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Plea for a New Approach in Combating Designer Drugs

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Introduction

Hungary is a small central European country with a population of roughly 10 million. It's a member of the EU and NATO – nowadays has become both a transit-country and a consumer country for illicit drugs.

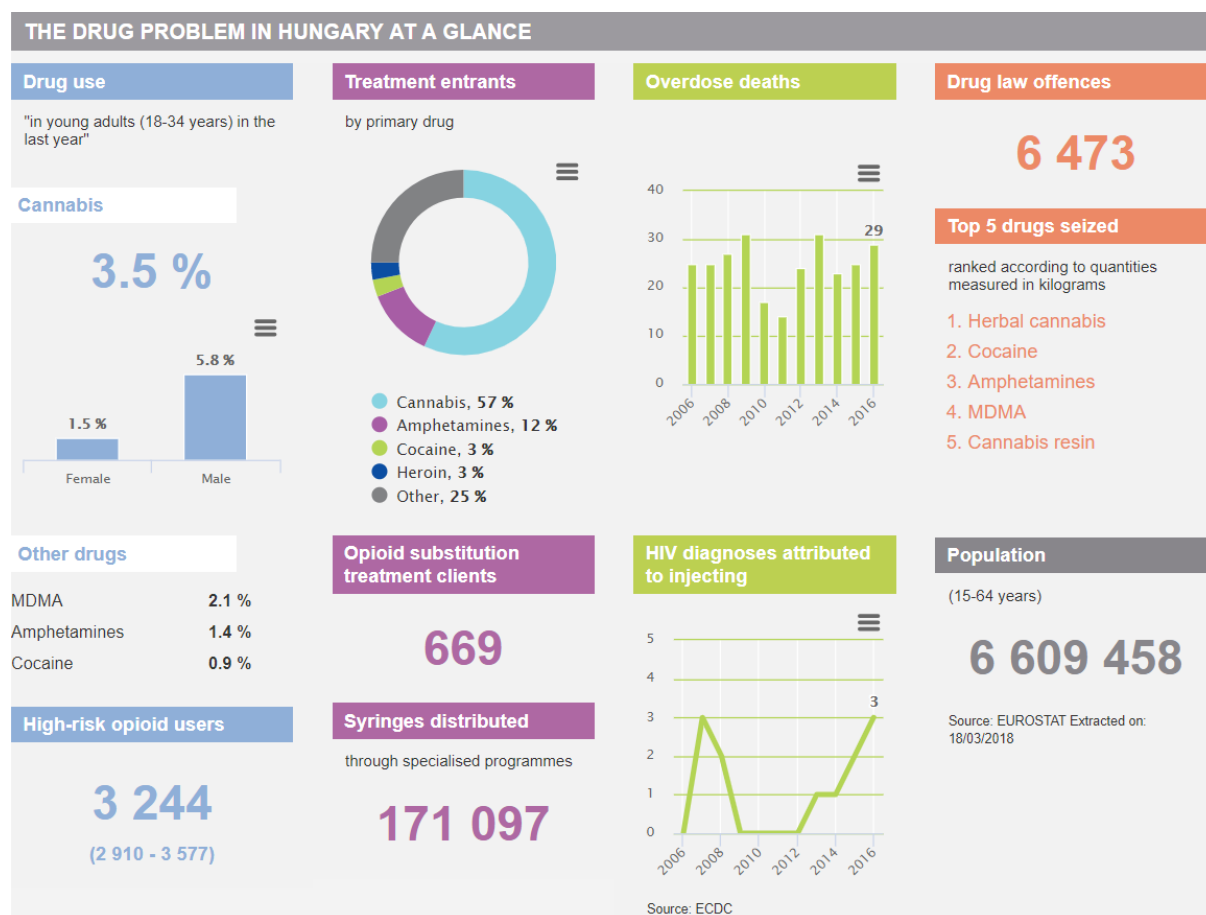
With reference to the past, drug consumption had been fully suppressed following the end of the Second World War, and was never addressed in public discourse, because communist ideals held that people did not need any drugs. However, despite this notion, some drug consumption indeed prevailed – beside the mass consumption of alcoholic drinks. The main patterns of consumption then included drinking poppy tea (an infusion of poppy seeds that produces opium and is consumed for its narcotic effects) or the use of toxic inhalants such as solvents or aerosols, including paint thinner or adhesives. After the fall of communism in Hungary, routes to western and northern Europe suddenly opened, and Hungary became an important transit country. A few years later, consumption widened and the production-based drug industry was born in Hungary. According to seizure statistics of law enforcement authorities, it is possible to measure whether a country is a transit or target (destination) country. Analysis of such statistics has revealed an increase in demand for illicit drugs and the emergence of different locally produced drugs, in addition to already existing, ongoing transit activities of Hungarians.

