

Experts Committee on ethical issues and professional standards: introduction to the work of the Committee

The Experts Committee on ethical issues and professional standards' mission and objectives are to undertake reflections and to devise opinions in addressing ethical and professional issues in specific drugs and drug abuse-related areas.

In line with the other Group's platforms, it is made up with experts from various professional fields and delegated by member States. Its work is done under the Group's programme of activities adopted for a three-years period during a Ministerial Conference.

The majority of this work is considered as experts' opinions and positions on given subjects and, as such, may be used by decision makers, where appropriate, when drawing up national policies. They are submitted to Permanent Correspondents during their regular meetings but are not meant to be formally adopted or to become formal recommendations to the member states.

During the ministerial conference of November 2006, the work on drug testing at school undertaken by the Committee during the 2003-2006 programme of activities, were presented to the Ministers. The reports and studies written by different experts were also distributed on this occasion.

Under the 2007-2010 Programme, the Committee proceeded with its work by examining drug testing in the workplace. It adopted in March 2008 an "Opinion on drug testing at school and in the workplace" which was published together with its appendices.

In June 2010, the Committee also completed this reflection by adding a third part on "the role of insurance companies in the practice of drug testing"

This publication is also available on the Pompidou Group's website
http://www.coe.int/t/dg3/pompidou/Activities/ethics_en.asp

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Opinion on drug testing at school and in the workplace

Experts Committee on Ethical Issues and Professional Standards

March 2008

The members of the Pompidou Group's platform on ethical issues and professional standards wish first and foremost to point out that Article 8 of the European Convention on Human Rights¹ safeguards everyone's right to respect for private and family life. It states that there may be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society (...) for the protection of health or the protection of the rights and freedoms of others.

As all European countries have signed the 1961 United Nations' Convention on Narcotic Drugs and all the ensuing treaties², they are committed to combating the illicit trade in a number of psychoactive substances commonly termed "drugs" and to limit the trade for research or medical reasons.

European countries have necessarily enacted national legislation to pursue this aim. In some countries it is forbidden to possess even small quantities of these illegal drugs. In other countries, possession of these drugs for personal use is tolerated.

Although Article 17 of the European Convention on Human Rights states that *"nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"*, the authorities in many European countries allow law enforcement bodies (such as the police and the judiciary) to interfere with their citizens' private and family lives in the name of the fight against drug trafficking, which is justified by the need to protect public health. Our national laws work within the limits set by international instruments on the protection of privacy and by the relevant case-law to establish the framework within which this interference may operate.

In all countries representatives of the authorities are allowed, even if legislations in this regard differ, to submit drivers to drug and alcohol testing.

Systematic drug and alcohol testing for airline pilots to ensure that air and passenger safety is respected is now common practice. This testing may be justified by the principle of proportionality as it is carried out with the aim of reducing the danger of accidents which may put lives at risk.

1 The Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe and was opened for signature in Rome on 4 November 1950. It entered into force in 1953

2 The Single Convention on Narcotic Drugs - 1961 (amended by the Protocol of 25 March 1972), the Convention on Psychotropic Substances - 1971, and the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances - 1988

As the consumption of certain legal or illegal psychoactive substances can affect the consumer's behaviour or alter some of his/her physiological parameters, it is also ethically acceptable for a doctor who has to make a diagnosis to conduct a drug test in an emergency. It seems equally acceptable in ethical terms that a doctor who suspects drug addiction in a patient with whom he/she is unable to establish a dialogue on the subject should carry out a drug test to determine the reasons for the deterioration in the patient's health. The health professional is of course required to keep the results secret, to make the best use of them and not to communicate them to any third party.

The platform on ethical issues and professional standards takes note of the following requirement of the European Convention on Human Rights: with the exception of the law enforcement agencies, in the specific context in which the law empowers them to act, and certain health professionals, to the exact extent that obtaining this confidential information is essential to enable them to take appropriate action in their patients' interests, no public authority or private individual has any right to impose in anyone's private or family life, and even less so to carry out or order drug testing in anyone.

The platform members nevertheless find that in some European countries, school authorities take the liberty of drug testing their pupils ³. They also find that drug testing is practised at the pre-employment stage or in the workplace without the confidentiality of the results always being protected by law ⁴.

As regards both school, pre-employment and workplace drug testing, the question is therefore to determine whether a higher ethical value can be invoked to authorise infringements of respect for private and family life as safeguarded by the Convention for the Protection of Human Rights. Only the precautionary principle could justify this. The platform has therefore endeavoured to analyse the protective impact of the use of drug testing kits on the incidence of drug consumption and the future lives of consumers.

Over and above the effort to identify the beneficence that might stem from the introduction of drug testing at school and at work, we note that with an eye to a "drug-free world", drug testing kits came onto the market in the late 1980s. They provide substantial profits for those who market and promote them ⁵. People do buy them, since they hold out the prospect of enabling anyone to easily detect whether anyone else has consumed illicit drugs, so they awaken every individual's latent policing tendencies. Rather than closely monitoring their children's emotional, social and intellectual development through dialogue based on trust, it is simpler for anxious parents to use a drug testing kit to confirm that their children are "clean". Yet one is entitled to wonder how useful testing is if a drug is found to have been used, since on the basis of that finding the parents concerned will have to pluck up the courage to embark on dialogue, unless it is too late.

If psycho-educational science makes it very clear that "family" use of detecting devices is no substitute for dialogue with a growing child who needs guides, not policing, can it be otherwise at school?

3 see report by Margareta Nilson (Appendix A)

4 see report by A.Lourenço Martins and Joaquim Rodrigues (Appendix B)

5 see report by Claire Ambroselli (Appendix B)

And regardless of educational aims, if pre-employment or workplace testing shows that an adult has consumed drugs, can this be a valid starting point for establishing dialogue between peers or with the employer, in the case of a white or blue-collar worker in difficulties?

It should also be recalled that the accuracy of the results obtained is far from guaranteed⁵.

1. Drug testing in schools

Those who practice drug testing justify it as a dissuasive method for preventing the consumption of illicit drugs, and particularly for preventing any abuse which may cause health and social problems. It is claimed to be a means of swiftly establishing that a pupil uses drugs and is therefore in danger, and allegedly makes it easier to direct such pupils to a support service before they definitively fail at school.

This assertion derives from the belief that all drug consumption reflects malaise in young people and exposes them to risks in the medium or long term. It masks the fact that the consumption of some substances such as cannabis or certain psychoactive substances is widely spread and sometimes proves that these young people are in tune with their times. It also ignores the fact that it is impossible to force help on anyone who does not feel the need for it.

In practice, despite the goodwill of some school heads and teachers, when a young person is proved to have consumed an illicit substance he/she is often expelled from school, either to set an example or to prevent him/her from having a harmful influence on other pupils.

Whether these pupils are directed to a support service against their will or directly expelled, discovering by testing that they have used drugs is of no benefit to them in either case, and it therefore seems difficult to justify drug testing at school in terms of the precautionary principle, at least where the tested pupil is concerned.

Some take the view that the organised detection of each drug consumption might have the indirectly beneficial effect of deterring other pupils. From a scientific viewpoint however, there is nothing to indicate this.

Rather than a means of preventing drug abuse, testing therefore seems to be practised to reassure teachers and pupils' parents, who are, moreover, exposed to pressure from strategies for marketing testing kits and from some government authorities, by proving to them that the school is concerned about illicit drug consumption and identifies consumers, the sub-text being that certain problems encountered by pupils at school are the outcome of their drug use. In this sense, school testing acts as a screen. It serves to mask the social and cultural problems that may be the cause of pupils' difficulties at school, and the difficulty teachers have in suggesting to their pupils that they are entitled to a future⁶.

⁶ see report by Micheline Roelandt (Appendix B)

The platform on ethical issues and professional standards also wishes to point out that drug testing techniques fall into the category of policing techniques and conflict with the tasks assigned to those working in schools. On the contrary, teachers are supposed to broaden and deepen their pupils' skills both in terms of the extent of their knowledge and in terms of their future citizenship. Teachers' educational responsibilities do indeed require them to be concerned about malaise in any of their pupils, to establish a constructive dialogue with such pupils in the event of a visible problem and, where appropriate, to suggest that they seek help if the teacher feels he/she has run out of solutions.

Like parents, teachers are supposed to guide pupils so that they learn to make responsible choices in order to achieve their full potential. In so doing, they are highly likely to prevent excessive consumption of both legal and illegal drugs among their pupils.

The platform consequently finds that the precautionary principle does not provide any arguments justifying infringement of pupils' private lives and interference with the school's vocation by drug testing. Testing actually undermines the pupil-teacher relationship and the psycho-social climate in schools, which has been proven by research to have a protective function⁷.

This should come as no surprise if we refer to the World Health Organisation's findings on the subject. In 2002, the WHO found that prevention methods centring on damage limitation rather than abstention seemed to yield better results, particularly where alcohol consumption was concerned⁸.

2. Drug testing in the workplace

It is a fact that consuming an excessive amount of alcohol or any other psychoactive substance can substantially reduce a worker's vigilance and fitness for work. Depending on the type of work assigned to a worker, it might therefore prove useful, for his/her safety and that of third parties, to practise drug and alcohol testing.

The platform on ethical issues and professional standards nevertheless notes that many other factors can reduce a worker's vigilance and that it therefore seems insufficient, in the name of the precautionary principle, to confine oneself to checking whether workers assigned tasks that are highly dangerous to themselves or others have consumed a psychoactive substance. In order to protect workers and any third parties who might sustain injury as a result of a worker's deficiencies, the platform proposes that in some sectors (e.g. pilots, lorry drivers, train drivers or operators of heavy machinery such as cranes) work should be organised in such a way as to allow peers or superiors to observe, before work starts, that a worker is not advocates maintaining respect for in the best state to perform his/her job that day.

The ethics platform notes the fact that most European countries fail to define these

⁷ see report by Micheline Roelandt (Appendix B)

⁸ see the WHO review "Prevention of Psychoactive Substance Use. A Selected Review of What Works in the Area of Prevention", Geneva, 2002

“high-risk jobs”⁹. It suggests that these high-risk jobs should be more clearly defined so that employers, employees and concerned third parties can be protected. It also notes that in this area, except in the case of pilots (but only to check that they are not drunk), there are no international regulations defining protocols for assessing whether workers are fit to do their jobs properly on a particular day.

It recommends that if there are doubts as to a worker’s fitness for the job, he/she should be referred to an occupational physician who will determine whether or not the worker is fit to perform his/her duties that day. The reasons for which the doctor finds the worker unfit for work must obviously remain confidential. While the ethics platform considers that regardless of the worker’s job, the precautionary principle always warrants referring him/her to the occupational physician if there are doubts as to his/her fitness for work, it nevertheless the worker’s private life in relation to any third parties not bound by professional secrecy.

In this connection, it regrets the fact that not all European countries have legislation on occupational medicine which guarantees the confidentiality of the results of medical examinations undergone by workers⁴.

3. Pre-employment testing

Drug testing is practised in several European countries when workers are recruited⁴

It is an undisputable infringement of private life and of the “right to work” recognised in Europe by the European Social Charter of 18 October 1961¹⁰.

Here too, the question for the ethics platform is to assess whether this infringement of private life and this discrimination in terms of the right to work are justified by the precautionary principle.

Clearly, finding that a job applicant sometimes uses illicit drugs or tends to drink alcohol regularly does not entitle an employer to forecast that the worker will one day come to work under the influence of a psycho-active substance.

If the worker concerned proves to be unsuited to his/her job because of genuinely problematic alcohol or drug consumption, or even because he/she is found to be a drug addict, most employment contracts provide for probationary periods and the employer can therefore refuse to take on the worker beyond the first few months¹¹.

In this case, however, he/she is a person with disabilities and European Directive 2000/78

9 see contributions of Behrouz Shanhandeh and Tom Mellish to the Seminar on “Ethics, professional Standards and Drug Addiction”, February 2003, p.25 and 33

10 The European Social Charter was adopted by the Council of Europe in 1961 and revised in 1996. The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance in the states party to the Charter

11 In some countries, civil servants may be recruited and appointed immediately after passing competitive or other examinations. They do not necessarily undergo a probationary period. As their performance has been assessed by means of examinations, it can be assumed that they are not drug abusers

of 27/11/2000, which prohibits “*any direct or indirect discrimination based inter alia on disability*”, does not allow the contract to be terminated on the grounds of disability unless it is proven that this disability is incompatible with the requirements of the position.

On the other hand, a decrease in output may also be used as justification to terminate a contract, provided, that is, that economic output is considered a legitimate aim. The fact remains, however, that the person in question has the right to work, like any other person with a disability, and it is therefore up to the government to ensure that he/she finds work.

Workplace drug testing cannot therefore be justified by a precautionary approach regarding the worker’s possible unfitness to do his/her job without endangering his/her health or that of third parties.

The only justification for pre-employment drug testing seems to be a moral one. Some European employers, like their American counterparts, might deny drug users the right to work, in breach of the European Charter. In European countries which do not prohibit drug use, there can be no justification for such an attitude in ethical terms. In countries where drug use is prohibited, the question is whether it is for employers, in matters relating to private life, to check whether their workers comply with the statutory provisions. As employers have not officially been assigned policing tasks, their intrusion into job applicants’ private lives appears unacceptable, particularly as it is likely to result in job discrimination.

It remains to discuss the effectiveness of these practices as drug abuse prevention policies.

While the consumption of certain drugs is a matter of fashion, the abuse of psychoactive substances is known to be more closely linked to disadvantaged socio-economic situations.

Idleness, the lack of social gratification and the lack of prospects for self-fulfilment are factors affecting the consumption of both legal and illegal psychoactive substances. As a preventive policy, excluding drug users from the labour market does not therefore appear productive – quite the reverse, at any rate for the person excluded. This observation does not mean, however, that excluding drug users in this way cannot have an indirect protective effect on others. Knowing that recreational use of a drug is likely to result in exclusion from the labour market might encourage some people to refrain from any form of drug consumption, so it cannot be denied that drug testing might have an indirect preventive function. However, insofar as nothing to date demonstrates that such a policy really has an indirect protective function with regard to drug abuse, and knowing that excluding drug users from the labour market can be harmful to them, the ethics platform considers that the precautionary principle cannot on any account serve to justify pre-employment drug testing, which is an infringement of private life.

In the platform's view, for reasons also deriving from the precautionary principle, it would on the contrary be advisable to ban pre-employment drug testing in order to safeguard the ethical principles enshrined in the European Convention on Human Rights. The platform believes that legislation should be enacted on the subject, particularly to prevent certain foreign firms located in Europe to take the liberty of practising drug testing directly or through the private insurance schemes they offer¹².

Conclusion

In the opinion of the platform on ethical issues and professional standards, drug testing is acceptable only if it is carried out by health professionals bound by confidentiality requirements who wish to refine their diagnosis or if it is performed in response to a request from a law enforcement or judicial body, in the precise framework of what is authorised by law. It should be borne in mind, however, that the result of these tests require confirmation.

All other testing procedures in schools or the workplace pose an ethical problem founded on international, universal and absolute rights. It would be appropriate to take steps to prohibit such procedures, and to seek to achieve the same ends by means that show greater respect for privacy, family life and the fundamental rights of every individual and are more appropriate for such purposes, in particular for preventing young people from developing drug addiction and adults in high-risk jobs from causing accidents

12 The platform will consider drug testing by insurance companies at a later date

APPENDIX A

Drug testing in schools in European countries

**Margareta Nilson, Programme Manager,
European Monitoring Center on Drugs and
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Reports written between October 2004 and October 2006



Drug testing in schools in European countries

**Margareta Nilson, Programme Manager,
European Monitoring Center on Drugs and
Drug Addiction (EMCDDA)**

Reports written between October 2004 and October 2006

The EMCDDA undertook a survey among REITOX (Réseau européen d'information sur les drogues et les toxicomanies) Focal Points in order to get information about the state of the art of drug testing and drug screening in schools in EU member states, the candidate countries and Norway. Answering the survey was voluntary it was very useful, often detailed and accompanied by relevant documents.

The questions were:

- Is there any drug testing or screening in schools. If yes, which is the practice and on what (legal or semi-legal) basis?
- Has there been any discussion about drug testing or screening in schools? If yes, which have been the arguments? Who have been the active players?

Of the 29 countries approached, information was collected from 18: Belgium, Czech Republic, Estonia, France, Hungary, Ireland, Italy, Cyprus, Lithuania, Netherlands, Austria, Portugal, Slovenia, Finland, Sweden, UK, Turkey and Norway.

In ten of the countries answering, there is no drug testing in schools, in four (Belgium, Hungary, Ireland, UK) testing takes place sporadically, while four countries (Czech Republic, Finland, Norway, and Sweden) answer that drug testing is implemented. No country reports systematic or random drug testing or screening.

Where drug testing has been implemented, it has been in cases where pupils have been under suspicion of taking drugs. Usually, consent of the student and parents is required. Urine or blood tests are the usual type of tests, but in the Czech Republic sniffer dogs are also used.

Governmental rules for drug testing have been issued in the following countries:

- the Czech Republic, where a school may demand drug testing under specific circumstances defined by law;
- Lithuania, where the Government in 2002 approved drug testing in regular health checks or in special cases in agreement with parents and student;
- Finland, where the National Board of Education in 2000 issued a memorandum on drug testing. In this connection, the Parliamentary Deputy Ombudsman stated that drug tests can only be conducted by health care professional, and that students testing positive should receive treatment.
- Sweden, where the Government Drug Commission in its report 2000 discouraged any widening of the legal scope for compulsory drug testing of children under 15, nor did it find appropriate for such measures to be entrusted to school staff or to any other professional categories but the police. The Justice Ombudsman in 2002 decided that a medical doctor can drug test minors, if the parents give their consent;
- the UK, where the Department for Education and Skill has issued a Guidance document for drugs policies in schools, including testing, which is considered one option available to schools; consent is required;
- Norway, where quality criteria were defined in a Social and Health Directorate Circular, which stated that there is no legal basis for enforced drug testing and no legal basis for sanctions on a positive result.

In other countries, like Belgium, Hungary and Ireland, regulations for drug testing are decided by the schools themselves in consultation with the parents. School drug policies can include drug testing.

In most countries, drug testing has been an issue in the public or political debate (Belgium, the Czech Republic, Hungary, Ireland, Lithuania, Austria, Finland, Sweden, UK and Norway). In some cases (Czech Republic, Lithuania, Austria, Sweden, Norway) discussion has at times been quite lively. In Estonia, France and Portugal there has been occasional debate on the topic.

In all countries, where there has been a debate, the primary potential group to be tested are students suspected of drug use or students with behaviour problems. Austria and the UK report that testing of teachers or teacher students has also been considered. In Lithuania and Austria random tests and in Finland mass screening have been discussed.

The ethical considerations voiced against drug testing have been based on human rights and children's rights. Also, the concern is put forward that testing would interfere with confidence between schools and students. Consent of students and their parents

has been required. The UK Guidelines point out that school testing should be part of a comprehensive school drug policy.

In most cases, the schools themselves are reported to be the main supporters of drug testing, although in some countries (Lithuania, Austria, Finland, Sweden), politicians have also been in the forefront backing school testing.

The main argument put forward is that testing serves the purpose of prevention and of protection. It is argued testing might be necessary to safeguard the health of and the development of students and their peers. Some claim that they need to know if a student takes drugs in order to intervene, and that schools test students for other health hazards. In Lithuania, the supporters quote examples of mandatory random drug testing in the USA.

Opponents to drug testing have in many cases been the superior school authorities, e.g. the Ministries of Education or reference bodies, such as “ombudsman”. Students’ organisations have protested against drug testing in Lithuania, Austria and Finland, while student support staff, e.g. school doctors in Belgium and youth solicitors in Austria objected. The arguments against drug testing are derived from children’s’ rights. It is also argued that drug testing would compromise trust, and that it is not an effective method of prevention.



Schools and drugs

René Padieu, Inspecteur General honoraire Insee, France

1. There is a very wide range of different opinions about drugs. These may be summarised in three general categories: the view that drugs in themselves are evil, justifying the use of every means to combat them; the view that the problem lies in the social acceptance or otherwise of drugs, which differs according to product, the solution requiring a re-examination of the prohibition; and the view that it is not so much consumption itself which should be combated, but the ensuing risks that should be reduced.
2. These different positions are connected with the scope of the definition adopted of “drugs” (narcotics, lawful or unlawful psychoactive substances, etc).
3. These differences in position legitimise the differences in schools’ and parents’ decisions as regards the drugs policies and activities of the schools.
4. The role of the school is to transmit not only knowledge, but also values. This includes learning to observe rules. It may also include learning to examine the basis of such rules and practising the discussions which are part of citizenship. In the first case, the question arises of whether teaching should cover just rules, or whether it should extend to monitoring their implementation and penalising breaches: should pupils be taught not to use drugs, or should checks be carried out to ensure that they are not using them? In the second case, the question arises of a balance between imposing a minimum morality on consciences which are still pure and the risk of discrediting rules in advance by leaving them to individuals’ discretion.
5. The absence of drug consumption at school may be regarded as a simple condition for the capacity to attend lessons, or as an idea to be instilled. In the former case, account should also be taken of the other demands which reduce pupils’ assiduousness or attention. In the latter case, conduct in respect of drugs cannot be detached from the education received in its entirety.
6. It is not only teachers, but fellow pupils as well, who teach children about lifestyles: fashions in clothes, sports, music, and so on. Parents choose to send their child to a drugs-free school, not so much because they want the school to supervise their child, but more so that it can guarantee that the child is not mixing with drug users.
7. Thus a school may define itself as a drugs-free school either as a policy decision or in order to offer that kind of school to parents. It presents a kind of commercial image, placing it under an obligation to pupils’ parents to stick to its decision. This will inevitably raise questions as to the legitimacy of any action taken by the school to remain drugs-free, such as the carrying out of tests.

8. The preceding paragraphs (§§ 6 and 7) relate to the institutional status of drugs in the school, as distinct from the question of the attitude towards the pupil in person, particularly when it is intended to subject him or her to a drugs test. This raises three questions: the significance of the test (§ 9), the legitimacy of the test (§ 10) and the effects of the test (§ 11).
9. The significance attached to the test result raises several questions itself:
 - Reliability: does a positive result for the presence of metabolites (in the blood or urine) signify that products have effectively been used? How high is the risk of false positives and, on the other hand, false negatives?
 - Up-to-datedness: a positive result may indicate current or previous drug consumption, so it does not necessarily distinguish drug use at school. Can the issue of drugs at school (particularly in the drugs-free school) be kept within the confines of the school itself?
 - Psychological significance: does proven drug use stand in the way of satisfactory schooling, requiring that schooling to be brought to an end, or is it a symptom of a malaise referring to other aspects and other times, and requiring an appropriate educational response?
 - Risk of reductionism: does the objective nature of the test not do away with the need for teachers to look beyond the material fact of consumption? Someone has suggested that this is a way for teachers to get away from a teaching problem that they cannot control, in the same way as drug addicts use drugs as a way of getting away from personal difficulties that they cannot overcome.
10. Is the right to subject pupils to testing a violation of their own privacy? Where minor children are concerned, is this not a matter for their parents (or guardians) to decide? Or if a test is a consequence of a public policy prohibition, it is legitimate for the state to impose such a violation, but, in that case, this legitimacy is general, and neither limited nor specific to the school. On the other hand, does education not consist essentially of intervention in the individual's personality? This would make an investigation legitimate, without the possibility of an objection on the grounds of the inviolability of the pupil's privacy. This last argument, however, may be limited if we bear in mind the fact that the education provided by the school is specifically intended to form personality, presupposing, even at this stage of formation, at least partial respect for that personality.
11. Possible consequences of the use of testing:
 - Before any results are known, the existence of tests may be regarded as a threat, but it may bring the benefit of curbing drug use. The question arises of people's respective roles: are the teacher's duties compatible with test administration?
 - Imposition of an immediate penalty, such as exclusion, with a risk of stigmatisation. The question arises of who is allowed to see the results;
 - The result is merely combined with other information so as to trigger assistance to the pupil in difficulty.

Law and ethics in the context of drug use in schools

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|-----|---|
| 1.1 | Schools' vocation seems to exclude drug use. The idea of screening might seem to recognise drug use, and consequently indicate either a laissez-faire attitude or a teaching failure. |
| 1.2 | If "drugs" are defined as any psychoactive substances used for their effects, there is a problem in distinguishing between what is lawful and what is not. |
| 1.3 | The question arises of whether it is drug use itself or the existence of teaching to counter it that is the most important thing to consider in the school context. |
| 1.4 | Certain ways of combating drug use might perhaps destabilise the personality the school is charged with forming, and therefore be counter-productive. |
| 2.1 | Education in the value of humankind, as expressed by human rights, may give pupils a personality capable of coping with the risks that life brings, including those of the temptation to take drugs. |
| 2.2 | While certain drugs have the effect of excluding their users from society and alter personality, others have a "socialising" effect: the rites associated with their use bring the user into a community and a counter-culture, the rejection of which by society at large confirms the user's exclusion. |
| 2.3 | As the individual is an independent being, he or she has to cope with drugs and their risks. However, drug abuse adversely affects judgment and jeopardises personality. The question arises of whether non-intervention as a matter of principle should give way to action on the grounds that a person who is in danger needs assistance. |
| 2.4 | A policy of repression or deterrence is meaningful only in conjunction with an educational policy. |
| 2.5 | Education about ethics structures personality, for ethics is about how one conducts oneself. |
| 3.1 | Ethics is a social construct which forms part of the history of society. |
| 3.2 | Education must transmit ethics, enabling people to play a part in their own society and its history. |
| 3.3 | Enjoying rights means belonging to a community which acknowledges that you have those rights. Holding human rights means having a place in human society, having a community where one has one's place. |
| 3.4 | A huge gulf separates the ethics which fits in with human rights from political and social reality. This gulf has widened because of the way in which human rights have developed since first being proclaimed. A major political crisis is the result. |
| 3.5 | Teachers thus face the tough challenge of getting ethics across successfully. The drugs issue reveals a shortcoming in the building of personality: teaching is falling well short, and the ensuing human rights crisis is a deep one. |

Ethical principles

1. Unlike morality, which involves complying with certain rules (passed down by tradition or by religion), ethics reflects such rules, their basis and their application. Personal conscience is involved, as is the thinking which goes on within society.
2. Ethics lie somewhere between compliance with exogenous rules (laid down by God, a prince or tradition) and a situation of complacency in which each person strives to achieve immediate pleasure and to avoid punishment.
3. The ethical principles which prevail in Europe stem from three philosophical currents.
 - a. in the view of Aristotle and his successors, human beings should strive to attain virtue, which must override pleasure and fear.
 - b. the utilitarian view is that the aim should be the greatest good of everyone, both individually and collectively, this collective maximisation of benefit sometimes necessitating personal restrictions.
 - c. Kant's view that action is good where there is a will to carry out one's duty: this assumes that every person thinks that what he or she hopes for could benefit everyone, his or her own freedom and responsibility existing by reference to this requirement for universality.
4. These principles presuppose the recognition by every person of other people's preferences and criteria as being of equal value to his or her own, i.e. that the dignity of each person is equal.
5. Dignity depends on the recognition and protection of life and security, personality, identity, privacy and integrity.
6. It also depends on each individual's freedom or independence to take his or her own decisions – and particularly to decide about the ethical rules which he or she intends to respect - this freedom nevertheless being subject to resistance from the environment (in the same way as birds can fly only because the air offers them resistance).
7. Equal dignity requires people to be treated justly (meaning fairly).
8. The State must simultaneously respect and promote these fundamental human rights, and thus the diverse ways in which individuals take decisions, and to this end ensure that no one person's exercise of rights compromises the same rights for other people. This maintenance of public order - not so as to restrict rights and freedoms, but, on the contrary, to promote them - because it does not impose a body of predetermined rules, sometimes leads to a state being described as governed by the rule of law, or even as a secular state, meaning that it does not derive such rules from ideological precepts.
9. While, in the framework of European ethics, human beings are not in the grip of a doctrine and, in contrast, must obey the rules they set for themselves, the problem arises of leaving people free to renounce their freedom. One of the areas where this question arises is that of the conduct to adopt towards drug users.
10. If, looking beyond considerable differences, this does seem to be the basis on which European ethics rests, another problem which arises is that of reconciling this tolerance with the ethical views of population groups from other civilisations.

Technical report on ethical questions connected with the practice of drug testing in schools

General introduction:

Ethical problems connected with drug testing, particularly in schools

René Padieu, Inspecteur General honoraire, France

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Conceptual and legal framework Lourenço Martins,

Juiz Conselheiro do Supremo Tribunal de Justiça, Portugal

Chapter 2:

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Claire Ambroselli, Doctor Inserm, France

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Ethics and drug testing in schools,

Micheline Roelandt, Psychiatrist,

Vice Chair of the Bioethics Committee, Belgium



Introduction:

Ethical problems connected with drug testing, particularly in schools

René Padieu, Inspecteur General honoraire Insee, France

The reflections presented here are focused on the screening in school environment: they are specific to this field, but they are worth more widely and prepare the general conclusions of the Committee.

