

NEW PSYCHOACTIVE SUBSTANCES²³

INTRODUCTION

Abuse of drugs is one of the biggest problems that all countries including Serbia are faced with. The abuse of various types of drugs is the cause of death of millions of people worldwide each year. It is important to stress that drug addicts are not the sole victims, but family members and society as indirect victims, as well. The subject of this paper is narcotic drugs since the use of drugs for medical purposes is not illegal.⁴ Some drugs are used for pain relief, while others have healing effects.⁵ According to Article 3, paragraph 12 of the Law on Psychoactive Controlled Substances, the abuse of psychoactive controlled substances is the use of the substances which are prohibited, as well as the use of psychoactive controlled substances in a way and quantities and for indications that are not prescribed.⁶

For more than a hundred years the international community has been striving to minimize the damaging effects of the drug abuse by preventive and repressive measures. For instance, in 2014 the number of deaths in the USA caused by the abuse of drugs increased 23% (47.055) compared to 2010 (38.29)⁷, while in 2015 there were 50 000 drug overdose deaths in this country which was a 300% increase compared to the beginning of the century.⁸ According to the UNODC estimate, there were 207 400 deaths caused by the drug abuse in the world in 2014.⁹

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⁴ *The Preamble of the Convention on Psychotropic Substances* from 1971: “The Parties being concerned with the health and welfare of mankind recognize that the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted.”

⁵ M. Pavlović, *Krivična dela u vezi sa opojnim drogama*, Zbornik radova Pravnog fakulteta u Nišu, 2012., Niš, p. 444.

⁶ Zakon o psihoaktivnim kontrolisanim supstancama, Sluzbeni glasnik Republike Srbije, broj 99/2010. (The Law on Psychoactive Controlled Substances, *Official Gazette of the Republic of Serbia*, no. 99/2010).

⁷ M. Warner et al., “*Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2010–2014*”, National Vital Statistics Reports, 10/2016, p. 3.

⁸ L. Baletsky, C. S. Davis, Today’s fentanyl crisis: Prohibition’s Iron Law, revisited, *The International Journal of Drug Policy*, 46/2017, p. 156.

⁹ UNODC (United Nations Office of Drugs and Crimes), *World Drug Reports*, 2016, Vienna, p. 9.

At the beginning of the 20th century, the Shanghai Opium Commission in 1909 and the League of Nation Conventions in 1925 and 1931 drew the world's attention to the problems relating to the traditional narcotic natural drugs (opium, cannabis, cocaine) and semi-synthetic drugs (heroin).¹⁰ The most important international documents adopted after World War II are the Single Convention on Narcotic Drug (New York, 30 March 1961), the Protocol Amending Single Convention on Narcotic Drug (Geneva, 25 March 1972) and the Convention on Psychoactive Substances (Vienna, 21 February 1971).¹¹ The mentioned conventions are of the utmost importance for the subject of this paper and they will be discussed in the text below.

Neither theory nor practice has a single opinion as regards the concept of new psychoactive substances (hereinafter NPS). The first part of the paper deals with the concept of these substances. It also analyzes the NPS and the so-called traditional drugs relation. Further, it discusses the specificities of the NPS distribution. A considerable part of the paper reflects on the criminal law response to NPS, i.e. different reactions of legislators to the emergence of NPS in the illicit drug market.

THE CONCEPT OF NEW PSYCHOACTIVE SUBSTANCES

Before analyzing the concept of NPS, we shall reply what psychoactive substances are. According to the existing law, psychoactive controlled substances are those which can be found on the List of psychoactive controlled substances: 1) opiates, i.e. narcotics; 2) psychotropic substances; 3) products of any origin having psychoactive effect; 4) other psychoactive controlled substances.¹² As per Article 3, paragraph 1 of the Law on Psychoactive Controlled Substances, narcotic drug is a substance of any or synthetic origin that is on the List and in accordance with the Single Convention on Narcotic Drug ("Official Gazette of the SFRY", no. 2/64), i.e. a substance which primarily has effect on the central nervous system producing analgesia (pain relief), narcosis (state of stupor or sleep), insomnia (wakefulness), hallucinations, disturbance of motor activities, and other pathological or functional changes in the central nervous system.¹³ Pursuant to Article 3, paragraph 2 of the Law on Psychoactive Controlled Substances, a psychotropic substance is a substance of any or synthetic origin that is on the List and in accordance with the Convention on Psychotropic Substances ("Official Gazette of the SFRY", no. 40/73), i.e. a substance having effects primarily on the central nervous system and changing the brain functions, thus altering perception, mood, consciousness and behaviour.¹⁴ Consequently, psychoactive substances are substances of any or synthetic origin which have effects on the central nervous system and change the brain functions.

