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Harmonizing NPS Legislation Across the European Union: A Utopia?

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Biography

Renaud Colson is Associate Professor at the Law & Political Science Faculty of the University of Nantes and Honorary Lecturer at Cardiff University. He was previously British Academy Visiting Fellow at Cardiff University, Marie Curie Fellow at the European University Institute (Florence) and invited scholar at the Institute of Advanced Study of the Jawaharlal Nehru University (New Delhi). He has written on a variety of subjects including comparative law, European law, drugs law and criminology. His most recent books are *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge: Cambridge University Press, 2016, edited with Stewart Field) and *European Drug Policies: The Ways of Reform* (Oxon: Routledge, 2017, edited with Henri Bergeron).

Abstract

With the emergence of more and more synthetic substances since the 1960's, and broader use occurring from the 1980's onwards, there has been an increasing commodification of the market in new psychoactive substances (NPS). The European Union took an active stance as regards the regulation of these new substances. Finding itself at the crossroads of public health policy, criminal law and judicial cooperation, the NPS market flouts Member States' borders and offers a nice field of experimentation to develop the European integrationist project. This chapter presents the development and current state of the cooperation as regards NPS legislation within the EU. The first part discusses the background and history of the first EU legislative efforts to deal with NPS. The second part reviews the current European governance framework that establishes a supra-national regulatory focus for this emergent public health threat. The third part evaluates the legal impact of this European supra-national response. Finally, the relevance of the EU strategy and its future are briefly discussed in the conclusion.

Introduction

It is a common-place substantiated by anthropologists and historians that intoxication is a universal feature of the human condition and a habit that can be found in all human societies (Withington, 2014). For much of human history, psychoactive substances were natural products geographically confined. Their

¹ The author wishes to thank Dr Hui Yun Chan (University of Hertfordshire) and Derek Wilson (University of Nantes) for their useful comments and suggestions.

use was restricted by limited availability and both formal (via religious and political rituals) and informal regulation. The rise of maritime European empires in the seventeenth and eighteenth centuries turned some of these mind-altering substances into global commodities (Courtwright, 2001). While some of these substances remained in the therapeutic realm, others quickly entered into non-medical use.

During the course of the nineteenth century gradual medico-technological advances and the progressive 'medicalisation of political power' gave rise to the framing of drugs as a regulatory concept (Seddon, 2016). By the beginning of the twentieth century the movement to restrict the production, trade and use of psychoactive substances had gained momentum, both at national and international levels. European drug policies were born out of this great historical shift, which precipitated the change in priorities of Western political elites from the promotion of intoxicants to their partial prohibition (Bergeron & Colson, 2017).

The 'cat and mouse game' whereby drug control legislation is circumvented by the synthesizing of new psychoactive substances (NPS) has existed since the very beginning of the prohibition regime (Brandt & King, 2014, 588) but only recently has this phenomenon scaled up. With the emergence of more and more synthetic substances since the 1960's, and broader use occurring from the 1980's onwards (Henderson, 1988) there has been an increasing commodification of the market in NPS, with some deliberately created to evade drug legislation. These new designer drugs, sometimes labelled as 'legal highs', fuelled occasional moral panics which triggered various political reactions, including innovative legal responses developed to cope with the wild imagination of these chemical entrepreneurs.

The European Union (EU) took an active stance as regards the regulation of these NPS. Finding itself at the crossroads of public health policy, criminal law and judicial cooperation, the NPS market flouts Member States' borders and offers a nice field of experimentation to develop the European integrationist project. This chapter presents the development and current state of the cooperation as regards NPS legislation within the EU. The first part discusses the background and history of the first EU legislative efforts to deal with NPS. The second part reviews the current European governance framework that establishes a supra-national regulatory focus for this emergent public health threat. The third part evaluates the legal impact of this European supra-national response. Finally, the relevance of the EU strategy and its future are briefly discussed in the conclusion.

The First Steps of EU NPS Policy

EU action to control NPS is a secondary branch of EU drug policy, a subject long deemed of medium-level importance, best left to the Member states, until the mid-1980's, when transnational political interest in the drug issue started to grow at European level (Estievenart, 1995). Once set in motion, the European institutions produced a number of policy documents and legal instruments promoting police

and judicial cooperation and legislative harmonization between Member States. Since the first European Plan to combat drugs in 1990, three 'strategies' have been successively adopted by the European Council² presenting a comprehensive approach linking drug supply reduction to drug demand reduction (Edwards & Galla, 2014). With a view to promoting research and facilitating science-based decision-making, the institutionalisation of an EU drug policy included the establishment of a European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) in 1993, a body which has since then played a pivotal role in coordinating and sharing information and best practice, and disseminating research throughout the Member States (Bergeron, 2017).

