Council of the
European Union

Brussels, 11 September 2018
(OR. en)

12024/18

EUROJUST 110
CATS 58
COPEN 287
EJN 34
CORDROGUE 68
SAN 263
COSI 188

COVER NOTE

From:	EUROJUST
To:	Delegations
Subject:	Analysis Report on current situation in judicial cooperation in new psychoactive substance and (pre)precursor cases (18 April 2018)

Delegations will find attached the Analysis Report on current situation in judicial cooperation in new psychoactive substance and (pre)precursor cases.

Current situation in judicial cooperation in new psychoactive substance and (pre)precursor cases

Analysis Report

18 April 2018

Table of Contents

1. Introduction

In 2015, Eurojust published a paper on (pre)precursors and new psychoactive substances (NPS) entitled *Judicial cooperation in cases involving (pre)precursors and new psychoactive substances (NPS)*. In 2016, Eurojust, jointly with the European Monitoring Centre for Drugs and Drug Addition (EMCDDA), published a booklet entitled *New psychoactive substances in Europe; Legislation and prosecution – current challenges and solutions.*

The purpose of this report is to follow up on the two previous publications by updating readers on the current NPS and (pre)precursor situation from a judicial perspective. Although legislative developments in different Member States have provided solutions for prosecuting NPS and (pre)precursor cases, some of the challenges identified in the past are still valid. The main issue remains keeping pace with the development of new substances and how to prosecute serious cross-border NPS and (pre)precursor cases when the produced or trafficked substance is legal in one or more involved Member States. This report focuses on the latest judicial developments and operational experience gained after the publication of the 2016 report on prosecuting NPS and (pre)precursor cases.

2. Background, scope and method

2.1. Background

On 10 July 2014, the Court of Justice of the European Union (CJEU) delivered a judgement, also known as the 'NPS Judgement' (C-358/13 and C-181/14). The judgement provided a definition of 'medicinal product', as it ruled that substances that do not have any beneficial effects on human health are not medicinal products. In practice, this judgement affirmed that medicine laws could no longer be used as a basis for prosecution of NPS cases. This situation created new challenges in prosecuting NPS, including cross-border judicial cooperation, since the requirement of double criminality was not fulfilled in relation to those countries in which the substance was legal.

The countries most affected by this judgement were Finland, France, Germany, the Netherlands and Spain.

2.2. Scope

After defining terminology, this report concentrates on three topics: (i) operational experience in prosecuting NPS and (pre)precursor cases, particularly cases involving other countries; (ii) some relevant judgements from the Member States; and (iii) legislative solutions chosen by the States to criminalise NPS. This report will also provide a short introduction to the new legislative instruments related to NPS at EU level, the so-called 'NPS package'.

2.2.1. Legal definition of new psychoactive substance (NPS)

The EU-level definition concerning **NPS** was not a simple one. **Framework Decision 2004**[1] **(FD 2004)** relied on the definitions established in other legislative acts when defining 'drugs'. It stipulated that the definition of drugs:

'*… shall mean any of the substances covered by the following United Nations Conventions: (a) the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol); (b) the 1971 Vienna Convention on Psychotropic Substances. It shall also include the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 concerning the information exchange risk assessment and the control of new synthetic drugs…'.*

The above quoted Joint Action[2] states that it:

'*… concerns new synthetic drugs which are not currently listed in any of the Schedules to the 1971 United Nations Convention on Psychotropic Substances, and which pose a comparable serious threat to public health as the substances listed in Schedules I or II thereto and which have a limited therapeutic value. It relates to end-products, as distinct from precursors…'.*

As part of the so-called 'NPS package', on 22 November **2017 a new Directive**[3] entered into force, amending FD 2004 by removing the above-mentioned definition and adding a new definition of NPS:

'*…a substance in pure form or in a preparation that is not covered by the 1961 United Nations Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, or by the 1971 United Nations Convention on Psychotropic Substances but may pose health or social risks similar to those posed by the substances covered by those Conventions;*'.[4]

