



Council of the
European Union

Brussels, 25 November 2016
(OR. en)

14810/16

LIMITE

CORDROGUE 74
DROIPEN 194
CODEC 1727
JAI 1000
SAN 406

**Interinstitutional File:
2013/0304 (COD)**

NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	12918/2/16 REV 2
No. Cion doc.:	13865/13
Subject:	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

Delegations will find below the above-mentioned text including, to the extent possible, the latest comments from the delegations of the Horizontal Working Party on Drugs (HDG) provided at the HDG meeting on 9 November 2016 and through the written procedures by 22 November 2016.

Proposal for a

DIRECTIVE (EU) .../...

OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

amending Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, in order to include new psychoactive substances in the definition of drug

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 trafficking¹ provides a common approach to tackle 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 drugs², 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 substances³, which pose public health risks comparable to those posed by the substances scheduled under the UN Conventions.

¹ OJ L 335, 11.11.2004, p. 8.
² OJ L 167, 25.06.1997, p. 1.
³ 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 public health and social risks. [The Regulation (EU) No .../... amending Regulation (EC) No 1920/2006 as regards information exchange, early warning system and risk assessment procedure on new psychoactive substances] provides the framework for the exchange of information on new psychoactive substances and for risk evaluation procedure based on initial report and risk assessment report drawn up to estimate if new psychoactive substance poses severe public health and social risks. To effectively reduce the availability of new psychoactive substances that pose severe public health and, where applicable, social risks, and to deter trafficking in those substances across the Union, as well as the involvement of criminal organisations, these substances should be included in the definition of drug in line with the provisions of this Directive and underpinned by criminal law provisions.
- (5) The new psychoactive substances included in the definition of drug 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.
- (5a) The essential elements of the definition of drug as well as the procedure and the criteria for inclusion of new psychoactive substances into that definition should be laid down in this Directive. However, in order to swiftly address the emergence and spread of harmful new psychoactive substances in the Union, implementing powers to include the new psychoactive substances to the definition of drug should be conferred upon the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

- (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 public health and, where applicable, social risks as soon as possible but no later than six months from the adoption of the implementing decision including them in the definition of drug. Member States should undertake every effort to shorten that deadline to the extent possible.
- (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 public health and, where applicable, social risks, cannot be sufficiently achieved by the Member States acting alone, but can rather 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 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 that 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 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 European Union and to the Treaty on the Functioning of the European Union, those Member States 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 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 European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States 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 Protocol No 22 on the position of Denmark, annexed to the Treaty on 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 not bound by it or subject to its application.
- (12) Framework Decision 2004/757/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Framework Decision 2004/757/JHA

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

in Article 1, paragraph 1 is replaced by the following:

"‘drug’ means any of the following:

- a) a substance covered by the 1961 United Nations Single Convention on Narcotic Drugs (as amended by the 1972 Protocol) or the 1971 United Nations Convention on Psychotropic Substances;
- b) a substance subjected to control measures by a Council Decision adopted in accordance with Article 8(3) of Council Decision 2005/387/JHA⁴;
- (c) a new psychoactive substance, in respect of which an implementing decision has been adopted in accordance with Article 1a;

in Article 1, the following paragraphs are added:

4. ‘new psychoactive substance’: means a substance in pure form or in a preparation that is not covered by the 1961 United Nations Single Convention on Narcotic Drugs nor by the 1971 United Nations Convention on Psychotropic Substances but may pose similar health or social risks.
5. ‘preparation’ means a mixture containing one or more new psychoactive substances;

⁴ 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).

the following Article is inserted:

"Article 1a:

Procedure for including of the new psychoactive substances in the definition of drug

1. Based on a risk assessment or combined risk assessment carried out pursuant to [Article XX of Regulation XX (amended EMCDDA-Regulation)], and in accordance with the criteria set out in paragraph 2, the Commission shall, without undue delay, adopt an implementing decision providing that the new psychoactive substance(s) pose(s) severe public health and, where applicable, social risks at the Union level and that it should be included in the definition of drug referred to in Article 1 (1) of this Framework Decision.
2. When considering whether to adopt an implementing decision referred to in paragraph 1, the Commission shall take into account whether the extent of use or patterns of use of the new psychoactive substance, its availability and potential for diffusion within the Union are significant and whether the harm to health caused by the consumption of the new psychoactive substance, associated with its acute or chronic toxicity and abuse liability or dependence-producing potential, is life threatening. The harm to health is considered life threatening if the new psychoactive substance is likely to cause death or lethal injury, severe disease, severe physical or mental impairment, a significant spread of diseases, including transmission of blood-borne viruses;

In addition the Commission shall take into account whether the social harm caused by the new psychoactive substance to individuals and to society is severe, in particular regarding its impact on social functioning and public order, resulting in public order disruption, violent and anti-social behaviour, causing damage to the user, to other persons or to property; or whether the criminal activities, including organised crime, associated with the new psychoactive substance are systematic, illicit profits, or economic costs are significant.

3. If, within six weeks from the date of receipt of the risk assessment or combined risk assessment report [pursuant to Article XX of Regulation XX (amended EMCDDA-Regulation)], the Commission deems it not necessary to adopt an implementing decision to include the new psychoactive substance(s) in the definition of drug referred to in Article 1(1) of this Framework Decision, it shall present a report to the Council explaining the reasons for not doing so.
4. Based on that report, one or more Member States, may request the Commission to adopt an implementing decision providing that the new psychoactive substance(s) is to be included in the definition of drug referred to in Article 1(1) of this Framework Decision, no later than six weeks from the date on which the Commission presented its report to the Council. If such request is supported by a simple majority of Member States, the Commission shall, within six weeks, adopt the implementing decision referred to in this Article.
5. Member States, which have-not yet done so, shall bring into force the laws, regulations and administrative provisions necessary to apply the provisions of this Framework Decision to those new psychoactive substances as soon as possible but no later than six months after entry into force of the implementing decision.

They shall immediately 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 a reference is to be made.

6. The Commission shall adopt the implementing decision referred to in this Article in accordance with the examination procedure referred to in Article 8a(2).

The following Article is inserted:

"Article 1b

List of drugs

1. The Commission shall draw up a list of drugs, as set out in Article 1(1) of this Framework Decision.

That list shall indicate the date as of which a substance falls under the definition of drug. It shall also specify the legal instrument on the basis of which the substance falls under that definition.

2. The Commission shall keep that list up-to-date, in particular each time that a new substance falls under the definition of drug, referred to above.
3. The Commission shall publish that list in the C series of the Official Journal of the European Union and shall make it available to public on its website.

The following Article is inserted:

"Article 1c:

National control measures

Without prejudice to the obligations of the Member States referred to in this Framework Decision, Member States may maintain or introduce on their territories, with regard to new psychoactive substances, any national control measures that they deem appropriate.

The following Article is inserted:

"Article 8a:

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁵.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing decision and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

Article 2

Transposition of this Directive

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 of this Directive*]. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, 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.

⁵ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

Article 3

Repeal of Decision 2005/387/JHA

Decision 2005/387/JHA shall be repealed on [the same day as the day for transposition of Directive (EU) .../ ... [amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provision on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking], without prejudice to the obligations of the Member States relating to the time limit for transposition of that Decision into national law. References to Decision 2005/387/JHA shall be construed as references to this Directive.

Article 4

Entry into force

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

Article 5

Addressees

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

Done at ..., ...

For the European Parliament

For the Council

The President

The President
