



**TNI / IDPC Expert Seminar on
Herbal Stimulants and Legal Highs
30 -31 October 2011
Report**



The Expert Seminar on Herbal Stimulants and Legal highs was an initiative of the Transnational Institute ('TNI') working together with the International Drug Policy Consortium ('IDPC') and funded by the European Commission and the Open Society Institute. The Seminar took place in Amsterdam on 30-31st October 2011. Thanks are due to Thanasis Apostolou for chairing.

This seminar is the fourth in a series of expert discussions on drug policy designed to feed into moments of opportunity for policy and law reform at national and international level with detailed technical analysis. This seminar was timed to maximise the opportunities presented by Bolivia's efforts to de-schedule coca leaf at UN level and the European Commission's intent to create a legislative framework of control for herbal stimulants and Legal highs.

The first in the seminar series was on the classification of controlled substances¹, the second on threshold quantities² and the third on proportionality in sentencing for drugs offences³. One more is currently scheduled for next year; on the future of the UN drug conventions⁴.

The seminar was held under Chatham House rule to ensure confidentiality and to allow participants a free exchange of ideas. A total of 27 people attended and comprised a mixture of domestic and international policy officials, scientific and anthropological experts, and also representatives from non-governmental organisations and academic institutions.

Four subjects were covered over the course of the day:

- Market Dynamics;
- Herbal Stimulants;
- Legal Control Mechanisms;

¹ TNI Expert Seminar on the Classification of Controlled Substances, Amsterdam, 10th December 2009; <http://www.druglawreform.info/images/stories/documents/classification-expert-seminar.pdf>

² TNI Expert Seminar on Threshold Quantities, Lisbon, 20th January 2011; <http://www.druglawreform.info/images/stories/documents/thresholds-expert-seminar.pdf>

³ TNI Expert Seminar on Proportionality of Sentencing for Drug Offences, London, 20th May 2011; <http://www.idpc.net/sites/default/files/library/IDPC-TNI%20Proportionality%20Report%20FINAL.pdf>

⁴ References to the UN Drug Conventions in this text refer to the following: The Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol ('The 1961 Convention'); The Convention on Psychotropic Substances, 1971 ('The 1971 Convention'); and, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ('The 1988 Convention').

● EU Strategies on New Substances.

Background papers⁵ were disseminated to all participants in advance. Each subject was prefaced by the introductory remarks of key participants, in order to stimulate reflection and dialogue, followed by frank discussion. This report reflects the highlights of that debate.

Introduction

A grey area has emerged between what is legal and what is not as states struggle with how to respond to the many new synthetic compounds emerging onto the market.

Of the various types of ‘Legal highs’ the seminar focused on stimulants because of the parallels with the other main drug-policy issue of the moment; i.e. the status of traditional herbal stimulants. These older discussions have been reinvigorated by: Bolivia’s efforts to de-schedule coca-leaf at UN level; the debates on the status of khat between EU States, and of kratom across Asia; and the increasing stride of legitimate cannabis use on the domestic front, as in for example Spain⁶. It was hoped that it would be constructive to look at each of these phenomena through the prism of the other. This approach was also considered appropriate because there are shared characteristics between the synthetic and herbal stimulant markets (i.e. they tend to be more recreational) as compared with psychedelics.

The seminar aimed to consider the legal responses of various jurisdictions to these issues and the lessons that can be drawn. Specific attention was to be directed at whether traditional criminal justice models suit legal highs or whether medicines law or other types of legal framework would be more appropriate. Broadening out to a policy-perspective, the seminar sought discussion of strategies to diminish the dominance of the concentrated and more harmful stimulant substances and steer the market towards milder forms. Whether or not, to this end, milder substances should be made licit and available, was an issue put directly on the table.

Session 1: Market Dynamics

What does the herbal stimulants and so called ‘legal high’ market look like? What are the recent trends and why? What production and distribution channels are used? What is the scale of the market? How serious are the health risks related to some of the new substances? Can any predictions be made about developments in the near future?

Experts fell to discussing how the markets have developed in different jurisdictions and online to see what broader lessons could be taken.

⁵ All papers are referenced below in the body of the report

⁶ Alonso B. 2011 ‘*Cannabis Social Clubs in Spain; A Normalizing Process Underway*’ TNI & Federation of Cannabis Associations. <http://www.tni.org/briefing/cannabis-social-clubs-spain>

The Online Market

Attendees turned to the EU funded *Psychonaut* Web Mapping Project ('the Project') as a tool for understanding the market. Initiated in 2006 in order to provide an early warning system for Legal highs through monitoring the internet, the Project has come to provide a very useful overview. Information gathered is fed back to health professionals and users in the form of technical reports for each identified compound that itemises the price, substance-constituents, and side-effects. These reports are available openly online and there was some discussion about how quickly it is appropriate to release such findings as, by doing so, there is a risk of promoting a new drug and contributing to the phenomenon rather than just observing it.

The Project monitors trend-setter websites which are mostly in the UK, but also Germany, Hungary and Spain. The data compiled shows a very fast moving market for Legal highs with new products coming on every month at the rate of two or three. The new products are often either a combination of known compounds, or new compounds under old labels; it is therefore often very difficult to work out what is new.

Initially researchers at the Project identified more than twelve hundred compounds being discussed in forums of experienced users. Variety is the main characteristic of the market; there are a large number of compounds that can be produced en masse and distributed to the wider population. The mephedrone phenomenon in the UK was somewhat singular in the sense that no other compound has reached the same status and level of demand as this substance had prior to its control in 2010.

In terms of trends in the movements of compounds, it was said that a compound might be banned in one country but will then move into other countries. The examples of spice and mephedrone moving from Europe to the United States were given; production did not stop, it just moved on.

The Project has looked at the online marketing strategies of the legal high websites and it was noted that these are very sophisticated with promotions, discounts, monthly alerts, twitter, facebook, and, other social media deployed to promote the products to wider users. Whilst the utility of the internet in connecting retailers with possible customers was evident, it was said that it is not the main source of legal highs as most users are supplied by friends. Hence, someone buys from the internet, then re-sells, or gives, to friends. The internet is only a window to what is happening; it is not possible to glean the turnover of sales through the web but one can see if a new compound is raising interest. For instance, with mephedrone, there were hundreds of websites selling just this one compound, so it could be inferred that there was a strong market for it, as websites usually sell many compounds. Moreover, one can see the number of people visiting a website or those searching for a specific term.

Delegates discussed the difficulty in monitoring the market online due to the changeability of compounds. It was said that a branded product may

nevertheless have different constituents albeit the packaging remains the same. It was countered, however, that testing samples directly is no simple solution; first is the problem of knowing what to test for, and second consistency and ratio of ingredients often change.

The Netherlands

The market for legal / herbal highs in the Netherlands took off in the 1980s. 'Smart Shops' opened and began selling herbal products like ephedra. However, these did not sell well, and retailers looked to other, usually more potent, substances for better profits. It was said that the retail context (with its profit motive) created a wholly different and often more problematic market than exists with herbal stimulants such as coca leaves and khat as used traditionally in their originating cultures.

It was observed that every time a profitable market had emerged for a product, it would be prohibited; GHB, magic mushrooms and ephedra were given as examples. Delegates recalled the renunciation of synthetic substances by the Dutch Organisation of Smart Shops and reflected upon the difficulties faced by sellers trying to conduct a legitimate business. It was said, however, that the Organisation's actions had had little impact on the Dutch market because online trade is more important, and even more important is the recreational trade amongst clubbers.

Discussion was curtailed due to little official data on the legal high markets prior to their control as, whilst licit, they were outside the remit of the national agency for monitoring drug use ('DIMS')⁷. There is, however, a DIMS operated reporting system for new drugs. Information is obtained from customs and the police as well as from users to whom DIMS offers a substance-analysis service. DIMS then co-operates with the EMCDDA and other countries to help issue domestic and international warnings when a substance is perceived to be dangerous. It was said that the Netherlands has a low rate of reporting to the EMCDDA compared to other countries, however, and it was queried therefore whether there were fewer new drugs found in the country and if so why. The answer was given that DIMS does not have the capacity to report every new substance that is found, but only those which are found in great amounts or in use by a large number of people. It was said, for example, that a substance might be reported as having become part of the market only if it has been found three or four times across the country.

Spain

Participants discussed the Energy Control programme⁸ in Spain which provides information, assessment and drug testing for people who use drugs. Since last

⁷ Drugs Informatie en Monitoring Systeem (DIMS) is based at the Trimbos Institute in Utrecht, Netherlands more information can be found on:

<http://www.trimbos.org/projects/alcohol-and-drugs/dims-coordinating-office>

⁸ More information (in Spanish) on this project can be found on: <http://energycontrol.org/>

year, this programme has received legal highs from users and has seen an amazing variety of new compounds. So far 37 samples have been analysed, most of which were composed of several substances. It was found that some products have the same label but different constituents and none had the exact composition detailed on the label, nor any information regarding its use. Many stated that they were not for human consumption but this was usually belied by attractive labels and other publicity.

