

# Third Study Commission Questionnaire 2024

## South Africa

## A U S T R I A

**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 essential provisions on drug precursors can be found in the Narcotic Drugs Act 2007. § 17 obliges economic operators to take precautions to prevent the diversion of drug precursors for the illicit production of addictive substances, within the scope of the necessary care, in particular to secure their stocks of drug precursors against unauthorized removal by taking appropriate measures appropriate to the respective circumstances. Upon request, economic operators must provide the security authorities with all information to the extent that this is necessary to prevent and prosecute the illicit production of addictive substances and the related crimes (§ 18 leg.cit.). The responsible authorities can inspect the premises, especially in means of transport, and request information and documents as well as take samples. The economic operators are obliged to help.*

*The customs authorities are responsible for monitoring the import, export and transit of drug precursors (§§ 19, 20 leg.cit).*

*Drug precursors - including the containers if necessary - must be secured or temporarily confiscated if there is reasonable suspicion of a criminal offense. The executive body must report the seizure or provisional seizure to the public prosecutor's office immediately (§ 21 leg.cit.).*

*The Federal Minister of Health has to keep a register of penal decisions to monitor the regulated traffic and handling of addictive substances and drug precursors.*

**2.Does your country have specific legislation on precursors control?**

Yes

**Title of current legislation and date of adoption:**

Community diplomas:

- Regulation (EC) No. 273/2004, of the European Parliament and of the Council, of 11<sup>th</sup> of February 2004, on drug precursors, in its current consolidated version;
- Council Regulation (EC) No. 111/2005 of 22<sup>nd</sup> of December 2004, which establishes rules for controlling trade in drug precursors between the Community and third countries, in its current consolidated version;

National diplomas:

- **Narcotic Drugs Act** (Suchtmittelgesetz: SMG)

BGBl I 2007/110;

last amended in 2023;

Especially the **3<sup>rd</sup> Main Chapter** (§§ 17 – 22) regulates the traffic and handling of drug precursors (last amended 2015) and the **4<sup>th</sup> Main Chapter** (§§ 23 -26a) regulates the surveillance of traffic and handling of drugs and drug precursors, drug data monitoring and information. (last amended in 2018)

In the **3<sup>rd</sup> section of the 5<sup>th</sup> Main Chapter** (§ 32) you will find judicial penal provisions for drug precursors.

§ 32.

(1) Anyone who produces, transports or transfers a drug precursor with the intent that it will be used in the unlawful production of addictive substances shall be punished with a prison sentence of up to one year.

(2) Anyone who acquires or possesses a drug precursor with the intent that it will be used in the unlawful production of addictive substances in quantities that exceed the limit (§§ 28b, 31b) shall be punished with a prison sentence of up to two years.

(3) Anyone who produces, imports, exports or offers, transfers or procures a drug precursor substance to another person with the intention of producing, importing or exporting it to another person is to be punished with a custodial sentence of up to five years so that the latter, in the event of the unlawful production of addictive substances in a quantity exceeding the limit (§§ 28b, 31b) amount is used.

- **Amendment of the Narcotic Drugs Act 2008**

- **Narcotics Regulation** (Suchtgiftverordnung: SV)

BGBl II 1997/374

last amended in 2024

*In table I, II and III of the Narcotics Regulation the substances and preparations that are considered narcotic drugs within the meaning of § 2 of the Narcotic Substances Act are listed. In table IV and V the substances and preparations that are treated in the same way as narcotic drugs are listed.*

- **Psychotropic medication regulation** (Psychotropenverordnung: PV)

BGBl II 1997/375

last amended in 2023

*The Psychotropic medication regulation contains a table the substances and preparations that are considered psychotropic substances within the meaning of § 3 of the Narcotic Substances Act according to the United Nations Convention.*

- **Drug Limit Ordinance** (Suchtgift-Grenzmengenverordnung: SGV)

BGBl II 1997/377

last amended in 2024

*The Drug Limit Ordinance sets the lower limit of the quantity that, based on the pure substance of the active ingredient, is capable of causing a large-scale danger to the life or health of people (limit quantity) for the individual addictive substances, taking into account their ability to cause habituation, as well as the habituation behavior of addicts.*