NPS quickly made their way to the top of the EU drug policy agenda. Soon after the Maastricht Treaty became effective (1993) the Union was given new powers to combat drug addiction and drug trafficking (Art. K1). In a context of increasing pressure from some Member States (especially France and Ireland) to promote punitive legislation throughout Europe, the Dutch Presidency proposed a Joint Action on new synthetic drugs. This move allowed the Netherlands, which had a reputation as a producer of synthetic drugs, to demonstrate it was taking the drug problem seriously in spite of its liberal stance on cannabis and its fear of harmonization (Boekhout van Solinge, 2002, 96, 124). At the time, designer drugs were starting to find an established user-base on the recreational drug scene (King, 2011). Combined to the scarcity of data available on the subject, this made these new substances an ideal object of regulation to try out the new European competencies. The Joint Action proposed by the Netherlands was unanimously adopted by the Council in 1997.³

The text targeted synthetic drugs with "limited therapeutic values" not listed in the Schedules of the 1971 United Nations Convention on Psychotropic Substances but which nonetheless posed a "serious threat to public health" (Art. 2). Such a loose definition was required by the very purpose of the Joint Action, namely to identify, assess and possibly bring under control both newly invented unknown substances and known substances being newly misused. The Joint Action established a mechanism for rapid exchange of information (Art. 3) by which Member States were supposed to provide data on new synthetic drugs to new European bodies (Europol Drugs Unit and EMCDDA) in order to carry out a risk assessment at the European level (Art. 4). If need be, the Council could then require Member States to take the necessary steps to submit these substances to control measures (i.e. to ban them) (Art. 5). Overall, these measures were essentially driven by a drug supply reduction approach and criminal law enforcement considerations: the official rationale behind the Joint Action was the need to fill legal gaps in the fight against designer drugs by preventing producers from circumventing legal controls.

² The last one was issued in 2012: *EU Drugs Strategy (2013-20)* (2012/C 402/01), Official Journal of the European Union C 402/1, 29.12.2012, 1-10.

³ Joint Action of 16 June 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the information exchange, risk assessment and the control of new synthetic drugs (97/396/JHA), Official Journal of the European Union L 167, 25.06.1997, 1-3.

In 2002 an external evaluation of the Joint Action deemed that the overall relevance and the legal impact of the instrument were very limited (Evaluation Partnership Limited, 2002). The fact that designer drugs did not develop in the late 1990's as the growing problem that was envisaged when the Joint Action was adopted only partly explains this stark judgement. Other institutional elements explain the limits of this instrument, among which is the absence of a consensus over its objectives. Although the scheme had been conceived as a means of harmonizing law enforcement measures, some Member States prioritized the monitoring of newly identified substances over the control dimension. More fundamentally, disagreements appeared on how to assess public health risks and on how to carry out the control process. Neither the mechanism for the rapid exchange of information nor the risk assessment process was considered satisfactory. By the time the external evaluation of the Joint Action was published, only five substances (MDBD, 4-MTA, GHB, Ketamine, PMMA) had been through the review process and only two (4-MTA and PMMA) had been subjected to pan-European control following a Council decision.

In spite of these disappointing results, the Joint Action was considered a step in the right direction in the fight against NPS which remained high on the EU political agenda. The European Union Drugs Strategy (2000-2004) submitted to the Council of the European Union in December 1999 emphasized that the emergence of new synthetic drugs required the development of "more efficient information gathering and management" and suggested that the mechanisms created by the Joint Action "should be reinforced".⁴ At the same time, the European Commission issued a "Communication on a European Union Action Plan to Combat Drugs" in which it contemplated "additional instruments" which "might enhance the effectiveness of the fight against the illicit trafficking in and use of synthetic drugs" (European Commission, 1999).

Current legal framework

Following the 2002 external assessment of the effectiveness of the Joint Action, the Commission drafted a proposal for a Council Decision on new narcotic drugs and new synthetic drugs.⁵ In order to improve the performance of the existing scheme, the Commission relied on an incremental reform strategy: no radical overhaul of the Joint Action mechanisms was suggested but rather an operational improvement in the existing process. This led to the adoption of the Council Decision 2005/387/JHA of 10 May 2005 (hereafter 2005 Council Decision) which repealed the 1997 Joint Action and replaced it.⁶

⁴ *European Union Drugs Strategy (2000-2004)* (12555/3/99).

