

## **THIRD STUDY COMMISSION CAPE TOWN**

### **SPAIN**

Sample questions:

1. Are there laws, regulations, or rules of judicial procedure in your country that are related to the topic we are dealing with this year: chemicals and essential equipment that may be used in the illicit manufacture and trafficking of drugs, including domestic import, export, distribution and use and due diligence by the private sector?

Please explain.

Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988) to which Spain is a party provides for the adoption of appropriate measures to control the manufacture and distribution of precursors among Member States. “Precursors” are chemical substances that are diverted from their legal course and used for the production of different types of drugs.

Within the European Union, the control of precursors from their manufacture to their final destination, to prevent their diversion for illicit purposes, is subject to the provisions of Regulations (EC) 273/2004 of 11 February on drug precursors, as amended by Regulation 1258/2013 of 30 November; and Council Regulation (EC) 111/2005 of 22 December 2004 laying down rules for the surveillance of trade in drug precursors between the Community and third countries, as amended by Regulation 1259/2013 of 20 November. Both regulations have been supplemented by Commission Delegated Regulation (EU) 2015/1011 of 24 April 2015 and by Implementing Regulation (EU) 2015/1013 of 25 June 2015, which lays down rules regarding Regulation (EC) 273/2004 and Regulation (EC) 111/2005.

The definitions contained in these regulations and their content serve as a framework for the legal treatment of this matter in Spain. Spanish legislation frequently refers to their content.

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

In Spain, Law 4/2009, of June 15, on the control of drug precursors and Royal Decree 129/2017, of February 24, approving the Regulation on the control of drug precursors, regulate the essential aspects for applying the measures included in the Community Regulations in our country.

The Law establishes the system for granting activity licenses and the system of sanctions that will be applied in the event of infringement of the Regulations.

The Criminal Code punishes as a crime in Article 371 the production, possession, and trafficking of precursors knowing that their purpose is the production of drugs.

3. In your country, is the approval of a judge a prerequisite for initiating investigations in a case of diversion and trafficking of precursors? Similarly, is a court order or the

approval of a judge required to carry out controlled or monitored deliveries? Please explain:

For the investigation of a diversion of this nature, judicial authorization is not necessary. The Intelligence Center for Organized Crime of the Ministry of the Interior or the Customs Service of the Ministry of Finance can carry out investigations. If they consider that the diversion may have criminal content, they must immediately inform the Judge so that he can conduct proceedings.

For controlled deliveries, it is only possible to carry out these with judicial authorization (art. 263 bis of the LECrim), except for the possibility of approval of these proceedings in investigations in other countries by police units, which, in any case, must immediately report to the Public Prosecutor's Office and, if there is an open judicial procedure, to the Examining Magistrate.

4. When a crime related to drugs or precursors is investigated in your country, does the judiciary have any role (a) in requesting information from a foreign State and/or (b) in providing information to a foreign State?

Yes.

If your answer to (a) or (b) is affirmative, what legislation, regulations, or rules of procedure apply to the decision of a judge involved in the investigation phase?

When what is being investigated is a crime and there is an open judicial procedure, without prejudice to the actions of international police cooperation (through the channels of specific agencies or others in the field of international cooperation, such as Europol or Interpol), international cooperation requires the intervention of a judge, and, depending on the country with which collaboration is requested, it will be carried out in the manner established by the cooperation treaties that exist with them. In the EU, the usual mechanism will be to use the European Investigation Order.

In other cases, the Fifth Additional Provision of Law 4/2009, of June 15, establishes regarding the exchange of international information: "The exchange of information with international organizations and other States shall be subject to the provisions of Community regulations, International Conventions and Treaties or, in the absence of the above, to the general principle of reciprocity, as well as to the submission of said foreign authorities to the same obligations of professional secrecy that apply to Spanish authorities"

5. Does your country have legislation or judicial regulations relating to the monitoring of the manufacture and distribution of precursors applicable throughout the national territory?

The aforementioned regulations establish the control and monitoring systems. It requires that the manufacture of these chemical products be subject to a license, that is, to a prior administrative authorization controlled by the Ministry of the Interior, and, for exports, control is exercised, requiring prior authorizations, by the Ministry of Finance. These authorizations determine that the activity is subject to monitoring and administrative control.

6. Does your country have legislation or judicial regulations that criminalize the manufacture, transport, and distribution of essential material for the illicit manufacture of drugs?

Please explain:

Article 371 of the Criminal Code states: “1. *Anyone who manufactures, transports, distributes, trades, or has in his or her possession equipment, materials or substances listed in Table I and Table II of the United Nations Convention, done in Vienna on December 20, 1988, on the illicit traffic of narcotic drugs and psychotropic substances, and any other products added to the same Convention or included in other future Conventions of the same nature, ratified by Spain, knowing that they will be used in the illicit cultivation, production or manufacture of toxic drugs, narcotic drugs or psychotropic substances, or for these purposes, will be punished with imprisonment from three to six years and a fine of one to three times the value of the goods or effects.*

2. *The penalty indicated in its upper half will be imposed when the persons who carry out the acts described in the previous section belong to an organization dedicated to the purposes indicated therein, and the higher penalty in the case of the heads, administrators, or persons in charge of the aforementioned organizations or associations.*

*In such cases, the judges or courts will impose, in addition to the corresponding penalties, the special disqualification of the offender from exercising his profession or industry for a period of three to six years, and the other measures provided for in article 369.2.”*

7. Concerning uncatalogued chemical products/equipment, is the fact that they have been wrongly declared to customs sufficient to impute “knowledge” on the part of the supplier that they are being used for the illicit manufacture of drugs?

Please explain:

Although this circumstance may be an indication of knowledge and willingness to carry out the illicit conduct, it is not a fixed and determining proof of a possible conviction. Evidence will be required to verify the will and intent of the person affected by the misdeclaration.

8. Does your country's national legislation include civil, criminal, and/or administrative measures and/or sanctions to deal with non-scheduled chemicals and emerging precursors, i.e. those used as raw materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention?

If so, what type of sanctions?

Please explain:

The sanctioning measures range from the most serious, which are the criminal sanctions that may be imposed by the criminal courts in the case of trafficking (three to six years imprisonment and a fine of one to three times its value), to administrative sanctions for failure to comply with the requirements on registration, processing or declaration of chemicals and the activity related to their manufacture.

These administrative sanctions range from the minor ones, which are those identified by EU regulations, provided that they are not classified as serious or very serious and which carry a fine of €300, to the very serious ones, which can be punished with a fine of €60,000 and lead to the closure of the activity.

9. Please detail the specific elements of information and the level of detail that would allow you, as a judge, to act based on the information/intelligence/evidence received

from your counterparts in investigations related to new chemical precursors of drugs not subject to control in your country.

Please explain:

Judicial intervention in Spain refers to investigations of a crime. Whenever the information deduces a possibility of intention to traffic (due to its clandestine and uncontrolled circulation, due to the quantity possessed or transported, or due to other circumstances related to the use of drugs, the court will decide whether to proceed with the investigation.

The investigation must be exhaustive and depending on its characteristics and those involved, it will be more or less extensive and/or complex

10. Are there specific provisions that allow you as a judge to act on uncatalogued chemical substances with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical substance has no known legitimate use facilitate your work?

Please explain:

In the criminal field, because of the rules of restrictive interpretation, if the substances or products are not previously cataloged, no crime can be found.

What happens in Spain is that there is a reference to the lists approved in the Vienna Convention or other treaties with similar content that Spain subscribes to in the matter. As products cataloged as precursors are incorporated into these lists, their trafficking will also be subject to criminal prosecution.