As **Council Decision 2005**[5] outlines a procedure by which the Council may submit new psychoactive substances under control measures, the definition used there is also relevant, although it is only applicable '*for the purpose of this Decision*'. Council Decision 2005 defines NPS[6] as '*… a new narcotic drug or a new psychotropic drug in pure form or in a preparation;'.* To further clarify, the Decision defines a new narcotic drug as:

'*… a substance in pure form or in a preparation, that has not been scheduled under the 1961 United Nations Single Convention on Narcotic Drugs, and that may pose a threat to public health comparable to the substances listed in Schedule I, II or IV'*[7]*,*

1 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, Article 1(1)(b). Framework Decisions need to be transposed into national law. This instrument ceased to apply to the UK in 2014. It does apply to Denmark and Ireland.

2 Joint Action 97/396/JHA of 16 June 1997, concerning the information exchange, risk assessment and the control of new synthetic drugs, Article 2.

3 Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA. Directives need to be transposed into national law. Ireland is bound by this Directive, but the UK and Denmark are not.

4 Ibid., Article 1(1)(a) and (b).

5 Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, Article 8. This instrument does not apply to the UK. It does apply to Denmark and Ireland.

6 Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, Article 3(a).

7 Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, Article 3(b).

and defines a new psychotropic drug as:

'a substance in pure form or in a preparation that has not been scheduled under the 1971 United Nations Convention on Psychotropic Substances, and that may pose a threat to public health comparable to the substances listed in Schedule I, II, III or IV;"[8].

After the Council submits an NPS to control measures, Member States shall endeavour to take the necessary measures to submit them to control measures and criminal penalties.[9] Effective from 23 November 2018, this definition will be repealed by the new Directive of 2017[10] mentioned above.

Regulation 2006 on the EMCDDA[11] does not include a definition of NPS. However, the second instrument of the so-called 'NPS package', a Regulation[12] that entered into force on 22 November 2017 and will be applicable from 23 November 2018 onwards, refers to the above-explained definition in FD 2004 as it is amended by the new Directive 2017.

2.2.2. Legal definition of precursor and (pre)precursor

For **precursors**, the EU-level definition was somewhat simpler. **FD 2004** defines precursors as:

'any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988'.[13]

The articles of the **Regulation on drug precursors**[14] do not include a definition of precursors. However, the recital speaks of precursors as '… *substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances*...'. [15] The slightly later **Regulation on monitoring trade**[16] contains a virtually identical definition.

2.3. Methodology

The project brief approved by the College mandated the Drug Trafficking Project Team (TRCT) to produce an analysis report on good practises and challenges in prosecuting NPS and (pre)precursor cases, including a section on legislative developments.

---

8 Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, Article 3(c).

9 Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, Article 9.

10 Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA.

11 Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast). It is binding on all Member States and directly applicable.

12 Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances. It is binding on all Member States and directly applicable.

13 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, Article 1(2).

14 Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors. It is binding on all Member States and directly applicable.

15 Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, Recital.

16 Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, Article 1. It is binding on all Member States and directly applicable.

The TRCT and the Eurojust Contact Point for Synthetic Drugs formulated the following questions:

1) '*Do you have any operational experience in prosecuting NPS and (pre)precursors cases, in particular cases involving other countries? If yes, can you please give us examples and elaborate on the challenges encountered (e.g. legislative issues, legal obstacles, practical problems, etc.) and the solutions found to overcome them (e.g. new legislation in place, good practices, etc.)?*

2) *Were there recently any relevant and interesting judgments in your country with regard to NPS and (pre)precursors? If yes, please elaborate further.'*

This questionnaire was sent in June 2017 to the Eurojust National Desks and the Liaison Prosecutors of Norway and Switzerland at Eurojust, as well as to the members of the European Network for Prosecutors for Synthetic Drugs and Precursors (ENPSDP).

