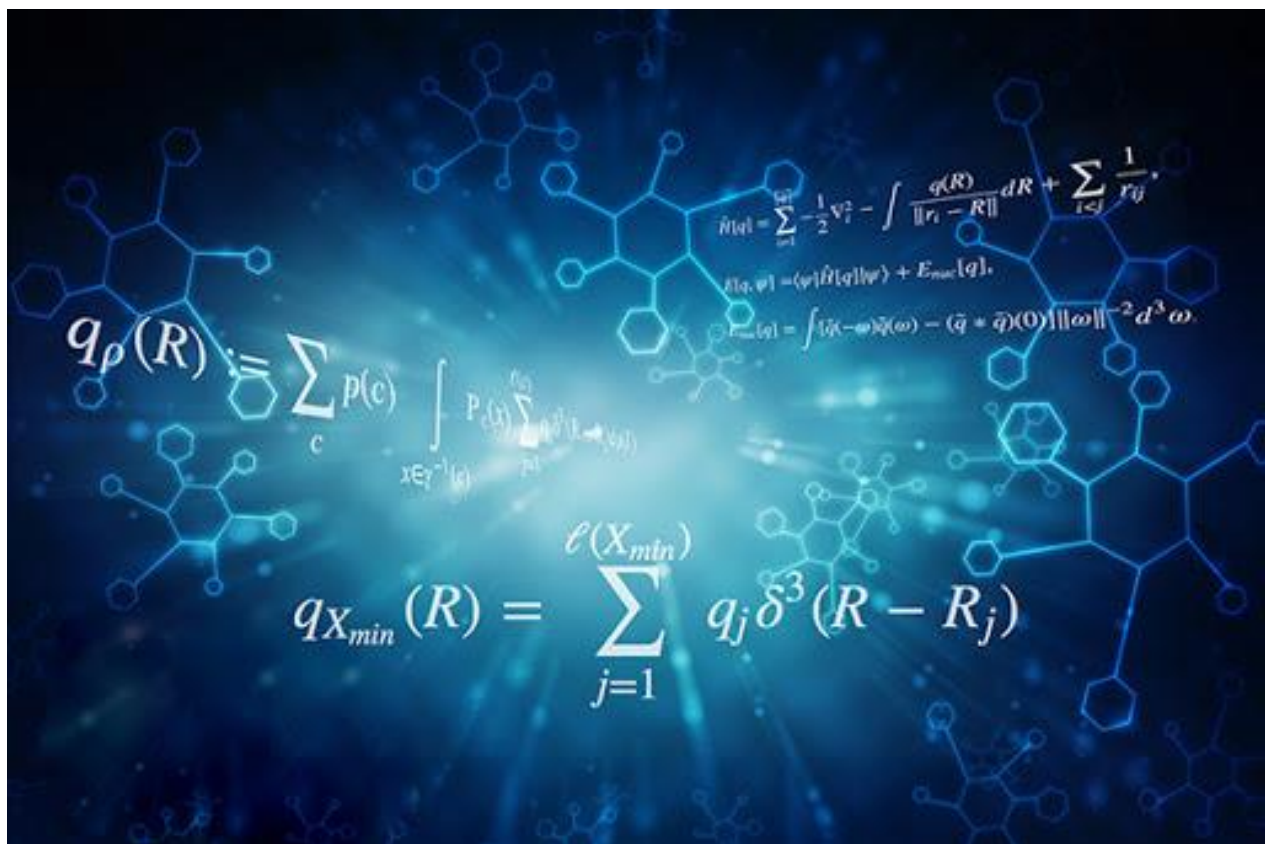


Response of the joint importers and distributors of psychoactive substances to the proposal to amend the Dutch Opium Act in connection with the addition of a third list with the aim of combating the production of and trade in new psychoactive substances and some other changes that has been submitted for consultation on March 9, 2020.



April 10, 2020

Introduction

With the proposed amendment to the Dutch Opium Act, designer drugs and natural substances that are still legal under the Dutch Opium Act are brought under a substance group ban. The joint importers and distributors of psychoactive substances believe that the proposal, the accompanying explanatory memorandum and the basis for the proposal raise some fundamental questions, which will be further discussed below.

