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'A' ITEM NOTE

From:	General Secretariat of the Council
To:	Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council amending 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, as regards the definition of drug - Political agreement

Delegations will find in Annex a declaration of Austria concerning the Proposal for a Directive of the European Parliament and of the Council amending 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, as regards the definition of drug.

Austria has indicated that it will vote against the political agreement on the above-mentioned text.

**Declaration of the Austrian Delegation for the minutes of COREPER II and Council
on New Psychoactive Substances:**

"We support the main goal, that is "to extend the application of the Union criminal law provisions that apply to illicit drug trafficking to new psychoactive substances posing severe public health and, where applicable, social risks" (recital 7).

However, we think that not all provisions of Framework Decision 2004/757/JHA should apply to new psychoactive substances.

Among the conduct described in sub-paragraphs (a), (c) and (d) of Art. 2 paragraph 1 of FD 2004/757, we think that Member States should be given the discretion if the conduct described under (c) – possession or purchase – should be criminalized or not. As the Directive contains minimum standards, any Member State is free to go further – but Member States should not be obliged, by virtue of Union Law, to criminalize such behaviour.

Such a more limited approach of the Union legislator would be in line with the principle of subsidiarity in general and also with the conditions foreseen by the Treaties for legislating in criminal law:

"The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." (Art. 83 paragraph 1 TFEU)

We think that the possession or purchase of new psychoactive substances in itself do not fulfil the cited (highlighted) criteria of the Treaty."