To encourage the Member States to reply, deadlines for replies were extended several times. The replies were received between June 2017 and March 2018. On 22 November 2017, the new EU-level legislative instruments came to force, which may have had an impact on the replies, as they may have solved some of the possible challenges and cooperation issues.

In total, 24 States replied to the questionnaire.

The following States replied: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Spain, Sweden, the UK, Switzerland and Norway.

Replies were received from four Member States after the NPS package came into force: Estonia, Finland, Poland and Slovenia.

Almost all of the most affected Member States replied to the questionnaire. Replies were analysed, and, when necessary, additional information was researched.

3. Experiences of judicial authorities

3.1. Operational experience

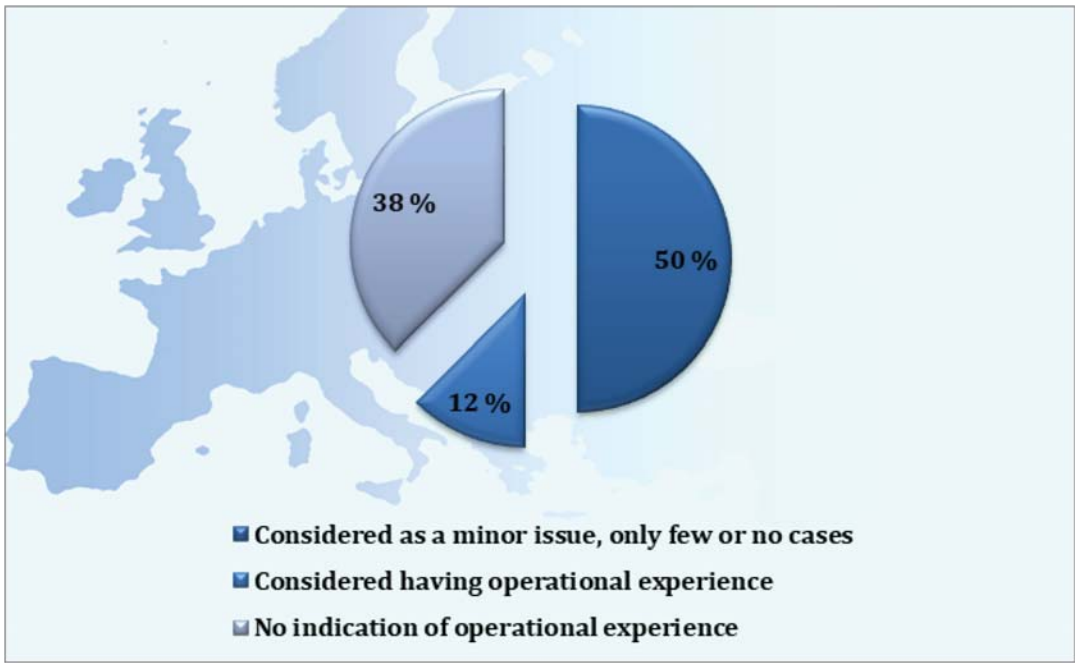
The first question in the questionnaire was:

'*Do you have any operational experience in prosecuting NPS and (pre)precursors cases, in particular cases involving other countries? If yes, can you please give us examples and elaborate on the challenges encountered (e.g. legislative issues, legal obstacles, practical problems, etc.) and the solutions found to overcome them (e.g. new legislation in place, good practices, etc.)?*'

Extent of operational experience

A significant part, ten out of 24 of the States had had **only a few or no cases** involving NPS and/or (pre)precursor substances. Two additional replies described the issue as minor or at a low level in the context of the national drug scene. Many different explanations for the lack of operational experience can be derived from the responses.

