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# **Legislative framework of cannabis within the European Union. Analysis of legal status of recreational cannabis for personal possession**

**BACHELOR THESIS**

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**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

**Abstract**

Riga, 2019

This study reflect current legal situation in the European Union regarding legislation of cannabis. Taking into account the increasing tendency of this topic, the analysis is based on the assumption that cannabis although usually perceived as a soft drug, is a transnational threat as every narcotic substance. Therefore, it is necessary to analyse and work on this matter to ensure that fundamental values of human life are not negatively affected by the growing trend of liberalization of cannabis. The focus is on the recreational cannabis for personal possession as this type of usage is referred in the statistical data of countries most often. This study is not dealing with the medical cannabis and related to it issues.

The work focuses mainly on the personal possession of recreational cannabis and evaluates its legal status in European Union Member states. Research is focusing more on Portugal, Spain, France and Netherlands. The main objective of this study is to illustrate the existing current grey area in law and explain its effects on states from the legal, social and economic point of view. Two research questions of this work contribute to the better understanding of the subject matter of this thesis. Research question are as follows:

1. How the European Union law harmonizes the legislation of recreational cannabis for personal possession and protection of public health?
2. Is the decriminalization of possession of recreational cannabis for personal use consistent with EU and International Drug Law?

Research provides variety of statistical data gained from official national drug addiction agencies. Reports from independent agencies are used in this work as well. The results of research highlighted the existing loophole in the law. Primarily, in the International Drug law, as this law is a core for the whole European Union and member states consequently.

## Summary

This work seeks to analyse current legal situation and attitude of cannabis.

However, this work is focused rather on the recreational cannabis and its possession for personal use. In virtue of recognized undeserved lack of attention towards the matter of recreational cannabis, this work is analysing and seeking to stress the significance of legal, economic and social concerns.

However, there have been not enough official studies, which compare comprehensively the aspect of the recreational cannabis for personal possession in different EU member states. The most reliable data is provided by the specialized EU agency. A recent date of the reports of this agency emphasizes the modernity of this matter. Thus, it was decided that the best method to investigate this issue would be to firstly provide the general overview of the legal situation in EU member states and secondly, in the subsequent chapters of the research to proceed with the more specific information of several member states – France, Netherlands, Portugal and Spain.

Based on this, this study compares different approaches towards the cannabis regulation in the EU. In terms of content, this work is divided into two logical parts. First part deals with the general observations of cannabis as a substance and as a legal item. It is believed that this part will help the reader to understand the legal nature of cannabis in EU. This is necessary for the better understanding of further chapters, which are dealing with more specific issue – analysis of specified member states ds in terms of legal and economical perspective with respect to cannabis.

The central question in this research asks how the European Union itself harmonizes the liberation of legal attitude towards cannabis and the matters of public health and public safety on EU legislative level.

The next no less important question is investigating the lawfulness of the decriminalization of cannabis for personal possession under the EU and consequently UN drug law.

The reader should bear in mind that the study is based on both quantitative and qualitative data.

The reader should also bear in mind that this research is not dealing with the examination of advantages and disadvantages of the consumption of cannabis products. This research is neither examining the issue of addiction of cannabis. Thereby, this paper perceives the nature of cannabis as a drug.

Findings of this work underlined and explained the reason of the existing variety of national laws regulating cannabis. Research highlighted both negative and positive impact of different legal approaches of cannabis on economy, as well as estimated the potential of cannabis industry. Analysis of the punishments across European Union member states emphasized the complexity and diversity of existing national approaches. Investigation of the current supreme European Union law provides the relevant data for the answering of the research question of this work. In general, this work highlights the complexity of the existing legal approaches and indicates the problematic matters of decriminalisation process in several countries.

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## Introduction

Rapid development of the modern world in all spheres is bringing significant changes as well as challenges for society. The topic concerning the drugs becomes more and more widely known and discussed as in the terms of business as in the terms of legal challenges. Huge businesses involved in the drug trade actively take part as well as influence the development of the drug sphere. Specifically, the drug widely known as cannabis is now a point of legal discussions all around the world. Questions arising from this matter involve many vital issues. For instance, the economical profits of entrepreneurs and countries where legal attitude towards cannabis is more benevolent are great. For the better illustration of this matter, it is useful to refer to the famous “Coffee Shops” which are located in the Netherlands. The Dutch authorities license such shops nevertheless sale and possession of cannabis is prohibited in Netherlands. Still, in such establishments sale of cannabis for personal consumption is possible on the basis that local authorities tolerate it. These “Coffee Shops” are very popular touristic places in the Amsterdam and it is obvious that such shops earn significant profit.<sup>1</sup> However, the following question, which arises here, is a question of protection of public health and the principles of morality. Europe is known as one of the largest consumer markets of the cannabis and its related products. Furthermore, according to the European Monitoring Centre for Drugs and Drug Addiction, which was established 8 February 1993 by the Council Regulation no. 302/93<sup>2</sup>, cannabis is the most popular type of drug, which is mentioned in the drug law violations.<sup>3</sup> According to the European Drug Report 2018 prepared by the EMCDDA, cannabis products take the greatest part of the drug trafficking market; more precisely its share is 38% comparing with heroin share of 28% and cocaine share of 24%. Cannabis products share is estimated at approximately EUR 9.3 billion. The significant factor showing the situation on the drug market is seizure. Following the European Drug report 2018, 763 000-seizure cases of cannabis products were recognized in the year 2016.<sup>4</sup> Pursuant

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<sup>1</sup> European Monitoring Centre for Drugs and Drug Addiction monographs, Editors: Sharon Rödner Sznitman, Börje Olsson, Robin Room, “A cannabis reader: global issues and local experiences Perspectives on cannabis controversies, treatment and regulation in Europe”, available on: <file:///C:/Users/library/Downloads/emcdda-cannabis-mon-voll-ch9-web.pdf>

Accessed April 5, 2019.

<sup>2</sup> Council Regulation (EEC) No 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, available on:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993R0302> Accessed April 5, 2019.

<sup>3</sup> European Monitoring Centre for Drugs and Drug Addiction, Cannabis legislation in Europe 2018- an overview, page 4, available on:

<http://www.emcdda.europa.eu/system/files/publications/4135/TD0217210ENN.pdf> Accessed April 5, 2019.

<sup>4</sup> European Monitoring Centre for Drugs and Drug Addiction, European Drug Report Trends and Developments, Chapter 1, page 20-21. Available on:

[http://www.emcdda.europa.eu/system/files/publications/8585/20181816\\_TDAT18001ENN\\_PDF.pdf](http://www.emcdda.europa.eu/system/files/publications/8585/20181816_TDAT18001ENN_PDF.pdf)

to the European Monitoring Centre for Drugs and Drug Addiction, in 2017 around 17.2 millions of young people within European Union have used the cannabis.<sup>5</sup>

Such statistical data emphasizes the increasing importance of the development of the legal framework concerning cannabis. Cannabis products are most often used illicit drugs in the Europe varying from the occasional use to the regular and dependent use. Potential health problems are another significant issue, which arises in the result of using drugs. Although, in relation to cannabis such problems are not so widely recognized, there is still a risk for the public health. Obviously, wide range of possibilities to access the drugs and the variety of types of drugs, and cannabis specifically threatens the public health.

It is clear though that the empowerment of the usage of cannabis is a potential danger for the society and more precisely for the EU citizens, which thus may provoke the increasing drug abuse cases. The controversial issue here is whether it is possible for the countries and their authorities to control and harmonize these two elements effectively. In these latter days, disputes between legal authorities related to different types of prohibition or permission of cannabis in the EU became an actual and debatable topic. Treaties legal framework and the domestic practice as well as their policy related to the cannabis products regulation are now the point of legal discussions worldwide and more specifically, in the European Union.

This comparative research will mainly focus on the legal framework of cannabis in the European Union emphasizing the recreational cannabis for personal possession. The majority of legal discussions and debates are related to the medical cannabis issues in the EU. This may be explained by the fact, that legalisation for medical purposes may be perceived as a contribution to the public health, from the perspective of legal authorities and policy makers. Vice versa, the situation with recreational cannabis is not aiming to fulfil certain medical needs. The lack of legal attention from the European and national law perspective is the key driving force for the need to analyse and propose a tenable solution for this matter.

In general, attitude of the member states in the European Union with respect to cannabis varies from country to country, although there is one common point - cannabis is defined as a narcotic drug all around EU and consequently, it is placed under the control by international laws and national laws. Thus, this research will analyse the legal and business framework of

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Accessed April 5, 2019.

<sup>5</sup> European Monitoring Centre for Drugs and Drug Addiction, *EMCDDA: resurgence of cocaine in a dynamic drug market*, Part - Cannabis: availability and use remain high and changing international policies may bring challenges to Europe, 7.08.2018, available on: [http://www.emcdda.europa.eu/news/2018/5/european-drug-report-2018-highlights\\_en](http://www.emcdda.europa.eu/news/2018/5/european-drug-report-2018-highlights_en) Accessed April 5, 2019.

cannabis from the perspective of European Union law as well as from the comparative perspective of several European Union member states. The research will analyse the path of the development of legislation towards cannabis using different data related to the subject-matter of the case and will proceed with the reasons behind such developments.

## **1. Overview of the “cannabis products”**

### **1.1 Definition of the terms “cannabis products” and “cannabis”**

In order to analyse legal issues concerned with cannabis, it is essential to give a proper definition of this term. This part of the research aims to clarify the respective definition. There are several so-called street words used in relation to the drug cannabis - “marijuana”, “hemp”, “haschich”, “ganja” and the “cannabis” itself. It is necessary to distinguish them and provide a concrete description of the specific type of drug, which is analysed in this research. Widely accepted definition of cannabis is as follows:<sup>6</sup>

*A drug, illegal in many countries, that is made from the dried leaves and flowers of the hemp plant. Cannabis produces a pleasant feeling of being relaxed if smoked or eaten.*

For purpose of clarifying the term of “cannabis”, it is relevant to refer to the scientific and chemical issues of that product at first. From the botanical point of view, cannabis itself is a genus of plants from the family *Cannabaceae* that includes several species including two most recognized ones - *Cannabis Sativa* and *Cannabis Indica*. When the term ‘cannabis’ is used usually it relates to the cannabis plant.

If the cannabis plant produces useful quantity of the delta-9-tetrahydrocannabinol, which is usually, referred as THC, and which is a psychoactive substance most likely such cannabis plant is legally operated. This psychoactive substance is a reason of the most psychoactive effects of cannabis.<sup>7</sup>

Term “marijuana” means the same as cannabis, which comes from the plant, called “*Cannabis sativa*”. However, “marijuana” relates to the cannabis plants, which contain high level of THC. Cannabis contains also non-psychoactive element, which is called cannabidiol or simply CBD. Although it is believed that CBD is not a psychoactive element of cannabis, it is still disputable topic on how the CBD affects the impact of THC on humans.

