



European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) was set up in the face of an escalating drug problem in the European Union and a lack of sound and comparable information on the subject at European level. Established by Council Regulation (EEC) No 302/93 on 8 February 1993, the Centre became fully operational in 1995. Its main goal is to provide 'objective, reliable and comparable information at European level concerning drugs and drug addiction and their consequences'.

The Centre's tasks are divided into four categories:

- collecting and analysing existing data;
- improving data-comparison methods;
- disseminating data; and
- cooperating with European and international bodies and organisations, and with non-EU countries.

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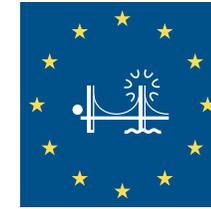
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European Monitoring Centre
for Drugs and Drug Addiction

INSIGHTS

PROSECUTION OF DRUG USERS IN EUROPE





Prosecution of drug users in Europe

Varying pathways to similar objectives

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Legal texts on drugs can be found on the EMCDDA's legal database (<http://eldd.emcdda.org>).

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (<http://europa.eu.int>).

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Foreword

Researching and analysing the responses of the criminal-justice systems to drug offenders throughout Europe is one of the EMCDDA's priorities.

This study is the result of a decision taken by the EMCDDA's management board in 1999 to set up a legal information system on drugs. This opened the way for objective comparison between European drug laws and for the promotion of studies in the area of penal policy.

While comprehensive details of the Member States' national drug laws have been collected and made available through the EMCDDA web site (<http://eldd.emcdda.org>), this study is the first concrete step taken to analyse the implementation of penal policies related to the drug problem across all EU Member States.

The work of criminal-justice services has been growing over the last decade and drug-related offences have escalated. There is also an increased level of awareness of the issue — both by policy-makers and the general public.

This study, focusing on the gap between law and practice, aims to highlight the real outcomes for individuals arrested for using and selling drugs and committing property crimes.

This is a challenging and evolving domain that is very relevant for policy-makers and we are aware that it needs to be further explored using scientific methods. However, we are convinced

that this study makes a valuable contribution to increasing knowledge of the varying approaches across the Member States and to the political debate on the prosecution of drug users.

Georges Estievenart

**Executive Director
EMCDDA**



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Secondly, we are grateful for the cooperation of the public servants in the Member States — drawn from the police, prosecution services and the judiciary — who contributed the information required by the study guidelines. This was made all the more difficult by the fact that the study asked for estimates of practices rather than recorded statistics (which would not have given the necessary information). Their positions make anonymity appropriate, so they cannot be thanked by name.

Thirdly, we wish to thank the national experts themselves for their hard work and for preparing their specific chapters: Brice De Ruyver, Kristof Van Impe and Tom Vander Beken (Belgium), Jørgen Jepsen and Lau Laursen (Denmark), Lorenz Böllinger (Germany), Calliope Spinellis and Paraskevi Zagoura (Greece), Rosemary Barbaret (with Ines De Oya Dale) (Spain), Yann Bisiou (France), Ted Murphy (some information for Ireland), Giulio Illuminati (with Francesca Massari) (Italy), Gilles Herrmann (Luxembourg), Anton van Kalmthout and Jack Derks (Netherlands), Stefan Ebensperger and Verena Murschetz (Austria), Ernesto Paulo Fonseca and Jorge Quintas (Portugal), Aarne Kinnunen and Heini Kainulainen (Finland), Josef Zila (Sweden), and Philip Bean (England and Wales). Due to the timing of this project, they were asked to work over the summer, which created practical difficulties.

Last, but by no means least, we extend many thanks to the research collaborators at DrugScope and at Ghent University: Nicholas Dorn, Brice De Ruyver, Christopher Black, Kristof Van Impe and Tom Vander Beken. Christopher and Kristof in particular put long hours into this project, helping to determine the framework, contracting the national experts, chasing outstanding work and synthesising material.

