



PERSPECTIVES ON DRUGS

Controlling new psychoactive substances

Recent years have witnessed a proliferation of new psychoactive substances becoming available in Europe. This can be illustrated through the rise in notifications of new substances to the EU early warning system, from just 14 per year in 2005 to 73 in 2012. Some of these substances will find their way onto the market, packaged and promoted as 'natural' or 'legal' products, in specialised physical and online shops. In particular, Internet sales of new drugs means that the expanding global network cuts across national boundaries and jurisdictions.

What policy challenges do new drugs pose?

The major policy challenge is this combination of diversity of new substances and the speed with which they have been appearing. The burden falls on national legal systems, which were not developed to face such a phenomenon. As criminal law has to be specific when defining an offence, this generally means that the drug law must clearly list all substances under its control. The traditional response to the discovery of a new 'drug', established at a time when such a discovery was a relatively rare event, was to assess the risk to public health and add it to the national list of controlled substances. The current situation, with many new substances and very limited evidence of health risks, both challenges existing processes and potentially stretches the credibility of control systems. The process of updating the law can be time consuming; some countries require criminal laws to be agreed by parliament, which may take more than a year. However, the speed with which new drugs appear means that, as soon as one new psychoactive substance is identified by the authorities and controlled, a replacement is already on the shelves.

What types of control are countries using?

At the national level, the new drugs phenomenon has provoked a range of innovative legal responses geared towards controlling the open sale of these substances. These include rapid interventions that have been put in place to allow countries time to design other responses or to fill the gap before drug law control can be enacted. Broadly speaking, three types of response can be delineated, differentiated largely by the speed with which they can be implemented. These responses are not necessarily mutually exclusive, as

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some countries have initiated more than one response, either simultaneously or consecutively.

a) Controls using consumer safety or medicines legislation

The advantage of using existing consumer safety or medicines legislation to stop the open distribution of a new psychoactive substance is that little or no time is required to implement changes. A number of European countries have successfully used these laws, which, as they are based on harmonised EU definitions, should already be operational (and available for use) in all Member States.

In practice, different types of consumer safety laws have been enforced, some targeting psychoactive products in general (as happened in Poland, resulting in mass 'headshop' closures), others directed towards individual substances. In Italy, for example, regulations requiring that goods or food on sale be clearly and accurately labelled in relation to their expected use have been invoked to confiscate Spice (i.e. dimethyltryptamine) products that were not labelled in the national language. A similar approach was used in the United Kingdom to stop the sale of mephedrone labelled as bath salts and plant food. Having first used consumer safety laws, Poland subsequently modified its legal definition of a 'substitute drug' (a substance used instead of a drug or for the same purposes) and updated the health protection law, so that it could be used when there was suspicion that a substitute drug posed a health threat.

As the harmonised EU definition of a medicinal product does not always require such a product to have therapeutic properties, there has been room for countries to use this legislation to respond to new psychoactive substances. In at least eight countries, medicines laws have been used to control new drugs. When a national medicines agency classifies a new psychoactive substance as a medicinal product, it can then demand a licence for any importation, marketing or distribution. In 2009, Austria classified Spice products under non-criminal medicines legislation, and this proved effective in stopping the open marketing and distribution of Spice in the country, while avoiding criminalising users.

b) Extending and adapting existing laws and processes

An alternative response to the threat of new substances has been for countries to manage them under existing drug legislation, through either modification or extension of these



laws. There is often a dearth of reliable information on new drugs, and scientific risk assessment panels have been created in Hungary (2010) and Finland (2011) to provide the evidence base for decisions to control new substances. In order to accelerate legal processes, some countries have introduced temporary control regimes, allowing time for investigation of the need for permanent control. For example, in 2011, the United Kingdom enacted a procedure allowing temporary class drug orders, under which named substances could be quickly controlled under drug laws for up to 1 year. A similar system was enacted in Hungary in 2012, allowing the addition of non-therapeutic drugs to the list of controlled substances on the basis that they can pose as serious a threat to public health as substances already listed in the drug schedules. These two countries' new laws do not apply to personal possession offences. A comparable procedure is also being drafted in Slovakia.