In Spain, Grow Shops are typically the distributors of legal highs. However, it has also been noted that legal highs are regularly sold from stalls at cannabis fairs where consumers are not usually users of other substances. Interviews with such users had revealed that their decision to experiment with legal highs had followed their publicity as 'herbal' or '100% natural'.

At first, the commercial names of many legal high products were in English - e.g. '*Charge Plus*' - but now, there are a variety of products with Spanish names such as: *coco-pollo; fuego; euforia; Gran Misterio; Segador y Cristal Blanco son polvos; Fiesta es una cápsula y Placaje son hierbajos; risa absoluta*. The researchers hypothesised, however, that whilst the products are now probably packaged nationally, they continue to be produced in other countries.

The Spanish legal high market was classified as an incipient phenomenon, but one that is growing due to aggressive marketing. In particular, in addition to the distribution at Grow Shops and at cannabis fairs, legal highs have been found on sale in several Head Shops on the Spanish East Coast. Moreover, five franchised legal high shops have opened since July this year - branded as '*Amsterdam Shops*' - with the most recently opened in Madrid. It was suggested that this increase in supply must be to meet an increasing level of demand.

There is limited data about the prevalence of use in Spain but it did seem that legal highs are scarcely used in recreational environments at the present time. However, experts noted the history of ketamine use in Spain, a trend that travelled from the north to the south of the country establishing itself fully in the process. Factors suggesting a similar extension in the consumption of legal highs have been noted by the Energy Control Programme as follows:

- increasing requests for information on legal highs from users, in particular questioning the health risks of various substances;
- submission of numerous accounts of experiences of use and in particular emails about bad-trips and hospitalisation;
- increasing numbers of legal highs have been sent through to the programme for analysis;
- a trend for using mephedrone (one of the most recently banned substances) as an adulterant of illegal drugs, or sold in their place. So, users have thought they were buying cocaine, MDMA, or speed, but in fact they received mephedrone;

- an increased media appetite to discuss legal highs.

The last two factors were discussed in greater detail. It was felt, in particular, that it was important to take the development of the market for mephedrone, as a recently controlled substance, into account when proposing new regulation models. Of 40 samples submitted to the Energy Control programme as mephedrone, only 21 contained mephedrone. Likewise, of 63 separate samples that were found to contain mephedrone: 2 were submitted as Cocaine; 5 as 'Pills'; 6 as MDMA; 3 as Ketamine; 37 as mephedrone; 5 as 'Unknown'; and 5 were other various substances.

Looking at these results, it was argued that the ban on mephedrone had not provided a solution to the mephedrone problem in Spain. Moreover, certain risks have been aggravated because with two or more psychoactive compounds in a drug, such as is often discovered on analysis, there is increased difficulty in predicting the effects of a substance. It was noted that on control of a legal high, there is often a quick and easy shift of the substance into other products as here, and so it can be said that the legal high producers have no concern for their product, only for their sales. Similarly, it was noted that it is very easy to re-route newly controlled product to other legal markets and the example was recalled of spice which, when it was controlled, was re-routed for sale to the USA.

On the contribution of the media to the development of the market, it was suggested that even negative attention by the media acts as advertisement bringing familiarity of these products to individuals who, otherwise, would never have heard of them.

Germany

A Media hype began to surround legal highs in Germany in late 2008 and a ban on spice and its constituents quickly followed in January 2009. Several waves of new 'herbal blends' then emerged, resulting in a second change of drug law in early 2010 but this still resulted in only a few synthetic cannabinoids being put under control. Thereafter medicines law was effectively used to close down the supply of legal highs via Head Shops and media hype was restricted. Products remain readily available via the internet with spice the most prevalent.

The phenomenon has been monitored across these reforms⁹ and in particular, the last month's prevalence for spice / herbal blend use had gone from just over 3% of 15 - 18yr olds in 2008 to just 2% in 2010. Experts noted that the results of these surveys were qualified, however, as closed questions had been asked and there was some doubt as to the clarity of the terminology employed. For

⁹ Monitoring of the phenomenon has been undertaken by Goethe University in Frankfurt using results from: the Frankfurt Local Monitoring Study and the Representative school survey (15 - 18yrs) both of which asked questions on Spice since 2008 and on other legal highs since 2010; a qualitative study on Spice prevalence and use questioning experts and users; an online survey on the use of 'legal highs' in Germany from June - September 2011; and, participation in the EU project '*Spice and synthetic cannabinoids' since 2011*'. www.cdr-uni-frankfurt.de

example, it was said that 'legal high' could have been interpreted as all 'herbal' substances. Also the term 'research chemical' was used as a general label for a pure synthetic substance, not subject to German drug law - but it experimenters or 'psychonauts' sometimes use this term as a label for substances which have not been tested.

Despite these qualifications, some very helpful information were extrapolated about the German market for legal highs from these surveys. In the first instance, it was noted that more than 90 separate substances were currently in use, most from the cathinone and amphetamine groups, and that some individuals were using synthetic cannabinoids to mix with tobacco. It has also become clear that the typology of spice users includes: 'psychonauts' - often heavy users or 'bath salt' people from the party scene; those who use it as a last resort when they are unable to obtain other preferred substances; and a small group of regular users.

Regular users included those who live in rural areas and therefore cannot obtain preferred substances, as those in fear of losing their driving licences. The police in Germany are very keen on testing for cannabis and since this substance stays in the system for a long time, this provides a strong motivation for cannabis users to switch to synthetic spice products.

Respondents from German States with more repressive regimes, such as Bavaria, were over-represented amongst users of cannabis replacement products albeit not for legal highs in general. It was postulated that more people who would prefer to use cannabis had switched to legal alternatives for fear of the criminal justice response. It was also noted that there were virtually no legal high users who had no experience of illicit drug use and that half of the heavy users of legal highs had also used cannabis in the previous month.

77% of respondents from the online survey gave obtaining a 'buzz' as their main motivation in using Legal highs. Thereafter, curiosity (62%), legal availability (61%), recreation and relaxation (57%), variation / diversity (37%), non-detectability (34%), (temporary) non availability of other drugs (33%), (favourable) price (13%), peer-use (11%), and personal problems (5%) were also given as motivators.

Noting that the surveys were comprised of closed questions, it was said to be a pity that respondents had not been asked whether they thought legal highs were safer than illicit drugs. It was countered, however, that this would be highly unlikely as these legal highs are usually labelled not for human consumption or packaged as bath salts.

Poland

The market dynamic in Poland was said to offer very helpful insights indeed. This jurisdiction had initially allowed legal high traders to function legitimately and prosper commercially but has since intervened to control the market.

Prior to 2008, legal highs were low on the agenda with few outlets or even online users forums on the topic. However, in the second half of 2008, the first street shop offering legal highs opened in the city of Łódź and an additional forty shops opened by the end of the year. Some of these shops were independent and some were franchised. Franchises were easy to start up, with franchisees needing 8,000-10,000 EUR¹⁰ to commence trading. As a consequence the market grew exponentially; by October 2010 over 1,300 street shops were operating. The name given to Legal high shops in Poland was 'Booster Shops' after the first company to develop the products in 2008. These shops retailed the products by buying wholesale from other companies and selling it on. There was competition between *Booster Shops* and *Smart Shops* with the latter taking psychoactive substances produced in Poland and mixing them themselves. The *Booster* shops advertised under the slogan "*Life is too short to eat unhealthy pills*".

The media was said to have had the same initial impact as in Spain, the angry reportage unwittingly raising awareness of and promoting the products and the shops. In surveys on lifetime use of drugs among pupils aged 18 – 19, 3.5% had tried legal highs in 2008 and 11.4% by 2010. In the same period, lifetime use of cannabis went up from 30.5% to 35.7%.

Concerns grew, and the Government began to intervene in 2009, banning individual substances at first, but ultimately cracking-down on the entire industry in 2010. The measures used and their consequences will be discussed in Session 3 of this report.

As a consequence of a strike action which closed down 900 legal high wholesale / retail and manufacturing businesses in one go, the Government obtained more than 10,000 products for analysis. Analysts were surprised to discover that 5% of the products components included illegal substances that had been put under control in the previous two years e.g. psychoactive mephedrone, BZP, and synthetic cannabinoids. The most common psychoactive substance found was MDPV "bath salts" and, in all, 91 separate compounds were identified including many cathinones.

Now although the shops have been closed, the market still exists online and both individual and larger purchases for retail continue to be made through this medium.

Discussion

Considering the overview, experts wondered whether anything could be predicted for the future: would the legal high market disappear or would it defeat the market for more traditional drugs?

There was debate as to the extent to which curiosity is the driver of the legal high market. Some felt that youngsters will always want to experiment; others

¹⁰ Half of this money was spent on equipment and the other on the goods (booster).

felt that the roots of the market lay in repression, rather than curiosity and that 'Psychonaut' experimenters form a very small community amongst people who use drugs. It was argued that it would be illuminating to survey whether legal high users had previously used other illegal drugs. Indeed, the German study had unearthed a number of young users (under 18yrs old) who were trying legal highs without experience of other traditional drugs. It was retorted that, at that age, one has to start on something.