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<sup>6</sup> <https://dictionary.cambridge.org/dictionary/english/cannabis>

<sup>7</sup> World Health Organization, *The health and social effects of nonmedical cannabis use*, available on: [https://www.who.int/substance\\_abuse/publications/cannabis\\_report/en/index11.html](https://www.who.int/substance_abuse/publications/cannabis_report/en/index11.html) Accessed April 6, 2019.



It is necessary to refer to the legal sources, which are useful in determining the term “cannabis”. The history of cannabis being controlled began in 1925 with a Second Opium Convention of 1925<sup>8</sup>. In this Convention, cannabis was referred as an “Indian hemp” and stated in the Article 1<sup>9</sup>:

*Indian hemp - means the dried flowering or fruiting tops of the pistillate plant Cannabis sativa L. from which the resin has not been extracted, under whatever name they may be designated in commerce.*

Relevant Article 11.1 (a) of the same legal source prohibited the export of Indian hemp to the member states, which had not permitted the usage of such products.<sup>10</sup>

Part 2 of the Article 11 defined the basic principle, which is as follows:

*The Contracting Parties shall exercise an effective control of such a nature as to prevent the illicit international traffic in Indian hemp and especially in the resin.*<sup>11</sup>

Second Opium Convention stabilized control and the measures of it only for the matters of cannabis in international trade. There is no mentioning of the legality that relates to the production of cannabis, as well as there are no rules set concerning the internal trade of cannabis for contracting states of the Convention. Therefore, it can be said that the first international Convention establishing rules on regulation of cannabis was not exhaustive enough.<sup>12</sup>

One of the significant international sources of law related to the issue of drugs and specifically cannabis is a United Nations Convention on Psychotropic Substances of the year 1971. This Convention controls the element contained in cannabis, which is defined as “dronabinol” in the Schedule II of the Convention.<sup>13</sup> Term “dronabinol” has the same meaning as the above-mentioned THC, which leads to the fact that products, which contain THC or “dronabinol” element, are subjects of the particular Convention.<sup>14</sup> It is important to note, that Convention of 1971 is not mentioning and thus not controlling the cannabidiol (CBD). Following vital Convention related to the subject matter is United

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<sup>8</sup> International Convention, Adopted by the Second Opium Conference (League of Nations), and Protocol relating thereto. Signed at Geneva, February 19, 1925 [1928] LNTSer 231; 81 LNTS 317, available on: <http://www.worldlii.org/int/other/LNTSer/1928/231.html> Accessed April 6, 2019.

<sup>9</sup> Second Opium Convention, *supra* note 8, Chapter I, Article 1.

<sup>10</sup> Second Opium Convention, *supra* note 8, Chapter IV - Indian hemp, Article 11 (a).

<sup>11</sup> Second Opium Convention, *supra* note 8, Chapter IV, Article 11.2.

<sup>12</sup> World Health Organization, World Drug Report 2018, Chapter 2.1.3 - The 1925 Convention, page 194, available on: [https://www.unodc.org/documents/wdr/WDR\\_2008/WDR2008\\_100years\\_drug\\_control\\_league.pdf](https://www.unodc.org/documents/wdr/WDR_2008/WDR2008_100years_drug_control_league.pdf) Accessed April 7, 2019.

<sup>13</sup> United Nations Convention on Psychotropic substances, 1971, Schedule II, available on: [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf) Accessed April 5, 2019.

<sup>14</sup> United Nations Convention on Psychotropic substances, 1971, Article 1(e), available on: [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf) Accessed April 5, 2019.

Nations Single Convention on Narcotic Drugs of the year 1961. This legal source provides the following definitions<sup>15</sup>:

b) “Cannabis” means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.

c) “Cannabis plant” means any plant of the genus *Cannabis*,

d) “Cannabis resin” means the separated resin, whether crude or purified, obtained from the cannabis plant.

It should be noted however, returning to the Convention on Psychotropic Substances of the year 1971 that it controls only substances containing the THC element while Single Convention of the year 1961 governs the cannabis plant, cannabis resin and cannabis itself.

Cannabis and cannabis resin are listed in the Schedule I and Schedule IV of the 1961 Convention.<sup>16</sup> As is stated in Article 2 (1), (5), elements described in the Schedule I and Schedule IV of the Convention are “...subject to all measures of control applicable to drugs under this Convention”.<sup>17</sup> Moreover, Article 28 of the Single Convention states the rules, which have to be complied if the party of the Convention decides to permit the cultivation of cannabis plant for production of the cannabis products recalling the Article 23 of the same Convention.

*If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.*<sup>18</sup>

The Article 23 thus contains requirements, which have to be fulfilled in a case of the Article 28 being applicable to the case. Those requirements include the establishment of at least one governmental organisation, which will carry out the actions listed in the Article 23, which in general are following:

- such governmental agency should define the areas and lands in which the cultivation of cannabis products is not prohibited;
- it is permitted to participate in the cultivation only for those cultivators who are licensed by the governmental agency;

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<sup>15</sup> United Nations Single Convention on Narcotic Drugs, 1961, Article 1 (b), (c) , (d) - Definitions, available on: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed April 6, 2019.

<sup>16</sup> United Nations Single Convention on Narcotic Drugs, 1961, Schedule I, Schedule IV - Revised Schedules including all amendments made by the Commission on Narcotic Drugs in Force as of 5 March 1990, available on: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed April 6, 2019.

<sup>17</sup> United Nations Single Convention on Narcotic Drugs, 1961, Article 2(10), (5) - SUBSTANCES UNDER CONTROL, available on: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed April 6, 2019.

<sup>18</sup> United Nations Single Convention on Narcotic Drugs, 1961, Article 28(1) - CONTROL OF CANNABIS, available on: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed April 6, 2019.

- such licenses should specify and state the exact space of land which is provided for cultivation;
- all cultivators of the cannabis products should deliver their cannabis products harvest to the agency which should purchase and occupy those harvests;
- Such agency should have an exclusive right to export, import, and trade and maintain the reserves.<sup>19</sup>

The 1961 Convention probably is the strictest possible treaty in a sphere of controlling cannabis. The explanation for this is the Article 4 and its provisions. Article 4, which stipulates that apart from the other substances defined in the Convention, cannabis, should be limited exclusively to the matters of the scientific purposes and medical purposes in manufacture as well as in export, import, drugs trade and possession and use of drugs.<sup>20</sup>

Following United Nations contribution to the control of cannabis products was a United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. This Convention is one of the three main legal international instruments regulating drugs. The other two Conventions of this importance were shown above, which are Single Convention of 1961 and Convention on Psychotropic substances of 1971. Convention 1988 should be perceived as an additional device supplementing the Single Convention 1961 and Convention on Psychotropic substances, 1971. Convention 1988 uses the definition of “cannabis plant” which was already established in the Convention 1961.<sup>21</sup>

The main feature of this treaty is its reinforcement of the duties of the member states regarding the establishment of criminal offences. Article 3 of the Convention 1988 establishes a requirement for the countries to set up the possession, cultivation and purchase of drugs for personal usage as a criminal offence “subject to constitutional principles and basic concepts” of those countries.<sup>22</sup> The aim of this reinforcement was an idea of fighting against the growing demand and supply of the drugs internationally including cannabis.<sup>23</sup>

These three Conventions described above are the core ones for European Union member states when classifying and controlling drugs. Although, not only these Conventions

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<sup>19</sup> United Nations Single Convention on Narcotic Drugs, 1961, Article 23 - NATIONAL OPIUM AGENCIES, available on: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed April 6, 2019.

<sup>20</sup> Single Convention 1961, *supra* note 14, Article 4 ( c ) - General obligations.

<sup>21</sup> Single Convention 1961, *supra* note 14.

<sup>22</sup> UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES , 1988, Article 3, available on: [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) Accessed April 7, 2019.

<sup>23</sup> Martin Jelsma and Amira Armenta eds., first edition, *The UN Drug Control Conventions, a primer*, (Transnational Institute, 2015), accessed April 7, 2019, [https://www.tni.org/files/publication-downloads/primer\\_unconventions\\_24102015.pdf](https://www.tni.org/files/publication-downloads/primer_unconventions_24102015.pdf)

should be taken into account and their rules should be fulfilled but also the issues of potential risks related to the public health as well as personal health should be taken into consideration within EU. In fact, cannabidiol (CBD) is not listed in any of the relevant United Nations Conventions on drugs.

The World Health Organization provides a detailed list of street names of the cannabis and cannabis resin<sup>24</sup>, which is based on the the Multilingual Dictionary of Narcotic Drugs and Psychotropic Substances under International Control, prepared by the United nations Office on Drugs and Crime<sup>25</sup>. According to the WHO Expert Committee on Drug Dependence Pre-Review apart from the other numerous names, the most widely recognized terms “marijuana”, “hemp”, “ganja” refer to the cannabis plant while term “hemp” usually is used when describing the cannabis resin. Summarizing the above, legal definitions of “cannabis” and “cannabis resin” include in itself a wide scope of the street names, which are well known to the society. For convenience, the term “cannabis products” and “cannabis” will be used in this research when referring to the cannabis resin, cannabis plant and other varieties of cannabis products, which are placed under the control of international law.

## **1.2. Impact of recreational cannabis products on human health**

In my opinion, it is relevant to list at least briefly the main effects of this particular drug. This should be done in order to fully understand the subject matter of this paper and to point out its importance once again. It should be noted that information stated below does not include the medical cannabis and its products. Medical cannabis issues will be discussed briefly further in the part 2 of the research. Primarily, it should be remembered that Cannabis is the narcotic substance, which accordingly may provoke addiction and harm to the human health and social well-being.

As was defined in the part 1.2 “Definition of terms “cannabis products and “cannabis””, the THC element is responsible for the psychoactive property and the subsequent effects of cannabis products. Such effects of non-medical cannabis depend on the variety of factors: the consumed amount of the product, previous experience in consumption of drugs etc. However, there are common effects, which occur due to the consumption of

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<sup>24</sup> WHO Expert Committee on Drug Dependence Pre-Review “Cannabis plant and cannabis resin” Section 1: Chemistry, Chapter 1 - Substance definition, Subchapter 1.5 - street names, available on: <https://www.who.int/medicines/access/controlled-substances/Section1.CannabisPlant.Chemistry.pdf?ua=1> Accessed April 6, 2019.

