Council of the European Union

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken, on behalf of the European Union, in the sixty-fifth session of the Commission on Narcotic Drugs on the addition to the list of substances in Table I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Delegations will find attached document COM(2022) 41 final.

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EUROPEAN
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Brussels, 8.2.2022
COM(2022) 41 final

2022/0029 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken, on behalf of the European Union, in the sixty-fifth session of the Commission on Narcotic Drugs on the addition to the list of substances in Table I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Commission on Narcotic Drugs (CND) in connection with the envisaged adoption of changes to the Tables of the United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 on the basis of recommendations of the International Narcotics Control Board (INCB).

2. CONTEXT OF THE PROPOSAL

2.1. The United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

The United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ('the Convention') aims to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

The Convention entered into force on 11 November 1990.

The EU[1] and its Member States are parties to the Convention.

2.2. The Commission on Narcotic Drugs (CND)

The CND is a commission of the UN Economic and Social Council (ECOSOC) and its functions and powers are inter alia set out in the Convention. It is made up of 53 UN Member States elected by ECOSOC. 12 Member States[2] are currently members of the CND with the right to vote. The Union has an observer status in the CND.

The CND, taking into account the comments submitted by the Parties and the comments and recommendations of the INCB, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in the Tables of the Convention.

2.3. The envisaged act of the CND

On 14 to 18 March 2022, during its sixty-fifth session, the CND is to adopt a scheduling decision on the addition of three substances in the Tables of the Convention ('the envisaged acts') namely 4-AP, boc-4-AP and norfentanyl.

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1 Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (OJ L 326 of 24/11/1990, p.56).

2 Austria, Belgium, France, Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Slovenia, Spain, Sweden.

According to the Convention decisions of the CND become binding, unless a Party has submitted the decision for review to ECOSOC within the applicable time-limit[3]. The decisions of ECOSOC on the matter are final. The envisaged acts will become binding on the Parties in accordance with Article 12 of the Convention, which provides as follows in its relevant parts:

'Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary General, together with all relevant information upon which the request for review is based.

The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.'

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The Commission has been informed on 2 February 2022 that the INCB recommends to add three substances, namely 4-AP, boc-4-AP and norfentanyl in Table I of the Convention.

According to the assessment of the INCB, 4-AP, boc-4-AP and norfentanyl are frequently used in the illicit manufacture of fentanyl and fentanyl analogues (i.e. synthetic opioids). There is evidence that the volume and extent of the illicit manufacture of these narcotic drugs and psychotropic substances poses serious public health or social problems so as to warrant the placing of the substance under international control. In addition there is no known legitimate use of 4-AP, boc-4-AP and norfentanyl except in small amounts for research, development and laboratory analysis.

Illegal manufacture of fentanyl and fentanyl analogues is a problem in the Union. These illegally manufactured narcotic drugs and psychotropic substances cause significant public health and social problems in the Union.

The Member States of the Union should thus express the position in the CND in favour of adding 4-AP, boc-4-AP and norfentanyl to Table I of the Convention.

Changes to the Tables of the Convention have direct repercussions for the scope of application of Union law in the area of drug precursor control as substances added to the

[3] Article 12(7) of the 1988 UN Convention.

Tables of the Convention are to be incorporated into the Union law[4]. The Commission has been empowered to adopt delegated acts in order to ensure this.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement[5].

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[6].

4.1.2. Application to the present case

The Commission on Narcotic Drugs (CND) is a body set up by an agreement, namely the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The act which the Commission on Narcotic Drugs (CND) is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and is capable of decisively influencing the content of EU legislation, namely: Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors and Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors. This is because the changes to the Tables of the Convention have direct repercussions for the scope of application of Union law in the area of drug precursor control as substances added to the Tables of the Convention are to be incorporated into the Union law.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

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4 COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors (OJ L 22, 26.1.2005, p. 1) and REGULATION (EC) No 273/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004 on drug precursors (OJ L 47, 18.2.2004, p. 1).

5 Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

6 Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 of the Treaty on the Functioning of the European Union.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207, in conjunction with Article 218(9) TFEU.

Subsidiarity (for non-exclusive competence)

Not applicable.

- **Proportionality**

The proposal is proportionate and does not go beyond what is necessary to achieve the objectives as it addresses new drug precursors that are of concern for the Union.

- **Choice of the instrument**

The use of a Council Decision is required by Article 218(9) TFEU in order to establish the position to be adopted on the Union's behalf in a body set up by an international agreement.

5. PUBLICATION OF THE ENVISAGED ACT

None

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ('the Convention') was concluded by the Union by Council Decision 90/611/EEC and entered into force on 11 November 1990.

(2) Pursuant to Article 12(2) to (7) of the Convention, substances may be added to the Tables of the Convention in which drug precursors are listed.

(3) The Commission on Narcotic Drugs, during its sixty-fifth session from 14 to 18 March 2022 in Vienna, is to adopt a decision on the addition of three new substances to Table I of that Convention.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Commission on Narcotic Drugs as the decision of that Commission will be binding on the Union and capable of decisively influencing the content of Union law, namely Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Union and third countries in drug precursors[7] and Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors[8].

(5) According to the assessment of the International Narcotics Control Board, three substances, namely 4-AP, boc-4-AP and norfentanyl are frequently used in the illicit manufacture of fentanyl and are highly suitable for the illicit manufacture of fentanyl and a number of fentanyl analogues, which are highly potent synthetic opioids. There is evidence that the volume and extent of the illicit manufacture of fentanyl and

[7] (OJ L 22, 26.1.2005, p. 1)
[8] (OJ L 47, 18.2.2004, p. 1)

fentanyl analogues poses serious public health or social problems so as to warrant the placing of these substances under international control.

(6) Accordingly, on 2 February 2022 the International Narcotics Control Board recommended to the Commission on Narcotic Drugs to add 4-AP, boc-4-AP and norfentanyl to Table I of the Convention.

(7) Illicitly manufactured fentanyl and fentanyl analogues have caused significant public health and social problems in certain Member States.

(8) The decision on the addition of substances to Table I of the Convention fall under the exclusive competence of the Union. The Union has observer status in the Commission on Narcotic Drugs of which currently 12 Member States of the Union are members with the right to vote.

(9) The Union's position is to be expressed by the Member States of the Union that are members of the Commission on Narcotic Drugs, acting jointly in the interest of the Union.

(10) The Member States of the Union should take the position in the Commission on Narcotic Drugs to add 4-AP, boc-4-AP and norfentanyl to Table I of the Convention,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union by the Member States in the sixty-fifth session of the Commission on Narcotic Drugs from 14 to 18 March 2022 shall be the following:

4-AP, boc-4-AP and norfentanyl are to be included in Table I of the Convention.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the Commission on Narcotic Drugs, acting jointly in the interest of the Union.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President