Experts noted that there is an element of self-regulation to the legal high market as many substances simply disappear when they become known amongst users as inconsistent or for causing bad experiences. On the other hand, when a particular product does gain a following amongst users for being a reliably good product, as did Mephedrone, it tends to be singled out for repression and so producers must pump replacement unknowns onto the market.

Attendees were exhorted to look to the countries in Europe where marijuana is readily available (e.g. the Netherlands) and recognise that synthetic cannabinoids such as spice have very little purchase in such a context. Likewise, it was widely agreed that mephedrone had developed as a result of MDMA suppression¹¹ and that the legal high market, in general, was simply a variant of the balloon effect that is seen elsewhere as a result of supply control measures. Very few substances have taken hold as mephedrone did in the UK and elsewhere and it was voiced with confidence that this was because, at the time, the MDMA supply in the UK had been poor. Many experts felt that given the choice between good ecstasy and good mephedrone, users would choose ecstasy every time. This had been evidenced in the Netherlands: when the ecstasy was good and readily available, the mephedrone problem very much reduced.

As for the Poland experience, it was revisited. Yes, there had been immediate and tangible gains from the widespread crack-down in terms of all of the products that had been confiscated and what could be learned from it. However, supply continued through illegal channels which were impossible to monitor and as such, with a long-term view, the crack-down was likely to undermine understanding in the field. Likewise, it was recalled that when mephedrone was controlled in the UK use did go down but sales by dealers increased. It was suggested that the legal high market was beginning to overlap the market for medicines and parallels with the abuse of prescription drugs were made. One delegate described the legal high market as endless, constantly renewing itself, and moving into grey zones.

It was widely agreed that great care should be taken as to which regulatory steps to take because of the capacity of the market to renew itself and to do so

¹¹ See the EU Organised Crime Threat Assessment OCTA 2011 as referenced in the Council of the European Union Draft European Pact Against Synthetic Drugs (13286/4/11 REV 4) at 5: *'there is a dynamic relationship between the reduction in availability of some traditional illicit compounds for synthetic drugs (MDMA) and the emergence of new psychoactive substances.'*

in more harmful forms. There, was, therefore much support among the delegates for a wait and see approach. However, it was also recognised that such would be difficult for policy-makers because of the media and legal hype that surrounds legal highs. Experts looked forward to the second session on Herbal Stimulants to see what lessons could be drawn from these more long-standing debates.

Session 2: Herbal Stimulants

Could mild herbal stimulants such as the coca leaf, khat, kratom or ephedra offer alternatives to the more concentrated substances that now dominate the market? Could the recreational stimulants market be steered towards a less harmful direction over time through differentiating the control mechanisms between plants and synthesized derivatives? Different legal regimes are currently implemented between countries and vary greatly for the different plants. The status of khat and coca in particular are the subject of much debate at present.

The Coca Leaf¹²

Light stimulants such as caffeinated beverages and the coca leaf were agreed to be distinct in reality and therefore in policy terms from party drugs as the former tend to be used regularly (and, for many, every day) whilst the latter are used much less regularly. It was hoped, nevertheless, that the history of the coca leaf could be instructive as a negative example of how markets can be distorted by inadequate legal interventions.

It was argued, and widely accepted, that the coca leaf is essentially an innocent drug. Certainly it has a strong cultural context and a lengthy history as well as a considerable medical bibliography demonstrating its lack of harmfulness. Nevertheless the coca leaf is subject to the strictest measures of control at the UN and domestic levels.

The modern justification for the harsh control of the coca leaf is that it is the source of cocaine and so dangerous by association. However, it was argued forcefully that although the substance of coca, cocaine hydrochloride and smoked free base cocaine may be the same, the drug effects are so hugely different that they cannot be considered similar.

Concerns were voiced within the seminar that making the coca leaf more widely available would result in an unpalatable threat of extraction and diversion. It was countered that, albeit it is not prohibitively difficult to extract cocaine from the coca leaf, it is uneconomical to do so with cocaine as available as it is on the street and at such low prices.

It was further argued that the coca leaf and other herbal stimulants like cannabis are 'honest stuff' as they represent a botanical species, not a product, as

¹² For background reading, see Jelsma M. 2009 *Submission to the House of Commons Select Committee on the Cocaine Trade: Memorandum on the Coca Leaf* TNI 2009 <http://www.druglawreform.info/en/issues/unscheduling-the-coca-leaf/item/2834-submission-to-the-house-of-commons-select-committee-on-the-cocaine-trade>

compared with legal highs. Honest, moreover, because they deliver what they are supposed to, with few surprises¹³. For example the coca leaf delivers a mild cocaine-like stimulation which continues for many hours. It was recalled that up until one hundred years ago there had been a legitimate market for coca-related products equivalent to the caffeine market of today. When this market was shut down, however, coca is restricted to a geographical and cultural ghetto within those places where it had traditionally been grown, whilst cocaine and crack took hold elsewhere. Acknowledging this as a simplified overview, it was nevertheless argued that this was an example of where policies of control had created a market for more problematic forms of the coca. Experts saw it as the job of policy-makers now to contrive how to use policy to drive in the opposite direction so as to favour less problematic variants.

It was said that for a substance or product to gain market share, it needs to have an adequate cultural context and supporting ideology. It was noted that over the last thirty years there has been exactly such a gradual, progressive, but constant expansion of coca into new social contexts. This has been particularly noticeable in Peru where coca is viewed as a nutritional supplement by the urban middle class – a target audience that does not self-identify as drug-using. The substance is also particularly sought after by the elderly as a good source of calcium because as one gets older the calcium from dairy products is harder to absorb. Likewise, in Colombia, the use of powdered coca (mixed with alkali) has taken hold a long way from its original invention for use in the Andes and the parallel use by some few indigenous tribes in Colombia in the 1960s. Students began experimenting with use of the substance and it caught on, particularly at the campus of the University of Bogota, in Letitia, and these students have taken this practice home to the cities. Similarly, in countries such as Argentina, where coca had been restricted to the North West provinces, it is now acquiring a more pan-regional market and has even been found in Buenos Aires.

One expert questioned why not leave the coca leaf in South America and khat in Africa? It was argued in return that these substances already have purchase in the west both in terms of use amongst immigrant populations and being brought home by travellers and industry – it was said that coca in particular already has leading brand-recognition as part of Coca-Cola. It was, indeed, conceded that there is already a small legitimate market for coca products in the west although currently Coca Cola is the only serious buyer of coca leaf, purchasing 700-800 tonnes a year, and separating the cocaine from it to supply the pharmaceutical market. However, for such industrial purposes, the coca leaf has to be decocainised and this was felt, by some experts, to be rather missing the point. It was argued that if coca were to be made available in the same way as Guarana – i.e. through health food and coffee shops – the positive effects could include re-educating the cocaine consuming market as to more stable and less damaging patterns of use. Some experts thought that coca could also have a harm reduction value, and might be useful to cocaine users looking for a milder drug with which to detox.

¹³ See the text on page 13 for further discussion on this point.

It was clear to many delegates that there is a massive market for light stimulants such as coca demonstrated by the tea and coffee industries and the recent *Red Bull* phenomenon in particular. Moreover, it was argued, coca is the best of them, remaining a shorter time in the body than caffeine, and containing many nutritional virtues. It was said that it would be impossible to turn the clock back to the sixteenth century when a distinct social change occurred from people drinking beer for breakfast to a culture of stimulants such as tea, coffee, chocolate, and coca being preferred articles of consumption. The aim of the UN to eliminate the coca leaf within 50 years had always been doomed and to allow a market to flourish would assist the development of producer countries.

Participants recognised that the legal stimulant industries would naturally be protective of their market but it was argued that not to open up to competition with coca is both immoral and bad public health. Moral policy would be to end the monopoly of the coca-market by one American multi-national and of the stimulants markets by the western favoured industries of caffeine and alcohol. A public health approach, it was argued, would see the coca leaf made available because coca, being associated with cocaine, is ideally placed to supplant the legal high market. Moreover, with our long understanding of coca's nominal acute and long-term effects, it is hugely preferable to the use of unknown legal substances about which we have no historical understanding.

Khat¹⁴

Khat is currently a big issue at policy level albeit this substance has, as yet, little history of control. Rooted in strong cultural traditions within Africa, it has become prevalent in Europe mainly through use by Somali immigrants.

Khat has been studied by the Dutch Committee for Assessment and Monitoring of New Drugs ('CAM') and found to be a low-potency substance with amphetamine-like cardiovascular effects. Users tend to experience an increased heart-rate, dry mouth, and sleepiness. For chronic users there are more severe side effects including: mild-malnutrition; disorders of the gastrointestinal tract; sexual malfunctioning; low birth-weight; and periodontal disease. Oral cancers have also been noted but it is doubted that these are related to the active compound within khat rather than other substances within the leaves. On the other hand, there is some evidence that use during stressful times (such as amongst the Somali community as Refugees in Europe, dislocated from their own home-land, and recovering from the trauma experienced in their native country) fosters poor mental health. It was argued, however, that people who are susceptible to schizophrenia should not use drugs at all whether that be khat, alcohol or other substances like cocaine.