Chart 1: Operational experience of the judicial authorities



One of the most logical and obvious reasons is the lack of regulations stipulating a certain substance as illegal. As a result, these substances do not reach the criminal justice system. One respondent explicitly pointed out that the perpetrators keep an eye on current legislation and adapt their products accordingly. Also, few responses related to the exploitation of legal gaps by the perpetrators. One State explicitly noted that missing legislation had attracted the criminal activities to this State from a neighbouring State. Similarly, when a prohibition on possession, manufacturing, buying, selling, importing and/or exporting a certain substance is stipulated as an administrative offence only or by penalties from the low end of the range, these cases are not likely candidates for international legal cooperation.

Another logical reason for lack of operational experience is that NPS are not widely used, manufactured or traded in a State. One State mentioned low levels of consumption coupled with no production or high-level trafficking in NPS, while another State explained that their drug consumers preferred 'traditional' psychoactive substances.

The profile of the State in the consumer chain may also have an effect on the extent of its international operational experience. For example, one State identified itself as a transit State and noted that it had only had a few cases. Some other States also stated a particular profile, identifying themselves as either a manufacturing State or a destination State.

Two States, both of which noted that they had only a few cases, expressly noted that they had not had serious problems with international legal cooperation. Interestingly, one destination State for NPSs noted that the foreign colleague's willingness to cooperate depended more on how serious the problem of NPS is in their State than the legislation itself.

The role of Customs was noted in three replies. One State pointed out that the effect of budget restrictions and the resulting lack of manpower of the law enforcement agency affected the detection of NPS.

Issues in prosecuting cases related to synthetic drugs

Five of the 24 respondents pointed out the lack of legal basis barring criminal prosecution, mostly due to the slight modification of the substance, thus creating a substance that differs from that of the substance identified in the law.

The difficulties created by the legal regulations varying from State to State were mentioned in several responses. For example, different sources of regulation (criminal/drug laws versus administrative regulations) affect the possibility to use coercive measures. More specifically, lack of investigative measures because of a lower level of punishment was singled out as hindering prosecution. In addition, different levels of punishment affect the possibilities to surrender a suspect.

Conversely, three States explicitly mentioned international agreements as part of their domestic law.

Several respondents pointed out procedural and evidentiary difficulties. Two States mentioned the burden of proof of the knowledge of the perpetrators of the illegality of the substance as hindering prosecutions. In addition, establishing the correct form of intent – intent, conditional intent or negligence – regarding the objective dangerousness of the substance was noted to be cumbersome. Further, proving the intent of the perpetrator to sell the substance was problematic. One State pointed out the difficulties in proving that the suspect intended to use the substance as a narcotic. Lastly, one State noted that the status of a substance might change during the time of continuous act.

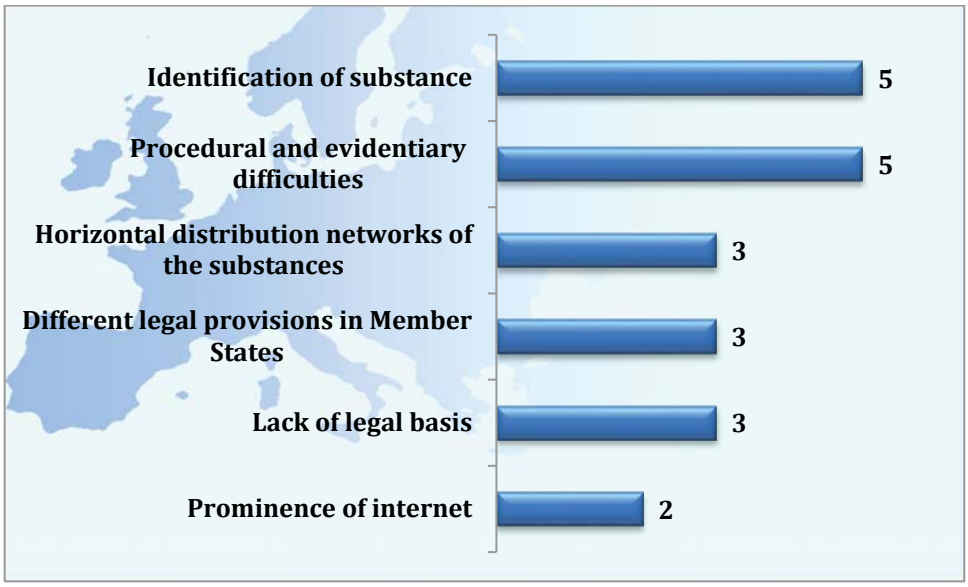
In the field of international legal cooperation, one State noted that the time-consuming procedure of requests for legal assistance was a consistent problem.

