

SYMPOSIUM ON DRUG DECRIMINALIZATION, LEGALIZATION, AND INTERNATIONAL LAW

CANNABIS POLICY INNOVATIONS AND THE CHALLENGES FOR EU COORDINATION IN DRUG POLICY

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In the past decades, Europe has been the site of multiple drug policy innovations and cannabis policy experimentation. Most of the policy reforms in this area are taking place at the national and subnational levels. They have not resulted from agreements or harmonization initiatives at the EU level, but rather from bottom-up adoption of cannabis policies and practices that deviate from punitive approaches. Cannabis regulation has been only marginally debated by European institutions and is not discussed in depth in any EU document. On the one hand, the diversity of European drug policies is a positive development: it serves as a policy laboratory and reflects adaptations to local contexts in light of drug market-related challenges. On the other hand, a greater EU consensus would be helpful for policy coordination and international engagement.

Drug Policy and Markets in the EU

Drug policy remains a domain under the competence of EU national governments. The principle of subsidiarity governs this area of policy, meaning that the issue of illicit drugs is controlled at the national, rather than the EU level.¹ This means that the role of the EU is to provide principles and frameworks within which member states can formulate and implement their policy responses with relative autonomy. Starting in the early 1990s, the EU developed common Drugs Strategies, which are non-mandatory generic documents that seek to establish a general framework for action. However, fundamental decisions like interventions, control measures, or fund allocations are made by national governments.² To date, EU drug policy documents have not included positions on the regulation of cannabis, nor have they provided any guidelines in this area. The different cultural and political attitudes towards drug use within Europe have made it difficult for the EU to speak with one voice in this field. Member states implement divergent approaches to drug control and there is a lack of consensus among them regarding whether drug policy has to be reformed and, if so, in what direction. This contrasts with other criminal justice areas where the EU has been more capable of harmonizing policies, such as corruption, anti-money laundering and organized crime.

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¹ Caroline Chatwin, *Multi-Level Governance: The Way Forward for European Illicit Drug Policy?*, INT'L J. DRUG POL'Y 18 (2007).

² General Secretariat of the Council, *EU Drugs Strategy (2013–2020)*, 2012 O.J. (C 402) 1; IDPC Advocacy Note, *The European Union Drugs Strategy 2013–2020* (2013).

Although the diversity of drug policies can be viewed as a positive attribute, facilitating experimentation and accommodating local needs,³ further harmonization is becoming necessary. The size and scope of the EU illicit cannabis market, which grows and diversifies year after year, highlights the failure of supply reduction strategies. According to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and Europol,⁴ cannabis is the biggest drug market in the EU, with around 25 million annual users. In 2017, the European retail cannabis market was valued at EUR 11.6 billion as a “conservative” estimate.⁵ The changing dynamics of this market and prospects for regulation undoubtedly deserve greater political attention from EU authorities, beyond demand and supply control measures. Nonetheless, cannabis regulation has been only marginally debated by European institutions and is not discussed in depth in any EU document, except for a limited number of policy analyses conducted by the EMCDDA.

The Diversity of Cannabis Policies Within the EU

The legislation of both the EU and its member states is based on the international drug control conventions,⁶ which limit the use of cannabis (as well as many other psychoactive substances) for strictly medical and scientific purposes. However, in practice, cannabis policies are not harmonized within the EU. Some member states treat cannabis the same as other controlled substances for the purposes of criminal law, while, in others, penalties vary depending on the substance involved.⁷ Approaches to personal use and possession for personal use of cannabis also vary at the national level. The drug conventions allow a certain margin of flexibility, in accordance with the constitutional principles of each state party.⁸ In practice, a wide range of cannabis policies exist within the EU. These range from *de jure* decriminalization in Portugal and the Czech Republic, to a strict prohibition in Sweden, and include different levels of *de facto* decriminalization in Spain, Belgium, the Netherlands, and Germany.⁹ Individual governments have adopted policies to suit their specific political, cultural, and economic conditions. Yet, it is difficult to make comparisons among these policies, or determine which one has worked best. Countries with such divergent policies as Sweden (more moralistic, with a zero-tolerance approach) and the Netherlands (more liberal and pragmatic) have each considered their drug policy to be successful.¹⁰

