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NOTE

From:	Presidency
On:	27 May 2015
To:	Permanent Representatives Committee
Subject:	Presidency Discussion Paper on new psychoactive substances

I. Introduction

1. On 11 July 2011 the Commission submitted the report on the assessment of the functioning of Council Decision 2005/387/JHA on the information exchange, risk assessment and control of new psychoactive substances (NPS)¹. The Commission report concluded that, while Council Decision 2005/387/JHA was a useful instrument, it was not sufficient, considering the scale and complexity of the problem, and therefore required revision.
2. Subsequently, the Council in its conclusions of 12.12.2011² on new psychoactive substances invited the Commission to table in 2012 a legislative proposal on NPS with a view to revising Council Decision 2005/387/JHA on the basis of findings identified in the Commission's assessment and some additional recommendations outlined in these Council conclusions.

¹ See doc 13074/11.

² See doc 17730/11.

3. On 17 September 2013, the Commission tabled a proposal for a Regulation on New Psychoactive Substances (Proposed NPS Regulation)³ and a proposal for a Directive amending Framework Decision 2004/757/JHA (Proposed NPS Directive)⁴.
4. In the European Parliament, the ENVI Committee adopted its opinion on 31 January 2014. Also the LIBE Committee, calling for urgent action, adopted its report on the proposed NPS Regulation and Directive already on 10 March 2014. Those reports were later adopted at the plenary session of the European Parliament on 17 April 2014⁵.
5. At present, NPS continue to be addressed in the Union by the existing mechanism established by Council Decision 2005/387/JHA⁶.
6. In its judgment of 16 April 2015 in cases C-317/13 and C-679/13 the Court of Justice has confirmed that the Council can continue to validly ban NPS through Council implementing decisions based on the existing mechanism, but that it needs to consult the European Parliament prior to the adoption of those decisions⁷.

II. Discussions on the proposed NPS Regulation at the Horizontal Working Party on Drugs (HDG)

7. The proposed NPS Regulation has been examined by the HDG since October 2013.

³ See doc. 13857/13.

⁴ See doc. 13865/13.

⁵ See doc. 9045/14.

⁶ Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances (OJ L 127, 20.5.2005, p. 32).

⁷ For further details, see information note by the Legal Service (doc. 8541/15).

8. A majority of Member States expressed the following concerns with regard to the proposed NPS Regulation:
- First, the NPS pose significant health risks and the protection of public health should be the primary objective of the EU action, rather than improving the functioning of the internal market regarding licit uses of these substances;
 - Second, due to a very small number of the NPS with legitimate use the licit internal market of NPS is almost inexistent, in particular given that the medicines are excluded from the scope of the proposed NPS Regulation;
 - Third, the Member States are concerned that the proposed NPS Regulation would lead to a complete harmonization of this area, preventing the introduction of any national measure on the NPS. A vast majority of Member States considers it necessary to have the possibility to maintain or swiftly introduce new or stricter measures at national level.

III. Discussion on an alternative solution for the NPS legislation

9. As a result, at the beginning of the Latvian Presidency there was a broad consensus that an alternative solution should be explored.
10. A great number of delegations suggested that an instrument of criminal law should be further explored, noting that such an instrument would allow the Member States to better address the concerns related to the protection of the public health, give their law enforcement authorities a better tool to tackle the NPS on their territory, while preserving their national competence to adopt more stringent measures on their respective territories. The HDG held several discussions on that alternative approach and delegations also had some concerns should Article 83(1) TFEU be used as a legal basis of the NPS legislation.

11. The Legal Service gave its opinion on the issue of appropriate legal basis and possible alternative solution for the proposed NPS Regulation⁸.

IV. Conclusion

12. In the light of the discussions at the HDG and the above-mentioned opinion issued by the Legal Service as well as the above-mentioned recent judgment of the Court of Justice (confirming the possibility for the Council to address the NPS through the current mechanism established by the Council Decision 2005/387/JHA) the Presidency invites the COREPER to reflect on the value added of the possible options and to decide:
- whether the HDG should resume its work on the proposed new mechanism on the basis of the alternative solution identified by the Legal Service in its opinion; or
 - whether the existing mechanism resulting from the Council Decision 2005/387/JHA sufficiently meets the current needs and should continue to be used to address the NPS at the Union level.

⁸ See the opinion of the Legal Service of 12 May 2015 (doc. 8592/15).