“Legalize It!?” – Opportunities and Challenges for the Regulation of Cannabis under European Law

Is Legalisation Legal?

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ABSTRACT

Following similar developments in other parts of the world (e.g. Uruguay, Canada, United States, Thailand), several countries in the EU are questioning or openly challenging the prohibitionist paradigm that has so far dominated international drug control law. Possibly the most far-reaching approach is contained in the concept paper (Eckpunktepapier) adopted by the German Federal Government in October 2022, which would provide for the comprehensive regulation of cannabis for recreational use from “seed to sale”. While the legality of this approach under public international and EU law has been called into question, this article shows that a responsible regulation of cannabis is not only desirable from a policy perspective but also legally feasible.

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I. Background

On 26 October 2022, the German government adopted key principles for the controlled sale of cannabis to adults for recreational purposes.[1] Following up on their bold promise in the Coalition Agreement, according to which the three parties forming the current government "will introduce the controlled sale of cannabis to adults for recreational purposes in licensed shops,"[2] the concept paper outlines how the production, supply, and distribution of recreational cannabis would be authorised within a licensed and state-controlled framework. This effort aims to strengthen harm reduction[3], improve the protection of minors and the health of consumers, and curtail the black market. While the proposal enjoys broad support in society and was welcomed by civil society organisations active in the field of harm reduction, it has also encountered resistance from conservative parties and critical voices in the legal literature, who question its legality. This is not surprising as the German plans go beyond any existing efforts to decriminalise or regulate cannabis in the European Union (EU). At the same time, the German plans represent the only consistent and comprehensive model in the EU, and possibly even in the world. Therefore, the issue whether they are compatible with existing EU law deserves attention. Before turning to that question, however, we will first briefly present the international drug control regime, and analyse why it has failed and possibly done more harm than good.

1. The international drug control regime

There can be no doubt that drugs[4] are dangerous. As the virtually universal Single Convention on Narcotic Drugs of 1961[5] (the Single Convention) reminds us in its preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind." Yet the preamble also recognises that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering." Moreover, humans have been using some form of mind-altering substances throughout the history of humankind.[6] Against this backdrop, it hardly comes as a surprise that two (opposing) paradigms have dominated drug control regimes over the last century: prohibition and regulation. Historically, the USA has been a champion of prohibition, while producing,[7] manufacturing,[8] and consuming states (led by Turkey, the United Kingdom, and other European countries) have been favouring a regulatory approach.[9] More recently, however, these roles seem to have been partly reversed.

a) A brief history of drug control[10]

Over the past two centuries, the answer to the crucial question how to deal with drugs has always been closely linked to both economic interests and general developments in the political-societal sphere. In the mid-18th century, when France and Britain twice used military force in the Far East, they did *not* do so in order to fight the drug trade but rather to open up the Chinese market for opium, particularly originating from India. The notorious "Opium Wars"[11] forced China to end the enforcement of its prohibition against opium trafficking by British merchants and to legalise the opium trade. It is safe to assume that these conflicts, along with various treaties imposed during the "century of humiliation", caused a national trauma that still resurfaces during present-day discussions about cannabis legalisation by Western countries and helps to explain China's visceral opposition to any such plans.

It was not until 1907 that Britain, China, and India agreed on a trilateral framework for ending Indian opium exports to China within ten years.[12] Two years later, the Shanghai Opium Commission was initiated under US leadership as the first multilateral drug control meeting to examine ways of suppressing international opium traffic, and in particular traffic bound for China. While the meeting only made recommendations, it led to the 1912 Hague Opium Convention, the first international drug control treaty.[13] In 1925, the Geneva Opium Con-

vention[14] established the first mechanisms to enforce a supply control framework. It created the Permanent Central Opium Board (PCOB), one of the forerunners of today's International Narcotics Control Board (**INCB**)[15], to monitor international imports and exports of narcotics. Further conventions were adopted in 1931 and 1936. Repeatedly, the United States tried but failed in all these negotiations to obtain a ban on all "non-medical and non-scientific" drug use. This approach must also be seen against the backdrop of alcohol prohibition in the United States, where the Eighteenth Amendment to the Constitution was ratified by the requisite number of states in early 1919, prohibiting the production, importation, transportation, and sale of alcoholic beverages from 1920 until it was repealed in 1933.

After World War II, the United Nations (UN) became the custodian of the existing treaties. In 1946, a functional commission of the UN Economic and Social Council (ECOSOC), the Commission on Narcotic Drugs (**CND**), was set up to serve as the policy-making body of the UN system with prime responsibility for drug-related matters. In 1948, the Synthetics Protocol brought synthetic narcotics under international control for the first time. The United States again tried to impose more severe limitations on the agricultural production of opiates through the 1953 Opium Protocol. However, as it was rejected by agricultural producing and consumer countries, as well as moderate states, it never entered into force. Instead, the **1961 Single Convention on Narcotic Drugs** consolidated previous conventions into one document (hence the name). It applies to opioids, coca, and cannabis. As countries with important pharmaceutical industries refused to extend the scope of the Single Convention to psychotropic substances, a separate convention was negotiated. The **1971 Convention on Psychotropic Substances**[16] (the 1971 Convention) brings psychotropic substances[17] under international control, but is less stringent than the Single Convention.[18]

From the early 1970s onwards, the United States stepped up its supply-side targeting drug policies again. In June 1971, in a speech to the White House Press Corps, US President Richard Nixon declared a "war on drugs". Although the restrictive, prohibitionist, and supply-side focussed US approach on drug policy dates back much longer, this speech is often seen as the beginning of a counter-productive and systemically racist domestic and international crusade that lasted several decades.[19] The focus on trafficking also led to the adoption of the **1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**[20] (the 1988 Convention), which aims at tackling organised crime and drug trafficking. It also introduced extensive precursor[21] controls.

