EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION WITHIN THE SCOPE OF THE UK/EU WITHDRAWAL AGREEMENT AND NORTHERN IRELAND PROTOCOL

2023/196

C(2022) 8440

COMMISSION DELEGATED REGULATION (EU) 2023/196 of 25.11.2022 amending Regulation (EC) No 273/2004 of the European Parliament and of the Council and Council Regulation (EC) No 111/2005 as regards the inclusion of certain drug precursors in the list of scheduled substances.

Submitted by Home Office 08 March 2023

SUBJECT MATTER

1. This Explanatory Memorandum (EM) relates to amendments of Regulation (EC) No 273/2004 of the European Parliament and of the Council and Council Regulation (EC) No 111/2005 as regards the inclusion of certain drug precursors in the list of scheduled substances.

2. Drug precursor chemicals (DPCs) are chemicals which may be used for the illicit manufacture of narcotic drugs or psychotropic substances. International duties to control DPCs are designated by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the 1988 Convention), to which the UK (and EU Member States) are a signatory.

3. The Convention establishes controls on DPCs to prevent the illicit manufacturing of drugs while also allowing for legitimate trade, delivered through a requirement for licensing and, additionally in some cases, for “pre-export notifications” (“PENs”) to the receiving country and export checks. The DPC control system is therefore one of international cooperation between exporting and importing jurisdictions to check that the receiving jurisdiction accepts the DPCs being imported, before export is permitted.

4. Regulation (EC) No 273/2004 of the European Parliament and of the Council lays down measures for monitoring trade in DPCs within the EU, while Council Regulation (EC) No 111/2005 governs trade in DPCs between the EU and third countries. The two Regulations jointly implement the measures envisaged by Article 12 of the 1988 Convention, to which the EU and the UK are both signatories.

5. The delegated Act schedules three additional drug precursor chemicals (4-AP, 1-boc-4-AP and norfentanyl) and two further pre-precursor chemicals (DEPAPD and PMK ethyl glycidate) in Category 1, under the above EU Regulations.

6. 4-AP is a substitute chemical for N-phenethyl-4-piperidone (NPP) to synthesize 4-anilino-N phenethylpiperidine (ANPP), which itself is an immediate precursor for the manufacture of fentanyl and some of its

analogues. 1-boc-4-AP is a chemically protected derivative of 4-AP, which could be converted to 4-AP, norfentanyl or a number of norfentanyl analogues. Norfentanyl is an immediate precursor of fentanyl and a number of fentanyl analogues. NPP and ANPP are already scheduled substances in the Regulations. Fentanyl and fentanyl analogues are very potent narcotic drugs, typically 10 to 100 times stronger than heroin. Their high potency continues to result in overdose deaths in users globally.

7. DEPAPD is a precursor of 1-Phenyl-2-propanone (P-2-P), also known as benzyl methyl ketone (BMK), which is used to make amphetamine and methamphetamine. PMK ethyl glycidate is a precursor of PMK which is used to produce3,4- methylenedioxymethamphetamine (MDMA), commonly known as ecstasy. BMK, some of its other pre-precursors which are very similar to DEPAPD (such as methyl alpha-phenylacetoacetate (MAPA) or alpha-phenylacetoacetamide (APAA)), as well as PMK are already scheduled substances in the Regulations.

8. Following the strict control of the scheduled substances mentioned above, 4-AP, 1-boc-4-AP, norfentanyl, DEPAPD and PMK ethyl glycidate have been designed by criminal organisations to avoid these controls. By scheduling these substances, the EU seeks to provide national authorities with the legal means to fight effectively against their use in the illicit production of narcotic drugs. The Regulations set out the applicable control and monitoring measures for the substances.

9. Before these measures are applied in GB it is necessary to amend UK legislation.

SCRUTINY HISTORY

10. A similar delegated Act adding two drug precursors, EAPA and MAMDPA, to the EU list of scheduled substances was deposited recently as EU document 8155/22, C(22)1840 on which the Home Office submitted an EM dated 30 June 2022. The House of Commons European Scrutiny Committee completed scrutiny of the EM on 7 September 2022 (Report 7, 22/23) with no follow up. That report also completed examination by the House of Lords European Affairs Committee's Northern Ireland Protocol Sub-Committee, who asked to be informed should the Government take a firmer position regarding equivalent changes to domestic legislation.

