

Third Study Commission Questionnaire 2024 South Africa

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 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.

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.

The possession, domestic distribution, importing, exporting or intermediary activities of the scheduled substances, referred in the Section 3 paragraph 2 of the Regulation (EC) No. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, and in the Section 6 paragraph 1 of 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, shall be permitted by the Government Authority of Budapest Capital, as a designated national authority. Such a permission shall be forwarded to the National Public Health and Medicine Centre /NPHMC/.

The following authorities have competence to control the activities with drug precursors: in general the Government Authority of Budapest Capital and the Police, then the National Tax and Customs Office (controlling exporting, importing, transit activities), and the NPHMC (especially in pharmacies).

If the doubt or suspicion of diversion to an illegal purpose or of the an illegal use crops up during the proceedings of permitting, controlling or other authority act, the authority concerned has to report it to the Police or the National Tax and Customs Office and the National Security Office and has to cooperate with them till the end of the planned measure or of the investigation.

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- 2, Does your country have specific legislation on precursors control?

Yes No....

Title of current legislation and date of adoption:

Nr. 159/2005. (VIII. 16.) Decree of Government about determining certain rules of procedure and tasks and competence of authorities with regard to drug-precursors

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Last amended/updated in:

01.08.2023.

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- 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, launching an investigation belongs to the competence of the police, the decision of a judge is not required.

Only to monitor deliveries no approval of a judge or a prosecutor is needed, the police decides about it autonomously. If the investigating authority wants to get acquainted with the contents of a certain consignment, the court order of a judge of investigation is necessary to open the package covertly.

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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.... During the investigation the prosecution proceeds in the cases of international legal assistance. Courts have such role only in the trial stage /after the prosecution filed the indictment/.

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?

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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:

See question 1. and 2.

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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 C. of 2012 on the Criminal Code

*Aiding in the Manufacture or Production of Narcotic Drugs
Section 182*

(1) Any person who:

a) produces, acquires, supplies, imports or exports, or transports in transit through the territory of the Hungary,

b) engaged in the distribution of or trafficking in, materials, equipment and/or accessories for the production or manufacture of narcotic drugs is guilty of a felony punishable by imprisonment between one to five years, insofar as the act did not result in a more serious criminal offence.

(2) Any person who provides material assistance for the criminal act defined in Subsection (1) shall be punishable as set forth therein.

(3) The penalty shall be imprisonment between two to eight years if:

a) the criminal offence defined in Subsection (1) is committed in criminal association with accomplices;

b) the criminal offence defined in Paragraph a) of Subsection (1) is committed on a commercial scale.

(4) Any person who engages in preparations for the criminal act referred to in Subsection (1) or (3) is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

(5) Any person who has been providing assistance for the production of narcotic drugs shall be exonerated from punishment if he confesses the act to the authorities before they become aware thereof; surrenders to the authorities the materials, equipment and/or accessories in his possession, and cooperates with the authorities in finding other persons who are engaged in the production of narcotic drugs.

Criminal Offences with Drug Precursors

Section 183

(1) Any person who:

a) possesses or places on the market or transports, or is engaged in intermediary activities with drug precursors prescribed in the relevant legislation of the European Union without authorization, or by exceeding the scope of the authorization;

b) acquires drug precursors prescribed in the relevant legislation of the European Union by way of making a false statement;

is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who breaches the notification obligation relating to the distribution or transportation of or intermediary activities with drug precursors prescribed in the relevant legislation of the European Union is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

(3) For the purposes of this Section:

a) 'legislation of the European Union' shall mean Regulation (EC) No. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors (for the purposes of this Subsection hereinafter referred to as "Regulation 273/2004/EC"), and 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 (for the purposes of this Subsection hereinafter referred to as "Council Regulation 111/2005/EC");

b) 'placing on the market' shall have the meaning defined in Article 2c) of Regulation 273/2004/EC;

c) 'transport' shall have the meaning defined in Article 2c) and d) of Council Regulation 111/2005/EC;

d) 'intermediary activity' shall have the meaning defined in Article 2e) of Council Regulation 111/2005/EC;

e) 'notification obligation' shall have the meaning defined in Article 8(1) of Regulation 273/2004/EC and in Article 9(1) of Council Regulation 111/2005/EC.

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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:

Transporting illegal substances through the country border without declaring them before the customs would naturally base the suspicion of an illegal activity, therefore it would also mean that the supplier has knowledge about this fact.

Nevertheless, in Hungary non-scheduled chemicals/equipment cannot be considered illegal substances, so activities involving such materials do not constitute crimes, thus they are not punishable.

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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:

There is legislation only about the substances referred in the regulation (EC) No. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors and Council Regulation (EC) No. 111/2005, as it was written at question 1. and. 6..

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:

There are several kinds of evidence during an investigation. E.g. in the beginning police often uses the so called RAMAN Spectrometer to state if a materia can be considered a drug or not. However, it is not sufficient to file a case with the court. If the police and the prosecution would submit an initiation for a coercive measure /e.g. an arrest/ to the judge of investigation, an expert opinion – stating the substance is a drug/scheduled chemical -is needed.

If the materia in question is a non-scheduled chemical, the criminal procedure shall be terminated in the lack of a crime.

E.g. in a criminal case in the year 2021, among other substances the expert opinion identified BZO-4en-POXIZID (BZO-4en-PentOXIZID, MDA-19-4en-pentyl analogue) which was not scheduled in Hungary at that time. The procedure had to be terminated in relation to this substance. However the expert reported it to the Ministry of Interior and the substance was listed as a new psychoactive materia in 2022.

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:

As it was answered at the previous questions there are no judicial actions on non-scheduled chemicals. It should be remarked also, that the term of 'no known legitimate use' can be difficult to prove.

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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:

As a judge I have the obligation to ensure basic human rights and principles of a fair procedure either in domestic criminal proceedings or in the case of international legal assistance.

According to the Hungarian procedural rules when a request for assistance is received from a foreign country – either from an EU member state or from a country outside of the EU – the Hungarian court has to apply our national law during its proceedings related to the request (e.g. during the hearing of a witness).

If the foreign authority requests for the application of a certain procedural rule or technical method, the Hungarian court has to apply it, except when the requested rule or method is incompatible with the basic principles of the Hungarian legal system.

In other words, in the case of a request for legal assistance from abroad, Hungarian courts apply the foreign procedural rules or technical methods only when they do not collide with the core of the Hungarian law. This way basic human rights and rules of a fair procedure are guaranteed.

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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 a previous criminal case our court acquired a testimony from a witness who was testifying in another country /Austria/. We sent a request to the competent foreign law enforcement authority to hear the witness; we enclosed a list of the questions that had to be asked, and requested that the witness should be warned about the consequences of perjury and others according to the Hungarian Criminal Procedure Act, finally we asked that the defendants and their lawyers should be notified about the date and venue of the hearing.

The foreign authority fulfilled the legal assistance very rapidly, in only 3 months. During their proceedings they performed everything that we requested; they gave the warning to the witness

Association of Hungarian Judges

*according to the Hungarian rules, notified the parties, even provided an interpreter during the hearing as one of the defendants' lawyers wanted to be present.
So the testimony absolutely complied with the Hungarian procedural rules and could be used in the proceedings.*

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Thank you for cooperation!
