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Responding to new psychoactive substances

As criminal laws should clearly define those substances under control, the discovery of a psychoactive substance outside legal control can allow suppliers to make a profit at unknown risk to the health of the consumers. These substances may then be identified by the authorities and added to the list of those controlled, and so the cycle begins again. Recent developments allowing organic chemicals to be synthesised cheaply, combined with the information exchange and marketing possibilities afforded by the Internet, have led to new psychoactive substances becoming widely available at an unprecedented pace. These may be marketed through shops specialising in drug paraphernalia in town centres and easily established websites, which have the potential to spread the use of a new drug rapidly within countries and internationally. The speed at which new psychoactive substances can appear and be distributed now challenges the established procedure of passing legislation to control a substance in each country. Suppliers are making substantial profits during the months required to control a new substance under criminal law and while the risks associated with its use have yet to be determined. Policymakers are demanding new, faster and effective ways of drug control that will protect public health and, if possible, deter the suppliers from finding a new substance to continue the cycle.

Member States require the capacity to rapidly identify and scientifically evaluate the increasingly diverse and complex new substances appearing on the market. Their response mechanisms should be optimised to act effectively and efficiently to protect public health with the minimum adverse consequences; control under drug law is one of various options that can achieve this.

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Definition

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).

Key issues at a glance

1. New psychoactive substances are not easily detected and identified by forensic laboratories. Testing products for unknown or unexpected substances is time consuming, complex and expensive. This may hinder targeted and timely responses by legislators and law enforcement.
2. It is not legally possible to criminalise the unauthorised distribution of all psychoactive substances, so legislation, rather than being proactive, can only react to substances as they appear.
3. New psychoactive substances may pose risks to individual and public health as well as social risks, affecting the broader community. However, when they first appear on the market, information on their associated risks is lacking.
4. The legislative procedure required to bring a substance under the control of the drug laws takes time, in some countries more than a year.
5. Controlling a new psychoactive substance might have unintended and unwanted consequences. It may stimulate the search for, and distribution of, a non-controlled replacement, possibly one more harmful than its predecessor.
6. Other control options, though faster, lack the penalties to send the same messages of deterrence and health risk. Furthermore, they might not be effective in preventing or stopping the marketing and distribution of a new substance.

1. Early-warning systems

In Europe, early-warning systems for new psychoactive substances work at both EU and national levels. The European early-warning system, which was established in 1997, is implemented by the EMCDDA and Europol and builds on the national systems. It is a multidisciplinary network, which collects, appraises and rapidly disseminates information on new drugs and products containing them. The last two years have seen a record number of new substances identified for the first time in Europe — 24 in 2009 and 41 in 2010 (see graphic). Currently, about 150 substances are monitored at EU level.

National early-warning systems have distinct structures or components depending on the specific national needs and priorities, although also serving the needs of the European system. Across Europe, national early-warning systems differ in many ways, including their legal basis, their location in the government (in health or law enforcement bodies), their coverage (local, regional or national) and the resources allocated to them. They may also differ in their composition and capacity. For example, some early-warning systems include strong forensic science and toxicology networks, some monitor samples collected from users and some are linked to a rapid response mechanism. National early-warning systems can be strengthened by the use of quantitative drug monitoring indicators, qualitative research and multidisciplinary information sources such as healthcare providers, law enforcement organisations and independent researchers. They may exploit the latest analytical and technological advances, and can benefit from efficient and timely information exchange between all partners.

2. Proactive control

Psychoactive substances controlled under criminal law must be clearly defined. The principle underlying this, enshrined in the European Convention on Human Rights and in some national constitutions, is that no one can be found guilty of an offence that was not criminal at the time. From this, the European Court of Human Rights ruled that criminal law has to be specific in what it classifies as an offence. This would mean that substances not listed in the drug law are not controlled by it.

