Third Study Commission Questionnaire 2024
South Africa

COUNTRY : ITALY

In 2024, the Third Study Commission of the International Association of Judges (IAJ) intends to study the rapid evolution of illicit drug manufacturing and the challenges this unstoppable process poses to successful prosecution.

Background

In general, a precursor is a starting material used to manufacture a narcotic drug, psychotropic substance or another precursor. A subset of starting materials is under national or international control, but there are a number of starting materials used in illicit drug manufacture that are as yet not controlled, often referred to as "non-scheduled chemicals".

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides the legal framework for addressing the problem of international drug trafficking, including manufacturing. With 191 States parties, this Convention enjoys nearly universal adherence. Article 12 of the 1988 Convention introduces a set of control measures to ensure control of internationally scheduled substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances, also known as "precursors". The premise underlying the control of precursorsis that the denial of these substances to illicit producers and manufacturers of drugs will result in areduction in illicit drug manufacture.

The decision whether a chemical precursor should be placed under international control lies with the United Nations Commission on Narcotic Drugs 1 (CND), a policy making body of the United Nations system with prime responsibility for drug-related matters. The scheduling decision by CND is promptedby the technical assessment by the International narcotic Control Board.

The very article 12 of the 1988 Convention establishes a system under which designated national competent authorities with the support of INCB monitor imports and exports of the internationally scheduled precursors listed in Table 1 and table 2 of the 1988 Convention. Finally, nationallegislations regulate to different extents the domestic manufacture, trade and distribution of these substances, as wellas of any other substance which can be used for illicit drug manufacturing.

The evolution of illicit drug markets toward synthetic drugs including the so called New Psychoactive Substances reflects the increased use by criminal drug manufacturers of non-scheduled precursors, including designer precursors3. To cope with this development some legislations put under national control entire families of chemical substances and incite operators of the chemical industries to exercise
due diligence in selling their products. Similarly, and keeping in mind article 13 of the 1988 Convention,
some jurisdictions also extend control and due diligence to the market of essential equipment possibly used in illicit drug manufacturing.

1 The CND has 53 member states that are elected by ECOSOC.

1. Does your country have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence.

Italy has specific legislation regarding narcotics: it is the Presidential Decree of October 9, 1990, No. 309, known as the Consolidated Law on the Regulation of Narcotic Drugs and Psychotropic Substances, and the Prevention, Treatment, and Rehabilitation of Drug Addiction.
This decree, among other things, defines the responsibilities of the Ministry of Health in terms of control and supervision of the regulation of narcotic and psychotropic substances, with particular regard to the criteria for the formation of tables and the rules that govern the authorizations for private entities (especially businesses or individuals practicing healthcare professions) that may cultivate, possess, use, import, or export chemical substances.
Regarding the duty of diligence in the private sector, in general, the exercise of hazardous activities is regulated by the Civil Code and the legislation on workplace safety.

2. Does your country have specific legislation on precursors control?
Yes …. No….
Title of current legislation and date of adoption:
Last amended/updated in:

Italy adopted the UN Convention signed in Vienna on December 20, 1988, with **Law No. 328 of November 5, 1990.**
Starting from the 1990s, the European Community introduced specific legislation for drug precursors through the issuance of a series of regulations and directives.
As of August 18, 2005, the previous community legislation was entirely replaced by the entry into force of three new regulations: **EC Reg. 273/2004, 111/2005, and 1277/2005**.
It is also necessary to mention the **Council Framework Decision No. 2004/757/JHA** "laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking," whose Article 2 stipulates that each Member State shall ensure that "the manufacture, transport, distribution of precursors, when the person carrying out such acts knows that they will be used for the illicit production or manufacture of narcotic drugs," is punishable.

Italy implemented the European legislation with significant delay (so much so that it was condemned by the European Court of Justice with a ruling on July 29, 2010).
In light of this important framework of obligations deriving from supranational legislation, Italy only introduced comprehensive legislation on drug precursors, also known as classified substances, into its domestic legal system with Legislative Decree No. 50 of March 24, 2011.
As previously mentioned, Italy already had specific legislation on narcotics, particularly the **Presidential Decree of October 9, 1990, No.** 309 (DPR 309/1990).
Until 2011, Article 70 of the aforementioned Decree, titled "Substances susceptible to use in the production of narcotic and psychotropic substances," constituted the main regulatory basis for precursors.
Italian law did not even use the term "precursor," which was explicitly used by the community legislator. Not only linguistically, but also in terms of substantive regulation, the Italian provision was found to be inadequate.

The 1990's legislation, in fact, regulated precursors together with actual narcotic substances without considering the significant differences in use (for narcotic substances, purely pharmaceutical use or individual abuse, while for precursors, industrial use, also non-pharmaceutical), and did not regulate all the scenarios provided for by community regulations (for example, in terms of licenses, authorizations, competent officials, exemptions, reporting, etc.).
Delegated Law No. 96 of June 4, 2010, Article 45, therefore delegated the Government to reorganize, implement, and adapt domestic legislation to community regulations, expressly stipulating the need to clearly distinguish between narcotic and psychotropic substances, on the one hand, and precursors, on the other. This was achieved with **Legislative Decree No. 50 of March 24, 2011**, which amended Articles 70, 71, and 72 of the Consolidated Law on narcotics.