Issues making the prosecution more costly and/or cumbersome were also mentioned in several responses. For example, few States pointed out the difficulties related to the identification of the substance. One State mentioned that establishing the quantities of the substance was problematic, as the consistency and thus the purity changes in each production batch. One respondent pointed out the lack of knowledge regarding the dosages of the substance. In addition, some of the respondents indicated that adding to the difficulties in proving a case is the fact that some of the NPS are so new that reliable and objective information on their effect on human bodies or the overall level of danger they pose is not yet readily available.

Some respondents also pointed to the different organisational structure in the distribution of NPS. Instead of the typical hierarchical structure of distribution networks, distribution networks for NPS are horizontal, affecting both investigation and prosecution. Another feature of the distribution of the NPS is the prominence of the Internet, which also enables the identity of the perpetrators to be concealed.

One State noted that the prosecution is affected by the fact that when a new substance is prosecuted the court practice of the level of punishments is unclear until sufficient information of the substance is gained.

Chart 2: Most frequently mentioned challenges



3.2. Case law

The second question posed was '*Were there recently any relevant and interesting judgments in your country with regard to NPS and (pre)precursors? If yes, please elaborate further.*'

After the issuance of the 'NPS Judgement' on 10 July 2014, several States modified their legislation. As this is quite a recent development, at least one State explicitly mentioned that relevant case law has not yet developed.

One State noted that as NPS are treated like any other illegal drug, no relevant judgements exist regarding NPS only.

Finland was one of the five Member States that, prior to the 'NPS Judgement', relied on medical laws to prohibit NPS. After the CJEU issued the 'NPS Judgement', the Finnish Supreme Court issued decisions to guide the lower courts in dealing with NPS cases. In 2016, the Finnish Supreme Court gave its decisions on two cases relating to psychoactive substances. In both cases, the Supreme Court concluded that the obligation to interpret national legislation in accordance with EU law meant that the definition of medicinal products in Section 3 of the Finnish Medicines Act must be interpreted in accordance with the judgement of 10 July 2014 of the CJEU. Thus, substances that merely modify physiological functions, but do not have any beneficial effects on human health, cannot be defined as medicines. The listing of medicinal products by the Finnish Medicines Agency Fimea therefore does not have decisive effect when establishing whether the substances in question are medicinal products.

The Supreme Court concluded, in both cases, just as the District Court had, that the substances in question cannot be considered medicinal products. The charges were dismissed.

Case I: The Supreme Court judgement in Finland in 2016[17]

A person was prosecuted for smuggling medicinal products in Finland because he ordered gamma-butyrolactone (GBL) and other chemical substances from a web shop and had them delivered to Finland via post. At the time of the act, these substances were classified in Finland as medicinal products.

The District Court decided that the positive effects of the substances on human health were unclear based on the evidence presented at court. The evidence showed that the substances were used only for the purpose of intoxication and could not be seen as medicines, although they were listed as such by Finnish Medicines Agency Fimea. Therefore, the person could not be convicted of smuggling.

However, the decision to classify certain substances and include them on the medicinal product list explicitly mentions that the list of medicinal products is not exhaustive. In addition to the substances listed as medicines by the Finnish Medicine Agency Fimea, a substance that fulfils the description of medicine can also be considered medicine. The Supreme Court, therefore, decided that when assessing the medicinal nature of a substance, whether or not the substance was mentioned in the list of medicinal substances in Finland as medicine at the time of ordering the substance via the Internet was not important.