<sup>25</sup> The Multilingual Dictionary of Narcotic Drugs and Psychotropic Substances under International Control, prepared by the United nations Office on Drugs and Crime, page 48, page 50, available on: [https://www.unodc.org/documents/scientific/MLD-06-58676\\_Vol\\_1\\_ebook.pdf](https://www.unodc.org/documents/scientific/MLD-06-58676_Vol_1_ebook.pdf) Accessed April 6, 2019.

cannabis products. It is essential to point out, that such effect is divided in two groups - long-term effects and short-term effects. Most obvious short-term effect of the cannabis is intoxication of human body, which causes an altered condition of consciousness and sudden changes in the behaviour. In other words, it can provoke unreasonable feeling of euphoria, happiness and even anxiety or other states of mind. This psychoactive impact can lead to the potentially dangerous situations for the consumer of drug. For instance, driving under the influence of cannabis products increases the risk of accident and following injuries. Talking about long-term effects, the main one is the possibility of the dependence on the cannabis. Furthermore, According to the World Health Organization there is a growing tendency of having psychotic symptoms and even a schizophrenia of the cannabis use during adolescence.<sup>26</sup>

## **2. Legal terminology related to the cannabis and cannabis products**

For purpose of following research on the legal terminology used in relation with cannabis, the three main types of usage of the cannabis should be distinguished.

There are three types or options of how cannabis products could be used. Cannabis for medical use, which was briefly mentioned above, recreational cannabis which is mainly a subject of legal control all over the world and in the EU as well and the industrial cannabis. Recreational cannabis as may be obvious from the title is used for non-medical purposes, for non-medical intoxication or drunkenness. In other words, recreational use is a consumption of cannabis without medical justification. Talking about medical cannabis or cannabis used for medical purposes, there are many ongoing discussions concerning it. The 1961 Convention has pointed out in its Preamble the importance of medical usage of the drugs:

*Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes.*<sup>27</sup>

The 1961 Convention is most likely the strictest treaty regulating cannabis and putting the obligations of its regulation to the contracting states. However, several articles of that Convention provide certain flexibility for the member states mentioning the medical aspect of drugs. As was already mentioned above, Article 4 of the Convention 1961 as

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<sup>26</sup> World Health Organization, *The health and social effects of nonmedical cannabis use*, available on: [https://www.who.int/substance\\_abuse/publications/cannabis\\_report/en/index11.html](https://www.who.int/substance_abuse/publications/cannabis_report/en/index11.html) Accessed April 6, 2019.

<sup>27</sup> Single Convention 1961, *supra* note 14, Preamble.

one of such provisions states the general obligations regarding the subject matter and underlines that the production, supply, export etc. should be restricted by the medical and scientific purposes.<sup>28</sup>

Currently there are a lot of scientific studies going on researching the impact and effects of medical cannabis and discussing its potential policy on the market. As an example of the cannabis used for the medical purposes there are certain mouth sprays and teas, which consist of cannabis extracts, or cannabis dried flowers.<sup>29</sup>

The industrial cannabis, or as it is often referred “industrial hemp” is used only for the industrial or manufacture purposes, excluding the medical and scientific purposes. This is clearly described in the Convention 1961, Article 2.9:

*Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that:*

- a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and*
- b) They include in the statistical information (article 20) furnished by them the amount of each drug so used.*<sup>30</sup>

In order to continue the discussion of legal issues involved in the process of controlling cannabis in more details the further differentiation of legal terms should be provided. Legal term “decriminalization” should be used when the idea is to make any action or behaviour not a criminal offence. The key point is that when the decriminalization is applied it does not mean that the action or behaviour is legal now; on the contrary, non-criminal fines could punish such action. An example of country which is a member state of EU and which has decriminalized the cannabis is Luxembourg. Starting from the year 2001, cannabis possession used for individual purposes is decriminalized. However, this is still an illegal activity, which can be punished by penalty.<sup>31</sup>

Next relevant terminology is “depenalisation”. According to the EMCDDA report “Cannabis legislation in Europe”, such term refers to the absence of punishment when closing the criminal law case. It can occur either when the issue of the case is about the “minor” amount of the drug or if the execution of such case is not considered to be in the

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<sup>28</sup> Single Convention 1961, *supra* note 19.

<sup>29</sup> Cannabis legislation in Europe, *supra* note 3, part I, page 7, table I.

<sup>30</sup> The Convention 1961, *supra* note 19, Article 2.9

<sup>31</sup> European Monitoring Centre for Drugs and Drugs Addiction, Luxembourg Drug Report 2018, page 3, National Drug Law, available on: <http://www.emcdda.europa.eu/system/files/publications/8898/luxembourg-cdr-2018-with-numbers.pdf> Accessed April 8, 2019.

public interests.<sup>32</sup> An example of such legal practice is Germany. In particular, German Narcotic Drugs Act gives an opportunity of being not prosecuted for the possession of recreational cannabis arguing that:

*...[t]he public prosecutor's office may refrain from prosecution if the offender's guilt could be regarded as minor, if there is no public interest in a criminal prosecution and if the offender cultivates, produces, imports, exports, carries in transit, acquires, otherwise procures or possesses narcotic drugs in small quantities exclusively for his personal use.*<sup>33</sup>

Moreover, in the case where prosecution has already started the court may cease the proceeding at any stage if the conditions defined in law above are met.<sup>34</sup>

One word that is more important is “legalisation”. Generally, it means that specific action from forbidden becomes lawful. For now, there is no such member state in EU, which has fully legalized recreational cannabis, although the tolerance policy in Netherlands is a policy, which is the closest one to the idea of term “legalisation”.<sup>35</sup> The effect of such practice is the impressive amount of well-known “Coffee Shops” all around the Netherlands and especially in the Amsterdam. Dutch law regulating the drugs is the Opium Act<sup>36</sup>, which has two groups or lists of narcotic substances. Cannabis is placed in the list II that refers to the so-called “soft drugs”. Accordingly, the following legal consequences involving the substances from the group I are more grave than those involving the substances from group II. Dutch tolerance policy in principle is aiming to limit and prevent consumption of the hard drugs which are listed in the schedule I of the Opium Act. Allowing people on the governmental level to sell and buy cannabis in coffee shops, which is counted as a soft drug under Dutch law, it is believed to limit the willingness of people and the access as well to the hard drugs. It should be noted that in general selling and buying of soft drugs is prohibited in Netherlands. However, as concerning the tolerance policy, there is an exception as was already written above. Moreover, in the case of being captured outside the coffee shop using the cannabis in small amounts, he or she will not be prosecuted. In general, it could be concluded that the

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<sup>32</sup> European Monitoring Centre for Drugs and Drug Addiction, Cannabis legislation in Europe - an overview, Part 2, page 13, available on: <http://www.emcdda.europa.eu/system/files/publications/4135/TD0217210ENN.pdf> Accessed April 8, 2019.

<sup>33</sup> Act on the Trade in Narcotic Drugs, Narcotic Drugs Act, (Gesetz über den Verkehr mit Betäubungsmitteln – Betäubungsmittelgesetz), Chapter VI - Criminal offences and administrative offences, Section 31a, (1), available on: <http://www.emcdda.europa.eu/topics/law/drug-law-texts?pluginMethod=eIdd.showlegalextdetail&id=677&lang=en&T=2> Accessed April 8, 2019.

<sup>34</sup> German Narcotic Drugs Act, *supra* note 33, Section 31a (2).

<sup>35</sup> Cannabis legislation in Europe, *supra* note 31.

<sup>36</sup> Opium Act, as after enforcement of the Act of 13 July, 2002, to amend the Opium Act (Staatsblad [*Bulletin of Acts and Decrees*] 2002, 520), and the Decree to actualise the Lists I and II of the Opium Act (Staatsblad 2002, 623), which Decree will be enacted simultaneously with the aforementioned Act, available on: <http://www.emcdda.europa.eu/topics/law/drug-law-texts?pluginMethod=eIdd.showlegalextdetail&id=2142&lang=en&T=2> Accessed April 8, 2019.

policy of tolerance breaches the Opium Act by making certain types of selling and buying of cannabis lawful, thus making this policy relatively similar to the concept of legislation.<sup>37</sup>

Bearing in mind the data provided in this part it should be indicated that common and broadly used phrase “cannabis legalization” which is widely recognized by mass media is not correct in the legal sense when speaking about EU and its member states. The reason behind this is the point that when using the phrase “cannabis legalization” it is usually referred to the legalization of cannabis products for non-medical and also non-scientific purposes. Thus, under the present international law governing drugs such perception is not acceptable in legal terms. Presently there is no such member state and there is no EU supreme law, which totally legalizes the cannabis, and it related products for recreational use. Simultaneously, there is an apparent tendency across the Union to move towards less strict policies when it comes to cannabis. The examples of such policies were defined above as following: decriminalization, depenalisation, legalization. Varying from country to country, the implementation of such policies differs due to the individual features of domestic laws. To illustrate the reasons behind such legal situation it may be valuable to refer to the Convention 1988 Article 3. This particular provision states the requirements to establish the criminal offence concerning the certain types of activities involving cannabis, mentioning that those requirements should be applied in accordance with constitutional principles and legal norms of individual country.<sup>38</sup> In virtue of this element of the Article 3, various types of interpretation and further implementation arise within EU. Croatia, Slovenia, Luxembourg and Portugal have decriminalized cannabis for personal possession. Countries, which depenalised cannabis, are Austria, Germany and Poland and only in Netherlands, a policy of legalisation is implemented.<sup>39</sup> However, legal perception of the meaning of all these three terms varies from country to country. For instance, often, drug policy of Netherlands is referred as a “decriminalization”.

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<sup>37</sup> Research and Documentation Centre (WODC), Ministry of Security and Justice, the Netherlands. ,Marianne M. J. van Ooyen-Houben, *THE DUTCH COFFEE SHOP SYSTEM, TENSIONS AND BENEFITS*, available on: <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1228&context=ilr> Accessed April 8, 2019.

<sup>38</sup> The Convention 1988, *supra* note 22.

<sup>39</sup> Cannabis legislation in Europe, *supra* note 31.



### 3. Cannabis offences and punishments within EU

#### 3.1 Classification of drug offences in EU, in particular - cannabis offences

There are several types of drug offences involving cannabis. Supply, trafficking, possession, use and distribution as well as cultivation are often used for the description of various types of offences. Thereby, the distinction between such matters should be indicated. In total, two types of the offences can be differentiated - supply and use. Despite the fact, that central issue of research is related to the use of cannabis, it is necessary to distinguish and understand the legal nature of these two terms for further analysis. The question is what is understood when saying “supply” and ‘use”. One more issue is the way in which the line is drawn between these two types. That is to say, at which point and from which conditions possession may become supply?