The substances included among the precursors were thus specifically indicated, in compliance with the principle of specificity. The legislation includes, in addition to individual, autonomous substances, also "mixtures" and "natural products" containing such substances.
The internal sanctioning system was then adjusted.
Article 70 of Presidential Decree 309/1990 contains the entire regulation on drug precursors, namely the substances identified and classified in categories 1, 2, and 3 of Annex I to Regulation EC No. 273/2004 and the annex to Regulation EC No. 111/2005. The legislator made a formal reference to community sources. The substances are distinguished based on their dangerousness.

3. In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries?
Please explain:

The initiation of an investigation is not subject to judicial control but is carried out, according to general principles, by the Public Prosecutor. Individual investigative acts may require judicial authorization (for example, in matters of wiretapping or other activities, except in cases of urgency, in which an ex-post review by the judicial authority is always provided).

The transportation of substances is not subject to judicial measures but to administrative measures, which vary depending on the relevant category. There are three categories of substances.
For substances defined as drug precursors and included in category 1 of Article 70 of Presidential Decree 309/1990, activities such as placing on the market, export/import, and even mere possession, are subject to stringent controls, and particularly the issuance of a license by the supervisory authority designated by the Ministry of Health. Within the European Union, it is mandatory that category 1 substances are supplied only to operators who themselves hold a license for use.

The license replaces the previous ministerial authorization, is valid for three years, must be communicated to multiple institutional entities (to allow for supervision), and is required even for those who only intend to possess these substances.
Without a license, the unauthorized availability of these substances is considered a criminal offense, even when such conduct does not fall within the scope of placing on the market, export, or import.
Less stringent controls are provided for the activities of placing on the market and export/import related to substances classified in category 2, for which it is necessary and sufficient for operators to register with the Ministry of Health. There is an exemption from this obligation for operators who do not exceed, in a year, certain thresholds provided in Annex II to Regulation EC No. 273/2004.

4. When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?
Yes …. No….
If your answer to either (a) or (b) is yes, what legislation, regulations or rules of procedure

apply to the decision of a judge involved at the investigation stage?

The requesting or requested Judicial Authority may play a leading role in transmitting requests related to investigative and/or evidentiary needs, or in transmitting information requested by the Judicial Authority of another State. Regarding international rogatory letters, there are three communication channels with the foreign State: the diplomatic route (the traditional method of transmission, which involves sending the request to the Ministry of Foreign Affairs, which, upon the invitation of the Minister of Justice, sends the request and provides directives and instructions to the diplomatic representation in the foreign State); correspondence between Ministers of Justice; and direct transmission, provided for by numerous conventions, between the interested Judicial Authorities. For countries adhering to the Schengen Agreement, direct communication between Judicial Authorities is provided, with only an information copy to the Minister of Justice. Article 53, paragraph 1, of Law No. 388 of September 30, 1993, which ratified the Schengen Agreement, expressly provides that requests for judicial assistance can be made directly between magistrates, and responses can be sent in the same manner.

Within EU law, the European Investigation Order (EIO) is particularly significant as a judicial decision issued or validated by the judicial authority of an EU country to obtain investigative measures carried out in another EU country to gather evidence in criminal matters. The EIO, regulated by the Directive of April 3, 2014, is based on the principle of mutual recognition: the executing authority is required to recognize and ensure the execution of the request formulated by the other country. The execution must be carried out in the same manner as if the investigative measure had been ordered by the authority of the executing State. An EIO can also be issued to obtain existing evidence. The European Investigation Order, for example, must be necessary, proportionate, and permissible in analogous national cases. Generally, according to international conventions, the principle of *lex loci* applies to international rogatory letters, which implies the application of the procedural rules of the State where the act is performed, constituting a typical exercise of the sovereignty of the requested State.

Finally, it is possible that some acts and documents may be spontaneously and autonomously delivered by a foreign authority to the Italian authority. In this case, the transmission does not necessarily have to take place through the instrument of a rogatory letter, as numerous forms of cooperation are provided for by international regulations, for example, those between different police forces.

5. Does your country have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory?
Please explain:

There is specific European-derived legislation that has been integrated into the Consolidated Law on Narcotic Drugs (Presidential Decree 309/1990). For full details, please refer to the response provided under point 2).

6. Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing.
Please explain:

The manufacture, transportation, and distribution of equipment necessary for the production of substances do not constitute an autonomous criminal offense. However, the creation of tools, devices, machines, lamps, etc., can be considered a criminally relevant illicit conduct as a contribution to the offense of producing or trafficking narcotics (material participation in the offense).

7. In respect of non-scheduled chemicals/ equipment, is the fact that they have been mis-declared before the Customs, sufficient to impute 'knowledge' on the part of the supplier of their being used for illicit drug manufacture?
Please explain:

To identify the criminally sanctioned behaviors, it is necessary to distinguish various cases and clarify some basic concepts. According to Italian law (Article 70 of Presidential Decree 309/1990), "placing on the market" refers to any activity aimed at providing, either for a fee or free of charge, classified substances or storing, manufacturing, producing, transforming, trading, distributing, or mediating such substances to carry out supplies within the European territory.
An "operator" is any natural or legal person operating in the sector of placing classified substances on the market, as well as any natural or legal person engaged in the import or export of classified substances to non-EU countries, as provided by European regulations.

