Council of the
European Union

Brussels, 15 July 2020
(OR. en)

9682/20

UD 117
DELACT 89
CORDROGUE 43

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	14 July 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2020) 4691 final
Subject:	COMMISSION DELEGATED REGULATION (EU) …/... of 14.7.2020 amending Regulation (EC) No 273/2004 of the European Parliament and of the Council and Council Regulation (EC) No 111/2005 as regards the inclusion of certain drug precursors in the list of scheduled substances

Delegations will find attached document C(2020) 4691 final.

Encl.: C(2020) 4691 final

EUROPEAN
COMMISSION

Brussels, 14.7.2020
C(2020) 4691 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 14.7.2020

amending Regulation (EC) No 273/2004 of the European Parliament and of the Council and Council Regulation (EC) No 111/2005 as regards the inclusion of certain drug precursors in the list of scheduled substances

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Drug precursors are chemicals which may be used for the illicit manufacture of narcotic drugs or psychotropic substances. Regulation (EC) No 273/2004 of the European Parliament and of the Council lays down measures for monitoring trade in drug precursors within the EU, while Council Regulation (EC) No 111/2005 governs trade in drug precursors between the EU and third countries.

The two Regulations jointly implement the measures envisaged by Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988[1] (the '1988 UN Convention').

In December 2013 these two Regulations were amended in order to strengthen the efficiency of the control measures for drug precursors. The empowerment to adopt delegated acts to add new substances to the list of scheduled substances was introduced allowing a quick adaptation of the Regulations to new trends in diversion of drug precursors. Further amendments to the two Regulations added extra substances to the lists of scheduled substances.

In its decisions 62/10, 62/11 and 62/12, taken at its sixty-second session on 19 March 2019, the Commission on Narcotic Drugs of the United Nations (CND) decided to include three substances, 3,4-MDP-2-P methyl glycidate[2] ("PMK glycidate"), 3,4-MDP-2-P methyl glycidic acid ("PMK glycidic acid") and *alpha*-phenylacetoacetamide (APAA) to Table I of the Convention. Additionally, in its decision 63/1, taken at its sixty-third session on 4 March 2020, the CND decided to include methyl alpha-phenylacetoacetate (MAPA) to Table I of the Convention. Therefore, the European Commission needs to adopt a Delegated Regulation amending Regulation (EC) No 273/2004 and Council Regulation (EC) No 111/2005 to add these four substances to the Annexes of these Regulations. The subsequent scheduling of these four substances under Regulations (EC) No 273/2004 and (EC) No 111/2005 allows increased controls on the use of those substances, with a view to prevent their diversion to illicit manufacture of amphetamines and MDMA - commonly known as "ecstasy".

The ease with which these four substances can be transformed to support the production of amphetamines and MDMA, the dimension of the subsequent social and public health problems related to the consumption of amphetamines and MDMA, the absence of known licit uses and the limited additional workload for the competent authorities justify their inclusion into the list of scheduled substances under Regulations 273/2004 and 111/2005.

Similarly, and although they have not been added to the Tables of the 1988 UN Convention methyl 2-methyl-3-phenyloxirane-2-carboxylate (BMK methyl glycidate) and 2-methyl-3-phenyloxirane-2-carboxylic acid (BMK glycidic acid) are frequently used in the illegal manufacture of amphetamines. The ease with which these two substances can be transformed to support the production of amphetamines, the dimension of the subsequent social and public health problems related to the consumption of amphetamines, the absence of significant licit uses of the substances and the limited additional workload for the competent authorities

[1] OJ L 326, 24.11.1990, p. 57.

[2] For reasons of consistency these substances will be named in the annexes of the Regulations under the recognised standards of the International Union of Pure and Applied Chemistry (IUPAC).

justify their inclusion into the list of scheduled substances under Regulations 273/2004 and 111/2005 thereby going beyond the .obligations stemming from the UN 1988 Convention.

Red phosphorus has significant legitimate use but it is frequently diverted from legal channels and used in the illicit manufacture of methamphetamine the EU. A significant number of illicit methamphetamine laboratories are dismantled each year in the EU. It is estimated that illicit production reaches between 10-12 tonnes per annum in one Member State alone. Additionally, recently there are strong indications that the illicitly manufacture of methamphetamine is spreading to more and more Member States.