As defined in the UNODC Report, NPS are psychoactive substances whose production, sale, possession, use, export or import are limited neither by the Single Convention on Narcotic Drug from 1961 nor by the Single Convention on Psychotropic Substances from 1971, but which nevertheless may pose a public health threat.¹⁵ The term "new" does not imply that these substances have been produced recently although very often it is so.¹⁶ Namely, NPS are the

¹⁰ P. I. Dargan, D. M. Wood, *New Psychoactive Substances – Classification, Pharmacology and Toxicology*, 2013, Boston-Amsterdam, p. 3.

¹¹ *Opus citatum*, p. 3.

¹² *Zakon o psihoaktivnim kontrolisanim supstancama*, Služben glasnik Republike Srbije, broj 99/2010 (*The Law on Psychoactive Controlled Substances*: "Official Gazette of the Republic of Serbia, no. 99/2010).

¹³ *Opus citatum*.

¹⁴ *Opus citatum*.

¹⁵ UNODC, *The Challenge of New Psychoactive Substances*, Vienna, 2013, p. 1.

¹⁶ C. Chatwin et al., *New drugs, new directions? Research priorities for new psychoactive substances and human enhancement drugs*, *The International Journal of Drug Policy*, 1/2017, p. 1.

substances which have been in existence for decades, but which have only recently become available and popular.¹⁷ Many of these substances were patented at the beginning of the 1970s or even earlier but their chemical composition has been slightly modified in recent times so as to produce the same effects as the traditional substances (e.g. the same effect may be produced by mixing with other known substances).¹⁸ NPS are legal alternative for illicit drugs since their effect is similar to the effect of the prohibited drugs.¹⁹

According to the UNODC definition, NPS may be sold with labels indicating that their distribution is not banned, such as: “not for human consumption”, “research chemical”, “legal high”²⁰, “designer drugs”, “synthetic drugs”, “analogues” or “new”²¹. The most frequent used term for NPS is “legal high” which was created by mass media and accepted in scientific debates, even in non-English countries.²² Each country has its own local name for NPS. In Italy, the term “smart drugs”²³ is in use, while the term “dopalaszcze” is used in Poland²⁴.

As per an acceptable opinion, the term “legal high” is inappropriate for several reasons.²⁵ Firstly, if something is legal, it means that it is not forbidden, i.e. that the use of a particular substance is not banned. The truth is that NPS were not prohibited when they emerged in the market, but there are mechanisms which can change their legal status, i.e. they should be scheduled as controlled substances as soon as possible. Secondly, the adjective *legal* is inadequate because young people, who are not familiar with legal regulations as regards drugs, can be misled about the ban on the use of particular substances. Thirdly, there is a possibility that the persons selling NPS use this name so as to stress the absence of the criminal prosecution risk and thus promote the substance. Finally, this term gives the wrong impression to the NPS users as regards their health because they believe that the substance is not harmful since it is “legal”.²⁶ On the other hand, the term “high” is improper since it highlights the supposedly positive effect of the substance thus deceiving the ill-informed that there are no health consequences.

The risk to public health caused by NPS is of high intensity since these substances are more easily obtainable to a large number of people than traditional drugs. For instance, NPS were available in more than a hundred shops (the so-called head or smart shops) in Ireland for a short period of time in 2005.²⁷ Moreover, it must be mentioned that in the past five years two types of NPS have been emerging in the drug market per week.²⁸ It must also be pointed out that the mentioned NPS refer to the so-called “legal high” drugs, meaning that the substances available in shops were not embodied in the existing legal regulations. To put it simply, since those substances were not scheduled as controlled substances, their sale was not prohibited.

¹⁷ *Opus citatum*, p. 1.

¹⁸ UNODC, *The Challenge of New Psychoactive Substances*, Vienna, 2013, p. 1.

¹⁹ P. Deluca et al., *Identifying emerging trends in recreational drug use; outcomes from the Psychonaut Web Mapping Project*, *Progress in Neuro-Psychopharmacology & Biological Psychiatry*, 39/2012, p. 222.

²⁰ P. Quintana et al., *The hidden web and the fentanyl problem: Detection of ocfentanil as an adulterant in heroin*, *The International Journal of Drug Policy*, 40/2017, p. 78.

