European Monitoring Centre
for Drugs and Drug Addiction

New psychoactive substances in Europe

Innovative legal responses

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European Monitoring Centre
for Drugs and Drug Addiction

Praça Europa 1, Cais do Sodré, 1249-289 Lisbon, Portugal
Tel. +351 211210200
info@emcdda.europa.eu I www.emcdda.europa.eu
twitter.com/emcdda I facebook.com/emcdda

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Authors: Brendan Hughes and Michael Evans-Brown

Introduction

The first report of this series of publications looked at developments in the market for new psychoactive substances from the perspective of the EU Early Warning System. The report examined the growth in the number, types and availability of these substances that has occurred recently, some of the factors driving this, and the increase in the harms caused by these substances as a result. In response to this growing problem, countries in Europe have developed a range of policy measures in order to reduce this availability, use and harm. One such measure is laws intended to regulate or prohibit various elements of the trade. The EMCDDA has already produced a number of publications and resources on these legislative developments, but this report takes a closer look at the more innovative legal responses that have been designed to address this challenge.

The challenge

Drugs are controlled internationally under United Nations conventions in order to protect public health — they have certain risks, as assessed by the World Health Organisation. Countries signing the conventions are required to establish criminal penalties to deter and punish unauthorised trade in controlled substances. As it is a general principle that criminal law must be certain, the substances subject to such penalties must be clearly specified, which means listing them individually, or in some cases in tightly defined groups according to their chemical structure. On this basis, when a new psychoactive substance is identified, its risk to health should be assessed and then it could be included in the list of those controlled under the criminal law. Until about 10 years ago, psychoactive substances not listed for control within the conventions tended to emerge on the illicit drug market. They were limited to a handful of substances each year, which were typically passed off as controlled drugs such as MDMA (methylenedioxymethamphetamine), amphetamine or heroin.

However, over the last decade, entrepreneurs have started selling substances not listed for control on the open market, reasoning that whatever is not expressly prohibited must be allowed for open sale. This manifested in the emergence of the 'legal highs' and 'research chemicals' markets, which took off in the mid-2000s with substances such as BZP (1-benzylpiperazine) and mephedrone, and products containing synthetic cannabinoids such as 'Spice'. The combination of globalisation and innovation in communications technologies means that substances have been developed, produced, and marketed internationally at great speed, and sold openly in specialised 'head shops' in towns and cities as well as via the internet. Some of these substances are so new to the field that, at least initially, there is very limited evidence of public health risks — the risks being the primary justification for punitive control measures. Entrepreneurs have used the lists in the drug laws simply as exclusions from their potentially vast product range; yet very broad definitions that might control many substances can be so vague that a prosecutor has difficulty proving that distribution was a crime. Adding substances to the list obliges law enforcement to test for those substances, but technical and financial resources for the new tests are not always increased accordingly. Altogether, this rapid growth in the number and types of new psychoactive substances discovered and distributed in Europe, accompanied by the limited evidence of public health risks, has challenged the capacity, and sometimes the credibility, of national identification, risk assessment and control systems. And suppliers respond swiftly: by the time one substance is controlled, a replacement is already on the shelves.

The latest update from the EU Early Warning System provides some insight into the size and scale of the European market (EMCDDA, 2015a). During 2014, 101 new psychoactive substances were reported to the EU Early Warning System for the first time. This brings the total number of substances being monitored by the EMCDDA to more than 450 — close to double the number of substances controlled under the United Nations international drug control conventions — with more than half of these being reported in the last three years alone. Between 2008 and 2013, there was a seven-fold increase in the number of seizures reported by law enforcement across Europe, while in 2013 almost 47 000 seizures weighing more than 3.1 tonnes were reported to the EU Early Warning System. The market for these substances has thus accelerated to a speed which the public authorities' established response has struggled to match.

