

Cannabis in the City: Developments in local cannabis regulation in Europe



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In the last decade, there have been clear signs of a shift in governments' approaches to recreational cannabis markets. Countries including Uruguay and, more recently, Canada – as well as a number of US states – have moved to control cannabis through regulated markets rather than prohibition. Proponents of this approach argue that prohibition has been largely ineffective in reducing cannabis consumption, and has been linked to significant negative impacts, including (often racialised) mass incarceration of drug users, threats to public health, high enforcement costs, and young people's unrestricted access to cannabis via criminal markets. Proponents of regulation argue that controlled markets are safer: they allow governments to more effectively keep drugs out of the hands of minors; better protect cannabis users from being exposed to adulterated or contaminated drugs, or to other 'harder' drugs, through black markets and criminal suppliers; and would reduce the proceeds of criminal groups involved in the drug trade. However, after decades of relatively progressive drug policy, Europe seems to be lagging behind the rest of the world in relation to cannabis.

During the linked crises of HIV and AIDS and heroin in the 1990s, many European governments adopted harm-reduction models, reforming their national drug policies in terms of public health. Since the mid-1990s and early 2000s, however, the focus of European drug policy seems to have shifted towards security, criminality and disorder. Since cannabis use is widespread in many countries, and local production and distribution involves the black market and is often controlled by organised crime, this shift has put cannabis policy back on the agenda. Some jurisdictions have responded by reinforcing prohibitionist policies, while a number of regions, municipalities, and other sub-national jurisdictions are advocating regulation rather than prohibition.

Around Europe, large cities in particular often bear the brunt of national drug policies. While municipal and regional governments have limited power to influence national criminal law, and therefore key elements of drug policy, cities and regions have to deal with the effects of these laws. From public nuisance and disturbances caused by street dealing, to social or public health issues resulting from unrestricted youth access to cannabis, to, in

some cases, high financial costs associated with enforcing prohibitionist drug legislation and confronting dangerous methods of illicit cultivation, the impacts of drug policies are felt at the local, municipal, and regional level. Because of their unique relation to drug policy and a tendency to approach drug issues pragmatically rather than primarily as issues of political or moral principle, cities have historically been important in championing new drug policies. For example, in the 1990s, European cities, organised into European Cities on Drug Policy (ECPD), were crucial advocates of the harm-reduction based responses to the heroin crisis mentioned above.

Although cities and regional authorities may have some powers related to the implementation of drug policy, they often feel shackled by national law, unable to act directly to change policy. For this reason, they have focused considerable energy on advocating some degree of reform of national laws that limit their ability to deal creatively with cannabis-related issues in their jurisdictions. National governments, however, have generally been slow to respond to these demands. States themselves have only limited opportunities for reform, as they are bound by international obligations stemming from the United Nations (UN) conventions on drug control and other treaties and agreements. This has created something of an impasse in the area of cannabis reform, which actors across Europe are trying to break in order to develop more efficient, effective, and locally adapted cannabis policies.

This paper examines six European countries – Belgium, Denmark, Germany, the Netherlands, Spain and Switzerland – in order to better understand the tools being used – and the challenges faced – by municipal and regional governments calling for different cannabis policies. Although the national contexts, histories, legislation, state structures, and social contexts of these countries vary significantly, there are important lessons to be learned by comparing different approaches. This paper draws on Country Reports (published separately) which were written by researchers within each country, which offer a more detailed exploration of the respective reform efforts, as well as of the national political and policy environment.

The picture that emerges from this research is one of municipalities and regions struggling within restrictive policy frameworks. This report opens with a discussion of the combined challenges that have created the current impasse in cannabis regulation at the UN, European Union (EU), and national level. This is followed by a short introduction to the history and context of cannabis regulation and reform in each of the six countries, and some of the research findings. In short, we have identified two primary routes to reform which are currently being pursued by regional or municipal governments in the six countries. Although government actors may try to make direct changes to national drug law, there are a number of spaces where they may, either autonomously or with the support of national governments, make direct changes to drug *policy* without major changes to national law. We will explore the ways in which government actors are pursuing these strategies in two sections, and touch briefly on the role of non-government actors including law courts and civil society in changing cannabis law and policy. We conclude with a discussion of a policy framework – multi-level governance (MLG) – which might help to mediate the complex relationship between the international and municipal levels of cannabis policy, with a focus on breaking the impasse in national and EU-level reform. Finally, in light of this research, we suggest a few findings and observations which may be of use to local authorities struggling to develop more locally adapted policies.

Cannabis and International Law

In order to make sense of the struggles taking place in relation to cannabis regulation in Europe, it is important to understand the international legal situation. This has played a key role in creating the current context in which European governments feel unable to act decisively in order to regulate the sale and consumption of cannabis. Although a growing number of countries – or sub-national jurisdictions – are moving towards legal regulation of non-medicinal cannabis markets, this policy choice is not permitted under the existing UN drug-control framework, thus putting countries that forge ahead with regulation in a compromising position.

Furthermore, while it may be less politically inflammatory for national governments to ‘turn a blind eye’ to changes at the sub-national level, tacitly allowing them without making corresponding changes to national law – the policy so far pursued by the United States – the principles of international law suggest that this does not avoid the relevant legal issues.¹ International treaties require countries to implement commitments throughout their territory, and are not sensitive to internal domestic jurisdictional distinctions, as the overarching 1969 Vienna Convention on the Law of Treaties (VCLT) stipulates: ‘a treaty is binding upon each party in respect of its entire territory’ (Article 29).² The 1961 Single Convention on Narcotic Drugs, the foundation of today’s UN drug control system, also specifies that it applies ‘to all non-metropolitan territories for the international relations of which any Party is responsible’ (Article 42).³ The International Narcotics Control Board (INCB), the body mandated to monitor implementation of the Single Convention, clarified its position on this in its 2014 Annual Report, stating that ‘action by the [United States] Government to date with regard to the legalisation of the production, sale and distribution of cannabis for non-medical and non-scientific purposes in the states of Alaska, Colorado, Oregon and Washington does not meet the requirements of the international drug control treaties’.⁴ In 2017, the INCB devoted a special ‘alert’ to the issue, underscoring that ‘if sub-national Governments have taken measures towards legalizing and regulating the non-medical use of cannabis, despite federal law to the contrary’ then such developments are ‘in violation of the international drug control legal framework’.⁵

Cannabis is one of many psychoactive substances included in the UN drug-control regime, which is based upon three treaties: the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Cannabis was placed under strict control in the core of the contemporary regime, the 1961 Single Convention, of which Article 4 states that, as with a range of other listed substances, ‘the production, manufacture, export, import, distribution of, trade in, use and possession’ of cannabis should

be limited ‘exclusively to medical and scientific purposes’,⁶ although there is also an exemption for the industrial use of hemp. The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances obliged countries to impose criminal sanctions to combat all aspects of illicit drug production, possession and trafficking, although there is no specific obligation in the conventions to make drug use itself a criminal offence⁷.

Cannabis, the world’s most widely used illicit drug, is treated as one of the most dangerous of all psychoactive substances under international control. This is reflected in its double listing in the 1961 Single Convention: cannabis, cannabis resin, and extracts and tinctures of cannabis are in Schedule I, among substances whose properties might give rise

to dependence and that present a serious risk of abuse, and are subject to all control measures envisaged by the Convention. Cannabis and cannabis resin are also (along with heroin and cocaine) listed in Schedule IV, a listing reserved for substances regarded as ‘particularly liable to abuse and to produce ill effects’,⁸ and with very limited therapeutic value.

The decision to include cannabis in these schedules of the Single Convention, taken more than 60 years ago, had very little to do with the available scientific evidence concerning health risks. Curiously, the Expert Committee on Drug Dependence (ECDD), the World Health Organization (WHO) body charged with the scientific and medical review of scheduling substances,⁹ did not undertake

Policy Proposal: Regulated cannabis markets in Canada*

Goals:

- Reduce black market, youth access, and health harms

Key features:

- Subject to some provincial controls/differences
- Available to those aged 18 years or above
- May possess up to 30 g dried cannabis or equivalent; share up to 30 g dried cannabis or equivalent with other adults
- May buy dried or fresh cannabis from provincially licensed retailer – in provinces without provincially licensed retail framework, can purchase online from federally licensed retailer
- May grow up to four plants per residence for personal use
- May make cannabis products like food and drink, with some restrictions
- Edible cannabis products and concentrates to be made legal for sale near to October 2019 (one year after original bill taking effect).

Additional and associated laws and regulations:

- Criminalise supply to youth
- Restrict ‘promotion and enticement’ including prohibiting promotion of cannabis in most situations
- Set federal standards relating to, among others, packaging and labelling requirements, standard serving sizes, and good production practices
- Allow provincial authorities to enact more stringent requirements (higher age limit, lower personal possession limit, additional rules for home-growing including lower numbers of plants, and restricting where adults may consume cannabis)
- Establish offences related to cannabis-impaired driving

* Based on information available at <https://www.justice.gc.ca/eng/cj-jp/cannabis/>, accessed 3 March 2019

a formal review of the place of cannabis in the Convention at that time. As the ECDD itself noted in 2014, announcing the beginning of a formal review process, ‘cannabis and cannabis resin has not been scientifically reviewed by the Expert Committee since the review by the Health Committee of the League of Nations in 1935’.¹⁰

The ECDD undertook a formal review of cannabis in 2018 and the results were made public in January 2019. For the first time WHO acknowledges certain medical uses of cannabis and recommends, therefore, the removal of cannabis and cannabis resin from Schedule IV, an important revision of its previous position. There are, however, significant concerns about the outcome of this review, which makes some positive recommendations but stops short of advocating significant reforms to the scheduling and control of cannabis that would bring its treatment under international law more closely into alignment with current scientific and medical assessments of its potential harm and benefits.¹¹ The ECDD recommended that preparations considered to be pure cannabidiol (CBD) (containing less than 0.2% THC) not be placed under international drug control. At the same time, it acknowledged certain medicinal uses for cannabis and recommended, therefore, the immediate removal of cannabis and cannabis resin from Schedule IV, but also that cannabis and cannabis resin remain on Schedule I, a designation reserved for substances which are considered on par, in terms of potential harm to health, with morphine and cocaine.¹²

It should be noted that, while the ECDD is the only body mandated to make recommendations regarding re- or un-scheduling, the decision to adopt those recommendations is taken by the Commission on Narcotic Drugs (CND) through a vote by member states. In the current polarised political circumstances¹³ relating to global drug policy, the outcome of a CND vote on more far-reaching recommendations for re- or un-scheduling is highly uncertain.¹⁴ Furthermore, cannabis is also mentioned explicitly in specific articles in the 1961 and 1988 Conventions, meaning that scheduling changes alone may not be sufficient to allow for fully regulated markets. Some form of amendment, modification, or reservation to those treaties might also be required. At present, therefore, countries that have

regulated non-medicinal cannabis markets are in contravention of their drug-control treaty obligations. This situation is causing increasing tension in the international drug-control regime and, as more countries consider regulation, whether at the national or sub-national level, the need to address the growing gap between the international regime and current state policies and practices becomes increasingly urgent.

There are several options available to states in this situation, but all have attendant challenges. Countries could simply withdraw from the conventions, although this could have serious political and economic implications, would be in stark contrast to countries’ stated commitments to international law more broadly, and could further undermine the already fragile legitimacy of a global world order based on international law, with potential impacts in other areas, for example human rights or disarmament. Likewise, implementing regulation without formally addressing the legal conflict with the treaties risks undermining the standing and legitimacy of international law. An amendment to the treaties would require majority approval, if not consensus, and the polarised international debate on cannabis makes it unlikely that a proposed amendment allowing legal regulation would succeed.

There are some options for state parties to make unilateral or multilateral changes to treaty agreements. For instance, following a failed attempt to amend the 1961 Convention, Bolivia withdrew and re-acceded with a reservation upholding the right to allow, within its territory, traditional coca-leaf chewing, the use of the coca leaf in its natural state, and the cultivation, trade, and possession of the coca leaf to the extent necessary for these licit purposes. This option – subject to certain conditions – is available to all treaty signatories, allowing them to make a unilateral exception with regard to specific treaty obligations that applies only within their borders. This procedure of withdrawal and re-accession with a reservation, in the case of the Single Convention, can be blocked if a third of the parties oppose it. In the case of coca in Bolivia, it was successful as the number of objections fell far short of the required number to question the legitimacy of the reservation.¹⁵ The same procedure could

legitimately be used by countries for the legal regulation of the domestic cannabis market. Although a higher number of objections could be expected owing to current political tensions regarding the issue, in light of the rapidly changing landscape of cannabis policy reforms around the world, it would not be easy for opponents to mobilise the minimum of 62 formal objections necessary to block acceptance of a cannabis reservation.¹⁶

Finally, a mechanism based on Article 41 of the 1969 Vienna Convention on the Law of Treaties (VCLT) is gaining momentum as a potentially promising legal solution. This so-called *inter se* treaty modification would allow a group of like-minded countries to agree among themselves on a modification to the cannabis-related provisions of the drug-control conventions, which would be effective only among themselves.¹⁷ Of the reform options not requiring international consensus, *inter se* modification might be the most ‘elegant’ and feasible approach, providing a useful safety valve for collective action to adjust a rather outdated treaty regime. Eventually, such an agreement might evolve into an alternative treaty framework, avoiding the process of approval of amendments to the current regime. In the shorter term, countries signing up to such an *inter se* agreement would resolve the legal conflict with their treaty obligations, demonstrating respect for the principles of international law while continuing to benefit from important treaty-related international drug-control cooperation mechanisms and access to medicines subject to treaty control, while gaining the right to regulate cannabis in the way that best benefits the health and safety of their population. This legal option has been treated at length in an issue of the *International Community Law Review*, and is being explored by a number of international legal scholars and government officials.¹⁸

Concerns about the legal restrictions imposed by the international drug-control regime are unquestionably standing in the way of innovation in cannabis policy and the conventions have made many national governments reluctant to take significant steps towards regulation. Nonetheless, in addition to Canada and Uruguay, 10 US states and the District of Columbia, have regulated cannabis markets despite federal prohibition. In 2018, the newly elected Mexican president

also announced his intention to legalise and regulate the cannabis market,¹⁹ and the newly elected Government of Luxembourg made similar statements.²⁰ The global consensus on cannabis control – if it ever really existed – is now definitely fractured but a new consensus to replace remains remote, and for EU countries treaties and regulations at the regional level add another level of complexity.

The European Dimension

Beyond the complexity related to the UN treaty regime, European agreements, in particular, the 1990 Schengen Convention implementing the 1985 Schengen Agreement on the abolition of controls at common borders by some EU member states, have become an additional obstacle to legalising and regulating a recreational cannabis market within Europe. EU law regarding cannabis assumes full compliance with the UN drug-control conventions. The debate on cannabis legalisation in Europe was thus further complicated by European integration.

In an effort to rein in the lenient policies of the Netherlands, the then French President Jacques Chirac put the ‘harmonisation’ of drug policy on the European agenda in 1996. The result was Council Joint Action 96/750/JHA which included a call to approximate laws of EU member states to make them mutually compatible to the extent necessary to prevent and combat illegal drug trafficking in the EU, which specifically mentioned measures to counter ‘drug tourism’ – an obvious reference to foreign buyers in Dutch coffeeshops – and to take the most appropriate measures to combat the illicit cultivation of cannabis, while reiterating that member states should fulfil their obligations under the UN conventions.²¹ Allowing cannabis cultivation by legalising it, tolerating it, or otherwise regulating it, would be inconsistent with this obligation. Nevertheless, successive Dutch governments succeeded in ensuring that the 2004 EU Council Framework Decision (2004/757/JHA) on drug trafficking²² – which strengthens Council Joint Action 96/750/JHA – would not commit them to changing Dutch policy on the so called ‘front door’ of coffeeshops and the possession of small amounts of drugs for personal use (see: “The Dutch Experience and International Law”, page 10). Like the previous instrument, the Framework Decision

only requires legislative action and does not intervene in enforcement and prosecution policies. However, it appears from the case law of the European Court of Justice (ECJ) that acts for which EU law requires criminalisation – as the Framework Decision does for various acts such as cannabis cultivation – that they are subject to an obligation to prosecute.²³ Further, the Framework Decision confirmed restrictions concerning the ‘back door’ of the coffeeshops, given the possible cross-border effects, since it required each member state to take all necessary measures to ensure that distribution and cultivation of cannabis plants, other than for personal consumption, should be punishable.

The penal obligations in the Framework Decision mean that legalisation or decriminalisation of cannabis cultivation, supply and trade aimed at recreational use by others is not possible, more specifically if this involves large-scale commercial trade. Consequently, there is no room to legalise or decriminalise cultivation to supply coffeeshops. The same probably applies to cannabis cultivation within a Cannabis Social Club (CSC) – a non-profit organisation in which cannabis is collectively grown and distributed to registered members, discussed in more detail below – although the obligation to prosecute would, in principle, not apply in the case of joint cultivation and consumption in a CSC.

Legal scholars claim that reservations, withdrawal or denunciation and re-accession with a reservation to the 1990 Convention seem to be impossible.²⁴ However, since the European legal instruments draw heavily on the UN drug-control conventions, it is unclear what a withdrawal or denunciation and re-accession to the UN conventions, let alone an *inter se* modification, would mean for obligations under EU laws. The European instruments do not specifically focus on the use of cannabis. This is left to individual member states, given that different countries pursue very diverse policies. However, the drive towards ‘harmonisation’ has had policy implications, especially in the Netherlands as the most permissive country in the diverse EU cannabis policy landscape.

Among senior policy-makers in the Netherlands a ‘wait and see’ attitude prevailed: any progress would depend on willingness for change abroad. In the

meantime, the Netherlands simply had ‘to muddle on with its (in)famous coffeeshop system’, as one of the officials involved in the 1995 reform attempt put it, for several more years; and implement a pragmatic ‘give-and-take’ policy at the international level, maintaining the status quo as a transitional situation towards potential administrative regulation.²⁵ Over the years, however, it has led to stricter legislation in the Netherlands through an array of new instruments in the national Opium Act, such as increased penalties for cannabis offences on the ‘supply side’ – commercial growing or wholesale selling of cannabis – and for participation in a criminal organisation. The overall effect was a tightening of restrictions, in particular regarding the supply of cannabis, and was the basis for stronger law enforcement by a special unit (the Taskforce Tackling Organised Hemp-growing) against illicit cultivation. The European Commission specifically expressed its concerns regarding the problem of the supply of coffeeshops by criminal networks.²⁶ This has led to increasing divergence between the national government, conscious of its international legal obligations and anxious about its relations with neighbouring countries, and municipal authorities confronting the negative consequences of restrictive policies in the form of increased illicit cultivation at the local level.

At the European level, the trend has been towards national drug policies adhering to the ‘lowest common denominator’ (i.e. the most restrictive system) in the EU (as in the UN drug-control system). Reform-averse countries are able to obstruct progress towards more liberal cannabis policies in the consensus-oriented policy process, based on the restrictive UN conventions that have been incorporated into European legislation.²⁷ In other words, existing EU legislation does not allow cannabis cultivation and distribution, which means that at present, regulating cannabis markets, whether nationally or locally, would require a revision of EU instruments. However, regarding harmonisation of policies, laws, and regulations dealing with cannabis users, it has been argued that core EU commitments to respecting national and cultural differences, and to governing at the closest possible level to the citizen, must be taken into account.²⁸ Nonetheless possible cross-border effects are likely to continue to be a major sticking

The Dutch Experience and International Law

The Dutch coffeeshop system, which emerged after the Netherlands decriminalised the use and possession of cannabis in 1976, was a prominent challenge to the international drug-control regime, and was for decades the best known and most widely publicised of all the 'soft defections' that took place. According to a government memorandum of January 1974, the Dutch government initially considered full legalisation of cannabis, calling for '[the removal of cannabis use] from the domain of criminal justice.'²⁹ The United States, however, made it clear following discussions with the Dutch government that amending the Single Convention could 'not be achieved in the near term'.³⁰ Subsequent Dutch governments quietly dropped the issue.

Dutch leniency, although it stopped short of legalisation, was not appreciated by neighbouring countries, especially Germany and France, leading to several diplomatic incidents.³¹ Dutch aspirations for reform were stymied and subsequent governments were not prepared to risk making the country an international pariah. Consequently, reforms were limited to toleration of the possession of 30 g of cannabis for personal use, implemented through the statutory decriminalisation of cannabis in the revised Opium Act of 1976. In 1979, official national Guidelines for Investigation and Prosecution came into force, formalising this tolerant stance. These guidelines are founded in the expediency principle, a guiding principle in Dutch penal law, which allows authorities to refrain from prosecution in the public interest.³² This *de facto* decriminalisation meant that while the small-scale dealing of cannabis remained an offence from a legal viewpoint, under certain conditions it would not be prosecuted.

