



# Cannabis Regulation, EU Drug Law, Trade Rules and the UN Drug Control Treaties

*Summary Report of the Expert Seminar: 17–18 June 2024, Amsterdam*

## Introduction

The Expert Seminar on Cannabis Regulation aims to address the evolving landscape of cannabis regulation within the European Union and its intersection with international drug control treaties. Organized by the Transnational Institute (TNI) and co-sponsored by the Washington Office on Latin America (WOLA) and the Global Drugs Policy Observatory (GDPO), the seminar gathered policy and legal experts from six European countries engaged in various forms of cannabis regulation, five of which are EU member states (Czechia, Germany, Luxembourg, Malta and the Netherlands) and one non-EU country (Switzerland). Also present were experts from the United States of America, where cannabis regulation is in full swing in states and discussed at the federal level, as well as other international policy experts and scholars in international law. Over the course of two days, the participants discussed the current state of cannabis regulation, legal tensions, and future scenarios for policy development.

## Context and Objectives

This seminar builds on previous expert seminars focusing on cannabis regulation, particularly those centered on the UN drug control conventions and states' international legal obligations. A first seminar took place in Washington D.C. in 2014<sup>1</sup> and resulted in the briefing *Cannabis Regulation and the UN Treaties: Strategies for reform*.<sup>2</sup> A follow-up seminar took place

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1 See: <https://www.tni.org/en/publication/international-law-and-drug-policy-reform>

2 See: <https://www.tni.org/en/publication/cannabis-regulation-and-the-un-treaties>

in Amsterdam in 2017<sup>3</sup>. The main outcome of that seminar were a publication on the inter se modification of the UN drug control conventions to facilitate cannabis regulation<sup>4</sup> and a Special Issue of *International Community Law Review*.<sup>5</sup> These seminars and publications all happened before the recent ‘green wave’ of cannabis reforms reached Europe. This shift necessitates a renewed focus on the EU’s role and the implications of these changes on international treaties, EU legislation and institutions, and their impact on national legal regulations.

In light of this, it is important to find legal solutions and coordinate efforts among European countries experimenting with cannabis regulation. While there seems to be little political appetite for formal changes to the treaty system, countries are increasingly adopting creative interpretations and justifications for non-compliance with the international drug treaties. This seminar offered a space to explore these approaches and address the resulting legal tensions, particularly those involving EU law and the legal room for maneuver for its member states.

In preparation for the seminar a discussion note was distributed including ten guiding questions to keep in mind during the discussions and four potential future scenarios to be discussed at the conclusion of the meeting (Annex1). The seminar also benefitted from initial discussions around the topic at a small informal meeting with officials and policy experts in Amsterdam in June 2023.

In order to create a confidential setting and to encourage candid discussion, the Expert Seminar was conducted under the Chatham House Rule,<sup>6</sup> under which participants may use the information received but may not reveal the identity nor the affiliation of the speaker or the participants at the meeting. This seminar report, for that reason, provides an anonymized summary account of the discussion that took place.

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3 See: <https://druglawreform.info/en/events/expert-seminars/item/8247-cannabis-regulation-and-the-un-drug-control-treaties>

4 Martin Jelsma, Neil Boister, David Bewley-Taylor, Malgosia Fitzmaurice & John Walsh (2018). *Balancing Treaty Stability and Change: Inter se modification of the UN drug control conventions to facilitate cannabis regulation*, Global Drug Policy Observatory (GDPO) / Washington Office on Latin America (WOLA) / Transnational Institute (TNI), available at: <https://www.tni.org/en/publication/balancing-treaty-stability-and-change>

5 *International Community Law Review*, Volume 20 (2018): Issue 5, available at <https://brill.com/view/journals/iclr/20/5/iclr.20.issue-5.xml>

6 “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”  
Chatham House, The Royal Institute of International Affairs (1927).  
<http://www.chathamhouse.org/about/chatham-house-rule>

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## Session 1: State of Affairs

The first session consisted of a round of updates of current and future legal cannabis regulation initiatives and pilot projects by policy officials from the six European countries as well as the state of affairs in the United States to provide the necessary background for the more substantive sessions.

### The Dutch Tolerance Policy & Controlled Cannabis Supply Chain Experiment

#### Tolerance Policy

The historic Dutch tolerance policy permits individuals to possess up to 5 grams of cannabis and cultivate up to 5 plants for personal use without facing legal repercussions. Coffeeshops are allowed to sell up to 5 grams of cannabis per person per day under strict regulations, also known as the AHOJGI criteria.<sup>7</sup> Municipalities may add additional rules to address local concerns, such as the proximity to schools. This policy aims to *de facto* decriminalize minor cannabis-related activities while maintaining public order, health, and safety.

#### Controlled Cannabis Supply Chain Experiment

The controlled cannabis supply chain experiment, initiated as part of the 2017 coalition agreement, aims to study the effects of supplying quality-controlled cannabis to coffeeshops through a regulated system. This initiative seeks to assess the feasibility of legally regulating the cannabis supply chain and its impact on public health, crime, and public order in municipalities. The experiment is independently monitored periodically throughout its 5 phases:

1. **Preparatory Phase (2018–2020):** Following the 2018 report by the Knotnerus commission, a special committee in 2019 advises on the selection of ten municipalities for participation: Arnhem, Almere, Breda, Groningen, Heerlen, Voorne aan Zee, Maastricht, Nijmegen, Tilburg, Zaanstad. The bill is approved by Parliament and the Senate in 2019.
2. **Start-up Phase (2020–2023):** The application process for cultivators begins in July 2020, with licenses awarded through a lottery in December 2020 and cultivators

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7 The Dutch acronym AHOJGI stands for: no advertising (A), no hard drugs (H), no nuisance (O), no youngsters (J), no large quantities (G), residents only (I). The I-criterion was added more recently and is only effectively applied in a limited number of primarily border municipalities. See: <https://repository.wodc.nl/bitstream/handle/20.500.12832/3295/3414-coffeeshops-in-nederland-2022-summary.pdf>

designated by May 2021. By December 2023, the first coffeeshops in Breda and Tilburg start selling cannabis from both grey market sources and licensed cultivators.

3. **Transitional Phase (June 2024):** From June 17, 2024, coffeeshops in participating municipalities may sell both tolerated and regulated cannabis products. This phase aims to optimize the supply chain's quality, diversity, and scalability.
4. **Experimental Phase (date unknown)<sup>8</sup>:** When five cannabis cultivators are ready for large-scale supply, regulated cannabis may be sold in participating municipalities.
5. **Completion Phase:** The conclusion of the four-year experiment will depend on an evaluation report. The decision whether or not to proceed to a national roll-out will be made by the new government in place by then. Intermediate evaluations are ongoing, with guidelines, quality standards, and the first lessons learned publicly available.

### **Future Directions**

The Dutch model for cannabis regulation reflects a cautious yet progressive approach, balancing public health and safety with the need for controlled legal access to cannabis. The outcomes of this experiment will provide valuable insights into the potential for broader decriminalization and regulation within the EU framework, as discussed in the seminar. It remains to be seen if the outcome of the experiment can function as a model for other states to follow.

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## **Controlled Dispensing of Cannabis for Adults in Germany**

### **The Latest Cannabis Act**

Germany's new cannabis regulation, effective from April 1, 2024, represents a shift from decades of prohibition to a harm reduction approach. The Cannabis Act is rooted in the 2021 coalition agreement, with goals to enable responsible cannabis use, destigmatize cannabis, increase prevention efforts, especially for children, and reduce organized crime. The legisla-

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8 After the meeting ended, it became known that instead of from September 16<sup>th</sup> onward, the start of the Experimental Phase is postponed because the production of the licensed growers did not yet meet all the conditions, which means that they cannot yet fully and continuously supply the coffeeshops.

tion aims to balance public health protection and market regulation while curbing the black market.

**Key aspects of the Cannabis Act include:**

- Legal possession of up to 25 grams of cannabis in public for personal use.
- Home cultivation of up to three plants, with a maximum of 50 grams for personal use.
- Non-commercial communal cultivation in cannabis clubs, with strict oversight and no advertising or consumption on the premises.
- Criminal penalties for violations, including increased sentencing for selling or supplying cannabis to minors.
- Road traffic regulations with a new legal THC limit of 3.5 nanograms per milliliter, effective from June 2024.

**A Two-Pillar Approach**

Further, the Cannabis Act is constituted by a two-pillar model:<sup>9</sup>

Pillar 1: Non-Commercial Private and Community Cultivation

The first pillar, implemented from April 1, 2024, focuses on non-commercial cultivation for personal use. This allows individuals to legally possess up to 25 grams of cannabis in public and cultivate up to three plants privately. Additionally, it permits from the 1 July 2024 non-profit cannabis clubs to cultivate and distribute cannabis to their members under strict conditions, including:

- A limited membership to adults residing in Germany.
- Adherence to regulations preventing commercial gains of clubs, such as no advertisement or sponsoring.
- Each club can have a maximum of 500 members.
- Strict youth protection measures, including a minimum distance of 200 meters from children's facilities.
- Clubs are subject to regular oversight and audits by regional authorities.

Pillar 2: Regional Pilot Projects

The second pillar involves regional pilot projects to incorporate commercial cannabis supply chains for recreational use, set to start later in 2024. This initiative permits licensed enter-

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9 More information is available in German at:  
<https://www.bundesgesundheitsministerium.de/service/gesetze-und-verordnungen/detail/cannabisgesetz.html>

prises to produce, distribute, and supply cannabis through shops within a state-controlled framework. The pilot is designed to run for five years and aims to assess the impact of a commercial supply chain on public health, youth protection, and black-market reduction. The approach involves scientific monitoring and evaluation, with findings shared with European partners to ensure compliance and regulatory alignment.

### **Compliance and Monitoring**

Germany emphasizes its commitment to respecting EU and international obligations. As formalized in the Cannabis Act, evaluations are conducted after 18 months, two years, and four years to assess the law's impact on public health, youth protection, and cannabis-related crime (executed by the Federal Criminal Police Office). The Bundesländer (state authorities) monitor cannabis clubs to ensure compliance with regulations.

### **Future Directions**

Similarly to the Dutch approach, the German model for cannabis regulation is cautious yet progressive, stressing legal compliance while focusing on public health and safety. The pilot project's findings are deemed crucial for shaping future policies and potentially influencing broader EU cannabis regulations. By engaging in transparent dialogue with European partners, Germany aims to contribute to a more flexible and harmonized regulatory framework across the EU.

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## **The Latest Cannabis-Related developments in Luxembourg**

### **A Revised Approach to Cannabis Legislation**

In 2018, Luxembourg was the first European government to propose full legalization of cannabis. However, the proposal is scaled back due to several challenges, including legal and regulatory complexities, tensions with international treaties, and the need for thorough consultations with the European Union to ensure compliance with EU law. Additionally, practical concerns such as quality control, youth access prevention, and black-market curbing were significant. The COVID-19 pandemic further delayed legislative progress. In 2021, Luxembourg adopted a more cautious approach with a two-step regulatory process. The first step, effective from July 21, 2023, allowed for limited home cultivation and decriminalized possession of small amounts of cannabis while the establishment of a commercial market (step 2) was postponed for further evaluation and planning, and was then abolished by the new center-right government after the elections in 2023.

**Key provisions of the Cannabis Law include:**

- Adults are allowed to grow up to four cannabis plants per household, exclusively from seeds.
- Personal consumption is authorized in private spaces, but public consumption remains prohibited.
- Plants must not be visible from public spaces, and criminal sanctions apply for non-compliance or exceeding plant limits.
- Introduction of a three-gram threshold for penalties related to consumption, acquisition, transport, and possession in public. Exceeding this limit results in criminal sanctions, while lower quantities incur a taxed warning of 145 euros.
- The zero-tolerance rule for driving under the influence of cannabis remains unchanged.

**Future Directions**

A baseline evaluation of the cannabis policy was conducted in 2023, with factsheets and a report to be published by the national focal point. Continued evaluation is scheduled to assess the impact and effectiveness of the policy.

The 2023–2028 coalition agreement confirms the government's commitment to maintaining the legally regulated cultivation of cannabis for personal use. The government will continue to observe the developments and the progress of regulatory efforts in neighboring countries—mainly Belgium, Germany, and France. Luxembourg's previous phased implementation of cannabis regulation illustrated the wish to balance innovation with regulatory rigor and compliance with international and EU obligations.