Some countries have chosen to extend the coverage of existing drug laws by listing defined groups of substances, rather than individual drugs as had been done previously. Tight 'generic' group definitions have been used for years in Ireland and the United Kingdom, while broader 'analogue' groups, or derivatives, are controlled in Bulgaria, Latvia and Malta (see 'Terms and definitions' box). However, group definitions are now being introduced into the drug laws of other countries, including Luxembourg ⁽¹⁾, Italy ⁽²⁾, Cyprus ⁽³⁾, Lithuania ⁽⁴⁾, Denmark ⁽⁵⁾, France ⁽⁶⁾ and Norway ⁽⁷⁾. Germany has been studying the feasibility of this group definitions approach, whereas the Netherlands rejected it in 2012 because of the complexity of targeting some substances while not restricting others that may have valid uses.

⁽¹⁾ Synthetic cannabinoids: 2009.

⁽²⁾ Synthetic cannabinoids and cathinones: 2011.

⁽³⁾ Synthetic cannabinoids, cathinones and phenethylamines: 2011.

⁽⁴⁾ Synthetic cannabinoids and cathinones: 2011; cannabinoids, cathinones, phenethylamines and tryptamines: 2012.

⁽⁵⁾ Cannabinoids, cathinones, phenethylamines and tryptamines: 2012.

⁽⁶⁾ Cathinones: 2012.

⁽⁷⁾ Cannabinoids, cathinones, phenethylamines and tryptamines: 2013.

Terms and definitions

New psychoactive substance: a new narcotic or psychotropic drug, in pure form or in preparation, that is not controlled by the 1961 United Nations Single Convention on Narcotic Drugs or the 1971 United Nations Convention on Psychotropic Substances, but which may pose a public health threat comparable to that posed by substances listed in these conventions (Council Decision 2005/387/JHA).

Generic system: legislation includes a precise definition of a family of substances (such as by describing substitution patterns in a parent molecule). Examples are Ireland and the United Kingdom.

Analogue system: legislation includes a more general definition of 'similarity in pharmacological activity', as well as 'similarity in chemical structure'. Examples are Latvia and Bulgaria.

Derivative: a compound that is formally (not synthetically) derived from the structure of a well-known compound.

Note: the definitions for 'generic systems', 'analogue systems' and 'derivative' are not universally agreed, but are the ones used by the EMCDDA in its comparisons.

c) Devising new legislation to tackle new substances

The most comprehensive response undertaken by European countries has been the introduction of new laws to manage unauthorised distribution of psychoactive substances, as has occurred in Ireland, Austria, Portugal and Romania. In spite of many similarities in the ways in which the new legislation has been developed in these four countries, a number of differences exist. Regarding the substance, all four countries define a psychoactive substance as one that stimulates or depresses the central nervous system and is associated with dependency, hallucinations or disturbances in motor function or behaviour. In Ireland and Portugal, however, these disturbances should be 'significant'; in Austria, substances can be listed only if they are likely to be 'abused' by certain sections of society and pose a possible threat to consumer health. In Romanian law, there is no specified requirement for harmfulness.

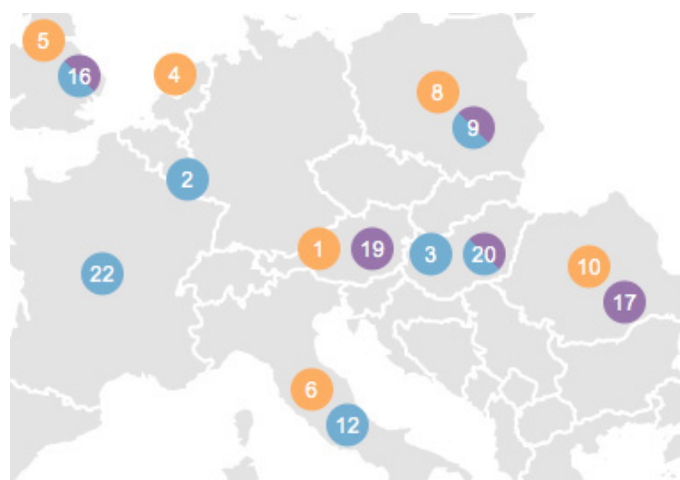
Under the new legislation, naming of a substance is not required in Ireland or Romania, as any substance that possesses the properties defined in the law is implicitly covered. In Austria, however, the minister for health must name the substances in a regulation; in Portugal, the substances are listed in a Decree-Law, but the authorities also have the power to confiscate and test any other substances if they suspect a serious threat to health,