The many concerns about drug use have led to widely varying provisions and actions. Very naturally, certain people propose to avoid that the persons do not consume drugs or, if they do, that they stop doing so or, at least, that the harmful effects for themselves and others are kept to a minimum. Clearly, in order to be able to do this, it is necessary to know who takes drugs, meaning people who say they do when they request treatment or who are simply identified as drug users. This is why drug testing has sometimes been suggested, in particular for certain occupations, in connection with driving or in schools.

In principle, it is helpful to try to know that pupils are taking drugs. It not only enables the police to question them about their suppliers and therefore combat trafficking, but also means that steps can be taken to treat them and help them to break the habit. For schools, this means taking part in the fight against drug abuse, and it also assists their educational role by ensuring that pupils are not in a mental state that prevents them from attending classes. At another level, it enables schools either to put a stop to drug use or to exclude pupils who use drugs: when they have no such pupils, schools respond to the demand of parents who fear that, if they are in contact with drug abusers, their children will also start taking drugs.

These commendable intentions may be encouraged by the manufacturers of tests, who offer their products and argue that they can contribute to these objectives. This offer also can be validated, indeed promoted by public or private authorities.

Is this really such a good idea when it is looked at more closely, however? First question: if the test is not completely reliable – and tests are never 100% reliable – what happens to pupils wrongly identified as users? Furthermore, when the test result is accurate, what is to be done with it: what decision or action is to be taken, what consequences need to be avoided and therefore who will have access to the result? Should results be restricted to certain professional categories, such as doctors or nurses? Or should teachers and school managements be able to request and use tests? At last, this request and this implementation are they discretionary or do they have to be authorized and then, by whom: parents, authorities?

The problem is more fundamental, however. There could be a contradiction between using such tests and the very objective of schools. The role of schools is not only to transmit knowledge and skills, but also to transmit values and help future adults develop their personalities and future citizens to take their place in society. These values include the dignity of the individual, which education in general, particularly when tests are conducted, should not begin by violating. This does not necessarily mean that testing implies a violation of dignity, but the reasons, conditions and consequences must be taken into account. For example, there should be no stigmatisation and the action that results – curative and educative – should be genuinely beneficial to the persons concerned. And if the objectives pursued in pupils' interests begin to be questioned, those of teachers, parents, head teachers, test manufacturers and so on also need to be looked at. For example, is the school really interested in managing its image and looking after its commercial interests at the expense of a few black sheep? Is it not easier for teachers automatically to rely on a chemical criterion instead of directly perceiving pupils' lack of well-being, trying to identify the causes and seeking remedies in their educational practices?

These questions will be examined in one of the three chapters that follow. It was also thought necessary to shed light on these issues in two ways. First, since we are talking about values, the values accepted in our societies must be seen in their historical and philosophical context, because these societies not only affirm the dignity of their members, as mentioned, but also promote their autonomy and responsibility. In the case of schools, this means teaching young people to control their own destiny and while drugs are certainly an obstacle to this, drug countermeasures may have the same effect! We therefore need to review the legacy of human values that has been bequeathed to us by earlier centuries

and remodelled by recent history. We also need to see how those values are legally and politically expressed by the institutions that govern contemporary society.

The relevance of relating pupils' drug abuse to what schools are supposed to inculcate in them cannot be divorced from a broader context summed up in the phrase "crisis of education" - not to point the finger at teachers' methodological shortcomings, but to question the very role of schools in an extremely unsettled society. We are talking about human values whose current expression is the result of the historic upheavals of the twentieth century and that must be seen in the context of a society disrupted by economic recession, globalisation, sexual liberation, the communication and information technology revolution, to name but a few. How are we to deal with children in these circumstances? For what future are we preparing them? What is, could be, should be the function of schools in protecting them against the deleterious effects of these changes and uncertainties? How do the generations that proclaimed the ethical values in the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and all nations" transmit them in schools? Some will say that this is to raise the problem to disproportionate heights of political philosophy, but can the problem and its effects and solutions be reduced to the detection of a few molecules?



Chapter 1:

Conceptual and legal framework

A. Lourenço Martins, Juiz Conselheiro do Supremo Tribunal de Justiça, Portugal

At least some preliminary explanation of the concepts that will be used in the discussion is needed in order to facilitate a fruitful outcome. This will be done in relation to the concepts of *ethics*, *morality*, *deontology* and *law*.

Ethics and morality

The concept of *morality* is not the only one linked to that of *ethics* – indeed some people do not distinguish between the two at all; *deontology* is also linked to it. While the term *morality* refers to the conduct and rules that many (or some) people regard as always valid, guaranteeing a common benchmark, *ethics* examines the rational justification for moral judgments and why we consider them valid by comparing them to other people's "moral" rules. Ethics should therefore be left to individual judgment, while morality applies to everyone. Ethics is therefore the theory or science of the moral behaviour of people in society, and as such cannot be reduced to a set of standards and prescriptions, though it can explain actual moral behaviour and may influence it.

Etymologically, both ethics, derived from Greek, and morality, derived from Latin, are linked with mores, i.e. a way of behaving fashioned by repeated use.

Nevertheless, ethics seeks to “deconstruct” the rules of behaviour that constitute morality, by looking into morals in order to examine their sources.

While morality may refer to a creative impulse, it is crystallised in prescriptions that are critically questioned by ethics, which may distance itself from them¹³.

Ethics is concerned more with thought than rules. Not in the manner of Plato as *“contemplation of the beautiful, the good and the true which nourishes the soul to the point of enabling it to conform to its ideal”*, nor so much for theoretical discovery seeking the model of “the art of living”, but with the rational aim of finding out how we can live better in practical terms (F. Savater).

Human action - values

To summarise, although this is particularly difficult¹⁴ here, three major philosophical lines of thought on human action can be identified.

The first, which is Aristotelian, takes as its starting-point the individual as a political animal endowed with language, acting logically, developing in a particular society at a particular time within practical forms of “government of the community” in order to be happy. For Aristotle, virtue means a strength and excellence concerning the practical and intellectual values of existence. Ethical behaviour includes, not only specifically “moral” concerns, but also implies, within a certain notion of human nature, a degree of wisdom or prudence with respect to dealing with the world. For Aristotle and all the Greek and Roman Stoics, the virtues are the goal every individual can and should strive to attain.

The second current, known as *utilitarian*, has English roots and its partisans are less speculative. For them, the greatest good of the greatest number, not excluding those who act, is the ethical value that should be pursued in life. *“Humanity has more to gain by allowing everyone to live in their own way than by forcing them to live like other people”* (John Stuart Mill).

Philosophies that take as the basis for deciding between different options the consequences of those options are therefore known as “consequentialist”. For example, with respect to the allocation of limited financial resources, if a choice had to be made between allocating more resources to children or to people in the terminal phase of AIDS, the ethically appropriate choice would be the children since they have greater life expectancy and more possibilities of happiness. The practicability of this nonetheless comes up against the problem of knowing what constitutes the ultimate good for human beings, since the concept of utility is relative.

¹³ Jacqueline Russ, “La pensée éthique contemporaine”, p.6

¹⁴ Following the Brazilian Álvaro Valls.

The third current is derived from Kantian philosophy and focuses on the notion of duty, expressed in the well-known categorical imperative, “Act as if the maxim of your action was to become through your will a universal law of nature”.

According to Kant, freedom is a transcendental predicate; practical subjects have an “empirical character” through which their actions are, as phenomena, governed by natural causation; but they also have an “intelligible character” through which they are themselves the causes of their actions – an unconditioned causation in which responsibility finds its roots.

For Kant, an action is not of itself generally either good or bad. What counts is the will of the person who acts and acting according to one’s duty. Freedom is not simply the rejection of any external determination; it is intrinsic autonomy, awareness of independence from pressures and circumstances. It is the power to establish one’s own law, obedience to the moral law. The only restriction on my freedom of action derives from others, who have the same power/duty.

According to Kantian ethics, the criterion of the ideal is to be found in the universalisation of our own maxims, which are in themselves subjective. In this sense, the individual is a lawmaker – because it is he/she who sees what should be done – and at the same time a member of an ethical society since he/she obeys the duties that are formulated for him/her by his/her own reason.

The second formulation of the categorical imperative – *“Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but at the same time as an end”* – enshrines the ethic of respect for the individual human being and humanity in general.

This theory is said to be modern in that it places trust in the individual and his/her reason and freedom. It has nothing to do with consumerist capitalism since it places no great value on the enjoyment of pleasures and emphasises duties. Here, happiness is found in awareness of duty fulfilled, the tranquillity of a clear conscience. It does not concern happiness at any price, since the aim of the duty to do everything to be happy is universalisability, based on respect for others.

Common ground

What these three ethical conceptions have in common is their intermediate position between religious or traditional morality – which contains heteronomic precepts revealed by a transcendental divinity or the force of historical tradition – and attitudes that might be termed infra-ethical, espoused by people solely and permanently in search of pleasure or power, personal gain or economic and financial benefit.

In ethics, because it is rational, the justification is extremely important in a situation characterised by multiple values and globalisation.

The importance of the topica

We do not need to take a position on the pre-eminence of any one of these conceptions but it is worth emphasising certain important points.

It has been said that the *“only world in which one can live well is one in which people treat each other as people”* (F. Savater). As a practical means of fulfilling this axiom, everyone should try to put themselves in the other’s place, which does not always mean deciding in their favour.

Accepting someone as one’s fellow means understanding others from within (their personality), adopting, if only for a moment, their point of view, and taking their rights or, failing that, their reasons into account.

In practical terms, we are approaching the principle of respect for human dignity in all circumstances, even though some like James Rachels would add that the “merit” gained by each individual has to be taken into account.

From another point of view, all important moral theories include the principle of impartiality, also seen as prohibiting arbitrariness in the treatment of each person. Morality should be based on good reasons. It implies that the interests of each individual should be taken into account impartially.

The Portuguese neuroscientist António Damásio says that we do not have a moral centre or centres. Good and evil are discovered rather than revealed. Ethical behaviour is the result of certain synergies: biological regulation, memory, decision-making and creativity.

Following Spinoza, he says that *“the biological reality of self-preservation results in virtue because, in accordance with our inalienable need to survive, we must necessarily help to preserve other selves”*. We cannot preserve ourselves without society.

Good actions, he argues, are those that, while doing individuals good through their natural appetites and emotions, do not harm others. Our good derives from the friendship and benefit we bring to others. The evolution of the brain has incorporated our natural tendency to seek social agreement through cooperative behaviour.

Deontology

We shall now move on to the concept of deontology – from the Greek deon, duty, and logos, discourse.

For the philosopher Jeremy Bentham, “deontology” had the precise meaning of a set of professional rules and duties in medicine and other liberal professions. For him, deontology was his utilitarian doctrine of duties. Later, the term was used particularly to refer to doctrines on certain classes of duties concerning certain professions or social situations (nowadays, terms such as “business ethics” and “media ethics” are used).

More generally, the term “deontological” is contrasted with “ontological”, in other words the antithesis between what should be and what is.

Deontology is a set of principles and rules governing professional persons in their ethical dimension¹⁵.

Ethics, morality and deontology are therefore related but not synonymous terms, although they may be ordered in concentric circles.

In the outer circle, ethics is concerned with the ideal conduct for an ideal individual, values and virtues, and defines actions as good or bad in terms of living well (happiness). In the middle, morality relates ethics to human and social behaviour, and lays down rules, while in the innermost circle, deontology links morality to individuals' occupational or professional conduct in society.

Ethics, morality and international law

It is also important for our discussion to consider whether *ethics and morality* are in any way connected with *law*.

Law is composed of a set of laws and regulations of general validity – although the legislator may amend them – that are enforced by the courts. In interpreting them, the courts lay particular emphasis on certainty of the law and social peace. But while the law is “determined” by the courts, everyone is able to make value judgements on the morality of situations.

According to Chaim Perelman, *“while law regulates external behaviour, morality emphasises intention. The law establishes a correlation between rights and duties, while morality lays down the duties from which subjective rights emerge. The law establishes duties to which government attaches sanctions, while morality falls outside the scope of organised sanctions”*. It can nonetheless be said that opprobrium is the social sanction for violation of moral rules.

The specific legal roles of legislation and the courts therefore run counter to the autonomy of conscience that characterises morality.

However, the importance of the moral element in the functioning of law still needs to be underlined (hence the importance of notions such as good and bad faith, intent to harm, accepted standards of behaviour and equity), based on the “ethical minimum” requirement. It has been said that law is the moral minimum enabling human beings to live in society.

Better still, together with pluralism, whether religious or ideological, it is the values of *freedom and human dignity that triumph in both morality and law*. The best expression of this is to be found in the Universal Declaration of Human Rights, (UDHR of 1948)¹⁶.

¹⁵ The term professional ethics is also used. They have long existed in several professions and their rules are accepted and implemented as if they were law. In the medical profession the Hippocratic oath was referred to by its creator as “jus jurandum” (the law one swears to obey).

¹⁶ Chapter III notes the events that at that moment in history led to the UDHR.

The importance attached to purely moral aspirations in a spirit of universalist humanism clearly emerges from the UDHR¹⁷.

This last reference leads us to consider the most important international legal instruments. Some of the main points of interest are as follows:

“All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood” – Article 1 of the UDHR¹⁸. The inviolability of human dignity is also affirmed in Article 1 of the Charter of Fundamental Rights of the European Union (2000).

“No one shall be subjected to arbitrary interference with his privacy” since everyone has the right to the protection of the law – Article 12 of the UDHR. “Everyone has the right to respect for his private and family life,” also appears in Article 8 of the European Convention on Human Rights and Fundamental Freedoms (1950).

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups ...” – Article 26, paragraph 2, of the UDHR¹⁹.

According to the Declaration of the Rights of the Child – Principle 10 – the child *“shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men”*.

In all decisions concerning children – any human being under the age of 18 – *“whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”* – Article 3 of the Convention on the Rights of the Child (1989)²⁰.

“No child shall be subjected to arbitrary or unlawful interference with his/her private life”, having the right to the protection of the law against such interference or attacks – Article 16 of this Convention.

Furthermore, the education of the child shall be directed to the development of respect for human rights and fundamental freedoms and the principles enshrined in the United Nations Charter – Article 29, paragraph 1(b).

With particular reference to drugs, Article 33 requires States Parties to *“take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances ...”*.

17 Although it is said that this universal agreement was achieved only because every state reserved to itself the right to interpret it in its own way. This is what makes the establishment of the European Court of Human Rights, set up to apply the European Convention on Human Rights and Fundamental Freedoms, so critical.

18 A similar statement is made in the International Covenant on Civil and Political Rights.

19 A subject dealt with in greater depth in Chapter III.

20 This principle is reaffirmed in Article 24, paragraph 2, of the Charter of Fundamental Freedoms of the European Union (2000).

The Convention on Human Rights and Biomedicine (1997) emphasises the importance of free and informed consent that may be withdrawn at any time with respect to interventions in the health field – Article 5.

As a governing principle, it provides that any intervention on persons unable to give their consent – which may take place with the authorisation of their representative or an authority or a person or a body provided for by law – may only be for their direct benefit.

In this very brief summary it is interesting to note that several provisions of these international law instruments establish moral requirements – along with, for example, health, public order, protection of the rights and freedoms of others – as limitations on the full exercise of rights.

Consequently, ratification or adhesion to the international treaties by the States oblige themselves to observe these norms to the national Law or, at least, to respect their principles. Besides, the simple declarations of principles, as for example, the UDHR, can be followed to the internal Law as interpretation rules on the “human rights”. Then, the international Law sinks itself in the national Law.

Ethical values in European societies

We will now consider the essential ethical values of contemporary European societies.

Freedom and human dignity

Freedom, a somewhat protean concept, remains a key notion in modern Europe.

For Plato, true freedom was the freedom that disciplines the passions and flows from reason, since absolute freedom may lead to excess.

There is no such thing as absolute freedom, according to Kant in the metaphor of the “light dove”: *“When the light dove parts the air in free flight and feels the air’s resistance, it might come to think that it would do much better still in space devoid of air”*.

For Hegel, the freedom to do as one likes taken to the absolute limit becomes totally abstract, avoiding substance as if it were a constraint, until it finally becomes a negative freedom (the freedom of the void), leading to religious or political fanaticism.

If human beings depended on things exterior to themselves, they could not be held responsible for their acts. Taken in conjunction with responsibility, duty and respect, freedom is at the heart of all moral thought.

For natural law theorists, freedom is specific to humanity and the state, as a creation agreed to by everyone, exists to defend it.

At the legal-constitutional level, when we talk of “rights, freedoms and guarantees” we are seeking, with the term “freedoms”, to defend the citizen against the state as a public authority. This is the negative freedom to which the English refer, also known as “individual freedoms”.

These include the right to life and personal integrity, freedom of movement, the right to security, identity, one's reputation, a fair trial and respect for privacy, freedom of expression and information, freedom of the press, of conscience, religion and worship and, lastly, freedom of assembly and association.

For Benjamin Constant, political freedom is a legacy of the Greco-Roman world, while individual freedom is the product of the modern world.

Freedom changes over time and the change is irreversible.

Associated with the idea of freedom, there is increasing emphasis on the notion of **human dignity**, a value inherent in the status of human being and combining rights which, irrespective of gender, ethnicity, nationality, religion or economic and social status, are entitled to national and international protection.

This dignity forms part of our being and is the basis of our right not to be physically or psychologically ill-treated or otherwise abused by anyone, including ourselves, from birth to death²¹.

For individualist humanism, in the Kantian sense of the human being as a phenomenon that does not repeat itself, human beings are the substance and the organisations to which they belong purely circumstantial. This leads on to the concept of individuals endowed with autonomy and independence, possessing both an internal capacity that permits rational self-determination and a sort of sovereignty that enables them to be agents separate from others, not subordinate to the community as a whole, in other words to be members of human society and citizens of the world.

In a democratic system, liberals will tend to highlight individual rights and freedoms, emphasising differences, while the more socially minded will emphasise equality and participation in the government of the community, thus encouraging homogeneity and forms of union.

It is not surprising that, among the different values on which it is based, the new draft European Constitution places human dignity and freedom first²². After reaffirming in the Preamble to Part II²³ the indivisible universal values of human dignity, freedom and solidarity, placing human beings at the heart of its action, it lays down the inviolability of their dignity and respect for their physical and mental integrity²⁴.

The draft Constitution for Europe still has to be ratified by the member states and, like any other national constitution, it is far from being a body of legal rules based on ethical standards.

21 We are not without knowing the conducted debate at the present time on the rights of the personality and «decision-making autonomy» - in particular about euthanasia, "ovocytes" donation, and even prostitution, debates where individual autonomy and rights of the personality find confronted themselves to the decisions based on the «common good».

22 Part I, Article 2: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination".

23 The Charter of Fundamental Rights of the Union.

24 Articles II-1 and II-3.

As we have seen, many important international instruments incorporate ethical principles. However, once again recent global trends and a lack of training on ethical issues relating to rights create a need for further ethical debate²⁵.

Above all, ethics has a paramount contribution to make to any understanding and extension of human values and the concepts of human dignity and freedom themselves, whether or not they have a constitutional basis.

From an ethical point of view, a maximum of freedom is desirable, but coupled with responsibility for actions and omissions, with restrictions only justified when someone does not respect others as fellow human beings.

In John Rawls' fairly consensual version, individual freedoms (basic freedoms) are the ethical and political basis of any well-organised society. Freedom is the first of the two principles of justice and takes precedence over the second, equality of opportunity, since inequalities must be "to everyone's advantage and attached to positions open to all".

Justice and equality

Linked to defence of and respect for human dignity is the idea of **justice** – which is not the same as law – and also that of **equality**, though bearing in mind that inequalities that allow equality to be achieved are permissible. This also involves the concept of solidarity.

We are not concerned here with what is commonly termed the administration of justice, referring to the legal system which, with all its merits and defects settles disputes and punish crime by applying the law.

Justice is, theoretically, the ideal of the law, "the mother of the law", its guiding star, the prime virtue of social institutions, the search for the common good, the quest for equality before the law, the "executive" of the principle of equality (treating the equal equally and the unequal unequally, based on impartial criteria) so that everyone receives his due.

This is the quest for the just, according to principles that the Romans laid down (Ulpian): *alterum non laedere* (commutative), *sum cuique tribuere* (distributive), *honeste vivere* (social).

In modern times this quest has been reflected in the development of the rule of law, which lays down the limits on and boundaries of the exercise of power, in particular executive power, which is constantly being required to give fuller justifications for its decisions in order to avoid arbitrariness and irrationality.

Even at the level of international law, the trend has been away from the rules of good faith and the *pacta sunt servanda*, towards properly enforceable laws.

In fact, it does not suffice that the States take and observe the modifications in the national law. It is important that the norms be directly constraining, if necessary with the intervention of a court, as early as the international law, as this the case of the International Criminal Court, instituted in 1998, linked up to the system of the United Nations, « *as an institution*

25 For example, Article 5 paragraph 1e of the European Convention on Human Rights itself provides for an exception to liberty with respect to the detention (provided for by law) of persons likely to spread infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. In our opinion, this represents an excessive stigmatisation of these situations, including drug addiction, which may harm the dignity of those concerned.

permanent one that can exercise his competence with regard to the persons for the crimes more serious having an international reach » (Statute CPI, art. 1). That implying even the change of the constitutional rules of the Parties.

Tolerance and pluralism

Tolerance, pluralism and diversity are other ethical values of European societies.

For Claude Levi Strauss, the abandonment of natural law means that we are unable to acquire authentic knowledge of what is good or just in itself, thus obliging us to tolerate all opinions and treat every preference and “civilisation” as equally respectable, a somewhat doubtful proposition.

One American author has raised the problem of tolerance with respect to one aspect of multiculturalism that is currently the subject of lively debate, namely immigration and the treatment of minorities.

He distinguishes three forms of tolerance. The first is concerned with separating individuals from their original group in order to assimilate them into the national culture. A second consists of separating groups so that they can have collective identities, which is achieved through decentralisation and giving particular groups access to autonomy or sovereignty. He calls the third form multiculturalism. Here tolerance exists not between distinct, identified groups, but between individuals as multiple identities belonging to several groups, in other words between free and atomised individuals. He describes the last form as a post-modern project, with diffuse communities where peace (interethnic, intercultural and so on) begins with the spouse and his/her previous family, and the children, something which might encourage nostalgia for greater family cohesion.

According to André Danzin, *“the major objective for Europe in this time of upheaval is to maintain a variety of cultures, plurality of traditions and respect for differences in philosophical and religious approaches and ways of life, as opposed to a levelling down by the instruments of a mass culture based on essentially materialistic criteria”*.

Antonio Gramsci emphasises the aspect of tolerance in discussion when the components of a group try to reach a complex truth as an integral expression of what is right. For a discussion to be exhaustive and sincere, great tolerance is essential. But when the time comes to act, everyone must agree and show solidarity.

Jürgen Habermas says that *“discussions are a sort of washing machine that filters what is rationally acceptable to everyone”*. There can, however, be no tolerance of error or dereliction, particularly when the person responsible avoids discussion and logical argument and descends into authoritarianism or idolatry.

Strictly speaking, in democracies rights are said to be compatible not with tolerance but with total mutual equivalence and independence.

In a political context pluralism is associated with structures with a range of decision-making bodies, representative authorities and parties. It is not a cause of discord or sedition since it generates emulation and progress in the quest for truth. It implies adversarial and dialectical debate, under the impartial, neutral gaze of the state.

There are those who warn against the tyranny of the majority, a tyranny of dominant opinion and sentiments over the minority, where the majority power is not restrained from excess.

Pluralism should accept not only different opinions but also different ways of life which are entirely a matter for individual choice in the private sphere. The “right to difference” is now being asserted.

Pluralism is therefore based not only on the free play of democratic institutions, but also on public non-interference in the individual sphere, the state’s role being to preserve diversity.

Individual autonomy

During the discussion of individual dignity the importance of **individual autonomy** was emphasised, that is not exploiting others and the right to non-interference by the state and fellow citizens, so long as there is no harm to others and the information available enables the best choices to be made. This in no way exempts the individual from contributing to the common good, starting with minor obligations like not interfering with the fundamental values that need to be preserved.

Being autonomous means setting one’s own standards for controlling one’s destiny. This refers not only to individual types of behaviour but also to individual character and personality.

Respect for privacy

With the development of new technologies – from the microphone (1870), instant photography (1880) and the telephone and sound recording (1890) to the growth of sophisticated means of detection and audiovisual reproduction and the intensive use of computers and telecommunications – the right to **respect for privacy** has become particularly important in Europe. The concept has a number of definitions but as a minimum seeks to prevent access by third parties to information about anyone’s private and family life and the disclosure of such information without the authorisation of the person concerned. Citizens increasingly want to defend themselves against violations of confidentiality because peace and tranquillity are necessary for contentment, and confidentiality is a prerequisite of freedom to enjoy privacy.

Respect for privacy may concern data on telephone numbers, health, conjugal, sexual and emotional life, events within the home, forgotten past events, one’s financial situation, or even movements in and out of one’s home.

However, an excessive emphasis on the defence of privacy could also lead individuals, especially children, to withdraw from the human community. It could become an excuse for the state and society to allow citizens or their children to exclude themselves.

We refer to the ethics of participation in human development, particularly in relation to the speed of technological innovation and the tension generated by control of its applications as a result of the changes it brings to daily life, habits and thought. There are now strong demands for freedom to control information about oneself.

Free and informed consent

The achievement of the consent because of the practice of certain acts that can constitute offends to the personal rights is a requirement to live in society. Everyone must be informed in an enlightened way on the actions and the events to which one must be submitted, its objectives, procedure, risks and benefices, and if there is confidentiality or not on the collected data. In order to have a free and enlightened consent, the person must have the capacity to understand the suggestion that is done for him and be able to decline it without no adverse consequences.

The consent of persons of age less than 18 years again must be obtained with the participation of their representatives or tutors, as well as of the minor if it has discernment, being able to be revoked at any moment. The ideal one will be that the achievement process of consent can imply an independent third person to guarantee his integrity.²⁶

The secular state

The contemporary value of **state secularism** is also relevant to the subjects under discussion.

Historically, state secularism meant liberating states and societies from the influence of the churches. Secularism was a political demand for religious plurality in society.

State religious neutrality means that it does not identify with and is not governed by any particular religious confession, for the simple reason that it has to harmonise all confessions in the higher interests of the common good. Religious neutrality does not mean anticlericalism, however, since this would make secularism a sort of creed, leading to an alternative form of confessional state.

Nowadays, the whole area of debate has been secularised. From school upwards, the state accepts responsibility for creating channels to enable the different cultures in civil society to emerge from the social system.

Conclusion

The background to any ethical discussion is respect for individuals and their human dignity,

26 For better deployments - cfr. Ethical challenges in drug epidemiology: exits, principles and guidelines - Global Assessment Programs on Drug Abuses, Toolkit Modules 7, op. cit. – where one calls a special attention on passive, obtained consent through generic communication sent to the parents and on the drug addiction and his influence in the benefit of an informed consent.

in particular those who suffer most or are most materially or spiritually deprived or, more concretely, those who do not even know about their “right to rights”. This calls for solidarity and recognition that ethical values are not cast in stone. Individuals’ freedom also needs to be set against the weight of responsibility for the choices made (the ethic of responsibility). Finally any incompatibility with the interests of society (the ethical imperative) must not lead to the submersion, or even unnecessary invasion, of each individual’s privacy.

This entails respect for the principles of tolerance and plurality, without subordinating equality and without unnecessary offence to individual autonomy, in an atmosphere of impartiality.

Subject to these conditions we can move on to our practical theme, bearing in mind that, as the United Nations recently stressed, the function of ethical principles is to raise the alarm and guide, on some situations, rather than provide solutions. The latter have to be tested in each specific case through a process of participatory debate.



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Chapter 2:

Educational problems raised by drugs testing in schools

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“Anything can become a drug for human beings”

Before deciding to test young people in school for illegal drug use, we need to consider the implications of such screening in a setting whose main purpose is to contribute to their education. It is surely incompatible with parents' and other adults' expectations regarding schools' educational role, which is to transmit human values that will enable them to exercise their own power of choice in accordance with these values.

Naturally schools are not the only institutions with the difficult task of educating young persons. Their development is also a function of the interaction between the different environments in which they live: family, social, cultural, religious and political. The precise form of this education is determined by national policies, which vary from country to country but ought to be based on the undertakings made by the peoples of the United Nations after the Second World War in the Universal Declaration of Human Rights. Are they so based?

At first sight, and according to traditional education theory in Europe, screening for drugs in schools cannot be justified since school syllabuses are still based on a humanist approach to education that takes insufficient account of the dual nature of our human condition: body and mind. This is particularly important for young people, whose bodies and personalities are at the stage of rapid development. Growing drug abuse in schools poses a particular challenge to this educational approach. Far from being compatible with educational theory, using screening tests to prevent such abuse appears to highlight a crisis in which schools are unable to achieve this end by providing a form of education appropriate to young persons' needs.

