

INTRODUCTION

How do six European states use legislation as an important element in their packages of drug control? How do they compare with each other? How do their laws stand in relation to the requirements of international conventions on drugs (a key concern of the study) and European law? In other words, what is the 'room for manoeuvre' on drug laws?

This study makes enquiries in two directions: (i) 'vertically', making analytical links between national drug laws and the relevant international and European laws in order to establish the room for manoeuvre that national arrangements have in relation to international conventions and European law; (ii) 'horizontally', making comparisons between the national laws studied and providing potential comparative reference points for English drug law. These ambitions pose challenges to the study, especially in terms of expert understanding and interpretation of national laws. It is all too easy to misread the meaning of legislation in a legal and constitutional system other than one's own. Indeed, it is not always that easy within one's own system, but the hazards are multiplied when reading across legal systems. With this in mind, it was decided to commission separate studies at the national level. These could be suitably detailed and appropriately interpreted only if carried out by national legal experts. In this way, we hoped to improve the already high standard of legal research.

Previous studies

As might be expected, studies of the drug laws of European (and other) states have been undertaken in the past. Their methodologies have varied somewhat. On the basis of translated versions of national drug laws which the United Nations has been collecting for many years, in the early 1990s Bernard Leroy, a legal expert in UNDCP, produced a study of the drug laws of the then twelve members of the European Community, which was published by the European Commission. In this case, the method was scrutiny and interpretation by one person of the written laws of states. A few years later, this method was more or less replicated, although in greater depth, by a team based at the University of Ghent, in a study sponsored by the Justice and Home Affairs Task Force of the European Commission.¹ In 1998, a perhaps hasty and rather uneven up-date was done by officials of the EU's Council Secretariat, apparently on the basis of replies by national officials.'

All these studies have been done centrally, with an individual or team putting together a

description based on written laws plus verbal or written commentaries. In the meanwhile, during 1997/8, ISDD/DrugScope conducted work in eleven EU member states which focused on administrative and civil law questions, using national legal experts to describe national laws.' This last approach has been followed here, on the basis that national experts are those best placed to do such work (as long as they adhere to a common framework of research — see below and Appendix A).⁵

Not only have the methods of past studies differed, so have their auspices, and that itself tells something of the backdrop to the present study. Leroy's 1991 study was published by a part of the European Commission concerned with health and drug dependence, reflecting one of the then most notably competencies of the European Community as far as drugs were concerned. By the mid-1990s, with the passage of the Maastricht Treaty, another legal basis for action had been formalised — justice and home affairs, through the third pillar of the EU. So, where Leroy in 1991 was primarily concerned with drug laws in relation to drug users, by 1995 De Ruyter et al were equally concerned with demand and supply, and moreover they included a final chapter on money laundering.

These shifting research interests correspond to some extent to the evolution of policies and structures in the European Union and internationally concerns from the 1980s onwards, focusing on drug trafficking—to which the 19886 is a witness — but also a broader concern from the 1990s onwards with organised crime.

Severity and balance: current responses

By the time we began the present study (1998), two general changes were visible.

(1) The 1980s and early 1990s bubble of political attention on drug trafficking per se became at least partly absorbed into a preoccupation with the broader topic of organised crime. Depending on one's definition of organised crime (a matter which we do not address in this study), drug trafficking plays a big or small part, and it may or may not sometimes also take place outside organised crime groups. Whatever the empirical facts may be about this linkage (organised crime/trafficking), control policies and cooperation in criminal and other laws have very definitely come to see trafficking as a matter closely linked to broader facets of organised crime.'

In this context, judicial measures against trafficking if anything stiffened further in some states, in judicial practice if not always in the written law. Whilst by the late 1990s drug trafficking as a politically galvanising category may have been getting past its 'sell by' date, its incorporation in the broader agenda on organised crime generally enhances the severity of punishment applied. In some states, a trafficker risks being sentenced for the supply offence, then for aggravating circumstances such as being involved in an organised criminal enterprise or some functionally equivalent offence carrying with it a 'top-up' sentence. Not all states apply such additional penalties but, following a EU Joint Action on criminalisation of membership of criminal organisations, the tendency seemed likely to increase. Additionally, confiscation of assets may occur (or should occur in principle, but the practice is somewhat behind the theory here).