The coffeeshop model as it emerged was not originally envisaged by Dutch legislators, but a series of court decisions interpreted the criminal law and prosecutorial guidelines in such a way as to allow the emergence of these commercial retail spaces, provided they met certain requirements. However, while the 'front door' sales to private customers were formally tolerated, the 'back door,' or the supply of cannabis to the stores themselves, remained unregulated. Whereas the 'front-door' policy could be justified by reference to the expediency principle as a 'basic legal concept' of the Netherlands (and therefore protected in the UN drug-control conventions), regulation of the 'back door' was and remains impossible under the UN drug-control regime.³³ Owing to these restrictions in the UN drug conventions,³⁴ the 'half-baked' compromise of Dutch policy persists to this day.

In 1995, Justice Minister Winnie Sorgdrager cautiously suggested in a newspaper interview that the just-installed government was contemplating resolving the issue through the regulated supply of cannabis,³⁵ to very negative international reactions. Herbert Schaepe, the secretary of the International Narcotics Control Board (INCB)³⁶ said that 'such a step would be completely contrary to international treaties'.³⁷ The INCB had become increasingly worried about the Dutch approach, and its apparently widespread public support³⁸ and, in its report for 1995, questioned the Dutch government's 'fidelity to its treaty obligations'.³⁹

The Dutch government at the time was committed to ending the discrepancy between permitted sales at the coffeeshops' front door and illegal supply at the back door. Thus, a new policy, in fact an extension of the expediency principle, was proposed.⁴⁰ Municipalities wishing to experiment with the supply of locally cultivated cannabis to *bona fide* coffeeshops could do so if the local triangular body responsible for public order in the city – made up by the mayor, the local chief public prosecutor and the head of police – agreed, and the prosecutors general at the national level gave consent.

The idea was that a regulated supply could reduce the criminal opportunities for the large Dutch illegal hash traders which had emerged in the 1980s.

Those intended reforms, however, again stirred resistance in Europe, in particular, from French President Jacques Chirac. France threatened to refuse to follow the Schengen Agreement and open its borders with Belgium, Luxembourg and the Netherlands if the regulation of cannabis went ahead. The Dutch government abandoned the idea of regulating cannabis supplies for coffeeshops, reduced the amount a person could purchase in a coffeeshop from 30 g to 5 g and opted for stricter control of coffeeshops.⁴¹

The final result, laid out in the 1995 government White Paper *Continuity and Change*,⁴² was an accommodation on the cannabis issue. The position of coffeeshops in the cannabis market was formally consolidated, as they became the only endorsed cannabis retail points, operating under a municipal license. Cannabis supply to coffeeshops remained illegal, but new prosecution guidelines were issued to try to shape illegal supply, reducing cannabis imports by large criminal networks in favour of small home growing. Small, non-professional home growers with a maximum of five plants were given low law-enforcement priority, with the intent that many of these small growers would supply the coffeeshops.

Legal advice to the government at the time on whether the Netherlands could unilaterally decide to legalise the market in cannabis was not encouraging. The conclusion was that both the 1961 Single Convention on Narcotic Drugs and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances would have to be denounced, and that there would be little chance to re-accede with a reservation on the issues of cannabis due to the likelihood that a sufficient number of parties would oppose such a reservation.⁴³

The lesson of the Dutch attempts to challenge the UN drug-control regime by regulating the cannabis market are still relevant today: significant reforms on the question of non-medicinal cannabis are exceedingly difficult under the current UN conventions.

point, as countries seeking to implement more restrictive drug policies may see their efforts compromised by progressive policies in adjacent jurisdictions. In that respect it is interesting to look at the measures taken by the Obama Administration after the cannabis regulation in Colorado and the state of Washington following their accepted ballot initiatives on cannabis legalisation.

The Cole Memorandum gave US prosecutors discretion on the non-prosecution of state-level cannabis regulation under certain conditions, although it is contrary to federal law.⁴⁴ One such condition is the prevention of 'leaks' of cannabis to states where cannabis is not legal. Another is to prevent the proceeds from benefiting criminal associations. If

such a measure is possible in a federal state such as the United States – given that the decision to refrain from prosecution under certain conditions is more a policy than a legal decision – why should it not be possible in a confederal context such as the EU?

In the absence of a major change to either the UN drug-control treaties or the European legislation derived from them, another possibility for reform-minded countries might be the creation of an exception regarding cannabis. An example is Sweden's exception for the use of snus, a kind of a smokeless, moist powder tobacco traditionally used in the country. When it joined the EU in 1995, Sweden negotiated an exception to the ban on the production and use of snus that otherwise

applies in the EU. This exemption was confirmed in the new Directive 2014/40/EU (EU, 2014).⁴⁵ Whether a country can stipulate an exception retrospectively is not entirely clear, but the reservation made by Bolivia concerning coca in the 1961 Single Convention may create a precedent in international law. It remains to be seen, however, if EU member states would agree to such an exemption by one of its members. The same would apply if an EU member state were to join an *inter se* agreement.

Finally, while it would require a revision of the basic approach to the EU on the question of what drug policy harmonisation would mean for the union, the framework of multi-level governance (discussed in more detail below) might offer an opportunity to cut the Gordian knot of differences in national-level drug policy. In 2007, Caroline Chatwin argued that, given the desirability of harmonising EU drug policy, and the apparent impossibility of obtaining functional consensus on core elements of the *content* of a European drug policy, the best way forward for the EU was to embrace an alternative model of harmonisation. Drawing on best practice in other areas of social policy, she suggests that:

... [illicit drug policy] may, rather, be a suitable candidate for a different style of governance, engaging multiple actors on multiple levels. Under this style of European governance, collective directives and framework agreements would be made at the European level, but room would be made for Member States, together with their social partners, to fill in the details (Barnard, 2002). Integration of national policy here would defy traditional notions: 'instead of harmonising national-level social policy regimes, EU social policy may actually encourage them to diversify. (Geyer, 2000)⁴⁶

Ultimately, such a model may show the way towards a new kind of bottom-up drug policy, driven by the needs of cities, regions, and affected communities. Such a policy aligns with established principles of good governance within the EU,⁴⁷ and this model of policy coordination is gaining traction and increasing recognition, as evidenced, for example by the 2014 Charter on Multilevel Governance. At the same time, it is possible to imagine that the ethos of multi-level governance, mediated by adaptive mechanisms like *inter*

se modification, may also eventually come to influence the international debate on drug control. As the UN system, like the EU, tries to balance uniformity of standards and the obligations of countries to each other, with flexibility, recognition of diverse local circumstances both cultural and historical, and national governments' obligations to their own citizens and residents, principled support from the EU for a model of 'local customization' might help to illuminate new possibilities in international drug control more broadly, as well as resolving tensions and contradictions within the EU and facilitating enhanced cooperation on areas of shared concern relating to drugs, including public health and criminal markets.

While it is beyond the scope of this report to make substantive recommendations regarding international treaty law, either at the EU or UN level, this international context is of vital importance to understanding the experience of European jurisdictions struggling to update and adapt their cannabis policies. The experiences illustrated below suggest the urgency of further work at the international level to address the impasses and blockages in the current system. The experiences of local and regional authorities in six countries demonstrate that there is significant political will to reform cannabis policy, backed by diverse actors with creative policy proposals. At the same time, however, the cases discussed below show the limitations of local adaptation under the current international regime and emphasise the need for change at higher levels.

Introduction to the Country Contexts

In order to illuminate the present and possible future of cannabis regulation within Europe, it is helpful to examine the history of the six countries involved in this study in more detail. The countries were selected due to their relatively active cannabis reform movements at the national and sub-national levels. In all six countries different types of policy experimentation are being either attempted or proposed. However, the diverse histories and characters of the countries, as well as the varying success of their reform strategies, provide a strong illustration of

the challenges facing any EU-level policy reform initiatives on this issue. We begin by introducing the country contexts as the basis for a more in-depth discussion of the tools and tactics for reform in each country, which will be discussed under the headings of 'policy spaces,' 'political levers,' and non-government actors, as mentioned in the Introduction.

Belgium⁴⁸

The basic Belgian law concerning the traffic in toxic substances, hypnotics, narcotics, disinfectants and antiseptics dates back to 24 February 1921, when its first legal instrument against drug trafficking and drug addiction was implemented. Following international developments, especially the growing influence of prohibitionist discourse initiated by the United States, policy-makers in Belgium began to introduce stricter legislative measures in relation to drug consumption and trafficking in the 1970s. Despite widespread criticisms among the scientific community – particularly stemming from concerns regarding the increasingly slanted portrayal of drug-related issues by media and political actors – the 1921 law was amended in 1975. Cannabis was added to the list of illicit substances alongside cocaine and morphine, while heavier penalties for drug trafficking were implemented and enforced more strictly, alongside probation policies for people who use drugs.

launched, serving as a basis for a prevention policy under which local administrative authorities were held responsible for the expansion and implementation of an integrated, local prevention policy for crime in general. While largely based on a prohibitive framework that securitises drug-related issues, the programme was eventually expanded to include financial support for local authorities (i.e. municipalities) to introduce treatment facilities, harm-reduction services, and alternatives to custodial sentences.

In 1993, two MPs launched a bill pushing for the decriminalisation of cannabis possession, while another MP submitted a proposal for the establishment of a parliamentary committee in support of a better coordinated drug policy in Belgium. This marked a growing interest among policy-makers in adopting a scientific approach to drug policy-making, coinciding with regional developments such as the establishment of the EMCDDA in 1993, and with the approval of the Federal Action Plan Toxicomania-Drugs in 1995. Six years later, a Federal Drug Policy Note was published, resulting in the creation of a framework of integral and integrated drug policy, acknowledging the multidimensional characteristics of drug-related issues. Cannabis was increasingly seen as a target for policy reform.

In 2003, possession of cannabis for personal use was differentiated in law from all other drug-related offences, giving public

Belgium is a federal constitutional monarchy whose politics is based on a representative democratic system. Executive power is exercised by government, and legislative power by both the government and the two chambers of the Federal Parliament. The country is divided into three main language-based communities (Flemish, French, and German) comprising 589 municipalities.⁴⁹ The country's institutional organisation is complex and is structured on both regional and linguistic grounds. It is divided into three highly autonomous regions: Flanders in the north, Wallonia in the south, and the Brussels-Capital Region.⁵⁰

National drug laws and Ministerial Circular Letters in Belgium allow for judicial districts and local governments to apply individual nuances in their drug policy. Belgium is divided into 12 judicial districts, some of which are 'tougher' on 'drug crimes' than others. In 1990, the 'Pinksterplan' was

prosecutors the option of declining to prosecute cannabis possession where there was no evidence of problematic drug use or public nuisance. Ministerial Guidelines issued in 2005 to clarify these terms established possession of under 3 g, or one female plant, in the absence of aggravating circumstances,

as the lowest possible prosecutorial priority. In these cases, rather than making arrests, police issue an on-the-spot fine of 120–200 Euros and draft a simplified police report.⁵¹ For minor possession of this kind, criminal sanctions are not imposed and there is no possibility of a jail sentence. This *de facto* decriminalisation of minor possession provided the apparent impetus for the growth of the CSC movement in Belgium (discussed in further detail below).

Notwithstanding these concessions to a drug policy based on public health, major cities such as Antwerp have recently intensified their ‘war on drugs’. Administrative sanctions apply in the case of drug possession (regardless of the quantity), while ever more political actors have resorted to anti-drug rhetoric, indiscriminately associating illicit drug use with crime, addiction, and other social and health-related problems. The propagation of prohibitionist narratives in Belgium has caused much uncertainty in the context of Belgian national drug strategy, especially given the growing polarisation of views in drug policy. While certain political parties, such as the Walloon Socialist Party, addressed cannabis legalisation in their campaigns for the 2019 federal elections, others, including the Flemish Nationalist party (NV-A), which received the largest proportion of the vote (20.26%) in the 2014 federal elections,⁵² have advocated a zero-tolerance approach in drug policy.⁵³

On 26 September 2017, the Belgian government issued a Royal Decree to introduce a ban on New Psychoactive Substances (NPS).⁵⁴ Issued without any public consultation with relevant stakeholders, the decree also serves as a basis for further restrictions relating to other substances, including cannabis, heroin and cocaine. This effectively undermines the supposed ‘special status’ of cannabis and its consequent ‘low prosecution priority’ in the context of low-threshold possession. In view of this, the main argument for the existence of CSCs is also under threat, as the possession of a cannabis plant is no longer officially tolerated.⁵⁵ A new trial of members of the CSC ‘Trekt Uw Plant’ (TUP) was scheduled for early 2019 and can be expected to have a major impact on the standing of CSCs within Belgium⁵⁶ – a decision to criminalise

members producing in a non-profit context for their own consumption could put an end to CSCs in the country altogether.

In 2012, it seemed that the prospects for medicinal cannabis in Belgium might be more promising than for recreational use. The cannabis-based mouth spray Sativex was approved by the Belgian government in that year, as the only legal medicinal cannabis product. Actors from corporations such as the GreenRush Group have since spoken up about the promising future of the medical cannabis industry in Belgium. However, in 2015, a Royal Decree on THC products was issued by the Belgian government, which led to a general prohibition of THC-containing products for medicinal purposes, leaving Sativex as the only legally acceptable cannabis-based medicine in Belgium, as is the case in several other European countries. A law proposed in January 2019 which would create a new federal Agency for Medicinal Cannabis may ease licensing requirements for products, but the effects on this on access to high-quality medical cannabis products for patients is unclear.⁵⁷ Finally it is also worth noting that, unusually, Belgian physicians have ‘therapy freedom’ to prescribe other forms of cannabis to patients, although these cannot be legally obtained in the country. Some users of medicinal cannabis do therefore obtain prescriptions in Belgium and present these at pharmacies in the Netherlands, although they risk criminal proceedings if they bring more than 3 g of cannabis into the country. Furthermore, exemptions for minor possession apply only to herbal cannabis and not to extracts or oils,⁵⁸ creating further obstacles for medicinal users.

Belgian public opinion on cannabis seems to be relatively divided. Journalists are typically critical of current drug policies, yet the ‘gateway drug’ theory, asserting that cannabis leads users into ‘harder’ drug use, remains popular. Nevertheless, an increasing number of academics, politicians, and civil society organisations (CSOs) have expressed support for cannabis regulation. So far, this advocacy has not taken the form of official policy proposals by political parties, with the exception of one submitted by the Walloon Socialist Party in 2017, which went largely unnoticed. At the local level, however, the Mons city council is currently aiming to conduct a social-scientific experiment of legal

regulation involving CSCs. The protocol for this experiment was due to be submitted to the Minister of Health in late 2018, but details have not yet been made public at the time of writing and the future of this experiment is unclear. Other policy proposals to legally regulate cannabis have also been published by academics and civil society actors.

Denmark⁵⁹

In Denmark, according to the 1955 Euphoriant Substances Act, cannabis use (and low-threshold possession) is categorised as a minor offence punishable by a prison term of up to two years. The penal code §191 from 1969, on the other hand, serves as a basis for penalties concerning the organised sale and possession of larger amounts of controlled substances. To date, there is no formal legal distinction between cannabis and other illicit substances in Denmark.⁶⁰ Given the high prevalence of cannabis use among young people in the 1960s, policy-makers were concerned that introducing stricter sentences would result in further criminalisation (and marginalisation) of cannabis users.⁶¹ Therefore, the penal code §191 from 1969 was implemented with the condition that law enforcement would, in practice, respond more leniently to cannabis users, and to a certain extent, to cannabis sellers.⁶² Until the early 2000s, the possession of small amounts of cannabis (up to 10 g of hash or 50 g of marijuana) was de-penalised and not prosecuted.⁶³

Discussions of cannabis-related issues in Denmark often touch upon the unique phenomenon of pervasive cannabis culture in 'Freetown Christiania' (henceforth Christiania). In this small, independent commune in Copenhagen, street markets for cannabis (as well as cannabis use) were commonplace and largely tolerated from the 1960s to the early 2000s, except for occasional police raids aimed mostly at sellers. Hash clubs, where people could purchase and consume cannabis, as visitors do at Dutch coffeeshops (though illegally),⁶⁴ were also popular during this period. In 2003, however, 'The War on Drugs' was adopted by the Danish government, resulting in mass raids attempting to abolish Christiania's cannabis markets in 2004; approximately 60 sellers were arrested,⁶⁵ and a 'zero-tolerance zone' was subsequently established.⁶⁶ Such crackdowns have led to the rise of 'mobile dealing' – frequently referred to as 'brown couriers'⁶⁷ – especially in marginalised residential areas. This began to intensify after the Law Prohibiting Visitors to Designated Places, also known as the 'Hash Club Law', was strengthened in 2005. Møller (2009) has pointed out that these policies have greatly undermined the previously organic separation of cannabis from other illicit substances.⁶⁸

Despite various anti-cannabis policing efforts, cannabis markets continue to re-appear in Christiania.⁶⁹ In the past two years, Denmark has also seen more criminal gangs and violent confrontations, both in Copenhagen and in its second largest city of Aarhus. Incidents have

Denmark is a constitutional monarchy but functions politically as a parliamentary democracy.⁷⁰ Executive power is concentrated in the cabinet, led by the prime minister, whereas legislative roles primarily fall under the mandate of the executive and the national parliament. Consensus-based decision-making is highly valued within various policy-making platforms, as reflected in the typical importance of negotiations and compromises among political parties.⁷¹

According to a study conducted by the European Parliament in 2017, Denmark has repeatedly been one of the most highly ranked in local autonomy compared to other EU member states, showing the importance of local authorities in policy-making processes.⁷² The judicial sector is independent,⁷³ and comprises the Supreme Court, two high courts, and a range of specialist and district courts.⁷⁴ In total, there are 98 municipalities in Denmark, spread over five regions.⁷⁵ Although the national government is mainly responsible for certain crucial policy areas including policing, defence, justice and the education and research, regional authorities have a degree of autonomy in the fields of health care and economic development.⁷⁶

included 40 shootings between mid-June and early November 2017, in which four people were killed and 20 people injured.⁷⁷ Most of the violent incidents were said to have been caused by gang rivalries concerning control over local cannabis markets – which began to further intensify following the increase in crackdowns and punitive measures from the 2000s.⁷⁸

A group of researchers and policy-makers have argued that such violent incidents have largely been triggered by the increasingly repressive approach of the Danish government towards cannabis, which has not only affected sellers but also people who use drugs.⁷⁹ In this context, debates on drug policy in Denmark have focused increasingly on the issue of gang crime and violence. On the one hand, experts and certain political actors argue that these problematic issues could be minimised by introducing regulation of cannabis use, sales, and production. Meanwhile, opponents of this idea claim that even if cannabis is legally regulated and is thus removed from the hands of criminal gangs, the latter would simply shift to the illegal sale of other drugs.⁸⁰

In comparison with other countries discussed in this report, there have been few (successful) attempts to adapt cannabis policies in Denmark, let alone to implement its legal regulation. Three proposals to regulate cannabis were submitted in Copenhagen in 2012, 2014, and 2016, all of which were immediately rejected despite comprising concrete elements that are crucial in the context of cannabis regulation.⁸¹ In 2016, the Danish Social Liberal Party (Radikale Venstre) made a proposal for a trial for cannabis regulation which was rejected by the Danish government's political party (Venstre). In January 2017, the then Social Democrat Social Mayor of Copenhagen Jesper Christensen, who had been involved in previous proposals, spoke out to endorse cannabis legalisation – three years after Frank Jensen, then Lord Mayor of Copenhagen, made a public appearance on television expressing his support for a legal cannabis trial in the capital.⁸²

Regardless of the challenges involved in these attempts, and notwithstanding the growing prohibitionist narrative and increasingly harsh measures towards illicit drugs, cannabis remains the most widely used illicit

substance in Denmark, although the use of other illicit substances has declined in the past 15 years.⁸³ Furthermore, as in other European countries, cannabis has also gained increasing prominence in the medical sector, despite criticism from sceptical doctors. On 3 December 2017, the Danish Parliament unanimously voted in favour of a four-year trial period (beginning 1 January 2018) legalising medicinal cannabis for a selected group of patients, although many doctors have refrained from prescribing cannabis-based products due to fear of possible side-effects.⁸⁴ The trial period is intended to create broader space for cannabis-based medicines (after Sativex was approved for treatment for multiple sclerosis in 2011) either through imports or local production. By November 2017, 15 companies had applied to the Danish Medicines Agency for licenses to grow cannabis for medicinal purposes in Denmark.⁸⁵

Germany⁸⁶

Drug policies in Germany are based on the German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG), which outlines various sanctions depending on the type and severity of the offence. The BtMG does not criminalise, nor does it call for sanctions for, drug consumption as such, but the purchase and possession of controlled substances, which typically occur before consumption, remain punishable due to their association with the potential danger of supplying illicit drugs to others.⁸⁷ The cultivation and production of illicit substances remains punishable with a prison term of up to five years, which may be increased in the case of large quantities and/or in the presence of 'aggravating circumstances'.⁸⁸

The BtMG makes no legal differentiation of the 'level of danger' posed by individual drugs (the Act does not differentiate, for example, between cannabis and other drugs). Thus, the legislature leaves it to the courts to determine a hierarchy of drugs based on an empirically graded scale of 'danger to public health'.⁸⁹ Consumption-related offences involving all types of drugs may, under the narcotics provisions of criminal law, be dropped without the need to go to court. In practice, however, this option is mainly exercised in connection with cannabis cases.⁹⁰

Germany is a federal parliamentary republic whose democracy is based on a multi-party system. Legislative power is exercised by the federal parliament (Bundestag) and the federal representative body of the 16 *Laender* or regional states (Bundesrat). The judicial branch is entirely independent, separate from the respective roles of the legislative and executive branches – with the latter falling under the mandate of the government and its cabinet. Comparable to the principle of individual liberty and civil rights, the notion and practice of federalism is highly valued because of the German constitution, meaning that legislative processes are distributed among the federal state, regional states and municipalities. According to a study conducted by the European Parliament in 2017, Germany has repeatedly been among the most highly ranked local autonomy in comparison with other EU member states, showing the importance of local authorities in policy-making processes.⁹¹

The BtMG allows for the consideration and implementation of alternatives to prosecution for offences which exclusively concern personal use, which involve only small quantities of controlled substances, or where prosecution is otherwise judged not to be in the public interest.⁹² In this regard, it is important to note that such discretion can only be exercised by public prosecutors, to whom the police must report all cases of suspected offenders.