CAM determined that khat is a mild substance that, in certain circumstances, such as confused mental states, is dis-advised. To be further illustrative, delegates heard that in a study by the National Institute for Public Health and the

¹⁴ See Griffiths P. et al. 2010 *Khat Use and Monitoring Drug Use in Europe: The Current Situation and Issues for the Future* Journal of Ethnopharmacology 132 (2010) 578-583.
<http://www.sciencedirect.com/science/article/pii/S037887411000303X>

Environment in the Netherlands ('RIVM'), of the nineteen main substances of use in the Netherlands, heroin was found to be the most harmful followed by tobacco and alcohol whilst LSD and khat were the least harmful. Indeed, the Board advised the Dutch government not to let khat remain openly available, but to monitor its use. Likewise, the UK ACMD has twice reviewed khat and has each time determined that it should not be controlled. Similarly, the WHO Expert Committee on Drug Dependence critically reviewed khat in 2006 and recommended not to schedule it.

From other angles, however, there is pressure to control khat. At local level, the chewing and spitting of leaves is considered alien and anti-social by some native Western Europeans amongst whom there has as yet been little take-up of the substance. Certainly, it was said, there has been no take-up by the native Dutch.

From the UK and the Dutch Somali communities there have also been calls to look into the issue of control. Despite the finding that khat is low-risk, some Somalis remain vocal about the health harms and have said that were khat-users white-skinned, there would be control already. Some have also attributed the various social problems experienced by the Somali community abroad to the use of khat. It was said that calls for control emanated particularly from the female population, whereas khat use is predominantly a male practice. Other members of the community have been more reticent, acknowledging that a poor-migrant / refugee population with enormously high rates of unemployment are using khat to excess because of the situation they are in and not the other way round. Moreover, it has been argued that the criminalisation of such a wide-spread practice will only add to the alienation and problems of the community as the police would have yet another excuse to stop and search young Somali men.

Some delegates expressed concern that States were not, however, free to consult with their khat-using communities and come to a local solution due to intense political pressure at the international level. In Brussels alarmed questions are regularly put to Parliament about khat use, usually on the subject of whether khat production is fuelling terrorism in Africa. The UK and the Netherlands are particularly attacked for their lack of control in these forums despite there being some 15 other States within Europe who have not controlled the substance. The problem was seen to lie in the fact that the Netherlands and the UK are transit hubs for khat and therefore stigmatised as the back-door suppliers of Europe. Indeed, the Dutch Ministry of Justice has expressed concern that the transit of khat through the Netherlands has lowered the state's reputation amongst business partners to such an extent that investment has been withheld. It was mooted that it was such political and economic pressures, rather than the stated public health concerns, that lie behind the commissioning of a further study on khat use by the Dutch Minister of the Interior.

Experts remarked that there were painful parallels between the discussions on coca-leaf 50 years ago and the discussions on khat today. Policy-makers are in danger of making the same mistakes, especially in terms of marginalising communities. It would be helpful instead to monitor what Somali communities

are doing where khat has been banned within Europe; in particular, whether they are moving on to other substances and if so, whether there has been any resolution or worsening of their social ills.

Kratom¹⁵

Kratom is a leaf from a tree used by Muslim Communities throughout Asia in place of alcohol which is avoided for religious reasons. In this regard kratom is similar to khat which also tends to be chewed by Muslims and not Christians. Kratom has also been identified for sale as a legal high in Dutch Smart Shops and on the internet.

In 1943 Kratom was put under control in Thailand under the Kratom Act in an effort to suppress competition with the taxed opium market. The following decades the Act was not enforced with much vigour. Anxieties about new patterns of consumption shifting away from traditional and natural methods of chewing towards the practice of boiling it with pharmaceuticals have resulted in an increase in control efforts especially in Southern Thailand.

There has been resistance at the local level, however, as for many kratom use is a traditional rite, and worryingly, studies so far have shown an increase in methamphetamine use in parallel with the increased control of Kratom.

Discussion

The question in the debate was whether khat, coca, and ephedra offer viable alternatives to synthetic legal highs.

It was widely agreed that chewing leaves and spitting is so alien within Western Europe that the active compounds would have to be offered on the market in some other format. Reference was made to the lack of market cross-over by the mild-stimulant betel nut which is chewed by the Bengali community in the form of the nut of the palm wrapped in a fresh leaf. Albeit this substance has similar periodontal side-effects to khat and more people use it than use coca or khat, betel-nut has never been subject to a WHO study or suggestions of control. This lack of regulatory interest was attributed by some to the fact that betel nut has no industrial uses.

Participants therefore mooted more western formats of delivery of coca and khat: a slow-release tablet; powdered with alkali; or in tea perhaps? It was said that through such preparations, the market for coca has taken off in Colombia. However, this gave rise to a further question: what is the difference between powdered coca and slow-release cocaine? The answer came that with powdered coca, one obtains other alkaloids, calcium, vitamin b12, and potassium; it has much higher nutritional value. Whether this answer would be sufficient for politicians and the public to differentiate coca from cocaine and avoid the stigma of the latter, however, was strongly queried. It was suggested that Coca Cola

¹⁵ See Tanguay. P. 2010 *Kratom in Thailand: Decriminalisation and Community Control?* TNI <http://www.druglawreform.info/en/publications/legislative-reformseries-/item/1258-kratom-in-thailand>

would not today achieve such success with the coca brand, and experts recalled that efforts by NASA to develop coca-based chewing gum as a stimulant for astronauts were blocked when Reagan came to power, worried what voters and others would say.

It was felt that such concerns were not, however, insurmountable and that researchers could study the Argentinian system for assistance; in that jurisdiction coca is legal but cocaine not. On the other hand, it was remarked that there remains, a large cocaine market within Argentina.

Participants returned to the issue of whether herbal stimulants were preferable to synthetics at all. It was affirmed that it was better to have known substances whose long-term and acute effects were well known to new substances about which little was known. Other benefits of herbal stimulants over synthetics include the fact that the psychoactive properties tend to be less pronounced in herbals. The down-side is in the risks associated with traditional delivery methods i.e. lung cancer for smoked herbals like cannabis and oral cancers for those which are chewed.

Some participants felt that the earlier emphasis on herbal stimulants as 'honest' substances had been overstated. The assumption is that plant-based products remain constant in psychoactive ingredients but it is known that, at least with cannabis, this is not correct. It was said that much anxiety is voiced about the dangers of chemists tweaking the chemical content of Legal highs but more regard should be had to clever botanists tweaking the psychoactive contents of plants.

In order to safely allow herbal stimulants onto the markets one of the tasks of prospective regulators would be to control the content of the active ingredients in herbal stimulants, i.e. THC for cannabis and cathinone for khat etc, in the same way that regulation of tobacco controls tar and nicotine levels. Problems for prospective regulators were thought to lie ahead, however, because pharmacological properties differ according to how a substance is taken; smoking is more important in bringing about an immediate high than the actual THC content in cannabis, for example. Whilst, through tinctures, one can control and standardise the active principle of a substance so that it becomes useful as a medicine, participants noted how alcoholic tinctures have recently been controlled at EU level. Participants saw the hand of pharmaceutical giants behind this, shutting off competition, and foresaw that even greater barriers would be set up by incumbent industries resistant to the development of herbal stimulants. Political barriers were also foreseen. It was said that politicians are only interested in drug control when there is an immediate public health or public order problem; in calmer times they fear creating a problem for themselves as there are so many sensitivities.

A clear division of thinking at policy level was identified. One camp recommends that everything psychoactive that is not currently on the market be prohibited unless a pharmaceutical company, through proper testing, can demonstrate that it is safe and bring it to market safely. This would be a simple and cheap

solution and would devolve the need for monitoring and analysis outside of government (except of course for the massive black market that would evolve). The second camp would allow everything on to the market unless and until there is a problem but then it would be the policy-maker's responsibility if any harms did materialise. Indeed, participants were interested to learn that the EU had asked States whether they thought there was scope on the market for mild psychoactive substances and none had felt able to answer, apart from one which said yes. The inability of states to answer struck a hollow chord for many experts for whom the huge demand that exists for stimulants was impossible to deny with students using pills and professionals drinking red bull in every Member State.¹⁶

The policy-makers' natural lassitude cannot, it was argued, continue any longer. It is no longer merely a question of responding to the media and other hype around legal highs, there is now a legal imperative to engage in these debates as a result of Bolivia's denunciation of the scheduling of coca at the UN level. Whilst for some experts this was a welcome development that would allow new ideas and evidence to update what had become a very stale framework, others were concerned that it presented a dangerous precedent that undermined the integrity of not only the drug conventions but other international instruments like the human rights treaties. Both groups felt, however, that there was at least an opportunity now to move forward the debate on drug control.

Session 3: Legal Control Mechanisms

What should control mechanisms actually aim to do with regard to new substances appearing on the market? Countries are experimenting with different approaches, some opting for catch-all (generic) controls under existing drug laws, other imposing regulatory frameworks by applying consumer safety or medicines legislation to new psychoactive substances. What lessons can be drawn from the different legal responses tried so far?