We assume our input will be involved in the further assessment of the usefulness and necessity of this proposal and we would like to discuss alternatives for a substance group ban with the relevant ministers.

Alleged health risks

According to the government, the proposal primarily aims to warn (future) user of new psychoactive substances about the health risks associated with these potentially very dangerous substances. At the same time, the user is made aware of the punishability of possession of these substances.

There is no necessity for this, especially now that the recently published National Drug Monitor of the Trimbos Institute has shown that the use of new psychoactive substances is rare in the Netherlands, with the exception of the substances 4-FA and 2C-B.

“Various studies show that the agents 4-fluoramphetamine (4-FA) and 2C-B are the most commonly used NPS. In 2018, 0.9% of adults in the Netherlands had used 4-FA in the past year. The second most commonly used drug in the past year has been 2C-B (0.6% of the adult population in the Netherlands. There are signals from other sources (see DIMS and Drug Incidents Monitor) that the use of 4-FA has decreased since warnings for the risks at the end of 2016 and placement on list I of the Opium Act in 2017. The use of other NPS (mephedrone, synthetic cannabis, methoxetamine and 6-APB) is considerably lower at 0.1-0.2% than that of 4-FA and 2C-B.”ⁱ

These figures show that the total use of new psychoactive substances in the Netherlands consists almost entirely of these two substances. The substance 4-FA was placed on list I of the Dutch Opium Act in 2017 and the substance 2C-B has been included in the Dutch Opium Act since 1997. So both drugs are not new psychoactive substances, but hard drugs. Possession, production and trade of these substances has already been criminalized. In addition, according to the Drug Incidents Monitor, there are few incidents with new psychoactive substances, except with 4-FA.

The question is whether it is justified to take such a far-reaching measure, such as the introduction of a substance group ban, if research shows that hardly any new psychoactive substances are used in the Netherlands and that there are few incidents related to new psychoactive substances.

In the explanatory memorandum, the government acknowledges that “not much NPS are being consumed in the Netherlands”. In addition, there is no evidence that the “health risks associated with these potentially very dangerous agents” will actually materialize in practice. As the government itself indicates in the explanatory memorandum, “these substances may entail a health risk unknown to the user. The precise health risks of these new substances have not yet been identified. However, it is plausible that they can cause health damage. It is therefore desirable to take measures based on the precautionary principle.”

This goes against the rationale of a ban on certain substances, namely that the ban is intended to limit damage from drug use. In order to establish this, a risk assessment must first be carried out before a specific product can be banned. ⁱⁱ

System of the Dutch Opium Act

The system of the Dutch Opium Act does not allow any action to be taken on the basis of the precautionary principle. Pursuant to Article 3a, second paragraph, of the Dutch Opium Act, substances can only be added to list I or list II if it has been shown that these substances

- 1) influence human consciousness AND
- 2) when used by humans can lead to damage to his health AND
- 3) cause damage to society.

Only if these three cumulative criteria are met can substances be added to List I or List II. This not only concerns health risks, but also damage to society and the fact that these substances influence human consciousness.

The new Article 3aa of the Dutch Opium Act knows no such limitation. According to this article, a substance group may be added to the list IA belonging to the Dutch Opium Act, if one or more substances that form part of that substance group are on list I or are added to list I. In other words, once a drug is on List I of the Dutch Opium Act or is added to List I, the entire substance group can be added to List IA.

In the proposal, the government appointed three substance groups, but once the change has been implemented, tens, if not hundreds of other substance groups could be added to list IA. This puts thousands of substances under the scope of the Dutch Opium Act, including those that do not influence human consciousness, do not pose health risks and do not cause damage to society. The government acknowledges this in the explanatory memorandum.

“It is not certain that all substances in the prohibited substance groups will actually be harmful to human health. However, in view of the precautionary principle, it is justified to ban substances as long as it is unclear whether they are harmful to health.”

Substance groups will also contain substances that do not have a psychoactive effect, are not harmful to health or even have a beneficial effect. This includes medicines, nutritional supplements and nutritional components. These substances will also be covered by the substance group ban, because all substances that fall under a certain substance group are considered to be potentially dangerous. No distinction is possible within the substance groups and there is no possibility to exclude certain substances from prohibition.