²¹ O. Corazza et al., *‘Legal Highs’ an inappropriate term for ‘Novel Psychoactive Drugs’ in drug prevention and scientific debate*, *The International Journal of Drug Policy*, 1/2013, p. 82.

²² D. Schmidt, *Die Entwicklung des Betaubungsmittelstrafrechts bis Mitte 2011*, *NJW*, 41&2011, p. 3013.

²³ O. Corazza, et al., *Opus citatum*, p. 82.

²⁴ P. Jablonski, A. Malczewski, *New psychoactive substances - problem and response*, 2014, Warsaw, p. 3.

²⁵ O. Corazza, et al., *Opus citatum*, p. 82.

²⁶ P. Jablonski, A. Malczewski, *Opus citatum*, p. 4 (An advertisement on the site for the sale of NPS in Poland was: “Life is too short to use unhealthy pills.” The seller’s intention to tempt potential substance users by convincing them that there is no risk for their health is obvious.).

²⁷ P. V. Kavanagh, J. D. Power, *New psychoactive substances legislation in Ireland - Perspectives from academia, Drug Testing and Analysis*, 7-8/2014, p. 884.

²⁸ EMCDDA and EUROPOL, *EU Drug Markets Reports – In depth Analysis*, 2016, Luxembourg, p. 142.

Undoubtedly, NPS were not advertized and sold as drugs in Ireland but as the products not suitable for human consumption though they were labeled with the slang terms for drugs.²⁹ NPS are not extensively sold in Serbia as in Ireland or some other countries, but there are a few so-called smart shops in Belgrade advertizing their products online.

The availability of NPS is closely connected with the possibility of online selling. Bearing in mind that very often NPS are not prohibited substances, they may be purchased using advantages of modern technology. A customer may buy NPS from any online shop in the country or the world by means of a computer or a cell phone without leaving his / her apartment or place of work. If the common way of obtaining drugs is compared with the online purchasing, it can be noticed that the latter has more than a few advantages: a buyer may get instructions and information how to lessen damaging effects of the substance; before making decision what to buy, one can see the offer of all available products in one place; both a customer and a seller feel safer since there is no physical contact between them.³⁰ The advance of technological capacities of China and India with regard to the NPS production in small laboratories on the one hand and the online selling on the other hand, make NPS more available in Europe's drug market.³¹

CRIMINAL LAW REGULATION OF NPS

International organizations and legislators in some countries have been trying to control psychoactive substances, i.e. their trade which can be achieved by regular updating of the List of psychoactive substances. The key issue is how to assess whether a new substance should be added to the Schedule of controlled substances.³² More precisely, it is disputable whether a substance should be prohibited, when it should be prohibited and how.³³

As per the Convention on Psychotropic Substances from 1971, the first mechanism for the control of new substances functions as follows: „If a Party or the World Health Organization has information relating to a substance not yet under international control which in its opinion may require the addition of that substance to any of the Schedules of this Convention, it shall notify the Secretary-General and furnish him with the information in support of that notification.” (Article 2, paragraph 1) The Convention has four lists of drugs referred to by its regulations. According to Article 2, paragraph 2 of this Convention, „The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission and, when the notification is made by a Party, to the World Health Organization.”

„If the information transmitted with such a notification indicates that the substance is suitable for inclusion in Schedule I or Schedule II pursuant to paragraph 4, the Parties shall examine, in the light of all information available to them, the possibility of the provisional application to the substance of all measures of control applicable to substances in Schedule I or Schedule II, as appropriate.” (Article 2, paragraph 3)

„If the World Health Organization finds:

²⁹ P. V. Kavanagh, J. D. Power, *Opus citatum*, p. 884.

³⁰ E. Wadsworth et al., *The adherence to UK legislation by online shops selling new psychoactive substances*, Drugs, education, prevention and policy, 2017, p. 1.

³¹ P. Griffiths et al., *Getting up to speed with the public health and regulatory challenges posed by new psychoactive substances in the information age*, *Addiction*, 10/2013, p. 1700.

³² M. J. Barratt et al., *A critical examination of the definition of 'psychoactive effect' in Australian drug legislation*, *The International Journal of Drug Policy*, 40/2017, p. 17.

³³ C. Coulson, J. P. Caulkins, *Scheduling of newly emerging drugs: a critical review of decisions over 40 years*, *Addiction*, 4/2012, p. 767.