temporarily prohibiting distribution. In addition, the supply of new psychoactive substances is a crime in Austria if the supplier has the intention to benefit and intends that the product will be used for its psychoactive effects; in Ireland, only knowledge of likely human consumption is necessary; and in Romania neither is required. Maximum penalties for supply in Austria, Ireland and Romania are 2, 5 and 8 years' imprisonment, respectively, rising significantly in Austria and Romania if supply causes serious injury or death. The Portuguese law is different in this respect, creating administrative powers only for health protection authorities to remove substances from sale or close shops.

Conclusion

The rapid emergence of new drugs has prompted a variety of innovative legal responses, and the situation continues to evolve. Since 2009, at least seven European countries have implemented one type of control measure and subsequently initiated another. Criminal sanctions are not uniform; the size of the criminal penalties and the degree of psychoactivity or potential harm that would trigger them vary widely across Europe. What is clear is that the legal systems, accustomed to 'drug' suppliers attempting to evade the law, are now faced with suppliers of new psychoactive substances making great efforts to stay within it, and legitimately making substantial profits during the months required to control a new substance under criminal law. Although there is no agreement across Europe as a whole on any one particular way in which to respond to the new drugs threat, two longer-term trends are nevertheless identifiable. First, there appears to be a general move towards the use of the threat of prison to deter suppliers; and, second, it seems that countries are choosing not to use criminal sanctions for those possessing a new substance for personal use.

Interactive element: map



Interactive: legal innovations across Europe available on the EMCDDA website: emcdda.europa.eu/topics/pods/controlling-new-psychoactive-substances

New Zealand's approach to the regulation of low-risk substances

In August 2011, in response to the proliferating supply of so-called 'legal highs', the New Zealand government announced that it would develop a new regime to regulate the manufacture and sale of 'low-risk' psychoactive substances. Details of the new regime were released over the course of 2012. The regime will require manufacturers to pay for clinical trials of the finished products they wish to sell, to prove that they are low risk before they are approved.

Based on the 2011 final report of the New Zealand Law Commission, and following consultations with the industry, the new approach aims to balance the demand for access to such substances with the risk of likely harm to individuals and society. The clinical trials may cost up to NZD 2 million (EUR 1.25 million) per product and take 1–2 years to complete. A manufacturer must also pay a NZD 180 000 fee to the regulator to have its product assessed. There is also a range of additional restrictions. The sale of approved products should be to people aged over 18, and there should be no sales from convenience stores, with advertising limited to the point of sale and other promotion prohibited. Packaging should be childproof and clearly list ingredients and health warnings.

The supply of any psychoactive substance that has not been approved may be punished by up to 2 years in prison, and personal possession of such a substance will be punishable with a civil fine (i.e. no criminal conviction is registered). In this scenario, a 'psychoactive substance' could be defined as anything whose primary purpose is to induce a psychoactive effect and is not already covered by other legislation (e.g. alcohol, tobacco, herbal medicines); a new regulator in the Ministry of Health could rule on borderline cases. This new legislation is envisaged to be enacted by August 2013.

This is not the first time that New Zealand has explored alternative regulatory options for managing 'legal highs'. In 2005, the government added a new category 'Class D – Restricted Substance' to the drug law, whereby sales were permitted to people aged over 18 only. The new psychoactive substance benzylpiperazine was legally sold in this way for 3 years before being withdrawn.