In 2012, the RIVM already warned against the fact that among the many possible analogues in a clustered substance group, medicines, food components and other useful substances may also be included. If all (possible) chemical analogues in a certain substance group are considered to be illegal, explicit exceptions must be made for useful substances in the Dutch Opium Act.ⁱⁱⁱ That has not happened.

Another problem of a generic approach is that substances with a small difference in chemical composition often have a different effect and sometimes even have an opposite effect. As a result, a substance group ban has the effect of a shot hail: you hit the target, but also things that are out of sight. Useful and non-hazardous substances will also become illegal as a result of the ban. A good example is anandamide, a cannabinoid naturally present in chocolate. Due to the substance group ban, these products may also fall under the scope of the Dutch Opium Act. It is completely unclear how these products will be dealt with. No attention has been paid to this in the explanatory memorandum.

Research

The government attempted to disrupt the activities of the chemical industry and research institutions as little as possible by including various options for exemption in the proposal. Other countries, like the US, UK and Germany, have adopted a similar approach. However, there are enough cases where a substance ban has seriously hampered research, despite the possibilities of working legally with controlled substances.^{iv} In other countries, research into the development of new medicines have been halted due to the introduction of a substance group ban.^v In the UK, studying an opium law drug takes many years of bureaucratic preparation and the cost of research is estimated to be about ten times the level of comparable studies with “legal” drugs. Financing such studies also presents tough challenges. Due to the stigma attached to illegal drugs, it is much more difficult to obtain funding for such studies.

The consequences of a substance group ban extend beyond the medical application of certain substances. A substance group ban also affects research areas such as neuroscience and has implications for studies on the harmfulness of certain substances, which are crucial for making informed policy decisions.

Principle of legality

The proposal violates the principle of legality, because it is not exactly clear which substances fall under the scope of the Dutch Opium Act. Without specialist knowledge, it is virtually impossible for someone to determine whether a specific substance is covered by the new ban.

In 2012, the RIVM already noted that the introduction of a substance group ban is contrary to the principle of legality; the rule that nothing is punishable without a prior penal provision and the associated recognizability for citizens. It must be clear what exactly has been criminalized in the Dutch Opium Act. This principle certainly applies if there are high punishment threats and is endangered if groups of substances are banned, without it being clear which substances are exactly covered.^{vi}

This is further reinforced by case law of the Supreme Court of 2002, which states that dried, mashed, ground or processed products containing naturally occurring substances are considered preparations within the meaning of Article 1 (c) of the Dutch Opium Act.^{vii} This means that anyone who processes a natural product that may contain a substance that belongs to one of the prohibited substance groups will commit a criminal act. This is incalculable for anyone and therefore seriously contradicts the principle of legality, which is meant to protect citizens against arbitrary prosecution on the basis of criminal acts that are not clearly disclosed in advance.

Consumers

The argument that "it is important to erase the false impression among consumers that these substances are not (so) harmful because they are legal" also seems to be based on nothing. For users of new psychoactive substances, the assumption that health risks are lower than with more traditional substances is one of the least important factors, according to the Global Drugs Survey, an international survey of more than 130,000 respondents.^{viii}

Consumers looking for new psychoactive substances are generally well informed about the effects of these substances. They are looking for specific experiences. Legal substances are available for this purpose, which are sold in a safe, regulated environment. Prohibiting these substances forces consumers to turn to the illegal circuit, exposing them to criminal traffickers and much more harmful substances.

In addition, this argument negates the fact that some people simply want to use certain substances to relax, gain new insights or escape everyday stress. In the vast majority of cases, these are responsible adults who make a conscious choice. For most of them, the use of these drugs has added value and they experience the effect as positive. Sufficient guidance and help is available for people who get into trouble due to (excessive) use, just like with other harmful substances, such as alcohol.

If the goal of the government is to warn ignorant consumers about the (potential) risks of new psychoactive substances, this can also be achieved in a far less drastic way than through a ban, for example with a targeted information campaign or taking other preventive measures. As far as known, the government has not even considered these measures. Instead, the heaviest measure was chosen; a ban.

Proportionality

The introduction of a substance group ban is not proportional, because as soon as new, harmful substances (such as 4-FA or 2C-B) are introduced, the current system of the Dutch Opium Act is sufficient. Article 3, fifth paragraph, of the Dutch Opium Act provides for an urgent procedure, whereby a substance can be prohibited immediately by ministerial regulation.