The EU Drugs Strategy shapes the general framework within which EU countries operate, which has included objectives such as “a measurable reduction of the availability of illicit drugs,”¹¹ including cannabis. Nonetheless, practices applying less strict models to cannabis have been developed within the EU, both for medicinal and recreational use. Many European countries have implemented cannabis access schemes for a limited number of pathologies, and others like Italy, Germany, the Netherlands, and the Czech Republic have established

³ Caroline Chatwin, [UNGASS 2016: Insights from Europe on the Development of Global Cannabis Policy and the Need for Reform of the Global Drug Policy Regime](#), INT’L J. DRUG POLICY 49 (2017).

⁴ Eur. Monitoring Ctr. for Drugs & Drug Addiction & Europol, [EU Drug Markets Report 2019](#), PUBL. OFFICE OF THE EU (2019).

⁵ [Id.](#)

⁶ The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁷ Eur. Monitoring Ctr. for Drugs & Drug Addiction, [Cannabis Legislation in Europe: An Overview](#), PUBL. OFFICE OF THE EU (2018).

⁸ [Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#) art. 3.2, Dec. 20, 1988, 1582 UNTS 95.

⁹ Tom Blickman, [Cannabis Policy Reform in Europe. Bottom up Rather than Top down](#) (TNI Series on Legislative Reform of Drug Policies 28, 2014).

¹⁰ Caroline Chatwin, [Mixed Messages from Europe on Drug Policy Reform: The Cases of Sweden and the Netherlands](#), BROOKINGS (2015).

¹¹ General Secretariat of the Council, [supra](#) note 2.

comprehensive medical access programs. Portugal and Luxembourg also passed laws on the medical use of cannabis in 2018.¹²

Policy innovation in relation to recreational cannabis is somewhat more complex to assess from an EU perspective, since most of the initiatives in this area have arisen at the local and subnational level, and not as a result of top-down processes led by national governments. These include regulatory initiatives such as the cannabis users' associations in Spain, known as cannabis social clubs, championed by the autonomous communities of Catalonia and the Basque Country. These regulatory proposals, which were not backed by the Spanish central government, included cannabis cultivation and distribution for "legally constituted registered, non-profit associations of adult cannabis consumers that collectively cultivate cannabis plants to meet their personal needs."¹³ This model has been replicated to some extent in Belgium and other EU countries (as well as the United Kingdom), although with a smaller number of cannabis users' associations.¹⁴

The coffeeshops model developed in the Netherlands has also been the subject of analysis and debate. The operation of this model has been subject to the so-called "expediency principle" for years, which allows a certain degree of prosecutorial flexibility to avoid taking legal action. However, the lack of regulation of cannabis cultivation and supply intended for sale in coffeeshops (known as the "back door"), has encouraged a group of municipalities to coordinate in order to clarify the legal situation and to initiate a series of pilot projects for the regulation of the entire supply chain of coffeeshops.¹⁵ In other countries, such as Germany or Denmark, some cities have tried to start pilot projects for the distribution of cannabis for recreational use, which has received different degrees of acceptance by national governments.¹⁶

Beyond these subnational initiatives, recreational cannabis regulation has begun to be discussed at the national level. In 2019, Luxembourg announced the federal government's plans to regulate the recreational cannabis market, which would include a strict regulatory system and a public agency to control production and distribution.¹⁷ If these plans come to fruition, this small state would become the first territory in the EU to regulate the recreational use of cannabis at the national level, which would have a significant impact not only on neighboring countries, but throughout the EU. How will the EU respond to that fact that it will be a single market in which cannabis is prohibited everywhere except in a small part of it? This development could spur the EU to take decisions that help shape a more coherent EU cannabis policy, especially if Luxembourg's policies have some sort of a domino effect.