Discussion was underpinned by a helpful EMCDDA study which show-cased a 'multitude' of criminal justice drug-control instruments and procedures in use across different Member States¹⁷; however, experts noted that confronted with legal highs, commentators were arguing new approaches¹⁸ and many states too had turned to other types of framework for assistance.

¹⁶IDPC Advocacy Note - Bolivia's legal reconciliation with the UN Single Convention on Narcotic Drugs, July 2011. <http://www.idpc.net/publications/idpc-advocacy-note-bolivia-withdraws-from-1961-convention>

¹⁷ Hughes B & Blldaru T 19th February 2009 *Legal Responses to New Psychoactive Substances in Europe* EMCDDA http://www.emcdda.europa.eu/attachements.cfm/att_78982_EN_ELDD%20Control%20systems%20report.pdf

¹⁸ For background reading see Hughes B. & Winstock A. (2011) *Controlling New Drugs Under Marketing Regulations* Addiction (forthcoming).

Poland

The Polish model was revisited and the methods of control evaluated.

Between 2008 when the legal high problem first emerged and the crack-down in 2010 Poland individually listed approximately 50 substances using a rapid amending legislative procedure. This was felt to be inefficient, however, as new substances immediately appeared on the market (sometimes in the packaging of the banned substance) or the banned substances were just given new packaging. Moreover, producers sought to avoid control by not listing ingredients on the packaging.

The National Consultant in Clinical Toxicology reported in October 2010 that 258 cases of poisonings were suspected as being connected with legal highs. The media seized on these anxieties reporting two deaths caused by legal highs for which there was no clear laboratory confirmation. Unlike the general angst of earlier coverage which had almost promoted the market, this focus on mortalities by the press was said to work to support control measures. Indeed, local and national protests, demanding action, followed.

In the first weekend of 2010, the Chief Sanitary Inspector closed the whole network of legal high shops, confiscating all products. The Inspector utilised the pre-existing legislation which provided for the closure of shops which retail 'dangerous' products¹⁹.

At the same time, primary legislation was approved by the Parliament and signed by the President which effected the following:

- A legal definition of legal highs: *'Substitute (analog) drug - substance of natural or synthetic origin in any physical state or a product, plant, mushroom or part thereof, containing such a substance, used instead of a narcotic drug or a psychotropic substance or for the same purpose as a narcotic drug or a psychotropic substance, whose manufacture or introduction to trade is not regulated by separate provisions; provisions on general safety of products do not apply to substitute drugs.'*²⁰
- A territorial prohibition against manufacturing drugs in Poland or bringing drugs into the country²¹ subject to a penalty of a fine between EUR 5,000 - 250,000.

¹⁹ Act of 14 March 1985 on State Sanitary Inspection, Articles 27.1, 27.2, and 31a (Journal of Laws DZ. U of 2006 No. 122, item 851 as further amended).

²⁰ Art. 4.27 Act of 8th October 2010 on amending the Act on counteracting drug addiction and the Chief Sanitary Inspectorate (Journal of Laws 'Dz.U.' No. 213, item 1396).

²¹ Art 44b Ibid.

- A ban on advertising or promoting foods or other products in a way that suggests it will have the effect of psychotropic or narcotic drugs²² subject to a penalty of a fine or a maximum of three years in prison.
- Powers to remove a product from the market and analyse it where there is a reasonable suspicion that it contains a controlled substance; the costs of this are to be borne by the vendor. Concurrent powers to order discontinuance of a business operation for up to 3 months to remove any threat²³.

Since this new law has been brought into force, five new substances have been identified and tested as a result of the seizure tool.

Prevention methods have also been utilised including: a poster-campaign detailing the consequences of using legal highs disseminated online, in the media and social media, and in public buildings; and a campaign addressed to parents delivered by the school counsellor or head teachers to sensitize, inform and encourage parents to act with regards to protecting their children from legal highs.

The coverage of the new regime was discussed. Albeit the laws apply also to the internet, there is no jurisdiction over web-pages hosted outside of Poland and, in fact there is a problem with Polish people operating out of the UK evading the prohibitions by publishing Polish-language web-pages based in Britain. Moreover, there are no punishments available to individuals who buy legal highs from abroad as possession of legal highs (as opposed to controlled drugs) is not prohibited, merely their manufacture and sale. These limitations were thought to be qualified in effect, however, as the main trade in Poland remains through Polish-shops albeit it was conceded that production is mostly centred in Asia.

The Polish authorities had conducted a number of studies on the use of legal highs over the course of their interventions and figures were presented to the seminar. There were, however, concerns that life-time prevalence dropped significantly between 2009 and 2010 and the difficulty in obtaining accurate data regarding drug use was discussed. Terminology was seen as a particular pitfall. For example, the term '*dopalacze*' or 'booster' had been used in one of the Polish surveys and it was felt that some respondents could have misinterpreted this to include energising drinks. Moreover, comparisons were being made of data from different surveys - i.e. across the Eurobarometer, school, and general population surveys all of which used different questions and different methodologies.

It was suggested that last month's prevalence is much more helpful a figure than life-time prevalence, in any event, and looking at these figures, across the different surveys, consumption did appear to be lower after the crack-down. Moreover, the number of drug overdoses attributable to legal highs is

²² Art 20.3. Ibid.

²³ Art 27b Ibid.

decreasing. Whereas there had been 258 medical interventions connected with legal highs recorded in October 2010, in April 2011, there had only been four.

Other experts argued that despite these positive official figures, drug-treatment practitioners report that at street-level legal highs are as available, if not easier to get, as before the ban; moreover, they are often cheaper. Further, legal-high users and using practices have remained constant and the market as strong as before although it now operated underground, through dealers and online, and as such (operating under-ground) users have been forced to adopt more harmful behaviour. Further, there is one demographic in particular for how little has changed; that of drug-users in substitution treatment programmes. Many such had turned away from illicit drugs towards legal highs because the latter could not be detected in the drug-testing to which they were subject and some patients have even become dependent on legal highs, particularly mephedrone. Comparisons were made with Romania where many opiate substitution patients are no longer using heroin but are injecting mephedrone which is widely available.

The Netherlands

The Dutch approach was described as more pragmatic and centring on safety for consumers. Food, medicines and drug control laws are deployed as appropriate. Various examples were given. Kava Kava, sold as a food-supplement, was put under control by using food legislation when the substance was found to cause liver problems. However, in smart shops some psychoactive substances, for example kratom and truffles, continue to be sold as food. Magic Mushrooms, contrastingly, were controlled under traditional drug control laws which took more time to activate as more assessments were required prior to control²⁴. Legal highs, like mephedrone, however, have been dealt with under medicines law, which allows the government to act very quickly.

The Dutch choice as to which type of legislation is deployed is made by looking at what is more practical for a particular substance both in terms of the process and the nature of the substance. Hence, in order to be a medicine, a substance must be pharmacologically active; that is acting on the brain. There is a loophole for suppliers however, under the medicines framework because where a substance is supplied as a pharmaceutical ingredient the controls do not bite. Moreover, medicines legislation only applies to substances in tablet-form so it is useless where substances are seized in bulk, pure form.

On the upside, if a substance is regulated using medicines or food legislation there are circumstances in which it can still be brought to market if the appropriate research and licensing is undertaken. This was seen as an improvement on drug control laws which were said to be notoriously inflexible; even where new evidence emerges to suggest that a controlled drug is not as harmful as once perceived or could be brought to market in a beneficial product, revisions cannot be achieved. It was agreed that this was a common difficulty

²⁴ though it has to be remarked that the control now enforced on magic mushrooms is not in line with the results of the assessment carried out by the CAM.

with traditional drug control models. However, it was also said that it was unlikely that legal highs could benefit from the opportunities afforded by food and medicines control because with these the onus is on the producer to perform various product-tests and produce reliable data on the safety of the substance and currently most legal high producers are anonymous and / or based in other jurisdictions.

Whichever framework is deployed, the Dutch objective is to safeguard the user rather than, for example, to classify a substance as a food, drug or medicine or simply to take it off the market. It was mooted at this, however, that criminal justice interventions rarely safeguard users but instead add the further harm of criminalisation.

The example of methylone was given. When concerns arose, the Dutch authorities quickly gathered the thoughts of experts over the phone and the substance was banned under medicines legislation within an hour. The decision was made by balancing the risks of the product against the risks of waiting to act. The result of control under medicines legislation was that supply of methylone without a licence attracts six years in custody; a much greater penalty than is given for cannabis supply. Arguably, it was said, this is a disproportionate penalty, but views differed on whether it was justified given the quick solution it had rendered to what had been a worrying phenomenon which had since returned to extremely low prevalence. It was said, in fact, that if you look at population surveys now, methylone will not even register.

Experts queried whether the Dutch success in combating methylone was to do with the measures taken or were instead a consequence of the wider drug framework. The argument was revisited that where you can get good drugs safely and easily on the market, the general population feel no need to experiment with new things. In particular, it had been recorded that when international measures had limited the availability of MDMA precursors in the Netherlands, demand for Legal highs had grown and vice versa.