The legal responses

Governments in Europe have responded to the challenges posed by the market in new psychoactive substance in different ways. Among these measures designed to reduce the availability and use of new psychoactive substances, three broad, sometimes overlapping, groups of legal responses can be identified. In the first group, existing laws which focused on

consumer or health protection, or medicines have been used. In the second group, drug laws have been modified, most commonly by introducing group definitions of substances under control. In the third group, innovative new laws have been developed to address these substances, in a few cases even defining a psychoactive substance by its effect rather than its chemical structure. Further information on the three groups of legal responses can be found in the online publication on legal approaches to controlling new psychoactive substances (EMCDDA, 2015b), but this short report focuses on the key aspects of the third group.

Innovative legal responses

Three main aspects of the innovative legal responses can be identified: the criteria used to define the substance or the motivation for use; the listing mechanisms that reduce the time needed to control new substances; and the levels of punishment established. These are summarised below and followed by a country-by-country summary of the key elements of the law which includes: the wording used to legally define a new psychoactive substance; whether any criteria of harmfulness is included; the mechanisms used to assess and control a new psychoactive substance; whether a control measure is temporary or permanent; the agency responsible for enforcement; and the penalties possible.

Criteria of psychoactivity, motive and harm

The definition of a substance as requiring control usually consists of two of the three following elements: a substance should be psychoactive; there should be a motive of abuse or intoxication; and there should be some possible harm or threat to health (see Table 1).

The Irish and Romanian laws set their definition of psychoactivity to a certain threshold, with the Irish requiring 'significant' mental disturbance or change (as in Portugal), and the Romanian requiring effects comparable to other substances controlled as drugs (as in Hungary and Portugal). Both also establish the capacity or likelihood of causing dependence as a criterion.

TABLE 1

Elements considered in innovative legal responses to new psychoactive substances

	Defining psychoactive effects	Motive (abuse or intoxication)	Harm or threat to health
Austria	+	+	+
Finland		+	+
Hungary	+		+
Ireland	+		Dependence
Latvia*			
Poland		+	+
Portugal	+		+
Romania	+		Dependence
Slovakia		+	+
Sweden*			
United Kingdom		+	+

Note: A mark indicates that the element is included in the definition.

* In the legal responses of Latvia and Sweden there is no mention of those three elements in their laws, as the decision on qualification as a new psychoactive substance is taken by a separate entity (see the country summaries for more information).

Listing of new psychoactive substances

In an analysis conducted in 2009, the EMCDDA considered the implications of the level of administrative decision required to list a substance as a drug, with a ministerial decree being approved much quicker than a change in a parliamentary law, but with a correspondingly lower level of scrutiny (Hughes and Blidaru, 2009). In the laws considered here, ministerial approval is required in Austria, Hungary, Portugal and Slovakia; approval of government is required in Finland, and Parliament in the United Kingdom (as the substance will be temporarily controlled as a drug); and in Latvia and Sweden, the decision will be taken by government agencies in the health sector (Table 2). The trade-off between the speed and supervision of control is important; in Finland, the law was only passed when the proposal for the decision to be taken by the Ministry of Social Affairs and Health was changed to the government, as it was felt that such a fast decision should be accorded due oversight. Three countries have a system in which no list of new psychoactive substances is established, but any substance meeting the criteria will be considered to qualify (Ireland, Poland, Romania) ([1]).

([1]) This approach was also attempted in the Portuguese autonomous region of Madeira in 2012, but it was struck down by the Portuguese constitutional court for vagueness.

TABLE 2

Bodies deciding on inclusion of new psychoactive substances in list

Ministry	Government or higher	Other	No list
Austria: Health	Finland: Government	Latvia: Centre for Disease Prevention and Control	Ireland
Hungary: Human Capacities	United Kingdom: Home Office approved by Parliament	Sweden: Medical Products Agency, National Institute of Public Health	Poland
Portugal: Health			Romania
Slovakia: Health			