As an EU member, Hungary joined the network centered on drug focal points and since then, the collection and analysis of data occurs based on the systematic approach of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA). This also means that information and statistical data from Member States, including Hungary, is collected by using validated European standards and methods with the goal that the data will be comparable, comprehensive, and can accurately and truly represent European tendencies. Regarding the statistics in this report, I apply the content of the latest Drug Report on Hungary (2017).

Drug Use in Hungary

In Hungary, cannabis is the most commonly used illicit substance among the general population and its use is concentrated among young adults aged 18-34 years. The most recent data shows a decrease in cannabis use among young adults in the last year. Against this background, use of MDMA/ecstasy, cocaine, and amphetamines has increased continuously from 2007-2015. Following the emergence of new psychoactive substances (NPS) in the Hungarian drug market, these substances, which mainly belong to groups of synthetic

cannabinoids, synthetic cathinones or amphetamine derivatives, have become as widespread as “classic” illicit drugs, in particular among young adults.¹



Source: European Monitoring Centre for Drugs and Drug Addiction; Hungary 2017

Drug use among students is reported in the European School Survey Project on Alcohol and Other Drugs (ESPAD). This study has been conducted regularly among 16-year-old students in Hungary since 1995. The results of the 2015 ESPAD survey confirmed that cannabis remains the most commonly used drug among this group, albeit at a lower level than in 2011, and that lifetime use of cannabis among Hungarian students is somewhat lower than the ESPAD average (35 countries). The prevalence rates of lifetime use of illicit drugs other than cannabis and NPS are similar to the ESPAD averages. In contrast, more Hungarian students reported having consumed alcohol within the last 30 days, and the reported frequency of heavy episodic drinking was also higher than the average for all countries.²

After 2008 Europe witnessed a huge influx of new synthetic drugs, such as cathinone-type stimulants and synthetic cannabinoid receptor agonists, partly replacing classic illegal drugs. But unlike in most parts of Europe, where these new substances were primarily considered

¹ http://www.emcdda.europa.eu/countries/drug-reports/2018/hungary/drug-use_en

² http://www.emcdda.europa.eu/countries/drug-reports/2018/hungary/drug-use_en. Se further analytics and findings of empirical research BORDA, VIKTÓRIA – VOJTEK, ÉVA: Az új pszichoaktív szerhasználat kérdése kapcsolathálózati megközelítésben [Novel psychoactive substance use and network-based social work]. Szociális Szemle 2017/1 45-61

party drugs, they became very popular among marginalized heroin and amphetamine abusers in Budapest. By 2011, heroin almost completely disappeared from the streets and most people shifted to injecting cathinone, or, lately even more so, users have started smoking SCRAAs (synthetic cannabinoid receptor agonists), also called synthetic marijuana or “spice”, sometimes dubbed “magic tobacco”.³

Legal Environment

Hungary has a strategy against drug consumption issued at the level of the Parliament in 2013 (for the period 2013-2020). The National Anti-Drug Strategy is entitled “Clear consciousness, sobriety and fight against drug crime”. It is synchronous with the policy strategies and initiatives directly related to its reference areas – particularly in the policy areas concerning the maintenance of public health and mental health and the youth policy area. Central to this strategy is a drug-free life model and the communication of health as a basic value, while with regards to the treatment of drug users, it promotes a recovery-based approach. These are the words of the Strategy, but the reality is different.