In response to this situation, I propose to examine three issues. First, is testing in schools for drug abuse likely to be effective in preventing this problem? If not how can such abuse be prevented in schools - is it a health or a school problem or a more general educational problem that concerns everyone? Finally, should not the values transmitted by schools and by the education process in its wider sense not be more open to history and to an understanding of our human condition?

Can screening prevent drug abuse in school?

The use of screening tests in school is based on the assumption that they will discourage drug abuse. This raises the issue of the purpose of schools. Schools are not places where drugs can be allowed to circulate. But what are they to do if their pupils are already drug users? The scale of drug use in European societies and of the problem among the young also affects schools. But how can we prevent abuse in a setting which, together with

parents and other social institutions, is concerned with educating our young generations? Schools have a special responsibility for transmitting the essential human values of education: learning to read and write, to express oneself, to respect oneself and others and to be receptive to educational values that change with succeeding generations and the world that these generations transform. How can we prevent drug abuse in school? Is there not a certain ambiguity, or even incompatibility, between this education and a form of prevention which, like testing, implies an initial laissez-faire attitude with respect to drug use in schools?

Before even discussing the problems raised by the legitimate prevention of drug use, the definition of drugs, the reasons they are used and the meaning given to their lawfulness or unlawfulness need to be examined. In 1994 the French Committee Consultative National on Ethics (CCNE) identified three reasons for the use of drugs, that is substances that act on the nervous system: recreational, experimental, and utilitarian²⁷. It recognised that the dividing-line between the therapeutic and non-therapeutic use of various substances was increasingly hard to define and that *“the legal distinction between legal and illegal drugs did not seem to have any coherent scientific basis”*. It also recognised that drugs that are not prohibited (alcohol, tobacco, painkillers and neuro-psychiatric drugs) were potentially as dangerous as prohibited drugs. What determined how dangerous they were was the use made of them. “Abuse” arose when someone became dependent on them in doses endangering health. Naturally, the level of dependence varied according to type of drug used. But might any drug use at all by young people amount to abuse?

These definitions reveal certain problems associated with drug use in schools, coupled with illegal drug use outside school and its repercussions for schools. The use of legal drugs that are banned in schools as far as young persons are concerned but authorised for adults is increasingly tolerated in certain quarters, which casts doubt on the educational principle of setting an example. Steps have been taken to impose universal bans on smoking in schools. Inside schools, the users of certain products may have an occasional or persistent influence on non-users. The reactions of each may vary according to these internal exchanges. Furthermore, senior secondary schools may include young adults, who are no longer minors and therefore have different rights.

Is it desirable to focus drug prevention on testing, which is not a preventive action but rather an attempt to detect that is not absolutely reliable and implies a degree of laissez-faire with respect to drug use in schools that is incompatible with the educational mission of schools? Drug prevention in the form of studying substances and understanding their use and the dangers involved in physiological dependence, crime as well as death, is also a possibility. But how to explain these dangers and risks to young people whose age makes it difficult to understand and stand up to them, and who do not yet have the means to understand them?

If schools cannot help them to understand these dangers and risks, and if their families or friends already use abuse legal or illegal drugs in front of them, or even share them with them, how can they resist their influence and understand why schools are taking

27 Special Needs of Children of Drug Misusers, Consultants' Final Report, by Beate Leopold & Elfriede Steffan, Strasbourg, Pompidou Group, 1997. (Available on the Pompidou Group site)

preventive measures that run counter to this harmful influence. It is as if adults brought children into the world without explaining to them their complex relationships with their parents and with each other, or that these complex relationships have health, and even life or death, implications, and above all that they depend on such human faculties as thought, free will, judgment and imagination – faculties that also determine our ability to act and our level of resilience or lack of it. Given the numerous pressures to use drugs in western societies, from the earliest age, what can schools do to support young people and help them to understand what they can expect from life and from their youth, without the need to resort to such devices as drug abuse, which are substitutes for their desires, their free will, and their respect for themselves and their relations with others?

When those responsible for schools fail to include in their educational curriculum instruction in the essential values of a shared world through which human beings find meaning and a place with others in the community, and renounce their educational responsibilities in favour of a degree of drug prevention without concerning themselves about the basic message they are supposed to transmit – the risks drugs present when they are abused, which is even more serious in their position – they run the risk of diluting the very content of education. The need to combat drug abuse and its increasing encroachment can seriously impede schools' real purpose, which is not to confront such abuse head on but to prevent its use by transmitting the right values. How can education pass on to the younger generation the essential values to enable them to take part in the construction of our common world by learning to resist everything that might endanger their existence, before they have even learned to reflect upon their lives, deaths, existence and ambitions in the light of these educational values?

Drug use in schools is therefore less important than an education capable of enlightening young people as to the dangers threatening them, not in relation to drugs, but first of all in relation to themselves and their place in their own lives, in their families and with their friends, so that they understand and can take their own place in the world alongside others. If they do not think about their own condition, how will they understand anything that might attract their attention and stimulate their appetites, ideas, judgment, will, personal responsibilities or very new rights? This is also true of health problems, which often remain the only educational context young people at school have for dealing with their personal problems, which are neither biological nor medical, but rather the essential human problems we all experience.

How to prevent drug abuse in schools

It is not the purpose of schools to combat drug abuse, when this becomes harmful to the abusers, or even criminal or pathological. Their task is to point the pupils concerned towards agencies specialising in those problems: doctors in the case of pathological conditions, the police and courts where offences are committed. They are not a suitable location for drug screening tests, as we have seen. Schools face a much greater challenge than the risks of drug misuse since the presence or absence of appropriate teaching can have a major impact on how young people deal with their problems of growth and maturity, just as their frequent conflicts with their parents can have a substantial effect, positive or negative, on schools' educational role, depending on the sort of dialogue those children and parents can establish.

The risk of drug use is not the immediate problem, which is rather that young people will not come to know and accept themselves and will lose themselves in practices that might become inhuman. Teachers must therefore be able to enter into dialogue with the younger generations to help them to take these essential risks. Drug use may at first be imperceptible, or even irrelevant. This is one of the dangers because a pleasant initial experience may lead to drug dependency by young persons who will then gradually lose their own still fragile positive forms of dependence. Preventing such dangers means entering into genuine dialogue with young persons to enable those concerned to identify situations that might push them into choices that could be harmful to them, rather than tackling the real problems they face. Contrasting drug use with the challenges of human existence may seem laughable to children who as yet have no sense of their existence and do not regard the experience of the adults they mix with at school or elsewhere, particularly in their families, as beacons and examples. How can young persons learn to rely on dependency relationships that are liberating, such as positive family influences, rather than ones that are harmful?

Schools are generally ill-adapted to the new problems facing the young people for whom, together with parents, they share responsibility. Pupils are subject to social and media pressures as well as the influence of school and family, and these pressures may have a quite distorting effect on their education. Teachers who are overburdened with curriculum demands may no longer be equipped to deal with the personal problems of their young charges, particularly when – as now – these media and social pressures spill over into the classroom. A number of these problems could be considered further, using the CCNE opinion as a basis.

The moral problem posed by drug use by young people, particularly at school, is simple to formulate but hard to live with. As the CCNE notes, *“no moral system forbids ‘doing good’, but no moral system authorises self-harm except in exceptional cases (the “suicide of the wise man” among the Stoics; the redemptive value of suffering among some Christians), and none permits the harming of others. The distinction between use and abuse is therefore morally important, above all for personal morality”*. It is true that the problem is the repetition of this pleasure without being able to judge the transition from “doing good” to “doing harm” to oneself of one’s own volition, but this may become a tragic problem for those who lose their own benchmark of good, without understanding why they are doing themselves harm. What is to be done when one realises one is slipping into dependency, the Committee asks.

When use becomes abuse, the problem becomes that of one’s own judgment. How is the immediate good to be distinguished from the evil to come if I am unable to distinguish between a pleasure that masks a problem and the joy of dealing with a problem or overcoming an obstacle that drugs obscure and that brings my judgment into play, since I must be able to think carefully and fully in order not to risk contenting myself only with the pleasure I feel in my solitude, my person and my body? How can I do this if no one has taught me to think about the sensations and feelings I experience and if no one is there when I am young to hear the problems I am unable to express? From a medical standpoint, the danger of drug abuse is long-term dependency, but in moral terms it is the loss of autonomy to act freely.

Drug use is therefore a choice made in relation to oneself; it is also a choice made in

relation to the law. When drug use is forbidden, to transgress is to face punishment. But national rights and laws may not be in line with fundamental rights. As the Committee said, *“transgressing the law means by definition accepting the risk of punishment. However, a citizen who in all conscience considers the law unjustified or even outdated may seek with others to demonstrate the validity of this criticism and succeed in having the law changed”*. This could be one approach for our working group, namely to make a comparative study of the legislation in European countries and the problems it raises with respect to fundamental rights and the educational needs arising from them, in order to combat drug abuse of course, but also *to respond to the educational needs these rights imply*.

On a number of occasions, the Committee advocates a form of *education for all*, in view of the fact that we are all affected. It suggests the following educational guideline: *“In the same spirit of understanding, society should guard against projecting a degrading self-image onto those who have ‘tried’ a substance.”* The CCNE is thinking particularly here of adolescents who, *“encountering psychotropic substances at an age when they are vulnerable or when the search for a personal identity may lead them to do things in a playful or almost experimental spirit or one that is to some extent self-destructive, need less to be judged negatively than to be invited to think positively about the problems of their physical integrity and the problem of ‘self-esteem’*. There is now every reason to believe that the best way of curbing the scourge of drug dependency is to train responsible, well-informed citizens”. It continues: *“a policy of enforcement and/or dissuasion is only meaningful if it is linked to one of education and prevention that makes citizens aware of the risks they run and inflict on others when they use, prescribe or in any way promote substances that act on the central nervous system*.

This means that objective information should be made available on substances, their effects and risks and the precautions that need to be taken. To ensure that such information exists, society should provide the conditions for sound scientific research in psychopharmacology, epidemiology, clinical medicine, anthropology, sociology and education sciences.”

Little is said about fundamental rights, however. These concern public freedoms and the problems of tolerance in democracies and respect for privacy, though subject to certain restrictions. *“Respect for freedoms in a democratic society implies that, up to a point, the use of drugs by adult, autonomous, well-informed citizens should be tolerated (like other high-risk behaviours), insofar as such use does not harm others and even if the individual seems to be harming him- or herself through that use. Moral subjects are the judges of the risks they accept. However, the expression ‘do harm only to yourself’ is of questionable value since very few people have no family or friends around them. ‘Tolerance’ comes from the fact that no one has power to control the privacy of a human life. This is yet another reason for developing prevention of high-risk behaviours through information and very seriously conducted education.”*

In the Committee's opinion, another factor is the alienation of people who abuse drugs, which in serious cases, because it is a question not of restraining free human beings who have made their own choices but of our duty to assist people at risk, leads to a right to interfere, albeit one that is difficult to implement. But the use of drugs may conceal more personal problems. In such cases the ethical crisis should be dealt with by friends and family and the relevant institutions. But how can the need for such assistance be anticipated if those surrounding persons at risk are themselves incapable of perceiving

the dangers that young people often find it extremely difficult to express? According to the Committee *“the duty to assist people at risk applies not only to our family and friends,” the Committee says, “but to the whole community. The community has a duty to put in place a public health policy of genuine help to individuals and therefore one not predicated solely on the question of abstinence. It must take into account all the health and social factors connected with the use of substances that act on the central nervous system.”*

What values should schools transmit?

It is not a matter of excluding health from the education curriculum, but of seeing that it is understood as defined by Georges Canguilhem²⁸ : *“being in good health means feeling responsible, being able to set one’s own norms, go beyond the ordinary norm, introduce new norms when faced with new situations and tolerate violations of the ordinary norms, what philosophers call “biological normativity”, examining the dynamic polarity of life with the positive tendencies towards health and the negative tendencies towards illness and death, learning to think about the tension of living between the normal and the pathological, on the basis of which new normalisations of political power are developed . Michel Foucault says in *The Birth of the Clinic*²⁹, that “in the management of human existence, medicine takes a normative position which does not allow it simply to dispense wise advice, but gives it a basis on which to dictate the physical and moral relationships of the individual and the society in which he/she lives. The risk is that, without the appropriate education, this excessive medicalisation will make it impossible for us to combat such abuses.”*

This implies a form of education that transmits the meaning of the body and knowledge of the vital organs – what it means to have a body – the meaning of the imagination, the benefits of thought, the will, judgment and responsibility, all of which are human qualities that it is difficult to acquire when one is still young and for which schools are essential. It is these human qualities that form the basis of the ethical and moral principles that guide our actions. The development of universal rights in the mid-twentieth century reflected the need for benchmarks so that these qualities can be shared by new generations who first learn through the examples of those that have preceded them. We have the capacity to confront the problems of our existence, but we need to be trained to use it. Drug use ultimately threatens or even eliminates this capacity to set new norms that transform the conditions of existence, partly through dependence but also because of serious educational shortcomings and a tragic lack of human support. Education free of oppressive dependency, which traditionally allowed some people to be “their own doctors”³⁰, should enable young people to explore freely and voluntarily the place they should make for themselves, with themselves and with others.

Could we not propose, in addition to a public health policy, an educational policy for Europe that would enable young people to be agents in their own lives without mistaking the objectives they should aim for or the risks they will face? Could young people not

28 Georges Canguilhem, *Essai sur quelques problèmes concernant le normal et le pathologique*, in *Le normal et le pathologique*, Paris, PUF, 1966, ch. 4. (Coll. Quadrige n°65, 1994).

29 Michel Foucault, *Naissance de la clinique, une archéologie du regard médical*, Paris, 1963, p. 35

30 Evelyn Aziza-Shuster, *Le Médecin de soi-même*, Paris, PUF, 1972.

be educated in essential ethical values, including universal human rights, “the ordinary law of humanity”, as Mireille Delmas-Marty suggests³¹? *“This ordinary law can ensure that human beings, even when they have deep roots in a particular human community, will never lose their individuality – their ‘personality’ as the UN Covenant puts it – and instead be reduced to mere elements of that group, to the exclusion of their other roles as unique beings and, simultaneously, as members of the human community”*. Can a public health policy that seeks to prevent legal or illegal drug use by the young, that can place those young people in complex medical and social communities, be effective without such education in the ethics of the ordinary law of humanity appropriate to the contemporary world, to offer them the essential elements of this personality – to learn to think, judge, imagine and act according to the moral principles developed by human reason?

Conclusion

The United Nations Charter, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Declaration of the Rights of the Child are not just statements of rights but “a means of producing a legal conscience”, a new universal ethical system to confront the new problems presented by human beings. These are no longer abstract, as in previous declarations, but are concerned with living human beings whose bodies and persons are prey to new criminal powers, and therefore with new rights and new powers of human resistance. Mireille Delmas-Marty has said provocatively that in human rights we find neither human beings nor law, not human beings in the biological sense that is, because human rights are, on the contrary, a protest against nature, a refusal to submit to its laws. Human rights are no longer a matter of law, *“if that is understood as a set of rules from which a solution or unique truth is deduced by formal reasoning”*³².

The ethics of universal rights are contained in the preambles to the relevant declarations. These declarations call on citizens not to be oppressed either by others or by themselves, to incorporate these rights formally into their constitutions and legislation and to bear them constantly in mind *“as a common standard of achievement for all peoples and all nations”*. How are these challenges to be met if such rights are never studied at school? How are these absolute duties to be acquired, this ethic that determines these “practices of the self”, requiring, as Michel Foucault puts it, *“the permanent reactivation of an attitude – a philosophical ethos that can be described as a permanent critique of our historical era”*?³³

These rights must be applied if we are to develop our human capacities. This development is a long term process, with stages according to age. If the schools and education that train the younger generation do not enable them to acquire the qualities needed to understand their human condition without using legal or illegal drugs, which simply mask

31 Mireille Delmas-Marty, *Pour un droit commun de l'humanité*, Paris, Seuil, 1994, p. 280. See also by the same author *Raisonner la raison d'Etat Vers une Europe des droits de l'homme*, Paris, PUF, 1989

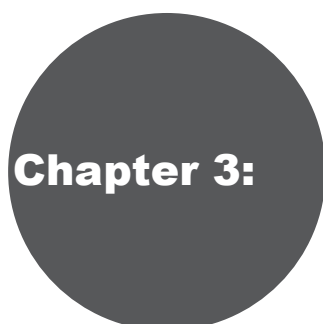
32 Mireille Delmas-Marty, in *Ethique médicale et droits de l'homme*, Prés. P. Lazar, M. Melot, C. Ambroselli, A. Spire, Paris, Actes Sud Inserm, 1988, p. 321. Debates at the Centre G. Pompidou, Paris, 1987. Coll. *Fabrique du corps humain et droits de l'homme*

33 Michel Foucault, *Dits et écrits*, vol. 4, n° 339, *Qu'est-ce que les Lumières ?* p. 571. Paris, Gallimard, 1994

and exacerbate the problems, it suggests an urgent need for a comparative study in Europe of the forms of education at issue, their positive aspects and shortcomings and the educational links that exist between schools, families and societies, rather than a form of testing that is inappropriate to every element of the situation. The problems raised by drug use in schools are also a consequence of the range of social backgrounds involved in the education process, which are often conflicting and uncoordinated. The danger is that, in response to social pressure, schools will be made responsible for dealing with all the problems that other relevant social and political institutions are unable to handle.

Notes

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Chapter 3:

Ethics and drug testing in schools

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Introduction

European opinion is divided on the issue of drug use³⁴. Some believe that any use of drugs, whether legal (such as alcohol, for example) or illegal (as is the case of narcotics), should be prohibited because they have a deleterious effect on the behaviour, awareness or perception of their users. They proclaim an ideal of abstinence and include a certain number who consider every means for bringing about a drug-free society to be justified. Others draw a distinction between legal drugs, the use of which is part of the culture, and illegal drugs, which they consider intrinsically dangerous, in particular because they are

34 As Ronald Verbeke very rightly remarks in "Un dictionnaire critique des Drogues", (Paris, 1978), the concept of "drug", introduced into the French language almost 500 years ago, has had various meanings over the centuries and is now increasingly rejected in academic circles, which prefer the concept of psychotropic or psychoactive substance. He also says that the term psychotrope, used in French as an adjective and a substantive, qualifies or refers to any substance whose principal action or one of whose principal actions is on the mind. Psychotropic substances include all the drugs commonly prescribed in psychiatry (antidepressants, neuroleptics, tranquilisers, soporifics) as well as most analgesics, great quantities of which are also prescribed. Narcotics also come under this heading. Nonetheless, the popular term "drugs" is used in this article to refer to legal and illegal psychoactive substances, with the exception of those prescribed by a doctor

not socially integrated since they are prohibited. They support the fight against certain drugs but tolerate legal drug use.

A third group tends to attribute the presumed danger of prohibited substances more to the fact that they are prohibited than to their chemical structure. They argue for legalisation and regulation of the trade in all drugs and, to avoid abuse, for learning how to use them, rather than banning them.

Finally, a fourth group, while not contesting the validity of international treaties on these matters, favours a risk reduction policy and decriminalising drug use, facilitating substitution treatment for problematic users and better quality control of illegally sold substances in order to minimise health risks.

Within the last three groups, some people distinguish between soft drugs and hard drugs, sometimes arguing that the use of soft drugs by young people is now part of the culture and therefore comparable to alcohol use. Others do not recognise this distinction, either because they are in favour of access to all drugs or, on the contrary, because they believe in the escalation theory.

Advocates of these various positions and/or convictions are to be found among young people as well as teachers and parents, although all agree on the need to prevent abuse of drugs, particularly among the young.

1. Schools and the ideal of abstinence

1a. State versus private education.

While it goes without saying that schools and their staff have a right to argue for an ideal of abstinence and that parents who share this moral view have the right to choose such schools for their children, it is not certain that in democratic societies the state, and therefore state schools open to all children, is bound to respect the diversity of its citizens' opinions on all matters, including drugs. It therefore has to be asked whether legislation that prohibits the use of certain drugs is acceptable from an ethical point of view and whether the imposition of an ideal of abstinence in state schools can be justified.

Legislation in European countries is the product of legislative power and is voted by political majorities. Nevertheless, while all citizens of a country are subject to the law, there is still the question of whether the law can impose "good" conduct on its citizens. For some liberal lawyers, this cannot be the case since people have moral rights vis-à-vis the state³⁵. But, as Pierre Bouretz emphasises in his preface to Julie Allard's book *Dworkin et Kant. Réflexions sur le Jugement*³⁶, *"Ronald Dworkin's position, drawing on the case-law tradition, judicial autonomy and a theory of interpretation, has to overcome the obstacle of a continental legal philosophy based on the paradigm of laws and a western legal culture*

35 Dworkin, R. "Taking Rights Seriously", New York, 1977, Introduction, p xi. This option is increasingly invoked in Europe to reject the idea of the state opposing free exercise of its citizens' individual rights and justifies the campaign started in Belgium by the Centre d'action laïque pour la réglementation du commerce des drogues.

36 Bouretz, P. in Allard, J. "Dworkin et Kant. Réflexions sur le Jugement", Brussels, 2001, p. 7.

marked by the central role of the state". And while the Canadian Will Kymlicka³⁷ takes it for granted that his model of a multicultural society can be transposed to Europe, this is nonetheless strongly contested in a country like France. Clearly, the debate on *Taking Rights Seriously*³⁸ cannot be discussed fully here, although it may be useful to bear it in mind, particularly as it has repercussions on the question of whether state schools are entitled to impose on their pupils respect for a moral rule that is not shared by the whole population, even though that rule has legal force. For example, no authority can prevent groups of citizens from taking a moral stand against legislation that prohibits abortion and euthanasia. Why therefore, in democratic and pluralistic societies, should state schools, which are par excellence where various moral options are discussed in order to help pupils form their own convictions, become flag-bearers for the abolition of abortion when some of the pupils' parents are probably fervent defenders of the right to terminate pregnancy? And what are we to make of state schools that advocate abstinence with respect to drugs and impose compliance on all their pupils?

Whatever the answer to this question, let us now take an ethical look at the right of state and/or private schools to determine whether their pupils adhere to certain moral principles they impose, possibly in compliance with the legislation of their country. When discussing drug testing in schools, we must bear in mind that some European countries do not condemn drug use but only prohibit possession. In these countries, although it is permitted, drug testing to identify drug use raises a problem in law, particularly as it exclusively targets minors.

While defenders of a drug-free society and therefore drug-free schools may believe that the end justifies the means, this conviction does not necessarily hold from an ethical point of view, which is supposed to take into account the good or protection of the greatest number of children while respecting the principle of non-interference in individual rights.

1b. Schools as transmitters of values

From an ethical point of view, it is important to examine first whether promoting abstinence authorises a school to present itself as drug-free. Indeed, no one now disputes that schools are far more than places that impart knowledge and award diplomas. They also have a duty to teach moral values and socialise children. Some schools may of course, through the dissemination of knowledge and information and through dialogue, try to inculcate an ideal of abstinence in their pupils in the same way that schools that offer a Catholic education are authorised to promote the Catholic religion and try to convince non-believers among their pupils of its validity.

However, this does not authorise schools to check whether each pupil is a practising Catholic or believer, and even less to introduce detection methods for that purpose. In my view, the role of teachers in Catholic schools is to stimulate pupils' interest in religion, motivate them to convert, if appropriate, while at the same time presenting them with a

³⁷ Dworkin, R, op. cit.

³⁸ Kymlicka, W. "Multicultural Citizenship: A Liberal Theory of Minority Rights", Oxford, 1996.

positive model with which to identify. Identifying non-believers, possibly by having pupils watched to see whether they go to mass on Sundays, seems to me not only pointless, but also incompatible with the rights of the child, whom some consider to have a right of self-determination with respect to values from the age of 12 to 15³⁹.

Going beyond ethical considerations, however, it seems obvious that such an approach is unlikely to achieve positive results since, while it leads to pupils being excluded for want of religious zeal, it has little chance of encouraging them to mend their ways.

Promoting abstinence does not therefore justify forcing every pupil to respect the ideal or describing a school as “drug-free”, since in principle it is impossible to impose pupils’ adherence to this moral rule. This is why some schools have introduced drug testing, thus replacing their original educational mission with a system in which what is important is no longer convincing pupils to resist the temptation to take drugs but using every means to track down those who do not respect this moral prohibition.

While it is therefore indisputable from an ethical standpoint that some school managements, teachers and parents are entitled to promote an ideal of abstinence, this does not mean they have the right to proclaim the school “drug-free”, and even less to introduce drug testing.

2. Drug testing in schools to prevent future drug abuse

2a. Testing and prevention

The avowed aim of testing is often preventive. It is argued that fear of discovery and its consequences will motivate pupils to resist the temptation to take drugs at all. This method of prevention is based on the effectiveness of “fear”, a feeling that has been used for centuries to discourage behaviour considered intrinsically dangerous⁴⁰. Some specialists strongly dispute the effectiveness of preventive methods based on exploitation of (young) citizens’ fear of death. But in addition, positive results may lead to pupils’ exclusion from school, harming their educational careers and their possibility of self-fulfilment, and thus producing fertile ground for the further development of drug abuse.

Nor do schools that describe themselves as “drug-free” and use drug testing necessarily base their actions on the moral principle of abstinence. This is particularly arguable when testing focuses on certain substances (such as THC and MDMA) and ignores, for example, tranquillisers and alcohol, so that rather than identifying pupils who present a potential risk of drug abuse the tests in fact identify those who take illegal drugs.

At a time when the use of certain drugs by young people is becoming common and in view of the anxieties this causes among parents, some schools are eager to describe

39 The reader is referred to opinion 16 of 25.3.02 of the Belgian Consultative Committee on Bioethics in which there is an ethical debate on young Jehovah’s Witnesses’ refusal to donate blood, which tends to confirm that minors of 12 to 15, and therefore those who are older, have the power of judgment and can exercise their autonomy with respect to philosophical, religious and ethical choices.

40 See in this connection the article by M.-S. Dupont-Bouchat “Faire peur et avoir peur. Attitudes et comportements face à la maladie et à la mort” in *Question Santé “Peur et Prévention”*, n° spécial 2003, pp.5-18.

themselves as “drug-free”, essentially for publicity reasons. Very often, both teachers and parents are convinced that drug use explains educational problems. To avoid them, it is therefore enough to keep the school “drug-free”. Clearly in some individual cases abuse of drugs, whether legal or illegal, is a significant factor in pupils’ failure at school, but it is hard to explain problems at school in general in terms of non-abusive use of recreational drugs. Attributing certain pupils’ inability to cope at school to drug use alone is to ignore the findings of educationalists and related disciplines, such as sociology⁴¹. It also ignores clinical experience of drug dependence treatment, which tends to support the reverse theory that it is inability to cope at school that leads pupils to abuse drugs.

Even when teachers themselves do not subscribe to the “drug abuse is the reason for failure at school” thesis, the wish to project the image of a “drug-free school” which tracks down users can be explained simply by the desire to please parents.

Some adults have gradually become obsessed by the supposed dangers of certain substances, partly as a result of systematic media disinformation. While some of them do not really fear cannabis use as such, the escalation theories – “if you smoke one joint, you run a serious risk of injecting heroine” – have fuelled their anxiety about the use of all illegal drugs.

2b.Can heroin addiction be prevented by screening?

While it is true that most heroin users smoked joints before using opiates, there is no evidence at all that using cannabis produces a taste for opiates. Young people know that heroin is a substance liable to cause rapid dependence that is difficult to overcome. Of course, young people who want to ignore the potential dangers of heroin will by the nature of things have first used substances that are easier to procure on the illegal market – it is far easier to get “shit” than “Heroin”. But if smoking joints led to heroin use, around 30% of the population would now be heroin dependent, something that seems not to be the case. It should further be pointed out that the type of theory that encourages people to fear the worst may become a self-fulfilling prophecy. As Patricia Seunier notes, *“it is here that, because it is often based on legitimate but often febrile anxiety, prevention becomes a lever for adolescents. Adults’ fears and expectations (they already see the young heroin addict in the gutter) become a springboard. The more fearful adults are, the more young people are attracted. This is how this type of prevention fails in its objective and becomes an incentive, precipitating young people towards the danger, rather than giving them the ‘weapons’ to help them keep their distance and think.”*⁴²

Knowing that schools test for users reassures parents. If they have not noticed themselves that their children are using drugs, the school will find out before it is too late, in other words, before they are in the gutter. Testing also reassures them from a defensive point of view. It is generally agreed that “our child” is “good, healthy and sensible” and that any behaviour that suggests otherwise is simply the result of “the bad influence” of the people

41 See in this connection Claire Ambroselli’s contribution to the Pampidou Group’s ethical platform.

42 Seunier, P. “L’information dans le processus de prévention : visées et limites”, in : Cahiers de Prospective jeunesse, Vol. 2, n° 3, 1997, p. 20

he/she mixes with. Sending him/her to a school where drug users will immediately be put in quarantine therefore greatly reduces the risk of “contamination”.