Virtually all German *Laender* have introduced threshold values for ‘minor amounts’ of cannabis, and in some cases also of other drugs including heroin, cocaine, and MDMA, below which prosecution is usually not pursued. These threshold quantities, which range between 6 and 15 g depending on each *Laender*’s definition,⁹³ function as a guideline from which public prosecutors and judges may deviate on a case-by-case basis. There is, therefore, no right for defendants to insist that prosecution is not pursued in a particular case.⁹⁴

Local prevention projects have been established in a number of *Laender*, which provide room for alternatives to court proceedings for drug-related cases. The programme known as the ‘Early Intervention with Drug Users Coming to the Attention of Law Enforcement for the First Time’ or FreD (Frühintervention bei erstaufälligen Drogenkonsumenten), for example, serves as a tool for intervention to avoid criminal prosecution and is mainly designed for teenagers and adults up to the age of 25 who have come to the attention of law enforcement for the first time due to their use of illicit substances.⁹⁵

The FreD project originated in a voluntary support service for people who use drugs. It was first established as a pilot project in the early 2000s. Given its perceived success and a positive perception among policy-makers, practitioners, and clients it remains in operation in 120 locations across Germany. The programme entails an ‘intake conversation’ as well as a range of courses aimed at preventing addiction and criminality. This and other treatment programmes demonstrate the perceived importance of health-oriented measures in relation to drug use and related disorders, as further strengthened by the financial framework outlined within the German Social Code of Law. Regardless, statistics gathered by Hans Cousto and Heino Stöver show that cannabis-related arrests have steadily increased in recent years.⁹⁶

In 2011, cannabis was reclassified from Schedule I to Schedule III of the BtMG, resulting in the legal pathway for cannabis-based products to be manufactured and prescribed for medicinal purposes, provided that clinical testing is completed and followed by licensing by the Federal Institute for Drugs and Medical Devices or BfArM (Bundesinstitut für Arzneimittel und Medizinprodukte).⁹⁷ This reclassification of cannabis made it possible for Sativex to be approved in 2011 to treat conditions related to multiple sclerosis. Six years later, the German government adopted the Cannabis as Medicine Act, which led to the establishment of a state-controlled agency on medicinal cannabis, ‘regulating prescription, financing, domestic production and import of cannabis-based pharmaceuticals, including herbal cannabis’.⁹⁸ Unlike in some European countries, patients who use cannabis-based

medicinal products in Germany are entitled to health insurance cover, though a prescription and/or reimbursement may be difficult to obtain in practice.⁹⁹

Overall, the resistance to prohibitionist drug policies in Germany is growing, particularly with regard to cannabis. This has been reflected in the shifting discourse in media coverage thanks in part to the work of civil society and advocacy organisations such as Der Deutsche Hanfverband (DHV) and the akzept e.V. – Bundesverband für akzeptierende Drogenarbeit und humane Drogenpolitik. Nonetheless, 63% of Germans oppose the legalisation of cannabis, according to a recent survey.¹⁰⁰ However, considerable differences in results have been found among different types of surveys, and among the many institutes who present this question. Illustratively, in another survey, 52% agreed that the possession of small quantities of cannabis should no longer be prosecuted.¹⁰¹

In recent years, there have been parliamentary attempts to push for cannabis policy reform at the federal level, as illustrated by the proposal from the so-called ‘Jamaica coalition’, coinciding with cannabis regulation initiatives from the FDP and the Green Party (the Greens Bill was debated in February 2018), as well as a related call from the Left Party. At the city and state levels, a wide array of cannabis regulation proposals has been submitted in Berlin, Bremen, Düsseldorf, Münster, and a number of districts and neighbourhoods. The recent emergence of these proposals, especially considering their different backgrounds, offers an interesting possibility for the future development of legal cannabis regulation in Germany. To date, however, no proposals dealing with regulation of recreational cannabis have been authorised to proceed by the relevant national authorities.

Netherlands¹⁰²

The Netherlands has long been recognised in Europe for its relative tolerance of cannabis, but its drug policy has undergone a number of phases and remains contested, with more liberal and repressive groups pushing for different kinds of cannabis policy. While cannabis use was first addressed in law in

the Dutch Opium Act of 1928, the possession, manufacture, and sale of hemp products did not become criminal offences until 1953. In 1956, the definition of ‘hemp’ in the Opium Act was narrowed in order to exclude various agricultural uses of the plant; the definition was altered to include only the dried tops of the plant.¹⁰³ However, as in much of Europe, cannabis use expanded dramatically during the counter-cultural and student movements of the 1960s. Dutch drug policy adapted to this shifting social context with various methods, culminating, in 1976, with the statutory decriminalisation of cannabis.¹⁰⁴ This was the result of a legal and social discussion within the country that was already significant from the first debates in Dutch parliament on the ratification of the 1961 Single Convention – legalisation was proposed both at this time and since. However, legislators at the time interpreted the Single Convention as forbidding legalisation as such.¹⁰⁵ For more information on the impacts of international law on Dutch drug policy, see ‘The Dutch Experience and International Law,’ page 10.

A compromise was reached in the Netherlands between prohibition and legalisation. Following the advice of two expert inquiries – The Baan Commission (1970) and the Hulsman Commission (1971)¹⁰⁶ – the 1976 revised Opium Act incorporated a legal distinction between ‘drugs presenting unacceptable social risks,’ like heroin and ‘hemp products’. Distinct criminal offences with different sentences were established for cannabis products, and possession of small amounts (up to 30 g) was reduced to a ‘petty offence’.¹⁰⁷ This statutory decriminalisation came about both because of increasing concern about heroin, and because of growing social acceptance of cannabis use. Legislators theorised that separating cannabis from ‘hard drugs’ would reduce the exposure of cannabis users to hard drugs.¹⁰⁸

In 1979, the Dutch approach to cannabis was further formalised with the release of official national Guidelines for Investigation and Prosecution. These Guidelines, based on the expedience principle, established a clear set of guidelines under which cannabis sales, while still illegal, would not be prosecuted. Known as AHJ-G for their Dutch acronym – no overt advertising (Affichering), no ‘Hard drugs’, no nuisance (Overlast), no under-age clientèle (Jongeren) and no large quantities

The Netherlands is a constitutional monarchy governed by parliamentary representative democracy and constituted as a decentralised unitary state divided into 12 provinces. Municipalities enjoy relatively robust powers. Historically, Dutch democracy is characterised by a striving for broad consensus on difficult issues. National parliamentary elections are decided through a proportional representative system, with governments formed as multi-party coalitions. The judiciary is independent, constituted by a supreme court, 11 district courts, four courts of appeals, and three administrative courts of appeal.

(Grote hoeveelheden) – these criteria laid the groundwork for the coffeeshop system, although legislators did not envisage the current system of coffeeshops. Rather, the Guidelines formalised an existing tolerance of ‘house dealers’ – small-scale cannabis sellers operating in counter-cultural youth centres. Subsequent case law established that small-scale cafés or dispensaries should be treated as equivalent in law to these house dealers, and paved the way for the development of the commercial coffeeshop system.¹⁰⁹

Medicinal cannabis is legal in the Netherlands. A variety of cannabis-based medications can be obtained on prescription through pharmacies. Currently, all medical cannabis is currently produced by the private company Bedrocan, overseen by the Office for Medical Cannabis (BMC in its Dutch acronym). However, cannabidiol (CBD) is not covered under the Opium Law and is not considered psychoactive. Thus, cannabis oils and extracts containing CBD but with no measurable THC content can be purchased online, and through a wide range of pharmacies, tobacco shops, and health food stores.

Dutch drug policy has not been uniformly permissive, however, and, as the heroin crisis was addressed and new drugs like MDMA became culturally significant, public discussions about cannabis sales turned increasingly away from public health and towards problems of perceived disorder, nuisance, and organised crime related to cannabis production. At the same time, the 1985 Schengen Agreement was followed by a rapid influx of ‘cannabis tourists’ from neighbouring countries, contributing to a rapid increase in the number of coffeeshops, especially in bordering municipalities. In 1995, the Dutch government, in a comprehensive White Paper on drug policy,

raised both cannabis tourism and the increasing involvement of organised crime in cannabis supply chains as major issues, while identifying the use of drugs in the Netherlands as ‘an acute, major social and administrative problem’.¹¹⁰ This marked a shift in public and official attitudes towards cannabis, and began an era of increasing regulation of coffeeshops, including a number of amendments to both administrative and criminal law which, while designed to control nuisance and organised crime, have had the intended or unintended consequence of dramatically reducing the number of coffeeshops; an estimated 1100–1500 coffeeshops were active in 1995¹¹¹ and by 2016 this number was just 573.¹¹²

By and large, the shift in Dutch cannabis policy did not involve major top-down policy changes but the creation of new capabilities for Dutch municipalities wishing to take steps against coffeeshops in their jurisdiction. While municipalities were always able to take measures against coffeeshops that violated the AHOJ-G criteria, legal changes after 1995 allowed them to veto coffeeshops in their municipality entirely (a choice taken by some 70% of municipalities)¹¹³ and to impose a range of licensing conditions, including limiting opening hours, requiring certain forms of security, introducing criminal screening of operators, and imposing a minimum distance between coffeeshops and schools, among others.¹¹⁴ At the national level, a uniform definition of ‘youth’ (under 18 years of age) was imposed, and coffeeshops were required to be alcohol free.¹¹⁵ Experiments were also made with introducing membership requirements (allowing coffeeshops to sell only to registered members) and ID requirements (allowing sales only to residents of the Netherlands – irrespective of nationality) but, after pilot projects showed a significant increase in street dealing as a result of these policies, neither

Policy Proposal: Summary of proposals for local regulation of the 'back door' in the Netherlands*

The mayors of eight communities in the southern province of Limburg presented a detailed proposal for a joint two to three-year pilot project with regulated supply to all coffeeshops in their communities by one or more certified companies. Cannabis should not contain more than 15% THC. Enforcement of illegal cannabis cultivation should be continued.

The municipality of Smallerland concluded that the national enforcement policy towards cannabis cultivation had resulted in most small-scale growers being arrested or having stopped growing cannabis for coffeeshops because fear of arrest. The municipality proposed to return to a small-scale system of non-criminal, experienced growers who supply the two coffeeshops (located in the city of Drachten) with organically cultivated cannabis. Cash payments should not be allowed, and the Tax Office should control purchase and sale.

The municipality of Rotterdam called for a foundation that cultivates various types of marijuana to supply coffeeshops only. The cultivated marijuana should meet certain quality criteria (e.g. not too much THC).

The city of Leiden proposed choosing between two options: either one cultivation site for all local coffeeshops, or for each coffeeshop to have its own cultivation site.

The city of Groningen proposed a regulated cultivation site similar to the 'Bedrocan model' (see section on medicinal cannabis), i.e. an agricultural site, with no company name or reference to cannabis being visible to the public. Cannabis should be grown according to the standards of Good Agricultural Practice, and thus without pesticides or fungicides. Quality and purity (THC, CBD) should be professionally analysed and reported. Growers should not have a criminal record (with the exemption of violation of the Opium Act for cannabis cultivation); transparent financial administration; and cannabis to be safely transported to the coffeeshops.

*Reproduced from Korf, D. (2019) Cannabis Regulation in Europe: Country Report Netherlands. Amsterdam: Transnational Institute.

was implemented at the national level and the membership requirement was abolished where it had been adopted.¹¹⁶

Increasingly, concern about criminality associated with cannabis in the Netherlands has focused on the so-called 'back door,' the supply of cannabis to coffeeshops, which is so far unregulated. Currently, police turn a blind eye to discrete sourcing of small quantities of cannabis by coffeeshops, but there is no legal framework for this.¹¹⁷ Growing concern has focused on the role of organised crime in cannabis production in the Netherlands.¹¹⁸ Since 2004 this has been addressed largely by increased criminal and administrative sanctions addressing cannabis cultivation,

including new rights for police to seize assets linked to drug production.¹¹⁹

A number of mayors, as well as some users' associations, have begun lobbying for comprehensive regulation to provide a safe, controlled supply chain for cannabis. In 2013, change seemed imminent: municipalities were invited to propose possible models for cannabis regulation in their jurisdictions, and a number sent in detailed proposals. In the same year, the Manifest Joint Regulation, initially signed by 23 mayors (now 61),¹²⁰ called for regulation of cannabis production. However, the government at the time was not receptive, and progress stalled. In February 2017 the Dutch parliament

voted, by a small majority, to adopt the 'Closed Coffeeshop Circuit Act' (Wet Gesloten Coffeeshopketen), which would exempt commercial cannabis growers from prosecution under certain conditions. This opened the way for new policy innovations. In October 2017, a new government took office, a coalition of four political parties that had committed to conducting an experiment in regulating the supply chain for coffeeshops. In March 2018 a committee of independent scientists and other experts was established in order to advise the government on the design of the experiment. The experiment, involving 6–10 communities, is slated to begin in 2019 after the implementation of an Experiment Act (to exempt activities undertaken as part of the experiment from criminal prosecution) and an associated Administrative Decree to define the conditions of the experiment. However, after being passed by the lower house of parliament in February 2017, the bill remains pending in the Senate (Eerste Kamer) at the time of writing.

In June 2018, the expert committee made its recommendations for the research design and content of the experiment, including a sufficiently varied range of cannabis in the coffeeshops (both marijuana and hashish), larger stock of cannabis in coffeeshops, and

prevention measures. In the course of 2019, the experiment will be further developed in consultation with local authorities, as a next step in a complex process to prepare, implement and evaluate it, with the aim of drawing out evidence-based lessons that, in around 2025, will allow any future government to decide on the next steps in Dutch cannabis policy.¹²¹

Spain¹²²

Cannabis use in Spain has a long history and relatively wide acceptance. Hemp and other cannabis products were important culturally and economically until the early 20th century, and in a survey conducted in 2016, nearly 3 million people in Spain admitted to having used cannabis during the last year.¹²³ Cannabis regulation began in earnest in Spain in the 1920s, but, even after the ratification of the 1961 Convention, controlling trafficking and export of cannabis to the rest of Europe remained the major focus of the law, rather than repressing use within Spain.¹²⁴ From the mid-1960s, after the end of Franco's dictatorship, a liberal trend in public attitudes to cannabis was observed, as in much of Europe. In 1983 this trend was recognised in law with a reform of the criminal code

Spain is a parliamentary monarchy, with executive power exercised by the prime minister, who heads the government. The judiciary is independent and not linked to the executive government, and the Supreme Court has jurisdiction over all Spanish territories, and is above all other courts, with the exception of the Constitutional Court, which has jurisdiction over constitutional matters.

Compared to other European countries, certain functions of governance in Spain are highly decentralised, with regional autonomy being an important principle of government. Spain's 'nationalities and regions' are constituted as 17 'autonomous communities' and two 'autonomous cities'. The constitution recognises these regions and guarantees certain rights of self-government – this administrative and political territorial division is known as the 'State of Autonomies'. Thus, while Spain is not formally a federation, regions nonetheless enjoy an unusual degree of autonomy. The constitution came into effect in 1978, and the process of establishing the scope and limits of regional autonomy is, to some extent, ongoing, with the Constitutional Court playing an important role in this process. The central government has progressively devolved powers to autonomous regions, but more power has been devolved to some communities than others: the so-called 'historical nationalities' of the Basque Country, Catalonia, and Galicia, as well as Navarre, have powers not shared by all communities. The devolution of fiscal powers also varies. Municipalities in Spain also have certain rights to autonomy, defined in the Spanish constitution.

that expressly differentiated between ‘less harmful’ substances (like cannabis) and ‘more harmful’ substances, including cocaine and heroin. However, this differentiation was criticised by certain actors within Spain and throughout Europe, leading to a significant backlash and the imposition in 1988 of a ‘counter-reform’ to the criminal code.¹²⁵ This counter-reform did not abolish the distinction between cannabis and other substances, but brought in harsher sentences for drug-related crimes and established a number of new criminal activities, including crimes related to ‘promoting, encouraging, or facilitating’ drug use.¹²⁶ Since 1988 there have been a variety of efforts from within Spanish society to push for reforms to cannabis law. Direct advocacy by social movements and political parties has been important, but both civil society groups and regional and municipal governments have also been engaged, sometimes against their will, in a continuing process of testing the limits of existing law.

There is no general legal framework for medicinal use of cannabis in Spanish law, although a single cannabis-derived medication (Sativex) has been approved for sale in Spain, albeit currently restricted to very particular cases.

Cannabis in Spain is governed by both criminal and administrative law. Article 368 of the Spanish criminal code establishes a number of offences pertaining to manufacturing, trafficking, and promoting, encouraging or facilitating the use of toxic, narcotic, and psychotropic substances, including cannabis, and sets out both fines and prison sentences for these offences.¹²⁷ The status of cannabis as a product not considered to cause serious harm to human health means that fines and prison sentences are smaller for offences involving cannabis than for those involving other substances considered more harmful. However, sentences can be increased in the presence of aggravating factors, or reduced in the case of mitigating factors (e.g. for a minor offence).¹²⁸

Under Administrative Law, regulations and sanctions relating to cannabis are elaborated in the Narcotics Law (1967) and the Organic Law on the Protection of Public Safety (LOPSC, in its Spanish acronym) (2015). While the standards imposed by these laws are more restrictive than those in the criminal law,

and establish as illegal a number of offences which are not criminal in nature, people cannot usually be imprisoned for violations of administrative law, and legal scholars generally agree that administrative crimes are exempt from the kind of social disapproval which accompanies criminal offences. Nonetheless, the 2015 law made a variety of activities relating to planting and cultivation of cannabis illegal, which had previously occupied a legal grey area. These activities, together with a number of new offences related to facilitating access to controlled substances, are considered ‘serious offences against public safety’ and punishable by large fines (from 601 to 30,000 Euro).¹²⁹

Interpretation of criminal law in Spain, and of administrative law especially before 2015, has been to some extent contentious as its ambiguities and loopholes appear to provide potential opportunities for legal provision of cannabis to adult recreational users, or even for larger-scale regulation of recreational cannabis markets. These legal ambiguities have been particularly significant in giving rise to the widely-known movement of Cannabis Social Clubs (CSCs). Beginning in the 1990s, associations of cannabis users, supported to varying degrees by certain Spanish courts and members of the public prosecutors’ offices, acted on the basis that self-production of cannabis for groups of adult members could be a legal way to provide cannabis. Many saw the LOPSC 2015 as a direct attack on these activities, and a way to ban cultivation outright. However, between 1990 and 2017 the Spanish courts, at various levels, played host to a debate about the legality of cannabis cultivation and consumption. Even under the new laws and despite jurisprudence established in 2017, a certain number of areas still remain open to interpretation and disputes continue within the courts.

