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Policy analysis

Assessing the 'added value' of European policy on new psychoactive substances

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ABSTRACT

Background: New psychoactive substances (NPS) are reported to be on the rise throughout Europe, and are often presented as the latest challenge facing drug-policy makers. At the European level, legislation on NPS has existed since 1998. Several evaluations, however, have suggested that this legislation is not effective and the European Commission has submitted a new proposal on NPS seeking to extend its powers in this area.
Methods: This article critically evaluates the new proposal against its predecessor's three main criticisms: (i) being unable to tackle the large number of NPS because of lengthy European legislative approaches, (ii) being reactive rather than proactive, and (iii) lacking options for regulatory and control measures.
Results and conclusion: In determining whether or not European interventions can bring added value to what is being done at the national level, it finds that, while the new proposal is more efficient, it is not necessarily more effective, and that there is a disappointing focus on legal frameworks at the expense of research and harm reduction.

Introduction

The latest phenomenon to catch the attention of drug policy makers and practitioners around the globe has been the rise in the popularity, availability and use of new psychoactive substances (NPS)—a catch all term for chemical compounds that have been modified and developed to mimic the effects of drugs that are already prohibited. Some NPS have already been regulated in many countries (e.g. mephedrone, synthetic cannabinoid agonists), but, given the ease of slightly tweaking chemical structures to create new substances, many remain outside the confines of national and international regulations. This is not a new problem per se, but the last decade has seen an increase in their "range, potency, profile and availability" (Winstock & Ramsey, 2010, p. 1685). Existing national and international illicit drug legislation has been generally reactive in its response to controlled drugs; a new substance is developed, marketed, gains in popularity, comes to the attention of the authorities and, where warranted, is eventually added to the list of controlled substances. NPS, however, may present a new kind of drug market where substances are emerging and evolving rapidly, within which new provisions are needed to keep pace with the capacities of developers to create new substances.

Latest figures from the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) indicate that more than 450 potentially harmful new psychoactive substances (NPS) are now being monitored in Europe (EMCDDA, 2015a), and the European Commission has claimed that NPS "are emerging at an unprecedented rate" (European Commission, 2011a). On a global scale, the International Narcotics Control Board (INCB) has declared that this situation is causing "increasing concern" (INCB, 2011, p. 97) and the United Nations Office on Drugs and Crime (UNODC) has recently developed its own early warning advisory (EWA) to share information on NPS on a global scale. There is clear evidence that the issue of NPS is one that is being prioritised, yet, while most regions in the world confirm the appearance of NPS within their internal drug markets (UNODC, 2013), the limited information that is available on prevalence rates suggests that they remain relatively low, with about 8% of the youth population reporting use across Europe (EMCDDA, 2015a). Furthermore, various academics have questioned the dominant discourse in this area. For example, Reuter (2011, p. 4) has described the problem as "modest and localised" with

> "no major disasters (large numbers of deaths or serious injuries/infections on the one hand; large and violent illegal markets on the other) associated with new substances in recent years" (Reuter, 2011, p. 27).

Birdwell, Chapman, and Singleton (2011), further elaborate that it is unusual for an NPS to cause widespread and significant

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problems (e.g. mephedrone in the UK and BZP in New Zealand) and van Amsterdam, Nutt, and van den Brink (2013, p. 317) confirm that 98% of NPS are little more than "one-night wonders".

Nevertheless, NPS have become a driver for changing drug policy landscapes. Traditionally, drug legislation lists individual substances which are to be controlled, but systems have also been developed which allow chemical compounds that are structurally similar (generic model) or which are perceived to have similar effects (analogue model) to existing controlled substances to be automatically controlled at any one time. These alternative systems can be useful in responding more proactively to the development of NPS and have been employed in many individual countries. Other countries have also responded to NPS by introducing emergency legislation that allows a substance to be immediately banned for a specific time period without undertaking the lengthy and time consuming legislative procedures necessary to bring a substance under permanent control. Finally, a handful of countries have established a system whereby any substance meeting certain criteria (e.g. psychoactivity) will be subjected to a total ban. This system has been adopted in Ireland, Poland and Romania, and the UK (EMCDDA, 2015b).