Danilo Ballotta

EMCDDA Project Coordinator

Executive summary

This study of the prosecution and non-prosecution of drug users in EU Member States was conducted in 2000 (although subsequent changes in drug laws have been updated up until September 2001). Our focus was on what happens in practice, in terms of prosecution and other forms of intervention under national law. Our objective was to move towards a quantitative and qualitative understanding of interventions by the police, prosecutors and courts, including an understanding of the whole process of intervention and discontinuance — for example, when intervention by the police may be followed by discontinuance by the police themselves, or by prosecutors (or the prefect) or the courts.

Patterns of prosecution and non-prosecution were examined in relation to:

- offences of drug possession and/or use, where such offences (criminal or administrative) exist in Member States;
- offences of drug trade and supply to drug users (in the street or in private premises), and sharing drugs between drug users (where such acts constitute offences); and
- acquisitive criminal offences, such as burglary, when committed by a drug user, particularly one who may be considered to have a habit, dependency or addiction.

Although such a scope is already quite wide, it does exclude some issues. For example, this study does not look into the prosecution of large-scale trafficking offences, or money laundering, or other aspects of organised crime when committed by drug

users. We concentrate on the practical application of law in relation to the everyday life of the majority of drug users.

Patterns of prosecution and non-prosecution involving the police and courts as well as prosecutors

For a study regarding the prosecution of drug users, not only are the actions of prosecution authorities relevant but also the actions of police forces. Therefore, such a study has to look at the decisions made by the police as well as those of the prosecution authorities.

In some circumstances, police action or non-action will be of a type which does not involve prosecutors (or, where appropriate, prefects), let alone the courts. In some of these instances, the police may make a note of the circumstances and of their action or non-action. However, even when such a note is made, it may not be transferred to any central information system. This raises some difficulties in terms of obtaining a clear idea of how prosecutions are started or — in many cases — are not.

So, a whole series of non-actions, actions leading to ‘no further action’ or discontinuance, informal warnings, advice about treatment programmes — even some minor forfeitures and disposal of small amounts of illegal drugs — may not be recorded:

‘In a Member State in which cannabis use is a criminal offence, and where there are no policy directions not to make arrests for cannabis use/possession, two police officers smell cannabis in the street. They are near a large block of apartments, many of which have open windows. Should they seek entry to every apartment until they find the culprit? If they have no powers of entry, should they seek such powers from the magistrate? How should they balance the demand to investigate the suspected offence against other demands that day — for example public

cannabis use, or street drug trades, or offers of drugs to minors, or acquisitive crimes?’

How often do the police have even firmer evidence that an offence might be committed — for example, actually seeing drug use when called to private premises for another reason — and yet they either take no action or simply advise the persons concerned to throw their drugs down a drain? In what proportion of such cases is no further action the outcome (often with advice about help or treatment facilities)?

The methodology of this study was designed to make a first approach to these questions in a comparative manner in relation to drug users. This methodology involved researchers in each Member State consulting with officials and experts who have a good view of practices in relation to the police, prosecutors and the courts and, where statistics might be lacking, making estimations. The national experts also reported briefly on climates of legal opinion on these matters. Finally, the national experts were asked to provide a detailed narrative description of these practices and of their relationship, if any, to the legal framework.

Overview of findings and recommendations

Recent published research describes how:

‘All countries [...] allow a certain amount of cases to be dropped or ended at police or prosecution level. Where the police have little or no power to end cases, the ability of the prosecution authority to select cases is greater; in countries where the police can end cases independently, the prosecution authority bring a higher percentage of cases to court. The great variety of structures, however, has led to a similar result. There is considerable reduction of cases to be dealt with by the court.’ (Jehle, 2000)

The present study finds that this general tendency — and the various roles which the police and prosecutors play in it — is to some extent visible in relation to minor drug offences. Although

there are differences in practices between Member States, there is some common ground from the point of view of objectives pursued.