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## **Cannabis Regulation in Czechia**

**Three-Pillar Approach**

The strategy elaborated by the Czech drug policy coordinator for cannabis regulation is structured around three main pillars: decriminalization, the introduction of the concept of 'psychomodulatory substances', and moving towards legal regulation. This approach mainly aims to address current legal inconsistencies and excessive penalties associated with substance use.



## **The Process of Policy Change**

The political landscape in Czechia features a five-party coalition, including center-right, conservative, and pirate parties, with substance regulation being a significant topic during the elections. The push for decriminalizing substance use in Czechia stems from several factors, including political uncertainty, excessive penalty rates, and judicial inconsistencies. The uncertain political environment makes a clear legal framework essential.

The coalition's stance on substance use harms and regulatory reform is predominantly led by scientific evidence driving the rationale for regulatory reforms. A working group was established to develop a comprehensive cannabis regulation framework balancing out the conservative stances on substance regulation within the coalition.

## **Psychomodulatory Substances<sup>10</sup>**

As a new regulatory category, the term 'psychomodulatory substances' has been introduced to facilitate the regulation of psychoactive substances with acceptable health risks. This approach has advanced significantly through national government review and provides a starting point for regulating parts of the industry. The concept has garnered unprecedented political support, offering a potential pathway for broader regulatory reform. The first substances to be included in this category are CBD products and Kratom.

## **Legal Regulation of Cannabis**

The proposed legal framework permits individuals to possess up to 30 grams of cannabis in public and grow up to three plants per household, with a limit of 600 grams of dry matter. While there is limited support for non-profit cannabis social clubs and/or a regulated market based on a licensing system and a seed-to-sale tracking mechanism within the government, there is significant backing for home cultivation and decriminalization for personal possession. Retailing through dispensaries, similar to pharmacy models, remains under consideration, but unlikely to pass due to opposition of a party in the government coalition.<sup>11</sup>

## **Future Directions**

Czechia's approach to cannabis regulation reflects a balance between innovation on scheduling and regulatory compliance. The focus on psychomodulatory substances offers a

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10 Find the full treatment of Psychomodulatory Substances in Session 3

11 See also: Czech government struggles to push through cannabis legalisation bill, CannIntelligence, 2 August 2024; <https://cannintelligence.com/czech-government-struggles-to-push-through-cannabis-legalisation-bill/>

new pragmatic pathway to advance regulatory reform suiting the country's needs, while addressing public health and decriminalization.

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## **The Maltese Model for Cannabis Regulation**

### **A legal overview**

The Maltese regulatory framework is based on the decriminalization of home growing and small quantities of cannabis for personal use in December 2021. The legislation permits individuals to grow up to four cannabis plants and possess up to seven grams in public spaces. The framework also allows for the distribution of cannabis through non-profit associations, referred to as Cannabis Harm Reduction Associations, which handle the entire process from seed to sale, providing cannabis exclusively to their members.

### **Non-Profit Cannabis Associations**

Malta's non-profit associations fall within a legal organizational category, and are capped at 500 members, all of whom must be residents of Malta. The associations are collectively owned by their members, with three administrators elected annually to execute the daily management. Administrators must have been residents for at least five years to ensure they are well-integrated within the cannabis community. Associations cannot advertise and must reinvest surplus revenue within the association ensuring the non-commercial function of the hub. They pay a special levy to authorities, contributing 5% of their income to harm reduction funds, and are further exempt from traditional commercial taxes. Each batch of cannabis produced for its members undergoes lab testing for quality control. Members are limited to a maximum distribution of 50 grams per month, and cannabis can only be sold in dried bud form, but not be consumed at the premises themselves. A ban on alcohol on the premises of associations is also in place.

### **Implementation Timeline and First Results**

The implementation timeline spans from the adoption of the legislation in December 2021 to the commencement of cannabis distribution in January 2024. By February 2023, the regulatory framework for non-profit associations was established, and the first applications were submitted in May 2023. Operations began in October 2023, with cannabis distribution to members starting in January 2024. As of this presentation, 57 applications had been submitted for cannabis associations, with 14 approved and at various stages of operation. Initial results from the five associations distributing cannabis indicated an average con-

sumption of 17 grams per member per month. Initial stock shortages due to high demand and production hiccups were noted, making it challenging to already establish stable consumption trends.

The seed-to-sale element provides the state with better oversight, mitigating the risk of criminal infiltration. The non-commercial nature circumvents the complex EU-wide regulatory framework for commercial setups. Most cultivation is done indoors, ensuring stability of supply and minimal impact on traditional agriculture, with cultivation sites requiring only 1.5 square meters per member. The model's success is reflected in the growing interest from prospective associations, with expectations to cater to the entire resident population of cannabis users within two to three years. Results of research in contamination of licit association cannabis and the illicit market shows that the quality improved substantially.

### **The Enforcement Mechanism**

Enforcement of association guidelines involves rigorous verification processes to ensure residency requirements for membership. Applications must include proof of residence, such as official identification and residency documents. The Authority for the Responsible Use of Cannabis (ARUC) conducts regular audits and inspections of the associations to ensure compliance with membership regulations and other legal requirements. This oversight helps maintain a strictly regulated cannabis market, focusing on harm reduction and preventing exploitation by non-residents.

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## **State of Cannabis Affairs in Switzerland**

### **A Diverse Cannabis Approach**

Switzerland currently navigates three parallel processes related to cannabis regulation: 1. pilot trials with regulated cannabis, 2. the parliamentary initiative Siegenthaler, and 3. the federal popular initiative 'Legalize cannabis: an opportunity for the economy, health, and equality'.

### **Pilot Trials with Cannabis**

Switzerland has implemented pilot trials under Article 8a of the Narcotics Act since May 2021. These trials aim to gather scientific evidence on the advantages and disadvantages of controlled cannabis access, seeking to establish a robust basis for potential regulation. Its

main focus is on increasing knowledge on controlled access in practice, minimizing social and health-related costs, and maximizing social benefits.

The pilot trials are meticulously structured with stringent rules, including a 20% THC cap, mandatory packaging declarations, strict production standards to ensure quality and safety, detailed record-keeping, secure transport, and limited points of sale to control distribution. These trials are conducted and funded by a diverse range of third parties, such as cantons, communes, universities, and associations, reflecting broad-based support and collaboration. To date, seven projects have received authorization, with preliminary results anticipated by the end of 2024, providing crucial data to inform future policy decisions.

### **The Parliamentary Initiative Siegenthaler**

The parliamentary initiative led by liberal politician Heinz Siegenthaler, adopted in October 2021, proposes drafting legislation directly by a parliamentary sub-commission, with the federal administration serving only an advisory role.<sup>12</sup> The initiative aims to align with Switzerland's four-pillar drug policy, which focuses on authority control over production and trade, protection of youth, separation of medical and non-medical markets, and drying up the black market by abolishing prohibition. The proposed legislation includes the introduction of a tax and regulation of advertising, and it also permits production for personal use. This initiative reflects a structured legislative approach to cannabis regulation, highlighting the importance of a balanced and integrated drug policy within Switzerland's federal system.

### **Federal Popular Initiative**

A federal popular initiative titled 'Legalize cannabis: an opportunity for the economy, health, and equality' was submitted on April 30, 2024. The pamphlet proposes to allow adults over 18 to cultivate and possess cannabis, enable commercial cultivation and sale under strict quality standards, and allocate tax revenue to education and prevention campaigns. It also introduces the idea of a THC limit in the blood for road traffic participation, permits private cultivation of up to 50 plants with storage limits, and legalizes the importation of cannabis seeds and clones. Although the initiative does not seem to have considerable political weight, a referendum could be prompted if 100,000 supportive signatures are gathered by October 30, 2025.

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12 Initiative parlementaire 20.473: Réguler le marché du cannabis pour mieux protéger la jeunesse et les consommateurs; <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20200473>

## Future Directions

Switzerland's multi-faceted approach to cannabis regulation seems to underscore its commitment to exploring comprehensive and responsible cannabis regulation frameworks. The outcomes of these efforts are important milestones in shaping Switzerland's cannabis policy in the coming years.

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## Cannabis Policy in the United States

### Three Parallel Markets

The United States has three parallel cannabis markets: 1. the legacy/illicit market, 2. the hemp market, and 3. the state-regulated marijuana markets (medical and adult use). Cannabis is legal in 38 of 50 states for medical use and 24 states for recreational use; 54% of Americans now live in a state where the recreational use of cannabis is legal.<sup>13</sup>

Despite the introduction of a diverse array of state regulations on cannabis in recent years, the legacy market still exists and operates illegally. The hemp market is federally legal for products containing  $\leq 0.3\%$  Delta-9 THC and is regulated by the United States Department of Agriculture (USDA) as an agricultural product. The state-regulated marijuana markets, though federally illegal, are heavily taxed and regulated within individual states, without allowance for interstate commerce.

### From Medical to Adult Use

Since 2012, states have progressively liberalized their cannabis regulations, leading to legal medical cannabis markets in 38–40 states by June 2024. This process from legalization to market implementation typically involves an 18-month delay. Common denominators within these state regulations are consumer safety, public health, equity, market stability, and economic growth. These regulations encompass seed-to-sale tracking, cultivation, processing, product safety, packaging, labelling, marketing, and sales.

In regulated adult-use cannabis markets across the different states, regulation is managed by various departments such as health, revenue, consumer protection, and sometimes stand-alone regulatory agencies. Licensed entities grow, process, distribute, and sell canna-

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13 *Most Americans now live in a legal marijuana state – and most have at least one dispensary in their county*, Pew Research Center, February 29, 2024; <https://www.pewresearch.org/short-reads/2024/02/29/most-americans-now-live-in-a-legal-marijuana-state-and-most-have-at-least-one-dispensary-in-their-county/>

bis, with adult-only retail stores being a common model. Regulations also cover public education, stakeholder engagement, data monitoring, and frequent policy updates to ensure comprehensive oversight and adaptability to evolving market conditions.

State regulators face significant challenges due to the lack of federal engagement and regulatory support. Ensuring consumer safety through rigorous ingredient standards and lab testing, as well as addressing equity in the cannabis market, remain top priorities but funding and capacity issues complicate these efforts.

### **Loopholes in the Adult Use Supply**

The regulatory framework for hemp, in particular, has become exploited in search for justifications to commercialize cannabis for adult use. This stems especially from loopholes in the 2018 Farm Bill, which removed from the Controlled Substances Act (CSA) not only hemp itself but also any product, extract or cannabinoid derived from it as long as it contains less than 0.3% THC. This led to a fully unregulated market of ‘intoxicating hemp’ products, including edibles with high concentrations of psychoactive cannabinoids marketed as hemp products.

These loopholes include the derivatives loophole, which allows impairing cannabinoids such as Delta-8, Delta-10, HHC, and THCO, chemically synthesized from CBD or other hemp-derived cannabinoids, to be marketed under the guise of hemp products. Another loophole is the TCHA loophole, where products with high levels of THCA, indistinguishable from traditional cannabis products, are sold as hemp. Lastly, expressing THC content in percentages versus milligrams leads to products with impairing amounts of Delta-9 THC to be openly sold.<sup>14</sup> State regulated recreational cannabis is suffering from these so-called “hemp” products and states are litigating in an effort to regulate their local hemp markets.<sup>15</sup> This situation underscores the need for clearer regulations to ensure consumer safety.