European Court of Human Rights case-law, however, allows certain elements of the offence to be clarified and brought under the original definition of the offence. Generic definitions of chemical families of substances under control are used by Ireland and the United Kingdom. Analogues or derivatives of controlled drugs may mean those with similar structures or effects and therefore cover a wider range of substances than a generic definition. These can be applied to all substances under control in the drug law (as in Bulgaria, Norway), selected categories (Latvia, Malta) or just one small group (Luxembourg). Some Member States, however, reported that they would have difficulties implementing a generic definition, as it would require changes to primary legislation or might contradict constitutional principles. In 2010, Ireland introduced legislation that prohibits the sale of any addictive or harmful psychoactive substances for human consumption and Poland prohibited the marketing of substitute drugs. It is too early to fully evaluate this approach.

3. Assessing the risks

National systems to assess the risks presented by new psychoactive substances exist in most EU Member States. These systems examine the health and social risks posed by new substances at the various stages from manufacture, through trafficking to use. They may also evaluate the potential involvement of organised crime and the consequences of possible control measures. Out of 26 countries for which information is available, six did not report having a risk assessment system as part of the legal procedure of control. A risk assessment system is directly referred to in the drug law of six countries, is semi-formalised in seven and can be performed on an ad hoc basis in another seven. It is carried out by public officials in the majority of countries, but by an independent scientific body in four (Hungary, Netherlands, Austria, United Kingdom).

About half of the EU Member States legally distinguish substances by the level of harm they may cause, and a risk assessment may assist with accurate classification and communication of the harms to the public. Media reporting of purported harms may increase pressure for legislative control before key facts are known. But, with indications that relatively few people use new psychoactive substances, care is needed not to lose credibility by overstating their risks. Few countries appear to reassess the accuracy of their classification when new information should be available.

4. Faster processes — but supervised

The amount of time it takes to put a new substance under control depends on the procedure followed, the nature of the law involved and the level of approval required. For example, a complex procedure to change a parliamentary law that requires the approval of the head of state will take longer than a simple procedure to change a regulation signed by one minister. To overcome procedural delays, Germany and the Netherlands have established emergency systems that enable a substance to be placed under temporary control for a year, with the approval of one minister rather than the government. If the procedure for permanent control is not followed within that year, the restriction will lapse. Several other countries have fast-track systems to place substances under permanent control by shortening defined consultation periods during the law-making process. In Sweden, a separate law, the 'Act on

goods dangerous to health', allows the rapid classification of a substance as subject to serious criminal penalties for sale or possession, while the authorities consider if it meets the definition of a 'drug'; in which case, it should eventually be listed as a controlled drug. Directive 98/34/EC of the European Parliament and of the Council requires a three-month notice period for national actions that limit intra-community trade, but this can be waived for serious public health or safety reasons.

5. Unintended consequences of control

The EU risk assessment procedure considers the possible consequences of control measures, which may include substitution of the newly controlled substance with another non-controlled substance — sometimes one which has more serious effects. For example, control of GHB (gamma-hydroxybutyric acid) may have led to a rise in the use of its chemical and metabolic precursor GBL (gamma-butyrolactone), which is at least as dangerous as GHB. After hallucinogenic mushrooms containing psilocin were controlled, some retailers began to offer the mushroom *Amanita muscaria*, which has substantial toxicity risks. When mephedrone was placed under control in Europe, online retailers started to advertise naphyrone as a replacement. However, instead of naphyrone, many samples contained one or more controlled cathinones, or other substances chemically unrelated to naphyrone.

Maintaining an elevated vigilance for new drugs can be expensive as it requires the identification of a growing number of new substances and research into their associated risks and responses. Bringing new psychoactive substances under drug law control also requires resources for enforcement. Countries applying this approach in all cases might run the risk of overloading their national system. With this in mind, scientific risk assessment panels in the Netherlands and the United Kingdom have recommended against criminal control of the supply of certain substances (hallucinogenic mushrooms and khat respectively), favouring instead prevention programmes.