- In most Member States, prosecution for use/possession per se is actively dealt with by the police and prosecutors/prefects (meaning that the police are likely to investigate, make arrests and prepare reports for prosecutors/prefects).
- Even so, in relation to 'simple' use or possession (for personal consumption), there is a general tendency throughout the EU for prosecutors and/or the courts to look for opportunities for discontinuance or, failing that, some arrangement that stops short of stronger criminal punishment.
- Greater priority is already given in nearly every Member State to policing/prosecution of retail sale (and of property crimes, regardless of whether or not they may have been committed by drug users) than to policing/prosecution of use/possession per se.

The study came to the following three conclusions:

- Common practices are emerging among Member States. However, better comparative information about prosecution practices is required. In future, this should be based not only on expert consultation, but also on interviewing police and prosecution staff and on direct research observation of everyday practices (of the police in particular). Such work could in time lead to an indicator on prosecution/non-prosecution practice.
- Further work might also contribute to the development of a common position in the EU. This could build on existing national prosecution practices, emphasising the objectives to be achieved. These objectives might include the reduction of drug supply and drug demand, the reduction of problems that may be associated with drug supply and drug demand (such as public nuisance, or property crimes), the achievement of such objectives through means that are proportional, and understanding by the public of the objectives.
- Those Member States whose legal framework does not allow for non-prosecution yet whose drug strategies include 'informal' actions by the police — including diversion to treatment — might wish to consider the case for putting police and/or prosecution practices on a more formal footing.

TABLE 1: INTERVENTIONS AND DISCONTINUANCE IN THE MEMBER STATES REGARDING POSSESSION/USE OF SMALL AMOUNTS OF DRUGS, RETAIL SALE (EVEN IF MINOR) AND PROPERTY CRIMES

| | Police | Prosecutors | Court |
|---|---|--|---|
| Possession/use of small amounts (not in public) | Diverse approaches at police stage | Diverse approaches, but discontinuance quite common at prosecution stage | Most Member States discontinue action at or before court stage |
| Retail sale | Strong tendencies to prosecute and not to discontinue at police stage | Tendencies to prosecute and not to discontinue at prosecution stage | Tendencies to prosecute, unless retail sale is seen as very closely connected to use |
| Property crimes committed by drug users | Strong tendencies to prosecute and not to discontinue at police stage | Tendencies to prosecute and not to discontinue at prosecution stage | Tendencies to prosecute, unless property crime is seen as very closely connected to use |

Source: Table 2 (in the 'Actual practice' chapter), derived from national experts' reports. Please see that chapter for commentary and reservations.



Introduction

The report consists of two sections. The first is a synthesis of the information contained in the national reports which are presented in the second section.

In the first section, the first chapter ('Methodology') introduces some key terms used in the study and describes the research methodology used for the study. The second chapter ('Formal frameworks') and the third ('Actual practice') present the legal basis and the current practice of prosecution and non-prosecution of drug users. The 'Actual practice' chapter also includes a discussion of the climates of legal opinion in the Member States in an attempt to define how actual practice is shaped. The report then presents its overall conclusions and offers some recommendations ('Conclusions').

The second section of the report presents a country-by-country narrative describing the legal systems in Member States and how what happens in practice fits with this framework.

Synthesis of the country reports

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METHODOLOGY: THE ISSUES ADDRESSED AND THE RESEARCH APPROACH

Use of terms

A number of terms relating to practices by the police, prosecutors and courts are used throughout this report. For the sake of consistency, these were defined at the start of the study and sometimes further fine-tuned in consultation with the participating national experts.

These terms are not intended to be a set of authoritative definitions — rather a set of working concepts for communicating ideas and presenting findings in a common framework. There is an emphasis on terms relating to law-enforcement practice, since that is the main focus of this study.