### **Federal Rescheduling and International Compliance**

The potential rescheduling of marijuana is currently under exploration, with discussions focusing on moving it to Schedule 3 in the CSA. This process includes a public comment period and possible hearings, though rescheduling is not expected to change the federal

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14 See the example of intoxicating Hemp products in California;  
[https://www.gettingitrightfromthestart.org/wp-content/uploads/2023/08/Policy-Brief\\_Intoxicating-Hemp-Products\\_July-2023\\_v3.pdf](https://www.gettingitrightfromthestart.org/wp-content/uploads/2023/08/Policy-Brief_Intoxicating-Hemp-Products_July-2023_v3.pdf)

15 See for example the webinar by Vicente LLP: Intoxicating & Synthetic Hemp Regulations: State Legislative Session Updates and Federal Predictions, 16 June 2023.  
<https://www.youtube.com/watch?v=Vp65uawqYrs>

illegality of state-regulated markets. This distinction highlights the ongoing disjunction between state and federal policies on cannabis in the USA. The approach, where states independently formulate and implement cannabis policies, seems to conflict with international treaties as well as providing a dubious justification for denying non-compliance, since cannabis remains illegal federally. The State Department's 'new' position is that the UN drug control conventions largely leave domestic enforcement to the discretion of national governments.<sup>16</sup>

### **Future Directions**

The USA cannabis regulation landscape is currently thus characterized by a patchwork of state-specific policies due to the absence of federal regulation. This results in significant heterogeneity across state markets. The outcomes of the ongoing rescheduling process and the evolving hemp market will be important steps in shaping future policies.

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## **Session 2: Legal Tensions in Europe**

The second session consisted of two prepared introductions and a round of questions and debates.

### **Legal Tensions in Europe: Cannabis Regulation through the 'Without Right' Clause?**

#### **The 'Without Right' Clause**

In the analysis of the legal tensions between cannabis regulation and EU law, the focus is on the 'without right' clause in Article 2(1) of the Framework Decision 2004/757/JHA.<sup>17</sup> The article obliges EU member states to ensure that cannabis cultivation (among other drug offences) is punishable 'when committed without right'. The interpretation of what constitutes 'without right' is key to determine the legal boundaries to legal regulation of

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<sup>16</sup> With regard to hemp derivatives, however, the 1961 Convention does not distinguish between 'cannabis' and 'hemp', and Delta-8 THC, for example is scheduled in the 1971 UN convention, whether or not it is derived or synthesized from 'hemp'.

<sup>17</sup> See on this particular issue: Piet Hein van Kempen & Masha Fedorova, 'Cannabis Regulation Through the "Without Right" Clause in Article 2(1) of EU Framework Decision 2004/757/JHA on Illicit Drug Trafficking', *European Journal of Crime, Criminal Law and Criminal Justice*, March 2023, 31(1):73-101. [https://brill.com/view/journals/eccl/31/1/article-p73\\_004.xml](https://brill.com/view/journals/eccl/31/1/article-p73_004.xml)

recreational cannabis in the EU, and to ensure consistent application across different EU jurisdictions.

However, the clause lacks clear definition in the explanatory memorandum. Initially drafted as ‘without authorization’ and later as ‘when committed unlawfully’, the final wording ‘without right’ reflects a compromise influenced by other EU legal instruments. This clause is further inconsistently translated across different language versions, ranging from strict ‘justification’ to broad ‘unlawful’, providing little guidance for interpretation.

It was argued that a grammatical interpretation could theoretically permit a national licensing system for cannabis, as that would render it ‘within right’ under national law, provided it conforms to the other Framework Decision’s other requirements and avoids cross-border effects or hinders transnational cooperation against illicit drug trafficking. Such an interpretation suggests that national legislation preventing cross-border trafficking might not conflict with the Framework Decision’s primary purpose of harmonizing penalties and criminalizing illicit drug trade within the EU.

### **Broader EU and International Legal Context**

Despite this theoretical possibility, historical interpretations and broader EU law present challenges. The Schengen Agreement, part of EU law, mandates member states to ‘combat’ illicit drug trafficking across borders but allows for deviations related to national policies on addiction prevention and treatment. The former 1996 Joint Action on illegal drug trafficking, whose ‘spirit’ the 2004 Framework Decision aims to uphold, underscores the need for an integrated approach to drug control, aligning with the obligations of the UN drug conventions.<sup>18</sup> While a licensing system for cannabis might align with the ‘without right’ clause under specific conditions, this possibility remains largely theoretical due to the strict obligations of the UN conventions.

### **Implications and Future Directions**

This analysis highlights the complexities of reconciling national cannabis regulation with EU and international legal frameworks. The need for careful legal interpretation and strategic international cooperation to navigate these challenges is emphasized. The broader implications of EU law and the UN drug control system on cannabis regulation underscore

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<sup>18</sup> EU Joint Action 96/750/JHA of 17 December 1996 was formally repealed in 2016 because it became obsolete after the entry into force of several other instruments, including the 2004 Framework Decision, which was, however, meant to be “entirely in keeping with the spirit of the Joint Action” according to its Explanatory Memorandum. [https://eur-lex.europa.eu/eli/joint\\_action/1996/750](https://eur-lex.europa.eu/eli/joint_action/1996/750)



the importance of finding flexible and innovative approaches to align national policies with international obligations.

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## Legal Complexities in Cannabis Regulation in Europe

### The ‘Without Right’ Clause

The second presentation treats the broad spectrum of legal complexities related to establishing regulation to commercialize adult cannabis in EU member states. Primarily the focus is again on the ‘without right’ clause of the 2004 Framework Decision. There seem to be three primary interpretations of this clause:

1. **Strict Interpretation in Line with UN Drug Treaties:** This interpretation holds that activities are only permitted if they have a medical or scientific basis, aligning strictly with the Single Convention on Narcotic Drugs. However, in practice this approach is problematic, as the European Court of Justice (ECJ) tends to prioritize EU law over international treaties.
2. **Member State Discretion:** Another view is that member states have the autonomy to define what constitutes a ‘right’ under their national laws. This approach allows for variation in cannabis regulation across the EU, considering consumer protection and public health. It is possible that the ECJ might accept these differences due to the precedent of allowing member state discretion in health care regulations.
3. **Need for EU Interpretation:** Lastly, there is a strong case to be made for an EU-level interpretation of the clause, since EU law should prevail over international treaties in case of conflict. The ECJ might well consider to support member state discretion in regulating cannabis, given the diverse approaches within the EU and the lack of a unified stance on cannabis regulation.

### Complicating Legal Arrangements

Despite the possibility for leeway through these interpretations, historical interpretations and broader EU law present challenges. The Schengen Agreement, which is part of EU law, mandates member states to combat illicit drug trafficking across borders while ensuring that national substance markets do not diverge in ways that impact other countries. In doing so, various approaches are considered, such as denouncing the UN drug conventions, justifying drug control deviations based on positive human rights obligations, creating an inter se agreement among like-minded states, or denouncing and re-accessing the conventions with

reservations. These combined strategies could offer a legally sound and politically viable path for cannabis regulation without fully abandoning the international drug control framework.

### **EU Competence and the Role of the ECJ**

Also, complexities around the EU competence in regulating cannabis must be considered. The ECJ may ultimately decide whether the authority regarding regulating adult use cannabis lies with the EU Council, the European Commission or individual member states. The court's history of balancing national discretion with the need for a coherent EU policy, particularly in health and consumer protection sectors, is a critical factor in this context.

Since member states could directly approach the ECJ if they believe another state is violating EU law, the ECJ might play significant roles in future regulatory developments. Nevertheless, there is reason for cautious optimism when Germany's new cannabis regulation is taken as an example. Combining both non-commercial home cultivation and state-controlled distribution may uphold international obligations while persuading other EU member states to accept a more flexible legal framework.

## **Session 2: Discussion**

*Why focus on the 'without right' clause of the 2004 Framework Decision, and what are its implications for national cannabis regulation?*

Paragraph 2 of Article 2 excludes personal consumption from the scope of the Framework Decision, allowing member states also to permit cultivation, possession and purchase "when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law". Some have argued that this clause could even provide a legal basis for national licensing systems if interpreted flexibly, offering a pathway for member states to regulate cannabis within their borders without breaching EU law. However, based on the discussion, it is difficult to see how the exemption could be used to justify commercial production and distribution.

*What does the concept of EU competence mean, and why is it relevant for cannabis regulation?*

EU competence refers to the different mandates held by the EU and individual member states, which can be shared, individual, or complementary across various policy areas. Notably, the EU has historically limited direct competence over health policy, which is primarily the domain of member states. Competence is an important concept to discuss since it essentially determines how much authority the EU or member states have over regulation on commercializing cannabis.

***What legal flexibility does the 'without right' clause provide for domestic regulation on commercialization of adult-use cannabis?***

The ongoing debate regarding the 'without right' clause in the 2004 Framework Decision focuses on whether it provides legal leeway for EU member states to domestically regulate the sales of recreational cannabis, and its alignment with the 1961 Single Convention. Despite its significance, there has been no specific impact assessment for this clause alone; assessments of the Framework Decision overall have not yielded clarity on this point. However, evaluations spurred amendments related to new psychoactive substances (NPS), which reflects the framework's adaptability to evolve in relation to changing drugs markets. In communications with member states, the EC provisionally accepted home growing and cannabis associations for the collective cultivation of recreational cannabis (as they fall under article 2(2) of the 2004 Framework Decision) and does not seem to oppose time-bound pilot projects such as in the Netherlands and as envisaged in Germany. The EC has announced a forthcoming evaluation of the Framework Decision set to begin later this year.

***How likely is the European Commission to engage in infringement procedures against member states for non-compliance?***

The Commission is hesitant to engage in infringement procedures on contentious issues like cannabis regulation, preferring member states to navigate their own policies within existing legal boundaries. This reflects a pragmatic approach to maintaining EU cohesion and avoiding member states risking political capital. That said, other EU member states, regional and local authorities and concerned organizations or individuals can start infringement procedures.

***How does the Lisbon Treaty language impact the interpretation of the Framework Decision, and what uncertainties does it introduce?***

The 2008 Lisbon Treaty introduced in Art. 83 of the Treaty on the Functioning of the European Union (TFEU) the term "particularly serious crime with a cross-border dimension", that might affect the 2004 Framework Decision's interpretation.<sup>19</sup> Because the Lisbon Treaty is more recent, its application to the Framework Decision remains ambiguous without clear case law from the ECJ, highlighting ongoing legal uncertainties that necessitate careful further legal analysis.

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<sup>19</sup> Treaty on the Functioning of the European Union (TFEU) (2008), Article 83; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E083>

***Should EU member states ask the ECJ for a preliminary ruling on the ‘without right’ clause?***

The restricted ‘regulation-light’ model of decriminalization, home-grow, cannabis clubs and experiments is likely to postpone a direct confrontation among EU member states. At the same time, the Commission has made clear that a fully regulated cannabis market would conflict with EU law and likely lead to sanctions, putting pressure on countries to find sustainable legal solutions within a four/five-year timeframe. While some participants were optimistic that the ECJ would rule favorably in allowing EU member states to regulate, others were reluctant to take the issue to the ECJ. They argued that the future course in the EU regarding is increasingly a political issue rather than a legal one, and some form of political accommodation is necessary, rather than depending on the uncertain outcome of an ECJ ruling.

***Could Germany’s expanded medical market pave the way for a recreational use system, and what implications would this have?***

Germany’s approach maintains separation between medical and recreational markets to comply with international treaties, suggesting limited immediate impact on recreational legalization. This separation is in line with the drugs conventions and widely supported across all member states. However, over-the-counter medicine with certain THC level limits might ease tensions that result from the limited legal regulation in Germany, where home growing and cannabis grower clubs probably will not be able to supply the recreational market sufficiently. A step-by-step approach to test the limits of what is legally and politically possible is probably the most convenient way to go.

***How does the Schengen Agreement affect cannabis regulation, and what complexities does it introduce?***

The Schengen Agreement requires member states to respect international conventions, including the UN drug control treaties, which complicates cannabis regulation across borders. The Schengen Agreement underpins the EU’s principle of free movement across internal borders, meaning a mix of liberal and prohibitive cannabis policies across states could disrupt this principle. This adds another layer of complexity to the regulatory landscape between member states and the EU level.

***How do countries like Switzerland and the Netherlands handle reporting cannabis experiments to the INCB, and what compliance strategies do they use?***

Both countries are transparent in their dialogue with the INCB and provide information to the CND about their experiments. Switzerland justifies its pilot trials more in terms of scientific research, while the Netherlands stresses the temporary and experimental nature

of the pilot, rather than explicitly appealing to ‘scientific purpose’, reflecting that various justifications for compliance are possible.

*How does the legal and political interplay affect cannabis regulation, and what are the implications for policy development?*

Legal arrangements facilitate political decisions, with member states exploring policy options within legal boundaries. Significant changes require broad political consensus and potential legal revisions at the EU and/or UN level, underscoring the interconnected nature of legal and political factors.