- a) That the substance has the capacity to produce:
 - i) 1) A state of dependence, and
 - 2) Central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor function or thinking or behaviour or perception or mood, or
 - ii) Similar abuse and similar ill effects as a substance in Schedule I, II, III or IV, and
- b) That there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control, the World Health Organization shall communicate to the Commission an assessment of the substance, including the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy, together with recommendations on control measures, if any, that would be appropriate in the light of its assessment.” (Article 2, paragraph 4).

„The Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV. The Commission may seek further information from the World Health Organization or from other appropriate sources.” (Article 2, paragraph 5)”.

However, the drug control is primarily conducted by their addition to the list of prohibited substances in national legislations. To put it simply, criminal law response to the emergence of NPS is the prohibition of such substances. Accordingly, there are several ways in which NPS are prohibited. As per the first one, some substances fulfilling the conditions to be considered drugs, and which have not been on the list of prohibited substances so far, should be added to the list. This concept is recognized in our legislation. In our opinion, the prohibition of some NPS may thwart their legal sale only for a few days. Such period is sufficient for the dealers to inform NPS manufactures that the substance is prohibited in a certain country and that they should modify its molecular structure so as to become “new” for the criminal law, i.e. to become legal.³⁴

NPS has a chemical structure similar but not identical to the chemical structure of the prohibited substances.³⁵ In 1982 two lawyers from the USA manufactured a synthetic version of heroin, the production of which was not prohibited (1-methyl-propionoxy-4-phenylpyridine (MPPP)), in the basement of their office. Despite the fact that the formula was correct, they did not manage to maintain chemical reaction at the proper temperature and acidity. Consequently, the result those two “chemists” came to was a toxic substance whose use caused the brain damage and symptoms similar to Parkinson’s disease.³⁶ Coincidentally, the list of chemicals that the lawyers had purchased was found by a chemist who found it strange that a lawyer’s office needed that type and quantity of the substances, so he reported the case to the police.³⁷

This is a good example showing how clandestine drug laboratories may be located. The cooperation among the state agencies fighting against illicit drugs is of the utmost importance for attaining this objective. For instance, if precursors or tablet making machines have been

³⁴ T. P. Stackhouse, *Regulators in Wackyland: Capturing the Last of the Designer Drugs*, Arizona Law Review, 4/2013, p. 1110.

³⁵ H. L. Weingarten, *1-Methyl-4-Phenyl-1, 2, 3, 6-Tetrahydropyridine (MPTP): One Designer Drug and Serendipity*, Journal of Forensic Sciences, 2/1988, p. 588.

³⁶ G. Kau, *Flashback to the Federal Analog Act of 1986: mixing rules and standards in the cauldron*, University of Pennsylvania Law Review, 156/2008, p. 1078; C. Coulson, J. P. Caulkins, *Opus citatum*, p. 767.

³⁷ H. L. Weingarten, *Opus citatum*, p. 589.

imported into the country, customs officials should report such import to the police for a further check. Moreover, if a natural person or a legal entity increases the water and electricity consumption suddenly, it should be a signal for the officials of the water and electricity supply companies to report such cases to the police. Thus, if all state agencies are networked, good results in combating illegal drugs may be achieved. We should emphasize an important role of the customs – if precursors are seized at the border, then the problem with drug manufacturing is solved. However, if precursors enter the country, then the state will be faced with an arising problem. For years to come the state agencies will have to struggle to find and seize the prohibited substances from clandestine drug laboratories nationwide.

The events following the above mentioned case in the USA are known to be a real disaster due to designer drugs. Designer drugs are synthetic compounds patented so as to imitate the controlled substances effects (United States v. Roberts, 363 F.3d 118, 122 (2d Cir.) 2004).³⁸ According to the existing regulations as regards illegal drugs, the Federal Government could not prosecute the perpetrators, i.e. the lawyers. As a result, a number of illegal laboratories were opened. Fearing designer drugs, the Congress passed the Federal Analog Act in 1986 whose aim was to prevent criminal prosecution evasion by slight structural modifications of drugs prohibited by the Controlled Substances Act. Pursuant to the Federal Analog Act, if a substance is “essentially similar” in its structure and pharmacological effects to the drugs prohibited by the Controlled Substances Act, this new substance is prohibited as well.³⁹ For instance, MDMA is similar to MDA in its chemical structure and it has analogous pharmacological effects as MDA, which is a prohibited substance, thus making also MDMA illegal in accordance with the Federal Analog Act. Parenthetically, since MDMA was prohibited in the USA in 1985, all researches on the positive MDMA effects on post-traumatic stress disorder (PTSD) were suspended for twenty-five years.⁴⁰

As per Article 813 of the US Code, i.e. chapter 13 stipulating prevention and control of drug abuse, any federal law regulating controlled substances may be enforced on analogue controlled substances that are intended for human consumption.⁴¹ “Not for human consumption” is the phrase which shall be discussed in the text below.