- **Prosecution** here refers to a process — whether under the auspices of criminal law, criminal-administrative or administrative arrangements — which could, if not discontinued, lead to a person being sanctioned (criminally or otherwise).
- **An offence** may be criminal, criminal-administrative or administrative, depending on the Member State's legal system and drug laws (for example, in Spain public consumption is an administrative offence) ⁽¹⁾.
- The term **dangerous drugs** refers to drugs such as cannabis and **very dangerous drugs** refers to drugs such as heroin ⁽²⁾.

(1) In this study, the definition 'drug-related offence' has not been used as a generic term. This is because such a term is too poorly defined to be serviceable in the context of a comparative legal study. Of course, some drug users may be prosecuted or otherwise dealt with for property offences which, although unrelated to drug legislation per se, may be regarded by some observers and some participants in legal systems as being drug-related. However, no generally agreed legal or operational meaning of drug-related offences as a generic category exists in Europe.

(2) There are many ways of differentiating between substances. The number of categories found in a Member State's legislation varies from one country to another. In this study, the terms 'dangerous drugs' and 'very dangerous drugs' were employed in order to gather information. These two terms could be seen to correspond to 'soft' and 'hard' drugs. However, this study does not seek to ratify any such categories.

- **Discontinuance** means that action, once begun, is not carried beyond a certain stage (discontinuance can occur at the police, prosecutor or court stage).
- **No further action** means that the decision-maker decides to take no formal action (such a decision may or may not include an informal warning).
- An **informal warning** occurs when the decision-maker — typically a police officer — gives an indication to the (suspected) offender that, although on this occasion no further action is being taken, it appears that an offence may have been committed and action may be taken on a future occasion.
- A **formal warning** refers to the application of a set procedure which, on every occasion, leaves (or at least should leave) a record of some kind.
- A **reduction of charges** occurs either when a suspect is charged with a lower charge than might have been applied or is charged at one level and then the charge is reduced at a later stage in the legal process.
- **Diversion** occurs when an offender or suspected offender is encouraged to enter some kind of social or health programme. In **weak diversion**, there is an offer of services or involvement in community, social, welfare, probation, behavioural or treatment services, with no consequences if the person disregards the offer and advice (i.e. there are no enforced conditions). In **strong** or **conditional diversion**, the person has to accept the offer and has to participate in the services if they are to avoid sanctions. The legislation and practices vary in the different Member States.
- **Discretion** is when, in practice, the police or prosecutor makes a decision that is not laid down precisely in any law, regulation or guideline. In law, some Member States may not formally allow for the exercise of discretion ('strict legality systems'), whilst others may ('opportunity principle'). The emphasis in this study is not on the legal situation but on what actually happens (see box on discretion).
- **Proportionality** is the legal principle, common to the legal systems of all Member States and enshrined in European law (EU and ECHR), that the intensity of intervention should be in line with the harm that it prevents.

This section refers only to terms which can be used to describe circumstances and practices common to a number of Member States. More specific terms, applicable properly only within the legal context of particular Member States, are mentioned in the text and (on the first occasion) in footnotes as they are applied in the following chapters.

Discretion

A contextual observation to make is that there does not seem to be a close relationship between the availability (or non-availability) of discretion as a power for the police and their use (or non-use) of it.

For example, the police in Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria and Portugal have no formal provision for discretion by which they can divert the drug user from the system at this earliest point. Nevertheless, in Germany, Spain, the Netherlands and Portugal, and possibly also other States, the police do in practice exercise discretionary powers. The police forces of Belgium, Denmark, the Netherlands and England and Wales have formal discretion and quite often exercise it ⁽³⁾.

Conversely, according to the national experts in Greece, Finland and Sweden, discretionary powers are available to the police but are rarely used in drug-related cases. This may be due to the perceived deterrent effect of prosecution, and the higher level of social sanction regarding drugs observed in these three countries.

This general observation underlines the point that one cannot simply 'read off' practice from the legislation in force. It appears that the police in some Member States make fewer interventions than one would expect strictly on the basis of law, whereas in other Member States this is less the case. Identifying practices requires inquiry.