(2) European debates on legal measures regarding drug use and possession had, by the late 1990s, moved away from the extremes seen in the 1980s and earlier 1990s. States which had hitherto been most 'tolerant', and some at least of those who had hitherto been most 'repressive', trimmed towards the centre of the control continuum. Some states relaxed aspects of law in relation to users (e.g., Germany, as regards support for locally-determined policies on prosecution for cannabis possession), whilst others tightened up (the Netherlands, on the coffee shops and related public order matters). The sometimes visceral debates between EU member states on strategies on drug users and 'drug tourism' were replaced, or at least overlaid, by a climate of enhanced administrative and criminal cooperation at the borders (France/Netherlands springs to mind). In all of this, a part was played by public awareness of HIV and AIDS and the implications for public health and social policies which could reduce those problems.

So, although by the late 1990s and especially in relation to drug suppliers, severity of repression had become firmly established as one strand in the collective response to drugs, as far as drug users are concerned, the situation is generally more nuanced. This is the policy context in which the laws reported on here have evolved and continue to evolve.

Key questions

Two key questions stand out, when viewed from the perspectives of recent history.

- Between the diverging streams of (i) international and pan-European emphasis on strong sanctions for combating drug supply in the context of organised crime and, (ii) national and European commitments to proportionality and social integration in relation to the drug user, how can the middle ground — user self-supply, possession, sharing between users, cultivation for

own use, etc — be dealt with?

- How can the relative claims of national constitutional/legal arrangements, and of the international drug conventions, be reconciled?

The six states whose legal systems are examined here seem to deal with these issues in a variety of ways. Each is stimulating in its own terms. An understanding of the approach of each, of commonalities and of differences points up a number of options for future developments, discussed in the national chapters and in the conclusion of the study. For each state, a national expert was asked to make an assessment of the extent to which national existing laws are in accordance with international/EU requirements, exceed these requirements, or fall short of them. They were also asked for their assessment of any current legal debates on possible changes in any of the areas covered by the study. The following chapter synthesises their work and has been checked by them. Nevertheless, synthesis involves some collapse of legal and other categories that deserve to be understood in their own right, in the context of national constitutional and legal systems, and for that proper understanding the reader will need to refer to the national chapters.

FIRST IMPRESSIONS: CONVERGENCIES AND DIVERGENCIES IN CRIMINAL LAW

The first impression is that the six states studied are rather similar in their responses to drug trafficking, whilst there is more variation in relation to the ways they respond to drug use. Based on chapters 2-7 on the legal situations in Spain, Italy, France, the Netherlands, Germany and Sweden, Table 1.1 compares national laws on drug use, possession and related matters, and supply. All six countries consider trafficking a serious offence, and prescribe long terms of imprisonment: not much difference in principle here. (But, as we shall see, maximum prison terms vary more than one might at first expect.) It is when one looks at controls on drug use and drug possession that one finds fundamental differences.

Laws on drug use (consuming drugs, being a user)

The legal status of drug use (note we are talking here of the status of the person who takes drugs) varies considerably from state to state. (For possession, see separately below.)

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Three of the six countries studied prohibit drug use and the other three do not. Italy, the Netherlands and Germany do not prohibit drug use per se. Spanish law says that drug use is unlawful, but the law provides for no punishment unless it is done in public, when administrative sanctions apply.

By contrast, Sweden and France both prohibit and criminalise drug use. This means that a person may be found guilty and punished under criminal law as a result of past drug use. Obviously, possession of drugs is quite convincing evidence of drug use — unless the person concerned wishes to argue that s/he is trafficking (not an appealing course of action), or that the drugs were being held for a friend (unconvincing, and anyway might be regarded as facilitating the offence of drug use). But, as far as France goes, the significance of possession is the evidence it provides of being a drug user, this being the offence (setting aside trafficking).