Methamphetamine is a very addictive drug and is causing serious social and public health problems in some regions of the EU. In this light it is proportionate and justified to include red phosphorus into the list of scheduled substances under Regulations 273/2004 and 111/2005.

Possibility to schedule in Category 1 or Category 2 of Regulation (EC) No 273/2004 and Regulation (EC) No 111/2005

The Commission has discretion as to whether to add the four substances scheduled by the UN 1988 Convention to Category 1 or Category 2 of the Regulations. Category 3 of the regulations is not appropriate as this would mean that the obligations stemming from the UN 1988 Convention could not be met. Category 4, which only exists for Council Regulation (EC) No 111/2005, is also excluded because this category can only include medicinal products and veterinary medicinal products containing scheduled substances.

Substances scheduled in Category 1 pose the greatest risk when diverted and usually become incorporated in full or in part into the molecule of the narcotic drug or psychotropic substance (i.e. an immediate precursor). Therefore, the control and monitoring measures applicable to these substances are the strictest in both regulations.

Substances in Category 2 either pose a lower risk or the amounts of these substances diverted to the illicit manufacture of drugs represent such a small proportion of the total amounts legally traded and used in the EU that scheduling them under Category 1 would cause a disproportionate burden; hence, the corresponding control and monitoring measures are consequently somewhat less strict.

Category 1 substances need to be stored in secured premises (e.g. locks, video-camera surveillance, etc.) and each operator dealing with these substances needs a licence. For substances of Category 2 there is no obligation to store them into secured premises and the operators only need a registration. As to the control of external trade, the main difference between the two categories is that substances in Category 1 require an import and export authorisation, while for Category 2 substances there is only an obligation for an export authorisation.

Legal use of the substances

Based on information collected during the scheduling process in the 1988 UN Convention it can be concluded that there is no legitimate trade and use of PMK glycidic acid, PMK glycidate, APAA and MAPA. During the analysis leading to the current proposal to schedule BMK methyl glycidate and BMK glycidic acid in the Regulations 273/2004 and 111/2005 it appeared that these substances have no significant licit uses in the EU.

As these six substances can be easily transformed to support the production of amphetamines and MDMA, taking into consideration the dimension of the subsequent social and public health problems related to the consumption of amphetamines and MDMA and the limited additional workload for the competent authorities and operators, scheduling them under Category 1 would not cause a disproportionate burden.

Red phosphorus on the other hand has significant legitimate use. To counter the diversion of this substance from licit use to illicit use in the framework of intra EU trade, it is therefore proposed to schedule it in Category 2A in Annex I to Regulation (EC) No 273/2004. A threshold of 0,1 kg will apply to mitigate the obligations of the Regulation where the quantity involved does not exceed that threshold over a period of one year. The threshold was determined in agreement with the competent authorities of the Member States.

Although it is currently not known whether red phosphorus is also diverted from the trade between the EU and third countries it is very likely that once the intra EU trade is monitored illicit drug manufactures will try to source this substance through the diversion from trade between the EU and third countries. Therefore, red phosphorus should also be added to Category 2 in the Annex to Regulation (EC) No 111/2005. This also ensures that the parallelism between the substances included in Regulation (EC) No 273/2004 and in Regulation (EC) 111/2005 remains and this simplifies the implementation of these regulations by operators and competent authorities.

In amending the two Regulations, it is also appropriate to update the relevant CN codes of the substances contained in the various annexes.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In line with paragraph 4 of the Common Understanding on Delegated Acts between the European Parliament, the Council and the European Commission, appropriate and transparent consultations, including at expert level, have been carried out in the preparation of this delegated act. A draft version of the delegated act has been transmitted to the European Parliament on 22 January 2020. The Group of Experts on Drug Precursors has discussed the proposal in detail during its meetings on 14-15 May 2018, 21-22 November 2018, 27-28 May 2019 and 28-29 November 2019. Additionally, a draft version of the delegated act has been submitted to the Group on 2 October 2019 and a revised draft version on 22 January 2020.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

On the basis of Article 15 of Regulation (EC) No 273/2004 of the European Parliament and of the Council, as amended by Regulation (EU) No 1258/2013, and Article 30a of Council Regulation (EC) No 111/2005, as amended by Regulation (EU) No 1259/2013 of the European Parliament and of the Council, the Commission is empowered to adopt delegated acts in order to adapt the Annexes to new trends in diversion of drug precursors and to follow any amendment to the tables in the Annex to the United Nations Convention.