In 2004, the European Council framework decision was adopted. This legally binding act laid down the definition concerning such offence as drug supply or the drug trafficking, which is believed to be of the same meaning. Despite the fact, that since year 2009<sup>40</sup> there is no such legal act as “Council decision”, at that time this decision provided a relevant definition for the MS. The Article 2.1. (a) defines supply of drugs with a list of actions which should be controlled by the states:

*...[t]he 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.<sup>41</sup>*

Furthermore, the Article 2 second part emphasizes an exclusion related to the possession of drugs:

*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.<sup>42</sup>*

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<sup>40</sup> EU Monitor, Framework decision, available on:

<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu> Accessed April 12, 2019.

<sup>41</sup> 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, Article 2(1), available on: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32004F0757> Accessed April 12, 2019.

<sup>42</sup> Framework Decision, *supra* note 40, Article 2.2

### **3.2 Punishments and its types for an unauthorised cannabis personal possession across EU**

Based on the previous information, penalties for cannabis related offences vary from country to country within EU. As was noted before, the common worldwide trend is to decrease the penalties for the specified offences. First of all, it is necessary to refer to the three international core Conventions and research its requirements regarding the penalties and its imposition. For now, it should be indicated that phrases “cannabis use” and “cannabis possession” are the synonyms in this matter. Under the Article 36 paragraph, 1 of the Convention 1961 there is no indication of the personal possession as a punishable offence.<sup>43</sup> However, Article 4 of the same law clearly defines the obligations for states to:

*...take such legislative and administrative measures as may be necessary, subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.*<sup>44</sup>

Despite such requirements, the Convention 1961 itself does not demand the states to adopt the penalties for personal possession or use of drugs, which is obvious from the general scope of the exact law, although the possession is mentioned in the Article 4. The Report prepared by the Secretariat on the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders underlines this issue as well stating that a personal possession of drugs is not ranked as a “punishable offence” in the international .<sup>45</sup> Consequently, there is no doubt that discussions in the international level favouring to decriminalize or depenalize the usage or possession of drugs for personal use are rather irrelevant. Moreover, such international legislation leaves it for the consideration of the states on whether and to what extent to punish the possessors or users of cannabis. If the state decides to implement a certain punishment for personal possession it will be not governed by the treaties. The official commentary on the 1961 Single Convention in the paragraph 4.21 in principle simplifies the Article 36 (1) saying that parties based on the defined article may release from that Article. In simple words,

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<sup>43</sup> Single Convention 1961, *supra* note 19, Article 36, paragraph 1.

<sup>44</sup> Single Convention 1961, *supra* note 19, Article 4.

<sup>45</sup> Department of Economic and Social Affairs, Report prepared by the Secretariat on the Fifth United Nations Congress on the Prevention of Crime, (A/CONF.56/10), paras. 65-77, September 1975, available on: [https://www.unodc.org/documents/congress/Previous\\_Congresses/5th\\_Congress\\_1975/025\\_ACONF.56.10\\_Fifth\\_United\\_Nations\\_Congress\\_on\\_the\\_Prevention\\_of\\_Crime\\_and\\_the\\_Treatment\\_of\\_Offenders.pdf](https://www.unodc.org/documents/congress/Previous_Congresses/5th_Congress_1975/025_ACONF.56.10_Fifth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf) Accessed April 10, 2019.

states may not impose punishments for the offences listed in this Article.<sup>46</sup> The Convention 1971 in its Article 23 defines the following:

*A Party may adopt more strict or severe measures of control than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the protection of the public health and welfare.*<sup>47</sup>

Therefore, the governments may establish, if it is vital for the matter of public health and wealth, stricter punishments. The same is defined also in the Article 39 of the Convention 1961.<sup>48</sup>

Provision listed in the Convention 1971 connects the option of conviction and punishment with another options substituting or complementing the punishment for the offenders in the cases where they have committed related offence.<sup>49</sup> This may be applicable only to the “abusers of psychotropic substances”, according to the same article. It should be borne in mind that this provision is not a mandatory one for the contracting parties of the Convention so it is up to the governments to decide upon this issue. The International Narcotics Control Board in its Annual Report for year 2001 has noted this point too: “[t]he international drug control treaties do grant some latitude with regard to the penalization of personal consumption-related offenses”.<sup>50</sup> It is also necessary to return to the Article 3 of the Convention 1988.<sup>51</sup> As was stated above, the states shall adopt the measure of the Convention “subject to its constitutional limitations”<sup>52</sup>. The last part of this Article declares:

*Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.*<sup>53</sup>

The Convention 1988 in term of “possession” is more precise than other core treaties subject to the Article 3<sup>54</sup> although due to the provision written above, it becomes obvious

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<sup>46</sup> Commentary on the Single Convention on Narcotic Drugs’ Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962, paragraph 4.21, available on:

[https://www.unodc.org/documents/treaties/organized\\_crime/Drug%20Convention/Commentary\\_on\\_the\\_single\\_convention\\_1961.pdf](https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_single_convention_1961.pdf) Accessed April 10, 2019.

<sup>47</sup> Convention on Psychotropic substances, 1971, *supra* note 13, Article 23.

<sup>48</sup> Single Convention 1961, *supra* note 19, Article 39.

<sup>49</sup> Convention on Psychotropic substances, 1971, *supra* note 13, Article 22, 1 (b).

<sup>50</sup> International Narcotics Control Board, Annual Report for 2001, Chapter II- Operation of the international drug control system, Part “G” - Control of Cannabis”, paragraph 211, available on:

[https://www.incb.org/documents/Publications/AnnualReports/AR2001/AR\\_01\\_Chapter\\_II.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2001/AR_01_Chapter_II.pdf) Accessed April 11, 2019.

<sup>51</sup> The Convention 1988, *supra* note 22.

<sup>52</sup> *Ibid.*

<sup>53</sup> The Convention 1988, *supra* note 22, Article 3 (11).

<sup>54</sup> The Convention 1988, *supra* note 22, Article 3 (1), a, I, III.

that the apart from the other issues, the choice on the prosecution and punishment is left for the governments solely. The Council Resolution adopted in year 2004<sup>55</sup> is aiming to encourage states to take the necessary measures for preventing the increasing possession of cannabis within EU by completing certain actions. These actions include improvement of the communication with cannabis users, training and informing of parents and controlling the content about the cultivation and promotion of cannabis recognized within the Internet. Nevertheless, such format of EU legal act is not binding on the member states thus this resolution could be seen as a recommendation on further work of states.

Thus, the fundamental international drug law does not specify certain type of punishments for the personal possession of drugs and other legal matters related to such punishments leaving it on the responsibility and legal principles of member states. Moreover, this issue was highlighted in the 2016 on the meeting of the United Nations General Assembly on the special session of the drug world problem:

*We recognize that there are persistent, new and evolving challenges that should be addressed in conformity with the three international drug control conventions, which allow for sufficient flexibility for States parties to design and implement national drug policies according to their priorities and needs, consistent with the principle of common and shared responsibility and applicable international law;*<sup>56</sup>

Thereby, the question of what is considered “certain flexibility” arises. From EU point of view, certain flexibility is seen as an option of decriminalization and softening of punishments.

Further, the question, which arises when dealing with cannabis for personal possession, touches upon the exact amount that can be considered for personal use on legal level. In countries where such limit of the amount has been established it is possible to be prosecuted for harsher offence if this amount is exceeded. Example of such country is Netherlands.<sup>57</sup> In accordance with Dutch Opium Act, the “small amount” which is permitted for personal possession is not punishable if the amount is of maximum 5 grams or 5 plants of cannabis.<sup>58</sup> Continuing the analysis of the “small amounts” issue within EU some countries, as mentioned Netherlands, have decriminalized the possession of minor quantities of cannabis whereas

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<sup>55</sup> COUNCIL OF THE EUROPEAN UNION Brussels, 7 July 2004, 11267/04 CORDROGUE 59, COUNCIL RESOLUTION ON CANNABIS, available on:

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011267%202004%20INIT> Accessed April 12, 2019.

<sup>56</sup> Resolution adopted by the General Assembly on 19 April 2016 [without reference to a Main Committee (A/S-30/L.1)] S-30/1. Our joint commitment to effectively addressing and countering the world drug problem, 1st plenary meeting 19 April 2016, available on:

<https://undocs.org/A/RES/S-30/1> Accessed April 12, 2019.

<sup>57</sup> Cannabis legislation in Europe, *supra* note 3, page 14.

<sup>58</sup> Government of Netherlands, Difference between hard and soft drugs, part - Toleration policy regarding soft drugs in coffee shops, available on: <https://www.government.nl/topics/drugs/difference-between-hard-and-soft-drugs> Accessed April 11, 2019.

other member states may enforce even the imprisonment for the same way of the possession. In contrast to Netherlands, Poland is considered as one of the strictest countries in EU in terms of controlling of cannabis. Act on Counteracting Drug Addiction of 29 July 2005 is the one which governs drug matters in Poland. Before year 2011 there was no possibility to possess even small amounts of cannabis for personal use and avoid the punishment. Without doubt, recreational cannabis for personal use is illegal within Poland. Cannabis use in small amounts was penalised by the imprisonment of up to three years. However, since year 2011, which was a milestone year for the legal developments in cannabis legislation, the new legislation was introduced. Starting from 2011 the Article 62(a) came into force providing the regulation that small amount of cannabis for personal use may not be the reason to punish the offender. This means that legal procedure may be stopped but the decision to do so is on the judge or prosecutor's responsibility.<sup>59</sup> The curious fact is that there is no clear limit stated in Polish law concerning the definition of "small quantity". Thus most likely it is up to the judge or prosecutor to decide upon this issue.

The common ways of punishment for personal possession are fines, warnings and suspended prison sentence, according to the EMCDDA publication.<sup>60</sup> In accordance with information provided in this publication, there is a common trend to use fines in the Denmark, Latvia, Netherlands, Czech Republic, France, and Germany. The highest chance to receive a suspended prison sentence for the possessor of drug is recognized in the Poland and Croatia. The warning as a type of punishment is prevailing in the Italy, Austria and Portugal.<sup>61</sup> Generally speaking, the ability to make a comparative cross-border research involving EU MS's is limited by the divergence in states basic legal principles, their interpretations of certain definitions and related terminology. All things considered, it can be said that despite the difference in national laws and their requirements towards punishment, the three main ways of punishment for personal possession exist for now across EU - fine, warning and suspended jail sentence.

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<sup>59</sup> European Monitoring Centre for Drugs and Drug Addiction, Drug policy profile: Poland, page 15-16, available on: [http://www.emcdda.europa.eu/attachements.cfm/att\\_227226\\_EN\\_TDAU14003ENN.pdf](http://www.emcdda.europa.eu/attachements.cfm/att_227226_EN_TDAU14003ENN.pdf) Accessed April 11, 2019.