The United Kingdom

The United Kingdom Drug Policy Commission, a non-governmental research body in the UK, has looked exactly at the opportunity presented by legal highs to take a new approach²⁵.

At the outset the UKDPC had registered discontent with the current system and a feeling that policy-makers had become stuck, automatically controlling any new substance under the Misuse of Drugs Act 1971. Consultees of the body had widely agreed that the current approach imports a great many harms one of which is a loss of opportunity to obtain good information about the risks

²⁵ For background reading see Reuter. P. May 2011 *Options for Regulating New Psychoactive Drugs: A Review of Recent Experiences* UKDPC. at:

<http://www.ukdpc.org.uk/publications.shtml> and

Birdwell et al (2011) *Taking Drugs Seriously: A Demos and UK Drug Policy Commission report on legal highs* at: http://www.ukdpc.org.uk/resources/Taking_Drugs_Seriously.pdf

associated with a substance. Moreover the control process has been speeded up so much that it is impossible to do a proper risk assessment; substances are banned and then go underground before scientists can properly monitor their effects. The UKDPC also identified a failure of the British media to recognise that control itself causes harm and that there are benefits attendant on many substances; people take certain drugs for a reason; for fun yes, but also, if it is safer than alternatives. The example was given of the unthinking call to ban mephedrone without any reporting of the drop in cocaine related deaths that accompanied the rise of the phenomenon²⁶. There was, indeed, concern that risk assessments consider a single drug only and not the whole picture.

It was suggested that there are a whole range of different measures that could be deployed if there were only political will. Mephedrone need not have been banned, rather it could have been subject to age-restrictions and trading standards controls. In fact, some individuals had successfully been prosecuted under trading standards laws as mephedrone was clearly not a bath salt or plant food such as it was generally sold as. The UKDPC found that even amongst widely disparate groups a consensus was achieved that a different approach to conventional drug control would be valuable as the current law is unenforceable and brings authority into disrepute. As such, the perceived political difficulty of discussing drug-law reform was found to be wrong and policy-makers behind the times.

There are voices on the UK scene, however, suggesting different approaches. The ACMD recently advised government to try and use a wider range of legislation to combat legal highs and recommended, as part of this, an analogue approach in conjunction with generic definitions of chemical scope²⁷. At the same time the British media piloted the discussion to focus particularly on this approach arguing that every single compound be banned. As with policy-makers, therefore, the media was said to be stuck, fearfully in a rut, preventing progress.

Discussion²⁸

The tendency to utilise pre-existing models of regulation, rather than design new models, was argued to be an efficient solution. Moreover, it helps that the same principle underlies each framework (food, medicines, and drug-control) of

²⁶ Bird, S. (2010) *Banned Drug May Have Saved Lives, Not Cost Them* Straight Statistics. <http://www.straightstatistics.org/article/banned-drug-may-have-saved-lives-not-cost-them>

²⁷ Advisory Council on the Misuse of Drugs October 2011 *Consideration of the Novel Psychoactive Substances ('Legal Highs')* at 1.19 &11 <http://www.homeoffice.gov.uk/publications/agencies-public-bodies/acmd1/acmdnps2011?view=Binary>

²⁸ For background reading see Winstock A & Wilkins C. 2011 *'Legal Highs; The Challenge of New Psychoactive Substances'* TNI; Hughes B & Winstock A 2011 *Addiction Article for Debate; Controlling New Drugs Under Marketing Regulations* Addiction, forthcoming; and Reuter P. 2011 *Options for Regulating New Psychoactive Drugs: A Review of Recent Experiences* UKDPC. Links above

protecting public health. Penal types of drug control are only preferred and new solutions demanded to satiate the hysteria surrounding drugs.

By others it was argued that penal drug control is a vital response to the aggressive reach of the drug trade whose vendors are profit-driven and uninterested in the harms that might befall. The example of poppers was detailed; these were originally only sold in sex shops to a small adult demographic, but when youngsters increasingly sought out the drug they were freely supplied and policy-makers felt it was vital to act. In this regard, drug control is really about social control: had mephedrone been sold under the counter only to a very few psychonauts, action would not have been taken – policy-makers would not give up this tool lightly.

It was accepted that in some respects using foods, trading standards, medicines, or consumer protection law (the latter was deployed in Romania) can be beneficial because they decriminalise possession and use of substances. Beyond this, however, such frameworks are just another type of supply side interdiction which replicates the problems of traditional prohibition – driving things underground. It was said that some countries use medicines and food legislation but then when a substance does not disappear from use, they turn to more severe drug control but use still does not disappear and attendant problems often increase. If policy-makers want to think about regulation as a way of reducing harm, they should not use regulation to drive people out of the market, but rather use it to make them behave responsibly.

The question was posed: whether it is possible to propagate a new way of regulation? The answer came: in basic principle yes, and penal law is unnecessary. Participants recalled that before the UN Conventions were in place, substances which are controlled now were successfully available on prescription and so forth (such as heroin in the UK). Moreover, there are precedents for discrete legislative frameworks per substance (such as are enjoyed, for example, by alcohol and tobacco) and for a generic approach to new substances.

Despairing of the fixedness of control regimes once in place, however, and the particular difficulty of trying something new with substances controlled at the UN level, it was suggested that policy-makers were in danger of missing an opportunity to experiment with legal highs to find more effective models.

As to new approaches, some experts voiced concern at the tendency of policy-makers and the media to find a generic prohibitory model attractive. That is, as discussed earlier, rather than doing a risk assessment for every new psychoactive substance that comes on the market, simply prohibit it unless and until a reputable body undertakes appropriate tests to demonstrate its safety and puts forward a plan to bring it to market in a proper way. The beneficial aspect of such an approach was, it was argued, to outsource all the financial and political expense to the private sector, whilst safeguarding users.

Against generic prohibition of all psychoactive substances, it was argued that the reality of such a scheme would be that the substances would not just disappear

but would come to the market illegally with all the negative consequences that would entail. There was also concern as to the opportunity cost of generic prohibition i.e. some substances which may carry benefits, would not be able to come to the market as the requirements for licensing would likely be too onerous. It was also suggested that generic prohibition would be too unilateral a stance and one so qualitatively different to the current risk-assessment models of most jurisdictions, that it is unlikely to carry public support. On the contrary, others argued that drug control was already morally and politically driven, rather than driven by evidence. An example given was hallucinogenic mushrooms in the Netherlands, which despite being assessed as relatively benign, were nevertheless prohibited.

There was some support for the proposition that generic approaches do not work; they cast too wide a net and cost too much money and time – it makes more sense to react to what is really on the market as with the Mephedrone phenomenon. However, participants recognised greater divergence of views recalling that of twenty-five European Member States: fourteen held that a wider range of control options should be considered including temporary controls and regulation; eighteen were in favour of fast-track / emergency control measures; three were in favour of generic approaches (the UK, Finland and Ireland); and others, like France were *'cautious about emergency measures, because substances that do not pose risks would also be controlled'*²⁹. Moreover a number of states already have rapid procedures in place for emergencies when new substances arise; there was comment, however, that with such procedures, some important step such as consultation, risk-assessment or primary legislation is always missed out.

Returning to the Dutch model, it was argued that it was misleading to see legal highs as a new problem needing a new solution; rather, they represent a continuation of initial control and are a tangible example of the balloon effect. Policy-makers should start at the beginning, by offering people who use drugs good cannabis instead of all the unknown synthetic products they have resorted to. By decreasing legal pressure across the board, policy-makers would solve the problem of legal highs. The scope for such reform, however, was acknowledged to depend on the starting point of policy-makers. If it is considered wrong to use psychoactive substances and this drives policy, the end result will be very different to a policy based on harm reduction. Currently, a risk adverse approach dominates in most societies – if there is a slightest risk that someone might die, a substance is banned; but this does not take into account the risk created by the ban, so it is a one-sided risk assessment. This is also an expedient approach; policy-makers under pressure to act quickly are much more drawn to a ban than to preventative measures.

²⁹ *Commission Staff Working Paper on the Assessment of the Functioning of the Council Decision 2005/387/JHA on the Information Exchange, Risk Assessment and Control of New Psychoactive Substances* Brussels 11.7.2011 {SEC(2011) 912 final) and *Report from the Commission on the same* {COM(2011)430 final at 7.2.

http://ec.europa.eu/justice/policies/drugs/docs/sec_2011_912_en.pdf

But what, it was ventured, would happen if the starting point of policy-makers was prevention? It was said that everybody now regrets that ecstasy is not available because it was rushed through and now it can't be reversed. Could there not be, for example, a more staged approach in which substances could be moved back and forth across different tiers of regulation? This would take into account, as the current scheme does not, that whilst some drug-harms and some drug-benefits are acute, some also take time to appear. Reference was also made to the option of legally controlling a substance but not then enforcing the law and the New Zealand approach of monitoring compounds placed on List D (albeit the latter is more expensive to implement). The main challenge in bringing any such scheme to fruition elsewhere, would be to obtain buy in from policy-makers and the media.