There has also been some experimentation with regulation via the frameworks that govern foodstuffs, medicines and specific commodities such as alcohol and tobacco (Reuter, 2011). Medicines laws have been utilised in at least 8 European countries and different types of consumer safety laws have been employed in Italy, Poland, Portugal and the UK (EMCDDA, 2012), although efforts have been somewhat sidestepped by the marketers of NPS declaring them 'not for human consumption'. The most radical example of alternative regulation, however, was proposed in 2013 under New Zealand's Psychoactive Substances Act. This legislation aimed to shift the burden of responsibility for determining the potential harms of an NPS to the vendor: if substances passed the extensive and expensive tests (funded by the vendors and expected to cost between 1–2 million NZ$) and were deemed to be of low risk of harm, then they would have been licensed for sale in restricted outlets and subjected to constrictions on age of purchase, promotion, and advertising. The Act, however, hit a stumbling block when a government amendment cut off the licensing phase and halted the legal sale of all psychoactive substances making the likelihood of future approvals much more remote (Brown, 2015). The amendment also prohibited the use of animal testing in determining the safety of a product leading Brown (2015, p. 1) to suggest that an impasse has been reached as the legislation passing through the New Zealand parliament "cannot possibly approve or license any product".

While national responses to NPS vary considerably, responding to this challenge has been identified as a priority at the European level. Europe has been at the forefront of NPS policy development since a 1997 Joint Action (European Council, 1997) on the control of new synthetic drugs established a mechanism for information exchange, risk assessment and control, which was later solidified in a 2005 Framework Decision (Council of the European Union, 2005). In 2011, the European Commission communicated its desire to produce stronger EU level regulations in this area (European Commission, 2011a), and in 2013 new proposals for a regulation and directive on the treatment of NPS in Europe were presented (European Commission, 2013). In April 2014, the European Parliament indicated its strong support for these proposals, but discussions among member states were stalled over the correct legal basis for the proposals. In April 2016, these discussions were resolved and the proposals were once again put forward on August 29th with a slightly amended legal basis. It is the aim of this article to consider whether legislative responses at the EU level provide added value over national responses, particularly considering the diverse cultural context of NPS use and the differences in legislative responses thus far.

Existing European policy on NPS

The control of NPS is an area of drug policy making where the EU is already relatively active. Within the EU, drug policy is an issue where the principle of subsidiarity has been applied, leaving decision making power in the hands of national governments. The EU itself can only intervene where it can be demonstrated that European intervention brings added value that national governments cannot achieve alone. This has meant that national drug policies within Europe tend to vary considerably, from countries such as Sweden where a zero-tolerance approach is taken, to countries such as the Netherlands or Portugal where the principles of normalisation and harm reduction are more rigorously applied (Chatwin, 2003).

Nevertheless, commonsense dictates that drugs are an international issue: it therefore makes sense for national governments to work together, particularly in relation to law enforcement agencies such as the police and prosecution services. To date, the most advanced European level policy making in the field of drugs lies in the creation of two Framework decisions: the first, passed in 2004, sets out minimum-maximum penalties (the lowest maximum penalties allowed) for drug traffickers (European Commission, 2004) and the second, passed in 2005, deals with the control of NPS (Council of the European Union, 2005). The 2005 Framework Decision on NPS has three main functions (EMCDDA, 2007). Firstly, it establishes a mechanism to facilitate the rapid exchange of information between European and neighbouring countries on the NPS appearing within their internal markets. Secondly, it outlines the process for conducting an assessment of the risks associated with individual NPS. Thirdly, it stipulates the protocol for bringing a substance under control if the Council decides that it presents an unacceptable risk. If it is subjected to control measures then member states have 12 months to bring this into effect within their own borders.

Since the implementation of this Framework Decision in 2005, bans have been slow, but steadily increasing: BZP was banned in 2008, mephedrone in 2010, 5-IT and 4-MA in 2013, 4 more in 2014, and 7 in 2015. This relatively low number is somewhat surprising given the high number of substances now being monitored in Europe and has contributed to the perceived need for several evaluations of the 2005 Framework Decision (Chatwin, 2013; European Commission, 2011b; House of Lords, 2011; RAND, 2012). Results suggest that the creation of an 'early warning system' which collects and disseminates information on NPS from across member states, has been welcomed (House of Lords, 2011) as the first of its kind in the world. Criticism, however, surrounds the ability of the risk assessment and control procedure to effectively control the NPS market. In 2011, the European Commission deemed the Framework Decision to be "inadequate" (European Commission, 2011a, p. 7) and outlined its main failings as (i) being unable to tackle the large number of NPS because of lengthy European legislative approaches, (ii) being reactive rather than proactive, and (iii) lacking options for regulatory and control measures (European Commission, 2011a).

The new EU proposal on NPS

The first steps towards strengthening EU policy in this area have been taken with the release in 2013 of a new EU proposal on the regulation of NPS within its borders (European Commission, 2013). Increased European action is officially justified on the basis that: "Member States alone cannot reduce the problems caused by the spread in the internal market of harmful new psychoactive

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