Protection of public health

According to the explanatory memorandum, “banning the proposed substance groups primarily protects the interests of public health. The protection of the health and life of persons is explicitly included as justification in Article 36 of the TFEU. It is important in this regard that the case law of the CJEU provides that Member States should be given a wide discretion in protecting public health because the level of protection may vary from one Member State to another.”

This premise is fundamentally incorrect and therefore illegal. The prohibition of 4-FA by placing it on list I of the Dutch Opium Act has not led to a reduction in use. On the contrary, according to the National Drug Monitor of the Trimbos Institute, the use of 4-FA has increased to such an extent that it is now comparable to the use of amphetamine. It is therefore not reasonable to expect that the proposal will lead to a reduction in use. This means that the measures proposed by the government are not suitable for the protection of public health.

Users of new psychoactive substances will continue to use them or use other illegal substances instead. This is exactly what happened in the UK. The "Psychoactive Substances Act", a similar substance group ban that was introduced in Great Britain in 2016, has led to an increase in drug use. Two years after the law was introduced, the death rate from the use of crude MDMA, cocaine and opiates has reached a new record. Cocaine use has also increased significantly in the UK. The Review of the Psychoactive Substances Act 2016 (November 2018) shows that the emergence of new psychoactive substances in the UK has not diminished following the introduction of the Psychoactive Substances Act and that street traders have largely taken over the distribution of new psychoactive substances.^{ix} The Home Office admitted that “harm reduction” targets have not been met.^x Such developments had already been predicted by experts, prior to the introduction of the “Psychoactive Substances Act”.^{xi}

Trade

According to the government, the proposal affects the drug trafficker who produces and trades new psychoactive substances in order to circumvent drug legislation. Drug traffickers will no longer be able to use the currently legal status of new psychoactive substances that fall under the most common substance groups.

There is a fundamental flaw in this reasoning. Entrepreneurs who import and distribute legal substances are not drug traffickers. On the contrary. They act within the limits of the law. This proposal will soon make it impossible for these entrepreneurs to legally import and trade psychoactive substances any longer. Due to the ban, these substances will end up in illegality. As a result, the quality can no longer be guaranteed, information can no longer be given and users are more likely to come into contact with more harmful substances. The way is open for new, stronger and more dangerous substances.

Contrary to the intended purpose of the proposal, a substance group ban affects criminal drug traffickers in a positive sense. By banning substance groups, virtually all new psychoactive substances will soon be brought under the effect of the Dutch Opium Act. This means that the illegal trade in these substances will increase, partly because the threat of punishment is lower than with more traditional substances. As a result, criminal drug traffickers will focus more on the trade in these new psychoactive substances, as a result of which more new psychoactive substances will be offered and used, instead of less.

Cannabinoïds

The proposed list IA contains a total of three substance groups:

1. Substances derived from 2-phenethylamine.
This also includes substances that have the basic structure of cathinone.
2. Cannabimimetics or synthetic cannabinoids.
3. Substances derived from 4-aminopiperidine

The placement of synthetic cannabinoids on this list is particularly striking, because these products are hardly used, if at all, in the Netherlands. There is no market for synthetic cannabinoids in the Netherlands, due to the presence of coffeeshops, where people can buy (natural) cannabis products.

It is completely unclear how the new ban relates to the countless products containing CBD (a cannabinoid) that have appeared on the market. Although these products are not harmful to health and demonstrably have a beneficial and therapeutic effect, they may soon also fall under the effect of the Dutch Opium Act, due to the substance group ban. No attention has been paid to this in the explanatory memorandum.

Law enforcement

According to the government, the parties in charge of investigation and criminal law enforcement, such as the police, the Public Prosecution Service and the customs authorities, will benefit in particular from the proposal, because the substance group ban contributes to tackling drug crime. Moreover, the proposed ban makes it possible to comply with requests for legal assistance from countries where the NPS in question are already prohibited. Law enforcement and pressure from other countries appear to be the main reason for this proposal.