Anyone who engages in placing substances on the market or simply possesses such substances without obtaining the relevant license is subject to imprisonment and a fine.
If the offense is committed by a license or authorization holder for substances different from those involved in the operation or possession, or by a registered person under paragraph 5 of Article 70, the penalty is increased. This is technically an aggravating circumstance, but part of the doctrine considers this case as an independent offense, deriving from the "infidelity" of the operator, which constitutes the core of the typical act.

From the distinct provision of these two hypotheses—whether they are two separate crimes or one crime with an aggravating circumstance—it can be inferred that a supplier, duly equipped with the necessary administrative titles, who transfers products and chemical substances to a third party (operator), cannot be presumed responsible for the illegal use of the substances by the transferee who has not correctly declared the type and quantity of substances held to the competent authorities.
The cases of export or import performed by licensed individuals without specific authorizations are also criminalized.

The 2011 reform expanded the sanctioned behaviors: in addition to illegal production, marketing, import/export, or transit, it now also covers providing for a fee or free of charge, possession, storage, manufacturing, transformation, distribution, or mediation of substances without the prescribed authorization.

It is important to note that the illegality of these behaviors is linked to the lack of a license (or cases of revoked or expired licenses), and the final intended use of the precursors does not have any bearing.

8. In your country, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions?
Please explain:

Please refer entirely to the response under point 2).

9. Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country.
Please explain:

Regarding the conduct of an investigation by the Public Prosecutor, a minimum level of detail is certainly necessary concerning the type of substance, the involved individuals, the transit locations, etc. Specifically, with regard to the localization of the substance, according to jurisprudence, the relationship of actual availability of the drug (important for determining the conduct) begins to exist from the preliminary agreement with the supplier.
However, it is not easy to provide a definitive answer on the required level of specificity for the effectiveness of synergistic judicial action. The principles governing criminal cooperation must be respected.

10. Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way?
Please explain:

Currently, the production, use, trade, etc., of so-called non-listed products cannot be considered criminally relevant behaviors. Scholars have highlighted that the complexity of narcotics law is inherently linked to the difficulty of identifying a shared ontological definition of "narcotic substance."

In Italy, the prevailing tabular criterion must be regarded as the only one capable of ensuring certainty regarding the narcotic nature of a substance. The Supreme Court of Cassation has repeatedly emphasized that, in general, the legal notion of a narcotic must be anchored to the tabular system to define the scope of the various incriminating provisions (Decision of the Supreme Court No. 9973 of June 24, 1998; No. 29316 of February 26, 2015).
According to Italian law, even simple "preparations" as well as "all isomers, esters, ethers, and salts, including those of isomers, esters, and ethers, as well as stereoisomers when they can be produced," provided they pertain to substances listed in the tables, may be relevant. Thus, it can be stated that the current penal orientation adheres to a legal rather than a substantial notion of a narcotic substance

11. As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected?
Please explain:

The evidence cannot be obtained in violation of the fundamental principles of the Italian legal system, among which, first and foremost, is the right to defense. The most challenging issue concerns identifying the essential core of defensive rights that must be respected for the act to be admissible. The specific modalities of the right to defense are regulated by the law of the State where the act is performed, which can vary the right to defense depending on the procedural rules.
Furthermore, international sources allow the procedural modalities of the requested State to be supplemented with other necessary forms according to the law of the requesting State, provided that these supplementary modalities do not conflict with the fundamental principles of the law of the requested State. In any case, our Code of Criminal Procedure – whose rules apply subsidiarily where no other regulatory sources exist – expressly establishes in Article 729, paragraph 2, that if the foreign State executes the request for assistance in ways different from those indicated by the judicial authority, the acts performed are inadmissible only in cases where inadmissibility is provided for by Italian law.

12. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

In the scope of my personal experience, I have had the opportunity to deal with requests concerning individuals subject to a European Arrest Warrant or extradition and detained in Italy for reasons unrelated to the conviction being sought for extradition by the foreign state.
In these cases, the foreign judicial authority requests the Italian judicial authority to hear the detained individual. The request is transmitted by the competent Public Prosecutor's Office to the supervisory magistrate, who must set the date and time of the hearing – which can take place either in person or via video link with the prison facility – through a decree containing the notice of summons to be notified to the party and their defense counsel.
The appointment of an interpreter may be necessary in cases where the detained individual does not understand or sufficiently speak the Italian language. Indeed, even in the enforcement phase, the rules set out in Articles 143 et seq. of the Code of Criminal Procedure apply, as amended following the transposition of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.

It is important to explain to the convicted person the reason why a foreign judicial authority requests consent for the extension of extradition or the waiver of the principle of specialty. Often, regardless of language issues, the cultural level of the convicted individuals is not sufficient to fully comprehend the stakes involved.