EU Drug Policy and Cannabis: Potential and Challenges

While the EU has refrained from putting forward a common position on these cannabis policy innovations, it is very likely that these local and regional movements will motivate the EU to adopt one in the near future. Albeit timidly, some discussions have begun in EU institutions. For example, there have been recent debates on medical

¹² Eur. Monitoring Ctr. for Drugs & Drug Addiction, [Medical Use of Cannabis and Cannabinoids: Questions and Answers for Policymaking](#), PUBL. OFFICE OF THE EU (2018).

¹³ Constanza Sánchez & Michael Collins, [Better to Ask Forgiveness Than Permission: Spain's Sub-National Approach to Drug Policy](#) (GDPO Policy Brief 12, 2018).

¹⁴ Tom Decorte et al. (2017), [Regulating Cannabis Social Clubs: A Comparative Analysis of Legal and Self-Regulatory Practices in Spain, Belgium and Uruguay](#), INT'L J. DRUG POLICY 43 (2017).

¹⁵ Tom Blickman & Katie Sandwell, [Cannabis en la ciudad: Reforma de políticas de abajo arriba para la regulación del cannabis](#) (Informe sobre políticas de drogas TNI 51, 2019).

¹⁶ *Id.*

¹⁷ Daniel Boffey, [Luxembourg to be First European Country to Legalise Cannabis](#), GUARDIAN (Aug. 7, 2019).

cannabis in the European Parliament, and there has been some effort to reach a common EU position on voting on the reclassification of cannabis within the international drug control system.

In 2019, the European Parliament issued a resolution on the use of cannabis for medicinal purposes which called for the Commission and member states to work together to provide a legal definition of medical cannabis and to promote greater knowledge among medical professionals on the use of this type of “medication” in light of the existing evidence on the therapeutic effects of cannabis and cannabinoids. The Parliament emphasized that regulation of medicinal cannabis would provide additional resources to public authorities, curtail the illicit market and access for minors, and grant legal and safe access to patients for medicinal use.¹⁸ Considering that many EU governments have already approved medical cannabis programs, these discussions seem long overdue. The impact that this resolution may have on the medical cannabis policy of the member states is still uncertain. But it undoubtedly opens a door to deepen debates within the EU institutions, and it is an important tool that can be used by civil society organizations to promote reforms in their own local and national contexts.

The diplomacy conducted at the UN drug control bodies has also provided a platform for the EU’s attempts to speak with one voice on drug control issues. Twelve EU member states (thirteen, before Brexit) are also members of the Commission on Narcotic Drugs (CND) as of 2020.¹⁹ The EU has favored EU member states advancing common positions in CND discussions, where the EU only enjoys an observer status. EU member states that are also members of the CND are thus responsible for bringing any EU positions to these international debates and speaking on behalf of the EU. At UN fora, the EU has advocated for drug policy approaches that place more importance on human rights, public health, and sustainable development. For example, the EU strongly supported the abolition of the death penalty for drug-related crimes at the UN General Assembly Special Session on Drugs in 2016.²⁰ More recently, the EU has also been a strong advocate for the UN system’s new Common Position on Drugs, supporting the UN Task Team’s efforts towards greater coherence within the UN system on drug-related matters.²¹

Additionally, the EU governing bodies have tried to achieve consensus among EU member states regarding votes on substance scheduling at the CND, in accordance with the procedures provided in the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances (decisions on substance and precursor scheduling are the only decisions taken by vote at the CND, as the rest are adopted by consensus). In 2017, the European Commission and the Council of the EU decided that the votes of EU member states should be previously authorized by the Council, and the EU common position on voting should be mandatory for them.²² The current process for re-scheduling cannabis at the international level following the World Health Organization (WHO) recommendations,²³ and the vote to adopt a common EU position, have been crucial tests of whether the EU could move from rhetoric to action in terms of speaking with “one voice.” Right before the 63rd CND session in March 2020, the Commission issued a proposal for a Council decision on the position to be adopted on behalf of the EU in relation to the reclassification of cannabis. It suggested “supporting only some of the WHO recommendations, which reflect developments of the scientific knowledge in this regard and would

¹⁸ Eur. Parliament, [Resolution of 13 February 2019 on Use of Cannabis for Medicinal Purposes](#) (2018/2775(RSP)).