Most of the pharmacological and toxic effects of GBL are caused by its metabolite GHB, which is also known as ‘gamma’. GBL can be transformed into GHB simply by adding water to it. GHB, as well as sodium salt contained in GHB, are commonly used medicinal products on the market. On the other hand, GHB is also classified as a drug in Finland.

The CJEU judgement does not give an answer to the question whether a substance that does not have a positive effect on human health but the metabolite of which, or at least its salt form, is used for treating illnesses could be classified as medicine. The Finnish Supreme Court decided that, because the main use of GBL is as an industrial solvent, and the fact that the Finnish drug law was amended in 2014 following the judgement by the CJEU, GBL could no longer be considered a medicinal product, even though its metabolite GHB is used for medicinal purposes.

[17] KKO:2016:35.

In Finland, the 'NPS Judgement' also raised questions about the validity of the previous judgements passed by the Finnish courts based on the Medicines Act. The Finnish Supreme Court issued a decision to clarify this situation.

Case II: The Supreme Court judgement in Finland in 2017[18]

The Court of Appeal convicted a person of smuggling and medicine crimes in 2012 due to trafficking gamma-butyrolactone (GBL) to Finland. GBL was classified as a medicinal product at the time of the criminal acts. After the issuance of the 'NPS Judgement' by the CJEU, the person convicted by the Finnish Court of Appeal requested for a reversal from the Supreme Court, stating that the substances he had smuggled could not be considered as medicinal products and therefore the medicine law could not be used against him. He demanded dissolution of the judgement.

The Supreme Court decided that regardless of the decision it rendered in 2016 (see case illustration I), which concluded that GBL could not be considered as medicine, the decision of the Court of Appeal in this case in 2012 was not manifestly based on misapplication of the law because the medicinal nature of the substance was questionable at that time and the matter was legally open to interpretation.

In Spain, the National Court handed down a judgement in relation to (pre)precursors.

Case III: The National Court judgement in Spain in 2017[19]

The National Court sentenced two people to three years of imprisonment and fines for crimes against public health after importing PMK glycidate – a (pre)precursor to MDMA – from China into Spain and then shipping it to the Netherlands. An appeal for this sentence is pending in the Supreme Court.

Since the relevant provision of the Penal Code only referred expressly to those substances listed in the 1988 UN Vienna Convention against illegal traffic in narcotic drugs and psychotropic substances, the National Court needed to determine whether such provision was applicable to unlisted (pre)precursors.

The provision, however, also made reference to manufacture, transport, distribution, trade and possession of 'equipment' and 'materials' used to produce the listed substances, thus also criminalising preparatory acts.

The National Court found that PMK glycidate, as a (pre)precursor, was a material required to produce an illegal substance. The National Court concluded, therefore, that it was also subject to the application of the relevant provision relating to crimes against public health.

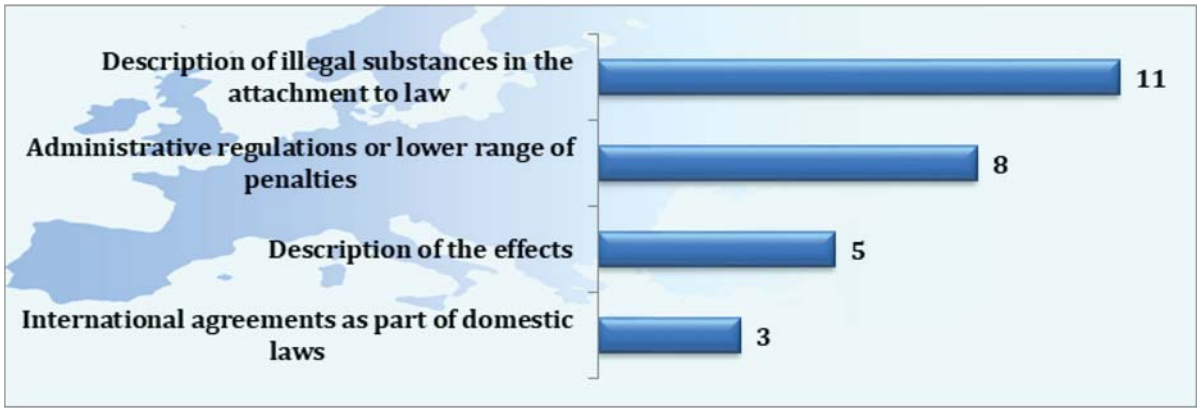
[18] KKO:2017:6.