Session 4: EU Strategies on New Substances

The state of play at the EU level. What are the outcomes of the evaluation of the functioning of the Council Decision (2005/387/JHA) on new psychoactive substances? What are the next steps under consideration to improve and harmonise controls on the market within the EU? What approaches are under debate for the EU Pact against synthetic drugs and the new EU drugs strategy? How are these issues being dealt with at the UN level and how might that influence EU approaches?

Experts began with an overview of how substances come to be controlled³⁰ at the EU level³¹. The trigger is a Member State reporting a new substance to the EMCDDA. The EMCDDA then tenders whether or not to assess the substance for harmfulness; if there is full support for an assessment they commence work. Only three substances so far have been through such an assessment – including BZP and Mephedrone; these were substances that emerged in several countries at the same time or that were associated with mortalities. The EMCDDA then reports that a substance should either be controlled or not; control means drug control, there are no other flavours. A recommendation is then made to the European Commission which decides whether to propose it to the Council of the European Union and Member States; where the evidence is not thought to be sufficiently strong, proposals are not made. However if a proposal to control is

³⁰ Council Framework Decision 2004/757/JHA of 25th October 2004 lays down minimum provisions on drug trafficking offences and penalties and Council Decision 2005/387/JHA of 10th May 2005 governs information exchange, risk assessment and control of new psychoactive substances.

³¹ For background reading see: SEC(2011) 912 final accompanying the document {COM (2011) 430 final}, link above; Winstock A & Wilkins C October 2011 *Legal Highs The Challenge of New Psychoactive Substances* TNI <http://www.druglawreform.info/en/publications/legislative-reformseries-/item/2833-legal-highs>; European Commission 2011 *Towards a Stronger European Response to Drugs* Communication from the Commission to the European Parliament and the Council, COM (2011) 689 final, Brussels, 25.10.2011, http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf; Council of the European Union *Draft European Pact Against Synthetic Drugs* (13286/4/11 REV 4) Brussels 3rd October 2011;

carried by the Council, the Member States must then translate the decision into their domestic legal frameworks.

It was argued that this system worked when there was one new substance emerging per year. However, now there is a new substance almost every week³². Some substances emerge through Member States searching proactively for them, some as the fruit of a crack-down as in Poland, and some as a result of research projects, such as the German Spice Project. It was felt that whatever is unearthed, however, a new substance will emerge to replace it as there are countless creative people working to do so. Moreover there is media attention and political attention increasing the sense of anxiety around the issue and there is a sense that the problem is bigger than one state; for example, in Poland when the head shops were banned, they relocated next door to the Czech Republic or online to the internet and websites hosted in other jurisdictions. Consequently many Member States are saying we need to find an EU solution. A survey of Member States in 2006 found that a large number wanted greater options for drug control: either new regulatory mechanisms or greater scope to deploy food, medicines, or consumer protection laws.

As such, drug control is again at the top of the agenda at the EU and different attitudes prevail at different levels. Amongst those tasked with actually drafting the EU response, it was perceived that there would be little appetite for an instrument that bans everything, that this would be neither useful nor possible. Moreover, there is an acute awareness of the need to be careful with criminal justice law, to avoid the development of illicit markets and the unnecessary criminalisation of citizens. At the same time there is an acute desire to protect public health. The Commission has in fact openly accepted the 'weaknesses' of the current system³³, not least because it *'has scarcely led to any alignment of national measures in the fight against drug trafficking'*. Competing with this is the political reality that demands immediate action; for example, the original timeframe allowed until autumn 2012 to devise the new framework but there is pressure to bring this forward to January 2012. Experts heard that some Member States are so desperate to be seen to act that they reject proper risk assessments of legal frameworks and substances and request instead an immediate ban on all psychoactive substances, irrespective of the health consequences.

³² Between 2005 and Oct 2011, 115 new psychoactive substances were reported through the EU Early Warning System of which 40 were reported in 2010. See SEC(2011)912 http://ec.europa.eu/justice/policies/drugs/docs/sec_2011_912_en.pdf

³³ COM (2011) 689 final at 4 *'this instrument has scarcely led to any alignment of national measures in the fight against drug trafficking'* and at 7: *'Council Decision 2005/387/JHA on new psychoactive substances...has three major shortcomings: it is unable to tackle the large increase in the number of new psychoactive substances, because it addresses substances one by one, via a lengthy process; it is reactive – substances subjected to control measures are quickly replaced with new ones with similar effects; it lacks options for regulatory and control measures.'* http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf

At the time of the Expert Seminar, the European Commission was preparing an impact assessment. In the preparatory study for this, the EC is looking at the legal options and debating appropriate objectives for the legislation. Participants welcomed the variety of expertise represented by the EC assessors, not least the inclusion of law enforcement. It was said that too often policy is made without mind to what is manageable and will work in practice and there was hope for the substantive output of this assessment.

There was also concern, however, that the findings of the assessment are predetermined and participants reflected on the Commission's stated aim to '*propose **stronger** EU legislation on new psychoactive substances*' that would:

'(1) Enhance the monitoring and risk assessment of substances, by extending support for forensic analysis, toxicological, pharmacological and epidemiological studies.

(2) Provide swifter and more sustainable answers to the emergence of these substances, possibly by exploring ways to address groups of substances, notwithstanding the need to determine scientifically the harmfulness to health of the individual substance.

(3) Enable a faster response to the emergence of substances, including, possibly through temporary bans on substances that pose immediate risks.

*(4) Better align laws in the field of drug control, product and food safety, consumer protection and medicines to cover the wide variety of substances that emerge.'*³⁴

Participants were assured that there are genuine debates as to the scope of action to be taken. The typical interdictory language of drug control discussions belie a more open approach; for example the Draft European pact against synthetic drugs of the Council now identifies that '*further investment should be made in identifying and developing legally sustainable approaches that effectively regulate the market for new psychoactive substances and prevent substances that pose a threat to health from entering the market.*'³⁵

Some argued that the European Commission could add value by undertaking full assessments but leave Member States to decide what they do at a national level or jointly through the EU structure. On the other hand, it was felt that there is scope for a more prescriptive approach using the Lisbon Treaty. The Treaty gives the Commission the right to act in the spheres of criminal justice and, to some extent, in health, but how to implement the Treaty is, as yet, unclear.

The major discussion at EU level is what the objectives of drug control should be. With BZP, the EU had adopted the precautionary principle; albeit the assessments had determined that the risks associated with BZP were so low that

³⁴ COM (2011) 689 at 7 http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf

³⁵ 13286/4/11 REV 4 at III.2 same

it should not be banned completely, there was no other response-framework available, at the time, other than to ban it. This reinforced the antipathy towards risk-assessments; what is the point of all the expense and delay if everything is just banned?

Experts understood that pragmatic arguments are also being made at EU level; particularly, nothing can be done to negate the fact that there will always be people who use drugs but a worthwhile impact on public health could at least be achieved by regulating the existing market. Suggestions in this vein include undertaking non-legislative measures like information and awareness raising campaigns, a requirement for ingredients to be listed fully on packaging, prevention measures, and research studies. A recognised stumbling block, however, is the fact that most product comes from outside the EU and it will be difficult to make improvements without real cooperation with actors in these markets which, in turn, will be hard to achieve. Moreover, there are those who think that regulating shops is not the province of the EU; the most it should do is recommend rules. There are others who think that regulating internet trade is beyond EU purview and is, moreover, a minefield debate. It was said that everybody has a shopping list for what to do with the internet and it is unlikely, therefore, that the EU would open itself up to such a difficult discussion because of drugs.

Participants reflected on the hard reality of policy-making; if Europe invests in a proper impact assessment of different models as well as a complete analysis of the harms of new substances, Member States will not wait for the outcome and will act independently at national level. On the other hand, if a pan-European framework is implemented quickly, this will deprive Member States of conducting proper assessments and regulatory experiments at local level.

Discussion

Discussion turned to the question of evidence-based policy making and experts looked to how the issues thrown up by legal highs are being dealt with at UN level.

It was argued that the classical system is beginning to fracture due to the pressure of the many new substances coming to prominence which are not already part of the UN Conventions. The UN system involves an assessment and recommendation by WHO as a precondition to CND consideration but these assessments, much like those at the domestic and EU level, are limited, lengthy, stretched across too many substances, and startlingly vulnerable to politicisation. There have been instances recently where WHO recommendations have not been adopted because it has not been possible to get to a vote at CND, let alone achieve a majority vote. As a consequence, the INCB has stepped in, overstepping its own mandate and making recommendations about control on substances ranging from khat to amphetamines; some have even been substances that WHO has recommended not be scheduled, (e.g. khat and ketamine) or have not had time to consider or even question. Accordingly, albeit the INCB cannot supplant the treaty-rights of WHO to actually advise on

scheduling substances at the UN level, it does in this way put political pressure on CND and national governments to control substances that are not in the UN Conventions. As a consequence, there are increasingly problems with the evidence-base at UN level which are dripping down to EU and national level.

