Third Study Commission Questionnaire 2024 South Africa

Answers from Poland

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 precursors is that the denial of these substances to illicit producers and manufacturers of drugs will result in a reduction 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 prompted by the technical assessment by the International narcotic Control Board.

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

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, national legislations regulate to different extents the domestic manufacture, trade and distribution of these substances, as well as 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 precursors. 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.

Sample questions

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.
Please explain.

Act of 29 July 2005 on Counteracting Drug Addiction - a Polish law passed by the Sejm (lower chamber of the Parliament) of the Republic of Poland, regulating the fight against illegal production and distribution of drugs and psychiatric treatment for drug addicts.

The Act contains provisions on criminal liability for the manufacture and distribution of drugs. The law is accompanied by lists of narcotic drugs with their classification. As of 21 August 2018, the list of substances

under the Act is contained in a regulation of the Minister responsible for health (Minister of Public Health). Before august 21, 2018 the list of illegal substances was contained in the act, so whenever a new substance was to added to the list it meant, that the Parliament had to start very long procedure of amending the act. Since that date it just needs a decision of the Minister of Public Health.

The 2005 Act replaced the older Act of 24 April 1997 (Journal of Laws 2003, no. 24, item 198). Since 2005, the Act has been amended several times (e.g. in connection with updates to lists) and revised.

2. Does your country have specific legislation on precursors control?

Yes …. No **X.**

Title of current legislation and date of adoption:

Precursors are regulated in above mentioned Act of 29 July 2005 on Counteracting Drug Addiction

Last amended/updated

in Act of 17 August 2023 (Journal of Laws 2023, item 1939)

The law also introduced the division of drugs into narcotics and psychotropic substances. Particular attention was also paid to precursors and, at a later date, to so-called substitute drugs. Article 31 introducing the division of narcotic drugs, like Article 19 of the previous law, reproduces the division adopted by the Single Convention, which also defined four groups of substances, placed in four lists, with List I corresponding to group I-N, List II to group II-N, List III to group III-N, List IV to group IV-N. The division into groups, adopted in the PPI, is intended to differentiate, as in the Single Convention of 1961, the control system according to the degree of risk of addiction and the extent of use of the substance for medical purposes. Narcotics in groups I-N (e.g. morphine, heroin, cocaine, opium, but also cannabis plant) and II-N (e.g. codeine, norcodeine, ethylmorphine) (Schedules I and II of the Single Convention) are subject to ordinary (standard) control. This therefore means that drugs in these two groups can be used for both medical, industrial and scientific purposes (Article 34 of the Act). In contrast,

Group IV-N narcotics (e.g. acetorphine, heroin, cannabis herb and resin) (Schedule IV of the Single Convention) are subject to heightened control. They cannot therefore be used for medical purposes (except in animal medicine, where etorphine and acetorphine are used), and are excluded from the retail market. They can only be used for scientific research.

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:
No, any investigations regarding a case of diversion and trafficking of precursors can be started by the police or the public prosecutor without any control from the judge.
When needed, upon a reasoned request of the public prosecutor, the competent Regional Court shall authorise the application of operational control measures - control of correspondence, control and monitoring of telephone conversations or internet connections/communications - to a suspected person.

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 X 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?

Article 55 Act of 29 July 2005 on Counteracting Drug Addiction

[Illicit international and intra-Community traffic].

§ (1) Whoever, contrary to the provisions of this Act, imports, exports, transports, intra-Community purchase or intra-Community supply of

narcotic drugs, psychotropic substances, new psychoactive substances or poppy straw, shall be liable to a fine and imprisonment of up to 5 years.
§ (2) In the event of lesser gravity, the perpetrator shall be
shall be subject to a fine, restriction of liberty or imprisonment of up to one year.
§ (3) If the object of the act referred to in paragraph (1) is a substantial quantity of narcotic drugs, psychotropic substances, new psychoactive substances or poppy straw, or the act has been committed for the purpose of gaining material or personal benefit, the perpetrator shall be liable to a fine and to imprisonment for a term of between 3 and 20 years.

Generally, a judge decides upon the case after the files are sent to the court with an act of indictment. There is one exception – the judge decides upon a pre-trial arrest on the public prosecutor`s request.