[19] Audiencia Nacional, Sala de lo Penal, Sección 2, Sentencia 12/2017 de 12 de Junio de 2017.

4. National legislation/legislative solutions

Five types of legislative solutions for NPS could be extracted from the replies: 1) unregulated, 2) administrative/misdemeanour, 3) a listing of substances or categories attached to a law, 4) regulation by law, and, finally, 5) describing the effects rather than the chemical structure of the substance. These five solutions were not necessarily mutually exclusive.

Chart 3: Most frequently mentioned solutions



Many of the responses highlighted the fast pace of modification of the chemical structure of the substances, and the legislative difficulties rising out of this.

Four of the respondents noted that they had adopted new legislation in this area: in May 2016, October 2016, November 2016, and December 2014, respectively. One of these responses expressly noted that the ruling of the CJEU in July 2014 had prompted this new legislation.

4.1. Unregulated

The Netherlands noted that NPS are not punishable. The Netherlands is currently in the process of adopting related regulations.

Nonetheless, the Netherlands has taken a different approach to address the issue of NPS. In one case, for example, the fact that the suspect had not paid any income tax on the money he earned in the NPS trade was explored as a possible prosecution strategy. Therefore, instead of the traditional method of resorting to drug laws, the Netherlands is applying different laws altogether, such as, for example, tax laws and money laundering.

Another solution used to counter the legislative shortcomings was to prove that a substance that in itself was not illegal was used a part of a chain of making drugs. In such a case, the prosecutor could use a combination of drug laws and the element of a preparatory act as a basis for prosecution.

4.2. Administrative/misdemeanour

A solution used is to regulate NPS and (pre) precursor substances by administrative regulations or by a lower range of penalties, often combined with broadly defined offences. This solution may be used to capture those newly emerging substances that had not made their way into the laws concerning narcotics or lists attached to these laws. These types of solutions were mentioned in eight out the 24 responses.

The Slovak Republic applies administrative regulations to those substances not included in the drug laws. Those substances fall under a broad definition of 'other addictive substances' in administrative law, and are punished as administrative misdemeanours.

In Greece, if the drug laws are not applicable, prosecutors have used a combination of national pharmaceutical laws and Customs Code, both of which provide for administrative penalties.

In Latvia, criminal liability is linked to the amount of the substance and the purpose of handling it. An administrative penalty of a warning or a fine will be imposed when a 'small amount' is involved (excluding selling). However, the administrative penalty includes a warning to the defendant that if s/he is found to have committed an additional violation of this type during the following year, s/he will be held criminally liable.

4.3. Listings of substances or categories attached to a law

Of the responses received, 11 out of 24 explained that in their national legislation, NPS and/or (pre)precursors are regulated by a listing of substances or types/groupings of substances attached to a law but modified in a different procedure. The advantage of this solution is that modifying it when reacting to new substances is easier and quicker.

In Estonia, the law refers to a Ministerial Decree that has a list of substances considered illegal in an annex. For fentanyl analogues, for example, the list is an open group rather than specific analogues. In addition, in court practice, prosecutors have summoned experts and specially qualified persons/witnesses to provide testimony about the possible (limited) uses of NPS and therefore provide evidence that NPS was used for illegal purposes.