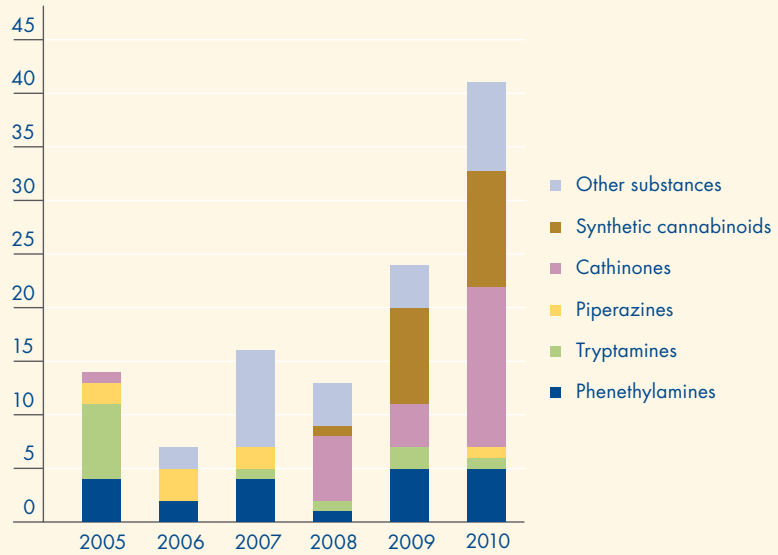
6. Are other laws effective?

Some European countries have successfully used other laws to stop the open distribution of a new drug. These laws are based on harmonised EU definitions, which should be already operational in all Member States. For instance, regulations requiring that goods or food on sale are clearly and accurately labelled in relation to their expected use have been invoked to confiscate Spice products not labelled in the national language (Italy), or mephedrone labelled as bath salts and plant food (United Kingdom). By applying the harmonised EU definition of a medicinal product to a new psychoactive substance, national medicines agencies can prohibit its unauthorised 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 Austria, while avoiding criminalising users. Import bans in Austria (Spice) and in the United Kingdom (mephedrone) contributed to stopping open distribution.

Young people's access to new substances can be reduced by licensing or age restrictions on sales outlets. These may be similar to those regulating alcohol and tobacco sales, but other examples include the 'coffee shops' in the Netherlands and the sale of butane and solvent products in the United Kingdom.

All these approaches follow the recent recommendations of the United Nations Office on Drugs and Crime to place an emphasis on enforcing laws to protect health and concentrate on suppliers rather than criminalising all users.

Number of new psychoactive substances notified to the European early-warning system under Council Decision 2005/387/JHA



NB: Council Decision 2005/387/JHA came into effect on 21 May 2005.
Source: European early-warning system.

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Conclusions and policy considerations

1. **Detecting and identifying new psychoactive substances as they appear on the market are the first steps to assessing the risks of, and ultimately controlling, potentially dangerous new drugs. The capacity to achieve this task is an essential element of early-warning systems.**
2. **Risk assessment systems can provide evidence to support the legislative process. The results can send an accurate and credible message to the public about the risk of harm associated with the substance. Targeted research is key to providing a firm evidence base for risk assessment and for ongoing justification of control measures.**
3. **Striking the right balance between swiftness of response to new substances, on the one hand, and sufficient scientific evidence and legislative supervision, on the other, is an important policy goal.**
4. **Drug laws should address substances that pose serious health and social threats. Other measures, combined with prevention programmes, may also be used to dissuade the use of non-controlled substances that are not necessarily safe.**
5. **It is important to consider if other laws already available, such as consumer protection and medicines laws, might achieve the desired objective. Speed of reaction may be more important than severity. Import bans can reduce pressure on local enforcement mechanisms.**
6. **The European Commission, in cooperation with EU countries, the EMCDDA and Europol, is working on new legislation to better address the control of new psychoactive substances throughout the EU.**

Key sources

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EMCDDA (2010), *Risk assessment of new psychoactive substances: operating guidelines*, Publications Office of the European Union, Luxembourg.

EMCDDA (2011), *Report on the risk assessment of mephedrone in the framework of the Council decision on new psychoactive substances*, Publications Office of the European Union, Luxembourg.

Web sources

EMCDDA Drug profiles:

BZP and other piperazines
http://www.emcdda.europa.eu/publications/drug-profiles/bzp

Synthetic cannabinoids and 'Spice'
http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cannabinoids

Synthetic cathinones
http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cathinones

Synthetic cocaine derivatives
http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cocaine-derivatives

Council Decision 2005/387/JHA on the information exchange, risk-assessment and control of new psychoactive substances

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:127:0032:0037:EN:PDF

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