As far as the request for information from a foreign state and/or (b) in the provision of information to a foreign state is concerned:

There is a special section XIII provided in Polish Code of Criminal Procedure concerning criminal procedure involving international matters. It covers inter alia: legal aid and postal service in criminal matters (Chapter 62, Articles 585-589f), requesting a member state of the European Union to enforce a decision to seize evidence or to preserve property (Chapter 62a, Articles 589g-589ka), requesting a Member State of the European Union to carry out investigative measures on the basis of a European Investigation Order (Chapter 62c, Articles 589w-589zd), request from a Member State of the European Union to carry out investigative measures on the basis of a European Investigation Order (Chapter 62d, Articles 589ze-589zt), takeover and transfer of criminal prosecution (Chapter 63, Articles 590-592f), requesting the surrender or transport of persons prosecuted or sentenced abroad and the surrender of objects (Chapter 64, Articles 593-601), surrender and transport of persons prosecuted or sentenced or surrender of objects at the request of foreign States (Chapter 65, Articles 602-607), requesting an EU

Member State to surrender a person prosecuted on the basis of an EAW (Chapter 65a, Articles 607a-607j), request from an EU Member State for the surrender of a person wanted under the EAW (Chapter 65b, Articles 607b-607ze), requesting the EU Member State to enforce the precautionary measure (Chapter 65c, Articles 607zd-607zg), an application by an EU Member State for enforcement of a judgment given to ensure the correct course of proceedings (Chapter 65d, Articles 607zb607zn), taking over and transmission of decisions for enforcement (Chapter 66, Articles 608-611f), cooperation with the International Criminal Court (Chapter 66e), request of a member state of the EU for implementation of a criminal order concerning probation of offenders (Chapter 66i),

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?

All the regulations concerning precursors in Poland are applicable over entire national territory.

Please explain:

Act of 29 July 2005 on Counteracting Drug Addiction in Article 1 presents the scope of regulation].

The Act defines:

1) principles and procedure of proceedings in the field of counteracting drug addiction;

2) tasks and powers of government administration bodies and local self-government units and other entities in the field of counteracting violations of the law on the circulation, manufacture, processing, processing and possession of substances the use of which may lead to drug addiction;

3) authorities or bodies competent to implement:

(a) Regulation (EC) of the European Parliament and of the Council No 273/2004 of 11 February 2004 on drug precursors (OJ EC L 047 of 18.02.2004), hereinafter referred to as "Regulation 273/2004",
(b) Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors (OJ EC L 22, 26.01.2005, p. 1; OJ EC Polish Special Edition 2005, Vol. 48, p. 1), hereinafter referred to as "Regulation 111/2005",
(c) 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 EU L 376 of 27.12.2006, p. 1, as amended1));
4) penalties for non-compliance with the provisions of the Act and the regulations mentioned in point 3.

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:

Act of 29 July 2005 on Counteracting Drug Addiction

Art. 54 [Instruments, vessels; punishable preparations].

(1) Whoever manufactures, possesses, stores, disposes of or acquires instruments where it appears from the circumstances that they are used or intended for the unauthorised manufacture, processing or conversion of narcotic drugs, psychotropic substances or new psychoactive substances,

shall be punishable by a fine, restriction of liberty or imprisonment of up to 2 years.

(2) The same penalty shall be imposed on anyone who:

1) adapts for the unauthorised manufacture, processing, conversion or consumption of narcotic drugs, psychotropic substances or new psychoactive substances vessels and instruments, even if they were manufactured for another purpose, or

2) enters into an agreement with another person for the purpose of committing an offence referred to in Article 53(2).

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:
There is no general rule. It all depends on the evidence. Anyway, the criminal intent is what is important. If the prosecutor is able to prove that a defendant knew about what were the chemicals/equipment and what was their purpose (illicit drug manufacture) the supplier can be prosecuted. But those are the very rare cases. I have never had a case like this in my court.

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:

Article 44 [Surveillance].
(1) Supervision of the cultivation and collection referred to in Article 49 (1) and Article 49a, manufacture, processing, conversion, import, distribution, trade and destruction or use for scientific research of narcotic drugs, psychotropic substances and precursors of category 1 shall be exercised by the provincial pharmaceutical inspector competent for the place of business - by controlling the implementation of the obligations under Regulation 273/2004, Regulation 111/2005 and the

provisions of the Act, with the exception of entrepreneurs referred to in paragraph 2a.

(2) Surveillance of precursors category 2 and 3 is exercised by the state district sanitary inspector competent for the seat of the manufacturer, importer or other marketing entity - by controlling the implementation of the obligations imposed on the manufacturer, importer or other marketing entity under the Act, Regulation 273/2004 and Regulation 111/2005 and the issuance of permits - under the rules and in the manner prescribed by the provisions of the State Sanitary Inspectorate, Regulation 273/2004 and Regulation 111/2005.