At the same time as a legal battle was carried out between individuals involved in CSCs or other types of cultivation whose legality was in question, Spanish regional authorities and municipalities also engaged in a process of ‘testing’ their own legal and administrative capacities in relation to cannabis regulation. In this context, a number of regions and municipalities have passed laws that would have major implications for cannabis cultivation and consumption in certain regions of Spain. The national government has, in

a number of cases, brought claims to the Constitutional Court, some of which remain unresolved. These cases will be discussed further below in the section on Policy Spaces.

In the face of an apparent narrowing of the legal space available for cannabis users, as the higher courts interpret the law in ways that close potential loopholes and remove ambiguity regarding the illegality (and in some cases criminality) of the activities of CSCs, many social movement actors and politicians are advocating a review of and changes to existing criminal and administrative laws. A number of proposals have been made for a comprehensive re-assessment of the legal position of cannabis, including high-profile calls for national regulation of the drug. These will be discussed further below in the section on Policy Levers.

Switzerland¹³⁰

Cannabis use in Switzerland is relatively recent, becoming socially significant only in the 1960s.¹³¹ Swiss drug policy on the whole has been shaped by concerns about harm reduction, especially during the heroin and HIV epidemics of the 1980s and 1990s. However, there has been lively public debate about the role of cannabis in society during the last two decades, with

a variety of proposals for legalisation and decriminalisation from specialised advisory bodies, citizen-driven initiatives, and through parliamentary proposals.

Recent outcomes suggest that public opinion is still divided about cannabis legalisation and regulation, but there is comparatively little stigma attached to cannabis use and both cannabis-derived medication and certain low-THC varieties and products are legal and widely accepted. The public debate is evolving, with a number of civil society groups, producers' organisations, users' associations, political parties, municipalities, advisory bodies and others pushing for a broader social discussion of cannabis regulation.

The first narcotics law was passed in Switzerland in 1924 and cannabis was added to the law in its first revision in 1951, in spite of being virtually unknown in the country at the time.¹³² Cannabis became a social issue in Switzerland in the 1960s, as in many other European countries, and revisions to the law responded to this with a trend towards repression: in 1969, for example, the federal court ruled that drug use should be treated as equivalent to possession, and therefore prosecuted.¹³³ A second major revision to the drug law, between 1971 and 1975, responded to the increase in cannabis-related offences as well as the first signs of the diffusion of heroin and cocaine in Switzerland. Among

Switzerland is a federal country with many powers remaining at the sub-national (cantonal) level. The cantons also devolve some of their powers to the municipalities. Switzerland is also a semi-direct democracy with provisions for referenda and citizens' initiatives on matters of national and local (cantonal or municipal) law and regulations. At the national level, constitutional changes decided by parliament are automatically submitted to a referendum. Citizens can also submit a change to the constitution to popular vote, provided they gather 100,000 signatures over a period of 18 months. They can also trigger a referendum over any law decided by parliament by collecting 50,000 signatures over a period of 100 days. Similar provisions exist at the cantonal level (constitution and any law) and at the municipal level (regulations).

In the last decades, Swiss citizens have frequently voted on drug policy issues with three citizens' initiatives¹³⁴ and two referenda.¹³⁵ In addition, many citizens have also voted on drug-policy issues at the local level, often in relation to the implementation of drug consumption rooms or other services. Switzerland remains the only country in Europe in which both the national parliament – with a proposal submitted by the government in 2001 – and citizens – with a ballot initiative in 2008 – were asked to legalise and regulate cannabis. Both proposals were, however, rejected.

other things, the new law provided clearer scope for judicial and prosecutorial discretion, outlining circumstances in which courts and prosecutors might refrain from sanctioning drug possession or drug use, including for minor offences or small quantities, or for persons who were undergoing treatment for problematic drug use.¹³⁶ This laid the foundation for Switzerland's drug policy, which can be described as 'a hard stance with a soft hand'.¹³⁷ This policy, however, failed to respond to the heroin and HIV crisis in the 1980s and 1990s. Local activists and authorities developed new approaches to the issue with innovative harm-reduction measures, leading ultimately to the development of the new 'four pillars' national drug policy, which formally includes harm-reduction interventions and goals.

At the turn of the century, the Swiss government wanted to change the national drug law further by ending the prosecution of drug use and allowing for a tolerated and regulated cannabis market. While this was eventually rejected by the lower house of the Swiss federal legislature in 2004, the intervening three years of legal limbo saw widespread experimentation with local-level cannabis regulation. Cannabis dispensaries established in this period were shut down *en masse* after the 2004 rejection of the reform proposal, but this may have had a lingering effect on public attitudes to cannabis.

In 2008, a citizens' initiative proposed wholesale legalisation of cannabis, and the establishment of a regulated market, including nationally regulated cannabis shops. This proposal was rejected but received 37% of the vote despite recognised difficulties in the campaign. Advocates have taken this as evidence of relatively widespread acceptance of cannabis in Switzerland, and potential openness to future reforms. Inspired by this and by developments at the international level, the Swiss-German association 'Legalize It!' has begun developing a campaign for a new referendum. The objective is to start collecting the requisite 100,000 signatures in late spring or early summer 2019. If successful, Swiss citizens could vote in the coming three or four years on an initiative calling for constitutional legalisation of use and growing for personal use of cannabis, and the development of a regulated market.¹³⁸ In the meantime, a number of local

municipalities have also made proposals intended to take advantage of the room for manoeuvre within the existing drug law. In line with the international drug-control conventions, the Swiss drug law permits experiments and clinical trials using drugs, including cannabis. All such trials must be approved by the SFOPH. A number of cantons and cities (notably Berne, Zürich, Basel, and Geneva) have begun developing proposals for cannabis trials. In 2017, a proposal from the city of Berne was rejected by the SFOPH, mainly on the basis that it included recreational users and that pharmacies may not distribute cannabis without a medical prescription. The SFOPH, however, suggested that a small amendment to the existing drug law could allow for such non-medical trials.¹³⁹ An effort is therefore currently underway to revise this law to allow broader scope for experimentation, with the apparent support of a group of parliamentarians and the executive government. A revision to the law to allow pilot projects in non-medicinal cannabis regulation is likely to be debated in parliament in 2019 or 2020, and is discussed further below.

While the use, distribution, and trafficking of cannabis remains illegal in Switzerland, a parliamentary initiative adopted in 2012 brought about changes to the drug law which appear to have been interpreted by courts and prosecutors in several cantons as amounting effectively to a decriminalisation of cannabis use, and of adult possession of under 10 g. The change of law introduced a minimal penalty (a 100 CHF fine, not accompanied by criminal proceedings) for cannabis use with this level of possession in the absence of aggravating factors. While interpretation has varied widely throughout the country, prosecutions for simple, small-scale possession of cannabis are rare today, and a series of supreme court decisions in the last five years mean that those who are prosecuted have increasing grounds (and therefore motivation) to challenge charges in court.¹⁴⁰

Switzerland also has an existing legal framework for medicinal cannabis use since 2011. With the exception of Sativex for the treatment of multiple sclerosis, this must be requested through a bureaucratically intensive process of applying to the Swiss Federal Office of Public Health (SFOPH) for a special exemption to prescribe cannabis,

Policy Proposal Berne: Safer Cannabis Research in Pharmacies Trial*

Research collaboration with University of Bern

Proposal details:

- Approved point of sale in participating pharmacies:
 - 5g per purchase
 - 25 g per month
 - Average THC content 12%
- Participants:
 - Residents of the participating city
 - Adults who regularly use cannabis and accept the study conditions: hair sample to show history of use; participation in online addiction prevention
 - Exclusion criteria mostly health related: pregnant or breastfeeding women; history of certain psychiatric conditions

Objectives and design:

- Is the offer of cannabis in pharmacies taken up and how does it affect use?
- 36-month duration
- randomised controlled trial, observational extension, qualitative study

Status/reception:

- Ethics committee approved, financing secured, pharmacies interested
- other cities in the region decided to participate – Zürich, Lucerne, Biel and St Gallen
- Exemption refused by SFOPH November 2017
- Study postponed pending legislative change

*Based on presentation and information from Swiss delegates at *Cannabis in the City: Regulation and Local Authorities in Europe*, Interactive Seminar, Brussels, 19 November 2018. Further details available online: <https://www.script-studie.ch/uber-die-studie/> (German)

and only a limited number of preparations are legally available.¹⁴¹ In spite of the paperwork involved for doctors and patients, the number of requests for exemptions has increased rapidly and it is anticipated that the process will need to be streamlined to deal with demand. At the same time, CBD (cannabidiol) is not explicitly covered by the Swiss drug laws, nor by the medical regulatory authority. This, combined with a regulatory decision in 2011 to class cannabis plants with less than 1% THC content as legal (in order to avoid false positives in the cannabis production for industrial fibre and related industries) has led to an unusual situation where ‘low THC and high CBD’ varieties circulate freely in the country.¹⁴² However, since clinical trials have not proven the effectiveness of these substances for most applications, a crackdown is possible as

concerns rise about the unregulated nature of these products.¹⁴³

On the whole, there are several mechanisms by which change in both the letter and the implementation of Swiss law relating to cannabis might be brought about. A number of regulatory areas, especially regarding CBD, remain to some extent undefined. The current criminal law is in the process of being defined through jurisprudence, but courts, police, and prosecutors seem to be moving towards an interpretation of the existing law which treats personal possession for use, but not actual use and consumption, as effectively decriminalised. At the same time, however, there has been some resistance from the national government, especially the Lower House of Parliament, which has historically opposed modifications to the Narcotics Law.

Policy Spaces

As discussed above, most countries in Europe interpret their obligations under international agreements to mean that regulation of recreational cannabis markets is currently impossible, severely limiting the extent to which regions and municipalities can explore regulatory alternatives. Several countries have, however, implemented changes that can open space for regions or municipalities to adapt policies. Gaps, grey areas, and ambiguities in the law create flexibility, and space for new policies. Often this is an unintended consequence of the way a law or policy at the national level is formulated or implemented, but in some cases states have also actively embraced this latitude to make deliberate changes to the effective drug policy in their country without the corresponding, potentially controversial, legislative changes. From the full exercise of prosecutorial discretion and sentencing freedom, to regulatory decisions about the definition of cannabis, to explorations of the extent of municipal powers over health and social programming, a number of interventions can have an important impact on local and regional-level policy possibilities, without requiring substantive changes to national law. Sometimes described as *de facto* (rather than *de jure*) changes to law, adjustments in interpretation, sentencing, and regulatory instruments, can be an important site for regulatory change.

In this section, we explore different ways in which government actors are implementing policy changes that take advantage of ambiguities, loopholes, grey areas and regulatory gaps in order to change the legal environment in their country *without* directly addressing national legislation. For the sake of this discussion, we identify these areas as ‘policy spaces’ – openings in the existing legal regime which allow for perhaps unanticipated flexibility. While many of these strategies require, at the very least, some cooperation from national governments they may represent more attainable, short-term targets at the sub-national level. In many cases, these strategies involve exploring or shifting the relation between municipal and national powers, and taking comprehensive advantage of spaces already available to sub-national policy-makers. We address these strategies under three headings, although in reality there

may be important overlaps: prosecutorial discretion; exploring the limits of municipal and regional powers; and regulatory matters and definitions of substances. This is not an exhaustive catalogue of all such strategies, but highlights a few important cases from the six countries studied.

Prosecutorial Discretion

There are many layers of interpretation between law as it appears “on the books” and its practice. This is true for both criminal and administrative law: no law is self-implementing or self-interpreting. One critical link between legislation and its implementation, especially for criminal law, is what is known as ‘prosecutorial discretion’.

Globally, prosecutors play a key role in the implementation of criminal law: in many jurisdictions they take the final decision about whether to bring an alleged crime to trial, although they may be obliged to do so in specific circumstances. In many places, prosecutors also have some discretion about which charges to bring in a particular case, and may also be able to impose other conditions, divert offenders to alternatives to prosecution, or make recommendations about sentencing.¹⁴⁴ Prosecutors thus play a critical role in the criminal justice system, and their role is often understood to include ensuring that national law is applied in full compliance with international human rights norms. Prosecutors are required to exercise judgement and discretion, while avoiding arbitrariness, and their special obligations in relation to human rights have been treated in the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.¹⁴⁵

While their particular powers and competencies vary widely, prosecutors in many jurisdictions have the authority to decide not to prosecute certain crimes. This usually applies to crimes which are judged to be of a minor nature, to pose a minimal threat to public order or safety, or in cases where, in view of other conditions or mitigating circumstances, proceeding to trial is judged not to be in the public interest. Such decisions help to ensure that the resources of prosecutors, courts, and police are used to best effect.

Jurisdictions which formally give the public prosecutor the right to decide not to bring charges, such as the Netherlands, are said to apply ‘the principle of opportunity’ (also referred to as the ‘principle of expediency’) while countries like Germany, which formally oblige prosecutors to bring charges where sufficient evidence is present, are said to apply ‘the principle of legality’.¹⁴⁶ However, the distinction in practice is less clear-cut than this dichotomy suggests – countries employing the principle of legality may allow prosecutors to decline to bring charges under certain conditions, and in countries that formally exercise the principle of expediency there may nonetheless be social, political, and organisational pressures brought to bear on prosecutors to bring certain types of crimes to trial.¹⁴⁷

Prosecutors’ decisions may be made on a case-by-case basis, or guided only by internal policies within the prosecutor’s office. However, international Guidelines on the Role of Prosecutors advise that, where prosecutors have discretionary power, published guidelines or regulations should be provided to enhance fairness and consistency.¹⁴⁸ Therefore, clear guidance or statements about prosecutorial priorities, including conditions under which crimes may not be prosecuted, are often published either by the prosecutor’s office itself or by another relevant authority. Where this kind of information is public and widely known, it can be expected to affect police behaviour, and can also provide a basis for people who are charged with crimes that are generally exempt from prosecution to argue for their rights. In the absence of a general directive limiting prosecution of certain categories or types of crime, prosecutorial discretion may nonetheless be used to exempt people from prosecution in the case of mitigating circumstances, e.g. for minor crimes or crimes committed by minors.

In the case of drug law, prosecutors in some jurisdictions may also decline to press charges against people with a history of addiction, or who are undergoing treatment for drug-use disorders (this was historically the case in Switzerland). In certain jurisdictions and in the cases of certain pre-defined classes of crime, including minor drug offences, the police or other employees in the justice system may have the authority to exercise discretion about charges as well as or instead

of the public prosecutor. For the sake of simplicity, we will treat this type of police or other judicial discretion under the heading of prosecutorial discretion, despite some procedural and political differences.

While it is important to note that crimes exempt from prosecution remain criminal offences, and can be met with heavy charges in the presence of aggravating circumstances, clear statements of prosecutorial priority can nonetheless function as a kind of *de facto* decriminalisation of certain acts, as has been the case for small-scale cannabis sales in the Netherlands. Prosecutorial discretion, whether exercised on a limited, case-by-case basis, or as part of a broader policy of constrained tolerance, can dramatically affect the way in which a country’s laws are enforced; can play a key role in mitigating harms associated with criminalisation of drug consumption, possession, trafficking, or cultivation; and can even open space for municipal policy-making, as has been the case in relation to coffeeshops in the Netherlands.

In several of the countries examined in this report, prosecutorial discretion has played a recognisable role in shaping the implementation of national drug law. In the Netherlands, for instance, while possession of even small amounts of cannabis remains illegal, and selling cannabis remains technically a criminal offence, official National Guidelines for the Investigation and Prosecution of Drug offences, which came into force in 1979, are widely recognised to have paved the way for the existing Dutch coffeeshop system where cannabis is openly sold in registered and regulated premises. The Guidelines established a clear and transparent set of criteria, known as the AHOJ-G criteria (see the Introduction to the Dutch Country Context, above). Premises which sold cannabis could avoid prosecution for trafficking provided that they abided by these guidelines, which were designed to protect public health and minimise nuisance. In conjunction with the statutory decriminalisation of possession of small amounts of cannabis for personal use, this strong, publicly acknowledged and officially recognised guideline allowed coffeeshops to operate as businesses, and allowed local authorities to have a formal role in regulating and managing them. At the same time the criteria allowed the Dutch police, and the broader legal apparatus, to focus their

energy and resources on targeting businesses and individuals who breached these criteria and whose actions posed a greater perceived threat to public health or society more broadly. Finally, this situation provided a powerful incentive for coffeeshops to abide by existing regulation.

In Belgium, prosecutorial discretion has also been significant in shaping the practical outcomes of the national drug policy. Within the scope of Belgian national drug laws and Ministerial Circular Letters, judicial districts and local governments can nuance their drug policy. With regard to the judicial districts, the public prosecutor makes case-by-case assessments and decisions in the case of drug offences. Some judicial districts are 'tougher' on 'drug crimes' than others. At the local policy level – where the mayor is the head of the local police service – a form of 'criminal' policy can be established via Community Regulations and the instrument of administrative sanctions (GAS), i.e. a maximum fine of EUR 350 for adults.¹⁴⁹ This leads to sometimes dramatically differing outcomes. Someone found with cannabis in their car could face dramatically different outcomes depending on where they were apprehended in Belgium.¹⁵⁰ Nonetheless, a Federal Drug Policy Note in 2001 created a national framework for drug policy that identified harm reduction as one of its three pillars. The translation of this federal Note into law created a separate status for cannabis, as well as distinguishing clearly between adults and minors in respect to cannabis possession.

While Belgium formally applies the principle of legality, in 2003 personal possession of cannabis was differentiated from possession of other controlled substances, relieving prosecutors of the obligation to pursue charges in cannabis possession cases where there was no evidence of problematic drug use or public nuisance.¹⁵¹ The 2003 law established the possession of small amounts of cannabis (later clarified by Ministerial Guidelines as up to 3 g or one female plant) by adults as 'the lowest prosecutorial priority'. Thus, in cases of cannabis possession for personal use with no aggravating circumstances, police draft only a simplified police report and the prosecutor is not informed about individual cases – criminal charges do not result. Where aggravating circumstances, or drugs other

than cannabis, are present the prosecutor must be informed and criminal charges may be pursued. The clear definition of what constitutes a small quantity of cannabis and the official designation of this as the 'lowest prosecutorial priority' played a role in the establishment of a CSC movement in Belgium. However, a recent press release by the Belgian College of Public Prosecutors refuted the interpretation of the 2005 Ministerial Guidelines, often presented by the CSCs and activists to justify the legitimacy (and legality) of their activities, clarifying the stance of that body – this could represent a more repressive approach towards the remaining CSCs active in the country.¹⁵²

In Switzerland, the Swiss Code of Criminal Procedure, which came into effect in 2011, increased the powers of prosecutors, including by increasing their discretion to divert cases.¹⁵³ As mentioned above, in 2012, a partial revision of the narcotics law decriminalised possession of small amounts of cannabis, replacing previous sanctions with a flat fine for adults carrying less than 10 g of cannabis with no simultaneous offence. This law came into force in October 2013 and early implementation figures showed that cantons had very different ways of implementing the new legislation.¹⁵⁴ One reason for this is that the Swiss narcotics law, with its successive and sometimes contradictory revisions, allows for multiple interpretations and options for law-enforcement bodies. Recent decisions by the country's highest court led many cantons to stop prosecuting cannabis possession (of 10 g or less by an adult) altogether, although this does not seem to have been the intent of the original legislation. Offenders seen using cannabis are still generally fined, but further sanctions are much rarer than previously.¹⁵⁵

In Germany, although the country formally also operates under the principle of legality, the national drug law, known as the BtMG, provides for the possibility to refrain from prosecution of narcotics use offences under certain circumstances, namely for minor amounts exclusively for personal use and when the offender's guilt is deemed to be minor as well as there being no public interest in prosecution. As explained in the Introduction to the German Country Context above, almost all *Laender* in Germany have introduced threshold values for 'minor amounts'¹⁵⁶ in relation to cannabis (and

often other drugs). The limits set by the individual *Laender*, however, are guideline values from which public prosecutors and judges may deviate on a case-by-case basis. It is important to note that, in the German context, there is no legal right for offenders to insist that cases of minor possession not be prosecuted. Further it should be noted that the police have no power to exercise discretion: officially all cases of suspected offenders must be reported to the public prosecutor.