<http://www.emcdda.europa.eu/html.cfm/index1338EN.html>, Accessed October 2016.

⁵ European Commission, *Proposal for a Council Decision on the information exchange, risk-assessment and the control on new narcotic drugs and new synthetic drugs*. COM/2003/0560 final - CNS 2003/0215. <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52003PC0560>, Accessed October 2016.

⁶ Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances. Official Journal of the European Union L 127, 20.5.2005, 32–37.

At first sight, the 2005 Council Decision showed very little signs of evolution in the way the EU dealt with new drugs. Changes in the legal basis and in the name of the instrument reflected the modifications in the institutional structure of the EU between 1997 and 2005, but both the structure and the content of the new Act looked similar to the Joint Action with some of the key provisions being mere copy and paste. With more than 3600 words, compared to less than 1500 words for the Joint Action, the volume of the Decision doubled. Yet most of the new provisions simply provided new legal definitions (e.g. new psychoactive substances, new narcotic drugs, new psychotropic drugs) and more detailed procedural protocols of an already existing process (especially the transmission of information from Member States and the content of reports of Europol and the EMCDDA).

Compared to the 1997 Joint Action, the 2005 Council Decision redefines the scope of the instrument to cover a wider range of substances, namely all new psychoactive substances, including non-synthetic drugs, not currently listed in the United Nations drug control conventions. The reason for refining the definition of NPS and for distinguishing between new narcotic drugs and new psychotropic drugs – a distinction drawn by analogy to that of the international drug control system – was to include both of these categories in the scope of the Council Decision. Although this definitional effort brings little classificatory added value, it emphasizes that the scheme is not limited to synthetic drugs and guarantees that control measures can possibly apply to any new substance. But for this difference which broadens substantially the reach of the Decision, the philosophy of the scheme displayed in the recitals remains unchanged: in short, “the particular dangers inherent in the development of psychoactive substances require rapid action” (recital 1), “the Joint Action (has) fulfilled its expectations” but it is “in need of reinforcement and reorientation” (recital 3). To do so, the Decision establishes a three steps process encompassing a rapid information exchange on NPS (the so-called early warning system), a risk assessment by a scientific committee set up at European level, and a decision-making process to bring NPS substances under a pan-European ban.

The Decision sets up a detailed process involving Member States, three EU agencies (the EMCDDA, Europol and the European Medicines Agency (EMA)), and two decision-making bodies of the EU (the Commission and the Council). The full procedure, from identification of a new substances to its risk assessment and its control, is broken down in 7 stages : 1/ Collection and communication of information on NPS by Member States to Europol and the EMCDDA, 2/ Dissemination of this information to Member States by Europol and the EMCDDA, 3/ Preparation of a Joint Report on the NPS by Europol and the EMCDDA, in collaboration with the EMA and Member States, and submission of the Joint Report to the Commission and the Council, 4/ Council request (acting by a majority of its member) for a risk assessment on the NPS from the EMCDDA; 5/ Preparation and submission of a risk assessment on the NPS by an extended Scientific Committee of the EMCDDA to the Commission and the Council; 6/ Decision by the Commission to present an initiative for control

measures to the Council; 7/ Decision of the Council (acting by qualified majority) to submit the NPS to control measures.