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## **Session 3: Internal Market & International Trade**

The third session consisted of two prepared introductions and a round of questions and debates.

### **EU Laws on Cannabis – the Prohibition / Regulation Confusion**

#### **Multifaceted Nature of Cannabis**

Cannabis has numerous components, such as roots, seeds, stalks, leaves, flowers, resin, and oil, each used for various purposes including recreational, industrial, medicinal, food, cosmetics, and smoking products. This diversity complicates the regulatory landscape, as each use and component fall under different legal categories.

#### **Varied Classifications and Confusion**

There are varied classifications for cannabis products across the EU, which lead to a complex patchwork of regulations and their fragmented enforcement.

Where medicinal products are defined by their presentation for treating or preventing disease or by their physiological effects, requiring a license for sale, cosmetics, as defined by Regulation No. 1223/2009, must not contain substances listed in the 1961 Convention. Food products, according to Regulation (EC) 178/2002, must exclude narcotic or psychotropic substances.

These differing definitions create significant regulatory challenges and inconsistencies when certain cannabis-derived ingredients are used in cosmetic products, or in food products. Also, the exclusion of industrial purposes of cannabis (Art. 28.2) from the 1961 Single

Convention leads to misconceptions about safety limits, where the 0.3% threshold set by the EU for hemp cultivation is mistakenly applied to hemp-derived consumer products.

Another example of confusion is the Tobacco Products Directive 2014/40/EU, which provides a framework for regulating smoking products, including low-THC cannabis products. While this directive sets general standards, member states have some leeway to prohibit certain products to protect public health. As a consequence, a patchwork of regulations across the EU is observed in various categories related to cannabis regulation, creating inconsistencies and complications within the internal market.

### **Intellectual Property Rights Challenges**

The multifaceted EU regulations also impact intellectual property rights, particularly trademarks related to cannabis. Trademarks for illicit substances are often refused on public policy grounds across all member states. However, there is still potential for registration under different classes, such as cosmetics or pharmaceuticals, depending on the intended use. This shows that while there are common EU standards, the application of property rights can vary based on the product's classification and intended market.

### **Harmonizing EU cannabis regulation**

Given this complexity, there is need for clarity in EU regulations to avoid further market fragmentation. A more harmonized approach to cannabis regulation within the EU can be expected to benefit consumer safety, public health, and facilitate the free movement of goods. Nevertheless, so far, the available mechanisms for national discretion have not led to a harmonized regulatory environment.

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## **Psychomodulatory Substances & Scheduling Cannabis in Czechia**

### **Regulatory Framework for Psychomodulatory Substances**

The presentation first outlines the current Czech situation and the need for a new regulatory framework for psychomodulatory substances. A working group within the Czech government has been working on this concept since autumn 2021, with the goal of filling the regulatory vacuum that currently exists. The process has led to the development of the Act on Psychomodulatory Substances, which was adopted by the Chamber of Deputies on May 3, 2024, and is currently under notification by the European Commission. When accepted, its expected date of implementation is January 1, 2025.

## Two Proposed Categories of Psychoactive Substances

The basis for the new regulation is provided by the Law on Addictive Substances (167/1998 Coll.), which defines psychoactive substances and establishes the legal framework for the control of two substance categories:

1. **Listed Psychoactive Substances (LPS):** These are substances for which serious health and social risks cannot be excluded based on current scientific knowledge. They are included in a precautionary list and are only permitted for research purposes, not for trade or marketing.
2. **Psychomodulatory Substances (PMS):** These are new psychoactive substances and other psychoactive substances that do not pose a serious risk to public health or have serious social consequences. These could be traded and marketed legally for adult human consumption.

## Proposals for Rescheduling

Kratom and low-THC cannabis are the first candidates for inclusion under the new category of psychomodulatory substances. The regulation of these substances would include strict criteria for marketing, such as licensing systems, restrictions on sales (both physical and online), and bans on advertising and sponsorship. The substances must meet specific packaging and quality standards, including limits on active components and contaminants, and must provide adequate information for consumers.

A risk assessment allows for a thorough evaluation of their health and social risks before determining the final regulatory status of a substance. This process takes a maximum of two years, and allows the government to classify a substance as a psychomodulatory substance, a drug controlled by UN drug conventions, or remove it from any list altogether. New Psychoactive Substances (NPS) are temporarily scheduled as LPSs during the risk assessment phase.

## Challenges and International Context

It remains a challenge to align national regulations with international obligations, particularly under the Schengen Agreement and EU law. The extensive debate within the government about export regulations illustrates this complexity. Initially, the proposal allowed export under strict conditions, similar to those for narcotic and psychotropic substances. However, to prevent Czechia from becoming a distribution hub, the final bill includes an explicit ban on exports. As expected, this decision has also sparked debate over the compatibility with the principles of free movement of goods within the Schengen area.

### The Current Czech Cannabis Regulation

The presentation also covered the scheduling of cannabis in Czechia. The current legal framework includes three categories:

1. **Cannabis:** Listed in Schedule 3 of the Law on Addictive Substances, reflecting its classification as a dangerous substance despite recent rescheduling efforts.
2. **Medical Cannabis:** Introduced in April 2013, it falls under a special regime within Schedule 1, allowing for medical use.
3. **‘Technical’ Cannabis:** Defined in January 2021, this category includes cannabis from industrial hemp with up to 1% THC, exempt from the regime of controlled substances.

The proposed new category, ‘consumable cannabis’, which might fall under Psychomodulatory Substances, aims to regulate low-THC cannabis products, potentially allowing over-the-counter sales with strict conditions.

### Session 3: Discussion

*What happens if the UN schedules a substance that is regulated as a Psychomodulatory Substance (PMS)?*

If the UN schedules a substance, Article 2 of the 1971 Convention requires member states to comply within 180 days, but reservations can be made. This approach allows member states some flexibility in adapting international obligations to their specific regulatory frameworks. Under the 1961 Convention, however, UN scheduling decisions are binding without any flexibility for national exemptions. Moreover, the EU has committed to have a common position on CND scheduling votes since the outcomes will have an EU-wide impact.<sup>20</sup>

*Is it practical to use percentage-based definitions for THC content in cannabis products?*

The use of percentage-based definitions for THC content in cannabis products originates from agricultural hemp regulations but is problematic for consumer products. Using percentages fails to provide precise dosing information, leading to inconsistent information for consumers and complicating regulatory oversight, as showcased by the US market of ‘intoxicating hemp products’ mentioned earlier. It is suggested to use milligrams instead, as

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<sup>20</sup> An infringement procedure was triggered against Hungary for breaching the common position on the CND vote to remove cannabis from Schedule IV of the Single Convention; the EC referred the case in April 2023 to the ECJ ([Case C-271/23](#)).



this aligns better with medical and consumer product standards, providing clearer information on dosage and effects.

*What has been the EU Commission's response to Czechia's decision to cross the 0.3% THC threshold for cannabis?*

The EU Commission was not pleased with Czechia crossing the 0.3% THC threshold, but the proposal was properly notified, and there has been no formal objection.

*How are psychoactive energy drinks, such as those containing taurine and caffeine, classified and regulated?*

Psychoactive energy drinks are controversial and often fall under NPS regulations. These products are monitored for public health risks, and their classification can vary, but they generally face stringent regulatory scrutiny to ensure consumer safety.

*Can health claims be made for smoking products like pure cannabis joints?*

Health claims cannot be made for smokables under tobacco regulations, but pure cannabis joints might be an exception. However, this remains a contentious issue since existing health and safety regulations may be different across member states.

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## **Session 4: Flexibility of the UN Conventions**

The fourth session consisted of two prepared introductions and a round of questions and debates.

### **Cannabis and Flexibility of the UN Drug Conventions**

#### **A Diversity of Treaty Reinterpretations**

The green wave of cannabis legalization is reshaping the global landscape, but aligning national policies with international obligations remains complex. The political appetite for EU-wide treaty renegotiation, amendment, or de-scheduling cannabis remains very low. Instead, countries have explored various reinterpretations of the existing treaties; these approaches are often politically appealing but legally appalling.

Several proposals for treaty reinterpretation are discussed, starting with Germany's approach to interpret the drug control treaties to permit state-controlled legalization of recreational cannabis. The German government argues that its system aims to achieve the

UN treaties overarching goals of health, youth protection, and crime reduction. Because the drug control conventions have been consistently interpreted over the past 75 years to limit scheduled drugs to medical, scientific and certain industrial purposes, such reinterpretations are legally questionable.

Pointing to treaty provisions that allow controlled drugs for ‘scientific purposes’ in order to justify ‘experiments’ with adult use cannabis is legally tenuous. While the meaning of ‘scientific’ is not clearly defined, subsequent agreements and state practices have not supported a broad interpretation of the term.

On the question of whether the Single Convention’s exemption for drugs used in industry (Article 2.9) could justify recreational cannabis markets it is clear that both the original intent and subsequent practice have strictly limited this exemption, making it also an untenable basis for broad legalization.<sup>21</sup>

Finally, the argument that the constitutional conditionality in the 1961 Convention’s penal provisions (Article 36) could be applied to the treaty as a whole does not meet accepted standards of faithful treaty interpretation. This interpretation lacks support in both the text and state practice, rendering it legally unfounded, even more so since the 1988 Convention deliberately restricted the constitutional conditionality clause to be applicable to personal use-related offences only (Article 3.2).

### **Alternatives to Treaty Reinterpretation**

Underlying these examples of treaty reinterpretations, a broad trend of disintegration of cannabis regulation is observed across EU member states as well as globally. Individual states seem to increasingly pursue regulatory models suiting their own needs without actively engaging with other governments to resolve the resulting tensions with international drug control legislation. The questionable nature of suggested reinterpretations has led to exploring a range of alternative options, more consistent with international law principles but facing considerable political obstacles:

1. **Denunciation and re-ratification with reservations:** Although the precedent set by Bolivia of exiting and re-entering the Single Convention with a reservation for coca leaf is legally viable, it requires active state participation and political will, which has been lacking for cannabis.

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<sup>21</sup> See also on this issue: Martin Jelsma, David Bewley-Taylor, Tom Blickman & John Walsh, *A House of Cards. ‘High compliance’: A legally indefensible and confusing distraction*, TNI Longread, 29 April 2022; available at <https://www.tni.org/en/article/a-house-of-cards>

2. **Inter se agreements:** The potential for inter se agreements, where a group of like-minded countries could modify their treaty obligations among themselves without affecting non-participating states, is legally viable but requires careful coordination to avoid external impacts and ensure compliance with broader treaty objectives.
3. **Human rights obligations:** Using human rights obligations to trump drug control treaties is legally appealing but politically challenging. The distinct regulatory systems of the Vienna and Geneva conventions complicate this approach, making it not straightforward to achieve substantive changes.

### **The Role of International Law**

Amidst this trend of disintegration, the importance of upholding international law and interpreting treaties in good faith is stressed. While politically appealing arguments might offer short-term solutions, they risk undermining the broader international legal order and global governance.

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## **Options and Limits of Interpretation**

### **Interpretation as an Art**

As an opening statement, it is emphasized that interpretation is an art, not an exact science. As a primary principle for legal cannabis regulation, the ‘Crucible Approach’, where all relevant elements are considered to arrive at a legally sound interpretation, is considered crucial. This approach involves understanding the hierarchy within Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).<sup>22</sup> Article 31 provides the general rule of interpretation, while Article 32 offers supplementary means. The interpretation process is not sequential but integrated, allowing interpreters to consider supplementary means at any point.

### **Evolutionary Interpretation & Principle of Contemporaneity**

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22 The 1969 Vienna Convention on the Law of Treaties is available here [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)  
For background on the ‘Crucible Approach’ see also: UN Conference on the Law of Treaties: Official Records: Documents of the Conference, A/Conf.39/11/Add.2, 39, at para. 8.  
<https://digitallibrary.un.org/record/683273>

In light of the recent trend of treaty reinterpretations, the tension between evolutive interpretation and the principle of contemporaneity is discussed. Treaties must be interpreted according to the meaning of their terms at the time of conclusion. However, treaties can also evolve based on the evolution of facts (e.g., medical and scientific advancements, societal changes) and the evolution of law (e.g., international law, customary law, domestic law). The intention of the parties and the object and purpose of the treaty are also crucial in guiding this interpretation.