Critical assessment of this approach shows that the policy dropped the former reduction-oriented national drug strategy and moved toward applying different tactics based on zero-tolerance towards drug users. In reality, the concept of harm reduction became foul language for this government, and in Hungary, such policies and programs have been terminated in many cities in the last few years (especially needle and syringes programs).

Criminal Law

In Hungary, illicit substances are criminal law related issues governed by Act C of 2012 on the Criminal Code, which covers trafficking, possession, incitement of minors to use drugs or such substances, assisting manufacture or production, and extends to drugs, precursors, and new psychoactive substances (NPS), as well as performance enhancers (doping). Consumption was reintroduced as a criminal offense, punishable by up to two years in prison (it had been abolished from the 2003 Criminal Code). Possession is still punishable by up to two years in prison if it involves small quantities, but other penalties are now one to five years for a basic offense, increasing to two to eight years if the offense is committed under certain circumstances, and 5-10 and 5-15 years if the offense involves a larger quantity of drugs. Similar sentence ranges can be ruled for offenses involving the supply of drugs, and even longer terms of imprisonment – 5-20 years, if certain circumstances are involved, and offenders may receive life imprisonment if large quantities are involved. In 2003, various lower maximum penalties for offenses committed by drug users were repealed in 2003; however, the court may take the perpetrator’s drug use into consideration when imposing punishment.⁴ The option to suspend prosecution in the case of treatment is available to offenders committing drug law offences that involve only small quantities of drugs (i.e.

³ SÁROSI, PÉTER: The social roots of the new drug scare in Budapest. 2017. <http://politicalcritique.org>

⁴ See more IGNÁ CZ, GYÖRGY: A kábítószer és az új pszichoaktív anyag fogalmának aktuális jogértelmezési problémái [Actual interpretation of the notions of drugs and NPS], *Jogelméleti Szemle*, 2018/2 84-98

consumption, acquiring drugs, possession, and production, manufacture for personal use); this is not available within two years of a previous suspension.⁵

To control NPS in Hungary, a government decree set up a formalised rapid assessment in 2012. This allowed the inclusion of NPS in a Decree 55/2014. Inclusion means a temporary control for one year with the possibility of an extension of one year (or until new information emerges). Accordingly, a new section of the 2013 Criminal Code provided for a punishment of up to three years in prison for manufacture and (since January 2014) one to five years for supply and up to three years for possession of more than a small amount of NPS ('small amount' was reduced from 10 g to 2 g in 2017). The section penalizing the incitement of minors to use 'a substance or agent that has a narcotic effect but is not classified as a drug' has been retained, although the maximum penalty has been reduced from three to two years.⁶

The possession and distribution of drug precursors is also punishable under Hungarian criminal law. Generally, drug precursors are chemical substances that are used for the manufacturing of illicit drugs. However, in most cases chemicals used as drug precursors have primarily multiple legitimate and important purposes (e.g. in the synthesis of plastics, pharmaceuticals, cosmetics, perfumes, detergents, or aromas). This is one of the main factors for the failure of traditional approaches aimed at the reduction of drug supply.

Challenges

The recent, yet increasingly widespread phenomenon of users consuming new – often unknown – psychoactive substances has had its effects in Hungary, with such trends appearing rapidly without delay already in the late 2000's, just as in western European countries.