In some *Laender*, local prevention projects, like the widespread programme 'Early Intervention with Drug Users Coming to the Attention of Law Enforcement for the First Time – FreD', discussed in the profile on Germany above, are used as a way to avoid court proceedings. They represent an additional possibility for intervention without immediately initiating criminal proceedings. Nonetheless, offences related to cannabis account for the vast majority of drug-related offences recorded by the Federal Criminal Police Office in Germany and some 80% of all drug-related offences include quantities for personal use.¹⁵⁷ Furthermore, the percentage of cannabis-related offences of all drug-related offences rose from 39.3% in 1992 from 39.3% to 60.3% by 2016.¹⁵⁸

In Spain, the situation has been complex. Possession of cannabis for personal use is punishable only with administrative sanctions.¹⁵⁹ However, while early experiments in CSC models relied on an opinion, issued by the then-anti-drugs prosecutor, that these activities would not constitute a crime, subsequent prosecutors, and prosecutors in other jurisdictions, have opted to pursue criminal trafficking charges against CSCs, and have appealed decisions when lower courts ruled in favour of club members.¹⁶⁰ Insofar as formal prosecutorial guidelines have been issued, these have tended to urge stronger interpretations of the law, and to encourage prosecutors to bring charges in cannabis-related cases. In August 2013, for example, the Attorney General issued Instruction 2/2013 'on certain matters related to associations that promote the use of cannabis'. Among other matters, this indicates that both growing cannabis and possessing the plant or its by-products are illegal activities unless authorised by the government. Therefore, in those cases where the prosecutor's office does not find grounds for a criminal trial, it

should agree – or, if necessary, demand – that a statement be taken and sent to the relevant institution so that the case can be dealt with in the administrative courts.¹⁶¹ Likewise, Instruction 2/2013 mentions that the activities carried out by CSCs may mean that they can be considered criminal organisations.¹⁶²

In Denmark, while cannabis-related offences are punishable with fines or prison sentences of up to two years, the Chief Public Prosecutor has historically recommended that police deal with minor cases by issuing offenders with a caution.¹⁶³ In June 2004, however, an adjustment to the law specified that cautions should be used only in certain circumstances, while a fine should be the norm for possession for personal use.¹⁶⁴ Prison sentences remain possible, but are rare without aggravating circumstances. In Denmark, increased concerns about the cannabis trade and associated criminal activities have led to a more restrictive attitude towards cannabis possession, and increased prosecutions of previously tolerated activities.

All six of the countries studied in this report make some use of prosecutorial discretion or policy directives in order to shape the implementation of criminal law. This can be an important avenue to change the practical implementation of drug law and the Dutch case shows just how dramatic the impact of such policy guidelines can be, amounting in some cases to virtual legalisation. It may be easier to make these kinds of changes than to make changes to national law, not least because international conventions – including at the EU level – tend to include less stringent stipulations about how laws are implemented. Therefore, advocating for enhanced prosecutorial discretion, clearer prosecutorial guidelines, and programmes to enable diversion away from criminal cases, may all be fruitful strategies for local authorities seeking to increase the flexibility within national drug-control regimes.

However, as the cases of Denmark and Belgium illustrate, this flexibility can be a double-edged sword and prosecutorial decisions can also be reversed without the level of public discussion that would be involved in a change of national law. Furthermore, prosecutorial discretion does not necessarily mean charges will not be pressed, as shown by the German case.

Finally, discretion may be open to abuse or bias – police officers and prosecutors’ interpretations of both mitigating and aggravating circumstances may open the door to discrimination against marginalised groups and create a situation or a perception of ‘different laws for different people’. The Dutch case illustrates that gains made in this domain can be significant, long-lasting, and vital to reducing criminalisation of drug users but they are ultimately a partial solution, and may be vulnerable to changing social and political attitudes.

Exploring the Extent of Municipal and Regional Powers

Globally and across Europe, there is a growing sense of the significance of cities as policy-making spaces. The formal rights and responsibilities of a country’s cities within can vary widely. As discussed in the Introduction, however, there are growing efforts to integrate cities into EU governance, giving them opportunities to have a direct impact on EU-level policy-making, in addition to engaging with EU legislation and regulation via their national governments. Cities play a major role in implementing EU policies, and there is therefore a growing acceptance that they can and should also play a role in shaping it,¹⁶⁵ evidenced for example by the Charter on Multi Level Governance.¹⁶⁶ At the same time, however, there are clear limits on the powers of cities, both in terms of their formal or legal powers, and the resources at their disposal. In all of the countries discussed in this report, criminal law is unambiguously a national power, defined by the national legislature. Nonetheless, a variety of other powers and competencies related to drug use and drug control are devolved to different levels of government. Regions, provinces, and municipalities control various aspects of the implementation of drug law within their jurisdictions. Regions and municipalities often have responsibility for health and addiction-related services, housing, regulation and licensing of businesses and other matters which regularly intersect with questions of cannabis regulation. Municipal governments may also have close relationships with police and law enforcement (or may have their own municipal police forces), and be able to communicate the

priorities and needs of a community to these actors more effectively than the national government can.

As a result of these dynamics, a number of places regions and municipalities have undertaken to explore the limits of their powers in addressing issues relating to cannabis. National responses to these initiatives have varied, with some national governments actively supporting the roles of cities in adapting drug policies to their local contexts, while others have moved decisively to limit the powers of local authorities. Nonetheless, all six countries offered examples of sub-national governments undertaking to re-shape one or more elements of drug control.

Netherlands

The Netherlands has long given municipalities considerable powers to shape the implementation of drug policy locally. For example, as discussed above, since 1996, local communities have had access to a mechanism to decide whether they allow coffeeshops to operate: coffeeshops today require a license from the mayor. The decision to condone coffeeshops is made at a municipal level, by the mayor in consultation with the public prosecutor and the police (the so-called ‘tripartite consultation’) and with approval by the city council. Municipalities also have the option of implementing additional requirements for coffeeshops.¹⁶⁷

Dutch cities have played a major role in *advocating* for changes to national law, as will be discussed below. It is at the same time worth addressing these efforts here, using the lens of municipal powers to see how these cases might represent cities’ attempts to directly make use of existing powers and competencies. In 2013, cities had the opportunity to propose models for local regulation of recreational cannabis. Their proposals varied in level of detail; level of centralised cannabis cultivation (one producer for all local/regional coffeeshops or various producers); characteristics of the proposed cultivation site; safety issues; whether or not to include hashish; legal bodies and role of coffeeshops in cultivation; reference to quality criteria (e.g. maximum THC %) and (type of) quality control; details

with regard to financial administration, taxation and control. At the time, however, all of the local proposals for regulation projects were rejected by the then minister of Safety and Justice. However, in February 2017, the Dutch Parliament voted to approve the 'Wet Gesloten Coffeeshopketen' (Closed Coffeeshop Circuit Act) and the government is now taking tentative steps towards an experiment in municipal-level production of regulated cannabis, which is planned to begin in 2019, involving six to ten municipalities.

While the progress of the experiment does entail changes to national law in order to make local-scale regulation possible, municipalities are poised to contribute the development of the future regulatory framework. The details of experiments will be determined locally, and a variety of different models will be implemented to meet different needs in different municipalities.

The future course of the experiment remains uncertain and it is still possible that the Dutch government will ultimately adopt a single model of cannabis regulation. However, given the approach to coffeeshop regulation, which prioritises the rights of municipalities to determine how and whether coffeeshops operate within their borders, and given the broader Dutch political commitment to 'local customisation,' it seems more likely that any ultimately adopted legislation in

the Netherlands will take the form of a framework law that leaves significant scope for municipalities to adapt it to their local circumstances. In either case municipalities are poised to play an unusually central role in determining the future of drug control in the Netherlands, and close observation in the coming years may yield important lessons about the interactions between national and municipal policy-making, and the possibilities for building bottom-up cannabis policy.

Denmark

Denmark has seen a variety of proposals for municipal cannabis regulation. An alderman and two town councillors in Aarhus municipality, the second largest city and municipality in Denmark, representing three left-wing political parties (Enhedslisten, Alternativet, and Socialistisk Folkeparti) promised, in the run-up to the 2017 election, to push for a three-year trial in Aarhus municipality.¹⁶⁸ Thus far, however, this plan has not come to fruition. In 2012, 2014, and 2016 the City Council of Copenhagen also submitted proposals for cannabis regulation to the government, all of which were rejected.¹⁶⁹ Nonetheless, Copenhagen's Social Democrat Lord Mayor Frank Jensen remains an outspoken advocate of the initiative and has argued that legalisation could undermine the status and financing of criminal gangs and better protect youth.¹⁷⁰

Policy Proposal: The Dutch Experiment*

While certain key points of the experiment are still being negotiated, the proposal as of November 2018 was for a temporary experiment including:

- 6–10 experiment cities, 54 coffeeshops
- Maximum 10 cultivators (only Dutch)
- Only Dutch residents (regardless of nationality) are allowed to buy
- Only cannabis produced in the Netherlands (no imported hash)
- Products will be transported and sold in sealed packages
- All coffeeshops in 'experiment towns' are obliged to participate
- Coffeeshops can only sell regulated cannabis products
- The experiment will stop after four years, and coffeeshops have to revert to their former suppliers

*Based on presentation and information from Dutch delegates at Cannabis in the City: Regulation and Local Authorities in Europe, Interactive Seminar, Brussels, 19 November 2018.

Policy Proposal: The Copenhagen Model*

Main Goals:

- Better control of markets, reduction of revenue to organised crime, reduction of youth (under 18) access

Key Elements:

- All links in production should be legalised
- Public (municipal) production and sale
- Educated staff
- Products and prices similar to those on the black market

Outline of proposal:

- Three-year trial period
- Sales Outlets: five or six municipal sales outlets; balance between risk of making access too easy and need to compete with the established black market; one location should be 24-hour.
- Sales environment: neutral, not encouraging cannabis use, information about harmful effects and treatment opportunities, no alcohol sale
- Production: produced in Denmark, sold by municipal authority; match expectations of regular users
- Buyers: at least 18 years of age; resident in Denmark
- Identification: identification by social security card, but no registration
- Maximum purchase: 5 g per day, possible special conditions
- Profits to be reinvested in prevention and treatment

*Based on presentation and information from Danish delegates at Cannabis in the City: Regulation and Local Authorities in Europe, Interactive Seminar, Brussels, 19 November 2018 and on Nygaard-Christensen, M. & Frank, V.A. (2019).

The most detailed municipal proposal, made by Copenhagen in 2014, suggested that cannabis should be produced in Denmark and sold by municipal authorities. Buyers should be at least 18 years of age and reside in Denmark, in order to prevent cannabis tourism. When purchasing cannabis, they should identify themselves using their social security card, but should not be registered, in order to avoid scaring off users from the legal market. Buyers should generally be allowed to purchase a maximum of 5 g per day. The municipality proposed to use profits from cannabis sales to support additional prevention and treatment programmes, including an expanded early intervention and treatment approach, encompassing youth education institutions. Finally, the proposal recommended the formation of a steering group with responsibility for defining and adjusting the trial framework, and emphasised the importance of ongoing evaluation of the trial.¹⁷¹ The reasons for rejecting these

proposals have ranged from concerns about public health to concerns about criminal gangs. Nonetheless, the continuing and thus far ineffective struggle to control the public sale of cannabis in Christiania, combined with a potential shift in public attitudes to cannabis following the trial legalisation of medical cannabis for certain patients since 2018, mean that these proposals may be on the table again in the future.

Germany

In Germany, *Laender* or regional governments helped to shape drug policy, for example by establishing thresholds for 'minor possession' of cannabis, below which prosecution is not advised (see Prosecutorial Discretion above). Moreover, cities are playing an increasing role in cannabis policy, even while the federal government remains opposed to regulation or statutory decriminalisation. Significant

responsibilities for the implementation of drug policy, including providing treatment and health services, lie with municipalities, and in several cities politicians across the spectrum have applied for cannabis pilot projects, citing concerns about public health and especially nuisance complaints related to uncontrolled street dealing. The German Federal Narcotics Act¹⁷² allows pilot projects to test the effects of certain changes in regulation, but these must be carried out in accordance with strict rules and approved by national regulators.¹⁷³

In 2015 the Berlin borough of Friedrichshain-Kreuzberg became the first major municipal actor to formally propose a pilot. While this proposal was rejected by the Federal Institute for Drugs and Medical Devices (BfArM)¹⁷⁴, it was followed by decisions in local parliaments in Hamburg, Cologne, and Frankfurt/Main, as well as cities like Bremen, Düsseldorf, Münster, and finally Berlin itself, to seek permission for projects of this kind.¹⁷⁵ There are indications of significant interest in other municipalities as well, but the federal government's stance has thus far been decisively negative. Interest is not unanimous at the local level either -- borough or district councils in Cologne, Frankfurt and Hamburg need, unlike the borough of Berlin Friedrichshain-Kreuzberg, support of their city councils in order to propose a pilot project. The relevant councils have so far refused to give this approval.¹⁷⁶

The district of Cologne-City Centre (Köln-Innenstadt) started a new approach in March 2018, which had not yet been decided upon at time of writing.¹⁷⁷ In 2017, Bremen launched a new initiative in the federal council to clarify the situation for pilot projects, but failed to achieve a majority. The city of Düsseldorf is still seeking a partner for scientific evaluation for its own proposal.¹⁷⁸ Currently the health senate of the state of Berlin (Senatsverwaltung für Gesundheit, Pflege und Gleichstellung) has set a budget to elaborate a new application to the BfArM to carry out a pilot project, with scientific partners, in order to provide cannabis for recreational use ('Erarbeitung eines Antrages an das BfArM zur Durchführung eines wissenschaftlich begleiteten Modellprojektes zur Angabe von Cannabis').¹⁷⁹ While German regulators have so far responded negatively to applications, citing factors such as the lack

of scientific merit for experiments and the lack of public interest in projects,¹⁸⁰ increasing public pressure, combined with the existence of a legal provision that would permit certain types of experimentation, suggests that future municipal initiatives may well succeed. Municipalities in this case are driven by their responsibilities to their citizens to ensure a safe and liveable environment, but the possibility of change is determined by the national law's provision regarding pilot projects, which in this case places clear limits on the powers of municipalities, requiring approval by national regulators and imposing strict limits on what is possible under the rubric of 'experimentation'.

Spain

Spain's constitutional structure, which affords fairly high degrees of autonomy to certain regions, has created unusual scope for experimentation on sub-national cannabis regulation, giving rise to an approach which researchers Sánchez and Collins have characterised as 'better to ask forgiveness than permission'.¹⁸¹ The researchers explain 'public officials and advocates feel emboldened to pursue a legally risky policy that may later be blocked by the Madrid government or the courts, rather than ask permission and be rejected up front'.¹⁸² Since 2014, various regional laws and municipal by-laws have been passed regarding CSCs at both the autonomous community level and the local government level. However, many of these laws have indeed been subsequently blocked by the national government, so that the dispute between municipal/regional and national powers in relation to drug control continues to play out in an unusually public way. The following are some of the most important laws approved by autonomous communities in recent years: the Foral Law 24/2014, which regulates cannabis user groups in Navarre; Law 1/2016, on integrated services for addictions and drug dependence in the Basque Autonomous Community (Comunidad Autónoma de Euskadi - CAE); and Law 13/2017 on cannabis user associations in the Catalan Autonomous Community (Comunidad Autónoma de Cataluña - CAC).¹⁸³ All three communities opted to regulate CSCs because of their powers in the areas of health and social services, as well as in order to take into consideration the rights of drug users,

the protection of public health, risk and harm reduction, the existence of legally registered, non-profit associations whose members are adult cannabis users, and the need for cannabis users to participate in measures to prevent and reduce risk and harm.

The fundamental differences between the proposals are related to the type of legislation. The aim of the legislation in the Basque Autonomous Community is to regulate the measures and actions to be taken as part of an integrated response to addictions – including behavioural addictions – in the areas of health promotion, prevention, supply reduction, support, social inclusion, training and research, and institutional organisation. The law is therefore not specifically focused on CSCs but it does allow for them to be regulated.

In contrast, the Navarre law (Foral Law 24/2014), and Law 13/2017, on CSCs in Catalonia, are specific pieces of legislation that focus on them. Law 13/2017 is much broader and more comprehensive than the legislation in Navarre. None of these three laws go as far as full regulation of cannabis retail points, which would allow adults to access cannabis for personal use without resorting to the black market.

These laws have also faced resistance from other levels of government. The Prime Minister has lodged appeals with the Constitutional Court against the legislation passed by Navarre, the Basque Country and Catalonia. In mid-December 2017, having considered the appeals, the Constitutional Court declared the Navarre law unconstitutional, and rendered it null and void for encroaching upon the exclusive power of Spain's national government to legislate on criminal matters, due to its impact on criminal offences defined in national legislation.¹⁸⁴ In the case of the Basque law (Law 1/2016), the Constitutional Court declared in a ruling in March 2018 that the Basque Autonomous Community **does** have the authority to regulate cannabis associations by issuing regulations, as reflected in the above-mentioned article of the law, provided that these regulations confine themselves to assisting the government with prevention and harm-reduction work and do not go beyond the criteria set out in the Supreme Court ruling of December 2017.

Just as legislation regarding CSCs has been approved by autonomous communities, municipal by-laws have also been introduced in Donostia, Girona and other cities, with the aim of regulating such associations at the city level. These by-laws not only seek to ensure that CSCs are properly registered in the public records, but also that their venues meet minimum conditions required to avoid disturbing the neighbourhood and with regard to the safety and health of the people who use them.

From November 2014 to March 2019, the municipality of Donostia / San Sebastián (Euskadi) had a municipal by-law – the first in Spain – regulating where CSCs could be located and the conditions they had to meet in order to carry out their activities. This pioneering by-law offered CSCs a degree of institutional recognition and legitimacy, and required them to abide by legal requirements, and to assist the local government with its prevention and harm-reduction work. However, after a series of appeals to different courts, on 5 March 2019 the Supreme Court definitively ruled the municipal ordinance null and void, on the basis that it could lead citizens to think that there is no illegality associated with the activities thus regulated.¹⁸⁵

Another pioneering proposal at the municipal level from Rasquera, in the province of Tarragona (Catalonia), with a population of fewer than a thousand inhabitants, was likewise annulled by a higher administrative court in spite of local support.¹⁸⁶ In the Municipal Action Plan to Address the Crisis, the town's mayor proposed to cede some municipal land to the Asociación Barcelonesa Cannábica de Autoconsumo (ABCDa), a CSC with about 5,000 members, for it to plant cannabis for its members' own use, both therapeutic and recreational. However, following a lawsuit by the Spanish government, the court found that the public interest justification in the Rasquera council's proposal was not valid, among other reasons because the council may not carry out an activity that could imply physical contact with substances legally classified as narcotics.¹⁸⁷ (More details on these cases can be found in the Country Report for Spain.)

Spanish municipalities and autonomous regions are actively pushing the boundaries of their powers, and seeking innovative

local answers to problems associated with the current legal situation of cannabis in the country. They see a major role for sub-national governments in tackling problems related to health and social harms from black markets, and are not afraid to take risks by implementing initiatives that may be challenged by other levels of government. The national government response, however, has been largely negative, and it seems likely that the process of negotiating the limits of municipal and regional powers will continue.

Switzerland

Swiss national drug law, like that of Germany, allows for experiments with cannabis to take place under certain conditions. The first discussions of conducting municipal experiments arose after parliament's refusal to revise the narcotics law in 2004. However, these were placed on hold while a proposal for more comprehensive national cannabis reform appeared to be in the cards. After the rejection of the 2008 ballot initiative, municipal and cantonal initiatives emerged again.¹⁸⁸ The city of Zürich was one of the first to re-open the debate with an early proposal in 2011 for a local experiment in cannabis regulation.