Several legal bases for evolutive interpretation can be identified. The primary aim is to reflect the parties' original intentions and the treaty's objectives. This interpretation can be informed by generic terms, human rights provisions, and subsequent agreements and practices, as long as they align with the treaty's original purpose. This indicates that interpreting treaties in an evolutive manner is theoretically possible granted the objectives and the parties' original intentions remain intact.

### **The Most Viable Way Forward**

In comparing the options for moving forward with cannabis regulation a hierarchy can be identified. The systemic integration, under Article 31(3)(c) of the VCLT, can be seen as the most promising approach. This option allows for a systemic interpretation of treaties by considering relevant rules of international law more broadly. It promotes a harmonious integration of human rights treaties with drug control conventions. There is recent international jurisprudence supporting this approach, highlighting its potential for creating a more flexible and adaptable legal framework. While this approach requires substantial legal work and preparation, it is considered the most promising due to its ability to integrate various international obligations and promote coherence in international law.

Subsequent agreements and practice, under Articles 31(3)(a) and (b) of the VCLT, also provide a viable option. These provisions allow for the interpretation of treaties based on subsequent agreements and practices among the parties, reflecting their evolving intentions and adapting to new realities. However, demonstrating clear evidence of consistent practice and agreement among the parties can be challenging.

## **Session 4: Discussion**

*How do human rights obligations coexist with drug control systems, particularly under the UN drug conventions?*

Integrating human rights into drug control requires specific, well-substantiated arguments. It is highlighted that the concept of systemic integration, which considers all relevant rules of international law, including human rights, can be used to achieve a coherent interpretation. However, it must be acknowledged that while the ECJ might favor a human rights-based approach, a solid jurisprudence must be presented.

***What is the political feasibility of treaty reinterpretation and the potential for countries to follow Bolivia's example of exit and re-entry with reservations?***

The Bolivia option worked for coca, and it may work for cannabis, but this is not proven yet. Such a move would require significant political capital and coordination among states, which has not taken place so far. However, legally it would be possible. The chances of success would depend on the amount of active objection it would prompt from other states. Employing that procedure would be lengthy and complex, and the costs in political capital of such a move must be thoroughly considered and weighed against the benefits. Opposition from other member states can be expected, but whether opponents would be able to amass enough objections and reach the required  $\frac{1}{3}$  of parties to the treaty to block treaty re-accession is not clear. With the challenges the USA now faces with their own lack of treaty compliance due to the federal government's inability to roll back state-level cannabis legalization, the USA might not lead a coalition to object to the option as it did in the case of Bolivia and the coca leaf. But countries such as Russia would likely lead a robust campaign in an effort to derail the procedure and increase its political costs.

***What is the concept of 'respectful non-compliance' in relation to drug control policies?***

Notably, the drug control conventions lack a formal review mechanism, unlike other more modern international treaties. This gap allows for diverse interpretations, where effectiveness can be seen either as making provisions meaningful or adopting the most protective interpretation. Respectful non-compliance, therefore, falls somewhere between adhering to international obligations and implementing deviating national policies.

***How likely is an inter se modification of the 1961 Single Convention?***

Like the Bolivia option, an inter se modification requires effectively taking steps by some of the parties to the convention, which so far none seems willing to do. It is even more controversial than Bolivia's denunciation and re-ratification with reservations. While the Bolivia option is now accepted and based on provisions in the Single Convention itself, an inter se is based on the VCLT and thus has potentially more far-reaching implications for other conventions and for the international treaty system as a whole. Inter se is, by definition, a procedure that requires at least two like-minded states. The more states that

are involved, the more the political risks can be shared and the greater the likelihood of success. But initiating inter se would require considerable coordination among multiple states to effectively strike an agreement that does not affect the object and purpose of the treaty, and does not harm other jurisdictions (otherwise this creates a reason for them to object). As distinct from the Bolivia option of exiting and re-acceding with reservations, there is no formal mechanism whereby a certain number of objections could block an inter se agreement from moving forward. An inter se within the EU might be feasible since non-EU members would not be able to do much about it. In case of a ECJ ruling that the 'without right' clause in the 2004 EU Framework Decision would allow for a legally regulated recreational cannabis market, which would create a conflict with the Single Convention, the ECJ could be on the interpretation that the 2004 Framework Decision would effectively be an inter se agreement, also considering the fact it explicitly allows EU member states to legislate nationally when offences are committed by its perpetrators exclusively for their own personal consumption, which is already a more unambiguous interpretation of the provisions in the 1961 and the 1988 conventions.

*How can drug control obligations be linked with broader international commitments, such as climate and biodiversity?*

A systemic integration could create space for more holistic approaches, addressing drug policy alongside ecological and human rights concerns. This integrated perspective could provide a stronger foundation for countries seeking to reform their drug policies in line with contemporary global challenges.

*What is the practical application of constitutional exceptions in drug policy, particularly in the USA?*

In the USA, constitutional exceptions in drug policy are often invoked through states' rights to legislate independently of federal drug control laws. This has led to a situation where states can legalize cannabis for medical or recreational use despite its federal prohibition. The practical application of these exceptions fits the broader trend of legal disintegration, where individual states pursue their own drug policies, resulting in a patchwork of regulations.

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## Session 5: Future Scenarios

During this session the participants discussed four potential future scenarios for cannabis regulation in Europe over the next five to ten years. The options presented were Regulation Stalemate, Legal Exemption, Political Accommodation, and Global Breakthrough (see below). The aim was to determine which scenario is most and least likely to occur based on current political and legal trends in Europe and globally.

## *Scenario I*

# Regulation Stalemate

No solution can be found for the obstacles in EU law and UN treaties, and the aspirations of a number of countries to move to a fully regulated cannabis market grind to a halt. EU infringement procedures and a negative ECJ ruling, in combination with changing national political conditions (influenced by new elections) frustrate the full implementation of the experiments and a subsequent nation-wide roll-out.

### *Influencing factors*

- European Commission position
- European elections (June 2024)
- Infringement procedures
- ECJ ruling

**Result:** the currently unfolding model of a more restricted European cannabis policy reform, based on decriminalisation, home growing and non-commercial associations, consolidates and becomes the new norm in an increasing number of EU states.

## Scenario II

# Legal Exemption

A group of like-minded EU states apply for new reservations or 'inter se' agreements under the UN conventions, and on that basis claim that the legal regulation of their cannabis markets fall within the existing exemptions under EU law. It would no longer be implemented 'without right' in terms of the 2004 Framework Decision, and no longer be 'illicit' drug trafficking under the Schengen and EU implementation agreements.

### **Influencing factors**

- European Commission position
- Infringement procedures
- ECJ ruling
- EU external mandate
- EU common market rules

**Result:** co-existence of different control regimes for non-medical cannabis within the EU, similar to the existing different regimes for medical cannabis, CBD products, kratom or snus, all currently allowed in some EU countries while still prohibited in others.

## Scenario III

# Political Accommodation

Under pressure of a growing group of like-minded countries and influenced by positive outcomes of the local experiments and cannabis developments elsewhere (f.ex. federal regulation in the USA), discussions at EU level in the coming years lead to political accommodation and/or amendments in EU law (f.ex. evaluation of the 2004 Framework Decision) leads to a clarification of the "without right" clause) allowing countries to move forward with legal regulation. Resolving global legal tensions caused by non-compliance with the UN treaties is left to further discussions with a broader group including non-EU countries with the same dilemma.

### **Influencing factors**

- EU like-minded coordination
- Outcomes of experiments
- Evaluation / review Framework Decision 2004/757/JHA
- Negotiation Council / Horizontal Working Party on Drugs (HDG)
- National elections
- International developments

**Result:** amendments in EU law are agreed by qualified majority that enable countries to move forward with legal regulation without the risk of infringement procedures. Co-existence of different control regimes.



## Scenario IV

# Global Breakthrough

EU countries, facing a legal stalemate at EU level, promote strategic discussions with the expanding group of non-EU like-minded countries to force a breakthrough at the global level. Possible outcomes: reinterpretations, amendment or ensuing treaty proposals based on human rights, health, and security imperatives; new reservations or ‘inter se’ modification or temporary suspension of cannabis-related UN treaty obligations.

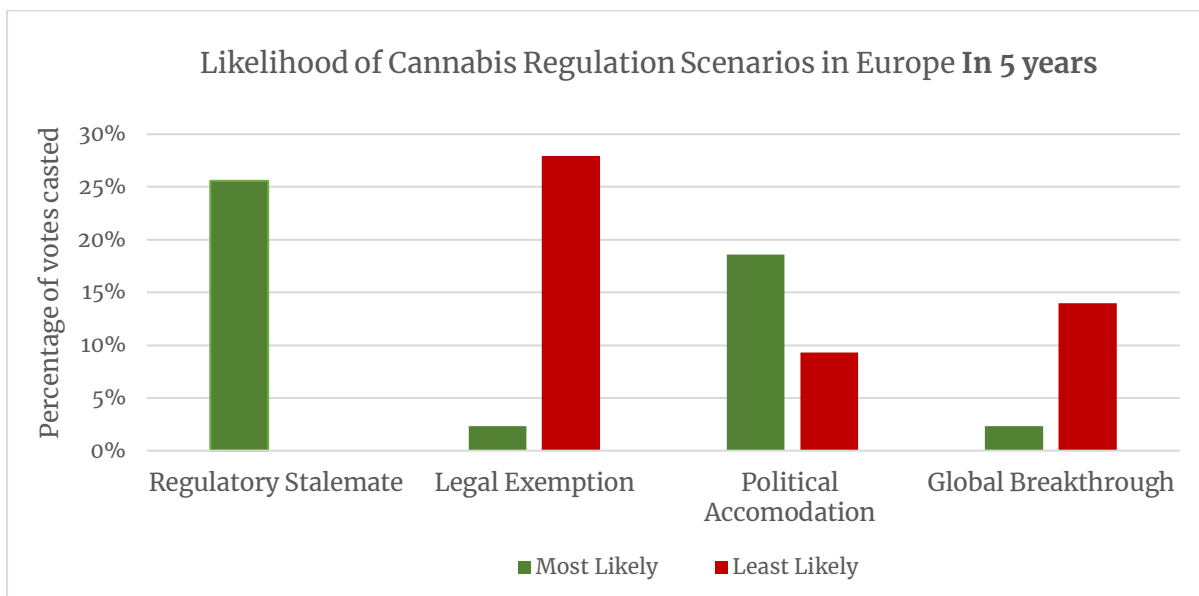
**Result:** worldwide more countries move forward with legal regulation; further polarisation of the cannabis policy debate at the UN and EU increases the pressure to find agreeable political accommodations, exemptions, or legal solutions in the longer term.