These legal instruments were complemented by an institutional framework and non-binding resolutions and declarations. In 1972, a UN Fund for Drug Abuse Control (UNFDAC) was created. The Fund and the United Nations Drug Control Programme later merged with the Crime Fund and the Centre for International Crime Prevention to form what is today the United Nations Office on Drugs and Crime (**UNODC**), an organisational unit of the UN Secretariat headquartered in Vienna, Austria. UNODC also acts as the Secretariat to the CND and hosts its annual sessions. In the 1990s, the UN General Assembly also turned its attention to the topic. At a UN General Assembly Special Session (**UNGASS**) in 1998, states committed to massive reductions in drug use and supply within ten years and coined the slogan, "A drug free world. We can do it!" Almost 20 years later, the third UNGASS in 2016 was more realistic and marked a break with traditional "war on drugs" approaches, even though it failed to break with the prohibitionist paradigm.[22]

Nevertheless, since the 1990s, a new paradigm in drug policy has emerged that recognises that there will always be some people who will use drugs, and some people who may be unwilling or unable to stop using drugs. This concept, called "**harm reduction**", therefore promotes policies, programmes, and practices that aim to minimise the negative health, social, and legal impacts associated with drug use, drug policies, and drug laws. Harm reduction focusses on positive change, and on working with people who use drugs without judgement, coercion, discrimination, or requiring that they stop using drugs as a precondition of support. It is cost-effective, evidence-based, and human rights-centred. Examples of harm reduction measures are needle

and syringe exchange programmes, opioid agonist therapy (such as methadone), drug checking (where drugs are checked for adulterants), and drug consumption rooms to reduce the risk of fatal overdose.

b) The international drug control conventions

As countless resolutions of the CND remind us, three UN conventions form the "cornerstone" of the international drug control regime: the 1961 Single Convention, the 1971 Convention on Psychotropic Substances, and the 1988 Anti-trafficking Convention (the Conventions).[23] None of these Conventions contains a comprehensive and unconditional obligation for states to impose criminal sanctions on (all forms of) drug possession and/or use.

- The 1961 Single Convention obliges its parties to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use, and possession of drugs (Art. 4(c)). Drugs are defined as the substances listed in "schedules" to the Convention (Art. 1(j)).[24] Cannabis and cannabis resin, extracts, and tinctures are listed in Schedule I.[25] Art. 36(1)(a) contains penal provisions which obliges any party, "subject to its constitutional limitations," to make certain actions, including the possession of drugs, punishable offences. However, subpara. (b) allows for alternatives to conviction or punishment when "abusers"[26] of drugs have committed such offences. It is also important to note that Art. 36 does not refer to "use."[27] Therefore, the possession for personal use is also considered to be outside the scope of the provision.[28]

- The 1971 Convention contains essentially the same limitations of drug use and penal provisions (Art. 5 and 22). Even though cannabis as such was already regulated in the Single Convention, its psychoactive ingredient, tetrahydrocannabinol (THC), is contained in Schedule I of the 1971 Convention only, as it was not yet known to science at the time the Single Convention was adopted.

- The 1988 Convention goes one step further than the previous conventions in that its Art. 3(2) requires parties to establish as a criminal offence the possession, purchase, or cultivation of drugs "for personal consumption" as well. This obligation, however, is subject to each party's "constitutional principles and the basic concepts of its legal system."[29] Moreover, para. 4(c) of this provision provides for alternatives to conviction or punishment "in appropriate cases of a minor nature." This effectively removes the obligation to criminalise possession for personal use. In fact, in its 2021 Annual Report, the INCB explicitly acknowledges that "measures to decriminalize the personal use and possession of small quantities of drugs are consistent with the provisions of the drug control conventions."[30] If personal use and possession can be decriminalised, a strong argument can be made that necessary precursor acts committed in the framework of a regulatory system are also consistent with the Conventions.

If **decriminalisation** is in line with the Conventions, then **depenalisation**[31] must, *a fortiori*, also be possible. By contrast, the INCB takes the view that **legalisation**, i.e. legislation implementing "policies that explicitly permit the non-medical and non-scientific use of internationally controlled substances" and entailing no penalty whatsoever, is in violation of the international drug control conventions.[32] While this view is shared by many conservative states, it must be borne in mind that the Conventions are inherently flexible. A case in point is decriminalisation itself: Not so long ago, the INCB held the view that decriminalisation was not in line with the Conventions, and even considered harm reduction measures like drug consumption rooms as inadmissible. In this context, it should be born in mind that, in the absence of a court that could provide an authentic interpretation of the Conventions, their meaning is defined by the parties, and there is no one single valid interpretation.[33] Lastly, the INCB (which seems to use the terms legalisation and regulation interchangeably[34]) ignores that regulation is a concept that is fully in line with the object and purpose of the

Conventions to improve the "health and welfare of mankind," reduce the "public health and social problems" resulting from drug use, prevent addiction, and combat the illicit production of and traffic in drugs.[35]

c) EU drug law

Drugs are mentioned only twice in the Treaty on the Functioning of the European Union (**TFEU**): Art. 83(1) provides a legal basis for the adoption of directives to establish minimum rules concerning the definition of criminal offences and sanctions for certain "areas of particularly serious crime with a cross-border dimension," which include "illicit drug trafficking." Art. 168(1) stipulates that the Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

Secondary legislation on the issue is scarce as well: Under the Lisbon Treaty (on the basis of Art. 83(1) TFEU), just one drug-related directive has been adopted so far.[36] It amends the definition of "drug" in **Framework Decision** 2004/757/JHA.[37] This Framework Decision (FD), which was adopted in the third pillar under the former Nice Treaty, lays down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. In this respect, Art. 2 of the FD provides that:

> 1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:
>
> (a) 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;
>
> (b) the cultivation of opium poppy, coca bush or cannabis plant;
>
> (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);
>
> (d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.
>
> 2. The conduct described in paragraph 1 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.