Summary point

Drug Use:

- No prohibition – Italy, Netherlands, Germany
- Unlawful status but no punishment unless in public –
- Prohibition with criminal punishment – Sweden and F

Possession: prohibition does not always equal criminalisation

When it comes to the legal status of possession per se, all countries studied prohibit it, but not all make it a criminal offence.

Here we are talking of possession rather than trafficking — e.g., possession of small amounts, or possession in circumstances which indicate that the drugs are for one's own use, or at least are not being sold on for a profit. Also bear in mind that possession generally means to have the drugs in one's hand, clothing, car, or other property, or to have effective control over them by having a key to a box containing them, etc.

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In relation to possession in this sense (possession by users, normally for the purposes of own use), four of the six countries studied prohibit or do not permit or allow' it — Italy, the Netherlands, Germany and Sweden — but only the last three criminalise it. Italian law makes possession an administrative infringement only; in Spain possession for one's own use is not lawful but it is not an offence unless it occurs in public, when it attracts administrative sanctions only.

Of the six states, France is the odd one out in the sense that its law does not define possession for own use. In practice, possession is responded to as evidence either of drug use (which is criminalized), or of trafficking. So although strictly speaking it may be correct to say that French law does not prohibit or criminalise possession for own use, in effect it does both.

Summary point

Possession:

- No prohibition – in effect, all six states studied prohibit possession
- Prohibition, without criminal punishment (when for personal consumption) – Italy and Spain
- Prohibition with criminal punishment – the Netherlands, Germany, Sweden, and France (via criminalisation of use)

Table 1.1 gives a more nuanced picture of the measures that may be applied, separately or together, on use and possession in the six states studied.

Obtaining drugs: the ground between use/possession and supply

Using a drug implies obtaining it. This can be legally problematic. Obtaining implies either the existence of another person who gives or sells the drugs (and so may be treated as a supplier), or manufacture or cultivation by the user him/herself (which in some legal systems may be treated as a supply offence). This raises a particular problem in drug law, which different national legal systems resolve in different manners.

	IT	FR	ES	NL
<i>Use</i> Drug use <i>per se</i> (i.e., in private)	Not prohibited after 1993 referendum (Prohibited only between 1990 and 1993; never criminalized)	Prohibited and criminalized. Up to 1 year imprisonment or fine or diversion to medical treatment	Unlawful, but not punishable	Not pro see be
Public drug use	As above (not differentiated)	Not differentiated	A serious administrative offence (fine, forfeiture, etc)	A 'less some l jurisdi
<i>Possession</i> Possession <i>per se</i> (in private)	Prohibited Administrative infringement regardless of quantity (unless seen as trafficking, when criminalized)	Possession for own use has no legal definition in French law. Possession is seen either in connection with use or supply	Unlawful but not an administrative offence unless in public (c.f. below)	Prohib crimin expedi princip non-pr in prac
Possession in public places	As above	As above	Serious administrative offence	As abo
Obtaining a prohibited drug	As above – except for cultivation, which is criminalized	As above	No criminal offence if for personal use; criminal offence if for re-sale or trafficking	Crimin includ cultiv to con