However, the Dutch Opium Act is not intended to promote investigation and criminal law enforcement. In the explanatory memorandum to the bill to amend the Dutch Opium Act in 1976, it is explicitly stated that

“the coherence of the articles of the Opium Act shows that the purpose of the law - in addition to implementing international treaty obligations - is to limit the use of the substances designated by or pursuant to the law to medical and scientific purposes. This means that substances that have a consciousness-influencing effect and whose misuse can cause damage to health and society, but whose scope is not mainly or largely within the medical or scientific sphere, are difficult to bring under the effect of the law. This applies, for example, to dangerous intoxicants such as paint thinner and other substances, which mainly have an industrial application. For the same reason, the Opium Act is not suitable as an instrument for the prevention of excessive and therefore risky use of stimulants, such as alcohol and tobacco.”^{xii}

The exact opposite happens with this proposal. Substances whose field of application is mainly or largely outside the medical or scientific scope are being brought under the effect of the Dutch Opium Act via a substance group ban. This goes against the objectives of the Dutch Opium Act.

In addition, according to the explanatory memorandum, the introduction of a substance group ban will lead to an increase in the workload and capacity of the police, the Public Prosecution Service, the NFI and the customs authorities. As early as 2012, the RIVM warned that the ultimate determination of whether a found substance belongs to a criminalized substance group must take place in high-quality chemical-analytical laboratories. These are expensive investigations. In addition, counter-expertise, which is also expensive, has to be allowed in criminal cases.

Conclusion

Pursuant to international treaty obligations, the Netherlands is not obliged to bring substance groups under the effect of the Dutch Opium Act. As the government indicates, “regulating substance groups, as proposed in this bill, is additional to what is regulated in the Single Convention and the Convention on Psychotropic Substances.” The government therefore has an extra heavy motivation obligation to introduce such a far-reaching measure.

This is not the case. The proposal is insufficiently substantiated and contradicts the principles of Dutch drug policy. Research shows that hardly any new psychoactive substances are being used in the Netherlands. Nevertheless, as a precaution, hundreds of substances are being brought under the scope of the Dutch Opium Act, without being demonstrated that they are harmful to health or to society. The substance group ban does not fit within the system and the objectives of the Dutch Opium Act. The proposed amendment to the Dutch Opium Act violates the principle of legality and in no way contributes to the protection of public health.

The current legal instruments of the Dutch Opium Act, the Medicines Act and the Commodities Act are sufficient to ban new psychoactive substances when this is necessary for public health reasons. Due to the substance group ban, the hitherto legal sales of designer drugs via the smart shops will move to the illegal, criminal market with all the risks to public health this entails.

Users of new psychoactive substances will continue to use them or use other illegal substances instead. The UK shows that the introduction of a substance group ban has led to an increase in the use of drugs and that the targets for “harm reduction” have not been met.

The main reason why a ban does not work is that it does not take away the demand for drugs.^{xiii} While demand for other dangerous goods (such as weapons or toxic additives) can be eliminated or significantly reduced by prohibition, drugs cannot. Throughout human history, people have been using psychoactive substances.^{xiv} Different groups of drugs (stimulants, depressants, psychedelics, etc.) are useful in different situations and appeal to different people. The supply of legal substances, such as alcohol, nicotine and caffeine, is insufficient to remove the demand for other psychoactive substances. Moreover, the choice of certain means and the way in which they are used strongly depends on the cultural background of users.

A ban is not effective in preventing the use or misuse of substances. Instead it is extremely expensive for society and harmful to users. Persistent demand creates an illegal market and promotes organized crime, causing many problems. A liberal, evidence-based policy focused on harm reduction is much more successful.

We believe that regulating new psychoactive substances is better than a ban. In this way, requirements can be imposed on the production process, the origin, the composition and the quality of these substances. Requirements can also be imposed on the environment where and the way in which these

substances are being sold. This will make people more likely to refrain from the use of harmful drugs offered on the black market and reduce drug related crime. Regulating the sales of new psychoactive substances demonstrably leads to less social and social damage and less risk to public health.