### Influencing factors

- Global like-minded coordination
- Federal regulation in the USA
- Developments in Colombia, Mexico, Caribbean
- Advances in Africa & Asia
- Solid basis in international law
- Opposition other treaty Parties
- INCB mandate - Article 14
- Potential ruling International Court of Justice (ICJ)

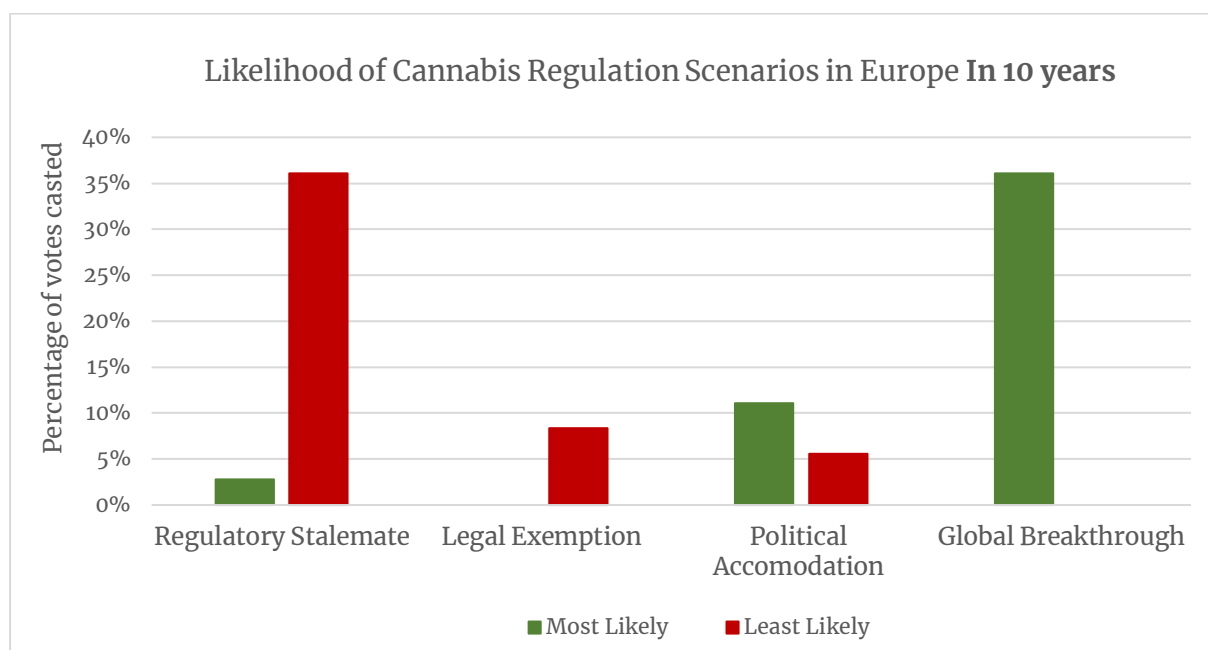
### Most Likely Scenarios

Participants were asked to vote which scenario they considered to be the most and the least likely to unfold in the next five and ten years. The voting results (see below) indicate that the Regulation Stalemate scenario is considered the most likely in the next five years.



Participants believe that in the short run no comprehensive solution will be found for the legal and political obstacles within the EU and UN frameworks, causing aspirations for a fully regulated cannabis market to stall. Factors influencing this outcome include the European Commission’s position, results of European elections, potential infringement procedures, and ECJ rulings. This scenario suggests that the current model of decriminalization, home grow, non-commercial associations and temporary controlled experiments with recreational cannabis will become the most viable option for the next five years.

For the ten-year outlook, however, the Global Breakthrough scenario becomes the most likely, reflecting a longer-term optimism. This scenario envisions EU countries pushing for global discussions with non-EU like-minded countries, potentially leading to treaty reinterpretations, amendments, or new treaties based on human rights, health, and security imperatives. Influencing factors include global coordination, federal regulation developments in the USA, and significant advances in cannabis policy in other regions like Colombia, Mexico, the Caribbean, Africa, and Asia.



### Least Likely Scenarios

The Legal Exemption scenario is seen as the least likely in both the five-year and ten-year projections. This scenario involves EU states applying for new reservations or inter se agreements under the UN conventions to claim that legal regulation of their cannabis markets falls within existing EU law exemptions. The primary barriers to this scenario include the complex relationship between EU and UN law, the need for a clear definition of

EU competence, and the current lack of political will among member states to pursue such exemptions.

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## **Session 6: Wrap-Up and Conclusions**

At the final session one of the participants summarized the key trends and conclusions from the two-day seminar and invited everyone to raise issues they felt had not been sufficiently addressed. The significant progress made over the past 20 years, transitioning from advocacy and protests to policy design and implementation globally was emphasized. Over half a billion people now live in jurisdictions where some form of cannabis regulation is either in place or being implemented. This shift is part of a broader demographic and political trend towards reform, driven by the realization that international law must evolve to accommodate these changes or risk becoming obsolete.

Further, there remains a high level of unpredictability in reform timelines, illustrated by the recent setback in adult-use cannabis regulation in Thailand. While there might be backwards movements towards punitive approaches, the overall trend globally remains towards more liberal cannabis policies. This trend is supported by a growing recognition of the need for international law to adapt to national reforms, ensuring that legal frameworks remain relevant and effective.

Lastly, the importance of collective action and cooperation among EU member states to reduce the political and diplomatic costs of reform was emphasized. Civil society plays a crucial role in maintaining institutional memory and providing expertise, particularly as government officials often transition quickly to other areas. As drug policy increasingly intersects with human rights, environmental sustainability, and social equity, the role of civil society becomes indispensable. Their involvement ensures continuity, informed debate, and a comprehensive approach to policy reform, making them vital contributors to the evolution and implementation of effective drug policies.

## **Session 6: Discussion**

### **International Trade and Global Markets**

Participants recognized the complexity of harmonizing national cannabis policies with international trade rules. The need for a balanced approach that supports small growers and prevents exploitative practices was emphasized. There was also discussion about the poten-

tial for international trade agreements to inadvertently perpetuate historical inequities, highlighting the importance of integrating sustainable development goals into cannabis policy, to ensure that traditional illicit growers from the global south will have fair opportunities to access the emerging licit cannabis market, which has not taken place so far.<sup>23</sup>

### **Unified Group vs. Individual Trajectories**

The debate highlighted the challenges of forming a unified stance among like-minded EU member states due to differing national priorities and political contexts. Some participants suggested that countries should support each other's individual paths towards reform rather than striving for a uniform group approach, which often results in wasted energy and diluted outcomes.

### **Coordination and Communication Platforms**

To facilitate ongoing collaboration and information sharing, there was a call for better communication platforms among EU states and globally. Tools like Basecamp were suggested for real-time technical assistance and resource sharing, ensuring that countries can support each other effectively and maintain momentum in cannabis policy reform.

### **Global South and Traditional Growers**

The discussion addressed the need to involve countries from the Global South in the cannabis reform conversation to counter the trend that newly regulated markets exclude traditional growers from lucrative markets, and thereby perpetuate economic disparities. Participants advocated for a more inclusive approach that considers the historical and socio-economic contexts of these regions.

### **Data Collection and Research**

The need for robust data collection and research to inform evidence-based policy decisions was underscored. Participants called for increased funding for cannabis research, covering various aspects from medical benefits and risks to social and economic impacts. This data-driven approach is seen as crucial for the ongoing development and refinement of cannabis policies.

### **Expanding Drug Market Regulation beyond Cannabis**

Participants discussed the importance of not focusing solely on cannabis, as it is considered one of the least problematic substances. Regulation scenarios for other drugs like MDMA,

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23 On this issue, see Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez Rivera & Dania Putri, [A Sustainable Future for Cannabis Farmers](https://www.tni.org/files/publication-downloads/2021_sustainablefuture_web.pdf). 'Alternative Development' Opportunities in the Legal Cannabis Market, Transnational Institute (TNI), April 2021; [https://www.tni.org/files/publication-downloads/2021\\_sustainablefuture\\_web.pdf](https://www.tni.org/files/publication-downloads/2021_sustainablefuture_web.pdf)

psychedelics or more dangerous substances should also be explored to mitigate harms related to drugs markets effectively. This broader approach would require rational and strategic policymaking, acknowledging the varied starting points and political landscapes of different countries.

### **Cannabis as a Gateway to Broader Drug Policy Reform**

The conversation acknowledged that successful cannabis regulation could pave the way for broader drug policy reforms. However, concerns were raised about the lack of social safety nets and harm reduction services, particularly in the USA, which could hinder the effective implementation of such reforms. The importance of learning from past setbacks, such as the reversal in Oregon’s decriminalization efforts, was emphasized in order to raise the chances that reforms can withstand political attacks and have the time and resources needed to be fully implemented and properly monitored and evaluated.

### **Environmental Impact and Sustainability**

The environmental implications of cannabis cultivation and production were discussed, with a focus on sustainable practices. Participants highlighted the need to integrate environmental sustainability into cannabis policy, considering factors such as water usage, energy consumption and the carbon footprints of indoor vs. outdoor cultivation, and the impact of illicit cultivation on protected areas.

### **Corporate Capture**

Concern was expressed about the increasing involvement of multinational companies, particularly from the tobacco and alcohol industries, in the cannabis market. The threat of corporate capture necessitates discussions on protecting small businesses and addressing the harms of the ‘war on drugs’ at an international level. A broad spectrum of approaches such as preferential trade conditions, restrictions on foreign investment or anti-trust rules are explored by some governments.

*Annex 1*



***Cannabis regulation, EU drug law, trade rules and the UN drug control treaties***

***Expert seminar: 17 – 18 June 2024, Amsterdam***

***Discussion Note***

***State of affairs***

Five European Union (EU) countries are considering or have taken initial steps to legally regulate the recreational or ‘adult use’ cannabis market. Luxembourg (in November 2018) and Germany (in November 2021) initially announced their intentions to establish fully regulated markets, similar to the ones existing in Uruguay, Canada and an increasing number of States in the USA. Confronting obstacles in EU legislation, however, both countries decided to scale back their original plans to the decriminalisation of possession and home cultivation for personal use. After national elections in 2023, a new coalition government in Luxembourg, now including the more conservative Christian Democrats, decided to maintain the limited reforms, but also not to progress any further towards a regulated market. Meanwhile, Malta opted from the start for a non-commercial model, with decriminalisation, home grow and cannabis associations.

In Germany collective growing by cannabis cultivation associations will also be allowed (known as Pillar 1), and pilot projects with legal production and sales in selected cities or Länder have been announced as a second step to commence at a later date (Pillar 2). Similar local ‘experiments’ will start in ten cities in the Netherlands in June 2024, while two cities already started in a preliminary phase in January 2024. Switzerland has started local experiments as well, and though not an EU member, the country is part of the Schengen area. In Czechia a draft bill in April 2023 envisioned the introduction of a strictly regulated cannabis market. The bill was originally supposed to address taxation, rules for legal cultivation, the functioning of cannabis clubs, and licensed sales and exports. Ultimately, however, the legislation will probably only include self-growing due to opposition of the leading party of the government coalition. New rules for dealing with substances such as kratom and CBD cannabis with a low content of the active ingredient THC were approved by Czechia’s Chamber of Deputies in May 2024. The ‘Act on Psychomodulatory Substances’ could come into force on the 1<sup>st</sup> of January 2025, [pending approval of the Senate and the European Commission](#).

The European Commission (EC) has followed these developments closely. The Commission immediately contacted the Luxembourg government in 2018 when the intention to fully regulate the recreational cannabis market was announced. The EC Directorate-General for Migration and Home Affairs, whose Organised Crime and Drugs Policy Unit oversees communal drug policy issues, made it clear that Luxembourg's plans were not in conformity with international and EU law and that only measures exclusively for the purpose of personal consumption were allowed in national legislation. The EC also warned of possible infringement procedures. Germany sought to engage with the EC before a formal notification of its draft legislation. However, the EC left no doubt that a law based on the key points (Eckpunkte) of Germany's proposal shared with the Commission would have to be rejected. The EC also signalled that there would be no obligation to notify the EC if Germany were to limit its intentions to the decriminalisation of consumption and possession, as well as the home cultivation of cannabis for personal use.

The first German 'Eckpunktepapier' included an unpersuasive 'interpretative solution'. Germany's second proposal and key points acknowledged legal difficulties, announced the separation in two phases, and noted that Germany will stimulate a debate at European level "*to make the relevant EU legal framework more flexible and further develop it in the medium term*", aiming for changes that could enable advancing with the experiments. The law proposal argues that Pillar 1 fully complies with UN treaties and EU law. Regarding next steps, Germany's proposal relies heavily on the exemptions for personal use in the [1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#) (Art. 3.2) and [Germany's declaration of understanding](#) when ratifying the treaty that the basic concepts of its legal system could evolve—suggesting that such an evolution could also provide a justification for future regulation. Germany also argues that the UN treaties focus on illicit international trafficking and Germany commits to fully comply with those obligations.

As things stand now, the EC also seems to accept cannabis associations for the collective cultivation of recreational cannabis and does not oppose time-bound pilot projects such as in the Netherlands. The legal justification for those experimental pilot projects is primarily based on their 'experimental, scientific, temporary and reversible' nature, alluding to the 'general spirit' of the conventions to protect public health and welfare.

### **Legal obstacles**

A much-anticipated European breakthrough in cannabis policies, especially after the announcement of the original German plans, has thus slowed and scaled back considerably in the face of obstacles in EU and international law. At the European level, the principal problems arise from the [2004 Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking](#) and rules around the open market, especially within the borderless Schengen area.

