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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

(OJ L 335, 11.11.2004, p. 8)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017	L 305	12	21.11.2017

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Article 1

Definitions

For the purposes of this Framework Decision:

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1. ‘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 by the 1971 United Nations Convention on Psychotropic Substances;

   (b) any of the substances listed in the Annex;

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2. ‘precursors’: shall mean any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988;

3. ‘legal person’: shall mean any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations;

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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, as amended by the 1972 Protocol, or by the 1971 United Nations Convention on Psychotropic Substances but may pose health or social risks similar to those posed by the substances covered by those Conventions;

5. ‘preparation’: means a mixture containing one or more new psychoactive substances.

Article 1a

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

1. Based on a risk assessment or combined risk assessment carried out pursuant to Article 5c of Regulation (EC) No 1920/2006 of the European Parliament and of the Council ([1]), and in accordance with the criteria set out in paragraph 2 of this Article, the Commission shall, without undue delay, adopt a delegated act in accordance with Article 8a amending the Annex to this Framework Decision in order to

([1]) Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (OJ L 376, 27.12.2006, p. 1).

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add the new psychoactive substance or substances to it and provide that the new psychoactive substance or substances pose severe public health risks and, where applicable, severe social risks at Union level, and that it is or they are included in the definition of 'drug'.

2. When considering whether to adopt a delegated act as referred to in paragraph 1, the Commission shall take into account whether the extent or patterns of use of the new psychoactive substance and 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 or a significant spread of diseases, including the 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, and, in particular, whether the impact of the new psychoactive substance on social functioning and public order is such as to disrupt public order, or cause violent or anti-social behaviour, resulting in harm to the user or to other persons or damage to property, or whether criminal activities, including organised crime, associated with the new psychoactive substance are systematic, involve significant illicit profits or entail significant economic costs.

3. If, within six weeks of the date of receipt of the risk assessment report or the combined risk assessment report in accordance with Article 5c(6) of Regulation (EC) No 1920/2006, the Commission considers that it is not necessary to adopt a delegated act to include the new psychoactive substance or substances in the definition of 'drug', it shall present a report to the European Parliament and to the Council explaining the reasons for not doing so.

4. As regards new psychoactive substances added to the Annex to this Framework Decision, 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 the entry into force of the delegated act amending the Annex. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Framework Decision or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 1b

National control measures

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

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Article 2

Crimes linked to trafficking in drugs and precursors

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:

(a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;

(b) the cultivation of opium poppy, coca bush or cannabis plant;

(c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);

(d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.

2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

Article 3

Incitement, aiding and abetting and attempt

1. Each Member State shall take the necessary measures to make incitement to commit, aiding and abetting or attempting one of the offences referred to in Article 2 a criminal offence.

2. A Member State may exempt from criminal liability the attempt to offer or prepare drugs referred to in Article 2(1)(a) and the attempt to possess drugs referred to in Article 2(1)(c).

Article 4

Penalties

1. Each Member State shall take the measures necessary to ensure that the offences defined in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties.

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances:

(a) the offence involves large quantities of drugs;

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(b) the offence either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons.

3. Each Member State shall take the necessary measures to ensure that the offences referred to in paragraph 2 are punishable by criminal penalties of a maximum of at least 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union ([1]).

4. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(d) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA and the precursors are intended to be used in or for the production or manufacture of drugs under the circumstances referred to in paragraphs 2(a) or (b).

5. Without prejudice to the rights of victims and of other bona fide third parties, each Member State shall take the necessary measures to enable the confiscation of substances which are the object of offences referred to in Articles 2 and 3, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

The terms ‘confiscation’, ‘instrumentalities’, ‘proceeds’ and ‘property’ shall have the same meaning as in Article 1 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Article 5

Particular circumstances

Notwithstanding Article 4, each Member State may take the necessary measures to ensure that the penalties referred to in Article 4 may be reduced if the offender:

(a) renounces criminal activity relating to trafficking in drugs and precursors, and

(b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:

(i) prevent or mitigate the effects of the offence,

(ii) identify or bring to justice the other offenders,

(iii) find evidence, or

(iv) prevent further offences referred to in Articles 2 and 3.

Article 6

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 2 and 3 committed for their benefit by any

([1]) OJ L 351, 29.12.1998, p. 1.

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person, acting either individually or as a member of an organ of the legal person in question, who has a leading position within the legal person, based on one of the following:

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person;

(c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 2 and 3.

Article 7

Sanctions for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

(a) exclusion from entitlement to tax relief or other benefits or public aid;

(b) temporary or permanent disqualification from the pursuit of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order;

(e) temporary or permanent closure of establishments used for committing the offence;

(f) in accordance with Article 4(5), the confiscation of substances which are the object of offences referred to in Articles 2 and 3, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 8

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2 and 3 where:

(a) the offence is committed in whole or in part within its territory;

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(b) the offender is one of its nationals; or

(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) where the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2 and 3 when it is committed by one of its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission when they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

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Article 8a

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 1a shall be conferred on the Commission for a period of five years from 22 November 2017. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 1a may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making ([1]).