Taking everything aforementioned into account, it may be concluded that the role of the Federal Analog Act is of the utmost importance for the prevention of NPS in the USA. On the other hand, criminal prosecution of perpetrators in accordance with the Federal Analog Act is rather complicated, especially when compared with criminal prosecution compliant with the Controlled Substances Act. The reasons for this are as follows: 1) it must be proved that the substance is analogue which requires the engagement of a forensics investigator in the course of the criminal proceedings thus making it more expensive; 2) analogue substances are illicit only if they are intended for human consumption. The NPS distributors frequently label that their products “are not for human consumption” so as to protect themselves from criminal prosecution.⁴² Their defence in case of criminal prosecution would be based on the fact that the user consumed the substance of his own free will although the product was properly labeled “not for human consumption”. These are the major shortcomings of the Federal Analog Act. This Act can also be disputed as regards retroactive application of regulations because the defendant

³⁸ T. P. Stackhouse, *Opus citatum*, p. 1108.

³⁹ H. K. Sathappan, *Slaying the Synthetic Hydra: Drafting a Controlled Substances Act that Effectively Captures Synthetic Drugs*, Ohio State Journal of Criminal Law, 2/2014, p. 827; G. Kau, *Opus citatum*, p. 1079.

⁴⁰ M. A. R. Kleiman, *Commentary on Coulson & Caulkins (2012): Optimizing drug scheduling*, Addiction, 4/2012, p. 774.

⁴¹ H. K. Sathappan, *Opus citatum*, p. 827.

⁴² *Opus citatum*, p. 828, 833.

usually does not know whether he is charged with a criminal offence until the substance is proved to be “analogue” in the course of criminal proceedings.⁴³

Although the Federal Analog Act has had a great impact on the control of NPS in the illicit drug market, it does not mean that the problem is solved. Quite contrary, in spite of almost three decades of fighting against NPS, the war against designer drugs is far from a successful ending. The biggest shortcoming of an analogue approach is its indefiniteness and a too broad field of application.⁴⁴ In this connection, it must be emphasized that neither the scientific community nor the practice has managed to answer the question as regards the level of similarity among the substances so that they can be prosecuted under the Federal Analog Act.⁴⁵

According to one concept, NPS may be prohibited by enforcing the regulations relating to medications. However, NPS are not used for medical purposes but for pleasure. Therefore, “the European Court of Justice ruled that member states could not use medicine laws to prohibit NPS”.⁴⁶

The legislators’ response to NPS in some European countries is manifested through generic control measures. “Starting from a core molecular structure, which does not itself have to be psychoactive, it specifies particular variations of the structure which lead to a substance being controlled.”⁴⁷ Generic control measures imply that the legislator prohibits a group of psychoactive substances in advance.⁴⁸ All types of substances, i.e. all substances derived from the same “molecular skeleton” are prohibited.⁴⁹ Consequently, generic control measures do not involve an individual approach to each substance, i.e. an individual estimate of its psychoactive effects. Therefore, generic control measures have certain advantages when compared both to traditional approach scheduling each prohibited substance on the list and analogue approach determining whether each substance is analogue (similar) to the already prohibited one. In 1971 a few generic control definitions were introduced in the UK Misuse of Drugs Act. For instance, the following substances were prohibited by the provisions of this Act: anabolic steroids, barbiturates, cathinones, fentanyls, pethidines, etc.⁵⁰

A common disadvantage of generic control measures is that it does not specify any individual controlled substance (e.g. neither mephedrone nor MDMA is mentioned in the Misuse of Drugs Act). Furthermore, its definitions are incomprehensible to laymen who are not chemists.⁵¹ As far as the promptness of the legal response is concerned, the 1971 Act enabled a temporary prohibition of a substance in just a few weeks’ time.⁵² Yet, nowadays when new NPS emerge in the illicit drug market daily, this prompt response as per the 1971 Act is considered to be slow.⁵³

In the past few years blanket prohibition of NPS has become integral part of criminal law in several countries: Ireland (2010), Poland (2011), Romania (2012), New Zealand (2013),

⁴³ L. A. King et al., *Analogue controls: An imperfect law*, UK Drug Policy Commission, 2012, London, p. 4.

