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'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Draft Directive of the European Parliament and of the Council amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA **(first reading)** - Adoption of the Council's position at first reading and of the statement of the Council's reasons = Statements

Statement by the Austrian delegation

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 9).

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.

Statement by the United Kingdom

The United Kingdom considers that both Protocol (No. 19) and Protocol (No. 21) to the Treaties apply to the Directive amending Council Framework Decision 2004/757/JHA 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.

In accordance with Article 7 of Protocol (No. 21), Protocol (No. 21) is without prejudice to the Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union. Therefore in accordance with Article 5(2) of Protocol (No 19) to the Treaties on the Schengen Acquis, the United Kingdom has indicated that it does not wish to take part in the Directive.

For the avoidance of doubt, the United Kingdom is not exercising its right, in accordance with Article 3(1) of the Protocol (No. 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, to take part in the adoption and application of the Directive.

Accordingly, the United Kingdom is not taking part in the adoption and application of this Directive.