Penalties for offences

The offences defined in the innovative laws relate mainly to the supply of new psychoactive substances (manufacture, import, sale or distribution), but some of the laws emphasise advertising the substances as a specific offence. The penalties for these offences range from simple confiscation and destruction of the product in Sweden, to a maximum of 14 years in prison in the United Kingdom. The high penalty available in the United Kingdom is due to the substance being temporarily considered as a controlled drug and thus attracting the same penalty as other drug supply offences. The most severe penalties available for the different legal measures are listed in Table 3. In Portugal and Slovakia, only a monetary fine is provided for, as the offence is considered administrative rather than criminal; this is also the case for manufacture or distribution in Poland. Non-criminal penalties may be chosen for reasons of proportionality against an uncertain harm, though Eurojust, the EU agency for judicial cooperation, has noted that such an approach may complicate judicial cooperation in transnational cases, when dual criminality may be required. Longer prison sentences are possible in Austria and Latvia in the case of serious health consequences, while Poland and Romania attach the most severe penalties to acts of advertising rather than distribution itself. Only two countries have established penalties for possession of new psychoactive substances for personal use, with Hungary criminalising possession of preparations that contain more than 10 grams of a new psychoactive substance, and Latvia establishing possession for personal use as an administrative offence punishable by a warning or fine, with possible criminal liability if a further offence occurs within a year.

TABLE 3

Most severe penalties in legislation for supply of a new psychoactive substance

	Imprisonment (years)		Fine in EUR (if no imprisonment)	Confiscation (if no fine)
	Normal	Aggravated		
Austria	2	10		
Finland	1	–		
Hungary	3 or 5	5 or 8		
Ireland	1	5		
Latvia	2	5		
Romania	2 or 3	5		
UK	0.5	14		
Poland	1 (advertising)	–	250 000 (manufacture or distribution)	
Portugal	–	–	45 000	
Slovakia	–	–	332 000	
Sweden	–	–	–	Yes

Innovative laws: key elements

This section provides a country-by-country summary of the key elements of the innovative laws, which include: the definition of a new psychoactive substance, noting any criteria of psychoactivity, abuse or harmfulness; mechanisms used to assess and control a new psychoactive substance; whether a control measure is temporary or permanent; the agency responsible for enforcement; and the penalties possible.

The following information is provided in summary form for the purpose of contrasting the general approach being used in different EU countries. The reader should note that much of this information is based on translations of original legal texts that have not been certified.

Austria

Law: Psychoactive Substances Act 2012

Definition: Substances not subject to the UN conventions of 1961 and 1971 are listed if they have the potential for 'psychoactive effects' (stimulating or depressing the central nervous system, resulting in effects such as hallucinations or disturbances in motor functions, perception, behaviour, mood) (s.1(2)), are likely to be used by certain sections of society and a threat to consumer health cannot be excluded (s.3). May include compound groups

Named exclusions: Substances placed on the market in accordance with drug, pharmacy or medicine import regulations as well as substances subject to the Narcotic Drugs Act (s.2)

Duration of control: Permanent

Listed by: Ministry of Health Regulation (s.3)

Offences and penalties: Unauthorised production, import, export or supply is a crime if the supplier aims to benefit and intends that the product be used for its psychoactive effects. Punishable by up to two years imprisonment, or one to ten years if supply results in many serious injuries or a death (s.4). Seizure of any amount of a substance is possible even when there is no suspicion of supply (s.5). Customs may also confiscate imported/exported goods (s.7)

Enforcement: Law enforcement

Finland

Law: Narcotics Act (amended 2014), Criminal Code (amended 2014), Government decree 2014

Definition: 'Psychoactive substances banned from the consumer market' mean those substances used for intoxicating purposes that might be a danger to health and that have been decided to be made subject to control in accordance with the EU Council Decision or are positional isomers of such a substance and are neither medicines nor narcotic drugs (s.3). Evaluation by the Finnish Medicines Agency together with the National Institute for Welfare and Health, police and customs (s.3a)

Named exclusions: Medicines and narcotic drugs (s.3). There are provisions for exemptions when the substances may also have industrial or research uses (s.3b, s.23b)

Duration of control: Permanent

Listed by: Government Decree

Offences and penalties: Production, import, storage, keeping for sale or transfer is punishable by fine or up to one year's imprisonment (Criminal Code, Ch.44 (Offences endangering health and safety), s.5a)

Enforcement: Law enforcement

Hungary

Law: Government Decree 66/2012, Decree 55/2014, Act XCV on Medicinal Products 2005 (amended 2015), and Criminal Code (amended 2014)