**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.

*In Austria, the public prosecutor's office leads the investigation. According to § 72 EU-JZG (EU judicial cooperation law) the public prosecutor's office in whose district the border is likely to be crossed or from whose district the controlled delivery is to originate is responsible for deciding on a controlled delivery through Austria. The public prosecutor's office is also responsible for approving controlled deliveries outside the EU according to § 59b ARHG (extradition and judicial assistance law). The controlled delivery through or from the federal territory must be taken over and managed by the Austrian authorities. It must be designed in such a way that access to the suspects and the goods is possible at any time. After the controlled delivery has been completed, the public prosecutor's office must check whether there is reason to request the state in which the suspects entered to take over the prosecution.*

## **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?**

*a) Unless transnational agreements stipulate other, the request is carried out through diplomatic channels, which means the authority that finds a request to be necessary (during investigation stage this will be the public prosecutor's office, when pending with a court this will be the judge) will transmit the request and necessary documents to the minister of justice. If reciprocity is given and public order or national interests are not endangered, the minister then transmits the documents to the responsible foreign authority. This does not apply for the European Investigation Order. In this case the public prosecutor's office itself is entitled to issue the order until court procedure is pending. Thenceforth the adjudicating court is responsible.*

*b) In general, the locally competent prosecutor's office is responsible for handling letters rogatories. If the issuance of a compulsory measure is requested that requires court approval under Austrian law - for example in the case of a house search, opening of an account or telephone surveillance - the public prosecutor's office must obtain court approval from the detention and legal protection judge. As soon as a national court procedure is pending, jurisdiction to execute an European Investigation Order passes over to the adjudicating court.*

*For example, the courts are responsible for issuing information about the court proceedings, a conviction or the execution of a sentence (§ 55 (3) EU-JZG). The court also decides on the execution of an European Investigation Order aimed at the transfer of a detained person (§ 55 (4) in conjunction with § 55g EU-JZG). Courts and prosecutor's offices are also allowed to transmit personal data on the basis of a cross-national agreement without a specific request if (1) the information regards actions that would permit extradition, (2) the transmission would be admissible to a domestic court or prosecution without request and (3) the information could help to initiate or support criminal proceedings, prevent a serious criminal act or ward danger to the public safety.*

**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?**

*As already stated under point 4 (b), the competences and procedural rules of the judges in the pre-trial proceedings essentially result from the EU-JZG in conjunction with the general procedural rules of the Code of Criminal Procedure (StPO).*

**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:**

*The above-mentioned Narcotic Drugs Act (SMG) and also the general procedural rules of the Code of Criminal Procedure (StPO) apply throughout the entire national territory of Austria.*

**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:**

*No, there are no specific legislation or court rules for this. Only when illicit drug manufacturing is attempted measures regarding equipment can be taken.*

**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:**

*As stated in question 2, § 32 SMG requires intentional action on the part of the perpetrator. Anyone who wants to realize a situation that corresponds to a legal offense acts intentionally; it is sufficient for the perpetrator to seriously believe that this realization is possible and to come to terms with it.*

*The fact of mis-declaration will therefore probably not be enough to impute "knowledge" to the supplier, if there is no other evidence. However, it can be a strong indicator.*

**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:**

*No.*

**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:**

*If a new emerging drug precursor chemical is not listed as a prohibited substance, no legal action can be taken by a judge.*

*The list of prohibited products and substances is updated by law,*

**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 mentioned above, no legal action can be taken by a judge. The information must be made available to the legislature.*

**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 mentioned above, at the investigation stage the public prosecutor's office is responsible for handling letters rogatories.*

*The legislation clearly states that requests must not be followed if public order or other fundamental interests of Austria are violated. Public order includes fundamental principles of the Austrian legal system, especially basic human rights (which include the right to a fair trial). This is extremely relevant for both the prosecutor and the judge.*

**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.**

Eisenstadt, 14<sup>th</sup> July 2024

Mag. Gabriele Nemeskeri, Judge

Member of the Austrian Association of Judges