<sup>60</sup> European Monitoring Centre for Drugs and Drug Addiction, Drug offences:sentencing and other outcomes, 2009, page 18, available on: <http://www.drugs.ie/resourcesfiles/ResearchDocs/Europe/Research/2009/TDSI09001ENC.pdf> Accessed April 13, 2019.

<sup>61</sup> Drug offences, *supra* note 58, page 11, figure 2.

#### 4. Current EU Law powers on regulation of cannabis

For the beginning, it is important to note, that further chapters of the research will focus more on the recreational cannabis for personal possession. This chapter is not analysing the EU law on the regulation of medical cannabis or industrial cannabis as well as it is not focused on the supply of drugs and drug trafficking.

As was already introduced in previous chapters, the EU law governing drugs is based on the three core UN Conventions: Convention 1961, Convention 1971, and Convention 1988. All member states of EU are the parties to these treaties. Signatory countries of these treaties are obliged to act in accordance with provisions. Thereby, recalling the Convention 1961, the recreational cannabis products are subject of all measures of control listed in the law. Under the Convention 1971, the distribution and manufacturing of cannabis (which is placed in Schedule II) can occur only in the event of special license or authorized person.

Thus, taking into account the three fundamental UN drug conventions, the cannabis products are strictly limited by medical and scientific purposes. International drug control framework exercises a list of limitations and requirements of control of trafficking, possession, of cannabis products. Despite the fact that EU is supranational law for its members states, which is covering a lot of vital issues to the society, the sphere of drugs is not controlled by the EU extensively. EU Treaty is not providing any provisions, which define the rules and obligations of EU MS on how to control drugs and the cannabis as well. Nevertheless, the Article 168 of Treaty on the Functioning of the European Union stresses the following: “The Union shall complement the Member States action in reducing drugs-related health damage, including information and prevention.” SNOSKA In accordance with Article 6 of TFEU, public health is the sphere of shared competence thus the Union has a right to support or complement the actions of member states.<sup>62</sup> Articles 82-86 then defines the concept of judicial cooperation in criminal matters between EU and states. Moreover, Article 83 is giving a right for the EU to establish the definitions regarding the criminal offences and sanctions in the spheres of notably severe crimes, including the drug trafficking. Based on this, there are only several legal acts enforced by EU in the sphere of regulation of cannabis products. The Union itself has relatively weak powers to extensively govern the issues of cannabis. However, by

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<sup>62</sup> Consolidated version of the Treaty on the Functioning of the European Union - PART ONE: PRINCIPLES - TITLE I: CATEGORIES AND AREAS OF UNION COMPETENCE - Article 6, available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML> Accessed April 20, 2019.

performing several legal steps such as implementation of “Council Resolution on Cannabis”<sup>63</sup> which was discussed before, the Union seeks to encourage the states to work towards the regulation of drugs. The EU Drugs Strategy is the approach developed for the further control of drugs. Such approach is fixed in the EU Drug Strategy 2013-2020 plan. The strategy itself includes two Action Plans - Action Plan 2013-2016 and 2017-2020. The main objectives are decrease of supply and decrease of demand. It also contributes to reduce the social and health threats. Taking into consideration the significance of public health, the Council Regulation<sup>64</sup> established the agency EMCDDA. EMCDDA is a specialised institution on drugs. It collects data, reports and other relevant information connected with drugs. At present, the agency is placed in Lisbon, Portugal. The main goal of the agency is to provide “...[f]actual, objective, reliable and comparable information at European level concerning drugs and drug addiction and their consequences”.<sup>65</sup> These instruments are dedicated to provide the necessary information regarding drugs and to contribute to the healthy environment within EU.

## **5. Correlation between legal development of cannabis and economic issues**

Cannabis products are the most used illicit drugs across Europe in accordance with statistical data provided by the EMCDDA.<sup>66</sup> Usually, law affects the economics and economics affects law. These two matters correlate also in the sphere drugs. Legal and economic issues related to the development of legislation of cannabis go hand in hand affecting each other. Thus, it is important to show the relevant economic data and provide the analysis of how the legal and economic factors correlate at this point. For the clarity, this chapter starts with the more detailed discussion of legal norms related to cannabis in the defined countries.

### **5.1 Cannabis regulation in Netherlands**

As was defined, the main law, which governs the drug related issues in Netherlands, is the Opium Act.<sup>67</sup> This Act dates back to the year 1928. However, the amendments added to his

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<sup>63</sup> COUNCIL RESOLUTION ON CANNABIS, *Supra* note 54

<sup>64</sup> Council Regulation, *Supra* note 2.

<sup>65</sup> European Monitoring Centre for Drugs and Drug Addiction, Mission, available on: <http://www.emcdda.europa.eu/about/mission> Accessed April 24, 2019.

<sup>66</sup> European Monitoring Centre for Drugs and Drugs Addiction, Cannabis policy, available on: [http://www.emcdda.europa.eu/topics/cannabis-policy\\_en](http://www.emcdda.europa.eu/topics/cannabis-policy_en) Accessed April 21, 2019.

<sup>67</sup> Opium Act, *supra* note 36.

law in 1976 made the Dutch drug policy famous all around the world. The year 1976 was a beginning of the Dutch tolerance policy which is still known in modern world. The Act itself differentiates the soft and hard drugs. There is a popular misbelief that cannabis is “legal” in Netherlands. However, as it was explained in the previous chapters, such perception is incorrect in terms of law. According to the EMCDDA translation of the Opium Act, the Article 3 of this law states:

*It shall be illegal to:*

- A. bring into or outside the territory of the Netherlands;*
  - B. prepare, treat, process, sell, supply, provide or transport;*
  - C. possess; or*
  - D. manufacture*
- a drug as referred to in List I accompanying this Act or designated pursuant to Article 3a, fifth paragraph.*<sup>68</sup>

From the Dutch law it is clear that possession of cannabis is still illicit. In virtue of tolerance policy, the coffee shops are allowed to sell the cannabis for personal consumption but this occurs only in the event of fulfilling certain obligations. These obligations include:

- limited amount of cannabis for sale: maximum of 5 grams of cannabis and maximum of 5 cannabis plants;
- exclusion of any nuisance;
- ban to sell “hard drugs”
- selling of cannabis is permitted only to the adults ( not minors);
- advertisement of drugs is prohibited;
- it is prohibited to sell more than the allowed amount of cannabis in one transaction (see the first point).<sup>69</sup>

Key issue of the Dutch drug law is the expediency principle. The application of this principle to criminal procedures gives the possibility for the prosecution to decide whether to apply the law or not. The basis for this is the matter of acting “in the interests of public”. Sections 167 and 242 of the Dutch Code of Criminal Procedure establish this principle. Section No. 167 states:

*1) If the Public Prosecution Service considers on the basis of the results of the criminal investigation instituted that prosecution is required by the issuance of a punishment order or otherwise, it shall proceed to do so as soon as possible.*

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<sup>68</sup> Opium Act, *supra* note 26, Article 3.

<sup>69</sup> Homepage of the Government of Netherlands, Toleration policy regarding soft drugs and coffee shops, available on:

<https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> Accessed May 10, 2019.



2) A decision not to prosecute may be taken on grounds of public interest. The Public Prosecution Service may, subject to specific conditions to be set, postpone the decision on prosecution for a period of time to be set in said decision.<sup>70</sup>

An interesting legal development appeared in the 2011, when Dutch government announced a ban for coffee shops to be located in the distance of 250 meters of walking distance of schools. This measure was based on the willingness to protect children, although there was no significant evidence on supporting this decision. A variety of cannabis retail shops was affected by this measure and as a result, for the period of 2014-2016, at least 28 shops in Amsterdam were subject to closure.<sup>71</sup>

## 5.2 Cannabis regulation in France

As was already discovered, France is a contracting party for all three UN Drug Conventions. This subchapter is investigating the legal overview of the legal attitude towards cannabis in France. However, in comparison with the Netherlands, France is not distinguishing the soft and hard drugs in its national law. In simple words, if the person is accused for cannabis use, it will be punished in the same way as if in the case of heroin or other “hard” drug. French Law also is not dividing the punishments involving cannabis by its types, such as possession and trafficking. Thus, unlike in the Netherlands, penalties are not connected to the type of abuse. Even more, in several cases possession may be treated as trafficking, as it is stated in Article 222-37 of the penal Code.<sup>72</sup> Under this provision, a fine of up to EUR 7, 500, 00 and imprisonment for 10 years, could be enforced towards person in the case of possession of cannabis. Main national instrument governing drugs is the Law of 1970<sup>73</sup>, which sometimes is called the Mazeaud Law. The main feature of this law is not only its severe nature but also the alternative for the repression methods - healthcare options for those who need specific

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<sup>70</sup> Dutch Code of Criminal Procedure (unofficial translation), Chapter Five- Decisions on Prosecution, Section 167, Chapter Eight - No Appeal in Cassation for the Public Prosecution Service, Section 242, available on: [http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering\\_ENG\\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf) Accessed May 10, 2019.

<sup>71</sup> Transform Drug Policy Foundation, Publication - Cannabis policy in the Netherlands: moving forwards not backwards, page 3, available on: <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Cannabis-policy-in-the-Netherlands.pdf> Accessed May 11, 2019.

<sup>72</sup> PENAL CODE of France, With the participation of John Rason SPENCER QC Professor of Law, University of Cambridge, Fellow of Selwyn College, Article 222-37, available on: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwii7pyg6JbiAhXwl4sKHeBXAL4QFjABegQIBhAC&url=https%3A%2F%2Fwww.legifrance.gouv.fr%2Fcontent%2Flocation%2F1740&usq=AOvVaw3jcyV4oaCp1UJSRlrN8AwQ> Accessed May 3, 2019.