Apart from the FD, there is little legislation that is relevant to the question of cannabis regulation. An earlier Joint Action[38] has been repealed and has not been incorporated in the FD. The Schengen *acquis* deals with narcotic drugs in Title III, Chapter 6 of the Convention Implementing the Schengen Agreement (CISA) . These provisions are mostly concerned with the import and export of drugs, including cannabis. Art. 71(2) obliges the contracting parties to 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".

The Council also regularly adopts decisions on the position to be taken, on behalf of the European Union, at the sessions of the CND, with regard to the vote on the scheduling recommendations from the World Health Organisation (WHO).[39] In particular, in December 2020, the CND voted on a re-scheduling of cannabis and cannabis-related substances. The Council decision supported the WHO recommendation to delete cannabis and cannabis resin from Schedule IV of the Single Convention.[40]

In addition to legislation, however, soft law also needs to be considered. Most relevant in the current context are the **EU drugs strategies** that have been approved by the Council, and the corresponding action plans. The

most recent versions of the EU drugs strategy and action plan cover the period 2021 to 2025.[41] Importantly, they do not require EU Member States to criminalise drug use. On the contrary, the strategy notes that "drug consumption and/or drug possession for personal use or possession of small amounts do not constitute a criminal offence in many Member States, or there is the option to refrain from imposing criminal sanctions."[42] **Council conclusions** of March 2018 promote the use of alternatives to coercive sanctions for drug using offenders.[43] In 2022, the Council approved conclusions on a human rights-based approach in drug policies acknowledging that, in line with the 2018 Council conclusions, the term "alternatives to coercive sanctions" could, according to national legislation of the EU Member States, also refer to alternatives that are used instead of or alongside the traditional criminal justice measures for drug-using offenders.[44]

2. The problems with prohibition

a) Prohibition is not working

It can hardly be denied that the existing drug control regime has had little effect: For years, both the supply and the demand of controlled drugs have been constantly rising.[45]

In principle, there are two possible responses to this finding: First, one can claim that without this regime, the situation would be even worse and that therefore, we just have to enforce it even stricter. In the absence of a counterfactual, this argument can never be entirely disproved. However, it is implausible for many reasons. Firstly, very strict, even extreme, supply-side and law enforcement-centred approaches have been tried for decades. As mentioned above, the United States even declared a "war on drugs" from the 1970s onwards. This "war" has not been won, on the contrary. Secondly, as UNODC noted in its first Transnational Organized Crime Threat Assessment, since transnational organised crime is driven by market forces, countermeasures must disrupt those markets, and not just the criminal groups that exploit them.[46] The enforcement approach neglects the demand side and ignores the fact that wherever there is a demand that cannot be satisfied legally, be it for drugs or anything else, an illicit market will appear.[47] As long as that illicit market generates profits, it will not disappear. Thirdly, in the face of extreme drug crises, countries have been forced in the past to change tack and adopt a more health- and harm reduction-oriented approach. This was the case in Portugal in the 1990s and can be seen today in the United States, where – faced with an opioid epidemic that currently claims over 100,000 drug deaths per year – the Biden administration has issued a new drug control strategy that clearly embraces harm reduction measures for the first time.[48] Fourthly, cutting off the drug supply, e.g. for millions of opioid addicts in the United States, would not cure them of their addiction, nor address the root causes of the epidemic. Lastly, it is not clear whether consumption would rise in the absence of prohibition. While this seems intuitive, the evidence is inconclusive.[49] Even a rise in consumption, however, does not necessarily entail more harm: The purity and quality of licit cannabis is clearly superior to substances sold in the streets; drug-related crime and imprisonment would decrease; and risk awareness raising and protection of minors (e.g. ID checking) could be carried out more effectively.

Therefore, the second and more convincing response would be to admit that the existing regime is not working and needs to be changed. A radical approach would be to scrap the system entirely. This, however, is neither practical nor desirable for a number of reasons, not least because it would jeopardise the supply security of controlled medicines. Rather, a strictly regulated licit market should replace an uncontrolled illicit market. It is debatable whether this is preferable for all drugs. In the case of alcohol, the experiment with prohibition in the United States at the beginning of the last century clearly demonstrated the advantages of a regulated market over an unregulated criminal one. The increasingly strict regulation of tobacco has been a success story, with cigarette use, especially among young people, in sharp decline over the last two decades. Cannabis is the logical candidate to test this strategy in the field of currently controlled substances.

b) Prohibition is harmful

Prohibition is not only not working, it is also positively harmful. Addiction – or rather 'drug use disorder' – can be a form of sickness.[50] It is not helpful to criminalise sick people. Criminalisation creates stigma, marginalisation and discrimination, and raises structural barriers for people who wish to access service such as drug treatment and harm reduction as they fear punishment.

As noted above, prohibition has created an illicit market that will not disappear as long as it generates profits. These illicit markets are feeding organised crime groups that have grown into horrendous proportions. Some of these cartels have become so powerful that they resemble quasi-states. The result is crime and bloodshed at an unprecedented scale, massive corruption, state capture, and failed or failing states. The war on drugs has cost thousands of lives and has destabilised entire countries.[51] Some countries are also taking lives through the imposition of the death penalty for drug-related offences and extrajudicial killings. Prison overcrowding has become a massive problem, especially in the United States.

Yet, there is no way to win the "war on drugs" by military or law enforcement means. The only way to put the cartels and organised crime groups out of business is to deprive them of their income. This would effectively destroy them and can only be achieved by regulating access to drugs. This approach also minimises the harm done by drugs, with both unregulated illicit and unregulated licit markets causing the greatest harm. A regulated market presents the best opportunity for reducing that harm.

Finally, from an economic perspective, current drug policy – especially with regard to cannabis – is a waste of money[52], a waste of time, and a waste of human resources. As you can only spend available financial resources once, it should be spent on those interventions that are the most effective in terms of health protection and harm reduction. This analysis applies, in principle, to all licit and illicit drugs, but regulation must be tailored to each drug. There can be no one-size-fits-all approach. This article only deals with the regulation of cannabis.