2c. The “scourge” of drugs

Based on the nineteenth century hygienists model, the “scourge” of drugs is still often presented as a contagious disease. Avoiding their spread therefore implies eradicating the slightest germ. But drug use is a personal choice and in no way contagious, although there is of course no doubt that the use of some drugs is a question of fashion and that youngsters are more likely to smoke a joint if they mix with other smokers. However, faith in the escalation theory and the fantasy of contagion may well encourage managers and teachers to seek drug-free schools, whether state or private.

The contagion theory also helps to justify drug testing in schools since what is important is putting all users in quarantine, even if they are never “under the influence” at school. Indeed, from a practical point of view, the presence of metabolites of illegal drugs in the urine does not mean that pupils are under the influence of any substance while at school. Depending on the substance, traces may be found several hours, days or even weeks after use. What is tested therefore is not whether pupils’ psychological state is such as to enable them to attend classes, but what they may have taken outside school, which raises many ethical problems.

3. Autonomy, ethics and screening

3a. Young persons’ rights

The 1989 International Convention on the Rights of the Child does not offer clear guidance on the question of testing. Article 33 authorises parties to take measures “*to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties*”. However, under Article 16 “*no child shall be subjected to arbitrary or unlawful interference with his or her privacy*”, while Article 14 enshrines “*the right of the child to freedom of thought, conscience and religion*”. A strict interpretation would therefore suggest that once they have reached the age of reason, children can exercise their rights and their decision making autonomy, just like adults. From an ethical standpoint, children’s right to autonomy is increasingly recognised – according to their degree of maturity, from as young as 12 and certainly from the age of 15 – even if their choices run counter to those of their parents. This has already been referred to. It is of course impossible to determine a definitive “age of reason”, but it is clearly appropriate to recognise that young people who have not yet reached the age of majority have a capacity of discernment that goes with the capacity to make their own choices. For example, many political representatives in Europe argue for the abandonment of a protectionist approach to young offenders, on the grounds that young people are responsible for their acts from the age of 12.⁴³

At all events, for more than a century educationalists have emphasised young persons’

⁴³ See Les annales parlementaires de la Chambre en Belgique, 1989-1990-1991.

right to privacy, which has been raised to an ethical principle. In the eighteenth century, their predecessors deployed an impressive range of measures to keep young people under observation, day and night, in a spirited attempt to prevent masturbation. Since then advances in educational methods have gone beyond the simple discovery that masturbation does not make you deaf. Informed opinion has increasingly turned away from special investigation techniques for uncovering children's misdeeds, whether it be reading their private diaries or letters without their knowledge or rooting out porn magazines from their secret hiding places. There is no reason to think that pornographic pictures will transform teenagers into sexual obsessives or predators in later life, let alone believe that confronting them with the knowledge that their secret store of porn has been uncovered will aid their sexual development – indeed quite the reverse. Forcing them to undergo a urine test that shows that they smoked a joint with their pals the previous weekend is simply to encroach on their privacy, and is ethically ill-advised and educationally of little or no value.

3b. Parents' educational choices

When they choose a school for their children parents are not necessarily aware that drug use has been banned, and schools may decide to do so long after the children first enrol. It is therefore not proven that in all cases parents have given their informed consent to drug testing for their children, or that they advocate an ideal of abstinence. If parents have no objection to recreational drug use by their children, this practice and its consequences, including possible exclusion from school, are a violation of their own right to autonomy. Certain parents who are aware of the presence of drugs in our society and their potential attraction for their children may even prefer the latter to use them in a convivial setting rather than abuse them later⁴⁴.

4. Drugs responsible for failure at school

Teachers in some schools, while not presenting themselves as supporters of the fight against drugs, may consider that drug testing and the sanctions that follow on from a positive result will motivate pupils to resist drugs, thus enabling them to attend classes in full control of their faculties. Testing is therefore justified from two standpoints, namely that it creates optimum conditions for teachers to do their job and for pupils to take maximum advantage of the instruction they receive.

This argument is invalid from a purely practical point of view, since it is based on the erroneous assumption that some pupils' inability to concentrate on the subjects being taught is generally attributable to drug-taking. Taking drugs, legal or otherwise, during school hours does of course have a negative effect on pupils' ability to follow lessons and drug abuse may lead to failure at school. However, proving through drug testing

44 En matière de prévention de l'abus des drogues par les jeunes l'O.M.S semble considérer que les résultats obtenus par des méthodes de prévention qui se fixent sur une minimalisation des dommages plutôt que sur l'adhésion à l'abstention semblent atteindre de meilleurs résultats, et ce notamment en matière de consommation d'alcool. (W.H.O. Review 'Prevention of Psychoactive Substance Use. A Selected Review of What Works in the Area of Prevention', p.42).

that pupils have taken drugs and that their dazed state at school is the result tells us nothing about why they are in school in such a state. Do they have serious problems at school? Are they rebelling against the educational system? Do they have personal and/or family problems that lead them to try to escape reality? The answers to these questions are extremely important but are not to be found in a urine sample. The danger though is that this assumption could enable teachers to avoid questioning the extent to which schools correspond to pupils' expectations and to reduce pupils to the label "drug addict", overlooking the reasons for their revolt or lack of well-being. Furthermore, once pupils' drug use, and perhaps even their resulting incapacity, have been revealed, what are the consequences? They will either be asked to undergo treatment in order to stop taking drugs, since these have been identified as the source of all their problems, or they will be excluded from school. In both cases they could be stigmatised as drug addicts and end up believing that they are no longer seen as autonomous individuals. In terms of prevention, identifying individual pupils as drug users, by definition problematic, in itself considerably reduces their chances of social and educational reintegration. Even if they are able to remain in the original school, they will have been medically labelled as drug addicts, and if they are excluded, their files will follow them and they will have to bear the burden of stigmatisation and reintegration in another school. They may even welcome this new identity as a drug addict and try to live up to it.

Moreover, if drug use is still to be detected and has not been spontaneously acknowledged by pupils when it genuinely is the cause of their difficulties, this type of approach will be counterproductive. Treatment of drug dependency can only be successful with the co-operation of the person concerned. If alcoholics do not acknowledge their alcoholism and do not want to do anything about it, there is no treatment that will cure them against their will. Even taking Antabuse requires their cooperation. Where a mandatory therapy order is the product of someone else's will (courts, parents, teacher, school management) young persons' co-operation with treatment will be zero. At best, for fear of reprisals, in particular by the police and the courts, they will change to another substance, but the root causes of their disproportionate appetite for drugs will remain.

So far we have only looked at pupils whose psychological state clearly makes their participation in classes impossible and who have tested "positive".

But, as we have already seen, the presence of drug metabolites in a pupil's urine does not allow the actual time when drugs were taken to be determined. Drug testing therefore makes it possible not only to make a presumed diagnosis of pupils' psychological state when they are at school but also to find evidence that they take drugs when they are not - in other words, to interfere in their private lives.

More than ever we may wonder about the consequences of a positive result for pupils who are clearly "clean" at school. Will the mere discovery that they use drugs result in sanctions, until it is proved that their use is recreational rather than problematic? If it is simply glossed over, what message is to be inferred? If it results in a mandatory therapy order, what is the use of it? If it results in exclusion, how does it help the pupil who has been excluded from school as a result of using drugs outside its walls? In the case both of pupils who arrive at school unable to concentrate fully on their lessons and of perfectly adequate ones who sometimes use drugs during their free time, it is preferable for teachers who are concerned that they should be able to understand the classes they attend to assess their

state “clinically” and, when in doubt, send them to someone capable of making a more precise diagnosis and, if necessary, providing appropriate help, which will above all be based on confidential discussion with a professional person. Besides, practical experience shows that most young users are quite willing to talk spontaneously to professionals about the legal and illegal drugs they take, particularly when they are conscious of other problems linked to their drug use.

While in principle the aims pursued by schools that use drug testing may appear laudable, looked at more closely, the technique is inappropriate, both practically and ethically, as a means of achieving them, particularly as questions can be asked about the technique itself and the appropriateness of using it in schools.

While schools are first and foremost places of education and learning in which teachers impart knowledge and skills to pupils, since the eighteenth century and particularly since Jean-Jacques Rousseau’s *Emile*, they have also been places where “the freedom of future adults is prepared from afar” and therefore places where pupils are trained in autonomy and its limits.

Educationalists, and educational psychologists and sociologists increasingly stress the importance of dialogue between teachers and taught and reject the old authoritarian model of the school. But dialogue first means a readiness to listen. Schools must therefore offer pupils the opportunity to talk about their hopes and difficulties and teachers should be capable of listening to them. While we all reject “schools of discord”⁴⁵ and believe schools should provide a clear framework of rules to their pupils and have a duty to help pupils respect it, not every means of identifying failure to observe that framework is necessarily justified.

Imposing respect for non-violence at school, requiring pupils not to disrupt lessons, being concerned about the reasons that lead them to arrive in class “spaced out”, whether as the result of insomnia, drinking alcohol or taking illegal substances, in no way implies that they can be subjected to testing. While tests are common in medicine, where they are conducted at patients’ request or at least with their consent, and are used in judicial contexts to make it possible to establish a person’s undisputed guilt (causing an accident when driving under the influence), there is reason to question whether they are appropriate in schools.

Is it a teacher’s role to “detect” and where is the feeling of dignity of a pupil forced to urinate into a little pot in order to be tested? In the rare or even completely exceptional or hypothetical cases of endemic overuse of drugs in school that make it impossible for teachers to do their job, there is certainly reason to look at the quality of the teaching and how suitable it is for the pupils who go to the school. If it appears that the health of the school makes it essential to curb drug use or even eradicate it and that police methods alone will be sufficient, is it not better to call in the police to deal with a situation that teachers have failed to control, rather than accept that they have a dual role? Police intervention would result in a report being made on offending pupils but would introduce a third party in the shape of either a social worker or a juvenile court judge and would

45 See LIFE, University of Geneva “L’école entre Autorité et Zizanie”, Lyon, 2003.

not necessarily result in pupils' exclusion from school and subsequent marginalisation. Moreover, the decision to order a urine test would be made by an authority with official power to do so, which is never the case when it is decided by the management of a school or on a teacher's initiative.

5. Schools as places for promoting health

In an article in *Les Cahiers de Prospective Jeunesse*, Line Beauchesne, Professor of Criminology at the University of Ottawa, identifies four types of 'drug' prevention programme in schools in Quebec.⁴⁶

The programmes examined range from hard-line social control to health promotion and she calls the first of these programmes "Testing and informing programmes". The second programme is called "Young people, say no to drugs!". While the latter seems to differ from the former, the difference is more apparent than real and what is involved is still simply social control. In these programmes, former drug abusers are given the floor and have to explain how they reached that point as a result of smoking their first joint. The clear message is: *"Young people, if you're not sufficiently autonomous to say 'no' to drugs like marijuana, it's only a short step from the joint to the syringe. Don't think you'll be able to manage your use of illegal drugs. The clear implication being, 'Look at me'."*

The third category of programmes has a less controlling approach and focuses more on assistance. It is nonetheless based on the assumption that if young people take illegal drugs, as opposed to legal ones, it is because they have personal problems. Irrespective of whether there is evidence of abuse or problematic use of such drugs, it is implied that all users have good reason to see themselves as sick or even behave as though they are. Only the fourth programme, which focuses on pupils' self-fulfilment, deserves to be regarded as promoting health. It goes without saying that such fulfilment depends not only on quality of education but also, if not more, on a family background and networks capable of helping young people to fulfil themselves and find their way in life⁴⁷.

We have known since Skinner that positive reinforcement is far more effective in education than negative reinforcement, in other words that encouragement is far more effective than punishment. We can extrapolate from this that messages of confidence in young people's ability to control their drug use are far more likely to be effective than all the ones that assure them that they will never be able to do so. Giving them the fullest and most objective information about all the illegal drugs they will one day encounter on the black market, after successfully promoting their optimum development through education appropriate to their needs, is to arm them against any risk of drug abuse. When young

46 Beauchesne, L. "Les programmes de prévention d'abus des drogues en milieu scolaire" in: *Cahiers de Prospective jeunesse*, Vol. 2, n° 3, 1997, p. 23

47 It is difficult to go further in evaluating drug prevention programmes for young people. A very interesting study by the British Health Development Agency in July 2004 looks at a number of such programmes and tries to assess their effectiveness. The overall conclusion to be drawn is that none of them are really effective, even if some do appear to delay drug abuse among non-users and reduce, at least temporarily, the consumption of regular users. In general, interventions are more likely to be effective with young persons at low risk than with those deemed to be high risk. Only one American training programme, "Life Skills Training" seemed to be effective beyond five years. (U. Canning, L. Millward, T. Raja, D. Warm).

people and others are at ease with themselves they have no reason to put themselves in danger and, on the contrary, find within themselves the resources they need to stop deadly behaviour that might harm their welfare at the outset.

Health promotion in schools is therefore best achieved by preventing failure at school and encouraging pupils to do better, which enables them to develop confidence in their abilities. It is not achieved by social control involving witch-hunts. Even when pupils seem to be having temporary problems, a message of confidence in them has far more chance of success than exclusion.

One of the major difficulties schools have had to face in the last three decades is that previously they prepared pupils for trades that guaranteed them a fulfilling future. For the last thirty years or so unemployment has made it impossible for them to claim that they can guarantee their pupils a permanent occupation. They therefore have to help them to be self-confident and develop a positive self-image in the absence of future employment. The changes in the tasks teachers were called upon to perform traumatised many of them and helped to bring about a crisis in education which was speedily attributed to drugs. But the shrinking of the job market also caused a crisis among pupils, some of whom no longer saw the point of going to school if their future only held the prospect of unemployment. Both teachers and pupils have had to work hard to bury schools' old functions and replace them with new ones, such as educating young people to become responsible citizens, happy to be such and happy to make their choices, completely autonomously but respecting the rights of others.

6. Conclusion

Whatever teachers and/or parents may believe about drug use, from an ethical point of view their rights are limited to the transmission of values on the subject. Forcing pupils to comply with the moral principle of abstention from any form of drug use runs counter to respect for their free will in the matter. Under current European drugs legislation, this principle can only be imposed by an officially recognised judicial or prosecuting authority with power to see that the law is enforced and only where national legislation allows.

It is not the role of schools or teachers or parents to subject teenage pupils to testing of any kind. While it is their duty as teachers and parents to identify pupils whose psychological state that does not allow them to follow lessons satisfactorily, this does not authorise them to detect any causes other than the quality of the education they dispense or of the family environment they provide for their children. Depending on the objective, it is the duty of psychologists, doctors or social workers to make a diagnosis that explains pupils' state and in complete confidentiality agree with them on the sort of treatment they should receive or, in exceptional cases, call in the police to identify those who are contravening the law and take any measures that, in their opinion, are necessary.

Justifying drug testing in schools as preventing abuse by some pupils amounts indirectly to stating that every young person who uses drugs runs the risk of losing control of their use. The risk is that this will cause such loss of control.

Testing for drug use means replacing essential dialogue with young people with a police technique that has no place in schools.

Recommendations on ethical problems linked to drug testing in schools

Experts Committee on Ethical Issues and Professional Standards

Preamble

1. Attentive to a wide range of ethical issues associated with policies to combat drug abuse, and concerned in particular about drug users' access to medical care and health services, treatment arrangements, the role of the judicial institutions, economic aspects and the lack of financial resources, protecting data arising from epidemiological and other forms of research and drug testing, particularly at school and in the work place, in February 2003 the Pompidou Group organised a European seminar on "ethics, professional standards and drug addiction".

Following the seminar and as part of its 2004-2006 work programme, the Pompidou Group set up an Expert Committee on Ethics to consider the ethical and human rights aspects of these issues from the specific standpoints of research, practice and policies, drawing on the experience of the different countries concerned. The aim was to produce agreed documentation and codes of conduct that could serve as a basis for national regulations.

In fact, national practice in the Council of Europe member states varies widely. The absence of detailed studies is particularly noticeable and in many cases there is something of a legal vacuum to accompany the multiplicity of initiatives and activities in this field.

There are also commercial interests at issue in drug testing which must be borne in mind.

One issue that has particular ethical implications is the collection of information on drug use - in schools, at work, among drivers and in prisons and other locations and circumstances – particularly through the use of tests over which the courts and judicial authorities exercise no supervision. The expert committee was therefore asked to examine the practice of drug testing in schools.

2. Ethics and morality both have their origin in the notion of "mores", a way of behaving based on repeated usage. To differentiate slightly between them, ethics can be said to "deconstruct" the rules of conduct that constitute morality and thus goes beyond the latter to consider its rational justification.

There are several approaches to identifying an ethically based ideal of life. For Aristotle, it involved the search for happiness within concrete forms of government in which man evolved. John Stuart Mill was concerned with the search for the greatest happiness for the greatest number, not excluding the author of the action.

In Kantian philosophy, it entailed a duty, in the form of the categorical imperative, to ensure that the maxim governing each individual's conduct had the value of a universal principle.

This last approach, in which humanity is viewed as an end in itself and not as a means, embodies the ethic of respect for both the individual human being and humanity in general. Happiness is to be found not in simple pleasure but in awareness of duty accomplished, in the tranquillity of a good conscience.

Nevertheless, ethics is currently less concerned with the theoretical discovery of the art of living than with the rational goal of establishing how one can live better in clearly defined situations.

3. Ethics, morality and deontology, or moral obligations, are thus related but not identical concepts. They may be viewed as concentric circles. Ethics occupies the outer circle, as the study of values and virtues, with the focus on human beings' ideal conduct in their search for happiness. In the middle circle, morality lays down rules that human beings must respect, thus imbuing their human and social behaviour with ethical principles⁴⁸. In the inner circle, deontology translates certain moral rules into rules of professional conduct.

4. In considering the role of law, we have found certain points of convergence with the notions of ethics and morality, particularly when the law is seen as the minimum level of morality compatible with men and women living in society. Law is more concerned with external behaviour than with intention, the principal focus of morality, and establishes a practical link between rights and obligations. When the rules it lays down are violated, this then triggers off the coercive power of the state.

The values of human freedom and dignity are increasingly evident in modern, so-called developed and pluralist societies, in both moral and legal rules. One good example is the 1948 Universal Declaration of Human Rights, the source and inspiration of many rules of international and national law.

- 4.1. In the context of this discussion, Article 26.2 of the Declaration states that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms, and shall promote understanding, tolerance and friendship among all nations, racial or religious groups.

Similarly, under Article 16 of the 1989 Convention on the Rights of the Child⁴⁹, "no child shall be subjected to arbitrary or unlawful interference with his or her privacy", while Article 29.1.b states that the education of the child shall be directed to the

48 Sometimes in the literature or in current language, morality and ethics are treated as equivalents.

49 See also the European Convention on the Exercise of Children's Rights, which entered into force on 1 September 2000. Regarding national measures to implement rights embodied in this convention, this should be seen in the context of Article 4 of the United Nations convention.

“development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations”.

In considering this range of values, different aspects of which are gradually securing acceptance by the community, the 1997 Convention on Human Rights and Biomedicine is especially relevant, particularly its emphasis in Article 5 on free and informed consent for any intervention in the health field, which may be freely withdrawn at any time. It also establishes the principle that where a person lacks the capacity to consent, this must be replaced by the authorisation of his or her representative or an authority or a person or body provided for by law.

Given its leading role, however, ethics as a discipline must continue to reflect on our understanding of all human values, particularly those of human dignity and freedom, and their extension, whether or not they are enshrined in international legal instruments or individual national constitutions.

5. We should now turn to those ethical values of most relevance to drugs testing and screening, particularly in schools.

- 5.1. The value of justice is the executor of the principle of equality, offering equal treatment to those in similar circumstances and unequal, or different, treatment to those whose circumstances vary, determined according to non-arbitrary criteria, so that each receives his or her due.

In the allocation of responsibilities or constraints pupils within a particular school must not be treated unequally, nor must there be unjustified differences of treatment between schools⁵⁰.

Nevertheless, far from violating the principle of justice, offering vulnerable groups favourable treatment, in other words positive discrimination, is a means to achieving it.

- 5.2. The concept of **individual autonomy** implies the non-exploitation of others and the right to non-interference by the state or fellow citizens, on condition that this does not cause harm to others and that information is available to allow the right choices to be made. However, this does not exempt individuals from contributing to the common good, starting with certain minor restrictions, so long as these do not affect any fundamental values and are necessary to secure beneficial results for the community that cannot be achieved by less coercive means.

Respecting individuals' autonomy means not interfering in actions that are part of the normal process of fulfilling their personality – everyone can make of his life what he wishes – so long as this does not result in unjustified harm to others.

⁵⁰ Any social measures, particularly ones with a fresh public impact, must take into account values such as tolerance, and the closely related ones of pluralism and diversity, all of which characterise European society. As André Danzin has said that in the face of all the current upheavals what must be preserved is the variety of cultures, the plurality of traditions, respect for differences in philosophical and religious approaches and ways of life, the alternative being a levelling down brought about by instruments of mass culture based on essentially materialistic criteria.

Specific infringements of individual autonomy can only be justified as a means of re-establishing this same autonomy.

- 5.3. Respect for privacy** is an evolving concept, which at the very least means that third parties should be prevented from gaining access to information on persons' private and family lives and that no one should be allowed to disclose such information without the authority of the individual concerned.

Because peace and tranquillity are preconditions for their happiness, the confidential nature of citizens' private lives is a prerequisite for enjoyment of the freedom of private life itself.

When the interests of society dictate that data should be collected on individuals' private lives, this must remain confidential. If such data reveals a possible link with criminal or related activity, special precautions must be taken to ensure that the data subject does not suffer any unwanted side-effects.

However, the leading role granted to defending privacy may not be taken to the point of inducing individuals – and in particular children – to withdraw from the human community by generating forms of self-exclusion that the modern state can neither encourage or maintain.

- 5.4.** Nevertheless, when it is decided to conduct screening tests the important issue remains of how to obtain the consent of persons under 18 years of age. Whenever persons are required to give their consent, this must be free and informed and may be withdrawn at any time. In the case of those aged under 18, it must be obtained through their representatives or guardians, and from the young persons themselves, if they have the relevant degree of understanding. Ideally, an independent third party should be used to obtain the consent, to ensure that it is genuine⁵¹.

Apart from capacity for understanding and lack of pressure, informed consent implies the provision of all necessary information for a good decision.

Even though it does not happen often in schools, the capacity for understanding of children or young persons may be affected by drug abuse.

- 5.5.** Other ethical values to be included in this discussion are those of **beneficence**, or doing good to others, and **non-maleficence** - doing them no harm, or reducing their suffering to a minimum.

Although it is more closely linked to other factors, such as availability of resources for treatment or automatic treatment, there is also the issue of paternalism, where the state or some other authority takes action that it considers to be clearly in "patients'" own interest but fails to take account of what the latter think or want, or alternatively because it does not consider the latter capable of deciding for themselves.

⁵¹ See Ethical challenges in drug epidemiology: issues, principles and guidelines - Global Assessment Programme on Drug Abuse, Toolkit Module 7, op. cit. – which draws particular attention to so-called passive consent, obtained through a general letter to parents, and to the question of whether drug addiction influences the ability to give free and informed consent.

6. There are, of course, arguments in favour of testing in schools: the threat of exposure due to testing should make transgressions less frequent; identification and action at an early stage can help to nip drug abuse in the bud; action can strengthen young people's ability to resist taking illegal drugs. Psychologically these arguments are based on the power and the threat of surveillance and on the young people's perception of the risk of being caught.

Thus far, however, regardless of what other values are taken into account, the plausibility of the theory has not been backed up by any hard evidence.

7. As the United Nations has recently emphasised, the role of ethical principles is to offer warnings and guidance in response to practical situations, rather than provide comprehensive solutions. Correct solutions have to be identified and tested separately for each individual case, on the basis of wide-ranging debate in which all participate.

Recommendations

1. To avoid drug abuse by young people in school it is essential to help them forge prospects of a worthwhile future. Governments must offer young people an education that enables them to find other means of achieving fulfilment in a society that must be open to all.
2. Also at the school level:
 - even the best information and training to combat drug abuse can only be understood by young people who have been educationally prepared to grasp the implications in terms of their own experience;
 - recognition of human dignity in all circumstances and human rights, as enshrined in the main international instruments, must be included in syllabuses and curricula, as a basis for building this dialogue between the generations;
 - according to the Convention on the Rights of the Child, schools must assume their responsibility to protect children from the illicit use of narcotic drugs and psychotropic substances.
3. At school it is necessary that teachers and educators develop, maintain or restore an open dialogue with their pupils and the pupils' parents. This makes it easier to detect when pupils are at risk or in trouble, and to help them overcome the problem.⁵²

⁵² Young adolescents are particularly vulnerable in the face of psychoactive substances. It takes less tobacco consumption for a teenager to become addicted to smoking than for an adult (INSERM group research on tobacco – January 2004). Delaying first contact with psychoactive substances for as long as possible is a priority.

4. All teaching establishments should have a multidisciplinary team, comprising, for example, a doctor, nurse, psychologist and social worker, to whom pupils in difficulty can turn, or to whom they can be referred. It is not advisable for teachers to play the part of both teacher and social worker.

5. If we want to teach young people self-respect and respect for others, it is important that the various players involved treat them with respect from an early age, which rules out all forms of violence, whether physical, psychological or emotional.

We should give them access to objective information about illegal drugs, which means understanding the risks associated with each drug. This also means informing them of the risks associated with the consumption of legal drugs.

6. There is currently no pedagogic evidence of the effectiveness of drug testing in schools as a means of preventing drug use and abuse.

7. The use of such tests in school may undermine the confidence necessary for a good pedagogic and educational relationship between teachers, parents and pupils.

8. Testing in schools may conflict with ethical principles such as individual autonomy and respect for privacy, to the extent that they are unjustified intrusions by the state or other authorities into young citizens' private lives that expose them to humiliating or ambiguous situations.

9. Such tests may also infringe the beneficence – or doing good – principle, since it is doubtful whether the benefit of carrying out tests in schools for preventive purposes outweighs the disbenefits for the young persons concerned, and the non-maleficence – or not doing harm – principle, since the young persons would always suffer unnecessary inconvenience from being subjected to such tests.

10. Authorities responsible for drug policies in schools, including parents' representatives, at all levels, should be given the facts on and arguments for and against drug testing in schools and strategies for effective drug prevention. They must also be offered reliable, documented information about how preventive activities are organised and conducted, the results obtained and how effective they are.

11. The Pompidou Group must make publications on screening tests in schools available to political decision makers and education and school authorities, together with any material it has produced on the subject that it considers relevant.

12. In view of the questions surrounding the problems of drug use by young people at school, more information is needed about the conditions in which drug use is developing and how the various authorities responsible for the pupils' protection and education – teachers, parents, public authorities and international human rights organisations – are involved in combating drug use. A European research project should be organised in order to cater for this need.

APPENDIX B

Drug testing in the workplace: Inventory of European national legislations

**Joaquim Rodrigues, Consultant at Instituto
da Droga e da Toxicodependencia, and
A. Lourenço Martins, Juiz Conselheiro do
Supremo Tribunal de Justiça, Portugal**

Reports written between March 2006 and March 2008



Drug testing in the workplace: Inventory of European national legislations

**Joaquim Rodrigues, Consultant at Instituto da Droga e da
Toxicodependencia, and A. Lourenço Martins, Juiz Conselheiro
do Supremo Tribunal de Justiça, Portugal**

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- 1.** This document is the result of the inventory on the different national regulations in Europe, including the problem of professional secrecy in occupational medicine

It is based on the information received at the authors' request⁵³ by the members of the workgroup on ethics (in the cases, in which the countries were represented in the group) or by the Permanent Correspondents in the Pompidou Group (in the other cases). In most of the cases, the information was received between 09th January and 24th February 2006.

53 Collaboration request made by the authors: "Within the framework "Ethical and Deontological Issues" of the Pompidou Group, I draw up an inventory of the national regulations regarding the use of drug detection tests on the workplace (when the recruitment for a working position is done and during the fulfilling of duties) and regarding the professional secrecy in occupational medicine, in the ambit of the countries, members of the Pompidou Group. For this task – and preparation of the following report – it is essential to have the updated normative texts (laws, regulations, circular letters, dispatches, guidelines). In this context, I should be most grateful for the sending of a copy of your country legal texts (or important parts of these same texts) related to the two issues mentioned above, with the information of the coming into force and of the preparation/revision of the texts, when is the case.

- 2.** The answers sent by each country, regarding the tests and the professional secrecy are subdivided and summarized; the legislation, the regulations and the adopted practices, if there are any, are also summarized and are object of a brief comment.

We will finish with a short global vision and some conclusions.

3. National Regulations

3.1. Belgium

3.1.1. Tests

In the elements consulted the *specific* matter of drug testing in the workplaces was not treated.