<sup>73</sup> Loi n°70-1320 du 31 décembre 1970 RELATIVE AUX MESURES SANITAIRES DE LUTTE CONTRE LA TOXICOMANIE, ET A LA REPRESSION DU TRAFIC ET DE L'USAGE ILLICITE DES SUBSTANCES VENENEUSES, available on: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000321402> Accessed may 3, 2019.

treatment. In 1994, most of the provisions of the law of 1970 were transferred to the new Penal Code. The only exception was the provisions, which were regulating the use. Cannabis is placed in the list I of the Decree Law of February 1990. With regards to the possession, it is treated as a criminal offence in French law. There is a domestic centre for dealing with drugs, which is called “Interministerial Mission for Combating Drugs and Drugs Addictive Behaviours”.<sup>74</sup> This institution performs and coordinates a variety of organizational tasks in the sphere of drugs. Later, the “drug awareness course” was introduced. This is the mandatory course defined in the Directive of 9 May 2008. The mechanism of this directive provided that individuals who use drugs might obtain a warning, which should be supplemented with a mandatory requirement to attend the “drug awareness course”. This measure is a priority for minors and for mere crimes involved in drug offences.<sup>75</sup> Thus, despite the ongoing national discussions on subject, France is staying aside from the trends of decriminalisation and depenalisation. There is a new pending bill issued by the French Government on November 2018. The bill is defining new fine for the illicit cannabis possession in the sum of EUR 200. For now and until the enforcement of the bill, the higher possible punishment for illegal cannabis use is a fine in the amount of EUR 3750 and imprisonment. This legislative innovation shows the tendency of France to soften its drug laws and follow the European Union trend of liberation of drugs.<sup>76</sup>

### **5.3 Economic issues related to cannabis industry in France and Netherlands**

The new research of the independent consultancy agency called “Prohibition Partners” discovers the internal market of the recreational cannabis within EU and its impressive numbers. Following information is based on the “European Cannabis Report”<sup>77</sup>. According to this report, current EU recreational cannabis market is valued at EUR 18 billion. The

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<sup>74</sup> Interministerial Mission For Combating Drugs and Drugs Addictive Behaviours, available on: <https://www.drogues.gouv.fr/page-simple/mildeca-interministerial-mission-combating-drugs-and-addictive-behaviours> Accessed May 4, 2019.

<sup>75</sup> EMCDDA, France Drug Report 2018, pages 27-28, available on: <http://www.emcdda.europa.eu/system/files/publications/8871/france-cdr-2018-with-numbers.pdf> Accessed May 5, 2019.

<sup>76</sup> International Consulting Law Firm, Publications, Cannabis Legal & Regulatory Update - October-December 2018, available on: <http://www.allenoverly.com/publications/en-gb/Pages/cannabis-legal-regulatory-update-october-december-2018.aspx> Accessed May 5, 2019.

<sup>77</sup> Prohibition Partners Agency, European Cannabis Report 2018, available on: [http://prohibitionpartners.com/reports/The%20European%20Cannabis%20ReportTM%204th%20Edition.pdf?utm\\_source=The+European+Cannabis+ReportTM+4th+Edition&utm\\_campaign=1d3204ec90-AUTOMATION\\_\\_1\\_EDITION\\_3\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_b2d65a7e56-1d3204ec90-76768635](http://prohibitionpartners.com/reports/The%20European%20Cannabis%20ReportTM%204th%20Edition.pdf?utm_source=The+European+Cannabis+ReportTM+4th+Edition&utm_campaign=1d3204ec90-AUTOMATION__1_EDITION_3_COPY_01&utm_medium=email&utm_term=0_b2d65a7e56-1d3204ec90-76768635) Accessed May 13, 2019.

calculations were carried out taking into consideration the black market and multiplication of prevalence by average consumption and average price for cannabis.

The average price of recreational cannabis per gram is EUR 8.33. Furthermore, the estimated market value of cannabis used for non-medical purposes is counted as 65 billion for the year 2028. From the economical perspective, the question that arises is as follows - how the creation of lawful recreational cannabis market may contribute to the economy of states. From the basic understanding of economy, it is clear that in a case, the extra earnings for the taxation will generate to the countries income. Moreover, establishment of such market may provide new employment facilities. Further, it is relevant to look on the specific examples of selected countries.

For the clarity, for the example for such analysis the Netherlands and France are chosen. The reason behind this is the fact that Netherlands is a country with most tolerant policy towards drugs as well as the most rapidly developing country in the sense of legislation of drugs. The Dutch policy is known as a so-called predecessor in the sphere of drugs. Conversely, the France is known for the comparatively strict policy regulating cannabis. For the purpose of the best possible inspection of impact on economics caused by the legislation, it is worth to investigate both countries.

During the research, the deficit of the authorized economic data on Netherlands was recognized. At the time of research there is no officially approved information regarding the domestic profits gained from the cannabis shops, however, there is a variety of mass-media articles and reports announcing economic issues of shops. For the explicitness of this chapter, such sources will be used.

Starting an analysis, the Netherlands and the example of the state's tolerance policy will be discussed. "Coffee shops" are retail outlets which are now located across the Holland but mainly in the Amsterdam. Consumers can purchase the cannabis products inside such shops for the average price from EUR 7 to EUR 11.00, although the sale of alcohol is prohibited there.

The EMCDDA report showed the economic performance of these shops for the year 2004. The numbers are as follows: from 737 operating shops in the country, the average estimated revenue per shop from cannabis is EUR 280000-380000.<sup>78</sup> The key point of Dutch drug law although is the so-called "back door problem" which is expressed through the illegal supply and growing of cannabis. It is prohibited for the owners of cannabis shops to grow and

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<sup>78</sup> EMCDDA Monographs: A cannabis reader: global issues and local experiences - Perspectives on cannabis controversies, treatment and regulation in Europe, Sharon Rödner Sznitman, Börje Olsson, Robin Room, Chapter 9, Table 1, available on: C:\Users\USER\AppData\Local\Temp\emcdda-cannabis-mon-vol1-ch9-web-1.pdf Accessed April 21, 2019.

produce the cannabis. Nevertheless, at the same time, in order to fulfil the demand of customers, the product should be produced. Under the law, resupply of the stock for the cannabis shops is prohibited. This results in the black market, which is also stimulated by the “back door problem”.

The black market usually involves organized criminal groups and thus possesses a potential harm to the society. Finances gained from the illegal production and supply of cannabis products most probably are serving for the more severe criminal offences and the development of the criminal organisations. Consequently, this raises the governmental expenditures on prosecution of criminal offences and results also in increasing costs for regulation of this problem. This problem illustrates the negative economic and legal impact of the tolerance policy as well as shows the loophole of the Dutch and International Law. Meanwhile, in accordance with the “European Cannabis Report”<sup>79</sup>, the government of Netherlands receives EUR 400 million tax revenue gained from the domestic cannabis sale. Financial contribution of member states to the budget of EU mainly is dependent on the GDP of each country. As the coffee shops are functioning on the fringes of law, the question is how it is possible for these shops to contribute to this matter. Starting from the September 2014, Dutch government shall include its illegal activities in the Dutch National Accounts, according to the European System of Accounts<sup>80</sup>. Insertion of illegal activities in the National Accounts most probably is resulting in a significant financial impact on EU budget. Thus, illegal activities are also bound by the income tax and cannabis retail shops are paying the tax from the generated profit. Moreover, shops are also subject of tax on wages and the social security premiums. Speaking about the value added tax, it is not imposed on the Dutch cannabis retail shops. The reason behind is the illegality of such shops. In accordance with EU Directive 2006/112/EC<sup>81</sup>, the VAT is harmonized through the EU. Therefore, in order to levy the specified tax on cannabis industry, legalization on national level should be accompanied with adaptation of international drug law and consequently EU regulation on value added tax.<sup>82</sup>

The case of Happy Family illustrates the issue of VAT connected to the cannabis market very well.

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<sup>79</sup> European Cannabis report, *supra* note 77, country overview – Netherlands.

<sup>80</sup> European system of accounts 1995, available on: <http://aei.pitt.edu/52185/1/1995.pdf> Accessed may 10, 2019.

<sup>81</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, available on: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32006L0112> Accessed may 12, 2019.

<sup>82</sup> L.J.M. (Leo) van den Ende, Taxation of Drugs – The Dutch Experience (Tributación de las drogas – La experiencia Holandesa), May 2015, part 8 and 12, available on: [https://revistaicdt.icdt.co/wp-content/Revista%2074/PUB\\_ICDT\\_ART\\_VANDENEN%20DE%20L.%20J.%20M.%20Tributacion%20de%20las%20drogas%20La%20experiencia%20holandesa\\_Revista%20ICDT%2074\\_Bogota\\_16.pdf](https://revistaicdt.icdt.co/wp-content/Revista%2074/PUB_ICDT_ART_VANDENEN%20DE%20L.%20J.%20M.%20Tributacion%20de%20las%20drogas%20La%20experiencia%20holandesa_Revista%20ICDT%2074_Bogota_16.pdf) Accessed May 13, 2019.

In the relevant EU case law, the court decided that unlawful sale of drugs shall not fall under the scope of VAT tax regulation. The exception is the case when drugs are used for the medical and scientific purposes. The court ruled:

*( 1 ) Article 2 ( 1 ) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value-added tax : uniform basis of assessment -- must be interpreted as meaning that no liability to turnover tax arises upon the unlawful supply of narcotic drugs within the territory of a Member State in so far as the products in question are not confined within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes .*

*( 2 ) That also applies to the unlawful supply of narcotic drugs derived from hemp even where, pursuant to a selective prosecution policy, the authorities of a Member State do not systematically bring criminal proceedings against small-scale retail dealing in such drugs.<sup>83</sup>*

In 2014, the coffee-shops industry contributed to the gross domestic product of the Netherlands in the quantity of 0,4 %.<sup>84</sup> Nonetheless, it is quite complex to estimate the real picture of earnings from the cannabis industry based on the fact, that huge amounts are still not controlled by the government namely, revenues are contributed to the black market. The explanation for quite impressive income on tax may be the widely recognized popularity and demand for “Coffee shop” production from the tourists travelling mainly to the Amsterdam. The strong connection between the changes in tolerance policy and the profitability of the tourism industry within the Netherlands exists now. In other words, introduction of the new limitations towards the tolerance policy may result in the significant economic loss. The best way to illustrate this interconnection is to refer to the judgment of the Marc Michel Josemans v Burgemeester van Maastricht case, which was handled by the European Court of Justice. In total, the court ruled, “the prohibition on the admission of non-residents to Netherlands ‘coffee-shops’ complies with European Union law”. This judgement was published by the press release of the ECJ in 2010.<sup>85</sup> Following the decision of court, tourists travelling to the Netherlands city Maastricht are prohibited to admit the cannabis shops. In the 2010, the judgment was addressed to the Maastricht city. On the average, 6 000 customers every year visited the cannabis shops in Maastricht. After the judgement entering into force, the significant amount of tourists was lost with the exception of Germans and

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<sup>83</sup> Judgment of the Court (Sixth Chamber) of 5 July 1988. Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting. Reference for a preliminary ruling: Gerechtshof Amsterdam - Netherlands. VAT on the illegal supply of narcotic drugs within the territory of a Member SState. Case 289/86. European Court Reports 1988 -03655ECLI identifier: ECLI:EU:C:1988:360, operative part, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0289#1> Accessed May 12, 2019.