"The new designer drugs significantly appeared in Hungary in 2010, of which the mephedrone has become the most widespread. The increase in mephedrone use has already been shown by the 2011 ESPAD survey, the incidence of mephedrone use among the 10th-grade students in Budapest has been 10.2%. Mephedrone has been prohibited since 1 January 2011 but several other, chemically similar substances have appeared that are legal and can be purchased through the internet or in specific shops, and the effect of which resembles that of the stimulants. The substances sold on the internet are placed on the market as substances not appropriate for human consumption but the only known use of these substances is consumption as a drug. Based on researches regarding the substance abuse pattern of new substances, it can be said that the low price and easy accessibility have been the primary

⁵ See http://www.emcdda.europa.eu/countries/drug-reports/2018/hungary/drug-use_en Criminal law analysis especially: ROMPOS, ÉVA: Designer drog - új pszichoaktív anyag – kábítószer A terület jogi szabályozásának a változása, hiányosságai és azok hatása a vegyészszakértői tevékenységre. [Designer drugs – NPS – Drugs: Changing legal framework and the work of experts of chemistry], Doktori Műhelytanulmányok 2017, 285-295; JÁMBOR, GELLÉRT: Az új pszichoaktív anyagok megjelenése, elterjedése és az új jelenséggel szembeni lehetséges büntető eljárásjogi és kriminalisztikai válaszleépések [NPS and state responses by criminal procedure and forensic science] Themis 2014 / 12 89-151

⁶ See http://www.emcdda.europa.eu/print/countries/drug-reports/2018/hungary/drug-laws-and-drug-law-offences_en

reasons for their incidence, in addition to the novelty effect and assumed lower risk due to their legality.”⁷

The structure of drug consumption changes rapidly, counteraction from law enforcement and criminal law policy makers has little or no effects and treatment is often useless or lacks proper methodology. Social consequences are also enormous: new psychoactive substances, the “legal highs” are often much cheaper than alcoholic beverages, and consumption of these substances easily replaces alcohol in underdeveloped, poverty-ridden, marginalized communities.⁸

Contrary to the Anti-Drug Strategy of the Hungarian Parliament, government and local municipalities do not have any supported plans or specific strategies to combat the misery of these communities where zombie-like drug users (poisoned by the mostly unknown substances) roam the streets. Civil organizations and other NGO-s do not receive funding for dealing with these issues, and are often hindered in their efforts due to administrative obstacles. Moreover, the harm reduction philosophy is not part of the national strategy, therefore there are no accessible and available harm reduction programs for drug users. Service providers are simply afraid that if they go to an area that has received so much public attention, they will simply be blamed (Sárosi) and shut down.

Although the dominant approach is the policy of law and order, it is clearly no suitable for dealing with such complex problems. Such approach treats the symptoms (e.g. arresting drug users), rather than identifying the root cause of the problems and trying to find appropriate solutions.

The need for ongoing restructuring of drug use policies especially with regard to “legal highs” is a clear matter of fact, as is questioning the usefulness (effectiveness?) or counter-productiveness of the government’s traditional conservative (criminal law) approaches. I think we need new answers to these issues involving drug consumption. To be more precise, we need new answers to how we could suppress the supply of the “legal highs” – as decreasing demand is not an issue to be addressed through legal regulations.

I hereby invite you to take part in a new discussion about offenses involving so-called “chemical crimes” – which have grown to become increasingly common with the emergence and spread of “designer drugs” and “legal highs”....

Combatting new „chemical crimes” – a general approach

Chemical crimes are the new challenge of global criminal law systems and law enforcement regimes. This challenge is a special one and is hardly to combat by traditional means of criminal law and it cannot be targeted and cannot be suppressed by the usual criminal law weaponry.