In 2014, a group of representatives from almost all political parties from the French-speaking canton of Geneva also developed a proposal for a trial with CSCs as they existed in Spain and Belgium. The main goal was to reduce street drug trafficking and associated public nuisance.¹⁸⁹ A growing group of cities and cantons met subsequently and started to work on proposals for different models of cannabis production and distribution, including in therapeutic settings.¹⁹⁰ Legal advice suggested that the only way to develop cannabis regulation at the local level was to conduct scientific trials under article 8 of the narcotics law, which had been used 20 years earlier for introducing medical heroin prescriptions. Proposals of this type must be approved by the Swiss Federal Office of Public Health (SFOPH) prior to implementation. Two cities (Berne and Zürich) and two cantons (Basel and Geneva) were to be the first four attempting to implement the trials. As a first step, four types of target population were identified: 1) adult users 2) underage problematic cannabis users 3) adult problematic cannabis users 4) medical

cannabis users who self-medicate. The city of Berne was to implement a project mainly for the first group and the canton of Basel only for the fourth, while the city of Zürich and the canton of Geneva initially planned to implement projects for all four groups.¹⁹¹

During the summer of 2017, the city of Berne submitted a first proposal to the SFOPH for a special authorisation to conduct a scientific experiment under the narcotics law (See 'Policy Proposal Berne: Safer Cannabis Research in Pharmacies Trial,' page 25). Cannabis was to be sold through pharmacies to about 1000 adult residents of the city who were already cannabis users and would agree to participate in a prevention and harm-reduction intervention via a phone application. The study design allowed for a control group, which, during the course of the intervention, was to join the intervention group. The proposal had been successfully submitted to an ethics committee and the funding was already secured from the national research fund.¹⁹²

Despite the fact that the project was designed to fulfil most of the criteria for a public health experiment, the request for a special authorisation was rejected by the SFOPH on the grounds that recreational cannabis use could not fall under the medical experimentations foreseen by the narcotics law and pharmacies may not provide cannabis without a medical prescription.¹⁹³ The SFOPH mentioned, however, that the proposed trial would be very useful and that a small change in the narcotics law could allow it. There is now reason for cautious optimism that such a change will go ahead. For details of the process please see the 'Parliamentary (and other legislative) initiatives' section of this report below and the Country Report on Switzerland.

Meanwhile, the canton of Geneva may submit its own proposal to the SFOPH for an authorisation under the current law. Its project is less well known as the authorities have decided not to publicise it widely. The project would set up a specific multi-point cannabis-distribution system rather than using pharmacies. Cannabis users (non-problematic users and those requiring treatment) could apply to become members of that system and obtain cannabis while also receiving harm-reduction and prevention guidance. The Department of Addiction of

Policy Proposal: Basel-City *

Research Objectives:

- Primary research objective: explore whether supply through pharmacies changes behaviour of self-medicating cannabis users (using cannabis for sleep, anxiety etc.).
- Secondary research objectives: explore demand for legal cannabis; changes in consumer behaviour; physical and psychological effects; changes in consumption of other substances

Participants:

- 18 +, regular cannabis consumption (once per week last six months shown through urine tests), cannabis consumption for self-medication, resident of Basel-Stadt.
- Exclusion criteria: pregnancy; certain psychiatric disorders; people using medically on prescription

Study Design:

- controlled supply for up to 220 participants over two years (50% access from the beginning, 50% only in second year).
- Randomised controlled study, four questionnaires throughout study period.

Status: Approved by Ethics Committee, pending approval from SFOPH at time of seminar.

*Based on presentation and information from Swiss delegates at Cannabis in the City: Regulation and Local Authorities in Europe, Interactive Seminar, Brussels, 19 November 2018.

the University Hospital would be a key player in its implementation.¹⁹⁴ The trial would try to circumvent the reasons for rejecting the project of the city of Berne. There should, for instance, be no mention of recreational use and the distribution of cannabis would occur outside pharmacies. The Basel-Stadt project, which has not yet been submitted, would only target medical cannabis users who self-medicate and be conducted by the department of psychiatry, with cannabis distributed through pharmacies. The city of Zürich, and some other jurisdictions, have expressed interest in joining the project of the city of Berne.

While the SFOPH's interpretation of current law places strict limitations on what can be undertaken as an experiment with cannabis use, a number of cities are nonetheless determined to develop experiments. If successful, the minor modification proposed to the national drug law, for which there appears to be cautious support, could increase the scope of possible experimentation to include a wide range of possible initiatives

and give more breadth for cities and cantons to develop and implement creative solutions for cannabis regulation within their jurisdictions.

Belgium

Belgian regions and municipalities have the power to apply tougher or more lenient accents on the national drug policy. This can result in major differences between sentencing in different jurisdictions, but no city has so far undertaken or proposed a wholesale attempt at regulating cannabis sale or distribution in their region.

In April 2017, however, the city council of the city of Mons discussed the possibility of creating its own CSC. The then mayor of the city – Elio di Rupo, former prime minister of Belgium – supported the idea. A working group was set up in order to prepare the protocol for a scientific experiment which would encompass an experimental group of experienced cannabis users who would have

access to cannabis produced by the CSC, and a control group of cannabis users who would only have access to cannabis through the traditional illegal channels. The idea is to study the feasibility of a social club as a legal model to supply cannabis and its effects on patterns of consumption, cannabis users' health, and public nuisance etc. After the municipal elections in October 2018, Elio di Rupo stepped down as mayor, and a new coalition of Greens (Ecolo) and socialists (Parti Socialiste) was formed. The new mayor, Nicolas Martin (Parti Socialiste) has not yet made any public statements about his predecessor's plan to create a CSC in Mons. It seems the idea of a 'local' experiment has been put on hold. Further, it is important to remember that federal elections will be held in May 2019, making predictions about the future of such experiments challenging.¹⁹⁵

Regulatory Matters and Definitions of Substances

Finally, it is worth noting that a number of regulatory bodies are involved in determining the implementation of national drug laws. Public health regulators, for instance, are the primary arbiters of the suitability or legality of experiments with recreational cannabis in most countries. As such, local authorities working towards regulation may consider focusing on these agencies for advocacy and knowledge-building, developing better mutual understanding of respective policy goals.

Another area where regulators can influence cannabis law is in developing definitions of substances covered by drug laws. In some countries, a definition of cannabis is included unambiguously in the drug law itself, as in the Dutch Opium Law which defines cannabis, for the purposes of the law, as the dried heads and buds of the hemp plant (thereby excluding agricultural uses of hemp, for example as wind blocks in fields, from prosecution). In other jurisdictions, however, the decision of how to differentiate between cannabis and other forms of hemp cultivation allowed under international law, such as production for fibre or seeds, has evolved.

An interesting example of the possible impacts of this type of decision can be found in Switzerland: In 2011, while updating its

legal framework, Switzerland increased the level of THC to separate industrial hemp from illegal cannabis in a by-law. The new level of 1% THC was intended to reduce the number of false positive cases of industrial hemp that had naturally occurring THC level above the previous limit of 0.2%.¹⁹⁶ Nobody at that time thought that cannabis with a level of THC of less than 1% would be of any interest to users, as the average level found in cannabis seizures was above 10%. However, the burgeoning US cannabis market introduced low THC and high CBD varieties which, particularly in the medical and medicinal cannabis sector, found a new customer base.¹⁹⁷ In spring 2016, two young cannabis entrepreneurs and their lawyer wrote to the SFOPH asking if their product – cannabis flowers with less than 1% of THC and high levels of CBD – could be registered and sold as a tobacco substitute with the same warnings and taxes as cigarettes. This regulatory body responded positively and, in early summer, the product was put on the market and branded as 'legal cannabis'. It rapidly sold out and triggered the development of a new industry with more than 500 requests for registration at the SFOPH for selling cannabis with low THC as a tobacco substitute. The new market also led to the creation of more health-oriented/ medicinal shops, selling CBD oils, lotions and other products. Two of the largest supermarket chains in Switzerland (Denner and Coop), as well as one of the largest chains of tobacco and newspaper shops, started selling the CBD products to smoke as 'legal cannabis'.¹⁹⁸

The CBD market has shown the diversity of possible cannabis consumers, but the future of oils, tinctures, pills etc., generally favoured by older users, remains unclear. These cannot currently be advertised as therapeutic products in Switzerland (the main use for which they are purchased) as this would put them under the law on therapeutic products and make them illegal without proof of efficacy. Even if they are sold as alimentary or cosmetic products, they might not be fully legal because of the way they are produced. A regulatory crackdown on non-smokable products is therefore a real possibility, though this might differ from canton to canton – once again illustrating the importance of local autonomy and powers in translating law into policies and practices on the ground.¹⁹⁹ In other jurisdictions,

Medicinal Cannabis

While regulation of medicinal cannabis may help in shaping public opinion about the therapeutic and recreational uses of the plant, the ways that regulators have approached these different frameworks for use have, so far, been very distinct. Medical and scientific uses of cannabis are unambiguously permitted by the international drug-control regime, so the perceived challenge of international treaties does not apply to regulating cannabis for medical use. At the same time, medical use can be quite separate in public opinion from so-called recreational use; it is perfectly possible for a country to endorse a strictly controlled supply of cannabis for medicinal purposes while embracing a repressive and prohibitionist policy in relation to recreational or non-sanctioned therapeutic use (as is, for example, the case for opiates and amphetamines in many countries).

Nonetheless, there has been rapid legal change in this area in recent years and there are four ways in which regulation of medicinal cannabis may hold the seeds of further change: changing public discourse and perceptions; providing models for safe distribution; developing non-criminal supply chains; and improved possibilities for research into possible harms and benefits of cannabis use.

People who use cannabis do so for a variety of reasons. In addition to recreational use, many people use it therapeutically (also for uses outside those recognised by the medical community). Regulation of legal cannabis can help to change the national discourse on cannabis, and to present a different public image of a cannabis user. In this way it can help to break down stigma and negative assumptions about people who use cannabis.

At the same time, regulating cannabis can help to provide models of safe distribution: in many jurisdictions, the regulation of medical cannabis allows people to grow it for their own consumption and, in some places, if people are too ill to grow their own supply, a designated individual close to them can do this on their behalf. The development of a system of prescriptions and pharmacies also helps to lay the groundwork for another, more top-down model of distribution. Although distribution models for medicinal cannabis cannot be translated directly into frameworks for recreational markets, legislating for cannabis used for medicinal purposes requires governments to think through some of the potential challenges related to safe production, quality testing, secure distribution, avoiding diversion into criminal markets, etc.

The regulation of medicinal cannabis may also help to develop a legal supply chain, meaning a network of qualified and quality-controlled growers, able to produce cannabis to a high standard and meet exacting logistical requirements (e.g. seed-to-shelf tracking). Whether these producers are international or within the country, the existence of such a network removes some of the obstacles to regulation of recreational cannabis.

Finally, a prohibitionist legal environment creates added barriers to a wide range of medical and non-medical research efforts, even where these are technically allowed by law. Widespread medical use may allow for the development of a broader base of scientific and medical knowledge regarding both possible applications of cannabis and possible risks, side-effects, or contra-indications, all of which could provide valuable information for the development of evidence-based and public-health-oriented regulation of recreational cannabis markets.

including the Netherlands, CBD is not classified as a psychoactive substance and is generally not considered to be regulated by the drug laws. Therefore, CBD oils and tinctures are widely available for purchase, in health stores and online, but must contain negligible levels of THC.

Political Levers: Pathways to national-level change or increased policy space

As illustrated above, government actors at the municipal and regional level have several tools available to modulate drug policy without changing criminal law. From making full use of prosecutorial discretion to undertaking limited-scale experiments, countries can experiment with regulatory models that may help to lay the ground for regulation of recreational cannabis markets, and that may mitigate the harms of prohibitionist policies in the meantime. However, this regulatory flexibility has significant limitations. As highlighted above, most of the solutions mentioned are vulnerable to changing public opinion and other factors. Therefore, government advocates for non-prohibitionist cannabis policies are also undertaking to directly influence national legislation.

Proponents argue that well-controlled, regulated markets for cannabis would produce a safer supply; separate cannabis markets from the markets for other, potentially more harmful recreational drugs; remove income from the criminal gangs who currently supply much recreational cannabis; make it easier to prevent young people from accessing cannabis; provide more and clearer roads for problematic users to seek treatment; remove the unnecessary punishment of users; increase consistency with alcohol and tobacco policies, and reduce stigmatisation of cannabis users, among other benefits. Reform-minded political actors working within the system of the existing government, through recognised formal challenges to bring about reform work in three main ways: (1) direct advocacy by municipalities and other local authorities; (2) promoting or initiating ballot initiatives and referenda; (3) parliamentary (and other legislative) interventions.

Advocacy by Municipalities and Other Local Authorities

In many European countries, cities and other local authorities have important policy-making functions.²⁰⁰ These jurisdictions often bear the costs of existing drug policies, both financially and operationally. As part of wider efforts to change cannabis policies, municipal governments and other sub-national policy-makers can advocate directly to national governments for legislative reform, proposing models of legal regulation for cannabis use, distribution, and production, and calling for changes to national law that would enhance their ability to adapt policies to their local contexts. This tactic has been used particularly in the Netherlands and Switzerland, where municipalities have been important and outspoken political voices calling for cannabis reform.

In 2013, several proposals for pilot projects to regulate the 'back door' of Dutch coffeeshops, were put forward in response to a letter from the Minister of Justice in which he offered municipalities the opportunity to present plans for cannabis cultivation.²⁰¹ Municipalities around the country including Smallerland, Rotterdam, Utrecht, Leiden, Eindhoven and Groningen, as well as mayors of eight communities in the southern province of Limburg, put forward diverse proposals. The municipality of Utrecht, for example, recommended the establishment of non-commercial social clubs as a model for production and distribution among recreational users, while others proposed the development of regulated cultivation sites to supply existing coffeeshops.²⁰² (See 'Policy Proposal: Summary of Proposals for Local Regulation of the 'back door' in the Netherlands' page 20.)

While these proposals were not accepted by the national government at the time, they were not just independent initiatives but formed part of a broader political strategy which, in 2013, also took the form of a coordinated call for a system of regulated cannabis supply in the Netherlands. The 'Manifest Joint Regulation' was initially signed by 23 mayors. The government's immediate response was negative, with the then Minister of Safety and Justice refusing to approve any proposals and indeed arguing for stronger measures against crime and

nuisance.²⁰³ However, municipal advocacy continued to gain strength – as of 2019, 61 municipalities around the country have signed the Manifest Joint Regulation.²⁰⁴ This was further accompanied by a call by the Union of Dutch Municipalities (VNG) in 2017 for the national government to create the necessary structure and exceptions to facilitate local experiments in regulated cannabis cultivation.²⁰⁵

Advocacy by municipalities can be identified as a critical factor leading to the 2015 proposal of the bill on closed coffeeshops' supply chain (Wet gesloten coffeeshopketen), which has opened the door for the kind of local-level experimentation they seek. While the exact form of the 'experiment' remains unclear, discussions are on-going and, in the course of 2019, the experiment will be further prepared in consultation with local authorities, including the VNG.²⁰⁶ Clearly, the organised and outspoken advocacy of municipalities and mayors was critical in advancing this vision of reform and pushing the government to take steps towards change.

While several Germany cities have made applications for Cannabis Pilot Projects, mentioned above, large-scale, coordinated, public advocacy towards the national government has not yet played a major political role. The generally oppositional stance of the German national government appears so far to have limited this kind of action.²⁰⁷ At the same time, cities in favour of regulation are beginning to meet and coordinate their actions more – for example, a full-day conference 'Fachtagung Cannabis – Gesundheitspolitischer Spielraum von Kommunen' (Symposium Cannabis: Health policy leeway for municipalities) was organised in Düsseldorf in 2016 to help build knowledge within, and networks between, reform-oriented municipalities.²⁰⁸ Such inter-municipal cooperation and collaboration may continue to grow and contribute to advancing policy.

In Switzerland, as mentioned above, none of the various proposals has been accepted by the SFOPH due to an article in the narcotics law which stipulates that trials may be carried out only for medical purposes. A group of Swiss local authorities has responded to this obstacle by cooperating to advocate for the addition of a new article allowing non-medical trials,

with apparent support from elements within the parliament and executive branch of the government. A group of parliamentarians proposed the necessary adjustment, and the national government has already undertaken stakeholder consultations on a possible formulation of guidelines for experiments.²⁰⁹ Efforts to add a new article to the national law appear highly strategic in the context of Switzerland given the history of the country's world-renowned heroin-assisted treatment programme, which was made possible after the programme was proven successful during a number of public health trials in the 1990s and 2000s.²¹⁰ Cities and cantons in Switzerland have demonstrated their legitimacy in the sphere of drug control in the past, and are pushing for legal changes which would open more space for them to develop innovative cannabis policy solutions at the local level.

In Denmark, proposals for the local regulation of recreational cannabis in Copenhagen have been denied by the national government. While there is no coordinated campaign of municipalities, political figures at the municipal level, including especially the Lord Mayor of Copenhagen, Frank Jensen and councillors and aldermen in Aarhus, have spoken out publicly about the need for regulation.

In the other countries addressed in this report, including Belgium and Spain, large-scale coordinated advocacy towards national governments has not taken place, has occurred at a smaller scale, or has failed to gain significant traction in the national political discussion. Nonetheless, relatively well-publicised efforts by municipalities to introduce local cannabis regulation, as discussed above, can be expected to have an impact both on public opinion and on policy-makers at the national level, by drawing the attention of both national legislators and the general public to the limitations of the current prohibitionist regime.

Ballot Initiatives and Referenda

In some countries, direct democratic mechanisms like referenda are a potential path for legal or policy change. In Belgium and Germany, such initiatives are possible, but only at the municipal and provincial level, where their results are not recognised as

Expert Opinions and Advisory Bodies

Expert and advisory bodies, from parliamentary committees, to scientific advisory boards, academics and medical associations, may provide input into law- and policy-making processes – and have done in several of the countries covered in this report, including:

Netherlands:

- The Baan Commission (1970) and the Hulsman Commission (1971) were mandated to study the cannabis plant and its related policies. Their findings ultimately contributed to the decriminalisation of cannabis, paving the way for the later implementation of coffeeshop licensing policies.²¹¹
- Leading up to the approval of the experiment in a controlled cannabis supply chain, three municipalities commissioned a study by legal experts who concluded that international human rights conventions to which the Netherlands is a signatory may allow or even oblige the country to legally regulate cannabis production and trade, on the grounds of rights relating to health and safety.²¹² External experts have continued to play a key role in the design of the experiment.
- In March 2018, an independent committee consisting of various scientific experts was tasked by the Ministry of Justice and Security and the Ministry of Healthcare to advise on the design of the experiment. Based on their study, the committee asserted that the experiment is ‘useful and feasible’, and made various recommendations, many of which were adopted by the government.²¹³

Spain

- The Cannabis Policy Study Group (Grupo de Estudio de Políticas sobre el Cannabis – GEPCA), consisting of a dozen academics and experts from different disciplines, formulated a comprehensive proposal for cannabis regulation based on the CSC model in Spain, meticulously outlining various practical aspects such as the maximum number of association or club members, potency, product labelling, risk and harm-reduction models, and many more.²¹⁴

Belgium

- In Belgium there appears to be growing attention to evidence-based drug policy, as shown by the Federal Research Programme on Drugs, created to evaluate and provide guidance for drug policies based on scientific research.
- In the context of cannabis regulation, various academics have worked together for years to formulate detailed reviews and expert advice on the subject, for example through the publication of scientific literature titled ‘The Third Way’ in 2013 and 2014.
- The Metaforum Group on Cannabis Policy was formed in 2018, involving 15 members active in the fields of criminology, economics, psychology, politics, psychiatry, and psychology. In March 2018, the Group concluded a comprehensive report highlighting the socio-economic failures of Belgian drug policies in the past decades.²¹⁵

Switzerland

- The national advisory board on drugs and its successor, the national advisory board on addiction issues, have published three reports specifically on cannabis policy in 1999, 2008 and 2019, all recommending a change from a repressive policy to a regulated market. The most recent report, published in April 2019, recommends again the legalisation and regulation of cannabis based on a set of ten principles.²¹⁶

legally binding but play an advisory role and can act as an important barometer of public opinion. Even where they are legally binding, ballot initiatives have inherent limitations, as they most commonly must take the form of a single question. Nonetheless they can help stimulate public debate on cannabis regulation. In the Netherlands there had been a mechanism to challenge an existing law by referendum, but this applied only to new laws and was in any case revoked in 2018.²¹⁷

In Switzerland, referenda and citizens' initiatives can play a major role in politics. A change in the country's constitution can be requested by at least 100,000 citizens who sign a petition within a period of 18 months. If the signatures are validated, and if the text complies with existing legal norms, citizens will be called to vote on the proposal in question. Parliament can come up with a counter-proposal. If the initiative obtains the support of both a majority of voters at the national level and a majority of cantons, parliament or government have to implement the proposal. On the other hand, a national vote or referendum can also be launched if at least 50,000 citizens sign a petition *against* a law adopted by parliament within 100 days after its publication. In this case, the law may enter into force only if the majority of Swiss voters approve it in the referendum.

Referenda have been significant in the history of Swiss drug regulation, and may be so again in the future. After a decade of heated debates surrounding drug use, related crises and policies in Switzerland in the 1990s, a majority of the electorate expressed support for the continuation of harm-reduction programmes through a referendum conducted in 2008, though a concurrent proposal to legalise cannabis was rejected. A referendum on cannabis seems to be on the table once again. After something of a false start in 2018, the advocacy group LegalizeIt! and other players set up new a committee in early 2019, this time including the youth sections of most political parties, some NGOs, and CBD cannabis producers. Their objective is to start collecting the required signatures in late spring or early summer 2019. The initiative wants to create a new constitutional article (105a) which legalises the use and the growing for personal use of cannabis. It also requires the federal government to develop rules for the production and commercial trade of

cannabis products.²¹⁸ More details are available in the Country Report on Switzerland.