Definition: A substance which appears on the market (or is formally notified to the EU Early Warning System) will undergo a formalised rapid assessment which must reach two conclusions. Firstly, the substance can affect the central nervous system, so it can change the mental state, behaviour or perception and therefore pose as serious a threat to public health as the substances listed in the 1971 UN convention; and secondly, the substance has no therapeutic use (amended Act XCV s.15B). May include compound groups

Duration of control: Temporary, one year, renewable. Within one year of being placed on the 'Schedule of NPS', the drug must be risk-assessed, resulting in full drug control or transfer to the 'Schedule of substances removed from the Schedule of NPS'. Absence of relevant information can extend the risk-assessment procedure by one year (or until

information becomes available with a risk assessment every two years). Compound groups will remain as long as any substance in the group fulfils the requirements (amended Act XCV 2005 s.15C)

Listed by: Ministry of Human Capacities Decree (Decree 55/2014 includes schedule of new psychoactive substances) and Government Decree (Decree 66/2012 includes a schedule of substances removed from the schedule of new psychoactive substances)

Offences and penalties: import, export, transport, manufacture — up to three years' imprisonment (if aggravating circumstances, one to five years); supplying, placing on the market, offering or dealing — one to five years' imprisonment (up to one year if a small amount; two to eight years with aggravating circumstances). Possession for personal use of more than a small amount (preparation contains more than 10 grams of new psychoactive substances) — up to three years (Criminal Code ss.184, 184/A-D). Possession of a small amount is a misdemeanour which falls within the competence of the police

Enforcement: Law enforcement

Ireland

Law: Psychoactive Substances Act 2010

Definition: 'Psychoactive substance' means a substance, product, preparation, plant, fungus or natural organism which has, when consumed by a person, the capacity to: (a) produce stimulation or depression of the central nervous system of the person, resulting in hallucinations or a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood, or (b) cause a state of dependence, including physical or psychological addiction (s.1)

Named exclusions: Medicinal products, animal remedies, intoxicating liquor, tobacco products, food, controlled drugs, other substances specified by the minister (s.2)

Duration of control: Permanent

Listed by: No list

Offences and penalties: Selling, importing or exporting a psychoactive substance knowing or being reckless as to whether that substance is being acquired or supplied for human consumption (s.3). Publishing or displaying an advert to sell substances or to promote the consumption of substances for psychoactive effects with information about how or where to obtain them (s.5). On summary conviction, a fine not exceeding EUR 5 000 or imprisonment for a term not exceeding 12 months, or both; conviction on indictment, a fine or up to five years' imprisonment, or both (s.20)

Enforcement: Law enforcement

Latvia

Law: Law on procedures for the legal trade of narcotic and psychotropic substances and medicinal products (amended 2013), Criminal Code (amended 2014) and Administrative Violations Code (amended 2014)

Definition: Substances that are not included in the lists of controlled drugs and for which the information has been obtained from the Early Warning System or from reports received from any of five named (forensic) authorities (Law on Procedures..., Article 4, part 2)

Duration of control: Temporary, one year

Listed by: Centre for Disease Prevention and Control

Offences and penalties: Unauthorised manufacture, acquisition, possession, transportation and transfer with the purpose of the distribution of new psychoactive substances or products; up to two years' imprisonment, or up to five years if the offence has caused grave consequences (Criminal Code, Section 248[1]). Unauthorised acquisition, storage, transport or transfer of new psychoactive substances or products containing new psychoactive substances, without the intent to sell them; warning or fine of up to EUR 280. Crime if repeated within one year

Enforcement: Law enforcement

Poland

Law: Act amending the Act on Counteracting Drug Addiction and the Act on State Sanitary Inspection, 2010

Definition: 'Substitute drug', in the Act on Counteracting Drug Addiction (CDA), Art.4, is redefined by the amending law as a substance, product or plant used instead of, or for the same purposes as, a controlled drug, and whose manufacture or placing on the market is not regulated by separate provisions. The law makes no specific reference to whether the drug should first be considered as harmful. Previously, under the Act on State Sanitary Inspection (SSI), the inspectors were empowered to act against any