3. The winds of change

Despite the evidence that the current regime of prohibition is not working and has significant negative or "unintended" consequences, the legal straightjacket of the three above-mentioned UN Conventions has kept change very slow and uneven.

a) Drug reform and cannabis regulation outside the EU

In 2013, **Uruguay** became the first country in the world to legalise the recreational adult use of cannabis for its citizens and residents. In 2015, **Jamaica** introduced a decriminalisation model of cannabis use in order to divert users from the criminal justice system. This was followed by **Canada** in 2017, which has allowed its citizens and residents to acquire quality-controlled cannabis through legal supply chains. The country has also developed comprehensive harm reduction services.

In 2018, the Constitutional Court of **South Africa** ruled that the use and possession of cannabis, and the cultivation of cannabis plants by an adult for personal consumption in private no longer constitute criminal offences. Likewise, in **Mexico**, the supreme court ruled the criminalisation of cannabis use unconstitutional.

In 2019, **Thailand** was the first country in the region to legalise medical uses of cannabis before fully descheduling it from its Narcotics Act in 2022. In 2019, **New Zealand** introduced a decriminalisation model allowing for law enforcement discretion towards personal drug use and possession. However, in New Zealand, a narrow majority rejected a model of adult cannabis legalisation by referendum in 2020.

In 2021, **Switzerland** passed the legal framework for the regulated sale of cannabis. This has enabled cantons, municipalities, universities, and other organisations to conduct pilot studies to gain scientific knowledge about alternative approaches to regulating the non-medical use of cannabis.

In the **United States**, the use and sale of cannabis continue to be illegal at the federal level. However, to date, 21 jurisdictions (18 states, two territories, and the District of Columbia) have legalised the use of cannabis for non-medical purposes, while 37 states permit medical use. In 2022, the Biden administration announced a review of the scheduling status of cannabis. This process could lead to federal regulation of sales for recreational use. US President Biden also signed a law to ease onerous restrictions on cannabis research, and to grant pardons to offenders convicted for cannabis use and possession.[53]

b) Developments in EU Member States

Portugal was the first country in the EU to decriminalise all drug use. Due to the pressure from the three UN Conventions, however, it remains an administrative offence.

The **Netherlands** has a long-standing policy of tolerating the sale of cannabis for personal use in coffee shops, which have been able to sell small quantities of cannabis for personal consumption since 1970. However, as the cultivation and sale of cannabis is not permitted, coffee shops have had to obtain their cannabis from illegal sources. In 2020, the Netherlands therefore introduced legal production of cannabis as an experimental pilot project in ten cities.

In 2021, **Luxembourg** announced the legalisation of adult cannabis use and cultivation (a maximum of four plants) within home settings. The same year, **Malta** passed a law on "responsible use of cannabis." This law allows adults to possess up to 7 g of cannabis, domestic cultivation of up to four cannabis plants, and the storage of up to 50 g of dried cannabis product. In addition, people can form non-profit organisations for the purpose of cultivating cannabis exclusively for the organisation's members within the framework of a risk and harm reduction approach.

As outlined above, **Germany** plans to comprehensively regulate cannabis from seed to sale. **Czechia** has announced similar plans.

II. The Compliance of Cannabis Regulation with EU Law

When it comes to the "if and how" of regulating cannabis in their domestic legal sphere, countries outside the EU have little to fear from the international legal order. This is true even for those states who have opted for a comprehensive regulation model like in Canada, which might not be in compliance with the three Conventions.[54] Indeed, the Conventions lack effective enforcement mechanisms, and the CND in particular does not dispose of any such mechanisms. Apart from issuing statements, the utmost the INCB could do is to recommend to parties that they impose a drugs embargo on the country concerned.[55] In practice, this has never happened and is unlikely to happen in the future.[56] For EU Member States, however, the situation is quite different: Their domestic policy choices are, in addition to obligations under general international law, effectively limited by EU law, an enforceable legal regime.

1. The 2004 Framework Decision on illicit drug trafficking

As mentioned earlier,[57] conduct related to self-consumption of cannabis does not fall within the scope of FD 2004/757/JHA laying down minimum rules in regard to drug trafficking offences and penalties. Recent

reforms in Luxembourg and Malta are therefore *ab initio* not affected by the FD. The more far-reaching models in the Netherlands and in Germany, however, are *prima facie*[58] not limited to conduct by persons for their own personal consumption. Instead, what is at stake here is a regulation of the entire distribution chain "from seed to sale". Hence, the question arises whether this is in compliance with the FD.

An initial and paramount observation in this respect is the wording of the title of the FD: It was adopted to counter criminal acts "in the field of illicit drug trafficking." Likewise, Art. 2 FD relates to "crimes linked to trafficking."

The proposed German licence model is of course the very opposite of illicit drug trafficking. Qualifying the cultivation and sale of cannabis through a strictly regulated state-licensed system as "illicit drug trafficking" would turn the meaning of these terms on its head. To any non-lawyer, this would seem so obvious and clear that it does not require any further explanation. Conversely, lawyers are well known for their creativity in interpreting legal norms. However, at least in the realm of criminal law, a cardinal principle exists which is deeply rooted in the *Rechtsstaatsprinzip* (rule of law), namely that the natural meaning of words marks the outer limits of their interpretation.[59] Qualifying the state-regulated acts in question as "trafficking" would clearly overstep these limits.

This is also important insofar as the EU does not have a general criminal law competence to legislate on drugs, but only one regarding "illicit drug trafficking" (Art. 83 (1) TFEU). Although the 2004 FD predates this norm, which was introduced by the 2009 Lisbon Treaty, its identical wording must be interpreted in strict conformity with the EU Treaties. Holding otherwise would lead to the untenable result of a criminalisation of conduct for which the EU has no competence.

These considerations are confirmed by the explicit caveat that limits Art. 2 FD to acts "committed without right." Conduct carried out on the basis of an act of parliament, and under a state-issued licence can hardly be considered "without right."