	IT	FR	ES	NL
Trafficking Small/retail: giving or selling to a drug user	Criminal offence: up to 4 years for soft drugs, 6 years hard (<i>unless</i> e.g., sharing between users in a group = an administrative infringement, like private possession)	Misdemeanours: up to 5 years	Generally, criminal offence: soft drugs 1-3 years, hard drugs 3-9 plus fines	Giving may be as sup 2 year impris
Medium/ distribution: non-small amounts (e.g, not retail sale)	Criminal offence, up to 6 years for soft drugs, up to 20 years for hard drugs	Intermediate between above and below: 10 years (including for users bringing drugs into the country)	Intermediate between above and below	Up to under t Act). E princip shops a (non-ap crimina
Big, or Organised Crime, or otherwise aggravated	Up to 30 years for aggravated circumstances of trafficking; 20-24 years basic penalty for directing an organised trafficking group	Up to 30 years, or life, for being a manager, or taking part in organised importation, exportation or production	First degree aggravations, for big quantities or members of crime groups: soft drugs 3-4.5 years, hard 9-13.5 years. Second degree, for leaders or extreme gravity: soft drugs 4.5-6.75 years, hard drugs 13.5-20.25 years. Plus fines	Parallel crime c almost applied internat trafficki 1/3 of C penalty: up to 16

User self-supply: when is it criminalized?

- Italy: not a crime to obtain singly or as a group; not a crime to share without payment among a group of users; is a crime to sell to a group or cultivate
- Spain: to cultivate is not punishable according to judicial practice (even though it is in the written law); to share among habitual users is not a crime according to the jurisprudential majority
- Other states: a crime to obtain, and to pass on (but NB expediency principle, cafés in NL)

Table 1.2. Middle-level trafficking - relative severity of penalties

	IT	FR	ES	NL	GM	SW
<p>Line A The tariff according to law</p> <p>Possible years for lower/mid market trafficking</p>	<p>Top of lower tariff, or 50% of full tariff: about 6-10 years, depending on drug</p>	<p>Top of lower tariff, or 50% of full tariff: about 5 years</p>	<p>Top of lower tariff, or 50% of full tariff: around 3-4 years for soft drugs, 7-11 for hard drugs</p>	<p>50% of full tariff: about 6 years for List 1 drugs (e.g., heroin), or about 2 years for List 2 drugs</p>	<p>Top of lower tariff, or 50% of full tariff: about 5-7.5 years</p>	<p>Top of lower tariff: 3 years</p>
<p>Line B Experts' comments on the possibilities of making estimates of sentencing practice</p>	<p>Not a valid exercise in relation to Italy. Wide variation. Research study needed</p>	<p>Depends on circumstances. Many sentences around 5-6 years for supply. (But if supply related to own use, up to 1 year.)</p>	<p>Very difficult to answer this in Spain – it might be similar to the above</p>	<p>List 1 drugs: 1 year for up to one kilo; for couriers, up to 6 years for 6+ kilos; less for those who collect from the courier. List 2 drugs: 6-12 months for 5-25 kilos; up to 2 years for 25-100 kilos</p>	<p>Information lacking: regional variation?</p>	<p>Depends on amount type of drugs to 2 years for up to 10 grams heroin 10 grams cocaine 2 kilos cannabis (top of 'normal' trafficking offences range from 'grave' offences 2-3 years and up</p>

CHAPTER 1 Synthesis: national drug laws compared and contrasted

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Summary point

The span of possible controls:

- States apply a variety of administrative [civil] measures alongside, or in some cases instead of, criminal law. Measures do not have to be criminal law to be deterrent and punitive

Table 1.3. Scope for action on drug possession for own use: the wide menu of possibilities. Prohibitions, administrative measures, minor sanctions and other forms of control (with the UK included for comparative purposes)

KEY: XX = typical measures
X = possible measures

	IT	FR	ES	NL	GM	SW	UK
Allowed or not prohibited							
Prohibited or not allowed	XX	X	XX	X	X	X	X
Minor curtailments – e.g. of movement	X	X	X	X	X	X	X
Moderate forfeitures – e.g. removal of prohibited thing	X	X	X	X	X	X	X
Administrative measures: not necessarily “deterrent and punitive”, definitely non-custodial	X		if public				
Criminal status (in addition to above)	Discretion or expediency		XX		XX	X	X
		Strictly applied				in some states	X
			Custodial sentence – or threat thereof to push users into testing, treatment etc				
		X				X	X

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