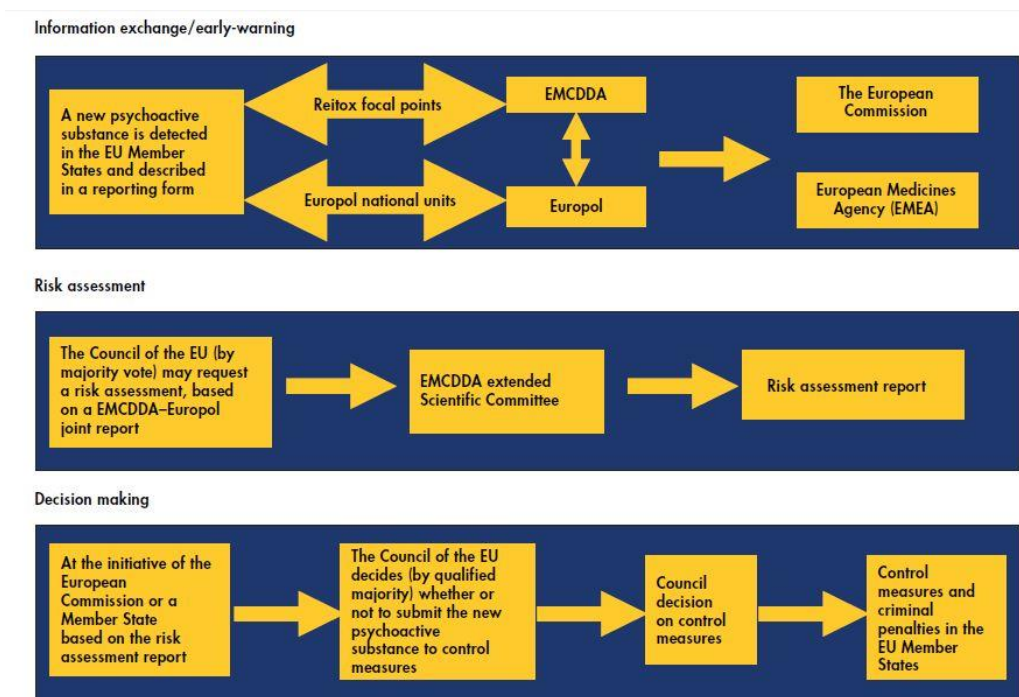


Figure 1: Council Decision 2005/387/JHA: a three steps process, EMCDDA (2007), 13.

The process, which lends itself to a flow chart presentation because of its complexity (see figure 1), is completed by operating guidelines issued by the EMCDDA (EMCDDA, 2007, 2010). Although not legally binding, these guidelines provide additional guidance on what type of information should be conveyed between the various actors within the procedure and how it should circulate. Of special importance are the templates of reporting form on new psychoactive drugs for the Early Warning System and the expert's scoring form for the Risk Assessment Report made available by the EMCDDA in order to standardize available information and promote science-based evaluation. Such an emphasis on the transferability of data should come as no surprise in the light of the labyrinthine process established by the Council Decision. In order to offset the risks of administrative bottlenecks and bureaucratic blockage, the normalization of information seems absolutely necessary to promote multi-agency cooperation and proper communication between the various institutional stakeholders in the control process.

From a legal perspective, this procedural hypertrophy is all the more remarkable when compared to the limited substantial obligations placed on the Member States by the Council Decision. At the outset of the process, European States have the duty to "ensure" that they "provide information" to EU agencies (Art. 4). Ultimately, should the European procedure be completed, Member States also have the obligation to submit the new substance identified by the Council to control measures and criminal penalties

as provided under their national legislation, by virtue of their international commitment to the international drug control regime (Art. 9). On these two counts only (duty of information and extension of national legislation to the new substances) can the Council Decision be said to be hard law. But even these two legal obligations were toothless until recently, as Member States were shielded until 1 December 2014 from any infringement proceedings brought by the Commission before the European Court of Justice with respect to the implementation of “third pillar” instruments.⁷

Impact of EU NPS policy

The institutional process created by the 2005 Council Decision offers a good illustration of the theoretical models used to describe and justify European governance over the last decade, namely multilevel governance and constitutional pluralism. On the one hand, the Council Decision allows EU institutions to play a guiding role in providing a normative framework for NPS regulation, but with the practical decision to be made at national level (Chatwin, 2011, esp. chap. 8). With regard to NPS, EU law is deprived of any direct effect in Member States which are the only competent authorities when it comes to triggering changes in drug control measures and criminal penalties. On the other hand, the 2005 Decision explicitly refers to the United Nations drug control system which it is seeking to prop up, in Member States, as an operative legal framework applicable to new substances not foreseen by the UN conventions: such an approach relies on a constitutional vision in which international law, EU law and national law are ultimately seen as self-standing sources of law that combine and overlap over a shared piece of territory (Jaklic, 2014). By and large, in the case of NPS (just as in other fields), EU law acts as a legal integrator between the EU institutions and the international and national legal orders. It creates relational mechanisms which rest on a principle of justification (Azoulai, 2011): in this instance the need to provide information, assess the risk, and control NPS. It is uncertain though that European integration, understood as the proper functioning of these relational mechanisms between the legal systems, ever actually took place in the field of NPS policy.

An assessment report issued in 2011 by the European Commission on the functioning of the 2005 Council Decision cast doubt over the efficiency of the EU system for dealing with NPS. The report, which emphasizes that “the market for new psychoactive substances has changed dramatically”, concludes that the 2005 Decision “is not an adequate instrument” (European Commission, 2011a, 1-2). Paradoxically, the observation of a significant increase in the number of substances detected was only made possible by the success of the early warning system established by the Decision. With a record number of 41 new substances notified in 2010, the Commission report could not but notice that since 2005, only three Joint Reports and two Risk Assessment

⁷ Protocol n°36 of the Lisbon Treaty (12008M/PRO/36) provides “as a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty” that the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable until five years after the date of entry into force of the Treaty of Lisbon. As a result Member States were shielded from any infringement proceedings until the end of 2014.