<sup>84</sup> Reuters, Article - It's official: drugs, prostitution boost Dutch economy, available on: <https://uk.reuters.com/article/us-dutch-economy-drugs-idUKKBN0F01N820140625> Accessed April 24, 2019.

<sup>85</sup> Court of Justice of the European Union, PRESS RELEASE No 121/10, Luxembourg, 16 December 2010, Press and Information, Judgment in Case C-137/09 Marc Michel Josemans v Burgemeester van Maastricht, available on: [http://europa.eu/rapid/press-release\\_CJE-10-121\\_en.pdf](http://europa.eu/rapid/press-release_CJE-10-121_en.pdf) Accessed April 22, 2019.

Belgian. Consequently, the revenues and profit of the operating coffee shops dropped.<sup>86</sup> Starting from the year 2013, this “residence criteria” was supposed to enter into force for the whole country and all its municipalities.<sup>87</sup> In October 2012, due to the new Dutch coalition government, the residence criterion was substantially neglected. Still, as was noted in the beginning of the chapter, each municipality has its own policy on coffee shops. To illustrate the issue it is useful to refer to the shop “The Grass Company” which is the coffee shop company in Holland. On the web site of the company, the information regarding the residence criteria is provided. Specifically, the company clarifies in which municipalities the entrance to their shops is opened for tourists and in which municipalities and shops the situation is contrary.<sup>88</sup> In February 2017, Dutch liberal party’s bill claiming the tolerance policy towards the supply of cannabis in coffee shops was approved by the Lower House of Dutch parliament.<sup>89</sup> This could be perceived as an attempt to fight against the black market on national level. The Dutch legal and economical approach towards the cannabis industry may be referred as a “two sides of the same coin”. The most recent Dutch bill emphasizes this argument. Netherlands are trying to balance the economics and social matters about cannabis by implementing different regulatory tools. The tolerance policy is aiming to prevent the public from usage of hard drugs although such policy gives the rise to the black market and its main actors - criminal organizations. The residence criterion was enforced for reducing the drug tourism in the Netherlands, but it may negatively affect the national economy. Thus, the Netherlands are still on the way of finding the best regulatory framework, which will harmonize the economic advantages and public health and wealth issues in the sphere of cannabis. In overall, the process of monetization of decriminalised drugs is taking place within EU and particularly in Holland. Apparently, the key economical driving force in this context is the opportunity for governments to control revenues obtained from the cannabis industry. More precisely, in order to monitor the tax revenues coming to the state budget. Besides, one of the possible advantages, which may occur in the case of full legalization of cannabis, not only in Netherlands, is the option to control the production of drug thus making it safer.

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<sup>86</sup> BBC News, Maastricht bans cannabis coffee-shop tourists, available on: <https://www.bbc.com/news/world-europe-15134669> Accessed April 24, 2019.

<sup>87</sup> The House of Representatives of the Netherlands, Coffee shop policy, available on: <https://www.houseofrepresentatives.nl/dossiers/coffee-shop-policy> Accessed April 25, 2019.

<sup>88</sup> “The Grass Company”, Article - Entry requirements, available on: <https://thegrasscompany.nl/en/4531/> Accessed April 26, 2019.

<sup>89</sup> Marianne M. J. van Ooyen-Houben, THE DUTCH COFFEE SHOP SYSTEM, TENSIONS AND BENEFITS ( Research and Documentation Centre (WODC), Ministry of Security and Justice, the Netherlands, 2017), page 663, available on: <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1228&context=ilr> Accessed April 26, 2019.

It is also important to specify, that due to the dynamic development of the cannabis industry and market it is difficult to distinguish which matters are consequences of the decriminalisation process and which are just inherent part of the industry itself.

Contrary to the Netherlands, France is quite conservative in terms of liberal legal attitude towards cannabis. In economic sense, France is the one of the greatest economies in Europe. France is considered as one of the highest cannabis consumption countries, where the prevalence of cannabis consumption between 2015 and 2017 ranks at 11.1% of population.<sup>90</sup> Despite this fact, the drugs laws there are comparatively strict. Consequently, France is also a subject of black market. Comparatively high demand of cannabis creates a favourable atmosphere for the potential legal cannabis market. French analytical centre “Terra Nova” in its report stated that EUR 568 million annually are spent for the battle against the cannabis. According to this report, in a case of France choosing the option of decriminalization of cannabis use, most probably it may lead to the decrease of the enforcement costs.<sup>91</sup> Currently, there is a visible pressure from the public towards the government authorities with the proposals to “legalize” the cannabis. As high demand is recognized widely through the France, which means that there is a need and place for supply. The report of “Prohibition Partners”, which is linking to the “Terra Nova” agency, states that possible liberalization of legal attitude towards cannabis may generate from EUR 1.3 billion to 2.1 billion tax incomes as well as may provide 13,000 employment positions in French cannabis market. Considering this, from the economical point of view, there is a space for growing the businesses and developing the huge market, which may positively contribute to the domestic economy. However, there was an attempt made by the President of France, Emmanuel Macron to soften the existing severe law regarding the cannabis use in the 2017. Yet, this reform has not been enforced. For now, France is staying aside from the global trend of liberation of drug policy.

The main problematic issue for France is the simultaneous high level of consumption and quire severe law regulating drugs. From this point of view and comparing with the Netherlands, level of consumption is not dependent on the “legal freedom” of cannabis. Thus, the conclusion appears that the goal to decrease the level of consumption of cannabis on national level is not fully achieved by implementation of severe laws.

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<sup>90</sup> Prevalence of cannabis use in the last year in Europe between 2015 and 2017\*, by country, available on: <https://www.statista.com/statistics/597692/cannabis-use-europe-by-country/> Accessed May 1, 2019.

<sup>91</sup> French liberal independent agency “Terra Nova”, Cannabis: Regulating the market to break the deadlock, available on: <http://tnova.fr/etudes/cannabis-reguler-le-marche-pour-sortir-de-l-impasse> Accessed May 2, 2019.

## 6. Example of non-commercial approach of cannabis

Cannabis is the most widely used drug in Spain as well.

Reverse example of how cannabis may be integrated is Spain with its social cannabis clubs.. These clubs operate as non-profit orientated organizations with specific members. Clubs distribute the cannabis to its members. Spain has decriminalized personal possession and cultivation of cannabis in the cases when it is used not for sale or trade purposes. However, it is illegal to use the cannabis for commercial purposes. As every member state of EU, Spain has ratified and then transferred the Convention 1961 into its national law called Narcotic Law 17/1967. Spanish Royal Decree 2829/1977 has incorporated the UN Convention 1971.<sup>92</sup> It should be noted, that Spain is divided in regions and each of these regions may have its own individual rules on this issue.

In the 1995, the Penal Code of Spain was introduced by the Organic Act 10/1995. Article 368 of this law states:

*Those who carry out acts of cultivation, preparation or trafficking, or who otherwise facilitate the unlawful consumption of toxic drugs, narcotics or psychotropic substances, or who possess them for those purposes, shall be punished with imprisonment from three to six years and a fine of one to three times the value of the drug the offence concerns, if they are substances or products that cause serious damage to health, and of imprisonment from one to three years and a fine from one to two times the amount in the remaining cases.*<sup>93</sup>

With regards to this provision, cultivation, possession, preparation is not a subject to the Penal Code if it is not meant to pursue commercial aim or the aim to encourage the consumption. This area of Article became a ground for the rise of social cannabis clubs, which are dealing with cannabis according to the law, as they do not chase the aim to earn. Thus, the possession of cannabis for personal consumption falls out of the scope of this provision. The clubs are not selling the drug; rather they are providing the cannabis for its members. As these clubs are operating for their members, the supply depends on the demand, which means that clubs produce only the amount required by the members.

The Spanish model shows the phenomenal issue. On the one hand, the law restricts the availability and promotion of cannabis. On the other hand, there is a justification for adults to access to the cannabis. Probably, the main advantage of these clubs is the control of quality as

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<sup>92</sup> EMCDDA, Country Profile – Spain, available on: <http://www.emcdda.europa.eu/html.cfm/index5174EN.html?pluginMethod=eldd.countryprofiles&country=ES> Accessed May 13, 2019.

<sup>93</sup> Criminal Code of Spain 1995 by the Organic Act 10/1995 of 23 November, Article 368.1, available on: [file:///C:/Users/library/Downloads/Spain\\_CC\\_am2013\\_en%20\(2\).pdf](file:///C:/Users/library/Downloads/Spain_CC_am2013_en%20(2).pdf) Accessed My 13, 2019



there is no need for the managers of these clubs to refer to the black market. This results in a high quality product.

## **7. Analysis of the efficiency of EU MS's current policies on drugs from the perspective of reduction of cannabis use**

The primary aim of the law is to create and ensure the well-being of society on legal level. The law as such is establishing standards to maintain the order favourable, safe and appropriate for the society. The wide spreading of the trend of decriminalisation of cannabis is touching upon the fundamental issues of human's life as from the individual perspective, as from the perspective of society's functioning. While there are different legal approaches to govern the cannabis abuse, none of them is the successor in its sphere. This is illustrated by one simple fact - cannabis remains the most used illicit drug across the Europe for decades. Neither the France with its severe laws, neither the Netherlands with their policy of tolerance has reached the aim of reducing the consumption of cannabis products. It is clear though that the success of implementation of any drug policy on national level depends also on the domestic traditions, internal mentality and national law traditions. There is no correct choice in choosing the option of decriminalization or severe punishments for personal possession. Due to the individual features of each state, the same policy can work in the different way ending up with the unexpected results. This creates a complex work for the legal authorities as on national level as on the international. Probably, the most suitable solution will be to "learn the lesson" of decriminalization policy in specific member states and to find the best possible tenable solution for the further legal development of cannabis regulation. There is no one equal formula of the cannabis regulation which will be suitable for each and every country. From the experience of Netherlands, the loophole in law or the "back door problem" gave the power to the increase of the black market and criminal organizations. By aiming to reduce the usage of hard drugs Netherlands produced the policy which enlarged the danger to public health and well-being and contributed to the drug tourism as well. From this experience, the issue of black market should be taken into account when considering the tolerance policy. As for France, which prohibits cannabis in the strictest way possible, this policy is not working successfully as well. The consumption rate is increasing and cannabis possession

remains one of the central legal issues for the French government. Thus, the option of severe punishments is not comparatively prosperous.

Spanish social cannabis clubs are positive in terms of controlling the quality of produced substance. Clubs also are not contributing to the development of the black market.