⁴⁴ T. P. Stackhouse, *Opus citatum*, p. 1110.

⁴⁵ H. K. Sathappan, *Opus citatum*, p. 836.

⁴⁶ P. Reuter, B. Pardo, *Can new psychoactive substances be regulated effectively? An assessment of the British Psychoactive Substances Bill*, *Addiction*, 1/2017, p. 28.

⁴⁷ L. A. King et al., *Opus citatum*, p. 3.

⁴⁸ C. Chatwin et al., *Opus citatum*, p. 2.

⁴⁹ P. V. Kavanagh, J. D. Power, *Opus citatum*, p. 884.

⁵⁰ L. A. King et al., *Opus citatum*, p. 3.

⁵¹ *Opus citatum*.

⁵² UNODC, *Commission on Narcotic Drugs Thematic Intersessional, Psychoactive Substances Act 2016 and the NPS Intelligence System*, 2016, p. 4.

⁵³ P. Reuter, B. Pardo, *Opus citatum*, p. 28.

Australia (2015) and the United Kingdom (2016).⁵⁴ On 26 May 2016 the Psychoactive Substances Act prohibiting the manufacture, export, import and supply of psychoactive substances, excluding those exempted by this Act, came into force in the UK.⁵⁵ The advantage of this legal solution is that it finally enables the legislator to deal with NPS since it criminalizes all psychoactive substances (both the existing ones and those that are still to be patented).

On the other hand, blanket prohibitions of psychoactive substances are not positively accepted in scientific literature. Numerous disadvantages are emphasized as it shall be explained further in the paper. Some authors are of the opinion that the concept of psychoactive substances as per the 2016 Act is defined too broadly. It is pointed out that the 1971 Misuse of Drugs Act criminalized some substances which might have damaging effects sufficient to cause a social problem (Article 1, paragraph 2). As already mentioned in the paper, the national legislature deems that a narcotic drug is the substance causing “pathological or functional changes of the central nervous system”.⁵⁶ In contrast, the 2016 Act defines a psychoactive substance as any substance bringing about psychoactive effects on the person consuming it. According to this Act, the psychoactive effect is present in case a substance stimulate or depress the central nervous system, has an impact on mental functions or emotional state of an individual (Article 2, paragraphs 1 and 2). Accordingly, there is no “threshold” of risk or injury that a substance must cause so as to be deemed a narcotic drug as per this Act. The legislator accepted the suggestion defined in the report submitted by the panel consisting of drug experts.⁵⁷ The Commission’s standpoint is that the definition of psychoactive substances according to the existing law is too complicated requiring plenty of time for establishing damaging effects of substances and thus preventing a quick reaction of the authorities to the emergence of NPS. On the other hand, the legislator has tried to prevent broad application of the 2016 Act by prescribing exemptions in Schedule 1 of this Act to which the Act does not apply (controlled drugs within the meaning of the 1971 Misuse of Drugs Act, medical products, alcohol, nicotine and tobacco products, caffeine and caffeine products, food).⁵⁸ However, some authors are of the opinion that prescribing exemptions cannot prevent broad application of the Act⁵⁹ and that quick screening techniques for establishing psychoactive effects of substances are not reliable since only clinical studies can provide accurate data.⁶⁰ Psychoactive effects may be predicted either on the basis of the substance chemical structure or animal testing though precise results can be obtained only by researches based on human experience. It has been established that particular substances have different pharmacological effects on the human brain than effects predicted in the laboratory experiments.⁶¹ An exceptional problem as regards the 2016 Act is the fact that psychoactive effects are determined after quick screening tests, while criminal legislation is retroactively applied.⁶²

Furthermore, it is difficult to prove in criminal proceedings that the perpetrator knew or suspected, or ought to have known or suspected that the substance in a concrete case was psychoactive, i.e. that it had psychoactive effects, which is the necessary requirement for

⁵⁴ M. J. Barratt et al., *Opus citatum*, p. 17.

⁵⁵ A. Stevens et al., *Legally flawed, scientifically problematic, potentially harmful: The UK Psychoactive Substance Bill*, *The International Journal of Drug Policy*, 12/2015, p. 1167.