As referred to in chapter 1, for PMK glycidic acid, PMK glycidate, APAA and MAPA there is a need to follow the amendments to the tables in the Annex to the UN 1988 Convention. BMK methyl glycidate, BMK glycidic acid and red phosphorus are substances which are frequently used for illicit purposes and which present increasing challenges for the Member States. Therefore, the Annexes to Regulation (EC) No 273/2004 and Regulation (EC) No

111/2005 should be adapted to new trends in diversion in accordance with the delegation of power in Regulation (EC) 273/2004 and Regulation (EC) No 111/2005.

Regulations 273/2004 and 111/2005 are closely linked. They jointly implement the measures envisaged by Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988. Common implementing rules for Regulations 273/2004 and 111/2005 have been adopted through Commission Delegated Regulation (EU) 2015/1011 and Commission Implementing Regulation (EU) 2015/1013.

In the light of the above, the bundling of two different empowerments based on different basic legislative acts into one single delegated act is justified by the close material link between the empowerments in question.

COMMISSION DELEGATED REGULATION (EU) …/...

of 14.7.2020

amending Regulation (EC) No 273/2004 of the European Parliament and of the Council and Council Regulation (EC) No 111/2005 as regards the inclusion of certain drug precursors in the list of scheduled substances

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors[1], and in particular Article 15 thereof,

Having regard to 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[2], and in particular Article 30a thereof,

Whereas:

(1) Annex I to Regulation (EC) No 273/2004 and the Annex to Regulation (EC) No 111/2005 each contain a list of scheduled substances, which are subject to a number of harmonised control and monitoring measures provided for by those Regulations.

(2) By means of Decisions 62/10, 62/11 and 62/12 of the Commission on Narcotic Drugs of the United Nations (CND), taken at its sixty-second session on 19 March 2019, the three substances methyl 3-(1,3-benzodioxol-5-yl)-2-methyloxirane-2-carboxylate (PMK methyl glycidate), 3-(1,3-benzodioxol-5-yl)-2-methyloxirane-2-carboxylic acid (PMK glycidic acid) and alpha-phenylacetoacetamide (APAA) have been added to Table I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988[3] ('the 1988 UN Convention'). Additionally, by means of Decision 63/1 of the CND, taken at its sixty-third session on 4 March 2020, the substance methyl alpha-phenylacetoacetate (MAPA) has been added to Table I of the 1988 UN Convention.

(3) One of the purposes of Regulations (EC) No 273/2004 and (EC) No 111/2005 is to implement Article 12 of the 1988 UN Convention in the Union. PMK methyl glycidate, PMK glycidic acid, APAA and MAPA should consequently be included in

1 OJ L 47, 18.2.2004, p. 1.
2 OJ L 22, 26.1.2005, p. 1.
3 OJ L 326, 24.11.1990, p. 57.

Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005.

(4) The scheduled substances listed in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005 are divided into categories for which different measures apply, so as to achieve a proportionate balance between the level of threat posed by each specific substance and the burden on licit trade. The strictest control and monitoring measures apply to substances of category 1. For example, substances of category 1 need to be stored in secured premises and each operator dealing with such substances needs a licence.

(5) PMK methyl glycidate and PMK glycidic acid are immediate precursors of 3,4-methylenedioxymethamphetamine (MDMA), commonly known as 'ecstasy'. APAA and MAPA are immediate precursors of amphetamines. In other words, those substances can be easily transformed into MDMA or amphetamines.

(6) The misuse and abuse of MDMA and amphetamines are causing serious social and public health problems in some regions of the Union. Additionally, organised crime groups in the Union produce vast amounts of MDMA and amphetamines. Large quantities of MDMA and amphetamines are also exported to third countries.

(7) There is no known licit production, trade or use of PMK methyl glycidate, PMK glycidic acid, APAA and MAPA in the Union. Including those substances under category 1 in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005 would consequently not entail any extra administrative burden for economic operators and competent authorities in the Union.

(8) In the light of the threat that PMK methyl glycidate, PMK glycidic acid, APAA and MAPA pose to the social and public health in the Union, and considering that their scheduling will have no impact on their licit trade, production and use in the Union, those substances should be listed under category 1 in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005.

(9) Methyl 2-methyl-3-phenyloxirane-2-carboxylate (BMK methyl glycidate) and 2-methyl-3-phenyloxirane-2-carboxylic acid (BMK glycidic acid) are also substances that are immediate precursors of amphetamines and that are frequently used for the illicit manufacture of amphetamines. Those substances should therefore be included in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005.