Parliamentary (and Other Legislative) Initiatives

In most jurisdictions, legislative changes introduced by MPs and government ministers are a major pathway for legal change. This section draws on examples from the Netherlands, Germany, and Switzerland of legal reforms initiated by MPs. (In the interests of brevity, we do not address less successful attempts in Denmark, Belgium, and Spain.)²¹⁹ It is beyond the scope of this report to address the campaign and lobbying efforts behind either the election of reform-minded politicians or the decision to advance or support a particular bill. We will, however, briefly touch upon a few recent cases where legislative proposals advanced cannabis reform at the national level, creating greater flexibility at the local level. Further details are available in the respective country reports.

As mentioned above, national cannabis policy reform in the Netherlands was advanced by the 2015 legislative bill proposed by D66 MP Vera Bergkamp, following a great range of earlier municipal efforts. Following a majority vote in the lower house in favour of the bill to generally regulate the supply of cannabis to coffeeshops,²²⁰ the governing parties in the Dutch coalition determined that an experimental pilot 'closed cannabis supply chain' should be implemented in six to ten Dutch municipalities for a period of four years. Meanwhile, relevant laws still need to be amended in order to create legal scope for the experiment. In support of this process, another legislative bill was submitted to the House of Representatives in July 2018, meticulously outlining the 'length of the experiment, its purpose, and the number of municipalities in which it will be conducted.' The bill, which needs to be approved and translated into law in order to facilitate the experiment, has not yet been approved by the senate (Eerste Kamer).²²¹ This history illustrates the role that a single MP can play in proposing a significant bill, which might rapidly change the landscape of debate on policy change. At the same time, however, this can occur only in the context of a broader advocacy campaign. While it can be vital to have a politician willing to risk tabling a bill,

this process is generally the culmination, rather than the beginning, of a process of political change.

Parliamentary initiatives for cannabis regulation have also taken place in Germany. In 2018, MPs affiliated with the Free Democratic Party called for the approval of model projects for the controlled sale of cannabis, particularly by requesting support for local authorities (as explained above) to implement such models. Similarly, the Green Party proposed the introduction of a strictly controlled legal market for cannabis, covering regulatory measures for cultivation, retail, import, and export, while specifically highlighting the need for concrete practices to prevent minors from gaining access to cannabis. Furthermore, the Left Party also called for the end of repression and stigmatisation, as well as more investment in health protection rather than law enforcement. Despite optimism at the time, all of these proposals were rejected.²²²

Finally, in Switzerland, a Parliamentary Initiative adopted in 2012 effectively decriminalised cannabis possession, implementing a flat, administrative fine of CHF 100 for adults found using cannabis and in possession of less than 10 g of the substance. In 2017, the Green Party introduced a parliamentary initiative for the legalisation of cannabis and the regulation of its market. It called the federal government to develop a national law for the regulation of cannabis covering the production, the trade, the use of cannabis, as well as youth protection and the taxation of cannabis. The lower house of the parliament rejected the initiative in September 2018 by 104 votes against 86.²²³

Recently, another possibility for legal reform has come to the fore in Switzerland. When municipalities applying to the SFOPH for leave to conduct trials on provision of recreational or therapeutic cannabis use were refused due to the narrow wording of a particular article in the national drug law, parliamentarians rallied in support of a new article allowing such trials. Soon after the relevant decision from the SFOPH, several parliamentarians from different political parties tabled parliamentary motions requesting a modification to the drug law that would allow pilot studies of recreational cannabis regulation at the local level. The first motion was defeated in

the lower house but a second group of five identical motions was later accepted by a small majority in that house. This paved the way for legislative change.²²⁴ Even before the parliamentary motions were accepted, the federal government opened a public consultation on a draft new article and its by-law.²²⁵ This was seen as a move from the executive to invite parliament to act in the cannabis policy field. The government's proposal submitted for public consultation sets out rules for future pilot studies and the results of the consultation were largely positive, with small adjustments proposed. It is therefore likely that a proposal for an updated article and by-law will be presented by the government and debated in parliament in 2019 or 2020. It is by no means certain that the law will be accepted in anything resembling its current form: the current parliament is very divided on the issue, and a new parliament will be elected in October 2019.²²⁶

Non-State Actors

The main focus of this report is on the efforts of government actors at the municipal and regional level. Especially in the case of cannabis regulation, however, which has attracted widespread engagement from citizens and civil society, as well as growing interest and advocacy from corporate actors, it is important to acknowledge the importance of different kinds of civil society initiatives in bringing about potential policy change. We will therefore touch very briefly on three important types of advocacy by civil society and other non-state actors: Advocacy; Bottom-Up Initiatives; and Strategic Litigation or Legal Intervention. More details on the cases mentioned can be found in the respective Country Reports.

Civil Society Advocacy

In several of the countries mentioned, civil society initiatives are making an important contribution to public debate on cannabis regulation. Some of these initiatives have been mentioned above, for example the Legalizeit! campaign for a referendum on cannabis regulation in Switzerland, or the research efforts by GEPCA (Spain) and The Metaforum

Group (Belgium), which have brought together engaged experts for research and advocacy on cannabis issues. However, citizens' networks are also active in the area of cannabis reform in other ways.

One particularly interesting set of civil society actors who have emerged in the field of cannabis reform have been organised groups of cannabis users, advocating for their own rights to use the substance. In particular, non-profit CSCs have played a role, particularly in Spain, where there are at least 500 active CSCs operating across the country.²²⁷ CSCs in Spain have inspired various stakeholders, from municipalities to scholars, to formulate proposals for cannabis regulation based on the CSC model – characterised by the relatively small-scale, non-profit, and non-commercial nature of the proposed collective cannabis supply chain. For instance, in 2012, in the Municipal Action Plan to Address the Crisis, the mayor of Rasquera, a small municipality in Tarragona (Catalonia) proposed to cede some municipal land to a 5000-member cannabis club to produce cannabis for its members' use,²²⁸ although this proposal was ultimately annulled by an administrative request in response to charges from the national government.²²⁹

Similarly, in Belgium, the two oldest CSCs in the country gathered in 2016 to develop a 'Blueprint for the regulation of cannabis in Belgium' (Blauwdruk voor weteelijke regulering van cannabis in België). The blueprint recommends three primary models for the supply of cannabis including home cultivation, CSCs, and medical dispensaries or pharmacies.²³⁰ The proposal included practical proposals for CSCs concerning the set-up of cultivation sites, the transporting of cannabis, quality control requirements by authorities, and similar measures. Despite its comprehensive nature, the proposal has received limited attention from policy-makers. Nevertheless, CSCs and their allies in Belgium continue to play an active role in the media, contributing to the increasingly favourable image of CSCs,²³¹ and, arguably, the recent acquittal of CSC leaders and members in September 2018.²³²

Belgian CSCs have also engaged with other organisations in the broader cannabis movement, including grow shops and seed banks in Belgium and abroad, as well as

cannabis testing labs or providers of testing kits. The Belgian CSCs are aware of and have contacts with CSCs in other countries, and have also enrolled in other national, regional or European lobbying or advocacy organisations, such as the European Coalition for Just and Effective Drug Policies (ENCOD) and the Alliance for the Abolition of Cannabis Prohibition.²³³

In Germany too, there is growing resistance to the prohibition of cannabis. There are several NGOs working on the topic of regulation at different levels. The NGO 'Der Deutsche Hanfverband (DHV)'²³⁴ advocates legal, user-friendly regulation of the cannabis market and campaigns against the discrimination and stigmatisation of cannabis users.²³⁵ Another key NGO, 'akzept e.V.', is the national umbrella body of organisations working in harm reduction and is advocating regulation of all drugs. The organisation is part of a coalition that produces an annual 'Alternative Drug Report' which details these issues and receives widespread media attention.²³⁶

These initiatives offer a powerful example of the potential for more grassroots and democratic policy-making, where people affected by policies are directly consulted and can contribute to shaping policies.

Bottom-up Initiatives from Civil Society

In addition to, though overlapping with, the kind of advocacy efforts mentioned above, some civil society actors and user groups are also engaged in the development of bottom-up initiatives for securing cannabis for personal use without relying on the black market. In a number of countries, clear statements about prosecutorial priorities, or grey areas in national law, have given rise to grassroots initiatives by and for people who use cannabis.

In a number of countries, advocates and cannabis users have interpreted laws or prosecutorial statements that exempt either possession or small-scale cultivation for personal use from prosecution to mean that a group of people can collectively grow cannabis for their own personal use. These groups are generally known as CSCs. In most cases CSCs are non-profit user groups, whose registered

members pool their resources to collectively grow small amounts of cannabis for their personal use (medicinal or recreational), which is distributed only to members.

CSCs originated in Spain. At the beginning of the 1990s, the Ramón Santos Cannabis Studies Association (*Asociación Ramón Santos de Estudios del Cannabis* – ARSEC) was founded in Barcelona, with the aim of putting an end to legal uncertainty about cannabis in the country and trying to find a way to supply its members with cannabis without having to resort to the so-called black market.²³⁷ ARSEC sent a letter to the anti-drugs prosecutor asking for information about whether it was a crime to grow cannabis for personal use by a group of people. Having received a reply indicating that, in principle, it was not a criminal offence, the association decided to grow cannabis plants for about 100 members. After a few months, the Civil Guard confiscated the plants without a court order. Several members of ARSEC were charged with drug trafficking. Although they were found not guilty at the trial held in the Tarragona Provincial Court, the prosecutor appealed this judgement and the Supreme Court sentenced them to four months and a day in prison and payment of a €3,000 fine.²³⁸

Despite the charges, the relatively minor sentence encouraged others to repeat the experiment. In 1997, the Kalamudia Association began growing 600 plants for about 200 members.²³⁹ Based on experiences of this type, and a report prepared by Juan Muñoz and Susana Soto for the Regional Government of Andalucía which mentioned the possibility of obtaining cannabis for therapeutic use without breaking the law, CSCs were launched across Spain during the early 2000s. They were not the ideal solution but seemed to be the arrangement most likely to stay within the law.²⁴⁰

For more than a decade, most of the rulings in court cases against members of CSCs have declined to convict them for the work they do.²⁴¹ However, many see the inclusion in the new Organic Law on the Protection of Public Safety, which replaced the previous law of the same name in 2012, of passages specifically identifying the unauthorised production of cannabis plants as illegal as an effort to crack down on CSCs. Several court cases have also had a similar chilling effect and the future of

CSCs in Spain is uncertain, as the country's higher courts seem to be working to remove the ambiguities which made their existence possible.

Meanwhile, however, the model has also been adopted in Belgium, where the first CSC was established in 2006,²⁴² following the issuing of the 2005 Ministerial Guidelines. Those behind the initiative argued that by imposing a limit of one plant per member, the organisation would respect the threshold established by the Ministerial Guidelines and thus should also be considered a 'low priority' for law enforcement.²⁴³ Subsequent CSCs have followed that reasoning, and thus the principle of 'one plant per member' has become central.

However, many CSCs have been subject to police interventions. In 2014, researchers identified five active CSCs in both Flanders and Wallonia.²⁴⁴ A more recent study by Pardal in 2018 found that only two of the previously identified CSCs were still in operation,²⁴⁵ although the author identified a total of seven active CSCs at the time of the second study.²⁴⁶ In comparison to other settings where the model is active (notably, Uruguay and Spain), the number of Belgian CSCs remains relatively small,²⁴⁷ supported by grassroots efforts within the drug-user movement.²⁴⁸ Some of the CSC activists have in fact also been involved in other local user groups and organisations, and had closely followed the earlier emergence and development of the CSC model in Spain.²⁴⁹ Since the Guidelines, no additional political, policy, or legislative change has taken place to consolidate the legal standing of CSCs. Indeed, a recent press release by the Belgian College of Public Prosecutors seems to refute their interpretation of the 2005 Ministerial Guidelines,²⁵⁰ and members of Trek uw Plant, one of the major CSCs, are currently awaiting trial on trafficking charges.²⁵¹

Denmark offers an additional important case of a grassroots initiative, which diverged dramatically from the letter of the law, and was tolerated for many years, in the famous case of Christiania in Copenhagen. After being occupied by squatters, Christiania operated as a semi-independent zone, and its popular and widely frequented open-air cannabis market, known locally as 'Pusher Street', was generally tolerated by the police. Since 2001, however, the police have adopted a less

tolerant attitude to this institution, and crack-downs have become increasingly frequent, with a major effort to close the market in 2004.²⁵² Although criminal charges are rare, products may be seized and fines issued to dealers. This has not eliminated street dealing in Christiania but has apparently resulted in changes in drug distribution, including increased reliance on home-delivery and other more discreet sales methods.²⁵³

While the situation in Christiania did not result from a legal grey area, inasmuch as cannabis sales were unambiguously illegal in Denmark throughout its history, it nonetheless benefited from a tacit understanding with local police that attempting to stamp out the trade was not a productive use of resources, as long as self-regulation limited the availability of 'harder' drugs, and as long as the 'nuisance' associated with cannabis sales was confined to a specific neighbourhood. This understanding was also echoed by the Chief Public Prosecutor, who recommended issuing cautions instead of pursuing criminal proceedings for possession of small amounts of cannabis.²⁵⁴ However, with growing concerns about the role of criminal organisations²⁵⁵ in the Danish cannabis trade, and an increasingly repressive approach to drug control becoming popular at the national level, the future of this situation is also uncertain.

Finally, it may be informative to examine a single historical example. In Switzerland in 2001, a proposal was on the table that could have introduced a regulated cannabis market – it remained 'on hold' in parliament for three years, during which period several cantons reduced their law-enforcement efforts against the cannabis market. This resulted, by 2002, in the presence of about 400 unregulated cannabis shops throughout the country.²⁵⁶ About 40 of these shops were located in the relatively small city of Biel/Bienne. There, a group of shop owners and social workers set up a first informal regulation model for the cannabis market. It included a ban on sales to minors and non-Swiss residents, as well as on advertisement. Warnings on product labels and sales of maximum CHF 50 per person per day were other elements of the informal rules.²⁵⁷ However, the revision of the law was refused in 2004, and the experiments which had been inspired by the potential change largely came to an end.

Grassroots initiatives may often run ahead of changes to the law – they draw on ambiguities, grey areas, and loopholes, but they may also, as in the Swiss example, react to projected changes. They are very vulnerable to changing legal contexts, including not only the passage of new laws but also shifting attitudes, priorities, or tacit understandings, in prosecutors' offices, national legislative bodies, courts, police forces, and communities. These initiatives can push the boundaries of what is legal and acceptable, can change public perceptions of drug use, and can push for more transparent, comprehensible, and humane national drug policies. They can also help to prefigure wider regulatory projects, offering examples of well-managed cannabis markets that may be taken up at other levels of government. But they can also be canaries in the coal mine, and some of the first organisations to suffer if countries turn towards more restrictive policies. However, their engagements with the justice system also provide a valuable illustration of the potential role of the courts in modifying drug law.

Strategic Litigation and Legal Intervention

Law is not self-interpreting. Rather, courts interpret law and, in so doing, can refine or even, arguably, modify its meaning. In many cases interpretation is straightforward and uncontroversial: a case falls unambiguously within established criteria and the court applies the existing law. When new laws are passed by a country's legislators, however, these must be interpreted by courts, in accordance with the whole existing body of law, as well as the country's constitutional and human rights obligations. This process of interpretation determines which cases are covered by a new law and how key terms must be understood, and the interpretation of the courts may differ from the intention of the original law-makers. At other times, existing law must be interpreted to apply to new situations which may not have been foreseen when legislation was passed, or changing social norms and conventions may affect the interpretation of established law.

Historically, the process of legal interpretation has brought about some important changes in law, sometimes

facilitated or provoked by civil society. A process known as ‘strategic litigation’ or ‘legal intervention’ has been employed, sometimes to great effect, to influence the application of the law (especially in common law countries). This often involves highlighting potential conflicts with human rights obligations or recognised rights (e.g. religious freedom) and was a key tactic in the United States civil rights movement and worldwide disability rights movements.

Strategic litigation relies on organised civil society actors, together with lawyers, actively selecting cases which have the ability to transform law usually either a ‘border-line’ case or one that brings to light an unjust law in unusually egregious circumstances. Strategic litigation is closely linked with civil disobedience: activists may undertake, often publicly and with advance notice, to break a law considered to be unjust in order to bring about a legal challenge and have the opportunity to mount a defence, on the grounds of human or constitutional rights, in a court of law. Some of the actions of European advocates for cannabis reform or regulation can be best understood through this lens.

Courts, of course, are constrained in their interpretation by the existing law and its intent, so the changes that can be brought about in this way are usually incremental. Nonetheless, the history of the development of drug policy in the countries studied illustrates the possible impact of these changes. In the Netherlands, as mentioned above, Dutch authorities began to tolerate so-called house dealers in youth centres in the 1970s. This was formalised in the statutory decriminalisation of cannabis use and possession in the revised Opium Act of 1976. The official National Guidelines for Investigation and Prosecution came in force in 1979. These guidelines, as discussed above, set out formal criteria, which allowed sale of cannabis under certain conditions without threat of prosecution (see country introduction for details), but legislators did not foresee the coffeeshop model. Rather, the current situation, where commercial coffeeshops are tolerated according to these criteria, was brought about through case law, where an interpretation of the guidelines was developed that protected coffeeshops, which eventually replaced house dealers.²⁵⁸

Likewise, in Switzerland, a 2012 revision of the Narcotics Law seems to have led to a far greater degree of decriminalisation than was envisaged by the original legislators. Zobel (2019) says:

The law came into force in October 2013 and early implementation figures showed that cantons had very different ways of implementing the new legislation (Zobel et al. 2017). One reason for this is that the Swiss narcotics law, with its successive and sometimes contradictory revisions, allows for multiple interpretations and options for law-enforcement bodies. An example of this was also a recent decision by the country’s highest court which led many cantons to stop prosecuting cannabis possession (of 10g or less by an adult), despite the fact that this was never the intent of the legislation. [...] Such a situation is likely to trigger ever more court cases with users challenging their punishment.

Whether willingly or unwillingly, social movements and citizens’ groups may also play a role in developing law by provoking legal challenges. This is very often not an intentional strategy but the result of unwelcome criminalisation of behaviour that citizens believe to be (potentially) legal under existing laws, or constitutionally protected. For this reason, we may prefer the term ‘legal intervention’ to ‘strategic litigation’. CSCs, for example, can be understood in this way: people who use cannabis and believe that they have the right to do so may choose to make their consumption public and highlight its non-criminal character partially as a way of exposing the injustice of laws which criminalise their consumption.

In Belgium, as mentioned above, CSCs argue that limiting cultivation to one plant per member should make them a ‘low priority for prosecution’.²⁵⁹ However many CSCs have in fact been subject to police interventions, their crops have been confiscated, and they have faced criminal proceedings. EMCDDA data suggests that illicit cannabis is widely consumed in Belgium with some 10.1% of adults reporting using cannabis in the last year.²⁶⁰ The vast majority of these people access cannabis through the black market, and face a relatively low risk of prosecution due to the prosecution guidelines. CSCs, on the other hand, make visible their active members’ cannabis use, with some clubs

even contacting media outlets.²⁶¹ In their by-laws, the CSCs have explicitly introduced the supply of cannabis as a goal.²⁶² In general, they have undertaken to implement guidelines which they believe keep their activities on the right side of the law, including accepting only members above 18 or 21 years of age, restricting production to one plant per member, and in some cases even requiring a declaration from new members that they have already used cannabis prior to their enrolment.²⁶³ Nonetheless, they are eschewing relatively accessible illicit supplies in favour of a more visible but arguably 'less illegal' system of supply, a strategy which bears a more than passing resemblance to other forms of civil disobedience.

Charges against one CSC came about following two public demonstrations it organised, during which some representatives planted cannabis seeds in pots – the defendants in this case were acquitted.²⁶⁴ More recently, on 7 September 2018, Belgian news sources reported lawyers in a CSC case stating to the press, 'our clients are activists, not criminals' – the five members of the Namur Cannabis Social Club on trial here were indeed acquitted, with the Namur Criminal Court judging them to be guilty of an *erreur invincible* or 'invincible mistake' on the grounds that the law is so unclear that a reasonably prudent person could have made the same mistake.²⁶⁵ On the whole, the outcome of this strategy remains unclear, and the recent statement by the Belgian College of Public Prosecutors refuting CSCs' interpretation of the 2005 Ministerial Guidelines may represent a more repressive turn and a commitment from the government to clarify ambiguities in the law in such a way as to criminalise their behaviour. Nonetheless, in the absence of new legislation it is likely that courts and CSCs will continue to play a role in interpreting the current legal situation of CSCs in Belgium.