4.4. Regulation of the chemical structure of the substance by law

Two out of 24 respondents noted that NPS and/or (pre)precursor substances are regulated by law, either by listing the substances or listing the groups/types of substances.

Slight modifications in the chemical structure of a specific substance declared illegal maintains its effect but renders it outside the scope of the law. This problem can be overcome by describing the substances as groups or types of substances. Thus, applying the same control regime to all derivatives attributable to such group as to the one that would be applied to the main compound is automatically possible. For example, the New Psychoactive Substances Act of Germany penalises certain psychoactive drugs that are identified by their affiliation to certain substance groups (e.g. Cannabinoids, Cathinones, Phenethylamines).

4.5. Regulation by describing the effects

Five out of the 24 States responding noted that their legislation identified NPS by describing the effects of the substance on human beings, at least as part of the definition, but in some cases combined with a specific chemical identification.

The legal solution adopted by the UK is another example of a solution to overcome the problem of the slight modifications in the chemical structure of a specific substance declared illegal. The UK's Psychoactive Substances Act defines the illegal substances by their effect on human beings rather than the chemical structure of the substances. Section 2(1) of the Act defines a psychoactive substance as any substance which:

'*(a) is capable of producing a psychoactive effect in a person who consumes it, and (b) is not an exempted substance (see section 3).*"

Section 2 (2) of the Act further clarifies that:

'*For the purposes of this Act a substance produces a psychoactive effect in a person if, by stimulating or depressing the person's central nervous system, it affects the person's mental functioning or emotional state; and references to a substance's psychoactive effects are to be read accordingly*.'

5. New EU legislative instruments

As mentioned in subsection 2.2, two new EU-level legislative instruments were adopted in 2017.

The first instrument is Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA. The Directive entered into force on the day following that of its publication in the Official Journal of the European Union, i.e. 22 November 2017. The deadline for the transposition of the Directive into national law in the Member States is 23 November 2018, which is also the date that the repeal of Decision 2005/387/JHA on information exchange, risk assessment and control of new psychoactive substances will come to effect.

The second instrument is Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances. This instrument also entered into force on the day following its publication in the Official Journal of the European Union, i.e. 22 November 2017. However, it will be applicable from 23 November 2018 onwards.

The effects of these new regulations on judicial cooperation remain to be seen.

6. Conclusions

From a judicial cooperation perspective, the NPS and (pre)precursor situation has remained similar to what it was two years ago.

Most countries did not report having significant operational experience in prosecuting NPS and (pre)precursor cases. Some countries use administrative law either as a sole means to regulate NPS or as an additional regulatory base to cover the gaps caused by the creation of new substances. Solely describing the effects of the substance on human beings was a legislative technique used by one State, but many others had included this type of description in their legislation, in addition to the chemical structure of the substance.

The most frequently mentioned challenges for judicial authorities in NPS and (pre)precursor cases were identification of substances and procedural and evidentiary difficulties. Horizontal distribution networks, often facilitated by the Internet, pose as much of a challenge as different legal provisions or lack of legal basis in the Member States. In addition to the regulatory solutions, the importance of the role of Customs and using international agreements as part of domestic laws were highlighted as good practices. The NPS package was adopted in 2017, so operational experience is not yet available to assess how it will influence prosecution of NPS and (pre)precursor cases, judicial cooperation and best practice.

Eurojust would like to take this opportunity to remind the readers of this report of the assistance it can provide in the field of judicial cooperation in cases falling within its mandate. Involving Eurojust in a case early on will facilitate, for example, finding the relevant counterpart in another State and receiving information on the legislation of another State. Coordination meetings can be organised to bring together the investigative and judicial authorities of the States involved to discuss issues and find solutions tailored to each specific case. Joint investigation teams (JITs) can be established to support investigations by, for example, facilitating the exchange of evidence. Thus, Eurojust encourages the authorities involved in NPS and (pre)precursor cases to contact their Eurojust National Desks to discuss the possibilities available in their specific cases.