¹⁹ [Members of the Commission on Narcotic Drugs](#), effective 1 January 2020.

²⁰ Civil Soc’y Forum on Drugs in the EU, [The Future of European Drug Policy. A Briefing Paper for Members of the European Parliament](#) (2019).

²¹ [European Union Statement on the occasion of the 63rd session of the CND Vienna](#) (Mar. 2–6, 2020).

²² See Kenzi Riboulet et al., [Briefing on the International Scientific Assessment of Cannabis: Processes, Stakeholders and History](#), 1 CRIMSON DIG. (2018).

²³ World Health Org., [Annex 1- Extract from the Report of the 41st Expert Committee on Drug Dependence: Cannabis and Cannabis-Related Substances](#) (2019).

not result in a significant change in the control of these substances.”²⁴ It is unclear whether serious differences persist within EU member governments around cannabis scheduling, as there were no public reports on these deliberations and these types of decisions have not been debated at the European Parliament thus far. As the final vote on the reclassification of cannabis was postponed until December 2020, there may be room for a more transparent EU debate around cannabis scheduling in the near future.

The Prospects for an “EU One Voice” on Drug Policy and Cannabis Policy Reform

The EU cannabis policy landscape is shifting rapidly. Innovations are complex to monitor and evaluate, given multiple languages, political cultures, and attitudes towards drugs within the EU. The EU lacks the jurisdictional competence to initiate the process for cannabis regulation, as this power remains within member states. EU institutions have also not been proactive in taking the lead on cannabis policy reform. However, there is clear political pressure on EU members to move towards more coherent and coordinated positions within this geopolitical space. These pressures come both from member states whose local and regional authorities are introducing cannabis policy innovations, and from the desire to adopt EU common positions at the UN and in other international forums. While cannabis regulation is not a priority for EU drug policy, these trends are likely to encourage, or even force, the EU to take a position on this matter in the near future. As some scholars suggest, this policy domain could entail multi-level governance mechanisms that involve greater participation of local authorities and communities.²⁵

Even if the EU has not encouraged cannabis policy experimentation, it has not prevented it either. Yet, for new ideas to emerge about how the EU could take a common position, it is important for the EU to encourage the debate about what has worked, and what has not, among drug policies. This should include cannabis policy innovations currently being implemented within the boundaries of the EU.

Conclusion

Drug policy diversity does not have to be seen as an obstacle; rather, it presents an opportunity for the EU to innovate in the drug control regime in a number of ways. First, it presents a scenario in which different policy options can be tested and evaluated, which can generate knowledge regarding what works and what does not in different contexts. Second, diversity facilitates discussions around drug policy reform that are grounded in experience and that may trigger more effective policies. Third, and finally, drug policy diversity can help shape an “EU common voice” in drug policy based on experience with best practices. Cannabis policy reforms will undoubtedly be the next litmus test in the quest for further harmonization of drug policy at the EU level.

²⁴ [Proposal for a Council Decision on the Position to be Taken, on Behalf of the European Union, in the Sixty-Third Session of the Commission on Narcotic Drugs on the Scheduling of Substances Under the Single Convention on Narcotic Drugs of 1961, as Amended by the 1972 Protocol, and the Convention on Psychotropic Substances of 1971](#), COM(2019) 624 final. (Dec. 12, 2019).

²⁵ [Charwin](#), *supra* note 1.