⁵⁶ *Zakon o psihoaktivnim kontrolisanim supstancama*, “Sluzbeni glasnik Republike Srbije”, br. 99/2010. (*Law on Psychoactive Controlled Substances*, “Official Gazette of the Republic of Serbia”, no. 99.2010).

⁵⁷ *New Psychoactive Substances Review – Report of the expert panel*, September 2014, p. 56.

⁵⁸ *Psychoactive Substances Act 2016* (c. 2) Schedule 1 — Exempted substances, p. 40.

⁵⁹ P. Reuter, B. Pardo, *Opus citatum*, p. 29.

⁶⁰ A. Stevens et al., *Opus citatum*, p. 1168.

⁶¹ P. Reuter, B. Pardo, *Opus citatum*, p. 29.

⁶² E. Wadsworth et al., *Opus citatum*, p. 3.

establishing mens rea.⁶³ Consequently, criminal prosecution of perpetrators is long-lasting and leads to additional trial costs. Additionally, prohibiting NPS may push users to seek out alternative stimulants, i.e. that they start using other controlled drugs with more damaging effects.⁶⁴

The full application of The Psychoactive Substances Act prevents NPS online sale. A research conducted by the British Government found out that after the Act had come into force, all sites selling NPS were closed or stopped selling NPS, or registered new domains abroad (informed their clients that they would not deliver NPS in the territory of Great Britain).⁶⁵ On the other hand, even if the Act prevents online sale of NPS successfully, drugs will be sold on gray market, i.e. users will buy them from illegal drug dealers. Such practice can cause more harm (e.g. buying drugs mixed with substances of doubtful quality; users will buy non-labeled and unpacked products).⁶⁶ Therefore, it is still uncertain what will happen on the NPS market in Great Britain. It is unlikely that the users will just stop consuming NPS or other drugs. Will they try to find alternative providers? Will they turn to traditional drugs? Time will show what will happen on the NPS market in this country, as well as the effects of the 2016 Act.

Trying to solve the problem with NPS, the legislator in New Zealand banned the NPS distribution unless the seller could prove that the substance was “low risk” (the burden of proof was on the seller). However, the legislator did not define the term “low risk” thus making the application of legal regulations in practice difficult.⁶⁷ Similarly, the Advisory Council on the Misuse of Drugs (ACMD) proposed a new definition narrowing the scope of the 2016 Act on the Misuse of Drugs according to which the ban would relate to only those substances which were harmful as the already controlled ones.⁶⁸ Evidently, it is hard to determine whether NPS are harmful as the already controlled substances since widely defined restrictions lead to an array of difficulties with regard to their enforcement and enable disproportionate response to NPS on the one hand, while on the other hand restrictions imply slower reaction.

CONCLUSION

It is rather complicated to determine whether a substance should be prohibited as NPS. Successful assessing is time-consuming and requires knowledge and equipment. While making a decision on the prohibition, three potential errors may be made: 1) the prohibition of the substance although it is not justified; 2) failure to ban a substance which must have been banned; 3) slow reaction in the case of the justifiably banned substance. Decision-makers must bear in mind the following: the substances whose ban is under review are often socially useful (e.g. they are used for energy production, etc.); police, prosecutors’ offices and courts view the substances as a source of trouble; political process of decision-making involves ethical issues; substances whose ban is under consideration give rise to fear among laymen.⁶⁹

Consequently, there is no simple solution to the expansion of NPS in the drug market. The key issue relates to the question what ought to be regulated (banned), i.e. what NPS refer to. All other problems as regards legal regulation of NPS arise from that question. The practice has proved that individual, analogue and generic control measures are not sufficiently effective in the

⁶³ A. Stevens et al., *Opus citatum*, p. 1168.

⁶⁴ *Opus citatum*.

⁶⁵ E. Wadsworth et al., *Opus citatum*, p. 3.

⁶⁶ A. Stevens et al., *Opus citatum*, p. 1169.

⁶⁷ P. Reuter, B. Pardo, *Opus citatum*, p. 28.

⁶⁸ *Opus citatum*, p. 29.