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 1a shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

([1]) OJ L 123, 12.5.2016, p. 1.

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Article 9

Implementation and reports

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 12 May 2006.

2. By the deadline referred to in paragraph 1, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. The Commission shall, by 12 May 2009, submit a report to the European Parliament and to the Council on the functioning of the implementation of the Framework Decision, including its effects on judicial cooperation in the field of illicit drug trafficking. Following this report, the Council shall assess, at the latest within six months after submission of the report, whether Member States have taken the necessary measures to comply with this Framework Decision.

Article 10

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 11

Entry into force

This Framework Decision shall enter into force on the day following its publication in the *Official Journal of the European Union*.

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ANNEX

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

1. P-Methylthioamphetamine or 4-Methylthioamphetamine, as referred to in Council Decision 1999/615/JHA ([1]).

2. Paramethoxymethylamphetamine or N-methyl-1-(4-methoxyphenyl)-2-aminopropane, as referred to in Council Decision 2002/188/JHA ([2]).

3. 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 ([3]).

4. 1-benzylpiperazine or 1-benzyl-1,4-diazacyclohexane or N-benzylpiperazine or benzylpiperazine, as referred to in Council Decision 2008/206/JHA ([4]).

5. 4-methylmethcathinone, as referred to in Council Decision 2010/759/EU ([5]).

6. 4-methyl-5-(4-methylphenyl)-4,5-dihydrooxazol-2-amine (4,4′-DMAR) and 1-cyclohexyl-4-(1,2-diphenylethyl)piperazine (MT-45), as referred to in Council Implementing Decision (EU) 2015/1873 ([6]).

7. 4-methylamphetamine, as referred to in Council Implementing Decision (EU) 2015/1874 ([7]).

8. 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-(dimethylamino)cyclohexyl]methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine), as referred to in Council Implementing Decision (EU) 2015/1875 ([8]).

9. 5-(2-aminopropyl)indole, as referred to in Council Implementing Decision (EU) 2015/1876 ([9]).

10. 1-phenyl-2-(pyrrolidin-1-yl)pentan-1-one (α-pyrrolidinovalerophenone, α-PVP), as referred to in Council Implementing Decision (EU) 2016/1070 ([10]).

([1]) 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 penalties (OJ L 244, 16.9.1999, p. 1).

([2]) Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA (OJ L 63, 6.3.2002, p. 14).

([3]) 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-2 (OJ L 321, 6.12.2003, p. 64).

([4]) 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 provisions (OJ L 63, 7.3.2008, p. 45).

([5]) Council Decision 2010/759/EU of 2 December 2010 on submitting 4-methylmethcathinone (mephedrone) to control measures (OJ L 322, 8.12.2010, p. 44).

([6]) Council Implementing Decision (EU) 2015/1873 of 8 October 2015 on subjecting 4-methyl-5-(4-methylphenyl)-4,5-dihydrooxazol-2-amine (4,4′-DMAR) and 1-cyclohexyl-4-(1,2-diphenylethyl)piperazine (MT-45) to control measures (OJ L 275, 20.10.2015, p. 32).

([7]) Council Implementing Decision (EU) 2015/1874 of 8 October 2015 on subjecting 4-methylamphetamine to control measures (OJ L 275, 20.10.2015, p. 35).

([8]) Council Implementing Decision (EU) 2015/1875 of 8 October 2015 on subjecting 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-(dimethylamino)cyclohexyl]methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine) to control measures (OJ L 275, 20.10.2015, p. 38).

([9]) Council Implementing Decision (EU) 2015/1876 of 8 October 2015 on subjecting 5-(2-aminopropyl)indole to control measures (OJ L 275, 20.10.2015, p. 43).

([10]) Council Implementing Decision (EU) 2016/1070 of 27 June 2016 on subjecting 1-phenyl-2-(pyrrolidin-1-yl)pentan-1-one (α-pyrrolidinovalerophenone, α-PVP) to control measures (OJ L 178, 2.7.2016, p. 18).

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11. Methyl 2-[[1-(cyclohexylmethyl)-1*H*-indole-3-carbonyl]amino]-3,3-dimethylbutanoate (MDMB-CHMICA), as referred to in Council Implementing Decision (EU) 2017/369 ([1]).

12. *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacrylamide (acryloylfentanyl), as referred to in Council Implementing Decision (EU) 2017/1774 ([2]).

([1]) Council Implementing Decision (EU) 2017/369 of 27 February 2017 on subjecting methyl 2-[[1-(cyclohexylmethyl)-1*H*-indole-3-carbonyl]amino]-3,3-dimethylbutanoate (MDMB-CHMICA) to control measures (OJ L 56, 3.3.2017, p. 210).

([2]) Council Implementing Decision (EU) 2017/1774 of 25 September 2017 on subjecting *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacrylamide (acryloylfentanyl) to control measures (OJ L 251, 29.9.2017, p. 21).