The law of 4 August 1996 regarding the well being of the employees at work is a basic law on safety and occupational health. The majority of the administrative rules of this law set up the Code on well being at work and some of these administrative rules are the transposition of European directives into Belgian law.

In order to detect risks for the employees, all employers should have an internal Labour Prevention and Protection Service. In certain issues (for. ex. medical implications), the employer must appeal to an external Labour Prevention and Protection Service. These external services have the task to assess the risks related to different matters.

For specific risks the King can fix the general prevention principles and to design them in detail for application or for the prevention of such situations (§ 3 of article 3).

The royal decree of 28 May 2003 related to the monitoring of the employees' health transfers into the Code on well being at work, the majority of the RGPT propositions regarding the employees' health.

This statute clarifies that the decision of the adviser on prevention-occupational medicine, that takes into consideration the category or the activity, must be based on the employee's aptitude or inaptitude to perform his task, at the moment of the medical examination (art. 3).

The employer is forbidden, both on recruitment and selection, well as during, to make further tests or medical examinations (examples: selection tests on hiring based on further considerations than those on the aptitude for a determined activity or offers of a free check-up) than those foreseen in the decree (art. 14).

The decision to consider someone *unfit* after a previous health assessment, must be justified by the adviser on prevention-occupational medicine, and the applicant or the employee can demand this justification to be transmitted to his own physician (art. 49).

The decision, to submit the employee to health surveillance or not, depends on the results of a risk analysis, the employer being responsible for the choice. But the adviser on prevention-occupational medicine takes part in this analysis, and this one must be submitted, with prior notice, to the Prevention committee. The employer does not have complete power.

The employee exposed to special risks is categorized with employees submitted to health surveillance for a period established by the adviser on prevention-occupational medicine, who will also establish the most suitable measure for each case. The employee has the right to be informed of the content of the health surveillance and of all resulting procedures. The roles of the different intervenient in this health surveillance – adviser on prevention-occupational medicine, Prevention and Protection Committee on the workplace, physician-inspector of medical Inspection, employer and employee – as well as their duties, are well defined.

3.1.2. Professional secrecy

The health dossier states that respect for private life is guaranteed (art. 79, 92), being possible the computerization of that dossier by observing the propositions of the law of 08-12-1992 related to the protection of private life (art. 92). The adviser on prevention-occupational medicine is responsible for data processing and runs the medical surveillance department (art. 93).

Certainly, there are general provisions on professional secrecy.

Comment: We can say, in general, that the Belgian legislation consulted is essentially centred on the employee's protection and not on the protection of third persons. In any case, the legislation we had access to, stresses the special risks that the employee can face and has a very important control element, the adviser on prevention-occupational medicine.

Although the elements consulted do not deal with the specific matter of drug testing in the workplace, the existing legal framework can provide adequate presuppositions to carry out drug testing, either in the recruitment phase, or during the employment.⁵⁴

3.2. Croatia

3.2.1. Tests

The possibility of narcotic drug testing in the work place is foreseen in the general labour laws (The Labour Act from 1995 – with the Amendments from 1995, 2001, 2003, and 2004) and the Health and Safety at Work (Health and Safety at Work Law, from 1996 – with the Amendment from 2003). There is specific legislation for a flight crew (Air Traffic Law from 1998 – with the Amendment from 2004).

The regulation on the assessment of the Health Ability of the flight crew (from 2001, 2004 and 2005) and the sea and inland ships crew from 2002 also includes propositions on this matter.

Article 26 of the Labour Law compels the employee, when signing the contract, to inform the employer of any disease or condition that may hinder the fulfilment of the obligations reported in the contract, interfere with his work, or endanger the life or health of the

⁵⁴ Belgium published the royal decree of 19 January 2005 related to the employees' protection against the smoking of tobacco, which replaces the ancient principles of reciprocal tolerance, individual freedom and civility by the principle, that all employees have the right to benefit from working areas and social equipment without tobacco smoke, from the 1st January 2006. This right is obviously completed by a smoking interdiction in all these areas.

people he is in contact with. The same article allows the employer, in the same context, – aiming establishing the Health Ability for performing certain jobs – to send the employee to medical examinations (where narcotic drug testing is included).

Article 64 of the Health and Safety at Work Law forbids the use of alcoholic drugs and other addictive substances before work or possession at the work place. Article 65 also establishes the legal means (an alcometre or any other convenient device or procedure): if the consumption test is refused, the employer may temporarily suspend the employee (who is under the influence of...or other addictive substances), and appeal to the competent security services if the employee refuses to comply.

The article 93 of the Air Traffic Law establishes the compulsory bond of medical examinations for the assessment of the flight crew Health Ability, the procedures to follow and the conditions to respect in the fulfilment of the mentioned examinations and the article 94 clearly forbids the crews – while performing their job - to be under influence of ...narcotic substances and foresees the possibility of, in the case of reasonable doubt, the flight crew be checked by a doctor authorized by the employer, before the crew start performing professional jobs and while performing these jobs (in a way so it does not interfere with the crew's work .

Article 5 of the Regulations on the evaluation of Health Ability of the sea and inland ship's crew foresees a special regime of the preliminary medical examination for this type of profession (on the occasion of the admission in specialized training institutions before the first or new job) and establishes the type of tests that the examination must include (where are included drug tests).

3.2.2. Professional secrecy

Secrecy regarding the collection, processing and delivery of the employee's personal data is regulated by article 29 of the Labour Law and by the Medical Law from 2003.

According to article 29 of the Labour Law the employee's personal data can only be collected, processed and delivered to a third person, if that is foreseen in the law or if it is required for the purpose of realising the rights and obligations connected with the employment; in that case, the employer has to define in advance which data will be collected, processed or delivered to the third person and the employer has to indicate the person authorised to perform that task; such person must have the employees' trust and the data learnt in the course of performing their job has to carefully be kept confidential.

According to article 21 of the Medical Law everything a doctor learns about the patient... relating to his/her health condition, must be kept as a doctor's secret and can be disclosed only with the patient's permission, unless stipulated otherwise by another law (a parent or a guardian for minors the family, a guardian or a legal representative in case of mental disability or death)

Comment: The legal texts, synthesized here, show the generality of situations set by the execution of drug testing in the workplace, and what deserves attention is their compliance with the "ethical principles". The possibility of a specific law –labour law- to prevent the employees to use alcohol and drugs before work, the obligation of the applicant to a job to inform the employer of any disease or condition that may be in conflict with the duties

included in the contract, the prerogative of not accepting a new testing of the results, the employer's right to send the applicant to a job (or the employee) to submit himself/herself to the drug testing without his/her consent; the law's legitimacy in considering the employee's refusal in doing the drug tests as a positive result, are issues that deserve to be analysed and clarified.

3.3. Cyprus

There is a law from 1996 on safety and health at work. This law which was amended in 2001, 2002 and 2003 does not contain any mention of drug testing.

3.4. Denmark

3.4.1. Drug Tests

There are no laws on drug testing at work in Denmark. The propositions that allow the execution of the mentioned tests and the processing of the collected data are included in the general labour law and in the law about personal data processing (The Work Environment Law of 1999, the White-Collar Workers Act of 1999 and the Act on Processing of Personal Data of 2000⁵⁵).

Chapter 11 of the Work Environment Law authorizes the Labour Minister to promulgate administrative regulations regarding medical examinations of employees in specific sectors whose work is associated with health risks.

Sections 5 and 7 of the White-Collar Workers Act impose white-collar workers to inform their employers of any illness or physical conditions that may prevent them from working.

The employers right to manage and control work gives him the right to carry out control measures (necessary and proportionate) and regulatory provisions.

Comment: As we do not have the legal texts mentioned above (nor the "employers' right to manage and control" framework- a concept not frequent in other legislations) is not possible to draw a conclusion about the true meaning of the mentioned propositions. The specification of the "health risks" as a support for medical examinations and "physical conditions" that bond a job applicant to the duty of information, add precision to the legal text (what is not the case in other legislations).

3.5. Finland

3.5.1. Tests

Finland approved recent legislation that includes this matter - Act on the Protection of Privacy (759/2004) including civil servants and any person in a civil service relationship or comparable service relationship subject to public law.

Recruitment

Drug tests can be performed to applicants of a job, that are presented to the employer in certificate issued by a health care professional and laboratory designated by the employer stating that the employee has been tested for the use of a drug referred to in section 2 of the Narcotics Act and containing a report based on the test stating whether the employee

⁵⁵ Transfers to the national law the propositions of the directive 95/46/EC.

has used drugs for non-medicinal purposes in a manner that has impaired his/her working capacity or functional capacity.

The submission of a drug test certificate during recruitment is only allowed “if the applicant is to do the type of work that requires precision, reliability, independent judgement or quick reactions and if performing the work while under the influence of drugs or while addicted to drugs could:

1) endanger the life, health or occupational safety of the employee or other persons; 2) endanger national defence or state security; 3) endanger traffic safety; 4) increase the risk of significant environmental damage; 5) endanger the protection, usability, integrity and quality of information received while working and thus cause harm or damage to public interests protected by confidentiality provisions or endanger the protection of privacy or the rights of data subjects; or 6) endanger business and professional secrecy or cause more than a minor level of financial loss to the employer or a customer of the employer, provided that this could not be prevented by other means.

The employer also has the right to process information in the event that:

1) the applicant is to carry out tasks in which special trust is required, in which work will be performed elsewhere than in premises supervised by the employer and in which the performance of duties while under the influence of drugs or while addicted to drugs may cause significant financial loss to a customer of the employer or endanger the customer's personal safety; 2) the applicant is to carry out tasks which, on a permanent basis and to a material degree, include raising, teaching, caring for or otherwise looking after a minor, or other work involving personal interaction with a minor, and no other person is involved; or 3) the applicant is to carry out the type of tasks in which there is independent and uncontrolled access to drugs or a more than minor quantity of medicines that could be used for the purposes of drug abuse.

For information processing, namely for the use of electronic means, the employer must get the employee's consent.

During employment relationship

The employer may require the employee to present a drug test certificate during his/her employment relationship if the employer has justifiable cause to suspect that the employee is under the influence of drugs at work or that the employee has a drug addiction; furthermore, testing must be essential to establish the employee's working or functional capacity and the employee must participate in work that requires special precision, reliability, independent judgement, or quick reactions – enumeration similar to that already described.

The employer may impose on the employee a reasonable deadline within which the certificate must be presented.

If the employee's duties change, the employer has the right to require a certificate about the use of drugs under employment.

The employer also has the right to process information entered in a drug test certificate if the employee is under treatment against drug abuse.

The employer shall notify the job applicant in connection with the application procedure

prior to the signing of an employment contract, or the employee prior to a change in the terms of his/her contract, that the nature of the job is such that the employer intends to process the information entered in a drug test certificate or is such that the employer intends to require the employee to present a drug test certificate according to the law. The employer pays for the drug test certificates.

There are penal provisions (Section 24) if the employer does not provide a certain type of information or submits the employee to tests contrary to what is laid down in the law.

3.5.2. Professional secrecy

The process information on drug test certificate must obey to confidentiality – Section 6 (1) and 5 (2-4). Furthermore, the information concerning the employee's state of health must be stored separately from any other personal data.

The rules, to which the health care professional and laboratory, that perform and issue the tests certificates, are not known, but we believe that the health professionals are obliged to professional secrecy –section 6 (3) refers to provisions of section 19 of the Occupational Health Care Act⁵⁶.

Comment: Finland, with this law, shows a special concern with the employees' private life towards their submission, in certain cases, to drug tests when applying for a job or during their employment relationship.

However, it may be useful, to know more about the way the tests are performed and how consent to comply is given. It is also important to clarify how the employee or the applicant may react against an interpretation of the tasks that the employer intends to submit for a drug test certificate, as the concepts mentioned in Sections 7 (1) and (2), 8 (1) of the law under analysis⁵⁷ are vague and indefinite.

3.6. France⁵⁸

3.6.1./3.6.2. Tests and professional secrecy

The Labour Code forbids alcoholic beverages at work, but there is nothing about the use of narcotic substances.

The employer has an obligation towards health and safety, the employees must also take care of themselves with others, and an internal regulation can determine guidelines in this matter.

There is the possibility for screening tests in cases justified by security motives and in

⁵⁶ Unknown.

⁵⁷ We were sent the OPINION OF THE NATIONAL ADVISORY BOARD ON HEALTH CARE ETHICS ON THE MEMORANDUM OF THE WORKING GROUP ASSIGNED TO DEFINE THE USE OF DRUG TESTS, of the 10.06.02, where we point out the following statements: "From the ethical point of view the most important aspect in the matter is that the tests must be carried out within the framework of health care services. The tests should be made as competently and correctly as possible. All essential ethical principles must be observed in the testing, including, expertise, reliability, confidentiality, security, and protection of the client's human dignity and interests in terms of care".

⁵⁸ We used a study of DURAND E., GAYET C., BIJAOU I A., "Le dépistage des substances psychoactives en milieu de travail", 2004 - www.inrs.fr/htm/

the following conditions: biological test carried out by an occupational doctor or biologist; the employee must be informed by the doctor about the nature and purpose of the test, its consequences on aptitude; the results are under professional secrecy; the doctor only informs the employer about the employee's aptitude or inaptitude, never about the diagnosis or the cause of inaptitude.

A letter from the Labour Ministry, dated the 9.07.1990, that publishes a note from the High Council for the Prevention of Professional Risks, advises occupational doctors to follow the opinion of the National Consulting Ethics Committee, of the 16.10.89 – hindering the systematic screening, only admitting it when the tasks to perform are very demanding in questions related to safety and behaviour, both at the recruitment and during the employment relationship. The tests rely on article R. 241-52 of the Labour Code.

Regarding alcohol at work, the Supreme Court (Cour de Cassation) admits control devices in the premises if the results can be contested, and taking into account the task trusted to the employee, a state of drunkenness might endanger people and goods, according to the Labour Code, art. 122-35. Since 1973 the same Supreme Court (Court de Cassation) only permits tests in the recruitment phase for certain jobs, if there was a direct and necessary relation with them– in order to defend the values of private life and to prevent discrimination.

A judgement from the CEDH, of the 7.11.2002, in a case of annual drug addiction control, considers that there is no offence to the proportionality of the interference in private life, if justified by the nature of the tasks. To conclude, the screening practice of psychoactive substances in workplaces is part of a certain number of prevention measures at work. “Meanwhile it must stay within its framework, in order to avoid any deviation».

The opinion of the National Consulting Ethics Committee for the life and health sciences, of the 16th October 1989, above mentioned, says:

“3. The occupational doctor must proceed, within the framework of each workplace, at the contract's signature, and later on, periodically, to the examination of each employee to verify his/her aptitude to the job he was called to, and if during the accomplishment of his/her task, he/she may put in danger himself/herself or others. When performing this mission, the occupational doctor must find out, if there is the case, if the job applicant or the employee is exposed to such a danger by the abuse of illicit narcotic substances. He can, for that purpose, prescribe all examinations necessary to do the screening of that behaviour, which may cause such a danger.

4. The deontological rules of the occupational medicine, like the principles imposed by the jurisprudence of the Supreme Court and the respect for the individual freedom, exclude the possibility of asking information from an applicant about to sign a contract or to an employee already working; it is not permitted to impose on him/her examinations or tests, besides those that show a direct and necessary connection to the job he/she is applying to, or that he/she is already performing. Therefore, it is juridical and ethically forbidden to carry out examinations or systematic tests when the contract is signed, or any periodic examination, without any distinction of the jobs applied for or occupied by the employees.

5. On the other hand, risks may exist if certain company activities are done under drug influence; these may affect another employee or a third person,. It is normal and desirable

that the applicants for such activities and the employees already performing such activities do systematic tests to detect drug use, in such a way that justifies the inaptitude of the applicants or the jobs already occupied. In this situation, and in this situation only, it is justified the use of systematic tests.

Each entity should have a list with this type of activities, established by a public authority after the warning of the employer, of the staff representatives and of the occupational doctor, and, if necessary, by an ethic Committee, within a framework of general directives determined by the High Prevention Council for professional risks.

6. The person concerned must be always warned of the test he is submitted to; it should never be done without his/her knowledge. It would not suffice to mention the general company regulation of a rule foreseeing screening tests.

7. According to the medical profession, principles, and rules of occupational medicine, the results of the screening tests are liable to professional secrecy. The occupational doctor should only make known the aptitude or the partial or total inaptitude of the applicant at the contract signature or of the employee. He must not, in any case, reveal confidential information such as the diagnosis or the inaptitude nature or cause, even to the employer.»

Comment: France does not have specific rules to carry out drug testing at work, however, it performs them in the same way as the alcohol tests.

It is curious, though, that the rules advised by the Labour Ministry are based on a statement of the National Consulting Ethics Committee.

3.7. Germany⁵⁹

3.7.1. Tests

There is no specific and explicit law on drug tests in Germany. The drug screening in the pre-employment stage and in the work place apply to the general principles and legal provisions on the collection and use of health-related data.

The Federal Data Protection Act (section 4) requires the subject to be informed about the data to be collected, and, if, after the collection, the data have to be stored, the propositions of that law must be observed.

Recruitment

Under the “right to ask questions” (developed by the Federal Labour Court) the employer has the right to ask the applicant certain kind of questions and collect relevant medical data (as far as he has a reasonable and legitimate interest in the answers because of the employment relationship), including information about any possible drug consumption and drug tests. If the applicant does not object to a medical examination, it implies that he consents to the collection of health-related data including the drug test.

During the employment relationship

In already existing employment relationships, drug testing shall be admissible if the

⁵⁹ We followed the Werner Sipp report :” Workplace Drug Testing- Legal Situation in Germany”.

consumption of drugs has been explicitly or implicitly forbidden to the employee. The employer's legitimacy to forbid drug use is not explicitly foreseen in the law, but is based on the Occupational Safety and Health Act (section 3 and 7) and in case of accidents in the Accident Prevention Regulations by the Occupational Accident Insurance Funds, in the Works Constitution Act (section 87) and –in the understanding of the Federal Labour Court- of the employee "general duty of loyalty"

There are specific legal propositions to regulate the right or the obligation to collect health-related data in certain areas of the working life (security-sensitive work places: pilots, tube drivers, locomotive drivers, fuel truck drivers, nuclear power inspectors and others). But such propositions do not allow, in any case, a general screening but only a random testing. That means that in general, drug tests shall only be carried out if there is a suspicion or a specific event.

3.7 2. Professional secrecy

In case of a positive test result the company doctor has to judge whether the applicant is qualified or not and may inform the employer about the mere result of his judgement⁶⁰.

Comment: The Working Group must review all type of relevant questions set by the drug testing in work place. The German situation presents an inventory that meets multiple situations (whose conformity with the ethical principles must be considered) beyond original aspects ("the right to ask questions", drug testing can only be imposed, when drug use is forbidden by the company regulation) and whose contribution for the clarifying of relevant issues is positive. In such measure, it would be useful to have the mentioned legal texts (available only in German).

3.8. Greece

3.8.1. Tests

In Greece the drug tests – only at the contract signature – are foreseen and regulated in law 2690/1998.

3.8.2. Professional secrecy

The professional secrecy is generally acknowledged in the Penal Code (article 371), in the Code of the medical profession (law 1565/1939) and in the law on medical deontology (law 3418/2005).

Comment: The law only allows drug testing in the recruitment stage. It would be eventually useful to have the mentioned texts (available only in Greek).

3.9. Ireland⁶¹

3.9.1 Drug tests

The Safety, Health and Welfare at Work Act of 2005 includes basic dispositions on drug tests of intoxicating substances at work.⁶²

60 A developed opinion of the German National Ethics Council is quite clear on the issue.

61 This legislation text was sent by Margueritha Nielson, who participates in the working groupe on behalf of the EMCDDA.

62 The law regulation is foreseen for 2006.

According to the mentioned diploma, it is the employee's obligation, while performing his/her work (section 13, 1) to:

- take the "reasonable" measures to protect his/her health, safety and well being and the health, safety and wellbeing of third persons, that might be affected by his acts or omissions (section 13);
- assure that he/she is not under the influence of any intoxicating substance that might harm their own health, safety and wellbeing or of third persons;
- submit, when reasonably requested by the employer (and under the supervision of competent health professionals) to reasonable and proportionate tests for intoxicants.

It is also the employee's obligation, when knowing that he/she is suffering of an illness or physical or mental disability that – in the performance of a certain activity – may put him/her or third persons in danger, to inform the employer or the competent health professional (that has to inform the employer), (section 23, 4).

It is the employer's obligation – while in the performance of his/her activities to protect the employee's health, safety and wellbeing – to give appropriate information to the employees about the risks at the workplace⁶³ (section 22, 1);

The employer has also the right to demand an employee or a certain type of employee be assessed (by a health professional appointed by him) in their aptitude to perform certain activities; the risk identification must be based on a proper assessment of these same risks (section 23,2-3)⁶⁴.

Finally, it must be mentioned that failure to fulfil the generality of the obligations and duties mentioned above, both by the employer and employee, is punished with a fine or penalty.

3.9.2 Professional secrecy

There is no information on this matter (regulated, according to the document given to the EMCDDA working group, by the Data Protection Act 1988 and 2003)

Comment: In general the Irish legislation – the most recent we know – explains clearly most of the issues posed by the tests application in the workplace.

The knowledge of the regulation announced for 2006, will allow the enlightenment of certain issues with ethical implications unfinished in this text and, in some cases, already questioned by other analyzed texts (tests before the employee's hiring, type of activities in which the tests can be asked by the employer, sampling tests/generalized tests, the employee's duty to inform of his/her disability/illness that may harm the performance of his/her activity). Issues related to terms such as "reasonably required" (section 13,1,c), "reasonable care" (section 13, 1,a) and to the independence of health professionals "appointed by the employer" have clear ethical implications that, in our opinion, must be mentioned in "the opinion of the working group", in preparation.

⁶³ The risks identification should be based on a proper assessment of these same risks.

⁶⁴ When the health professional, based on the assessment, concludes that the employee is not fit for that kind of activity, he must inform both the employer and the employee immediately – giving the reasons for his/her opinion.

3.10. Iceland

3.10.1. Tests

Iceland does not have any regulations regarding the use of drug detection tests in the work place.

3.10.2. Professional secrecy

The professional secrecy in occupational medicine is foreseen and regulated in the Act on the Rights of Patients n. 74/1997.

Article 12 of the mentioned law determines that *“a health worker shall fully respect the principle of professional secrecy regarding whatever he comes across in the course of his work regarding the health, condition, diagnosis... as well as other personal information”*. The same article explains that professional secrecy continues to apply after the death of the patient or even after the healthcare worker has left his job. The mentioned article still foresees the conditions in which the worker may provide information to third persons (*urgent reasons, with due regard to the wishes of the deceased and the interest of those concerned*).

Article 13 of the same document determines in what cases and in what conditions the healthcare worker is not bound to keep secrecy (when the law foresees it and when the patient or his/her guardian has consented it).

Comment: The doubt remains if there is or not a “justifiable law” (that gives support to the drug testing practice). If the answer is negative, we might question what kind of assessment should be done of the mentioned practice.

3.11. Italy

3.11.1. Tests

Article 125⁶⁵ of the DPR n. 309/90 (Italian law on narcotic substances) – foresees that the persons belonging to the class of workers with activities that may endanger the safety and health of others should submit to drug tests at the contract signature and during the employment relationship.

This class of workers must be identified by a decree of the Ministry of Labour and Social Policy and by the Ministry of Health. This decree also determines the drug testing administration timing – its periodic character – and the drug testing administration modalities. The public structures of the National Health Service are qualified to do the tests, even if the costs are born by the employer.

If drug addiction is found out during the employment relationship, the employer must stop the activities that may endanger the safety and the health of others.

If the employer does not follow these provisions, he risks imprisonment or fines.

Since 1990 no decree has ever been published on risk activities. Currently, there is a regulation proposition on these activities (mainly transport, health and constructing

65 Article not amended in the revision of the DPR n. 309/90, published in G.U. n. 48 of the 27th February 2006 – cfr. <http://www.politicheantidroga.it/IE> Le texte mis à jour du DPR n. 309/90 a été publié au G. U. n. 62 du 15 Mars 2006

workers) that is being examined by the competent authorities.

The Authority for the protection of personal data (Garante della privacy) has taken an issue on the regulation proposal. It has underlined (official information of the 5th January 2006) that the drug testing for the specific worker categories must be carried out respecting the citizen's dignity and discretion, above all to avoid discrimination and marginalization. Furthermore, the Authority supports the need of tests, when there is real substance abuse dependence, and not only when there is an abuse, even occasional. Ordinary tests and not sufficiently motivated, should also be avoided. The Authority also mentions the need to be specific in case of accident in the workplace. The obligation to submit to tests must be foreseen, when there are specific accidents that can have origin in drug abuse.

3.11.2. Professional secrecy

The physicians registered in the Medical Association must respect a deontological Code that also foresees a professional judgement. Art 9 of the Code keeps the professional secrecy, art. 79 foresees the doctor's relation towards the drug addicts' prevention, treatment and social reintegration. There is no Medical Code for occupational doctors.

Comment : It would be interesting to have access to the draft regulation which was cited by the Authority for the Protection of Personal Data on 15th December.

In this Regulation is also indicated the rank of workers that carry out activities that may endanger the safety and the health of third persons, so drug addiction ⁶⁶ cannot be tolerated.

We are inclined to think that Italy is going to adopt suitable juridical rules on this matter.

3.12. Lithuania

3.12.1 Tests

(The use of "drug testing" is mentioned in the Code of Administrative Offences of the Republic of Lithuania for the cases of road vehicles drivers, driver of boats and vessels in Lithuanian waters, workers of the commercial aviation and other persons, if there are any suspicions of drug use, they must be suspended from those activities.

There are some companies testing their own workers on their own initiative.

We didn't receive any elements on professional secrecy

Comment: For a better analysis it would be necessary to know the text of the Code of Administrative Offences and the texts on professional secrecy.

We still believe that Lithuania needs better rules on this matter.

66 Cfr. <http://www.garanteprivacy.it/garante/doc.jsp?ID=1209068>.

3.13. The Netherlands

3.13.1. Drug Tests

Holland's information was as follows: *"In the Netherlands, drug testing is perceived as an infringement on privacy according to article 10 (privacy) and article 11 (physical integrity) of the Dutch Constitution. Under specific circumstances, employers may invade such Constitutional rights, provided there has been made a statutory exception.*

The question if employers can perform drug tests on their employees, depends very much on the specifics of each case. If there is a dispute, it's settled in court. There have been no appeals in such cases; until now, our highest legal office, the Supreme Court, has not been able to make a general remark about the admissibility of drug testing in the workplace."

The legislation on Aviation (Aviation Law, 1st July 1999) includes severe control measures on alcohol, drugs and medication in all persons involved in air traffic, whether on duty or in pre-flight preparation phase. According to the law dispositions "it is forbidden for a crew member to perform any activities under influence of a substance (i.e. medicine, drugs), that inhibits his/her ability to perform his/her duties properly."

The Aviation Police are using Breathalyser tests are to detect alcohol and (according to the detected alcohol level – when the alcohol level exceeds the level of 90mg/L) the activities can be suspended temporarily and the licence can be cancelled.

We didn't receive any elements on professional secrecy.

Comment: It would be useful for the working Group to know the exact terms of the Aviation Law and assess, in general, how far the agreed procedures are ethically acceptable. In the case of alcohol is not foreseen a counter proof, in case of positive results.

3.14. Norway

3.14.1 Tests

Drug testing at work is foreseen in the Act of 17 June 2005 Nr. 62 relating to the Working Environment, Working Hours and Employment Protection (Chapter 9), that came into force on the 1st January 2006.

There is another relevant legislation.

The Act of 17 June 2005 Nr. 62, states that the employer can only demand medical examinations in three circumstances: when pursuant to law or regulation; for positions associated to special risks; when the employer finds it necessary to protect life or health of employees or a third party. The wish, both of the employer and of the employee (consent) does not provide a sufficient legal basis for drug testing.

Furthermore, the controlling measures must be objectively justified and not be a disproportionate burden for the employee and the employer must discuss them with the elected representative of the employees and provide enough information about the controlling measures.

3.14.2. Professional secrecy

The professional secrecy is regulated in the Act of 2 July Nr. 64 relating to Health Personnel (The health Personnel Act) – Chapter 5.

Health personnel is liable, as a rule (§ 21), to the duty of confidentiality relating to people's health or medical condition or any other personal information that they get to know in their capacity as health personnel. This duty is not to prevent information from being made known to the person that the information directly relates to, or to others, as long as the person who is entitled to confidentiality gives his/her consent thereto, and there is a distinction regarding the consent between persons over or below 16 years of age.

There are restrictions in the duty of confidentiality (§ 23), namely "if exceptional private or public grounds make it legitimate to pass on the information". According to § 28, the Government (Ministry) may stipulate regulations regarding the access of the employer to information regarding the employee's medical condition; the employer can only accede to that information when it concerns the employee's fitness for a certain type of work or assignment.

Comment: Only a deeper knowledge of the legal texts⁶⁷ could determine whether the ethical principles are respected at legislative level.