⁶⁹ C. Coulson, J. P. Caulkins, *Opus citatum*, p. 767.

combat against NPS primarily for their slow reaction. Additionally, although analogue and generic control measures are improvement in controlling NPS, they are not an adequate measure for the emergence of NPS which have no similarity to the already identified substances.⁷⁰

Our country recognizes individual control measures for NPS which imply scheduling new substances on the controlled substances list by the Minister of Health on the proposal of the Commission for psychoactive controlled substances consisting of “representatives of the Ministries of Health, Education, Internal Affairs, Labour and Social Affairs, Defence, Youth and Sport, Culture, Justice, Agriculture and Veterinary Medicine, Local Self-Government, as well as recognized experts in the field of psychoactive controlled substances” (Article 8, paragraph 1 and Article 4, paragraph 1 of the Law on Psychoactive Controlled Substances). NPS do not pose a threat to public health either in Serbia or some other European countries. Yet, it is just a matter of time before NPS share in the drug market becomes significantly bigger. Therefore, it is necessary to take preventive measures and prepare for repressive measures from this time forth.

The competent ministries of some countries (the Netherlands, for instance) may temporarily ban the NPS trade until the legislator reaches the final decision.⁷¹ Likewise, the sanitary inspection in Poland is authorized to ban the sale of a substance for a limited period of time until necessary tests are completed.⁷² In this connection, it must be pointed out that when the reaction to NPS is in question, strictness, i.e. rigorousness of prescribed penalties is not of the utmost importance, but the promptness of reaction.

An ideal solution would be a legal regulation relating to all types of NPS. Blanket prohibition existing in Great Britain since 2016 is an example of such a regulation. However, the paper explains the shortcomings of general prohibition of all NPS. Such prohibition is inadequately defined, i.e. it is not quite clear what substances it refers to. There is a chance that it may be applied to the products not producing damaging effects as the traditional drugs. To put it simply, blanket prohibition is a disproportionate response to the emergence of NPS and its enforcement is connected with numerous difficulties. For instance, criminal prosecution for selling NPS producing minor psychoactive effect is unacceptable because it may lead to high trial costs and imposition of a disproportionate penalty. Furthermore, general prohibition may slow down scientific researches on new medications.

As already mentioned in the paper, blanket prohibition has a number of advantages compared to other legislators’ attempts to create the regulations with regard to NPS. The countries already enforcing this prohibition should continually conduct researches on the effects of blanket prohibition and if necessary, accordingly modify provisions regulating NPS. In our opinion, certain modifications are desirable since although very effective at first sight, simple regulations are not the solution for regulating complex social relations. Undoubtedly, NPS are a complex phenomenon.

Therefore, the fight against NPS requires the cooperation and interaction among the state’s agencies. In the aforementioned example from 1982 involving two lawyers “chemists”, the case was successfully solved by mutual cooperation among police, the agency fighting against illicit drugs, health workers, clinical toxicology laboratories, chemists and firefighters. The firefighters entered the suspects’ premises and inspected them since the suspects kept inflammable substances there and since the police did not have legal basis for the search.⁷³ Although each agency has in the possession the data adapted to its function, certain data are of the mutual importance. Hence, the information exchange among key subjects, as well as

⁷⁰ L. A. King et al., *Opus citatum*, p. 4.

⁷¹ B. Hughes, A. R. Winstock, *Controlling new drugs under marketing regulations*, *Addiction*, 11/2012, p. 1895.

⁷² P. Jablonski, A. Malczewski, *Opus citatum*, p. 14.

⁷³ H. L. Weingarten, *Opus citatum*, p. 595.

continual education is essential. Education is not important only for successful solving of cases, but for the protection of the officials having physical contact with NPS.

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NEW PSYCHOACTIVE SUBSTANCES – CONCEPT AND CRIMINAL LAW REGULATION

Summary

Drug abuse is one of the biggest problems facing all countries. It is enough to say that millions of people in the world annually lose their lives due to the misuse of various types of drugs. There is no unique concept of NPS in theory and practice. In the first part of the paper the author tries to find out what is meant by this term. The paper analyzes the relationship of NPS with the so-called traditional drugs. The author discusses the specifics in the NPS distribution. A significant part of the paper deals with the criminal law reaction to NPS, i.e. different ways of the legislators' reactions to the appearance of NPS in the narcotics market.

According to the definition in the Report of the United Nations Office for Drugs and Crime, NPS are psychoactive substances whose production, sale, possession, use, export or import are not limited in the Single Convention on Narcotic Drugs of 1961 and the Convention on Psychotropic Substances from 1971, but nevertheless are a threat to public health. The term "new" means that these substances might not necessarily have been produced recently, even though this is often case. The advantages and disadvantages of the legislators' reactions to the appearance of NPS in several countries have been considered in this paper. In this connection, we have analyzed the individual, analogue, generic and blanket bans of NPS.

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