Modern chemistry is essential for our societies and it triggers development in every field of our life, we need the innovations and the new discoveries of chemists in order to make our life

⁷ Anti-Drug Strategy, 2013-2020; 14

⁸ Sárosi reported that „one portion of magic tobacco costs 500 HUF (1.8 USD), much less than alcohol products. As synthetic cannabinoids are regularly brought under control and put on the list of new psychoactive substances by the government, drug designers are in a constant hunt for new substances, imported from Asia.” Sárosi (2017) see above.

easier, simpler and healthier. Both state agencies and non-governmental organisations and also the independent research centres consume huge amounts of money to finance the science of the chemistry. We are interested in new technologies and new substances, which can be used for peaceful and legal purposes. However, chemistry in its narrow sense is neutral. It does not differ whether or not the purpose of the outcome of chemical designing is illicit. The producers of chemicals generally operate in a legitimate environment, even the synthetic manufacture of narcotics (which anyway has no legitimate use) is composed of chemical processes, which could be not prohibited in their single steps. But many newly designed substances may become useful. Or many were originally discovered and published in the course of legitimate research for legitimate purposes. Many substances have not (yet) completed a full product development cycle („failed pharmaceuticals”) and have not been approved for consumption.

The chemical processes and syntheses always follow the same rules and the same principles of nature, and so are the chemical results neutral from a scientist's point of view. The main question is rather what to the result of chemistry will happen, to what purpose the substance or the method will be used. To put it simple: the purpose of use can be lawful or not. Using new substances as narcotics, as doping or as chemical weapon or using them for counterfeiting medicines or food are unlawful purposes. The reasons for which the societies label some types of use as unlawful and others as lawful are really colourful. In case of narcotics and psychotropic substances (and medicines with similar active substances), our societies follow public health reasons and also – some countries – protective goals on individuals. In case of doping, besides the public health interests, we underline the fairness of the competition in sport as a brick stone of common cultural heritage. The chemical weaponry is prohibited – for example – because of the high risk of uncontrolled non-expected damages. Chemical counterfeit of foods and drinks is unlawful because it contains the risk of consuming uncontrolled substances, which can be dangerous for human health, and the risk cannot be decreased by other means. It can be also connected with aspects of protecting intellectual property rights like in case of medicines as well. The use of fake medicines is unlawful because of public health and property rights issues. And generally, in case of fake products, which make the false impression to be original, the trust of consumers is also broken.

How can the law fulfil the need for protection of these different interests? How can the law react on the very different unlawful purposes? Barely, as a matter of fact. It is important to understand that the illegal or unlawful purposes do not influence the production procedure, I mean, the chemistry itself. The distinction made upon the different purposes has its impact only on the level of legal responses concerning the use of these originally neutral chemical results.

We can state that the illicit purpose of use of certain chemicals creates the field of “chemical crimes”, right in the moment when the use gets prohibited by the law. As a consequence, the legal response on the illicit purpose of use necessarily reacts upon the chemistry itself: if the use of something is unlawful, the law tries to expand the restrictions not only on the behaviour connected to the use (like trading, trafficking etc.) but also on the chemical processes, I mean, on the production of such substances. But this step could constitute a real conflict between fundamental interests of the modern society: between the interests of research and industrial innovation and science for good purposes and that of suppressing risk of dangerous

substances. The risk shall therefore be suppressed, and the caused damages shall be reduced by running different control systems so that the international community can avoid braking down research and innovation of chemistry.

The chemical crimes have different types and the control systems of chemicals in a broader sense both on global level and in the single countries are different. The narcotics and psychotropic substances are subject to their own specific international control system based on UN conventions and on internationally recognised regulatory lists of illicit substances. Use and any other conduct affecting them shall be defined as criminal offence in the signatory countries and shall be prosecuted. Chemical weapons are suppressed also by international conventions and their use (production etc.) establishes an international crime. The production and use of substances with doping effects is controlled by international and national anti-doping agencies. Faking medicines falls under the scope of the Medicrime convention, which stipulates many criminal law obligations for the signatory states within the Council of Europe. But, as far as I know, fake food does not fall generally under any control regime, only in case of dangerousness and only among the MS of the European Union. Therefore, I am convinced that, also in case of falsified food, we need an effective control system in order to avoid public health risks and damages. I would like to invite you to a common brainstorming: let's think together how to design an effective control system to protect the citizens from the "Gentle Killer".