There is plenty of room for such an approach, because a large part of the trade in new psychoactive substances is not (yet) in the hands of organized crime. Most online suppliers and wholesalers of new psychoactive substances take great care to ensure that their business operations are as close as possible to those of legitimate chemical suppliers, they pay VAT and they pay tax. The existing market for new psychoactive substances is largely self-regulating and is demonstrably less dangerous for users than sales via darknet websites or by criminal street traders. Instead of a substance group ban, the government should consider regulating the existing market by imposing a form of control that is comparable to the rules that apply to the sales of alcohol and tobacco.

Since the new psychoactive substances are not covered by the UN drugs conventions, the Netherlands has the opportunity to distinguish itself by regulating the sales of new psychoactive substances and thereby demonstrate that evidence-based policy works. From an international perspective, the Netherlands is still seen as a pioneer when it comes to sensible, progressive policy. The best known examples of this are the legislation on euthanasia, same-sex marriage and the tolerance policy of cannabis. The Netherlands thus paved the way for similar developments in other countries. Regulating the sales of new psychoactive substances, if the policy is well formulated and properly implemented, could be just as successful and eventually gain international acceptance and following. By not bowing to international pressure and introducing a substance group ban for that reason alone, the Netherlands can lead by example and confirm its image as an ethically progressive and pragmatic country, while benefiting economically and avoids the pitfalls of a now obsolete drug policy.

Recently, D66, Jellinek, VKN and various other addiction physicians suggested to start an open discussion about regulating prohibited substances such as MDMA, cocaine and magic mushrooms. They want to set up a state committee that will examine how Dutch drug policy can be modernized. The basic principle is to keep the health risks of drugs as low as possible and to guarantee the health, safety and well-being of society as a whole. The ultimate goal of this policy is to limit damage to consumers at home and abroad by reducing the demand for harmful substances and increasing the availability of safer alternatives. Regulating the sales of new psychoactive substances would be a good start.

Literature and resources

ⁱ <https://www.trimbos.nl/aanbod/webwinkel/product/af1706-jaarbericht-nationale-drug-monitor-2019>

ⁱⁱ Reuter, P.; Pardo, B. Can New Psychoactive Substances Be Regulated Effectively? An Assessment of the British Psychoactive Substances Bill. *Addiction* **2017**, *112* (1), 25–31. <https://doi.org/10.1111/add.13439>

ⁱⁱⁱ

<https://www.rivm.nl/bibliotheek/rapporten/340011005.pdf?fbclid=IwAR09tLW7llhszuTwmLuVn4jXmb4EwXUANOQBHsuA9nXYuOlask-KwYJY-5l>

^{iv} Nutt, D. Illegal Drugs Laws: Clearing a 50-Year-Old Obstacle to Research. *PLoS Biol.* **2015**, *13* (1). <https://doi.org/10.1371/journal.pbio.1002047>.

^v Nutt, D. J.; King, L. A.; Nichols, D. E. New Victims of Current Drug Laws. *Nat. Rev. Neurosci.* **2013**, *14* (12), 877–877. <https://doi.org/10.1038/nrn3530-c2>.

^{vi}

<https://www.rivm.nl/bibliotheek/rapporten/340011005.pdf?fbclid=IwAR09tLW7llhszuTwmLuVn4jXmb4EwXUANOQBHsuA9nXYuOlask-KwYJY-5l>

^{vii} [ECLI:NL:HR:2002:AE2095](https://www.legislatie.nl/consolidatie/ECLI:NL:HR:2002:AE2095)

^{viii} <https://www.globaldrugsurvey.com/gds-2019/>

^{ix}

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756896/Review_of_the_Psychoactive_Substances_Act_2016_web.pdf

^x Great Britain; Home Office. *Review of the Psychoactive Substances Act 2016*; 2018.

^{xi}

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368583/NPSExpertReviewPanelReport.pdf

^{xii} Kamerstukken II 1974-1975, 13 407, nr. 3, blz. 15

^{xiii} Baumohl, J. *Forces of Habit: Drugs and the Making of the Modern World*. By David T. Courtwright. (Cambridge: Harvard University Press, 2001. x, 277 Pp. \$24.95, ISBN 0-674-00458-2.). *J. Am. Hist.* **2002**, *89* (1), 261–262. <https://doi.org/10.2307/2700873>.

^{xiv} Vetulani, J. Drug Addiction. Part I. Psychoactive Substances in the Past and Presence. *Pol. J. Pharmacol.* **2001**, *53* (3), 201–214