Legal regulation of cannabis markets for recreational use contravenes certain UN treaty obligations and conflicts with correlated EU law. The [1961 UN Single Convention on Narcotic Drugs](#) limits the use of the flowering tops and resin of cannabis "exclusively to medical and scientific purposes" (Art. 4) and "subject to its constitutional limitations", each Party should take measures to ensure that cultivation, production, sale, possession, etcetera, "shall be punishable offences when committed intentionally, and serious offences shall be liable to adequate

punishment particularly imprisonment or other penalties of deprivation of liberty” (Art. 36). The Single Convention does not apply to the cultivation of the cannabis plant “exclusively for industrial purposes” (Art. 28.2), or to cannabis leaves and seeds. THC cannabinoids are controlled under the [1971 UN Convention on Psychotropic Substances](#), either synthetic or extracted from the plant. The 1988 Convention focuses on illicit trafficking and reinforces the obligation to criminalise, including by removing the previous ‘escape clause’ in the 1961 treaty about ‘constitutional principles’. When it comes to the obligation to criminalise possession, purchase or cultivation for *personal use*, however, the escape clause is upheld and even broadened out to “subject to its constitutional principles and the basic concepts of its legal system” (Art. 3.2), allowing Parties some leniency when offences related to personal use are concerned. The 1988 Convention also devotes a special article to prevent illicit cultivation of cannabis and obliges Parties to eradicate cannabis plants cultivated illicitly in its territory (Art. 14.2).

EU law builds upon the UN drug control conventions with a clear focus on illegal cross-border trafficking and strengthening controls on the external borders of the Schengen area. The 1990 [‘Convention implementing the Schengen Agreement of 14 June 1985’](#) contains a special chapter on ‘Narcotic Drugs’ (Chapter 6, Art. 70-76) and obliges the Parties to “adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking” in drugs (Art. 71.1) and “undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances” (Art. 71.2). Although the 1985 Schengen Agreement mentioned ‘narcotic drugs’ as one of three policy areas where Parties “shall seek to harmonise laws and regulations” (Art. 19), drug policy has remained a domestic domain to a large extent within the EU, ranging from strict zero tolerance in Sweden to lenient policies in the Netherlands allowing the sale of limited amounts of cannabis in the (in)famous coffee shops.

Nevertheless, attempts to legally regulate cannabis have led to conflicts in the EU, notably when the Dutch government in the mid-1990s expressed its intention to end the discrepancy between permitted sales at the coffeeshops’ front door and the illicit supply at the back door. In response, France initially threatened to refuse to implement the gradual abolishment of border checks agreed upon in the Schengen agreement. According to France, the Netherlands violated the provisions of Art. 71.2 of the 1990 Schengen implementation agreement. In the fierce debate, the Netherlands was labelled a narco-state and France insisted on an ‘action commune’ to further harmonize drug policies at the EU level. The drive for harmonization resulted in [EU Joint Action 96/750/JHA](#) of 17 December 1996 concerning the approximation of the laws and practices to combat drug addiction and to prevent and combat illegal drug trafficking, requiring that: “Member States shall ensure that their obligations under the United Nations Conventions on narcotic drugs and psychotropic substances of 1961, 1971, and 1988 are applied strictly and effectively” (Art. 7). Formally, 96/750/JHA was repealed in 2016 because it became obsolete after the entry into force of several other instruments, including the EU Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. The Framework Decision, however, was meant to be “entirely in keeping with the spirit of the Joint Action” according to its Explanatory Memorandum.



In the 2004 Framework Decision EU Member States agreed to take the necessary measures to ensure that “the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs”, as well as “the cultivation of opium poppy, coca bush or cannabis plant” is punishable “when committed without right” (Art. 2.1). The listing of punishable conduct is copy-pasted from the 1988 UN Convention. The Framework Decision makes clear that the conduct described “shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law” (Art. 2.2). Decriminalisation of cannabis for personal use can thus easily be justified under the 2004 Framework Decision, and in fact the wording suggests that not only possession, purchase and cultivation, but also import would fall outside of the scope of the Framework Decision if undertaken for personal consumption, including arguably distribution in a collective setting by members of a social club.

One of the main problems to resolve to reach a final agreement was the Dutch determination to continue to allow the possession of small quantities of cannabis and its tolerated sale in coffee shops. The solution was in part found by inserting in Article 3.2 that a “Member State may exempt from criminal liability” the attempt to offer, prepare or possess drugs including when intended for sale and distribution, allowing the Dutch tolerance policy of non-prosecution of the coffeeshops to continue. A legally regulated cannabis market with state-licensed cultivation and sales to adults for non-medical use, however, clearly falls within the scope of 2004/757/JHA (Art. 2.1) and would constitute a breach “when committed without right”.

#### **Without right**

According to [Van Kempen and Fedorova](#) it can be argued that the “without right” clause does allow for the introduction of a national licensing system for cultivation, distribution, and sale of cannabis for recreational purposes. An authorization under such a licensing system would indeed provide for a “right” in the meaning of Article 2(1) Framework Decision, while it would not go against its purpose, provided that several conditions are met: the licensing system may not result in, for example, cross-border effects or the hindering of transnational cooperation in combatting cross-border drug trafficking. Whereas the preparatory history with its long and difficult deliberations on the wording of the Framework Decision 2004/757/JHA points in the direction of a more limited understanding of the scope of the “without right” clause, lacking any explicit statements or declarations, the exact intention of state parties is difficult to construct. The EU Court of Justice has not addressed the interpretation of the “without right” clause to date. Moreover, in light of the general rule of interpretation, the ordinary meaning of the terms of an instrument in their context and in light of its purpose is of more significance than the preparatory history of that instrument. But even in the preparatory history there are elements that might indicate a wider understanding. In its [proposal for Framework Decision 2005/222/JHA on attacks against information systems](#), which was negotiated at the same time, the Commission stated that “without right” was *‘a broad notion, and leaves some flexibility to Member States to decide the precise scope of the offence. Nevertheless, to assist in the implementation of the Council Framework Decision in domestic laws, the Commission believes that it is necessary to indicate that certain activities should not fall within the scope of the offence. It is not possible, and probably not desirable, to draw up a comprehensive,*

*exclusive list of exemptions at the level of the European Union. But the phrase "without right" builds on the previous definitions so as to exclude conduct by authorised persons. **It also excludes any other conduct recognised as lawful under domestic law**, including standard legal defences and other types of authority recognised in domestic law.'*

One could argue that when an EU Member State would introduce a law to legally regulate recreational cannabis at the national level, that would lift the "without right" impediment since it would in that case be "within right". However, such a move would contravene that Member State's obligation under the 1961 Convention and the EU requirement to adhere to the UN drug control conventions. In other words, to introduce national legislation for a regulated recreational cannabis market an EU Member State also needs to address its obligations under the UN conventions. Non-EU states that have introduced legally regulated recreational markets, such as Canada and Uruguay, have so far eluded serious consequences of their violation of international law other than being "named and shamed" by the International Narcotics Control Board (INCB), the treaty body mandated to monitor compliance with the 1961 and 1971 conventions. Theoretically, persistent non-compliance could lead the INCB to recommend an embargo of international trade in controlled medicines with the defecting country. In practice, however, the Board has never taken such extreme measures and it is unlikely to happen in the case of cannabis regulation.

An important difference between the UN drug control conventions and EU drug legislation is that formal complaint procedures and sanction mechanisms have a much stronger basis under EU law, and breaches can bring more immediate and more serious consequences. The effective application, implementation and enforcement of EU law is a responsibility entrusted to the European Commission by Article 17(1) of the Treaty on European Union. In comparison with the INCB, the EC can more easily initiate [infringement proceedings](#), acting on its own initiative or in response to a complaint from an EU member state, or (under certain circumstances) even from citizens, businesses, or other stakeholders. Such proceedings are quite common, especially regarding Single Market legislation (environment, transport, energy, or tax issues), but have also been initiated to enforce respect for LGBTQ+ rights, independence of the judiciary or freedom of the press.

The legal conflict with EU law can, therefore, only be resolved by derogating from cannabis obligations under the UN drug conventions; only then can EU Member States claim that cannabis regulation is no longer "committed without right". An additional compelling argument for an urgent solution is that some form of international legal arrangement is needed to enable trade between regulating countries. It will be very difficult if not impossible, for example, to supply the huge German cannabis market only from newly created domestic sources.

In order to regulate recreational cannabis without contravening their obligations under the UN drug control conventions, states can choose to: (1) exit entirely from the UN drug control conventions; (2) deviate from the obligations of the UN conventions, justified on the basis of fulfilling their positive human rights obligations; (3) create 'inter se' agreements between like-minded states that deviate from the UN conventions; or (4) denounce and exit the UN drugs conventions and re-accede subsequently with a reservation allowing for regulation of recreational cannabis. While the first option—complete drug treaty exit—probably boils down to

diplomatic suicide, a combination of the last three options might provide the best option to move forward. An additional obstacle for the denounce and reaccede option (the ‘Bolivia route’) is that several countries formally registered objections when Bolivia employed this option to obtain a new treaty reservation regarding the coca leaf. All G-8 members objected back in 2013 (so including the USA, Canada and Germany), plus Finland, Ireland, Israel, Mexico, Netherlands, Portugal, and Sweden. Mexico (in 2018) and The Netherlands (in 2023) have already withdrawn their objections and other countries should consider doing the same if they want to keep this option open for the future to resolve their legal conflicts.

## **Ten Guiding Questions**

### **1) Amending the 2004 Framework Decision**

What would be the procedure for amending the 2004 Council Framework Decision (2004/757/JHA)? Changes can be adopted by a [qualified majority](#) of the Council, which requires 55% of Member States (15 out of 27) representing 65% of the total EU population. What are the mandates with regard to such a procedure of the Council Members, the Commission and the European Parliament? Can each of those submit proposals for amendments, or only the Commission? Are there any possibilities at all for Member States to apply for exemptions based on public health priorities? The [EU Road Map to fight drug trafficking and organised crime \(COM/2023/641\)](#) mentions (on p. 16) that the Framework Decision will be evaluated in 2024: “The rules, especially those on criminal sanctions, could be amended, modernised and strengthened.” The [EU Drugs Action Plan 2021-2025](#) also refers to “a study assessing the effectiveness” of the Framework Decision, “with a view to amending possibly outdated aspects and strengthening areas as needed, including the provisions on NPS”.

### **2) Infringement procedure**

What is the discretion of the Commission regarding deciding to initiate, or not, an infringement procedure? It seems that there is an informal agreement that ‘experiments’ can go ahead without the Commission initiating an infringement procedure. Initially, the Commission did request explanations about the Dutch experiment under the [EU Pilot mechanism](#), but the Commission abstained from stepping up the ladder from the stage of informal dialogue to formal infringement. Especially after Germany announced it would move in a similar direction, the current Commission apparently decided to avoid a direct confrontation and to leave the issue to the new Commission to be established after the June 2024 European elections. But what happens if another EU country or a sub-national authority such as Bavaria that is opposed to any steps in the direction of cannabis regulation in Germany, still pressures to start such a procedure or wants to bring the case to the European Court of Justice (ECJ)?

### **3) The role of the ECJ**

The restricted ‘regulation-light’ model of decriminalization, home-grow, cannabis clubs and experiments is likely to postpone a direct confrontation, and bring about a pause for the next four or five years. At the same time, the Commission has made clear that a fully regulated cannabis market would conflict with EU law and likely lead to sanctions, putting pressure on countries to find sustainable legal solutions within that timeframe. What role could the ECJ play to prepare for

that moment or to assist countries that wish to jump the experimental queue by adopting a legally regulated cannabis market? Could an intervention or infringement procedure from the Commission or other EU Member States be pre-empted by taking the issue directly to the ECJ? National courts can ask the ECJ for a [preliminary ruling](#) to clarify a point concerning the interpretation of EU law or to “seek the review of the validity of an act of EU law”. Member States can also appeal to the Court to seek “the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union”. Could the ‘[opinion procedure](#)’ established by Article 218(11) TFEU, granting the ECJ jurisdiction with regard to international agreements, perhaps be used to request a Court opinion about the compatibility of international drug control obligations with fundamental rights in primary EU law? Any of these procedures would prompt the Court to give its opinion on the interpretation of EU law in the field of drug control and could determine the future course of action. Would it be too risky to ask for an ECJ ruling or opinion under current circumstances and without any prior changes in EU or treaty law? Or might the ECJ be able to play a transformative role by taking a more positive attitude towards drug policy changes based on health and human rights arguments? How much influence could the changing perspectives on cannabis regulation and the progressive positions recently coming from the UN human rights system have on ECJ opinions?