An interpretation that respects the natural meaning of terms should stop here. However, for the sake of the argument, we will also explore if this conclusion could be challenged if the words "illicit trafficking" and "without right" were to be understood as a reference to international drug control law.

a) Licensed conduct is not "committed without right"

Unlike the "personal use" clause in Art. 2(2) FD 2004, the "without right" clause in Art. 2(1) does not explicitly and necessarily refer to national law. Moreover, all EU Member States are also parties to the three UN Conventions. Some authors therefore seem to assume that "states can only recognise a 'right' under the clause if this does not violate their obligations under international law."[60] This view, however, has no basis in the text of the FD and completely ignores the autonomy of EU law.

In that respect, it must be noted that the FD does not incorporate the international drug control regime into Union law. On the contrary, its preamble does not even once mention the three UN Conventions. The only place these Conventions are referred to is in the definition of "drugs" and "precursors" in Art. 1 FD. Therefore, the words "without right" must be given an autonomous interpretation.

The clause in Art. 2(1) FD grants Member States a possible derogation from the mandatory criminalisation. Any limitation of that derogation must be interpreted restrictively: first because we are in the field of criminal law (and limiting the "rights" expands criminalisation); and second because the TFEU strictly limits the Union's competence to the criminalisation of acts related to "trafficking." Finally, the interpretation must also preserve the *effet utile* of the clause.

Applying these principles, it must be noted that it would have been easy for the drafters of the FD to include a reference to international law in the chapeau of Art. 2(1). Instead of, or in addition to the words "without right," they could simply have used the term "illicit conduct" and defined it elsewhere as "not in compliance with the international drug control conventions." In order to enhance legal certainty, they could also have incorporated the essence of the Conventions into the FD by criminalising conduct "when committed for non-medical and non-scientific purposes." Yet, they chose the unusual wording "without right." It must thus have an independent meaning going beyond these cases.

In other words, to require that any "right" under this clause must be in conformity with the Conventions would limit the meaning of the clause to medical and scientific use – as these are the only permitted uses under the UN Conventions. Therefore, equating the clause with "right in conformity with the Conventions" would deny it any independent meaning going beyond illegality under international law. The caveat "without right" would thus have no *effet utile*. It follows that these words must mean that illegality under international law is a necessary – *but not sufficient* – condition for punishment.

Indeed, the ordinary meaning of the words "without right" does not simply mean "illegally," but rather without authorisation. This would seem to result even clearer from some other language versions of Art. 2(1) FD.[61] It is further supported by the meaning of the clause in two other EU instruments harmonising criminal law where it is used (in the English version[62]): In both Directive 2011/92/EU and Directive 2013/40/EU, the words "without right" are explicitly defined as referring (also) to a permission or an authorisation under domestic law.[63] The fact that in Directive 2011/92/EU and Directive 2013/40/EU the clause is given a defined meaning also contradicts the view that "without right" implies a limitation to medical and scientific use. If that were the case, it would certainly have been included in the definitions in Art. 1 or in the Preamble of the FD.

It is therefore more convincing to interpret the clause in Art. 2(2) FD 2004 as a reference to a national authorisation. A licence system would constitute such an authorisation.

Lastly, the fact that the Member States are parties to the three UN Conventions, and the EU to the 1988 Convention, does not change this conclusion. The EU competence under the 1988 Convention is explicitly limited to precursor control. Therefore, cannabis regulation is outside the EU competence. Moreover, the status of international law in the domestic legal order is determined by the domestic legal order. Countries that follow the monist theory may be prevented from establishing a licence system to authorise and regulate cannabis cultivation and use because they might see themselves bound by the international Conventions. This does not, however, apply to countries that follow the dualist theory. Even if they were in breach of international obligations (which is debatable, see below), this would have no consequence for the validity of the domestic legislation. Since the landmark judgment in *Kadi*[64], we know that EU law does not follow a (purely) monist system. Illegality under international law does not automatically entail illegality under EU law. In any case, the EU would have no competence to issue an authorisation. Therefore, any reference in the FD 2004 must be a reference to national law.

b) Licensed conduct does not constitute "illicit trafficking"

The term "illicit trafficking" is a pleonasm: There is no such thing as "licit" trafficking. Trafficking is inherently unlawful.[65] If a state decides to responsibly regulate a drug rather than leave it to the unregulated illicit market, it does not engage in trafficking. Any assertion to the contrary would contravene the meaning of "trafficking." This must of course be distinguished from a hypothetical situation in which a "rogue" state, e.g. a failed state under the control of a narco cartel, actively engages in activities that are illegal under its own laws or decides to turn a blind eye. This could indeed be called state trafficking but is very different from the situation in question.

This argument does not only apply to the FD but also to the three Conventions. In reality, a state regulation model as the one planned in Germany lies outside the scope of the Conventions because, like the FD, they are limited to illicit trafficking. They were never meant to apply to a state-controlled distribution system.

It must also be called to mind that it is not easy to decide what constitutes "illicit" behaviour under the UN Conventions. Given the great flexibility of the Conventions, which is regularly invoked by all parties, the interpretation of what is in line with the Conventions is not easy and has changed dramatically over time.[66] In the absence of an authoritative interpretation of the Conventions[67], each state is free to make that assessment for its own conduct. As noted above, states' (and the INCB/CND's) assessment is liable to change over time as well.[68]

c) Licensed conduct benefits from the exemption in Art. 2(2) FD

All of the above rests on the premise that the "personal consumption" exemption in Art. 2(2) FD is not applicable to the situation in question. If it were, state-licensed regulation of cannabis would fall outside the scope of the FD entirely. Indeed, there are very good reasons to substantiate this case.