In Spain, where the CSC model originated, the clubs are also at the centre of, and have played a role in provoking, discussions about the criminalisation of cannabis production. As mentioned previously, CSCs in Spain have been subject to different opinions about their legal status: the first CSC began operations after receiving an informal opinion from the then prosecutor that its activities would not be considered criminal. Further, an opinion issued by two prestigious professors

of criminal law stated that, provided they complied with a set of requirements, the activities carried out by the CSCs abided by the criminal and administrative laws currently in force.²⁶⁶ For them to be legal, associations' members had to be adult users of cannabis, and they had to support the self-organisation of cannabis use with the following objectives: disconnect the use and consumption of this substance from illegal trafficking and supply by managing the entire cycle of cannabis production and distribution themselves; make it impossible for cannabis to circulate indiscriminately by distributing it among a closed group with a limited number of members; and ensure that cannabis use is controlled and responsible by guaranteeing the quality of the cannabis supplied and preventing abuse of the substance. These objectives are consistent with protecting public health and safety.²⁶⁷

In August 2013, however, the Spanish Attorney General issued Instruction 2/2013 'on certain matters related to associations that promote the use of cannabis'. Among other matters, this indicates that both growing cannabis and possessing the plant or its by-products are illegal activities unless authorised by the government – where criminal charges are not pursued by the prosecutor, administrative charges should be pursued instead. Instruction 2/2013 also mentions that CSCs' activities may mean that they can be considered criminal organisations.²⁶⁸

From the mid-1990s to the first few months of 2015, the majority of rulings in court cases involving CSC members did not consider the work done by these associations to be illegal. Despite this, in three cases where the provincial courts had found members of cannabis associations not guilty, the public prosecutor appealed and the cases reached the Supreme Court,²⁶⁹ which pronounced the CSC members guilty in all three cases, as it took the view that there was a real and evident risk of cannabis use spreading.²⁷⁰ In all three rulings, the Supreme Court found that those on trial were culpably ignorant of having committed an offence, and sentenced them to short prison terms and large fines.²⁷¹

In December 2017 and in 2018 the Constitutional Court ruled on two existing appeals by people accused of crimes in relation to CSCs²⁷² – while the court recognised

certain procedural problems with the trials held in the lower courts, they refused to hear other arguments, strongly suggesting that they consider the activities of the CSCs fall within the crimes defined in Article 368 of the Criminal Code. While lower courts have nonetheless acquitted CSC members after this ruling, arguing that they have not been proved to have engaged in trafficking,²⁷³ the Constitutional Court ruling of December 2017 seems to have dramatically limited the space available for CSCs.

As a result of the Attorney General's Instruction 2/2013 and the Supreme Court rulings mentioned above, the public prosecution service and the police have been noticeably more aggressive in their actions with regard to the cannabis associations.²⁷⁴ This has led some CSCs to change the way they operate in order to reduce their vulnerability. For example, some have reduced the number of people who can be members, or turned to growing cannabis indoors (in commercial greenhouses, etc.)²⁷⁵ rather than outdoors.²⁷⁶

Thus, the legal status of CSCs in Spain appears to be hotly contested, with different courts and different levels responding to them in different ways. The general trend suggests one of the important dangers of legal intervention: the reluctance of a number of courts to convict CSC members of criminal or even administrative charges on the basis of existing Spanish law has led the central government to introduce changes in both legislation and policy. The 2015 Organic Law on Public Safety (LOPSC) introduced new administrative offences related to cannabis production and distribution, as discussed in the Country Report, while the Attorney General's Instruction and the findings of the Supreme and Constitutional Courts reduced the grey areas in which CSCs had been operating and encouraged prosecutions. Juridical interventions often serve to clarify the law and reduce ambiguities, but this does not necessarily happen in a progressive direction and there is a risk of provoking a 'crack down' on activities previously tolerated.

Nonetheless, the cases of Switzerland and the Netherlands show that Legal Intervention can lead to interpretations of law that clarify and solidify the rights of cannabis users. International cases have also shown the

power of legal decision-making. For example, in Canada, a series of challenges in both provincial and national courts argued that the criminalisation of cannabis possession and/or features of the way in which medicinal cannabis was regulated were unconstitutional or violated the rights of defendants. While no single court decision led directly to the legislative decision to regulate recreational cannabis markets in that country, it can be argued that a series of relatively high-profile court cases between 2007 and 2016, which were covered in newspapers with headlines like 'Pot laws ruled unconstitutional',²⁷⁷ played a role in undermining the legitimacy of the prohibition-based regulatory regime. It is important to note, however, that these were accompanied by widespread political action of other kinds. It seems that legal interventions are most likely to bring about broader transformation when, as in the American Civil Rights movement, they are partnered with social mobilisations that build public support for proposed change.

A Possible Framework for Moving Forward: From top-down to bottom-up

Despite their many and creative solutions to cannabis policy problems, local authorities are struggling to implement effective policies. In the countries studied, we saw a growing number of 'defections' by local authorities, whose innovative policies were being blocked in varying degrees by national governments – from Dutch municipalities vigorously and collectively lobbying their national government for an experiment in regulated cannabis, to regions and municipalities in Spain being brought before the constitutional court for implementing local policies that the national government argued overstepped the limits of their constitutional powers, to Swiss cities working to broaden the definition of experimentation to allow for new trials in municipal regulation. While the receptiveness of national governments varies significantly, all the governments studied showed some level of concern about the effect that supporting municipal or regional initiatives in relation to cannabis regulation would have on their international relationships, both at the EU and the UN level. Is there a way out of this bind?

The National Level: Local Customisation

Countries vary in how centralised their policy-making is at the national level, and exploring the different frameworks for policy-making can cast light on a possible new approach to national-level drug policy. The Netherlands, for instance, has embarked on a political project of devolving certain kinds of decision-making to the lowest possible level.²⁷⁸ As discussed above, in 1996 the Dutch government effectively put municipalities in charge of their own cannabis policies, dramatically increasing the rights (and responsibilities) of municipal governments in relation to coffeeshops within their jurisdictions and allowing them to veto coffeeshops altogether, or propose a range of different solutions. Similar decentralisation trends can be seen in other areas of Dutch policy, for instance regarding the regulation of sex work.²⁷⁹

Since 2004, the Dutch government has produced a formal policy of ‘local customisation,’ devolving various areas of policy-making to the municipal level and enhancing cities’ powers to adapt regulation to their local circumstances. The current discourse regarding the ‘Cannabis Growing Experiment’ shows a similar spirit – rather than seeking one perfect answer to the question of how to tackle illegal cannabis markets, the study will encourage the development of diverse systems and methods. In a context where municipalities differ significantly in their experiences of and concerns about cannabis markets, this strategy can make it possible to move forward without agreeing on a ‘one size fits all’ model. In the Netherlands today, the majority of Dutch municipalities do not allow any coffeeshops within their jurisdictions. At the same time, other jurisdictions have embraced these businesses as part of their community and economy, and have regulated them accordingly, in an effort to ensure the safety of customers and prevent minors from accessing cannabis. The experiment seems poised to be extended, developing a safe supply chain for these cannabis shops without requiring or implying that cities where cannabis use is viewed more negatively must adapt to a new national policy framework imposing a regulated cannabis market.²⁸⁰

This policy approach is not a simple ‘free for all’ where cities or regions do as they wish – rather, there is a clear division of powers, with increased decision-making powers given to cities, within a national legislative framework. There is, however, a noticeable tendency towards introducing new legislation first as a geographically bounded and often time-limited pilot, which can then be compared with other jurisdictions. For example, the trial implementation of regulation that would require coffeeshop customers to register in order to purchase cannabis was pursued in a limited number of municipalities. Because it was observed to cause major increases in street dealing in those municipalities, it was never adopted by other jurisdictions, though municipalities retain the right to implement this, alongside other kinds of restrictions, on coffeeshops if they believe this would be advantageous in their local context. This model of policy development, which gives space for local innovation and adaptation within a more minimalist national framework, and which prioritises evidence-based evaluation of new policies, offers a promising model for mediating the relationship between national governments and local authorities.

The EU Level: Multi-Level Governance

At the EU level, some advocates are also proposing a similar style of policy-making. In the last 30 years, a substantial body of academic and policy literature has advocated political and administrative decentralisation.²⁸¹ A group of theorists and policy-makers have argued that decentralised decision- and policy-making has the capacity to lead to more effective policies, adapted to local environments, needs, and interests.²⁸² At the same time, some advocates consider decentralised policy-making to be more democratic, offering opportunities for citizens to directly influence policies that affect their daily lives, and enhancing both engagement and buy-in.²⁸³ Although policy-makers and scholars have cautioned against assuming that decentralisation automatically leads to better governance or more locally adapted policies,²⁸⁴ decentralised governance has nonetheless gained significant, if cautious, support within the EU.

Decentralisation has been endorsed by the EU as a principle of good governance,²⁸⁵ where

it is often discussed in the context of Multi-level Governance (MLG). The Committee of the Regions, an EU body charged with strengthening representation of non-national jurisdictions in European policy-making, defines multi-level governance as 'coordinated action by the European Union, the Member States and local and regional authorities, based on partnership and aimed at drawing up and implementing EU policies'.²⁸⁶ Critically, embracing principles of MLG suggests that municipalities, regions, and other sub-national levels of government should be able to play a direct role in the development, not just the implementation, of European-level policies.

The European Charter of Local Self-Government, introduced in 1985 and ultimately ratified by all member states, introduced the principle of decentralisation and asserted the significance of local governments in EU policy-making. More recently, the Committee of the Regions (CoR), in 2009, issued an Own Initiative Report on the significance of multi-level governance in a wide range of European policy areas,²⁸⁷ and the Lisbon Treaty incorporated some key principles of this approach. In 2014 the CoR launched the Charter for Multilevel Governance (MLG) in Europe which, by February 2019, had been endorsed by 220 signatories across Europe.²⁸⁸ The Charter argues for the key significance of this governance approach, stating that 'In line with the subsidiarity principle which places decisions at the most effective level and as close as possible to the citizens, we attach great importance to co-creating policy solutions that reflect the needs of citizens'.²⁸⁹

Recently, some analysts have suggested that greater reliance on the principles of MLG could provide a partial way out of the current impasse in European-level drug policy.²⁹⁰ In 2007, Caroline Chatwin argued, with respect to drug policy, 'A system of multi-level governance would allow initiatives to develop at the local level with power following a bottom-up structure'.²⁹¹ A focus on creating opportunities for the local adaptation of drug policy might help to advance European cannabis policy without the need to achieve consensus on certain key points. At the same time, such an approach would recognise the innovation, local knowledge, and differentiated needs of cities and regions. This

research has lent at least initial plausibility to this approach: a number of municipalities and regional authorities in the six countries studied are eager to develop their own drug policy solutions, and are actively searching for means and mechanisms by which to adapt existing national policies. National and international level policy frameworks often figure in their work as a constraint, limiting the development of policies, sometimes through heavy-handed interventions.

While criminal law remains a core national-level competency, much of which could not feasibly be devolved to the sub-national level, and while the position and significance of MLG within the EU should not be overstated, this research has revealed a number of possible mechanisms for increased flexibility at a local level. At the same time, the engagement of civil society, researchers, users' groups, academics, and other constituencies in advocacy related to local drug policies suggests that there could be widespread support for broadening the scope of possibilities open to municipalities and regions struggling to implement national drug policies.

Further research and thinking are urgently needed about what such an effort would entail if applied to drug, and especially cannabis, policy. Efforts to negotiate drug policy at the EU level have been hampered by principled disagreements between different countries, but, as illustrated in the discussion of the role of international pressure in shaping Dutch drug policy in particular, a trend has emerged towards harmonising policy in the direction of the most restrictive policy options. Re-orienting discussions of EU-level drug policy away from harmonisation as such and towards 'collective directives and framework agreements', which would allow member states and local authorities, in direct consultation with citizens, to 'fill in the details'²⁹² could make space for a more diversified and locally adapted drug policy. Such a shift in perspective could allow international discussions of drug policy to focus on the truly international elements – namely, preventing trafficking of harmful substances and guaranteeing the safety of drug users – while allowing the elements of drug policy that are more closely linked to local customs, practices, and social mores to be regulated at the appropriate level.

The UN Level: Inter-Se Modification

Finally, although a detailed discussion of this point is beyond the purview of this paper, the international treaty law mechanism of inter se modification, by which a group of like-minded countries could agree to modify certain cannabis-related treaty provisions with effect only among themselves, offers a parallel option to realise more diverse national-level drug policies. Like MLG and Local Customisation, this approach recognises the value of cooperation across regions and borders: controlling the trafficking of dangerous substances, reducing the power of criminal networks, and guaranteeing access to vital drugs for medical purposes all require international cooperation, which is impossible without shared standards and agreements. However, shared agreements also need to be flexible enough to allow every jurisdiction to implement the policies and practices that will best protect the health and well-being of its population. A growing number of jurisdictions are coming to believe that, with regard to cannabis, these policies may include legal regulation of recreational markets. There is an urgent need to re-think the international drug-control regime in such a way that the benefits of cooperation and harmonisation can be achieved without unduly and unnecessarily limiting the freedom of policy-makers.

Conclusions

Cannabis regulation at the global level is showing signs of moving in a more progressive direction, as Canada, Uruguay and several US states have turned their back on prohibition; countries as diverse as Italy, Lesotho, and Thailand are regulating medicinal cannabis; and countries like Luxembourg and Mexico are publicly considering regulation of recreational cannabis. The direction of change for cannabis policy within Europe is, however, far less clear.

The six countries covered in this report were identified in 2012 on the basis of their evolving cannabis policies, and a degree of focus on municipal and regional-level initiatives. In the years covered by this study, Germany, the Netherlands and Switzerland have made

limited but interesting steps towards more comprehensive non-prohibitionist cannabis policy, primarily by broadening the scope of experiments and public health trials for local cannabis regulation. At the same time, however, governments in Belgium, Denmark and Spain have shown signs of shifting towards a more constrained or repressive framework for cannabis. While Belgium and Denmark have both taken steps towards consolidating the position of medicinal cannabis over this period, there has been a detectable trend towards closing legal loopholes and erasing grey areas which had allowed unofficial cannabis distribution networks, whether CSCs or community-controlled street-dealing, to operate as *de facto* distribution systems. CSCs in Spain, and the sub-national jurisdictions that moved to regularise or legitimise these distribution networks, have also faced crackdowns and unwelcome clarifications of the limits of municipal and regional powers.

The picture is complex and it is beyond the scope of this report to analyse in depth the elements of public and political opinion, legal and legislative structure, advocacy, and interests that have shaped the different outcomes of efforts by municipalities and regions in all six countries. The research findings do, however, suggest a few key conclusions that may help to point the way to developing more effective strategies for change at the municipal and regional level:

- The perceived significance of international obstacles (at the global level) seems to be diminishing, but remains relevant. At the same time, concerns about European-level agreements seem as relevant as ever. A deeper exploration of both global policy tools (like *inter se* agreements) and European-level policy tools (like MLG) may be key to addressing concerns about the international impacts of local or regional cannabis regulation;
- Similar concepts and initiatives are taking shape across national borders and at several different levels: information sharing and stronger international networks can help cities and regions to explore policy options more effectively;
- Judicial strategies carry clear risks that loopholes will be closed and grey areas

eliminated; parallel political and advocacy work may be important to controlling this risk;

- Limited-scope research proposals within the framework of existing medical and scientific exceptions may offer an important and relatively 'low risk' strategy for cities to build wider understanding of cannabis regulation, reduce stigma, and demonstrate the possibilities of regulation, but also have inherent limitations;
- Coalitions and political alliances between cities seem to be instrumental, both in developing proposals and in advancing national-level advocacy for policies that increase the room for manoeuvre and local customisation by local authorities;
- Coordination between cities and regions across national borders, including through the MLG framework may offer a fruitful pathway towards European-level policy discussions.

This research has revealed a tremendous degree of flexibility and creativity in respect to cannabis regulation from municipalities and other sub-national actors. While national governments largely see themselves as strait-jacketed by international agreements including both the UN Drug Control Conventions and existing EU treaties and agreements, cities are eager and agitating for change. Local authorities are acutely aware of the costs to them of prohibitionist cannabis policy and are actively seeking better solutions to the need to control cannabis consumption to protect the health and safety of citizens, reduce organised crime, and maintain liveable cities. At the same time, however, the responses of national governments in many such cases, and the growing emphasis on law and order in several of the countries involved, shows the limits of what cities or regions can achieve in the absence of a supportive national, or even international, context.

Municipalities, regions, and non-government actors in all six of the countries studied are affecting and adapting drug policy in a range of different ways, showing the vitality and significance of 'bottom-up' policy-making. Cities and regions can be important

in developing, testing, and advocating for alternative policies. However, the existence of sometimes overlooked spaces for the contestation and adaptation of policy does not mean that cities and regions can simply adapt national drug policy to fit their needs and those of their constituents. Rather, the picture that emerges from this research is of sustained attempts to better adapt drug policy to local contexts, which are frequently thwarted by other visions and interests at different levels of governance, national and international. This research has revealed the diversity of solutions on the table, and three policy frameworks – local customisation, multi-level governance, and inter se modification – point towards the kind of structures and systems which could be implemented at the national, EU, and UN level in order to allow fuller scope for local adaptation of drug policy to fit the needs of individual jurisdictions. Bottom-up change must be met by a supportive policy environment from above, and policy-making at every level must become more open to efforts to adapt it to local circumstances. The best hope for cities and regions in pushing for these approaches is to continue to expand and strengthen their national and international networks, share their successes and failures, and unite to call for greater support, at the national, EU, and international level, for bottom-up initiatives.

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plants were confiscated from various commercial greenhouses in the Basque Autonomous Community (CAE): January, 120 plants; February, 1,547 in one plantation and 101 in another; March, 1,145 plants; April, 1,000 plants; May, 14,000 plants; June, 1,200 plants; September, 1,950 plants; October, 1,000 plants. Most of these police operations included making arrests (Noticias de Gipuzkoa, Gizartea, 13 October 2017, p. 7). (Note drawn from Arana, X. (2019))

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Country Reports

Key information in this report is drawn from the following country reports, available at tni.org

Cannabis Regulation in Europe:

Country Report Belgium

Tom Decorte, Ghent University, Department of Criminology, Criminal Law, and Social Law

Cannabis Regulation in Europe:

Country Report Denmark

Maj Nygaard-Christensen and Vibeke Asmussen Frank, Aarhus University

Cannabis Regulation in Europe:

Country Report Germany

Heino Stöver, Ingo Ilja Michels, Bernd Werse, Tim Pfeiffer-Gerschel

Cannabis Regulation in Europe:

Country Report Netherlands

Dirk J. Korf, University of Amsterdam, Bongers Institute of Criminology

Cannabis Regulation in Europe:

Country Report Spain

Xabier Arana, Instituto Vasco de Criminología (IVAC-KREI)

Cannabis Regulation in Europe:

Country Report Switzerland

Frank Zobel, Addiction Suisse

The NAHRPP project (New Approaches in Harm Reduction Policies and Practices) is a joint project of the Transnational Institute (TNI), based in the Netherlands, ICEERS (Spain), Forum Droghe (Italy) and Diogenis (Greece), supported by the European Union. The project addresses recent drug policy developments in Europe.

One section of this project, led by TNI, is focused on the role of local authorities in cannabis regulation. Local and regional authorities across Europe are confronted with the negative consequences of a persisting illicit cannabis market. Increasingly, local and regional authorities, non-governmental pressure groups and grassroots movements are advocating for regulation of the recreational cannabis market, rather than prohibition. This project analyses the possibility of cannabis market regulation models, alongside political, policy, and legal steps under exploration by local authorities in Belgium, Spain, Switzerland, Germany, Denmark and the Netherlands. It is hoped that the information collected through this initiative will help to improve the understanding of regulating drug markets as a means to reduce the negative consequences of illicit drug markets on individuals and society.

In order to better understand the situation around, and possibilities for, local and regional cannabis regulation, a series of six country reports were developed. The country reports provide detailed information about the state of cannabis policy, and the possibilities for change, within each country. This Report summarises some of the key findings from the research and explores opportunities, obstacles, and strategies for cannabis regulation at the municipal and regional level.



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