#### **4) Scheduling decisions**

How far does the EU mandate go with regard to scheduling decisions? In principle, the EU has committed to have a common position on CND scheduling votes, and an infringement procedure was triggered against Hungary for breaching the common position on the recent CND vote to remove cannabis from Schedule IV of the Single Convention. After an unsatisfactory EU Pilot procedure, the EC referred the case in April 2023 to the ECJ ([Case C-271/23](#)) where it is now awaiting a final ruling. But what happens if a consensus cannot be found (f.ex. no common position could be reached on the whether to support or oppose the Bolivian coca reservation). Has reaching a common position on scheduling decisions become mandatory, and does that always require a unanimous Council decision or could decisions be made by a qualified majority vote in case a consensus cannot be found?

#### **5) Novel food**

Under EU food safety regulations, any food that was not consumed ‘significantly’ prior to May 1997 is considered to be a ‘[novel food](#)’. The EC considers that [CBD qualifies as ‘novel food’](#), which created much legal uncertainty. How binding are the EU rules around ‘novel food’ and to what extent do those regulations serve as a parallel control regime and barrier to entry into the EU not only for CBD products but also for psychoactive plant products like kratom and coca leaf powder, and perhaps also certain cannabis products once they become legal in some countries?

#### **6) EU single market & Schengen rules**

To what extent can different regulatory regimes for cannabis products co-exist within the European Union single market and within the borderless Schengen area? The [EMCDDA report on cannabis laws in Europe](#) details an already complex patchwork of national differences with regard to hemp, medicinal cannabis, CBD and low-THC products. The legal regulation of recreational cannabis markets in some countries would surely add to the already existing complexity, but not create an entirely new reality. Similar experiences with co-existing control

regimes have occurred with regard to khat, kratom or ‘snus’ tobacco (see text box). In spite of ongoing efforts to harmonize regulations, the European internal market has shown to be capable to accommodate national differences. What can be learned from those experiences and what are the limits of flexibility and variety? Is it in principle feasible that legally regulated recreational cannabis markets in some Member States can co-exist with prohibitive regimes in others? Can lessons be drawn in this regard from the U.S., where legalizing States have been able to operate within a federal prohibition regime and in a borderless environment for more than a decade?

#### **Different control regimes for psychoactive substances in Europe: the example of snus**

Snus, a moist oral tobacco product placed between the gum and upper lip for a period of time, and popular in Sweden and Norway, is not allowed in the EU and all the 2003 WHO Framework Convention on Tobacco Control (FCTC) provisions cover smokeless tobacco by default. In 1992, the EU banned the production and sale of snus. According to the European Commission, snus is a nicotine product which causes dependence. Using it entails substantial risks to health, and it is a very addictive product for young users. Sweden negotiated an exemption when it acceded to the EU in 1995. The Swedish exemption was justified by referring to the long tradition of snus use in Swedish society. However, the derogation was granted on condition that Sweden would take all measures necessary to ensure that snus did not enter the markets of other Member States. The ban on snus was reaffirmed in the 2001 EU Tobacco Products Directive and again in the 2014 EU Tobacco Products Directive (TPD).

#### **7) EU notification procedure**

[EU Directive 2015/1535](#) of 9 September 2015, the ‘single market transparency directive’, establishes an obligatory notification procedure in the field of technical regulations that “may create obstacles to the free movement of goods within the internal market”. EU countries are obliged to inform the Commission about any new regulation or legislation they plan to introduce that may impact on the functioning of the single market. During a standstill period of 3 months (which may be extended to 4, 6, 12 or even 18 months, depending on the case) the Commission and other EU countries examine the proposed regulation and can react if they have concerns or objections. National changes in the scheduling or control of drugs are usually notified to Brussels via this procedure, as [Czechia recently did with the new Psychomodulatory Act](#). A notification does not seem to be required for the time-bound cannabis experiments, but for a future nationwide roll-out it surely will, potentially posing another hurdle or delay for cannabis regulation. The question is who decides if the Commission or other EU countries object to a proposed regulatory change. Is it the standing committee of national officials that was created under the Directive, operating under the chairmanship of the Commission, the Commission itself or would objections end up at the ICJ for a decisive ruling? What lessons can be drawn from previous ECJ rulings, like the [Judgment in Case C-663/18](#) about CBD trade, or the [‘Josemans’ Case C-137/09](#) about coffeeshops?

#### **8) International trade**

To what extent is international trade fully controlled by EU rules? What is the remaining flexibility under current EU regulations for individual EU countries to make their own agreements on cannabis imports, as long as there is no EU-wide agreement? Are there any provisions in existing EU

free trade and investment agreements (f.ex. with Canada) that enforce 'equal access' for foreign companies to European cannabis markets, or that could endanger protective arrangements for local companies or preferential arrangements for traditional producing countries or 'Appellation d'origine contrôlée'-type certification? Arguments of social justice or sustainable development have been largely absent in the European cannabis debate and countries have opted for closed national regulation models. How feasible is it to consider possibilities for international trade? Are there any sound legal arguments that imports are somehow 'more prohibited' under international or EU law than domestic cultivation for recreational markets? Are there any realistic prospects for legal imports of Moroccan hashish or sustainably produced cannabis from other traditional producing countries to regulated European markets in the future?

### **9) Flexibility of UN drug control conventions**

The political appetite to consider treaty re-negotiations or amendments remains very low. While Bolivia created a precedent by exiting and re-entering the Single Convention with a coca reservation, countries have been hesitant to consider doing the same with cannabis. Also the proposal that a group of like-minded countries could enter into an 'inter se' agreement to modify cannabis-related treaty obligations amongst themselves, has found little traction thus far. Instead, multiple ideas about treaty re-interpretations have circulated: the German 'interpretative solution'; justifying cannabis experiments under the treaty allowance to use controlled drugs for 'scientific purposes'; justifying recreational cannabis markets under the treaty exemption for 'drugs which are commonly used in industry for other than medical or scientific purposes' (1961, Art. 2.9); questioning the prohibitive nature of treaty provisions more generally; arguing that the Constitutional conditionality in the 1961 Convention for penal provisions in Art. 36 could be applied to the treaty as a whole, even to the General Obligation of Art. 4; claiming that the similar escape clause in the 1988 Convention for personal use-related offences in Article 3.2 ('Subject to its constitutional principles and the basic concepts of its legal system') could be applied as well to offences in Art. 3.1 because ultimately all cultivation, production, sales and trade are destined for 'personal consumption'; or referring to 'evolving State practices' to argue that certain provisions have become obsolete. While politically appealing, none of these are very convincing under the general rule that 'a treaty shall be interpreted in good faith' and that respect for international law more broadly needs to be protected and upheld. What are the limits of latitude for flexible interpretations of the three UN drug control conventions? Could a path forward be found by appealing to human rights obligations and arguing that in case of conflicts with other treaties, human rights take precedence over drug control?

### **10) EU external competence**

How far does the 'Union exclusive external competence' nowadays reach regarding international treaty making? What kind of treaties require EU-wide agreement? In German legal opinions doubt has been expressed about the possibility of national reservations under the UN drug control conventions, because the EU itself is Party to the 1988 Convention (though only with regard to its precursor regime under Art. 12) and the EU external competence on criminal matters has since expanded. However, the UN treaties also deal with public health and EU action in that area is restricted to 'complementary competence' (see text box). What is the remaining flexibility for EU Member States to make individual treaty reservations under the UN drug conventions or for a group of Member States to enter an *inter se* agreement on cannabis? Could other EU countries



or the Commission make a legal case that those are not allowed in absence of an EU Common Position?

#### **EU law: internal competence**

##### **Treaty on the Functioning of the European Union (TFEU):**

- Drug policy lies outside of the realm of EU exclusive competence. It falls under various policy areas of ‘shared competence’ (internal market, social policy, consumer protection, security and justice), and ‘complementary competence’ (public health). The EU competence is therefore clearly restricted.
- In the area of **Public Health**, the EU “*shall complement the Member States' action in reducing drugs-related health damage*” and may adopt “*measures concerning monitoring, early warning of and combating serious cross-border threats to health [...] excluding any harmonisation of the laws and regulations of the Member States. [...] Union action shall respect the responsibilities of the Member States for the definition of their health policy*”. [Art. 168]
- In the area of Judicial Cooperation on **Criminal Matters**, EU competence is based on “*the principle of mutual recognition of judgments and judicial decisions*” and the ‘approximation’ of laws and regulations by means of ‘minimum rules’ that “*shall take into account the differences between the legal traditions and systems of the Member States*”. [Art. 82]

## ***Some possible future scenarios***

### **Scenario I: Regulation stalemate**

No solution can be found for the obstacles in EU law and UN treaties, and the aspirations of a number of countries to move to a fully regulated cannabis market grind to a halt. EU infringement procedures and a negative ECJ ruling, in combination with changing national political conditions (influenced by new elections) frustrate the full implementation of the experiments and a subsequent nation-wide roll-out.

**Result:** the currently unfolding model of a more restricted European cannabis policy reform, based on decriminalisation, home grow and non-commercial associations, consolidates and becomes the new norm in an increasing number of EU states.

#### ***Influencing factors***

- European Commission position
- European elections (June 2024)
- Infringement procedures
- ECJ ruling

### **Scenario II: Legal exemption**

A group of like-minded EU states apply for new reservations or 'inter se' agreements under the UN conventions, and on that basis claim that the legal regulation of their cannabis markets fall within the existing exemptions under EU law. It would no longer be implemented 'without right' in terms of the 2004 Framework Decision, and no longer be 'illicit' drug trafficking under the Schengen and EU implementation agreements.

**Result:** co-existence of different control regimes for non-medical cannabis within the EU, similar to the existing different regimes for medical cannabis, CBD products, kratom or snus, all currently allowed in some EU countries while still prohibited in others.

#### ***Influencing factors***

- European Commission position
- Infringement procedures
- ECJ ruling
- EU external mandate
- EU common market rules

### **Scenario III: Political accommodation**

Under pressure of a growing group of like-minded countries and influenced by positive outcomes of the local experiments and cannabis developments elsewhere (f.ex. federal regulation in the USA), discussions at EU level in the coming years lead to political accommodation and/or amendments in EU law (f.ex. the evaluation of Framework Decision 2004/757/JHA leads to a clarification of the "without right" clause) allowing countries to move forward with legal regulation. Resolving global legal tensions caused by non-compliance with the UN treaties is left to further discussions with a broader group including non-EU countries confronted with the same dilemma.

**Result:** amendments in EU law are agreed by qualified majority that enable countries to move forward with legal regulation without the risk of infringement procedures. Co-existence of different control regimes

#### ***Influencing factors***

- EU like-minded coordination
- Outcomes of experiments
- Evaluation / review Framework Decision 2004/757/JHA
- Negotiation Council / Horizontal Working Party on Drugs (HDG)
- National elections
- International developments

### **Scenario IV: Global breakthrough**

EU countries, confronted with the legal stalemate at EU level, promote strategic discussions with the expanding group of non-EU like-minded countries to force a breakthrough at the global level. Possible outcomes: reinterpretations, amendment or subsequent treaty proposals based on human rights, health, and security imperatives; new reservations or 'inter se' modification or temporary suspension of cannabis-related UN treaty obligations.



**Result:** worldwide more countries move forward with legal regulation; further polarisation of the cannabis policy debate at the UN and EU increases the pressure to find agreeable political accommodations, exemptions, or legal solutions in the longer term.

### ***Influencing factors***

- Global like-minded coordination
- Federal regulation in the USA
- Developments in Colombia, Mexico, Caribbean
- Advances in Africa & Asia
- Solid basis in international law
- Opposition among other treaty Parties
- INCB mandate - Article 14
- Potential ruling International Court of Justice (ICJ)

### ***Background reading***

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