The aforementioned international control systems themselves are regulatory systems in their nature, and these systems go often with criminal law prohibitions hand by hand. This connection seems to be inevitable and highly necessary because it gives power to the domestic law enforcement authorities to proceed against actors of chemical crimes and it represents legal entitlements to punish the criminals and to seize or confiscate the illegal substances. In the same time, this basic criminal law approach put a limit to the effectivity in the practice. Why I am saying this?

In countries, where criminal law concept is based on the mens rea principle, which means that the liability for criminal offences presupposes the mens rea of the perpetrator, the simple breach of the regulatory rules cannot establish criminal responsibility. For instance, the fact that somebody is in possession of narcotics or fake medicines, is not enough for any conviction generally. The perpetrator's intent (mens rea) shall be also proven during the investigation and the trial, which is a difficult issue of evidence. Maybe you know also examples from your country, which show acquittals or even not triggered criminal procedures because of the lack of sufficient evidence. In my country, such situation occurs often in connection with the subjective side of the offence, that is in connection with the means of evidence regarding mens rea. Moreover, if we take a look into situations where the control system is not at all developed (like in case of fake medicines or foods or designer drugs), the law enforcement authorities have no right to proceed because the suspicious substance or product found by the authorities is not prohibited by law.

Thus, we need to walk another way. We need to establish a new approach of suppressing dangerous substances. We don't need to lose our faith in criminal law solution but we shall not overestimate its impacts. The idea I would like to offer you was born in combat against designer drugs, which are in a continuous chemical development and therefore not touchable neither by the usual international control systems nor the national legal regimes. Therefore,

this example could be useful and fruitful also in the combat against dangerous foods and suspicious medicine products. The concept is already introduced in some countries and is supported by a very famous Hungarian pharmacologist, Prof. Szendrei,⁹ whose expert team I have the honour to belong to. According to this concept, we need to follow a regulatory regime, which is based on the concept of controlled and therefore lawful chemistry. The core element would be the principle that chemicals as such are not subject to free manufacturing, use and trade (etc.) because of their inherent dangerousness on human health. The chemicals shall be treated as risky substances (harmful chemicals) unless the non-dangerousness of the given substance is proven. With such a system, the society could enhance the security level on the field of substances not yet known in the food market, just like it is the case regarding non-listed designer drugs. The law enforcement authorities (or special task forces against dangerous substances) would have the right to require the owner or possessor of the substance or the person who has it at his/her disposal (for example at the border or in case of search) to prove its non-dangerousness. To put it simple, the authorities are entitled to require justification why to be in possession of that substance. If there is no legitimate purpose (research, production etc.), the authorities would have the right to seize the substance because of the risk of unknown dangerousness. This concept prevents the risk of unknown bad effects of new substances or food products with unknown components. This solution can be connected with administrative sanction as well and if there are already evidences indicating an intentional offence, also the criminal procedure can be triggered. But in such a case, the criminal law reaction has only complementary character.

Well, I know, our concept calls for more administrative power for the authorities. And please keep in mind, I am not pleading here for abolishment of the criminal law instruments. But we have to understand that criminal law answers have to comply with the principle of legality, and this requirement prevents criminal law from being effective. Effective prevention requires therefore the means of administrative law. We have to see the burden of unknown shall not be carried by the individuals. Our legal systems shall minimise the risk of serious consequences following from unknown and uncontrolled substances. If we need to change our mind, we shall do it.¹⁰ For the sake of our societies and of their members.

⁹ SZENDREI, KÁLMÁN – DOMONKOS, VERA – HUNYADI, ATTILA: Új pszichoaktív szerek Európában – a dizájner drogok. 1-2. rész [NPS in Europe – Designer drugs] *Gyógyszerészet* 2012 / 6 357-364 and 2012/7 414-423

¹⁰ This research was supported by the EU-funded Hungarian grant EFOP-3.6.1-16-2016-00008.