. 14.

¹² OJ L 321, 6.12.2003, p. 64.

¹³ OJ L 63, 7.03.2008, p. 45.

¹⁴ OJ L 322, 8.12.2010, p. 44.

¹⁵ OJ L 72, 15.03.2013, p. 11.

¹⁶ OJ L [...], [...], p. [...].