Reports had been published, with two substances eventually submitted to pan-EU control measures. Since then the number of NPS notified as well as monitored has kept on increasing to reach almost 100 new substances in 2015 (570 from 2005 to 2015); however, the number of Risk Assessments remained low with only nine new reports since 2011. This discrepancy is used as evidence by the Commission that the Council decision is not the right instrument to handle the increase in the number of newly developed psychoactive substances. Among the defects attributed to this instrument, the fact that it deals with new substances one by one, and only after they have been reported, is considered to impede a swift legal response.

Further evidence of the limits of the framework established by the EU is provided by a comparative perspective on Member States domestic law (EMCDDA, 2015a, 2015b). National governments have developed different legal responses to NPS. While some countries have used consumer safety or legislation on medicines to outlaw the distribution of NPS, others have extended and adapted existing drug laws to new substances, and a third group has devised new legislation to tackle them specifically. These innovative policies which can be observed in Member States often combine new criteria to define psychoactive substances, swifter administrative processes to classify them, and a specific regime of sanctions. Member States' laws in the field of NPS remain many and diverse in spite of the EU's effort to provide a common framework to tackle the problem. Beyond technical differences, this plurality of national approaches illustrates how drug policy culture varies throughout Europe, with some countries favouring a law enforcement approach while others promote close monitoring and harm reduction measures. As a result, the limited legal options established by the Council Decision, which requires choosing between a pan-EU ban backed by criminal sanctions or no legal action at all, is seen as hardly satisfactory by many Member States. Because it offers limited leeway to national governments, such a one-size-fits-all solution may well have contributed to the failure of the Council Decision as a decision-making instrument.

Conclusion

In the last two decades a visible convergence took place between European Member States' drug policies (Colson & Bergeron, 2017). It remains unclear though what role the EU did exactly play in this coming together. Indeed EU action remains subject to the subsidiarity principle and the competencies for drugs policy (including both its public health and criminal justice components) remain primarily at Member State level. Evidence suggests nonetheless that EU policy did have a role in the drift towards a more common approach in European countries. Yet paradoxically, although the EU took strong legal action in the field of NPS, no legal harmonization can be seen in this area.

The acknowledged failure of the control dimension of the 2005 Council Decision has been attributed, among other things, to Member States' political resistance and an unwieldy administrative process. Beyond these conjectural reasons, it is also necessary to question the very logic of criminalization at the core of this instrument. It

is generally agreed that the recent rise in NPS is evidence of a ‘substance displacement’ (Rolles & Kushlick, 2014), a process described by the United Nations Office on Drugs and Crime (UNODC) as one of the major negative consequences of prohibition which, by reducing either supply or demand, pushes “suppliers and users (...) on to another drug with similar psychoactive effects, but less stringent controls” (UNODC, 2008, 216).

If this proves correct, nothing short of a blanket-ban on psychoactive substances will do to curtail the open distribution of NPS, a strategy adopted by several countries including some within the EU. Yet growing evidence from drug policy analysis shows that the widening of the prohibitionist net to more and more substances, beyond its deleterious political and criminological effects, has repeatedly failed to tackle the drug problem in the last century (Global Commission on Drug Policy, 2011). Combined with ever more numerous signs of systemic breaches to the core prohibitive norm of the international drug control regimes and official calls to establish an alternative regulatory framework (Bewley-Taylor, 2012; Boister, 2016) this may well explain why the European Commission changed tack in its 2013 Proposal for a Regulation on new psychoactive substances.⁸

This proposal, which fell within the scope of EU action to improve the functioning of the internal market (as opposed to the creation of an Area of freedom, security and justice), emphasized that “new psychoactive substances and mixtures (should) move freely in the Union for commercial and industrial use, as well as for scientific research and development purposes” (Art. 3) unless moderate risk or severe risks justify market restriction. While preserving the structures of the early warning system and the risk assessment process, both deemed successful achievements, the Commission changed the tune of its action by explicitly opting for a regulatory framework to organize legitimate trade in NPS while protecting the health and safety of consumers from the risks posed by the harmful products. Although endorsed by the European Parliament, the proposal did not prosper in the Council and Member States expressed doubts concerning this new approach, but the draft was in itself another sign of the spectacular landslide moving the ground below the century-old drug prohibition regime.

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⁸ European Commission (2013) Proposal for a Regulation of the European Parliament and of the Council on new psychoactive substances. COM(2013) 619. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013PC0619>, Accessed October 2016.

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