However, the drug regulation model of Portugal may be useful to take into account. In the July of 2001, the new law entered into force. This law decriminalized not only cannabis, but other drugs also. Law of 2000/30 stated that possession or use of any drug is not a criminal offence starting from the enforcement of this law. Rather, the administrative law controls this issue. Article 2 of Law N° 30/2000, of 29 November, states:

*The consumption, acquisition and possession for own consumption of plants, substances or preparations listed in the tables referred to in the preceding article constitute an administrative offence.*<sup>94</sup>

It should be noted, that this Article refers only to the own consumption thus the Portuguese law still restricts the trafficking for personal consumption. Furthermore, the second part of the same Article states:

*For the purposes of this law, the acquisition and possession for own use of the substances referred to in the preceding paragraph shall not exceed the quantity required for an average individual consumption during a period of 10 days.*<sup>95</sup>

Hereby, by the Administrative Rule 94/96, Portugal established the average one-day quantity of each of the drug. In accordance with the rule, average one-day amount of cannabis is equal to 25 grams.<sup>96</sup> Person having in possession more than the 10 days consumption amount of cannabis are subjects of Portuguese criminal law.

In contrast with France, and in this case being similar with Netherlands, administrative penalties used for the drug offences in Portugal depend on the type of drug. Article 15 defines:

*In applying penalties, the commission shall take into account the consumer's circumstances and the nature and circumstances of consumption, weighing up namely:*

- a. The seriousness of the act;*
- b. The degree of fault;*
- c. The type of plants, substances or preparations consumed;*
- d. The public or private nature of consumption;*
- e. In the case of public consumption, the place of consumption;*
- f. In the case of a non-addicted consumer, the occasional or habitual nature of his drug use;*
- g. The personal circumstances, namely economic and financial, of the*

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<sup>94</sup> Law N° 30/2000, of 29 November, Defines the Legal Framework Applicable to the Consumption of Narcotics and Psychotropic Substances, together with the Medical and Social Welfare of the Consumers of such Substances without Medical Prescription, Article 2 – Consumption, available on: [https://www.unodc.org/res/cld/document/prt/law30\\_html/portugal\\_law\\_30\\_2000.pdf](https://www.unodc.org/res/cld/document/prt/law30_html/portugal_law_30_2000.pdf) , Accessed May 8, 2019.

<sup>95</sup> *Ibid.*

<sup>96</sup> EMCDDA, Threshold quantities for drug offences, Portugal, available on: <http://www.emcdda.europa.eu/html.cfm/index99321EN.html> Accessed May 12, 2019.

*consumer.*<sup>97</sup>

The interesting legal invention of the Law 30/2000 was the establishment of Commission for the Dissuasion of Drug Abuse. In practice, when an individual is recognized with the amount of cannabis not exceeding the one listed in the Law 30/2000, the drug is seized and the person then is directed to the Dissuasion Commission. The Commission therefore meets the person and evaluates specific case. If during the hearing of the case, there is an evidence that person is drug addictive, the Commission may refer him or her to the further rehabilitation. There is an option to voluntarily agree to undergo the necessary treatment.<sup>98</sup> In a case when person decides so, the Commission may Commission has a list of options when deciding on the case: the warnings, fines, certain bans on exercising of profession as well as bans on visiting certain places.<sup>99</sup> The statistics shows, that in the 2009 the most of the decisions made by Commissions, were about the provisional suspension for not-addicted users of drugs. More than a half of these decisions involved cannabis. As it may be obvious from the information stated, the aim of Portugal is not to punish but rather to prevent and if necessary, treat the addiction making this option as freely available as possible for the society.

The case of Portugal is a distinctive one in the sphere of cannabis. Decriminalization of cannabis has not led to the increasing consumption rate among Portugal inhabitants. Portugal focuses more not on the punishments, but rather on the prevention and treatment. The Commissions are providing the opportunity of treatment to the accused persons, which in future is resulting in the decrease of drug crime. From the UK Home Office report is obvious that consumption of cannabis for personal use has increased after the decriminalization policy although afterwards there was a visible decrease.<sup>100</sup> However, it is important to remember, that Portuguese drug strategy was directed not only towards cannabi, but towards other types of drugs. Thus, a majority of data on the consumption level is presented together with other types of drugs. Nevertheless, there is no information stating that after decriminalization consumption of cannabis felt significantly. More or less, it remained at the same level. Notwithstanding the scepticism of those who opposed the decriminalization strategy on Portugal, the Portugal is not a place for “drug tourism”. According to the EMCDDA and the European School Survey Project on Alcohol and Other Drugs for the year 2015, lifetime use

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<sup>97</sup> Law 30/2000, *supra* note 83, Article 15.4.

<sup>98</sup> Law 30/2000, *supra* note 83, Article 14.1.- Suspension of penalties applied in the event of voluntary treatment

<sup>99</sup> Law 30/2000, *supra* note 83, Article 17-Other penalties.

<sup>100</sup> UK Home Office (2014) Drugs: international comparators. Report, UK Home Office, UK, October page 48, figure 4.7., available on;

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368489/DrugsInternationalComparators.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf) Accessed may 11, 2019.

of cannabis in Portugal is just slightly lower in comparison with other member states.<sup>101</sup> In the 2016, possession of drugs remained the most frequent and common drug offence. Majority of these offences constituted cannabis.<sup>102</sup> This again highlights the global problem of the matter of personal possession of drugs. Quite recently, in the 2014, Portugal introduced the “National Plan for reducing addictive behaviours and dependencies” for the period of 2013-2020.<sup>103</sup> This strategy defined the need for the particular treatment and prevention of dependence for families, educational institutions, sports settings, workplaces focusing on the age factor. Moreover, the strategy aims to provide help also to the non-addicted individuals and the connected problems with behaviour. This emphasizes the willingness of the Portugal to work on the prevention rather than the punishment thus decreasing the need for punishments in future.

However, when evaluating the results of Portugal’s drug policy, it should be borne in mind that decriminalization works together with the strong social public health care service. Appropriate application of these two elements probably is the reason why Portugal is known as the successful country in the sphere of drug regulation.

## **Conclusion**

The existing variety of different approaches of drug policies in national laws within EU may be a point of conflict between its states. The reason behind this is the possible negative effect of the decriminalization and liberalization policy in one states to its neighbours. The Union itself is a unified organism, which acts in accordance with the general principles of law and morality. From this point of view, it is obvious, that the single organism should act in the best ways of cooperation, addressing the issues of vital importance, such as public health in a sense of drugs legislation and related legislation.

In my opinion, and taking into account the relevance of public health protection on EU level, it may be useful to invent a new provision on EU level, which will regulate this matter more extensively. Such legal instrument may be appropriate in order to create and achieve a

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<sup>101</sup> EMCDDA, Portugal Drug Report 2018, page 6, available on: <http://www.emcdda.europa.eu/system/files/publications/8890/portugal-cdr-2018.pdf> Accessed May 12, 2019.

<sup>102</sup> Portugal Drug Report 2018, *supra* note 97, page 5.

<sup>103</sup> General-Directorate for Intervention on Addictive Behaviours and Dependencies, Ministry of Health – Portugal, NATIONAL PLAN FOR REDUCING ADDICTIVE BEHAVIOURS AND DEPENDENCIES 2013-2020, Executive Summary, available on: [http://www.sicad.pt/BK/Publicacoes/Lists/SICAD\\_PUBLICACOES/Attachments/97/NPRABD\\_2013\\_2020\\_executive\\_summary.pdf](http://www.sicad.pt/BK/Publicacoes/Lists/SICAD_PUBLICACOES/Attachments/97/NPRABD_2013_2020_executive_summary.pdf) Accessed May 13, 2019.

common position across states and their national laws regulating cannabis. Thus, the drugs, which are, without any doubt, a transnational threat will be controlled unanimously. This may lead to the reduction of potential harm to the society, individuals, states and the Union itself. In relation to the consumption and successfulness of the regulations on cannabis, it can be concluded, that the severe regulations of cannabis possession and use not necessarily guarantee low level of consumption domestically. This was shown in the discussion about France and Netherlands. For the France, this point demonstrates its outstanding problem, which is not solved through the strict drug laws as the consumption level, remains one of the highest within EU.

From the economical perspective, there is an obvious potential space for growth as for the domestic businesses as for the state's economy. However, the example of Netherlands clearly emphasizes the potential problematic aspects, which arise after the decriminalization process. Of course, example of only two countries should not be perceived as a "rule". This stands by virtue of the UN drug Conventions that give certain flexibility of implementation to the signatory parties. Based on this, the economic effects of decriminalization process will vary from country to country depending on its national law features and internal traditions.

It is impossible not to notice the common worldwide tendency of popularization of cannabis products. Varieties of businesses are looking forward for the future investments and achievements in this market. However, such businesses are not directly aiming to promote the recreational cannabis; rather they are focusing on the CBD products. Such companies include famous producers of cookies "Oreo" and the giant in terms of business - "Coca Cola". Both of the companies are adding new products containing the CBD to their already existing successful goods. This example brings here the conclusion, that the increasing popularity of cannabis industry affects all the types of cannabis thus the development of recreational cannabis as well. This means, that all the issues are interrelated and could not be divided. Despite the fact, that this type of cannabis (CBD) is not directly linked to the main subject matter of the research, it was decided to illustrate it here in order to highlight the growing trend of cannabis in all its forms.

With regards to the central research question of this work, it can be concluded that there is no harmonized EU law on cannabis as such. The closest provision regarding the harmonization of drug issues is the Article 168 of TFEU. This Article may stand as a legal base for the Union on future developments of harmonization of drug liberalization and prevention of drug abuse and drug addiction. Although for now, from the Union's legal perspective, regulation of cannabis falls out of its competence and thus is left for the consideration of member states.

As it was defined above, all member states are the parties to International Drug Law. The key point is the sort of “legal freedom” which is given to the states by the International Drug Law when implementing and regulating drugs nationally. This results in a high diversification of legal approaches across the Union.

However, by implementing the EU Drug Strategy and establishing the EMCDDA, Union seeks to encourage states to act in the best way possible to balance the growing liberalization of cannabis and matters of public health.

Answer to the question whether the decriminalization of recreational cannabis for personal possession is consistent with EU and consequently with International law is rather complex in its nature. The UN Treaties itself are giving certain flexibility for the states to establish the policy of decriminalization, as it was proven in this research.

However, there is such provision in the international law that obliges member states to impose criminal punishments on the offenders in the case of strictly personal possession. Thus, the decriminalization technically is not breaching the International Drug Law. Although, Conventions does not give a right for the states to “permit” the recreational cannabis. Rather, it is asking the states to punish drug offence in accordance with the state’s individual legal characteristics.

The UN Treaties itself are giving certain flexibility for the states to establish the policy of decriminalization.

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