Art. 2(2) FD does not only cover the possession and use but all the acts in para. 1 that necessarily precede consumption. It is true that the exemption is limited to conduct committed by its perpetrators for their own personal consumption. However, if preparatory conduct is exempted when carried out by users then, *a fortiori*, that conduct must be exempted if it is carried out under a state-issued licence. The FD simply did not foresee such a situation. Nevertheless, it would be highly inconsequential and illogical if state-regulated conduct were to be treated less favourably than the same conduct by a consumer. Moreover, that conduct (cultivation, distribution etc.) is a *necessary* precursor to the later consumption. Lastly, para. 2 clarifies that "personal consumption" is defined by national law. Arguably, that law therefore remains free to include in "personal consumption" all acts that necessarily precede the final consumption.

2. The Schengen acquis

As mentioned above, the Schengen acquis is primarily concerned with trans-border situations, and deals with the import and export of narcotic drugs. Importantly, a Joint Declaration has effectively modified Art. 71(2) CISA.[69] This Joint Declaration allows contracting parties, under certain conditions, to depart from the principle referred to in Art. 71(2). As a consequence, the creation of a national licensing system for recreational adult-use cannabis would not be in breach of the Schengen acquis as long as the regulatory model aims to contribute to the prevention of addiction, and provided that administrative and penal measures are taken to prevent and punish cross-border illegal drug trafficking.[70] All of this would be fulfilled under the German model.

3. CJEU jurisprudence

National drug policy is a highly political area that – given its relevance for health protection, criminal law, and law enforcement – touches the core of national sovereignty. Therefore, the European Commission would probably hesitate to second-guess national choices in this matter and refrain from instituting infringement proceedings against a Member State (Art. 258 TFEU). Nevertheless, bearing in mind that infringement actions can also be brought by other Member States (Art. 259 TFEU), the question of interpretation of the 2004 FD on illicit drug trafficking may eventually reach the Court of Justice of the European Union (CJEU) as the final arbiter of EU law.

How the Court would approach such a case is anyone's guess. That said, the case law leaves room for optimism. In particular, the CJEU's seminal CBD case[71] is inspiring. In a judgment concerning the free move-

ment of goods, the judges in Luxembourg examined the question whether cannabidiol (CBD) is covered by the Single Convention. They could have chosen an easy route, as they found "that a literal interpretation of the provisions of the Single Convention might lead to the conclusion that, in so far as CBD is extracted from a plant of the Cannabis genus and that plant is used in its entirety – including its flowering or fruiting tops – it constitutes a cannabis extract […] and, consequently, a 'drug' within the meaning […] of that convention."[72]

Instead, the Court made the effort to carry out a teleological interpretation and held that "since CBD does not contain a psychoactive ingredient in the current state of scientific knowledge […], it would be contrary to the purpose and general spirit of the Single Convention to include it under the definition of 'drugs' within the meaning of that convention as a cannabis extract."[73] The Court therefore concluded that CBD is not a "drug" within the meaning of the Single Convention.[74] This indicates that the CJEU is prepared to consider the purpose of the Conventions to protect the "health and welfare of mankind," and reduce "public health and social problems" when interpreting them. *A fortiori*, this must be borne in mind when interpreting Union law.

Ultimately, the Court will have to apply the Charter of Fundamental Rights of the European Union when interpreting the 2004 FD and the CISA. The right to privacy in Art. 8 of the Charter could provide a powerful basis for a judgment in favour of a responsible cannabis legalisation. In this case, the Charter would take primacy over treaty law.[75] The *Kadi* jurisprudence has set a strong precedent in this respect.[76] There are very good reasons why this case law, which gives priority to the protection of fundamental rights over international obligations, should also be applied in the present context.

III. Conclusion

In her foreword to the 2021 Report of the Global Commission on Drug Policy, *Helen Clark* notes:

> "[i]n general, the world looks to international law to support the achievement of humanity's fundamental aspirations, including of human rights for all. Yet in drug policy, international law itself bears much of the responsibility for the world's failure to address drug use in a rational and humane way."[77]

Unfortunately, there is little hope that this will change any time soon. Given the extremely divergent approaches to drug policy among the state parties to the three UN Conventions on drug control, amending these Conventions is all but impossible in the foreseeable future. In all likelihood, the global drug control regime will thus remain stuck in the 1960s forever. This makes it all the more important not to interpret Union law as condemning EU Member States to perpetuate the errors of the past. This article has sought to demonstrate that, correctly interpreted, Union law does in fact not stand in the way of responsible regulation at the national level. Nature and scope of the German Federal Government's proposed regulation of cannabis constitute such a regime.

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1. Bundesgesundheitsministerium, "Eckpunktepapier der Bundesregierung zur Einführung einer kontrollierten Abgabe von Cannabis an Erwachsene zu Genusszwecken". See press release: <https://www.bundesgesundheitsministerium.de/ministerium/meldungen/kontrollierte-abgabe-von-cannabis-eckpunktepapier-der-bundesregierung-liegt-vor.html> accessed 15 January 2023.↩
2. "Mehr Fortschritt Wagen - Bündnis Für Freiheit, Gerechtigkeit Und Nachhaltigkeit", Koalitionsvertrag 2021-2025 zwischen der Sozialdemokratischen Partei Deutschlands (SPD), Bündnis 90/Die Grünen und den Freien Demokraten (FDP), p. 68.↩
3. On this term, see below I.1.a) *in fine*.↩
4. The term "drugs" is generally used to mean narcotic and psychotropic substances. However, non-controlled substances like alcohol and nicotine are also drugs in the wider sense and at least as harmful.↩
5. UNTS, vol. 976, No. 14152. 186 states are parties to the 1961 Convention (as amended by the 1972 Protocol).↩
6. Cf. only (with further references) M.-A. Crocque, "Historical and Cultural Aspects of man's relationship with addictive drugs", (2007) *Dialogues in Clinical Neuroscience*, 355–361.↩
7. Countries cultivating poppy, coca leaf, and cannabis.↩
8. Countries with pharmaceutical industries.↩