MINISTERIAL RESPONSIBILITY

11. The Home Secretary has responsibility for drug control decisions in the UK, following recommendation for control internationally.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

12. The delegated Act will not apply in GB but will be implemented directly in Northern Ireland under the NI Protocol.

13. In GB, drug precursor policy is reserved to the UK Government under paragraph B1 of Schedule 5 of the Scotland Act 1998 and paragraph 54 of Schedule 7A of the Government of Wales Act 2006.

14. The Northern Ireland Executive Ministers would have a particular interest in this delegated Act because it will impact on Northern Ireland directly by virtue of the UK/EU Withdrawal Agreement and the NI Protocol. In the absence of the NI Assembly, we have ensured relevant NI officials are content.

LEGAL AND PROCEDURAL ISSUES

15. Legal Base

    i. The legal base for the delegated act is Article 15 of Regulation (EC) No 273/2004 and Article 30a of Regulation (EC) No 111/2005, under which the Commission is empowered to adopt delegated acts in order to adapt the Annexes to new trends in diversion of drug precursors.

    ii. Regulation (EC) No 273/2004 and Regulation (EC) No 111/2005 are closely linked. They jointly implement the measures envisaged by Article 12 of the 1988 UN Convention. Therefore, the bundling of two empowerments based on different basic legislative acts into one single delegated act is justified by the close material link between the empowerments in question.

16. Voting Procedure

    iii. The European Parliament and/or Council may object to the delegated act within two months of the Commission adopting the act, which will prevent it from coming into force. To exercise their right of objection, a majority in the European Parliament is necessary, or a qualified majority in the Council.

17. Timetable for adoption and implementation

    iv. The regulation came into force on 20 February 2023.

POLICY IMPLICATIONS

18. The Commission has discretion regarding the Category in which to schedule a drug precursor. By designating 4-AP, 1-boc-4-AP, norfentanyl, DEPAPD and PMK ethyl glycidate as Category 1, they will be subject to the strictest controls and monitoring. For instance, they need to be stored in secured premises (e.g., locks, video-camera surveillance) and will require import and export licences.

19. Once in force, there will be a regulatory divergence whereby 4-AP, 1-boc-4-AP, norfentanyl, DEPAPD and PMK ethyl glycidate are subject to controls and licensing in NI, but not GB. Control of these five substances as DPCs will introduce a requirement for a domestic drug precursor chemical licence for businesses handling them. It will also introduce requirements in respect of the import and export of these substances, including pre-export notifications and

import and export licences. At present, trade in DPCs between NI and GB is minimal and the numbers of NI businesses holding Drug Precursor Chemical Licences are very small.

20. Regulations (EC) 273/2004 and 111/2005 apply in NI because of the Northern Ireland Protocol. The changes in this delegated Act will have direct effect in NI. Before introducing equivalent measures in GB, the Government must first make amendments to existing domestic DPC regulations which form part of retained EU law.

21. The UK Government will consider the introduction of equivalent changes to domestic regulation and, if it decides to introduce controls, will bring forward the necessary legislative amendments to enable this. The Government has committed to ensuring we meet international obligations and will therefore consider the best approach to controlling the five DPCs recommended for control in this delegated Act, in addition to those previously scheduled by EU document 8155/22, C(22)1840 (EAPA and MAMDPA).

CONSULTATION

22. No consultation has been taken by the UK Government or the Department of Health in Northern Ireland on this matter with key stakeholders. To date a regulatory impact assessment has not taken place. Before undertaking legislative change, the Government will undertake the appropriate impact assessments and engage relevant stakeholders, including other government departments and experts, on an assessment of the regulatory divergence between Northern Ireland and Great Britain.

23. Home Office officials will continue to consult their counterparts in the Department of Health Northern Ireland on all matters relating to DPCs in NI.

FINANCIAL IMPLICATIONS

24. Any future impact assessment or economic note would include financial implications.

MINISTERIAL NAME AND SIGNATURE

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Minister for Crime, Policing and Fire

Home Office