(10) There is no significant licit production, trade or use of BMK methyl glycidate and BMK glycidic acid in the Union. Including those substances under category 1 in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) 111/2005 would consequently not entail any significant extra administrative burden for economic operators and competent authorities in the Union.

(11) In the light of the threat that BMK methyl glycidate and BMK glycidic acid pose to the social and public health in the Union and considering that their scheduling will only have marginal impact on their licit trade, production and use in the Union, they should be listed under category 1 in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005.

(12) Red phosphorus is frequently diverted from trade in the internal market and used in the Union for the illicit manufacture of methamphetamine. It is used as a catalyst to drive the chemical conversion to methamphetamine of ephedrine or pseudoephedrine, which are already listed under category 1 in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005). Consequently, red phosphorus should be included in Annex I to Regulation (EC) No 273/2004.

(13) Methamphetamine is a very addictive drug which is causing serious social and public health problems in some regions of the Union.

(14) Red phosphorus has however important and diversified legal uses, such as the manufacture of flame-retardants for plastics, pyrotechnics and striker plates for safety matches and flares.

(15) In order to achieve a proportionate balance between the threat that red phosphorus poses to the social and public health in the Union and the burden on licit trade in that substance on the internal market, red phosphorus should be included under category 2A in Annex I to Regulation (EC) No 273/2004.

(16) Although it is currently not known whether red phosphorus is also being diverted from the trade between the Union and third countries it is very likely that once the trade in that substance on the internal market is placed under control in the context of Regulation (EC) No 273/2004, illicit drug manufactures will try to source it through the diversion from such extra-Union trade. Consequently, red phosphorus poses a high risk of diversion with regard to trade between the Union and third countries and it should therefore also be included under category 2 in the Annex to Regulation (EC) No 111/2005. This also ensures that the parallelism between the substances included in Regulations (EC) No 273/2004 and 111/2005 remains and simplifies the implementation of those Regulations by operators and competent authorities.

(17) Annex II to Regulation (EC) No 273/2004 sets quantitative thresholds on transactions involving certain substances carried out over a period of one year. The purpose of that Annex is to avoid unduly hampering legitimate trade in those substances in cases where it is possible to reduce or eliminate the risk of diversion into illicit channels by limiting the restrictions on trade to quantities over a certain threshold. Based on available evidence and consultations with the competent authorities of the Member States, that threshold for red phosphorus should be set at 0,1 kg.

(18) It is also appropriate in this context to update the combined nomenclature codes (CN codes) in Regulations (EC) No 273/20014 and EC (No) 111/2005 on the basis of the latest version of the Combined Nomenclature adopted by Commission Implementing Regulation (EU) 2019/1776[4] and applicable as of 1 January 2020, to ensure the correct classification of the scheduled substances.

(19) As the substance Alpha-phenylacetoacetonitrile is commonly referred to as APAAN by competent authorities in the Member States, that abbreviation should be added in Annex I to Regulation (EC) No 273/2004 and in the Annex to Regulation (EC) No 111/2005.

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[4] Commission Implementing Regulation (EU) 2019/1776 of 9 October 2019 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 280, 31.10.2019, p. 1).

(20) Regulations (EC) No 273/2004 and (EC) No 111/2005 should therefore be amended accordingly.

(21) Given that there is important lawful production, trade and use of red phosphorus in the Union, economic operators and competent authorities should be given sufficient time to adapt to the new restrictions concerning that substance introduced by this Regulation.

(22) Regulations (EC) No 273/2004 and EC) No 111/2005 jointly implement certain provisions of the 1988 UN Convention. In view of the close material link between those two Regulations, it is justified to adopt the amendments by way of one single delegated act,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EC) No 273/2004

Annexes I and II to Regulation (EC) No 273/2004 are amended in accordance with Annex I to this Regulation.

Article 2

Amendments to Regulation (EC) No 111/2005

The Annex to Regulation (EC) No 111/2005 is amended in accordance with Annex II to this Regulation.

Article 3

Entry into force and application

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

Point (1)(b) and point (2) of Annex I and point (2)(b) of Annex II shall apply from … [please insert the date that is one month after the date of entry into force of this Regulation].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14.7.2020

For the Commission
The President
Ursula VON DER LEYEN