Based on the transmitted elements, it looks like "drugs testing" is included in the possibility of doing "medical examinations" (in general), at the employer's disposal.

3.15. Poland

3.15.1. Tests

This is Poland's answer:

There are no laws, regulations and other official public rules/guidelines regarding drug testing in the work places.

Such tests are not performed in Polish Companies. Those we have reached did not have special regulations concerning the issue.

3.15.2. Professional secrecy

Medical confidentiality is foreseen and regulated in the Medical Code of Ethics, articles 23 to 29 (the last amendments were adopted in 1993 and 1994).

Article 23 stipulates the principle of medical confidentiality of all information, (acquired in the course of his/her professional duties) concerning the patient; article 25 enumerates the circumstances and refers the conditions, in which the physician may disclose information concerning the patient to third persons (when it is foreseen in law, when aims to improve the patient's treatment, when the patient gives his/her consent, when the maintenance of confidentiality constitutes a threat to the patient's life or to a third person) and article 28 designates that the physician should ensure that his/her professional assistants respect the patient's confidentiality.

Comment: Considering the absence of "justifying laws", as it seems to be the case of Poland, and the existence of drug tests, it would be interesting to know, in the abstract, what kind of assessment should be done of the mentioned practice.

⁶⁷ Those texts were not accessible.

3.16. Portugal

3.16.1. Tests

Portugal has a recent Labour Code (LC) approved by Law nr. 99/2003, of the 27th August, and regulated by Law nr. 35/2004, of the 29th July.

Although there are not specific propositions referring to drug testing in the work place, the law appoints a set of very strict general rules regarding the worker's health, as a result of constitutional principles – principle of the human dignity, basis and limits of a lawful and democratic State (article 1 of the CPR), the right to personal integrity (article 25) and the right to preserve the intimacy of the private life (article 26), and the right to the protection of personal data and the use of computers (article 35).

The right to preserve the intimacy of the private life mentioned in article 16 of the LC, includes both the access to and the disclosure of aspects regarding the intimate and personal sphere of the parts, namely those related to the family, affective and sexual life, and those related to his/her state of health.

Objectively, the employer cannot ask an applicant for a job or the worker to give information about his/her health or state of pregnancy, unless when specific demands related to the nature of the professional activity justify it and the respective reason is presented in writing; such information is given to the doctor; the job applicant or the worker who has given personal information is entitled to control his/her own files; the files and the computerized accesses used by the employer for the processing of the personal data of the job applicant or of the worker are subject to the legislation related to the protection of personal data (article 17 of the LC).

Article 19 of the LC regulates in general about tests and medical examinations saying that *“the employer cannot, for the purpose of admission or continuous employment, demand the job applicant or the worker to complete or present tests or medical examinations of any nature to prove physical or psychic conditions, except when those aim the protection and safety of the worker or third persons, or when particular demands related to the activity justify it, in any case, the worker or the job applicant should be given the respective reason”; on the other hand, “the doctor responsible for the tests and medical examinations can only inform the employer if the worker is fit or not fit to perform the activity, unless the worker gives his/her permission in writing”.*

Safety, hygiene, and health in the work place are covered in articles 272 to 280 of that same Code, as well as a description of the employer's general duties, the employees' duties, the employer's duty to give information and consult his/her employees or their elected representatives, about the safety, hygiene, and health measures in the work place.

The State, through the Labour General Inspection, the Directorate-General of Health, and the National Protection Centre against Professional Risks, proceeds to inspections to see if the rules are followed.

Articles 211 to 289 of Law 35/2004, of the 29th July⁶⁸, regulate the Labour Code, that is,

⁶⁸ Also called Regulation of the Labour Code (RLC).

the Code regime is described in detail. We point out some points:

The employer must promote medical examinations in order to verify if the employee is physically and psychically fit or not fit to perform the activity, and must also verify the effects and the conditions, in which the activity is made, can have on the employee's health (article 245);

§ The examinations to be carried out are those of admission, periodic (annual for minors, and every two years for employees above 50 years of age), occasional (whenever there any substantial changes that may have harmful effects on the employee's health);

The occupational doctor has the technical responsibility of the health monitoring (article 244);

The employee has the duty to go to consultations or medical examinations appointed by the occupational doctor (article 255-1, b).

The employee is entitled to know the results of the medical examinations and of the health monitoring and can demand the revision of those results (article 254 -6);

The employer pays for the organisation and functioning of the safety, hygiene and health services in the work place (article 261);

In case of risk for the employee's safety and health for the safety and health of other employees or third persons can cause a situation of inadequacy, making the maintenance of the employment relationship impossible, (article 406-1, c).

3.16.2. Professional secrecy and confidentiality

The doctor is responsible for the health monitoring, for the organisation and updating of the data records and for the results of the health monitoring of each employee, with the indication of the medical examinations or other complementary examinations already done and with other elements that the doctor considers useful (article 56-2, do RLC). When the enterprise ends its activity, the confidentiality of those records ensured by the ministerial body responsible for the labour area.

The clinical observations regarding the medical examinations are noted in the clinical file, subject to professional secrecy, can only be handed to health authorities and to the doctors of the Labour General Inspection (article 247 of the RLC). On the other hand, the file cannot contain elements involving the professional secrecy (article 255-3 of the RLC).

The employees' representatives for the safety, hygiene and health in the work place, cannot reveal to the employees or to third persons any information that they were told in the legitimate exercise of their functions, and with the clear mention of the respective confidentiality, duty that must be kept after the end of the commission.

The disclosure of other people's secrets, known to someone on account of his/her state, job, employment, profession or arts, is punished by a term imprisonment of 1 year or fine until 240 days, also applied to the doctor– article 195 of the Penal Code. The doctor follows the Deontological Code, which compels him to professional secrecy– articles 67 to 80. For the clerk the penalty is more serious – article 383 of the same Penal Code.

3.16.3. Some national practices

Several entities and companies were heard – National Ethical Council for Life Sciences, Air Portugal (air navigation), CTT Portugal Post-Office, Portuguese Industrial Association and the two main trade unions (CGTP-IN and the General Workers Union)

Although the legal support is not clear, one of these companies carries out drug detection tests to job applicants and periodic monitoring examinations to the air aviation staff and employees under treatment/recovery of drug addiction.

The trade unions, although not having statistic data⁶⁹, report that the absence of specific legislative rules, is common practice in the companies, specially in the multinational corporations, to force the employees and the job applicants to do tests for the detection of consumptions.

The most frequently followed method has been the prediction of such compulsory tests in internal regulations (or simple service orders), invoking the employer's executive and disciplinary power to legitimize these practices. These internal regulations very often include the prediction of disciplinary proceedings, with sanctions including discharge (alleged fair discharge) when certain levels of consumption are detected, or there is a refusal to do the tests.

They consider that it is necessary to have a specific normative set to regulate the alcohol and drug detection tests within the framework currently established in the mentioned article 19 of the Labour Code. The issues needing clarification are the following: (1) to define the conditions in which the tests can be carried out, and the method of consent of the concerned person; (2) to define the professions/categories, professional/sectors of activity in which tests are compulsory, both at the admission and periodically; (3) to define the type of the authorized tests, considering the prerequisites for technical quality and reliability; (4) to predict confirmative tests, in case of positive results, particularly when handling with detection tests; (5) to define the tests that can only be carried out in the internal company's health services or in qualified external services, compelling all the professionals involved to professional secrecy; (6) to ensure the confidentiality of the obtained information, namely, that the results will only be communicated to the responsible occupational doctor or to the employee's family doctor and that the information will only be given to third persons with the employee's consent in writing; (7) to guarantee that the positive result will only influence the applicant's admission when interests of equal value are in cause and never on grounds of arbitrary discrimination; (8) to guarantee the maintenance of the employee's job while he is under treatment, or to transfer him/her to other functions, in which there are no risks for third persons.

The enterprise's intervention in the area of treatment and rehabilitation must be based on the principle of the employment protection and the respect for the employees' personal rights, freedoms and guarantees.

Comment: Although recent, the Portuguese legislation is not sufficiently clear for their users regarding drug testing in the work place, when these are justified, and so, there is a risk of diverse internal regulations in the different companies and even elaborated in discordance with the Constitution of the Republic and the labour laws (too generic in this field).

69 According to the ILO and WHO, drug addicts have twice to four times more working accidents than the other employees.

The trade unions are waiting for the Government to amend legislation on this matter, in order to avoid the abuses that are taking place.

3.17. Slovenia

3.17.1. Tests

There are no specific regulations regarding drug testing at work in Slovenia. The legal ground to carry out such tests is based on certain propositions of the general law relating to Health and Safety (Health and Safety at Work Act), Employment (Employment relationships Act), and Health Care and Security (Health Care and Human Insurance Act (adopted in 1992).

Article 6 related to the Health and Safety at Work Act defines the principles upon which the employer must define and implement measures to keep and reinforce health (of the workers) and article 15 and 22 of the same diploma compel the employer to provide health examinations for employers (to be approved by the minister of health in agreement with the minister of labour).

According to article 9 of the same law, the employee must take care of his own safety and health and that of other persons affected by his acts at work.

Article 5 of the Employment Relationship Act prevents to treat unequally the job seekers or the worker during the employment relationship on the bases of. health or disability.(any direct as well indirect discrimination) and article 33 of the same law determines that the worker must respect and implement the regulations on safety and health at work carefully in order to protect the life and health of himself and others..

The health Care and Health Insurance Act provides health care for...mental diseases, including addictions⁷⁰

We did not receive any elements on professional secrecy.

Comment: For the “originality” of some mentioned propositions – namely those regarding the compliance of the employee to take care of his/her own safety and health and of the safety and health of others affected by his acts at work, those related to the non discrimination based on health disability and that related to the compliance of the employee to respect and implement the regulations on health and safety carefully – and for the practical effects of such propositions, it would be more than justified to have the texts on the respective laws (not available in English or in French).

⁷⁰ There were difficulties in the definition/interpretation of the terms in the law related to disability, because there were cases that had specifically excluded addiction problems from the definition of disability. The employee was disabled within the meaning of the regulation where his depression was caused by alcoholism. Employee was depressed and using drugs heavily and consequently signed off sick for few months and being treated with methadone substitution and being tested positive for drugs...After been dismissed the employee brought an action against his former employer alleging disability discrimination. The court findings stated that the key issue was whether the employee became clinically depressed and turned to drugs, or whether his drug use/addiction led to his depression...

3.18. Sweden

3.18.1. Tests

This was the answer of Sweden:

"There are several reasons why workplaces should be drug-free environments, including safety, productivity and quality. Many Swedish workplaces have therefore drawn up policies that set out guidelines on how to prevent and treat substance abuse. As often stated in these documents, drug testing can play a part in prevention. Such tests are not currently regulated in Swedish law, but are instead governed by agreements between employer and employee organizations. However, there have been demands in various contexts for statutory regulation of drug testing in the workplace.

This was most recently proposed in 2002 in a government report on personal integrity in the workplace (Swedish Official Government Report SOU 2002: 18). An important forum for settling disputes between employee and employer organizations in Sweden is the Labour Court. In recent decades, some cases brought before the court, have been about the right of employers to demand that their employees undergo drug tests.

The case that attracted most attention in public debate was one involving drug tests at a Swedish nuclear power station, on which a verdict was issued in August 1998. The main issue in the case was whether the employer, within the framework of his right to lead and direct the work, was entitled to demand that employees underwent compulsory drug testing. The opponent in the case was a member of the Swedish Electricians Union. The employee organization lost the case on drug testing and the court's verdict was that an individual employee was obliged to undergo those drug tests for which instructions to employees were available. The Swedish Electricians Union took the case before the European Court of Human Rights in Strasbourg in 1998-2004 but was unsuccessful.

There is a legal framework for drug testing in some areas of Swedish society such as the prison and probation system and the police. These areas have relatively detailed regulatory frameworks for how such tests are to be performed, even without the consent of the individual.

Guidelines for voluntary drug testing have been issued by the Swedish National Board of Health and Welfare January 2004 and are primarily aimed at registered healthcare staff, including those in occupational healthcare. The Guidelines state a number of requirements that should be met if a reliable result is to be obtained from a urine test for narcotic drugs.

The most important include the following:

The final test result depends on a number of factors. To ensure a correct result, a whole chain of measures must be built up (known as a "chain of custody"), from the summons to the test, identity checks of those providing samples, the taking of samples, transport and analysis, to the reporting of results, interpretation and action.

Staff training and regular quality checks of the entire (testing) process are also important.

Laboratories that analyze samples for narcotic drugs for control purposes should be accredited by SWEDAC, the Swedish Board for Accreditation and Conformity Assessment".

3.18.2. Professional Secrecy

General principle:

For the Health Care and Medical Services, the Dental Care and the Social Services the general principle in Chapter 7, Section 1 and 4 of the Secrecy Act applies. Secrecy applies to information about an individual's circumstances if it is not clear that the information can be disclosed without causing harm to the individual or to somebody close to him. Regarding the Health Care and Medical Services the information about an individual's health status is mentioned as such a personal circumstance that is covered by the general principle.

The secrecy covers both written and verbal information. For information in public documents within these areas secrecy applies as long as the risk of harm to the individual remains - but at the most for 70 years. Staff in Health Care and Medical Services who are registered comprises the Secrecy Act. The same rules concern registered staff in occupational medicine.

Comment: Like in other countries, in Sweden drug testing is not formally regulated, subject to agreements between employer and employee organizations. In specific cases, in the prison and probation system with the police, drug testing can be carried out even without the consent of the individual.

It could be useful to know in detail the Guidelines for voluntary drug testing issued by the Swedish National Board of Health and Welfare January 2004.

3.19. Switzerland

3.19.1. Tests

There is no specific legislation that foresees and regulates drug detection tests in the workplace. But, both the Penal Code, the Obligation Code as well as the Labour law regarding industry, trade, workmanship and the federal law that concludes the civil Code, include propositions complying the employer to take measures to protect the employee's health at work and which aim the protection of personality.

Article 6 of the Labour law (RS 822.11) establishes both the employers' and employees' duties in order to protect health (imposing the employer the duty to prevent the employee to be forced to drink alcohol or use other psychotropic substances when performing his/her activities)

Article 17c of the Labour law recognizes the employee's right to have a health examination, when working at night. And article 45 of the same law (RS 822.11) enumerates the type of activities that must be submitted to periodic medical examination.

According to a recent report ⁷¹of the Swiss authority responsible for the data protection, it is possible that the doctor who examines the person may think necessary to do a drug screening test to find out if the worker or the apprentice is fit to perform the activity in question.⁷²

Article 2 (RS 822.113) obligates the employer to take all necessary measures to ensure

⁷¹ Report about the drug screening tests during apprenticeship of the responsibility of the federal Proponent on data protection (13 February 2001).

⁷² For its content and possible interest for the group, here are the report's conclusions: "Submitting apprentices to generalised drug testing is not allowable, because those tests are not going to solve the drug problem. In most cases, these

and improve health and to ensure the employees' physical and psychic health.

Article 70 ss. about the prevention of accidents (RS 832.30) foresees that the National Insurance Fund can, in case of accident, submit part of the company or an employee to prevention prescriptions in the area of occupational medicine.

Article 328 of the law completing the civil Code, includes protection measures of the employee's personality (complying the employer, namely, to avoid sexual harassment and to keep the morality).

3.19.2. Professional secrecy

The collection and processing of personal data is, in general, object of a careful regulation in the Penal Code and in the Contract Laws.

Article 4 of the Penal Code (RS 235.1) establishes the general principles that must be respected in the collection of personal data and article 15 of the Contract Laws stipulates the individual right to rectify the data, to proceed to their destruction or to prevent them to be communicated to third persons.

Article 328 b of the contract laws determines that when processing personal data the employer cannot process the data regarding the employee unless they are related to the employee's fitness to do his/her job or if they are necessary to sign the working contract.

No. 5 of article 45 of the Labour Code (RS 822.11) foresees that when the employee is declared fit to certain activities, the occupational doctor is no longer complied with the professional secrecy towards the employer and when the measures taken in the company demand it and when the employee gives his/her consent.

Article 321 of the obligation code establishes sanctions for the violation of the professional secrecy by the doctors.

(It was also implied that other propositions regarding the treatment and communication of data related to people's health exist (article 11, al.1 of the deontological Code of the FMH, and article 4, al. 2 and 3 of the federal law on data protection -LPD, RS 235.1; we don't have the text, but the reference remains).

Comment: The two issues under analysis in the Swiss legislation are treated in so many contexts, that we think, this legislation deserves a more careful and profound reading.

3.20. United Kingdom

3.20.1. Tests

There is no direct legislation on drugs testing at work in UK. Provisions in Health and Safety, Employment, Human Rights (Human Rights Act, 1998), and Railways Transportation (railways and Passenger Safety Act, 2003 ⁷³) are the legal support for the practise of the drug tests (although there are important issues regarding the interpretation of the provisions).

⁷³ That gives the police the right to test and arrest anyone in charge of public transport if they suspect them of being impaired.

The general principles based on the legislation mentioned above establish:

- that people are entitled to a private life;
- that employers are required to look to the safety on the public;
- that people are entitled to dignity;
- that people are entitled to proper quality standards for evidence used against them in court or disciplinary proceedings.

The Information Commissioner has recently published part 4 of Employment Practices data Protection Code which states that “the collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons” and recommends that employers should “confine testing to those workers whose activities actually have a significant impact on the health and safety of others”.

3.20.2. Professional secrecy

The Employment Practices Data Protection Code (Information Commissioner’s Office, 2005) provides guidance on good practice, including compliance with the requirements of the Data Protection Act, 1998, and states, in particular, that:

- *“Wherever practicable only suitable qualified health professionals have access to medical details of employees... Managers should not have access to more information about a worker’s health than is necessary for them to carry out their management responsibilities. As far as possible the information should be confined to that necessary to establish fitness to work. Safety representatives should be provided with anonymised information unless any worker concerned have consented to the provision of information in a identifiable form” (Paragraph 4.1.4.);*
- *“Unless told otherwise workers are entitled to assume that information they give to a doctor, nurse, or other professional will be treated in confidence and not passed to others” (Paragraph 4.2.1.)*

Comment: The UK legislation is very useful reference in the matter. To go further in our analysis it would be necessary to acced the texts of the laws. The report “Drug testing in the work place (Joseph Rowntree Fondation, York Publishing Services, Ltd, York, 2003) gives a good overview of the matter and help us further in our work.

4. Final considerations

A first comment has to do with the validity of the collected elements and their interpretation. Although not dealing with an accurate and exhaustive data collection about the way the 20 European countries mentioned above deal with the issue of testing in the work place, it is possible, thus, to draw some solid signs about the extent of the problem and the type of approach adopted by the several countries.

If the Group intends to base its work upon more complete and reliable information, both on regulation (or in its absence) and on the practices followed, this document must incorporate a more profound study, with the means and resources considered necessary, including the contributions issued made during the discussion⁷⁴.

After this statement and within the framework of the Group's objectives about the ethical and deontological issues, it is fair to draw the following conclusions:

- 1.** The workers' submission to drug testing at recruitment or during the employment relationship, both in general activities and those specifically demanding specific safety measures, because of the risks for the workers and for other persons, is a common practice in the countries, being in expansion in some of them.
- 2.** The situations detected by drug testing, on admission or during the employment relationship, are essentially three: (i) absence of laws and regulations, therefore drug tests are made without the observance of general juridical rules; (ii) the tests are carried out within the general framework of the "medical and health examinations", following the mechanisms set out in the legislation regarding labour, employment, safety, health and welfare; (iii) existence of specific legislative rules in some countries – Finland and Norway – more or less described in detail or about to be regulated (Italy).
- 3.** The issues⁷⁵ related both to drug testing and to the retention, treatment, communication of data and information resulting from the tests, are mainly these:
 - 3.1.** Labour activities that, due to their nature and the circumstances in which they are performed, may endanger the health or the safety of the workers and of third persons, so that the practice of drug testing on recruitment or during the employment relationship is more than justified; in which way (legal or contractual obligation, or others) and who has the competence to specify such activities;
 - 3.2.** In this ambit, how it is possible to harmonize the employers' rights and duties with the employees' rights and duties, protected by the Constitution or by law, and how can the general interests of the community be protected;
 - 3.3.** When concluding that it is legitimate to do drug tests, what presuppositions and conditions must be respected, namely in relation to the consent of the interested party;

⁷⁴ It would also be useful to take into account the conclusions of the seminars organised by the Pompidou Group in 1999 (Road traffic and drugs) and 2003 (Road traffic and psychoactive substances)

⁷⁵ Beyond the preliminary issues raised by Claire Ambroselli in document P-PG/Ethics(2006)6

3.4. What kind of tests are allowed, what guarantees are given by the competent authorities that they are going to be carried out with technical quality and reliability;

3.5. How can data confidentiality be preserved – from the beginning until the end – and how can the duty to secrecy be kept by all the professional involved, doctors and others;

3.6. What information on the test results are to be transmitted to the employer, the way to transmit it and the consequences to the employee – in terms of employment relationships;

3.7. In case of a positive result, what are the possibilities to do confirmative tests and how can the final decision for non admission or job exclusion be refuted;

3.8. If the employee's job is kept, while this undergoing treatment, or whether he is transferred to other activities, with no risk for others;

4. Based on the information collected from the texts received, there is a high degree of convergence regarding professional secrecy of the health professionals, who are usually bound to it, about the data related to drug tests and about the protection of personal data⁷⁶;

5. There are other issues that also deserve some thoughts:

5.1. Legal propositions concerning drug use that establish limitations possibly "inappropriate" to the employees' rights, as for instance, the duty of total abstinence;

5.2. Normative texts or practices with an opposite meaning or with an evident divergence;

5.3. To carry out drug tests based on distinct laws, if not opposed, or based on imperative rules, on entities' opinions without a legal bond, or based on simple "voluntary agreements";

5.4. Several and serious omissions related to the prediction of this situation or incomplete or vague formulations of certain rules, that may allow substantially different practices;

76 Which is not a surprise, because in relation to professional secrecy all countries follow similar principles usually based in deontological codes. Regarding the treatment and protection of personal data, one should recall the Convention of the Council of Europe for the protection of people and automatic treatment of personal data (Convention nr. 108), opened to signature on 28.01.81 and that came into force on 1.10.85; as, it has a non self executing character, this convention compelled, before its ratification by the States, the adoption of national legislative rules according to its principles. In the ambit of the European Union and also with the agreement of all, the State-members proceeded to the transposition of Directive 95/46/CE of the European Parliament and Council, of 24 October 1995, related to the protection of the individual in what concerns the treatment of personal data and to the free circulation of these data. Perhaps, the way to achieve the proceedings uniformity on the matter under study is to take inspiration from these examples

6. We recall the ethical principles that may be in jeopardy in this matter.

At the very beginning the principle of **individual autonomy**, the manipulation of the other, the right of non-interference of the State or of the fellow-citizens, except if higher values are cause for concern and there is no conflict with the human dignity.

It values mainly the **respect for private life**, which can only be confronted with significant and predominating social interests. In this case the confidentiality of the collected data is a rule and “if the data transmit a possible connection to the practice of criminal offences or others, special precautions must be taken, in order to avoid harmful indirect consequences for the owner of these data “ (Technical Report, Part II).

The **principle of welfare** must not be forgotten – beyond any doubt, with the use of such an intrusive method, this principle can benefit the community, in terms of the prevention of serious and immediate risks based on certain activities.

The issue of **consent, free, enlightened** and revoked at any moment, should deserve particular attention, specially from the applicant to a certain job, that has the wish to gather conditions to get the job and sees him(her)self confronted with the disclosure of circumstances or conditions of his/her private life. And also the consequences by refusing consent during employment relationship.

7. There are no doubts about the importance of a clarifying text for the State-members of the Council of Europe, duly justified, that would gather, in an ethical plan, the set of principles, presuppositions and conditions, that would allow to mark out the situations in which drug tests in the workplace are justified and, in the affirmative case, to observe the rules while carrying out the tests, according to those ethical demands.



Quality, availability and reliability of drug screening tests used in the workplace: ethical issues and the difficulties of building dialogue and human relationships

Claire Ambroselli, Doctor, Inserm, France

I have proposed exploring a few manufacturers' websites on the Internet in order to understand how these new products - drug screening tests - came on to the market, and how future customers were informed about their use.

I am not an expert on drug testing practices or on these manufacturers, whom I discovered, therefore, by exploring their various websites. But I proposed this exploration in order to gain a better understanding of what it meant, in our working group, to focus the study of ethical issues on problems relating to the instrumentalisation of testing, and not on the educational and cultural problems involved.

In making this choice we run the risk of finding in the study on the workplace the same problems as those already encountered in the study on schools. These are problems which get worse with the development of the people involved in drug abuse and hamper the building of a dialogue between these people and those who organise the fight against drug abuse. The problems arising above and beyond those raised by the instrumentalisation of the fight against drug abuse is likely to lead us towards the same finding: predominance of an unbalanced dialogue in this aspect of the fight which increase its ineffectiveness. This is something which the players involved come up against with the profusion of policies that focus more, in the relationships that make up this dialogue, on those who seek to control abuse of harmful substances than on those who abuse them or who are dependent on them, with whom we seek to establish this dialogue in everything we do to prevent and combat drug abuse.

The young people with whom these educational and political problems are not addressed when they are obscured by controls and tests which evade them will find it increasingly hard to become integrated into society, with difficulties on recruitment, then in the workplace, and other members of society will lack appropriate means to improve dialogue. Educational institutions (not only schools, but also the rapidly changing vocational training sector), workplaces and the political institutions responsible for labour and anti-drug policies are unlikely to develop appropriate means of improving this dialogue, making the fight more effective and promoting the inclusion of everyone in society.

Like every human dialogue, this dialogue is difficult, particularly complex and problematical, but the difficulty is heightened by the great complexity of the situation we are seeking to remedy, with a difficulty specific to human relationships, especially when they are strained between people who abuse others, without any tools enabling them to acquire the means of remedying the different aspects of that abuse. The complexity is related to these difficulties of human dialogue, especially when they are ignored on both a personal and a political level:

what becomes of the issues raised by human relationships in difficulty when the prevention process turns away from them, as we have seen, in the fight against drug abuse and trafficking, being more concerned with test procedures that are necessarily complex, given the complexity of so-called advanced industrialised societies, with a profusion of procedures that are increasingly remote from the true needs of prevention, and which are likely to be even more remote with the constraints and limitations involved in the growing use of tests which merely detect substance use, without addressing the problems of abuse and dependence raised by that use, and being unable even to raise them?

When we talk about the use of tests we are talking about instruments which have a history in the development of techniques, which is particularly marked in industrialised societies with detection devices that have transformed certain areas of biological knowledge, both normal and pathological, through new, miniaturised and computerised measuring instruments, which increases their diagnostic capacity and widens the scope for using them on the market. This instrumentalisation which is pervading biological and medical institutions is developing gradually in the fight against drug abuse, with the risk that this instrumentalisation might prove ineffective when it comes to addressing complexities which have no obvious link but tend rather to conflict with one another: how are we to study the interactions between the technical, biological, legal, political, social and cultural complexity of the use of drug tests and the personal, professional and political complexity of drug use and the fight against drug abuse, dependence and trafficking, which the use of tests merely detects?

I therefore undertook making a more specific, but also more limited, study of these tests by going on to the websites of the main manufacturers to gain a better understanding of their production difficulties and the pressures which lead them to step up production, as is the case at present, in the face of the competition, in response to political programmes and, in the context of our present study, in the different working environments, in order to put them on the market. In fact, I found myself faced with a difficult situation in the course of the work, being unprepared for such a profusion of problems, despite the initial surveys already carried out, in the context of the study on the use of drug tests in schools.

The fact is that the complexity of the study of the use of tests in the fight against drug abuse impinges on the whole anti-drug effort in the industrialised countries, forcing us to view the problems raised by this instrumentalisation in the context of the crisis in the dialogue with those principally concerned, i.e., first of all, those for whom drug abuse and dependence are harmful to themselves and to others, and also with the criminals, who all too often go unpunished, responsible for international trafficking in these substances which they sell to them.

Now, the complexity of this rapidly developing instrumentalisation, with the growth in the use of drug tests, is so great not only in the real and potential networks for drug test use, but also in the policies encouraging the use of drug tests, that I felt it would be difficult to make a study of the theme selected here, namely the quality, availability and reliability of drug tests used in the workplace, in a study of the ethical issues raised by the use of these tests in the working environment, because I felt that it would be premature unless we decided to limit the scope of the study in order to be able to identify the ethical issues to be explored in greater depth, given the abundance and complexity of the subject-matter. I therefore propose to outline here what might be termed a road map of the issues which

should be addressed, in order to be able to study them in the next stage, with a group of individuals who would take up some of the many elements involved, which would be selected by a working group, after debate, for further consideration.