'failure to meet hygiene and health requirements'. They now have the specific right to withdraw from trade a 'substitute drug' for up to 18 months in order to assess its safety, if there is a justified suspicion that it might pose a threat to life or health. If the substance is judged to be potentially harmful, costs are borne by the supplier; if not, costs are paid by the state (amended Act on SSI, Art.27c)

Named exclusions: Substitute drugs are not governed by regulations on the general safety of products (amended Act on CDA, Art.4)

Duration of control: Temporary, up to 18 months (amended Act on SSI, Art.27c)

Listed by: No list

Offences and penalties: The penalty for manufacturing such drugs or introducing them into circulation is a fine by the state sanitary inspector of between PLN 20 000 and one million (about EUR 5 000 to 250 000) (amended Act on CDA, Art.52a). The penalty for advertising the psychoactive effects of a substance is up to one year's imprisonment (amended Act on CDA, Art.68)

Enforcement: State sanitary inspector

Portugal

Law: Decree-law 54/2013

Definition: Psychoactive substances that pose a public health risk comparable to that posed by controlled drugs, from their effects on the central nervous system, with the ability to induce significant alterations in the level of motor function, as well as mental functions, namely reasoning, critical judgement and behaviour, often with states of delirium, hallucinations or extreme euphoria, with the ability to cause dependence and in certain cases, produce long-term or permanent damage to the health of consumers (Art.2). Any substance that is suspected to pose a grave risk to human health (Art.7)

Named exclusions: Permission may be given for supply when intended for industrial or pharmaceutical purposes (Art.4)

Duration of control: Permanent

Listed by: Ministry of Health (Art.3)

Offences and penalties: Production, import, export, advertising, possession and distribution of these substances or their derivatives (Art.4): closure of the premises involved (Art.6), as well as administrative fines of up to EUR 45 000. Users are referred to a commission for the dissuasion of drug addiction (Art.10)

Enforcement: Portuguese Economy and Food Safety Authority

Romania

Law: Joint Ministerial Order establishing mixed teams to control new psychoactive substances (2011)

Definition: Order set up multidisciplinary teams of representatives from ministries (e.g. health, interior, agriculture) and health and consumer protection agencies, to target environments where 'harmful unregulated psychoactive substances' were being distributed or consumed. The group is tasked to enforce all existing laws in their respective fields to stem the distribution of these substances

Duration of control: Permanent

Listed by: No list

Offences and penalties: All relevant existing offences and penalties

Enforcement: Mixed teams

Romania

Law: Law 194/2011 laying down rules to counter operations with products likely to generate psychoactive effects, other than provided by current laws

Definition: Any product ('substitute', Art.2a) likely to provoke psychoactive effects similar to those caused by substances controlled under drug laws (Art.1). These effects are defined as stimulation or inhibition of the central nervous system provoking 'changes in functions and mental processes and behaviour', or 'causing dependency' (Art.2e). The law makes no specific reference to 'harmful' substances. It establishes a system of pre-authorisation via the National Health Veterinary and Food Safety Authority evaluation commission. It takes about five months for a decision to be made (Arts.3-12)

Duration of control: Permanent

Listed by: No list

Offences and penalties: (from February 2014) Distribution without a permit (particularly if consumption was likely): three months to two years' imprisonment when the psychoactive effects are unknown but likely, and six months to three years' imprisonment when the psychoactive effects are known (Art.16). Advertising the psychoactive effects: one month to one year's imprisonment (Art.20). Claiming that the products are lawful: one to five years' imprisonment (Art.17). No penalty for the possession of these substances for the purpose of use. Failure to ban access to website within 12 hours: fine of EUR 12 000–23 000 (Art.15.1)

Enforcement: Ministry of Health, National Authority for Consumer Protection, National Health Veterinary and Food Safety Authority, Ministry of Internal Affairs, Ministry for Information Society

Slovakia

Law: Law 40/2013, amending Act No 139/1998 Coll.; Ministry of Health Decree 298/2013