9. Scholars have noted that "the Single Convention represented a victory for the regulatory strand and UK-led coalitions over the US-led prohibitionist strand," cf. J. Collins, *Legalising the drug wars: a regulatory history of UN drug control*, 2021, p. 224.↩
10. This short overview draws heavily on the detailed account in two seminal books: J. Collins, *Legalising the Drug Wars: a regulatory history of UN drug control*, 2021; and W. B. McAllister, *Drug Diplomacy in the Twentieth Century*, 1999.↩
11. "Opium Wars" is a collective term for the conflicts between Western powers and China, including the First Opium War (UK vs. China, 1839–1842), and the Second Opium War (UK & France vs. China,1856–1860).↩
12. See R. K. Newman, "India and the Anglo-Chinese Opium Agreements, 1907-1914", (1989) *Modern Asian Studies*, 525-560.↩
13. League of Nations Treaty Series, vol. 8, pp. 188–239.↩
14. League of Nations Treaty Series, vol. 81, pp. 318–358.↩
15. The INCB styles itself as a quasi-judicial body tasked with monitoring the compliance with the international drug control conventions. This seems to be based on Art. 14 of the Single Convention, on Art. 19 of the 1971 Convention, and on Art. 22 of the 1988 Convention. However, these articles do not, in fact, contain such a broad mandate. As a last resort, the INCB can recommend to parties that they stop the import of drugs, the export of drugs, or both, from or to the country concerned ("embargo").↩
16. UNTS, vol. 1019, No. 14956.↩
17. Psychoactive drugs such as amphetamine-type stimulants, barbiturates, benzodiazepines, and psychedelics.↩
18. For instance, the threshold to schedule a substance under the 1971 Conventions is higher (two thirds) than for the Single Convention (simple majority).↩
19. See also J. Hari, *Chasing the Scream. The Search for the Truth About Addiction*, 2015.↩
20. UNTS, vol. 1582, No. 27627.↩
21. Precursors are (licit) substances frequently used in the illicit manufacture of drugs (cf. Art. 12 of the 1988 Convention).↩
22. The Outcome Document of the 2016 UNGASS is widely considered to be the most progressive negotiated UN drug policy document to date.↩
23. For a succinct overview, see N. Boister, "The international legal regulation of drug production, distribution and consumption", (1996) vol. 29 *The Comparative and International Law Journal of Southern Africa*, 1-15.↩
24. The term "illicit drugs", although it is frequently used in CND resolutions (presumably to distinguish them from "licit" drugs like alcohol and tobacco), is not used in the Conventions. Therefore, it is preferable to speak of controlled substances.↩
25. Cannabis and cannabis resin also used to be in Schedule IV, which comprises the most harmful drugs (cf. Art. 3(5) of the Single Convention). After a long and very controversial discussion, the CND decided (by a very close vote) in 2020 to de-schedule cannabis from Schedule IV. It remains listed in Schedule I.↩
26. The terms "abuse" and "abuser" are nowadays considered stigmatising and should be avoided.↩
27. The 1973 Commentary on the Single Convention on Narcotic Drugs (Prepared by the Secretary-General in accordance with para. 1 of ECOSOC resolution 914 D (XXXIV)) notes that "article 36 is intended to fight the illicit traffic, and unauthorized consumption of drugs by addicts does not constitute 'illicit traffic'" (Art. 36, para.7).↩
28. The Commentary (note 27) on Art. 36 (para. 8) refers to Art. 4, where it is noted that the purpose ("to fight the illicit traffic") and the *travaux préparatoires* of the Single Convention "support the opinion of those who believe that only possession for distribution, and not that for personal consumption, is a punishable offence under article 36" (para. 18; also Art. 33, para. 2).↩
29. In 1993, upon ratification of the 1988 Convention, Germany made an interpretative declaration on Art. 3(2), stating that the caveat ("subject to … the basic concepts of its legal system") can change over time: "It is the understanding of the Federal Republic of Germany that the basic concepts of the legal system referred to in article 3, paragraph 2 of the Convention may be subject to change." This means that the country can now argue that in the meantime, harm reduction has become a basic concept of its legal system, and that the intended regulation of cannabis is grounded in harm reduction and health protection. To that end, Germany can cite evidence that the prohibition of cannabis has not led to a reduction of cannabis (to the contrary, use is increasing), and that THC content has increased, making the sale of unregulated cannabis products increasingly dangerous.↩
30. Para. 380.↩
31. According to the INCB, depenalisation describes "a situation in which the behaviour in question remains a criminal offence but in which there is a reduction of the use of existing criminal sanctions, which does not require changes to the law, as in the case of decriminalization."↩
32. INCB, *2021 Annual Report*, paras. 375-376.↩
33. On the mandate of the INCB, cf. note 15.↩
34. In our view, the term "legalisation" should be avoided because it could imply a complete absence of regulation.↩
35. Cf. below I.2.↩
36. Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of "drug," and repealing Council Decision 2005/387/JHA, *O.J.* L 305, 21.11.2017, p. 12.↩
37. Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *O.J.* L 335, 11.11.2004, 8 (amendments: *O.J.* L 305, 21.11.2017, 12; L 66, 7.3.2019, 3; L 379, 13.11.2020, 55; L 178, 20.5.2021, 1; L 200, 29.7.2022, 148). According to its Art. 1, "'drugs': shall mean any of the substances covered by the following United Nations Conventions: (a) the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol); (b) the 1971 Vienna Convention on Psychotropic Substances. It shall also include the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 concerning the information exchange risk assessment and the control of new synthetic drugs."↩
38. Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, *O.J.* L 342, 31.12.1996, 6.↩
39. These decisions are based on Art. 83(1), in conjunction with Art. 218(9) TFEU.↩
40. Council Decision (EU) 2021/3 of 23 November 2020 on the position to be taken, on behalf of the European Union, at the reconvened sixty-third session of the Commission on Narcotic Drugs, on the scheduling of cannabis and cannabis-related substances under the Single Convention on