It was said that the UN system showcases the inflexibility earlier debated; the new synthesised drugs are met even here with policy panic i.e. emergency responses and a default instinct to schedule. There could be 8 million Bolivians chewing the coca leaf outside the US embassy in La Paz but this would not effect change as coca leaf is already scheduled by the UN Conventions. New substances, on the contrary, provide an entry point and an opportunity to widen the debate about the paradigm of drug control: what is it trying to achieve and what is the best way to achieve it?

It was welcomed that, in contrast, at EU and domestic level there is some hesitance and some, albeit small, appetite for experiment; the examples of Austria, Ireland, Poland and Romania were given. These examples involve different models but share the common feature that they do not criminalise use and possession, and thus diminish one of the main negative consequences of adding substances to the existing schedules.

The discussion turned to other options, precedents for which include responsible marketing, holding categories, temporary banning orders like those in the UK, and doing nothing.

Responsible marketing is seen in the AHOJ-G criteria used for the marketing of the cannabis market in the Netherlands. The coffee shops are required to comply with a set of conditions: no advertising (A), no sales of hard drugs (H), no nuisance (O), no admission to coffee shops for minors under 18 (J), and no sales of large quantities (more than 5 grams) per transaction (G). Holding Categories have a precedent in the Class D system of New Zealand under which substances (so far only BZP) are sold only through licensed outlets and are subject to close monitoring. It was said that this precedent needed widening out to other substances to be better evaluated. Likewise Temporary Banning Orders have only just been legislated for in the UK under the Police Reform and Social Responsibility Act; these are intended to allow for control of the market to take place whilst allowing time for appraisal of the harms of a substance. Doing nothing, is to impose no controls, not even controls like those exerted over alcohol and tobacco. Participants held the example of health and herbal medicines in the UK as an example of doing nothing; such products are regulated by EU medicines law, which like EU food laws, is far less prescriptive and leaves a great deal of space for Member States to act at the national level – consequently health and herbal medicines are sold in the UK on the basis of untested claims.

The discussion centred most on the pros and cons of regulation, and particularly of the type enjoyed by pharmaceutical products. Participants reminded themselves of the advantages that would come with regulation as opposed to control. It was said that there is currently a problem with adulterants; people

think they are buying ecstasy but are in fact getting mephedrone or worse. There was agreement that buyers would prefer to go to regulated sellers rather than the internet and in such circumstances advice could be delivered as to how to use the product safely thus providing public health benefits.

Some experts were concerned as to potential conflict at delivery point between a desire to make money and a duty, if there were one, to deliver good health advice. Others remarked that pharmacists, properly regulated by a professional body, are able to navigate such competing interests and anticipated that conscientiousness could also be expected of legal high vendors. It was recalled that only a few weeks prior to the seminar there had been a hearing in the Dutch Parliament where coffee shop owners had made real and constructive proposals on how to improve the cannabis market and how to work to something safer and more normalised. There is, likewise, an association of legal high retailers lobbying for industry and safety standards in the UK. While legal highs remain a grey market the trade will, of course, appeal mainly to those who want to make fast money but such people would not go into the field if there were strict regulations; only the well intentioned and legitimate businesses would stay the course.

It was argued that licensing Smart Shops would bring further benefits. As with coffee shops, where you can buy only cannabis, nothing else, in licensed Smart Shops sales could be limited to substances like mephedrone, not cocaine or heroin and so, unlike on the street, distance the various trades.

Detail was scant, however, about how these prospective models might work and it was felt across the room that there was a big gap where a functioning alternative should be.

It was argued forcefully that legal highs provide opportunities and advantages. Specifically, legal highs enable policy-makers to experiment with policy solutions; something which is impossible with those drugs already controlled by the UN Conventions. There is an opportunity to look at things in a different way and to accept that everything has a certain level of risk. The example of coffee was taken; it was felt that if this came on the market now, it would surely be controlled. It was suggested that new substances be looked at in comparative terms and, for those that are less risky, experiments could be undertaken with a new regulatory framework involving responsible marketing. Some experts foresaw a possibility of reversing past mistakes with coca and cannabis if positive outcomes are achieved through such experimentation. The most important thing, it was said, is to brainstorm and design and to find the political will to make it acceptable to have a responsible market.

There was fear in the room that there was to be a repetition of historical mistakes, whereas, in fact, the phenomenon of legal highs should be an opportunity to better understand the mechanisms of retail and consumption and the informal but effective social controls that can emerge amongst users so that policy-makers can devise a system that would help users come to a relatively safe port.

The discussion turned to whether the power of WHO could be harnessed for this cause especially as the organisation currently has plans to undertake risk assessments on some legal highs. However, the danger was felt that if WHO recommended scheduling this would close down national options. In any event, WHO have a long list of competing subjects to assess and cannot begin their work without more funding.

Some participants expressed concern that the international control system is so hooked on legal definitions and, at the same time, so negligent when it comes to studying real social formations and events that policy designed at grass roots level would be preferable. This may be a moment to widen the actors of the debate, involving the public, sellers, and consumers in forming the new framework.

It was argued that there would be a number of preconditions to taking the debate on regulation forward in this way. First, public insecurity about drug control would have to be addressed. Second, the subsisting non-criminal systems of regulation would need to be examined with a view to how transferable they are to the peculiarities of legal highs and also any anomalies should be addressed; for example in the UK there are controls on cigarettes but not roll your own tobacco. Third, the governance of regulatory systems would have to be explored; for example, in the UK governance is devolved to the local level with a great deal of variation in privatisation and in practice. Fourth, policy-makers had to grapple front-on with the internet.

On governance, there was concern that in some cases, policing through criminal justice can be more comfortable for citizens, because it is often perceived to be more consistent and transparent. There was also some level of disconcertedness about the wildly varying levels of licensing for alcohol that can, for example, be seen in the UK but there was also strong support for local areas who want to have more autonomy. There was scope, it was said, for just such a more democratic and experimental approach to drugs; top down policy has failed, it is time to try something new.

Experts debated the likelihood of policy-makers seizing these opportunities. It was remarked that there is no 'Occupy Vienna' movement, and that the discussion had perhaps over-estimated popular opinion on drugs. It was felt quite strongly that the first reaction of the general public to drugs issues is the same as politicians - "let's not undertake strange experiments". Creative thinking is therefore needed to come up with solutions to this reticence.

Much more is needed, it was argued, to get drugs on the political agenda at this time of economic austerity. Policy-makers will bear in mind the cost of different regulatory systems and even of enforcing bans; in the UK, for example, funding has now been cut for forensic testing which is essential to enforcing controls. Further police in the UK are said to have deprioritised enforcement against non-problematic users of established drugs³⁶, expect to reduce activity in many

³⁶ Winstock AR, Ramsey J. 2010 *Legal Highs and the Challenges for Policy Makers* Addiction. 2010 Oct; Vol 105(10) p.p. 1685-7

aspects of drug-related enforcement due to reduced funding³⁷, and are offering little support to bans on novel substances³⁸. It was argued that drugs are a nuisance and a non-issue for most people; so why have a difficult and expensive regulatory system for a non-issue? Moreover, any policy change will only be felt during later administrations so there is little point, from a policy-maker's view, of investing effort into changing these models. As such, it was anticipated that the policy-makers' response to the legal high phenomenon, at least at EU level, was likely to be quite decisive and unsophisticated – either control or don't, with flexibility at Member State level.

For those wishing to progress the debate on drug control, it was suggested that cannabis is perhaps the area where change is possible, as opposed to legal highs. It was felt by some that there a critical mass on cannabis now, with more and more countries considering legal regulation. However, this optimism was tempered by others who saw few European policy-makers in favour and a trend for those who are to turn away from legalisation at decision making moments. It was said to be the same with the electorate; supportive in the polls but then at the moment when the vote is cast, something changes. However, through bottom up policy and experimentation, there was argued to be a way through and participants looked to the successfully self-regulating cannabis clubs in Spain³⁹ which have taken hold, gathering momentum and public opinion with them.

Conclusion

The meeting ended on a note of opportunity, but also urgency. It was felt that there is a real danger of unthinking replication of inflexible, traditional drug-control models at the local, EU, and UN levels whereas policy-makers could and should use legal highs to begin experimenting now with frameworks to find ways to drive the markets towards less harmful substances and less harmful patterns of use. Experts agreed that a depth of perspective had been achieved through the discussion which was valuable but there was only a short time in which the detail could be hammered out.

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<http://onlinelibrary.wiley.com/doi/10.1111/j.1360-0443.2010.02934.x/abstract>

³⁷ Beck H, 2011. *Drug enforcement in an age of austerity*. London: UK Drug Policy Commission. At: http://www.ukdpc.org.uk/resources/Drug_related_enforcement.pdf

³⁸ <http://www.guardian.co.uk/uk/2011/oct/11/police-cuts-impact-tackling-drugs>

³⁹ Cannabis social clubs in Spain- A normalizing alternative underway, Martín Barriuso Alonso, TNI Series on Legislative Reform of Drug Policies Nr. 9, January 2011 <http://www.druglawreform.info/en/publications/legislative-reform-series-/item/1095-cannabis-social-clubs-in-spain>