2a. The Main Pharmaceutical Inspector supervises:

1) the manufacture, processing, conversion, import, distribution and destruction of narcotic drugs, psychotropic substances and precursors of category 1 by an entrepreneur holding the permit referred to in Art. 38 (1) of the Act of 6 September 2001. - Pharmaceutical Law, or an entrepreneur entered in the register referred to in Art. 51b (1) of this Act - conducted within the framework of control of fulfilment of the obligations arising from the provisions of Regulation 273/2004 and Regulation 111/2005 and the provisions of the Act;

2) wholesale trade in narcotic drugs, psychotropic substances or precursors of category 1 by an entrepreneur holding the authorisation referred to in Article 76 (1) of the Act of 6 September 2001. - Pharmaceutical Law - carried out within the framework of control of fulfilment of obligations arising from the provisions of Regulation 273/2004 and Regulation 111/2005 and the provisions of the Act;

3) export of category 4 precursors by an entrepreneur holding the authorisation referred to in Article 38 (1) or in Article 76 (1) of the Act of 6 September 2001. - Pharmaceutical Law - carried out within the framework of control of fulfilment of obligations under the provisions of Regulation 111/2005 and the provisions of the Act.

(3) The authority competent to apply to third countries with the pre-export notification for precursors category 2 and 3 referred to in Article 11 (1) and (2) of Regulation 111/2005 is the Chief Sanitary Inspector.

Article 44b. [Prohibition of manufacture, import and marketing of substitute drugs and new psychoactive substances].

(1) It shall be prohibited:

1) manufacture, import and marketing in the territory of the Republic of Poland of substitute drugs;

2) conduct activities within the scope referred to in Article 40a(1) by an entity which does not fulfil the requirements referred to in Article 40a(1), Article 40b and Article 40c.

Article 44c. [Suspension of manufacture or placing on the market. Withdrawal order] 1.

(1) In the case of ascertaining the manufacture or placing on the market of a product which is reasonably suspected to be a substitute agent, the State Sanitary Inspector competent for the place of manufacture or placing on the market shall order, by decision, the suspension of the manufacture of that product or its withdrawal from the market, for the time necessary to conduct tests to determine whether it is a substitute agent, but not longer than 18 months.

(3) In the event of issuing the decision referred to in paragraph (1), the competent state sanitary inspector shall:

(1) shall secure the product which is reasonably suspected to be a substitute agent;

(2) order to cease the activity in the premises or facilities for the production or marketing of this product for the time necessary for the elimination of the hazard, not exceeding 3 months.

(11) If, as a result of the tests referred to in paragraph (1), the presence of a substance demonstrating an effect on the central nervous system is found, the entity that conducted the test shall notify the Team and the Centre, as a cooperating entity with the European Monitoring Centre for Drugs and Drug Addiction and the European Information Network on Drugs and Drug Addiction (Reitox), of the result of that test, in accordance with Article 8b, paragraph 2, point 22(b) of the Act of 11 September 2015 on Public Health.

(12) Tests to determine whether the product referred to in paragraph (1) is a substitute drug shall be carried out by entities, including scientific entities, having scientific and technical background, technical preparation and infrastructure, which make it possible to determine whether the tested product is a substitute drug, in particular to determine:

1) the origin of the substance with a central nervous system effect identified by the tests;

2) the mechanism of action of this substance;

3) its pharmacological activity;

4) adverse effects, including somatic and psychological effects in humans.

Article 44d. [Handling of a product reasonably suspected to be a substitute drug or a new psychoactive substance].

(1) Where it is found that a product which is reasonably suspected to be a substitute drug has been imported into the territory of the Republic of Poland, the customs authority shall seize the consignment of that product for the time necessary to establish whether it is a substitute drug, but not longer than 18 months.

(2) Where examination of the product referred to in paragraph (1) is necessary to establish whether it is a substitute agent, it shall be carried out by the entities referred to in Article 44c(12).

(3) If, as a result of the tests carried out, it is established that the tested product is a substitute agent, the customs authority shall apply for its forfeiture to the State Treasury.

(4) The forfeiture of a product which is a substitute agent for the benefit of the State Treasury shall be ruled on by a court, at the request of the customs authority, applying the provisions of the Code of Civil Procedure.

(5) The product being a substitute measure, the forfeiture of which has been ordered, shall be destroyed.

(6) If the importing entity is unknown, the product being a substitute measure shall be destroyed without the need to apply to the court for forfeiture in favour of the State Treasury.

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

The list of forbidden products and substances is an act on the Minister of Health. Usually when a drug is stopped by the police it is tested by the Police Criminal Lab and the test results determine the course of action. If the stopped substance contains even a bit of forbidden substance the investigation starts. Basically the test results is the key evidence.

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:
No, the domestic legislation is binding.

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:
It is irrelevant. Everybody, no matter the case is treated the same way in my courtroom with maximum respect to the human rights.

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.

I am a criminal judge with almost 25 years of experience. I am working in the district court dealing with a lot of cases concerning drug possession, manufacturing or trading. I had cases that started as international cooperation of law enforcement offices and also concerning witnesses being heard abroad. I was always impressed by the professionalism od EU member states police officers and prosecutors. I hope I was able to be helpful too.

Thank you for cooperation! ------