Definition: Substances for which there is reasonable suspicion of the existence of persistent or sporadic and deliberate abuse, which is accompanied by harmful physical or mental reactions (Art.16a(1) of amended Act 139/1998)

Duration of control: Temporary. After three years a substance is either deleted from the list or is moved to the list of controlled substances following the normal legislative procedure (Art.16a)

Listed by: Ministry of Health (Art.16a(4))

Offences and penalties: Administrative breach of consumer law — selling, promoting or putting the life or health of consumers in danger — (Act No 128/2002 Coll. on the state control of internal market in consumer protection matters, and Act No 250/2007 Coll. on consumer protection): maximum fine EUR 332 000

Enforcement: Slovak Trade Inspection Authority

Sweden

Law: Act of destruction of certain substances of abuse hazardous to health (2011:111)

Definition: The substances covered by the act are goods or substances which: (1) the government has decided to list as narcotics or as goods injurious to health, or (2) are included in an international convention to which Sweden is adhering but where listing has not entered into effect, or (3) can be presumed to be injurious to health (Art.2)

Duration of control: Permanent

Listed by: Medical Products Agency and Swedish National Institute of Public Health

Offences and penalties: The only 'penalty' is confiscation of property. All matters are handled according to the Administrative Act (1986:223) and are not viewed as criminal offences. Certain protocols must be used and the decision can be appealed to court

Enforcement: Law enforcement

United Kingdom

Law: Police Reform and Social Responsibility Act 2011, amending Misuse of Drugs Act 1971

Definition: 'Temporary class drug orders' (TCDO) may be drawn up where a substance is misused or likely to be misused, and where that misuse is having, or is capable of having, harmful effects (amended Misuse of Drugs Act [MDA], s.2A(4)). To proceed with such an order, the Home Secretary must consult the Advisory Council on the Misuse of Drugs (ACMD). However, there is also an 'urgency procedure', to consult only the ACMD Chair, if the likelihood of misuse poses an urgent or significant threat to public safety or health (amended MDA, s.2B)

Duration of control: Temporary, one year (amended MDA, s.2A(6))

Listed by: Home Secretary with approval of Parliament (amended MDA, s.2A)

Offences and penalties: TCDOs apply only to supply-related offences under the Misuse of Drugs Act (amended MDA, s.2B), and carry the same penalties as drug supply offences: 14 years' imprisonment and an unlimited fine on indictment, or six months' imprisonment and a fine of GBP 5 000 (about EUR 6 900) on summary conviction. Simple possession of a temporary class drug is not an offence. However, law enforcement officers with suspicion may search an individual and seize and dispose of anything they believe is a temporary class drug (amended MDA, s.23A) to prevent possible harm to the individual

Enforcement: Law enforcement

Conclusion

This brief report provides an overview of how different European countries are developing innovative legislative responses to a rapidly evolving market which challenges public health and drug policy. Countries are forced to act by the speed at which new psychoactive substances appear and their open sale, balancing the precautionary principle of rapid control against the credibility and enforceability of the criminal law which is not always backed by evidence of harm to public health. Lessons may be learned from observing the evolution of legislation in different countries and seeing how some responses may be later adapted according to subsequent findings. Continuous monitoring of the situation is necessary to ensure an effective public health response tailored to the needs and context of the particular country.

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EMCDDA (2015a), *New psychoactive substances in Europe: An update from the EU Early Warning System (March 2015), Publications Office of the European Union, Luxembourg.*

EMCDDA (2015b), *Legal approaches to controlling new psychoactive substances* (http://www.emcdda.europa.eu/topics/pods/controlling-new-psychoactive-substances).

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Resources

- Learn more about the legal responses to new psychoactive substances: http://www.emcdda.europa.eu/topics/pods/controlling-new-psychoactive-substances
- Learn more about the work of the EU Early Warning System: emcdda.europa.eu/ews

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The EMCDDA's publications are a prime source of information for a wide range of audiences including: policymakers and their advisors; professionals and researchers working in the drugs field; and, more broadly, the media and general public. Based in Lisbon, the EMCDDA is one of the decentralised agencies of the European Union.

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