This road map of the issues to be addressed here is set out in two parts: a brief analysis of the ethical issues raised by the complexities and difficulties which are linked more or less closely to different levels of action in the dialogues and relationships of the various players in the wide social spectrum of the use of tests in combating drug abuse in the workplace, then, secondly, the presentation, in the appendices², of a number of studies which can serve as points of reference, in view of the ethical issues raised, and which can be accessed on the Internet.

The all too brief remarks set out above concern the effects of the use of tests and the threats posed by their repercussions on the quality, availability and reliability not of the tests themselves, but of the dialogue to be established between the various players involved in the fight against drug abuse. These effects and threats are related to the complexity of the situation in question, and to the major difficulty of establishing a dialogue between players who do not pursue the same aims in their relationships and who are not seeking to improve their dialogue: what dialogue and relationships are established between the manufacturers of tests, the politicians and professionals who are responsible for their use, those who abuse and are dependent on harmful substances, and the various players involved in preventing and combating this abuse and dependence?

The use of drug tests depends first of all on their availability at various levels, and at various points and places in the development of drug test use.

Market availability depends on the very large number of manufacturers currently involved in the development of new tests, whose quality and reliability may vary within the same company or between companies, depending on the substances detected, on the biological matrices used, and also on the type of tests to be conducted (personal, professional, judicial), with instruments that evolve in time between specialised laboratory apparatus and the use of rapid tests for on-site detection which usually requires confirmation with traditional measurements by specialised laboratories.

Secondly, market availability depends on the national institutions responsible for technical control of quality and reliability, prior to marketing, depending on industrial supply and political, professional and social demand. The complexity at this level of the marketing process outlines a first geopolitics of the emerging scene, which can develop at this level of dialogue between manufacturers and policy-makers without dialogue with those who are in another dialogue and in other relationships, but who are the focus of these policies, namely the drug users experiencing problems of abuse and dependence, and those who have been trying to help them in policies for combating that abuse and dependence, for over 20 years now. In the already complex stratification of these three levels, current studies of the dialogue between these various players and the working environment are gradually opening up in time, in space and in terms of the range of different areas concerned by posing the central problem of each individual's freedom in his or her existence, because when drug use is tested in the workplace, it concerns not only substance use in the workplace, but also substance use in places and at times outside that environment. Obviously it concerns everyone's safety, but with difficulties sometimes

in defining and evaluating the risks run by each individual, and in establishing a proper balance between those evaluations. Furthermore, the responsibilities of employers and employees are founded on laws, rights, employment contracts and the dialogues they establish between themselves.

This geopolitics could be analysed in terms of the following pluralities and complexities. The plurality and complexity of the companies which manufacture the tests, major companies whose drug tests are merely one of the products manufactured by the company, and major companies focusing specifically on the production of these tests (Securetec), whose number has been increasing since 1995. The plurality and complexity of the policy goals pursued in the fight against drug abuse and dependence in high-risk situations – vehicle driving (on land, at sea and in the air), high-risk enterprises (chemical or nuclear) and other enterprises and working environments, schools, sports - with screening through the use of tests whose history goes back to the first pronouncements by the US Government in 1986, following accidents.

The first American policies developed with a stratification of the industrial production of tests, which is currently experiencing a period of rapid growth and spreading through Europe and other regions of the world. This geopolitics of governments produces administrative regulations which encourage the manufacture upstream and the use downstream of tests that are increasingly easy to use, but not always reliable in the face of the different substances or adapted to new substances, particularly synthetic substances. The basis for their use is neither quality, nor availability, nor technical reliability, but the conditions in which their use is developing in increasingly complex, not only industrial and political, but also personal, civil, professional, social and cultural situations, with objectives that do not answer the central questions of the fight against drug abuse, which are asked by drug users, not the test users, except when drug users use them themselves.

The complexity of the conditions in which the use of tests is developing via this close geopolitical relationship between the test manufacturers, governments and employers is so great that it also impinges on the quality, availability and reliability of tests and their use in the areas in which they can be used, i.e. in another area of dialogue, the therapeutic and preventive area created by policies for combating drug abuse, a fragile and vulnerable area which links up drug users and those who are helping them to cope with drug abuse and with the harmful dependence they are experiencing. How do these pressures regarding the use of tests, which are so charged, upstream, with industrial and political issues and, downstream, with professional responsibility and civil liberty issues, impinge on the fragility and vulnerability of the human relationships which constitute the battlefield for the fight against drug abuse when it comes to preventing their harmful effects with the people who are affected by them, in the various environments in which they live and work, while these tests merely detect and measure substances?

This question forces us to set the proposed study within the context defined by our working group on ethical issues, i.e. the ethical issues raised by the use of these tests in this specific environment, and not the industrial, political, technical, biological, professional, social and cultural issues involved, which obviously need to be considered, but which only come within our sphere of competence if we join together in thinking about an objective and a working method that would bring them into play by linking them up with the ethical issues raised by this complexity of the situation: how does this complexity related to the current growth of test use in the different social strata where they are used, and which is

situated upstream and downstream of the relationship established between drug users and those who help them to address the problems of abuse and dependence, affect this central relationship of the fight against drug abuse, and how does it meet the ethical requirements of that relationship and fight?

Of course, there is no question of using poor-quality tests that are unavailable and unreliable for the purpose of combating and preventing drug abuse. It is more a question of studying the ethical issues connected with their use, in the complex conditions already described. Hence, the ethical issues raised by the quality, availability and reliability of the tests used in the workplace do not concern the tests themselves, but the study of the complex conditions governing the development of the use, upstream, by the decision-makers, and downstream, the conditions in which the use of these tests may or may not answer the questions asked by drug users to prevent abuse and dependence. The ethical issues raised by the quality, availability and reliability of tests depend on the ability of those who use them to meet the needs of those for whom they are using them. If the aim is to combat drug abuse and dependence, the primary concern of those involved - drug users and those involved in drug prevention and the provision of care to drug users - is to maintain between them a dialogue adapted to the fragility of their human relationships.

What becomes of this fragile and vulnerable relationship, itself complex, but of a complexity depending on its own relationship with itself and with others, in the face of the pressures brought to bear upstream and downstream of its own complexity? This ultimate fragility of the human relationships between those who need policies for preventing and combating the abuse of and problematical dependence on certain substances, and those who are directly in contact with them in places and with therapeutic goals that have become indissociable from the goals of prevention - this fragility of their relationships with themselves and with others is particularly clear in the face of the issues raised by the use of screening tests, with means that come from another level of dialogue not always tailored to their needs, to meet those needs. This fragility is particularly clear when one considers the complexities surrounding it: the complexity of the different geopolitics outlined above, constituted by the different layers of dialogue established upstream of the therapeutic dialogue, with the industrial and political decision to use screening tests, and the complexity downstream of the therapeutic dialogue, with the pressures that are exerted on environments other than the therapeutic or judicial environment, such as in the workplace (police in the case of vehicle driving, high-risk jobs in all environments, and other checks in the school environment, which is even more problematical).

The complexity of these conditions also depends on the scale of the growth in the use of tests and the companies which put them on the market, especially in North America, where substance testing began in the 1980s as part of the fight against drugs in the workplace: the complexity of companies' market research, of the screening techniques already in the process of being introduced in companies, or the techniques for manufacturing tests in view of the multitude of substances used and screened for today, on the basis of policies and legislation specific to the different nations of America and Europe, which outlines a geopolitics that raises problems in view of the educational and political shortcomings of the fight against drug abuse. These complexities would require a study of this whole issue, a study which would fall outside the scope of the subject under consideration here, namely the quality, availability and reliability of the dialogues established between the different people involved in the development of the use of screening tests in the workplace, but which would shed more light on the ethical issues involved if we wanted to gain a better

understanding of the complexity of the situation, the fragility of the human relationships at stake specifically in the fight against drug abuse and the developments that are possible with effective prevention policies.

Hence, the issues raised by these complex conditions governing the development of test use concern initially the ethical issues raised by respect for the fragile dialogue established with drug users, in the context of the fight against drug abuse, and by the risk of increasing fragility of this dialogue and of the difficult human relationships established with them in society. Is the use of screening tests not inappropriate to this dialogue and these fragile and vulnerable relationships? Is it appropriate, and under what conditions, to the policies that need to be developed to address the personal, educational and political problems raised by drug users, without allowing oneself to be distracted from these problems, by focusing on those raised by the test manufacturers because of the pressures they exert on the policy-makers and on employers to the detriment of the real needs of the people for whom these policies and workplaces are made?

Given the paradoxical situation in which we find ourselves when it comes to reflecting on the ethical issues raised by the subject under consideration, the use of tests in the workplace, namely the fragility of the human relationships between drug users and those who help them to cope with drug abuse and with the dependence by which they are threatened, we have to contend with two difficulties. The first difficulty is to address the complexity of the conditions in which the relationships established between the test manufacturers, the policy-makers and those in charge of the different workplaces interact to bring screening tests onto the market and into the workplace, without this being to the detriment of the ethical issues raised by the personal, educational and political problems of the fight against drug abuse. These problems consist above all in providing a sounder basis for the human relationships established between drug users and the teams who help them to combat drug abuse in order to ensure better integration for everyone in society, an objective which may be obscured by this complexity of the implementation of drug testing if we do not study the links which may be established between the pressures upstream and downstream of these fragile human relationships and the firmer footing on which, together, we are seeking to put them.

The second difficulty depends on the previous one: how to link the external yet powerful complexities of the various circles involved in the development of test use with the internal yet fragile complicity of the human relationships established by means of certain policies for combating drug abuse, in order to gear those policies more effectively, with or without screening tests, to real management of the personal, educational and political problems involved, which would enable citizens to place their relationships on a lasting, human footing, by discussing these problems amongst themselves and thus developing an effective strategy against drug abuse, with appropriate means, tailored to their needs as ordinary human beings.

After these preliminary observations on the ethical issues to be raised, I suggest to read the appended studies which were selected on the Internet and which provide some further elucidation to guide our ethical reflection along the lines proposed for our working group.

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⁷⁷ The appendices can be obtained on request with the Secretariat of the Pompidou Group (e-mail: pompidou.group@coe.int)

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Ethical considerations in connection with drug testing in the workplace

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I. Introduction

Before beginning any ethical reflexion on drug testing prior to employment or in the workplace, it seems worth drawing attention to the key principles upheld by our European democracies.

a. Right to respect for private and family life

The respect of Human Rights as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 is safeguarded by Article 1 of this Convention. In Article 8, the Convention states that *“there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society (...) for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

Article 5 of the Convention stipulates in paragraph 1 that *“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”* and specifies in sub-paragraph (e) that deprivation of liberty may be justified in the following case: *“lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”*. It is for the Contracting States to equip themselves with laws enabling them to establish the legal frameworks within which such persons could be deprived of their liberty. We know that these laws vary over time and from one country to another. Some countries, such as Belgium, have abolished their vagrancy laws. Others have made improvements to the laws permitting compulsory hospitalisation of some mentally ill persons. Within these legal frameworks, practices also vary over time and from one region to another. For example, while some alcoholics were routinely hospitalised in Belgium up to the 1980s, the medical profession has opposed this for the past two decades on the grounds that any treatment of addiction to a substance calls for motivation, and hence co-operation, on the part of the person concerned.

General principle 5.13 adopted by the ILO at its 267th session, in November 1996, states that *“workers may not waive their privacy rights.”* Respect for the right to private and family life is, moreover, expressly recognised in most of Europe’s Constitutions.

b. Right to work

The European Social Charter, adopted on 18 October 1961, clearly states that *“everyone shall have the opportunity to earn his living in an occupation freely entered upon”* and that *“all workers have the right to safe and healthy working conditions”*.

ILO Convention No. 159 of 20 June 1983 provides for equal opportunities for disabled

workers and other workers and is designed to enable people with disabilities to obtain and keep a suitable job.

Lastly, European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation prohibits, throughout the European Union, “any direct or indirect discrimination” based, inter alia, on “disability”. Discrimination is taken to occur where one person is treated less favourably than another in a comparable situation on grounds, inter alia, of disability or age. A first exception provides that, in certain unspecified circumstances “a difference of treatment may be justified where a characteristic related to (...) disability (...) constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate”. A second exception may be made to the principle of non-discrimination where national law lays down measures necessary “for the protection of health”, particularly in the workplace, and “for the protection of the rights and freedoms of others”.

c. Principle of non-discrimination

Article 2 of ILO Convention No. 111 of 25 June 1958 provides: “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination”. Article 1 specifies that the term “discrimination” includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or any such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

d. Right to autonomy and right to dignity

As it is stated by Lourenço Martins⁷⁸, individual autonomy in our European societies as an ethical value is growing stronger; the respect of this value implies not exploiting others as well as the right to non-interference by the State and fellow citizens, so long as there is no harm to others.

Let’s also remind that the founding ethical value of our societies is the right to dignity accordingly to humanity.

While it would be wrong to claim that these two values conflict, it is nevertheless true that, from an ethical standpoint, there are tensions between them. The definition of dignity is far from universal since it depends on a number of factors, such as religious, philosophical and/or cultural beliefs. In Europe, certain countries have for some time now had legislation permitting euthanasia in the name of the indignity that some people with terminal conditions refuse to suffer, while other countries prohibit it in the name of human dignity.

As regards the issue of concern to us here, the debate is far from closed. Some may consider it an indignity to subject any individual to drug testing, while others may consider it an indignity to consume illicit substances or abuse alcohol and might advocate testing to prevent the state of indignity in which some people might put themselves.

⁷⁸ cf. Laurence Martins Appendix A

It should be said straight away that the rights of non discrimination and of respect of private life do not appear to be respected in all circumstances. For instance, in most Council of Europe countries, it seems to be the done thing to require a certificate of good character before someone is recruited. This clearly introduces discrimination, infringes respect for privacy and leads to inequality of treatment among job applicants. There is, however, every reason to believe that this requirement, which manifestly discriminates against those with a criminal record, is justified for the sake of protecting colleagues whose lives or property could be endangered by the presence of a criminal in their midst.

II. Drug testing

First of all, it seems worth making a few general preliminary comments on drug-screening tests and the way in which they are marketed. One need only key in “drug testing” on the Internet to call up a large number of laboratories advertising their kits. Clearly, the development of equipment making it possible to detect the presence of drugs or some of their metabolites in the urine, blood or mucous membranes of certain people has allowed laboratories to glimpse the prospect of large profits⁷⁹.

From an ethical standpoint, use of a drug testing kit outside a legal or medical context seems problematical, whether in the case of parents wanting to make sure that their children stay off drugs or in the case of a couple where one partner suspects the other of illicit substance use, or indeed any instance of use by one person in respect another. In the research field, some tests can be carried out on the express condition that they are totally anonymous.

These tests can be carried out only on human material and are therefore medical acts. This means that only a doctor or other health care professional working under a doctor's supervision is authorised to carry out such a test and, in the area that concerns us, only the occupational physician or his or her assistant may do so. Given that no human material may be removed without the express consent of the person concerned (except in a medical emergency), there can be no question of testing for legal or illegal drugs prior to recruitment or in the workplace without the consent of the (prospective) employee.

Two ethical issues arise straight away. Can we, in connection with recruitment or checks in the workplace, talk of informed consent, freely given by the employee, in view of the hierarchical nature of the latter's relationship with the occupational physician? When the doctor insists, rightly or wrongly, on testing for drugs, employees who refuse are liable to be sacked, while job applicants who do not consent are liable to be turned down. It is therefore difficult to consider that their consent is “freely given” and, as Behrouz Shahandeh⁸⁰ points out, in his contribution to the seminar on ethics, professional standards and drug addiction held in Strasbourg on 6 and 7 February 2003, a refusal is very likely to be interpreted as an indirect admission, which is contrary to the principle, generally respected in Europe, that every suspect is innocent until proven guilty. Moreover, in agreeing to be tested, are workers not disregarding ILO general principle 5.13, whereby workers may not waive their privacy rights?

79 cf. Claire Ambroselli Appendix B

80 Shahandeh, Behrouz., “Ethical issues in workplace drug testing in Europe” in “Ethics and drug use, Pompidou Group, Strasbourg, 6-7 February 2003, pp. 25-32

There is also cause for concern from the data protection angle. As drug testing is a medical act, the result of the test may be obtained only by the occupational physician, who is bound by confidentiality in this as in any other matter and must ensure that the relevant data are protected. It is highly advisable, moreover, to check the reliability of the equipment used to carry out the test and, when the result is positive, to confirm it with a second test before drawing any conclusions.

It should therefore be stressed from the outset that, ethically speaking, while there may be justification for drug testing, such testing is justified only in so far as it is ordered by the occupational physician and carried out by a health professional, and on the express condition that the test is carried out with the worker's consent and that the physician ensures that the result is confidential and the relevant data are protected. In Europe, national legislations do not guarantee that, in all circumstances, it is indeed the occupational physician, and not the employer, who takes the initiative of testing and that the results remain confidential⁸¹.

III. Pre-employment drug testing

Berouz Shahandeh says, *"around 80 per cent of [workplace drug testing] conducted in the world is carried out as part of the recruitment process"*. It should be said straight away that these drug tests do not, as indeed B. Shahandeh points out, make it possible to distinguish between recreational/occasional drug use and drug addiction/abuse. All that the test does is reveal the presence of a drug or one of its metabolites in the body of the person undergoing the test. What is being looked for is not therefore so much drug addiction as drug use. Furthermore, it is impossible to determine, on the basis of the figure quoted, whether these tests were ordered by the employer or employer's representative before/during the recruitment process or whether the request actually came from the occupational physician asked to confirm that the person in question was fit to do the job for which he or she had applied.

In its Opinion no. 15 of 16.10.89, the CCNE (National Consultative Ethics Committee) draws a parallel between pre-recruitment HIV screening and screening for drug addiction. The committee proposes a ban on systematic pre-recruitment HIV screening, whatever the post applied for, and says that the same should apply to screening for drug addiction.

It adds that *"the use of drugs is only considered to be an ailment if drug dependence is severe"*. In the committee's view, *"biological investigation requested by the occupational physician is only conceivable in exceptional circumstances when the specific constraints of the occupation are such that the use of drugs would make the incumbent unfit"*. In the same opinion the CCNE concedes that it is difficult to determine which jobs carry risks, and for whom. It says that responsibility for drawing up the list of risky occupations should lie not with the employers but with bodies specifically set up for that purpose and/or with ethics committees.

B. Shahandeh points out that there is usually no clear definition of posts that carry a risk and observes, moreover, that in some countries, even in Europe, *"the safety argument has been extended from the traditional question of health-related safety to 'business-related safety'"*, i.e. to the question of employee performance.

81 cf. A. Laurenço Martins and Joaquim Rodrigues Appendix B

While not calling this argument into question, Mr Shahandeh, quoting a director of a human resources department whose words were reported in *Personnel Today* 2001, contradicts the myth that drug abuse leads to deteriorating performance, explaining that one of the main reasons why drug abuse is difficult to spot is that *“some abusers can perform consistently well over long periods”*.

While it would appear essential to determine which posts carry a risk, and why, even if the post carries indeed a risk it seems to us that there is not necessary a justification, even when a post carries a risk, for carrying out a drug test in addition to a fitness examination. A detailed clinical examination of the applicant by the occupational physician makes it possible to decide whether he or she is fit for the job. The clinical examination may be accompanied by a psychometric test to determine the speed of the applicant's reflexes. If, when sitting the test, the applicant is under the influence of certain medicines or of a drug, legal or illegal, there is every likelihood that the clinical examination will reveal this. If the person shows no sign of slowness or confusion and seems to be perfectly physically and mentally fit, there is no reason not to recruit him or her. Refusal to acknowledge that applicants are fit for a job because, during a drug test, THC metabolites are found in the body, is unfair and constitutes an invasion of privacy, since there is no reason to suppose, in the absence of proof to the contrary, that their recreational use of drugs will one day impair their fitness for work.

Indeed, testing for drugs taken prior to the appointment with the doctor does not provide any additional information about the job applicant's short-term fitness. The idea that such drug use might, one day, lead to drug abuse or addiction is merely an extrapolation, and should not be taken into account at the time of recruitment.

Applicants who abuse drugs are very likely to have symptoms related to chronic abuse. An ordinary clinical examination should therefore make it possible to diagnose the abuse and, if necessary, turn down applicants for posts for which they are not suited on account of their state of health. Respect for the principle of non-discrimination requires, however, that such applicants be channelled towards services that can help them or towards employment better suited to their condition. If the transferase level in a job applicant who has been unemployed on a long-term basis provides evidence of alcohol abuse, that cannot be used as an argument for rejecting the person's application because his/her alcoholism might be a consequence of unemployment and might disappear once he/she gets back to work.

If a job applicant arriving in the occupational physician's office is visibly under the influence of a legal or illegal drug, it goes without saying that the doctor will try to establish as detailed a case history as possible in order to grasp the situation as clearly as possible. Is it a question of an isolated incident, involving a medicine for example – an overdose of cough medicine for acute bronchitis, for instance – or is it simply the result of an inability to handle drugs? Is it a question of drug addiction, or perhaps a disability? Must it be inferred that the applicant is unfit for all work and should receive medical help, or is there a case for reorienting him or her towards work where the inability to handle drugs is a risk neither to the applicant nor to other people? Simply by virtue of the precautionary principle, the doctor will have to take the view that the prospective worker is unfit, in the immediate future, to do a job carrying a risk, but that is no excuse for ignoring the principle of non-discrimination, and the doctor must therefore reorient the job applicant.

When the post to be filled does not carry a risk, screening for drug use raises an even greater number of ethical issues. Either the occupational physician is carrying out an epidemiological survey of the consumption of certain products, and the result of the tests can in no way interfere with the choice of job applicant, particularly as the samples taken will necessarily have to be rendered anonymous, or the physician, for reasons of his or her

own, or because the employer so wishes, wants to avoid recruiting a drug user, on moral grounds. Testing job applicants for drug use in this case is an undeniable infringement of their privacy and freedom. Turning them down for a job is discriminatory and at variance with their right to work. Its aim is not to preserve general security.

There are those who consider that such discrimination is justified, taking the view that any drug use may eventually lead to drug abuse. The introduction of pre-employment drug testing would deter prospective job applicants from taking drugs, particularly as the metabolites of certain drugs, in particular the most commonly used illegal drug, THC, can be detected several weeks after use. As they are unable to foresee when they are likely to apply for a job, prospective applicants will refrain from using drugs.

Those in favour of pre-employment drug testing therefore justify their views on public health grounds and consider that they are helping to combat drugs, a cause which they see as their main concern without caring about others' freedom.

While, from the health point of view, it cannot be denied that any drug use may one day lead to abuse, from the ethical point of view it is difficult to argue that a government and, through it, an employer or occupational physician are entitled to impose respect for a moral choice on citizens by restricting their autonomy in this way or, as the case may be, punishing them indirectly when they make choices that are not in keeping with those of their employer. This kind of preventive testing is even more unthinkable in those European countries where drug consumption is not prohibited by law.

The occupational physician has the possibility, in order to assess the fitness of a applicant for a post, even a high-risk post, of carrying out a detailed clinical examination and, where appropriate, additional psychomotor tests, which should make it possible to assess the fitness of the applicant for the post. Testing the applicant for drugs or their metabolites is nothing short of an invasion of privacy and reveals nothing about the risk the potential user would pose to third parties. It discriminates against any drug user as regards employment.

IV. Testing in the workplace

1. Fitness for work

It is generally accepted that an employer has the right, and indeed the duty, to ensure that employees are fit for work: the right, insofar as it is morally acceptable in our societies to ensure that employees are productive. The employer has this right inasmuch as an employee who is unfit for work could do himself or herself harm, endanger colleagues or, worse, present a threat to third parties⁸².

Depending on the type of job done by the worker, the employer must be more or less vigilant.

It would therefore seem indisputable, ethically speaking, that employers should be able to detect impaired health and/or concentration among their employees in order to guarantee

82 Certain national laws, as in Belgium, take into account only the harm an employee can do to his colleagues. From an ethical point of view, the threat to third parties seems however also worrying to us.

the well-being of all and sundry. Depending on the potential consequences of impaired health in an employee, it may be necessary to organise the work in such a way that it is possible to ascertain visually whether an employee is unfit for work. In the case of work on a building site, the workers themselves or the foreman are supposed to intervene if they observe that one of their colleagues is unfit for work. In any job that is likely to endanger the lives of third parties, it would seem appropriate to provide for the presence of someone who can replace a colleague who is no longer fit to do his or her job. For instance, it is desirable that every coach driver be accompanied by a second driver, and the same goes for train drivers and airline pilots. In a hospital, an impaired surgeon should also be replaced without delay by another surgeon.

2. Unfitness for work from an aetiological point of view

- a. Unfitness for work in a professional whose job does not entail particular risks for third parties

Office workers, gardeners, dressmakers may, for various reasons, go through periods when their productivity is severely affected. They may, for instance, suffer from a chronic illness, a low-level infection, a metabolic disorder, a hormonal problem, a psychiatric disorder, a progressive neurological complaint, an unhealthy lifestyle or interpersonal conflicts (at home or in the workplace) – all of which can lead to a decline in performance. It is in their interests, and possibly in the interests of their colleagues and employer, to ascertain this decline in performance, and it goes without saying that the employer is authorised to ask the occupational physician to examine the employee concerned and, if necessary, declare him or her unfit for work and refer the employee to his or her general practitioner, preferably explaining to the employee the reasons for this decision. Ethically speaking, it is actually preferable for the employer to refer the employee to the occupational physician, so as to give him or her the chance of obtaining treatment and subsequently returning to the job, rather than dismissing him or her on the spot on account of the decline in performance, which is usually temporary.

- b. Unfitness for work in a professional whose job entails risks to third parties, be they colleagues, users or other people

When a professional who handles potentially dangerous tools arrives at work in what seems to be less than perfect health, his colleagues and employer have a duty to stop him or her working that day. There are various possible reasons for such unfitness for work. As stated above, the cause may be an infection that is likely to worsen in the course of the working day; it may be a metabolic disorder that could seriously impair the employee's concentration in the hours that follow; it may be a cardiovascular problem likely to worsen during working hours. It may also be a question of fatigue due to persistent insomnia, an unhealthy lifestyle, depression, alcohol abuse or the use of legal or illegal drugs.

It should first be pointed out that in professions where the consequences of the professional's unfitness for work may be tragic (as in the case of a train driver, an airline pilot, a doctor or any team leader), it is desirable that staff should be very regularly required to undergo a thorough medical examination to detect the slightest medical problem, in order to prevent its worsening and triggering major incidents.

Even if there is regular medical supervision, however, there is nothing to prevent people from suddenly finding themselves in a state of unfitness for work without realising it or in a state of unfitness that they refuse to acknowledge. This applies to some people suffering from masked depression, someone who has been unable to get over a broken relationship, someone who has consumed a large amount of alcohol or someone who has used an illegal drug.

Needless to say, therefore, the employer, who is responsible for lives that could be endangered by an employee, must ensure that every employee is able, on any particular day and at any particular time, to do his or her job. In the vast majority of cases, unfitness for work on a particular day is easily ascertainable with the naked eye. In that case, it is only right that the person in question should be referred direct to the occupational physician and barred from doing his or her job. If there is any doubt and the employer merely suspects that the employee is unfit for work, there can be no question of running the risk of letting the employee endanger the lives of others. In that case, too, the employee should be referred to the occupational medicine department, where a health professional will examine the worker to assess his or her fitness. Depending on the results of this assessment, the occupational physician may or may not bar the worker from working.

The occupational physician alone is entitled to make a diagnosis concerning the worker, and it is compulsory for the diagnosis to remain confidential. If the employee's unfitness for work is the result of an excessive intake of alcohol, the occupational physician must bar him or her from working that day but, as a matter of general and professional ethics, the physician is not authorised to inform the employer of the reason. Needless to say, when the occupational physician suspects chronic alcoholism, he or she will arrange to monitor the evolution of the employee's condition before allowing him or her to return to work. It is also his responsibility to determine if the drunkenness observed on this worker is not the result of an excessive intake of alcohol but rather the result of a moderate consumption by a deeply depressed person.

Ethically speaking, it seems difficult to prohibit the occupational physician outright from carrying out a test that will make it possible to obtain an accurate assessment of the condition of the professional he or she is supposed to examine. Yet an increasing number of countries in Europe have introduced legislation or codes of ethics recognising the right of patients to refuse to undergo certain tests. There is no reason to suggest that occupational medicine is any exception. If the employee refuses to give a urine or blood sample, the occupational physician is not allowed to override that refusal. The physician does, on the other hand, have a duty to try to persuade the person in question to undergo a clinical examination so that his or her fitness for work can be assessed. If the patient refuses, it is important that the occupational physician should declare him or her unfit for work on that day. If the patient agrees to be tested for drugs, legal or illegal, and the occupational physician carries out such tests as part of the medical examination, it is to be hoped that, quite apart from the question of the confidentiality of the results, he or she has the expertise needed to draw the appropriate conclusions.