Narcotic Drugs of 1961, as amended by the 1972 Protocol, and the Convention on Psychotropic Substances of 1971, *O.J.* L 4, 7.1.2021, 1. The Decision was adopted with a qualified majority and is binding on Member States. Despite this, Hungary voted against the Union position at the CND. The Commission therefore initiated an infringement procedure in February 2021. On 15 February 2023, the Commission referred the case to the Court of Justice.↩

41. EU Drugs Strategy 2021-2025, 18 December 2020, Council Doc. 14178/20; EU Drugs Action Plan 2021-2025, *O.J.* C 272, 8.7.2021, 2.↩
42. Para. 7.4.↩
43. Council doc. 6931/18.↩
44. Council doc. 15818/22, 8 December 2022, p. 6.↩
45. For instance, the estimated number of people who use drugs has risen from 185,000 in 1998 to 269,000 in 2018 (International Drug Policy Consortium, *Taking Stock: A Decade of Drug Policy*). The global illicit production of opium has increased by 950% since 1980. On cannabis consumption, cf. also UNODC, *World Drug Report 2022*, Booklet 3, p. 3 *et seq*.↩
46. UNODC, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, 2010, p. iii.↩
47. The size of that illegal market is estimated to amount to USD 500bn, controlled by transnational organised crime groups.↩
48. Office of National Drug Control Policy, *2022 National Drug Control Strategy*, p. 30 *et seq.*; cf. already previously Office of National Drug Control Policy, *Biden-Harris Administration's Statement of Drug Policy Priorities for Year One*, 2021.↩
49. The experience in the USA would suggest a rise, both with regard to alcohol (after the end of prohibition in 1933), and cannabis. In Canada, however, the data is not so clear. Moreover, unlike in the USA, in Canada, the perception that cannabis can be addictive has increased, especially among people who use cannabis regularly (UNODC, *2022 World Drug Report*, Booklet 3, p. 23, fig. 19).↩
50. UNODC and WHO generally refer to 'drug use disorders' rather than 'addiction'. See the International Treatment Standards for the Treatment of Drug Use Disorders - https://www.who.int/publications/i/item/international-standards-for-the-treatment-of-drug-use-disorders. They also note that "8% of individuals who start using psychoactive drugs will develop a drug use disorder over time, with significant variations for different classes of psychoactive substances" (p. 4). So the great majority of people who use drugs do so without developing a 'disorder'.↩
51. In 2019, 36,661 people were killed in drug-related violence in Mexico alone, according to the Instituto Nacional de Estadistica y Geografia.↩
52. An estimated USD 100bn is spent annually on the war on drugs (Global Commission on Drug Policy, *Time to End Prohibition*, p. 16).↩
53. Cf. <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/; https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> accessed 15 January 2023.↩
54. This is, however, debatable, see above I.1.b) and below II.1.b).↩
55. Cf. note 15.↩
56. If only because the work of the INCB is largely funded by the US. In any case, such a recommendation would be non-binding.↩
57. Cf. I.1.c).↩
58. But see below c).↩
59. Cf. only recently, German Federal Constitutional Court, Order of 5 May 2021 (2 BvR 2023/20 et al.), mn. 13.↩
60. Cf. P. H. van Kempen/M. Fedorova, *Cannabis regulation through the "without rights"-clause in Article 2(1) of EU Framework Decision 2004/757/JHA on illicit drug trafficking*, 2022, p. 14.↩
61. In French: "ne peuvent être légitimés", in German: "ohne entsprechende Berechtigung". The term "Berechtigung" clearly points to a positive authorisation rather than a mere illegality under international law.↩
62. In other language versions, the terms used in the 2004 FD and in the mentioned two instruments is not always identical (e.g. in French: "sans droit"; in German: "unrechtmäßig" and "unbefugt").↩
63. Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *O.J.* L 335, 17.12.2011, 1 (Art. 5 and the definition in para. 17 of the Preamble); Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *O.J.* L 218, 14.8.2013, 8 (Art. 2(d)).↩
64. CJEU, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461.↩
65. According to the Cambridge Dictionary, trafficking is the "activity of buying and selling goods or people illegally."↩
66. See above 1.b).↩
67. The INCB does not have a treaty mandate to monitor the implementation of the Convention, although it claims to be a quasi-judicial body with such powers, cf. above note 15. The three Conventions contain clauses on dispute settlement by the ICJ. However, this has never happened and many parties have made reservations on these provisions (e.g. Art. 48(2) and 50 of the Single Convention).↩
68. Cf. the interpretative note by Germany, quoted above in note 29.↩
69. Joint Declaration included in the Final Act of the CISA.↩
70. This view is shared by van Kempen/Fedorova, op. cit. (n. 55), p. 11-12.↩
71. CJEU, 19 November 2020, Case C-663/18, *Commercialisation du cannabidiol (CBD)*, ECLI:EU:C:2020:938.↩
72. Para.71 of the judgment.↩
73. Para. 75 of the judgment.↩
74. Para. 76 of the judgment.↩
75. D. Thym, "Ein Weg zur Cannabis-Legalisierung führt über Luxemburg", *Verfassungsblog,* <https://verfassungsblog.de/ein-weg-zur-cannabis-legalisierung-fuhrt-uber-luxemburg/>. Also see the articles on *Verfassungsblog* by K. Ambos (https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung/) and R. Hofmann (<https://verfassungsblog.de/cannabis-2/>). All accessed 15 January 2023.↩
76. See supra note 59 and for a detailed analysis K. Ziegler, "The Relationship between EU Law and International Law", in D. Patterson and A. Södersten (eds.), *Blackwell Companion for European Union Law and International Law*, 2016, p. 42-61.↩

77. Global Commission on Drug Policy, *Time to End Prohibition*, 2021. Helen Clark is a former Prime Minister of New Zealand and has been Chair of the Global Commission since 2020.↩

* Authors statement

The views expressed in this article are those of the authors and do not necessarily reflect the official opinion of the European Union institutions.

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