The presence of metabolites of certain drugs in the urine does not necessarily mean that the person is under the influence; nor, indeed, does the opposite prove the contrary. It is also to be hoped that the health professional is able to set aside his or her own moral principles and deal with the employee in an unprejudiced way. More specifically, it is to be hoped that, if cannabis metabolites are present but the person examined is ascertained to be perfectly vigilant, the occupational physician will not extrapolate and take the view that the person's lifestyle is incompatible with his or her remaining at work.

3. Drug testing and the illusion of security

In practice, certain professionals are currently subjected to tests for a number of drugs. Employers pride themselves in organising spot checks, on the grounds that this obliges their employees to refrain completely from using drugs and therefore ensures that they perform well. As we have just seen, nothing could be further from the truth: serious medical incidents that impair the concentration of certain professionals may have many other

causes. Such testing, although it salves the employer's conscience, does nothing at all to ensure the well-being of users or of the colleagues of the worker who is tested. On the contrary, the illusion of security that it generates is liable to impair the vigilance of teams and employers as regards employees' general fitness for work. The view might be taken that, since we test pilots for drugs, there is no point in having them examined regularly by the occupational physician. Nothing could be further from the truth. Stating that a pilot has not drunk any alcohol the moment when he enters his plane does not guarantee that he will not take any psychotropic substance during the flight.

Moreover, as drug testing is a medical or judicial act, it does not seem acceptable for just any employer to be able to order such tests. The practice is therefore contrary to the most elementary rules of professional ethics and raises two ethical issues. For an employer to insist that employees be tested for drugs is an invasion of their privacy and undermines their dignity. The autonomy of an employee who voluntarily undergoes such testing is an illusion, as the employer is in a hierarchical relationship with the employee which very often obliges the latter to do as the employer wants. Refusal to do so entails a risk that the employee will lose his or her job.

4. Interference by the employer in the private lives of employees

Quite apart from the illusion of security that prevails as a result of such practices, it is of course obvious that they allow employers to require their employees to abide by certain moral rules, which is contrary to respect for their privacy and their right to exercise their autonomy.

While there seems to be no denying that, despite the existence in Europe of legislation prohibiting discrimination on recruitment, employers are allowed in certain cases to ascertain the philosophical or religious beliefs of staff they take on, such situations are exceptional. It seems only logical that representatives of bishoprics who recruit teachers of the Catholic religion should assure themselves, as far as possible, of their recruits' religious beliefs. It seems equally logical that the management of a secular support centre should avoid recruiting convinced Muslims to provide secular support to prisoners. Save in exceptional situations of this kind, however, it is forbidden to discriminate against people on recruitment on the grounds of their philosophical or religious beliefs or lifestyle.

In this area, as in others, such as security for example, the issues raised by the use of screening tests have political overtones. The marketing and possible widespread use of tests represent a windfall for their producers. They are promoted in the name of the "war on drugs and drug addicts", which masks numerous societal problems with which we are faced and exacerbates the risk of exclusion to which some of us, often the weakest, are exposed. While their use may constitute a quick and effective means of "separating the wheat from the chaff", they offer no response to the reasons why some people use or abuse drugs. Yet it is indeed the issue of drug "abuse" with which we should be concerned. By the same token, while the growing feeling of insecurity in some European countries helps to sell armoured doors, alarm systems and surveillance cameras, all this arsenal provides no answer to the fundamental question we should be asking ourselves, which concerns the possible reasons for rising insecurity. Given the excellence of our protection equipment and in the absence of any social response to the malaise and disaffection felt by some people, an escalation of violence is to be feared. Given the use that is made of drug screening and the exclusion which some people are likely to suffer as a result, the risk is that the doors to abuse will be opened wide.

Above and beyond these considerations, it should be noted that several European countries have no legislation against misuse of drug screening. There would seem to be an urgent need for national parliaments all over Europe to establish a precise legal framework regulating drug screening both prior to employment and in the workplace. The same applies to the laws governing occupational medicine. From an ethical point of view, these rules or laws, when set up, must take into account the principle of proportionality which claims that the aim justifies the means used to reach it. These rules should also apply to foreign firms operating in a country's territory.

5. Occupational medicine and confidentiality of results

In some European countries, the occupational physician is clearly independent of the employer. Even if the physician is paid by the employer, he or she is not accountable to the latter. On the contrary, the physician is bound by professional secrecy and may not divulge the reasons for declaring someone unfit for work. If an occupational physician is not bound by professional secrecy vis-à-vis the employer, it would seem logical, from an ethical point of view, to oblige the physician to restrict his or her investigations to a clinical assessment of the person's fitness for work, resorting if necessary to psychometric tests as well, but he or she should refrain from further aetiological investigations. When an employee is examined by an occupational physician, it is inconceivable from an ethical standpoint that an employer or head of human resources should obtain any information about that person's state of health other than his/her fitness or unfitness for work.

V. Conclusions

There seems no denying that certain jobs entail a risk to the life or health of the worker, or to the lives or health of third parties, whereas others present no such risk, or very little. There is, however, no proof that testing for legal or illegal drug use, either on recruitment or in the course of employment, makes it possible to determine whether the worker is fit to perform such a job. As Tom Mellish said in his contribution to the February 2003 seminar "Studies are lacking on whether testing programmes reduce possible work difficulties resulting from alcohol and drug use."⁸³

In the case of jobs that present a risk to the employee or third parties, it is worth introducing safeguards, drug use being only one of the many factors liable to impair a worker's concentration.

Since such testing runs counter to fundamental principles upheld by the European Human Rights Convention and a number of other Conventions that safeguard the right to work, it is necessary to determine whether efforts to combat the use of legal or illegal drugs justify, in ethical terms, certain exceptions to our fundamental values.

In Europe, opinions probably differ over the answer to this question, since it introduces a hierarchy in the values to be upheld. While everyone agrees that an infringement of fundamental values is justified only when necessary for the protection of health or of the

83 Mellish, Tom, « Ethics Professional Standards and Drug Addiction » Pompidou Group, Strasbourg, 6/7, February 2003, page 33

rights and freedoms of others, there are those who consider that combating drug use or alcohol does not help to reduce the number of problem users or protect the rights and freedoms of users, any more than it protects those of non-users. They believe, moreover, that discriminating against drug users in the area of employment entails a serious risk of relegating them to the fringes of society, and that their marginalisation may help to transform recreational drug use into abuse.

Others take the view that drug use is an intrinsic danger to the health of the user and a danger to others. They believe that it might be legitimate to combat this use and that from a political point of view there may be justification for disregarding certain fundamental freedoms to that end. This is problematic from the ethical point of view.

Whatever the state's political approach, it is essential that it realises that reliability of tests is limited and guarantees that results are confidential. In any case it should establish a legal framework outside which all pre-employment and workplace drug screening is prohibited.



APPENDIX C

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between October 2004 and March 2008

Members of the Committee on ethical issues and professional standards

between October 2004 and March 2008

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Addendum: The role of insurance companies in drug testing

Opinion of the Committee, June 2010

With regard to the ethical validity of requiring people to undergo drug screening to establish the amount of their insurance premiums (for civil liability, life insurance and health insurance), there is a tension between two “founding” ethical principles of European democracies, namely the right to respect for private life enshrined in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the precautionary principle, which may be relied on by insurance companies to justify not taking any ill-considered risks with their financial viability.

In the case of life insurance, premiums take account of applicants’ life expectancies and in the case of income protection insurance, premiums reflect the number of years that applicants are likely to be able to carry on working without suffering health setbacks.

For these types of insurance, there is good reason for companies to be interested both in the age of the persons concerned and in their state of health and hence in one of the aspects of their private lives. Although article 2 of the Convention on Human Rights limits the right to respect for private life, recognising the right of public authorities to interfere with the exercise of this right under certain specific conditions, it does not recognise the right of a private body to interfere. Therefore, insurance companies may only gain access to the information they are interested in if the person concerned authorises them to do so.

From an ethical standpoint, there is much to say about the so-called free and informed consent that an individual gives to insurance companies to investigate their state of health as, in fact, their choice is between giving their consent for an insurer to access the information or giving up on their insurance cover. In practice, people who want insurance accept the interference by the company in their private lives, fill in a questionnaire for this purpose “on their honour” and, in some cases, undergo a medical check-up. This interference in insurance applicants’ private lives is supposed to be justified by a dual principle of beneficence¹: it enables applicants to acquire the insurance cover they need and the company avoids a potentially significant risk of bankruptcy, which would be unfortunate for the company and its policy-holders alike.

However, in order to be able to rely on the principle of beneficence, non-maleficence², must first be established. The assessment of non-maleficence is all the more difficult in that it is hampered by another founding principle of our societies, namely the prohibition of all discrimination, particularly on grounds of health. Although from the end of the 1980s onwards, it seemed that the principle of non-discrimination had prevailed in Europe as regards both HIV (in France, the National AIDS Council prohibited insurance companies from conducting HIV tests) and the carrying out or use of genetic tests (Universal Declaration on the Human Genome and Human Rights, UN Conference of 11 November 1997, and the European Treaties of 4 April 1997, Articles 11 and 12 of Chapter 4), it has

1 and

2 The principle of beneficence or non-maleficence need to be considered as primarily the wellbeing and interest of the patient

to be acknowledged that, in practice, compliance with this principle of non-discrimination is becoming less and less strict. Life insurance cover for HIV positive people is limited and they have to pay additional premiums to be able to take out insurance. Insurance companies will now be able to conduct genetic tests for monogenic diseases, but seem not have yet to take “genetic susceptibilities” into account.

On the question of the insurance consequences of legal or illegal drug use (see P-PG/Ethics(2009)9), the summary of national legislation, regulations and practice in Europe drawn up by J. Rodrigues demonstrates that European countries are far from complying with the same principles and applying the same rules.

However, it is a fact that citizens are dependent on insurance companies. Insurance is mandatory in some cases and imposed or highly promoted in others. So, the medical coverage financed by the employer puts the employee in a position of lack of real choice. It allows in certain cases to by-pass national legislations on screening tests before hiring an employee³.

There is an urgent need for legislation and practice in Europe to be harmonised in strict compliance with human rights and without undermining the insurance companies' legitimate desire to ensure their own survival.

It seems reasonable, where use of illicit substances is concerned, for the company to question applicants about their consumption and, if necessary, ask them to undergo a medical check-up to assess their objective state of health to assess whether their risk (and therefore their premium) differs from the general population.

The Pompidou Group's Expert Committee on Ethical Issues and Professional Standards considers it self-evident that, where a person has caused an accident under the influence of a psychotropic substance and the causal link has been established, the company should not be liable to pay out.

When someone states that they regularly consume alcohol, they are still only susceptible to adverse health effects. Only a medical examination and an assessment of how their liver is functioning will make it possible to infer how their life expectancy might be affected by this

The same applies to the use of illegal psychotropic substances. Where insurance applicants admits that he or she occasionally takes cocaine or uses another drug, only a medical examination showing that this has damaged the person's health entitles the company to charge an additional premium. Clearly all drug users are susceptible to drug abuse or addiction but, as with genetic susceptibility, insurers are not entitled to take this into account.

The Pompidou Group's Expert Committee on Ethical Issues and Professional Standards considers that legislation in this field is useful in order to guarantee the citizens' right to respect for privacy. It is all the more important as certain firms suggest insuring their employee's health care and could use this route to obtain information either before they are hired, or in their workplace which has an impact on the private life of their future employees³.

The Committee considers it desirable that there should be standardised practice across Europe which balances the need for insurance companies to collect relevant information with the importance of promoting social cohesion.

3 Cf Opinion of the Platform on drug testing in the workplace (P-PG/Ethics (2008)5)

APPENDIX A

Drug testing by Insurances companies: legislations, regulations and practices in Europe

**Joaquim Rodrigues, Consultant at Instituto da Droga
e da Toxicodependencia, Portugal,**

June 2010

Drug testing by insurance companies: legislations, regulations and practices in Europe

Joaquim Rodrigues, Consultant at Instituto da Droga e da Toxicodependencia, Portugal, June 2010

After the adoption of the opinion on drug testing in the educational and professional environments, the Committee of Experts on Ethical and Deontological Issues decided to address the matter of drug testing by insurance companies in life, health and other insurance contracts. In this connection, I requested, on behalf of the Committee of Experts, the co-operation of representatives of all the Member States, including members of the Committee of Permanent Correspondents of the Pompidou Group.

The aim was to collate all available information on legislation, regulations and usual practices in this field in a wide range of Member States of the Group¹. We have received replies from Slovakia, Greece, Sweden, Hungary, Luxembourg, Norway, Croatia, Portugal and Ireland². The main substance of the information forwarded (most of it in a very concise form) has been included in a final summary, accompanied by a number of observations.

¹ The letter sent to all Member States is as follows:

Dear colleague,

The Pompidou Group's Platform on Ethical Issues and Professional Standards, following its work on drug testing at school and in the workplace, has decided to turn its attention to the questions raised by the drug testing introduced by insurance companies for the purposes of life, health and other insurance contracts. The priority task is to list the relevant legislation, regulations and practice in a larger number of European states, and I have been asked, as a member of the Platform, to carry out this task. In this context, I should like to ask for your help. What I should like to receive from you in practice is:

1. a copy (or abridged version) of the relevant legislation, regulations or other standards (in English, French, Spanish or Italian);
2. any credible/reliable information that is available about the practices (and their scope) adopted by insurance companies in your country, including - in so far as is possible - the frequency with which courts are involved in the resolution of disputes.

I have been told that, in certain countries, autonomous bodies exist to supervise, control and regulate activities in this sphere; this role is performed in other countries by a government department. The source of information will be either the government or the responsible autonomous body, as appropriate. On behalf of the Platform on Ethical Issues and Professional Standards, I should like to thank you for your co-operation. Please send me your information by e-mail or ordinary mail by 20 February at the latest.

Lisbon, 21 January 2009

² I would like to thank Anna May (Ireland), Josipa L. Andreic (Croatia), Elisabet Svedberg (Sweden), István G. Takács (Hungary), Simone Schram (Luxembourg), Arnaldo Oliveira (Portugal), Hege C. Bredesen (Norway) and Zuzana Jelenkova (Slovakia).

1. Slovak Republic

“...From all collected information, generally speaking in the Slovak Republic commercial insurance companies don't implement drug testing by contracting life and health insurance. Insurance companies are included in private sector and civil legislation (Civil Code).

The general rights and obligations connected to commercial insurance are written in some paragraph of Civil Code which is the basic and principal Legislative Act for all commercial insurance companies.

In the Civil Code we don't find any kind of regulation connected to drug testing. The Civil Code defines the obligatory items of insurance contract. It is defined that the insurance contract should include the general insurance conditions. It is up to the insurance company to create details of these conditions.

In the Civil Code, the paragraph connected to the insurance of an individual, is the only one statement about the use of alcohol and addictive drugs. If a person's injury is caused by his/her use of alcohol or addictive drugs the insurance company has a right to decrease the amount insured. The general insurance conditions also state that the insurance company is not obliged to pay any insurance if the insured person has committed suicide or he/she consciously creates an accident to get the insurance money.

Some information collected from insurance companies practice when we are speaking about standard insurance (not about the higher price insurance) and which are incorporated to the general insurance conditions:

When the insurance contract is signed the person who wants to be insured (“the insured person”) is obliged to fill out the questionnaire including the questions about his/her health and contact and date on his/her general practitioner. Usually the question about use of tobacco, alcohol and drugs is included in that questionnaire. The insured person is obliged to answer honestly. If the answers are not true or are incomplete the insurance company has a right to annul the insurance contract, or if the contract has been signed, the insurance company has the right to decrease the amount insured or not to pay the entire sum of insurance.

In connection with the question about use of drugs, insurance companies sign the contract when insured person declares in the questionnaire that he/she doesn't use drugs since more than five years and after an examination of his/her health is satisfactory for insurance company. If the period of drug use is lower than five years the contract is usually not signed by insurance company.

The insurance company has a right to examine the health of the insured person before the contract is signed as well as during the duration of contract. The insurance company examines reports from medical institutions where the insured person is treated or insured person is obliged to visit the doctor of the insurance company. I didn't receive any kind of information that the contracted doctor tested the insured person specifically for drugs.

Finally, in the Slovak Republic there are two international reinsurance and financial services groups: Munich Re Group and Swiss Re. These groups reinsure the majority of Slovak insurance companies and define for them common standards which are incorporated into

the general insurance conditions. These standards have an international character which are common in other EU countries.”

2. Greece

“The only legal text of any possible interest here is Law No. 2472/1997 on the protection of personal data. This legislation ensures the protection of individuals’ private lives, but it also comprises provisions on the rights of individuals’ vis-à-vis insurance companies. The Law can only be relied on by analogy and by interpretation.

Insurance companies ask individuals applying for insurance to fill in a questionnaire on their state of health. The questionnaire comprises questions on drug addiction. Only elderly people are required to take medical examinations in order to establish their state of health. There has never, to our knowledge, been any legal dispute between insurance companies and individuals.”

3. Sweden

“The main principle in Sweden is that within health and medical care secrecy should be maintained regarding information about the health of an individual or other personal information, if it is not clear that this information can be revealed without causing negative consequences for said individual or next of kin. (Source: Secrecy Act; SFS 1980:100, chapter 7, § 1c).

Swedish insurance companies usually require a potential customer to fill out a declaration of health upon signing an individual’s personal insurance. With a completed and signed declaration of health, the customer gives the insurance company a “general power of attorney”, which makes it possible to obtain information about him or her. This “power of attorney” gives its holder the right to take certain measures (judicial actions) on behalf of the principal and there are no limits regarding time, nor care provided. If the information in the declaration of health is such that the risk assessor at the insurance company judges that additional information is needed, it will be obtained through medical records, doctors’ assessments and information from the Swedish Social Insurance Agency. The insurance company may keep the information obtained from medical records, doctors’ assessments, the Swedish Social Insurance Agency, etc. even if the customer cancels his or her insurance or stops paying for it. According to existing regulations companies have to keep this kind of information for at least ten years after the customer’s death and many companies keep this kind of delicate information about the individual for an even longer period than that. The National Board of Health and Welfare maintains that the manner in which insurance companies currently use “general powers of attorney” needs to be curtailed through a law or regulation.

At the Swedish Ministry of Justice, an investigation is supposed to be underway which is to look at the regulatory framework regarding the possibilities of insurance companies obtaining medical information about (potential) customers.

In addition: The Swedish Financial Supervisory Authority oversees the companies in the financial market. The authority functions, among other things, as the national watchdog of 3700 financial companies, including insurance companies.”

4. Hungary

“Regarding the question by the Pompidou Group Platform on Ethical Issues and Professional Standards on the questions raised by the drug testing introduced by insurance companies for the purposes of life, health and other insurance contracts, we can provide you with the following answers.

1. Copies of relevant legislations.

Please find attached the English version of Hungarian Criminal Code (Btk.) and the Hungarian Civil Code (Ptk.). Possession, acquisition etc. of illicit drugs (not use of drugs) is considered a criminal act in Hungary based on the Btk. 282.§ (1). The rules and regulations regarding insurance companies can be found in the Ptk. 560-566.§ paragraphs.

Regarding interpretation of the Civil and Criminal Law we can state the following:

1. Illicit drug use is a criminal act in Hungary.
2. Data on drug use is a personal data protected by the Law on Data Protection (Avtv. 2.b), more specifically in this case it belongs under insurance privacy by the Law on Insurances and Insurance Companies (Bit 153.§).
3. According to the Ptk. 205.§ (3), the insurance company has the right to assess health risk factors relevant to the health or accident insurance contracts.
4. If the insured denies to undergo parts of assessments prior to the signing of the contract, the insurance company has the right to deny the signing of the contract based on the lack of cooperation. This can be true of drug tests.
5. In case of a positive test the insurance company may not report this to the police as it would be a criminal act (Btk. 177/A.§). In case of a legal request by the prosecutor or the police it has to provide information.
6. If the insured lies to the insurance company on questions related to drug use when it was asked, the company may deny paying in cases caused by those conditions that were withheld at the times of assessing them (Ptk. 540.§ (3)).

2. Practice.

We do not now of any literature or research in this field, what we could do is that we called several insurance companies. The answers were all the same by the different companies. There are different life insurance packages. The more valuable, or more costly the insurance is, the more the issue of drugs comes into focus. At the lower levels there is no question regarding drugs. As you go higher there are health questionnaires that include questions on present and/or previous drug use. At even higher levels there is a questionnaire plus blood and/or urine samples for the purpose of detecting traces of drugs in the body.

We have no information on the scope of this practice, however all the companies said on the phone that when the insurance is costly they definitely do testing.

We do not have any information on the frequency with which courts are involved in the resolutions of disputes (we do not know of such a case).”

5. Luxembourg

“Further to your request for information on practices and legislation on the role played by private insurance companies in drug testing in the workplace, we would like to submit the following information:

- drug testing is not explicitly included among the legal obligations of insurance companies;
- as an example of common practice for life insurance policies (general conditions), insurance companies reserve the right to ask physicians having treated the insured person for any additional information required for assessing the circumstances and causes of claims;
- insurance companies must comply with the Law of 2 August 2002 on protection of individuals vis-à-vis personal data processing;
- we have no data on the number of cases submitted to the courts on this sensitive subject.

The subordinate national supervisory agency is the Commissariat aux Assurances (Insurance Commission). This public body operates under the authority of the Ministry of Finance and the Budget, has a separate legal personality from the State and enjoys financial independence. For further information see <http://www.commassu.lu>.”

6. Norway

“We have no information indicating that Norwegian insurance companies use drug testing. When a person wants to take out insurance he/she has to fill in a form on personal statement of health including if he /she uses or has used drugs. According to the insurance act the insurance companies can only ask for information of relevance to their evaluation of the risk. The insurance company can ask the insured for permission to obtain relevant information from health personnel and others who can have relevant information. A licence from the Data Inspectorate is required for the processing of sensitive personal data (health information).”

7. Portugal

1. Legislation/regulations

The Portuguese statutory texts governing insurance contracts in general and life and health insurance contracts in particular comprise no specific provisions on drug testing for persons wishing to take out an insurance contract. The main applicable general prescriptive provisions are as follows:

- 1.1 Law No. 46/2006 of 28 August 2006, Article 4 c), prohibiting insurance contracts discriminating against persons on ground of disability or aggravated health risk;
- 1.2 Law No. 12/2005 of 26 February 2005, Article 12, prohibiting insurance companies from subjecting applicants for insurance contracts to genetic testing;
- 1.3 Law No. 12/2008 of 12 March 2008 (*), Article 6, prohibiting insurance companies from using the applicant's sex as a factor in calculating the insurance rates and setting out the conditions under which gender differentiation is acceptable (on the basis of “actuarial data” and “relevant and accurate statistics”);
- 1.3 Legislative Decree No. 72/2008 of 16 April 2008, prohibiting discriminatory practices in insurance contracts and detailing such discriminatory practices (against persons with disabilities and in cases of aggravated health risks – Article 12),

as well as the conditions and procedures applicable to medical examinations, where provided for (Article 178);

- 1.4 Statutory Provision No. 8/2008-R of 6 August 2008, issued by the Portuguese Instituto de Seguros³ (*), laying down the conditions under which insurance companies can provide for “differential” insurance rates in their contracts.

2. Practices⁴

- 2.1 In life insurance contracts in which risk is a factor, insurance companies usually require applicants to fill in a preliminary questionnaire. The latter, especially where the amount of the contract exceeds a certain threshold (€ 50 000), comprises questions on drug-taking (type, quantity, frequency and date of the last consumption). Applicants answering these questions in the affirmative must go on to fill in a second, more specific questionnaire, which is provided by the insurance and reinsurance companies in such cases, usually immediately followed by a series of tests.
- 2.2 The information supplied by insurance companies on the consequences of such a situation for the applicant (answering the specific questionnaire and taking the tests) is insufficient (case-by-case examination and, sometimes, consultation by the insurance company of the reinsurance companies’ rate-setting registers).

(*) These two standard-setting texts transpose Directive 2004/113/EC of the Council of 13 December 2004 into Portuguese law.

8. Croatia

“About the questions raised by the drug testing introduced by Insurance Companies for the purpose of life contracts I would like to inform you that in Croatia there is no regulation and practice about this topic. I contacted a few Insurance companies, and according to the information they have given us, they do not pursue drug testing before a person takes out a life insurance contract.

When a person wants to take out an insurance policy, he/she has to complete a questionnaire. One of the question is about the condition of health, diseases (if there any) and a question: “Have you ever regularly used or you are now using alcohol or other substances, or medications”.

Insurance companies do not check authenticity of answers, because they assume the answers are truthful. People who want to take out an insurance policy for more than 30.000 Euros or in case they are older than 60 years have medical examination (but doesn’t include drug testing). When an insurance company receives a claim payout, in the case of death or in the case of accident – the medical documentation/or a police report/ about cause of that condition – and if it is caused by drug use could be a good reason not to pay out an insurance benefit.”

³ National agency responsible for regulating and supervising this sector.

⁴ Information supplied by the Instituto de Seguros, collected under a survey of insurance companies with authorisation to operate in Portugal.

“Your first question requested a copy of any legislation or standards in relation to drug testing by insurance companies for the purpose of life, health and other insurance contracts. I have made enquires from the Department of Finance and the Financial regulator here in Ireland. They have informed me that they are not aware of any such legislation, regulations or practice in this area in Ireland.

In relation to your second question on any reliable information that is available about the practices and their scope adopted by the insurance companies, I contacted the Irish Insurance Federation (www.iif.ie) who refer to leaflets on Applying for Life Assurance which they stated deal with the issue. These leaflets are available at ^a..link:

<http://www.iif.ie/ConsumerInformation/LifePensions/Protection/tabid/139/langage/en-GB/Default...>”

Summary and observations

1. **Where legislation and regulations are concerned, the following are generally deemed sensitive:**
 - 1.1 before acceptance of the contract:
 - 1.1.1 questions concerning the obtaining and protection by insurance companies of information relating to the situation and state of health of the applicant for insurance, as well as the conducting of additional examinations for the same purpose;
 - 1.1.2 questions concerning decisions either to accept or refuse insurance or to increase the rates;
 - 1.2 after signing the contract:
 - 1.2.1 the consequences (obligations and rights) of accepting the contract, including the insurance companies' right to refuse to pay out in the event of an accident. The fundamental rights to respect for private life and non-discrimination are relevant in this context.
2. **In the specific field of drug testing⁵, the following findings have been made:**
 - 2.1 overall, none of the States have any legislation/regulations or specific provisions on testing (Ireland, Croatia, Portugal, Luxembourg, Greece, Slovakia and Sweden);
 - 2.2 several of the countries have legislation which explicitly or implicitly entitles insurance companies, in certain situations:
 - to examine the state of health of an applicant for insurance of an insured person in the event of accident and, in this context, to conduct tests (Greece, Hungary, Portugal, Slovakia, Croatia, Sweden and Luxembourg);
 - to increase the rate applied (in the case of alcohol and drug users) (Norway and Portugal);
 - 2.3 other countries have legislation which entitles them:
 - to refuse to sign the contract (where the customer refuses to co-operate) (Hungary);

⁵ Unspecified, embracing screening tests and blood and urine sampling.

- to refuse, in the event of an accident/death, to pay out where the insured person has supplied inaccurate/erroneous information (Hungary and Slovakia) or where these events were the result of drug-taking (Croatia);
- 2.4 some countries have legislation which:
- confines the information requested by insurance companies exclusively to risk evaluation (Norway);
 - specifies the situations in which an increase in (or a differentiation of) the rate is possible (Portugal);
 - specifies the conditions to be fulfilled for conducting medical examinations (where these are provided for) (Portugal).

Protection of fundamental rights vis-à-vis the legitimate interests of insurance companies manifestly varies from one State to another. In other words, the balance which States have struck between protecting citizens' fundamental rights and defending the legitimate interests of economic operators diverges considerably.

The protection of sensitive personal data is, in all cases, explicitly guaranteed by law.

- 3. In connection with the practices adopted by the countries in this sample, and with due regard to the fact that most available information comes from insurance companies,**
- 3.1 broadly speaking, the questionnaires comprise questions on alcohol consumption and drug-taking;
 - 3.2 medical examinations, including drug testing, are commonly conducted, either where the insured amount exceeds certain limits or where the applicant is elderly;
 - 3.3 the refusal to insure, suspension of the insurance contract and increased rates are common where the applicant is considered as a current drug-taker, as is the refusal to pay the amount insured (in the event of accident or death) if drug testing proves positive;
 - 3.4 a number of countries generally conduct an examination of the insured person's state of health during the period covered by the contract.

Some information sources have indicated that, alongside the major disparities in protection of the fundamental rights of citizens by the States and the balance struck between the exercise of these rights and legitimate private economic interests, there is a deficit in regulation and control of (wrongful) practices by insurance companies. Given that such practices are generally dictated by reinsurance multinationals, it would be useful if

- international and regional co-operation bodies such as the Council of Europe could deal with these questions from the human rights protection angle;
- the Pompidou Group could promote awareness of this issue in its field of action.



APPENDIX B

Members of the Committee on ethical issues and professional standards

between October 2008 and June 2010

Members of the Committee on ethical issues and professional standards

between October 2008 and June 2010

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