⁽³⁾ In the Netherlands, there is no legal basis for the police to divert law breakers from the system, but prosecutorial guidelines make formal provisions for the police to exercise diversionary discretion and they frequently use this.

Research methodology

Three research methods were employed for the study:

- In order to make estimations about the extent and circumstances of interventions by the police, prosecutors and the courts, a questionnaire was sent to one national legal expert in each Member State. Each was asked to make appropriate consultations with key people in and around the legal system who were conversant with the practices of the police, prosecutors and the courts. Answers were requested in the form of estimates of the percentages of occurrences in which action is taken and not taken. The form of the questionnaire is described below and the results are reported in the chapter 'Actual practice'.
- In order to explain how such actions and non-actions 'make sense' within the specific climates of opinion in each Member State, national experts engaged in further consultations, making sure to include diverse opinion holders. Those questioned were asked to respond to a number of propositions, formulated by the study coordinators, designed to discover the boundaries of agreement and disagreement. A summary of the questions and the responses can be found in the chapter 'Actual practice'.
- Finally, there is the question of the relationship between practices in each Member State and the legal framework. The method here was to commission narrative reports from the same national experts. It became very clear that, in some Member States in particular, the question of the 'fit' between practices and legal bases is a complex one. Some national experts — and their consultees — appeared embarrassed by what might appear to be a rather indeterminate or loose fit. The best sources for discussion of this are the national reports themselves in the second section of this book. The following chapter provides an overview of this question.

Method for estimating percentages on action/non-action

A questionnaire was developed reflecting the objectives (above) of the study, to be filled out by experts at national level. This inquired about decisions in practice — by the police, prosecutors and

courts — in relation to use/possession, retail sale and property crime, both in terms of dangerous and more dangerous drugs.

Use/possession

- **Private** use/possession (according to how ‘private’ is defined in national law), where the amounts of drugs and/or circumstances of discovery are such that the national legal system considers that use/possession is least serious (e.g. for personal use) and where there is no public use.
- **Public** use/possession (e.g. use in public is open and visible), where the law considers the act to be relatively serious.

Retail sale (‘dealing’)

- In private, sale to existing users, who immediately use together.
- In private, sale to existing users, who buy and depart.
- In public, sale in open/street market.

Property crime

- Shoplifting (stealing from a shop) of items valued at more than EUR 100.
- House burglary (stealing items whose replacement value would be above EUR 1 000).
- Stealing from a person in the street money to the value of EUR 100 (for example, by snatching a bag or purse), without any physical injury to the person.
- Stealing from a person in the street EUR 100, with physical injury to the person (for example, where the person is pushed or falls down and is injured as a result).

For each of the (potential) stages of decision-making in the legal system — by the police, prosecution authorities, courts — the following questions were asked:

- Does discretion exist, in practice, in any of the following ways: no further action, diversion or reduction of charges (the substitution of a lesser charge) ⁽⁴⁾?

⁽⁴⁾ Simple yes/no answers were required for each of these areas. The experts were also asked to identify the criteria used and the underlying legal basis. (They were subsequently asked to elaborate on and explain their narrative reports.)

- What proportion of (potential) cases are dealt with by no further action, diversion or reduction of charges? The study aims to report percentages on the basis of either official figures (O), a good estimate (E, to nearest 10 %) or a guess (G, to nearest 20 %) ⁽⁵⁾.
- Is there any information on the effectiveness of the above practices? (Very little information was in fact available on this point.)

It should be noted that the national experts found the study requirement to make percentage estimations very difficult. This was for three reasons:

- Police practices — and in some Member States also prosecution practices — are not always uniform on a national basis and often vary from place to place. Such variations can occur in all Member States, whether they have a federal structure or not. This variation makes it much more difficult to attempt to construct a reliable picture of patterns of police/prosecutor action/discontinuance in relation to the variety of offences of interest in this study.
- There are sometimes difficult questions concerning the relationship between police practices leading to prosecution/non-prosecution, and the legal framework for such decisions. As already noted, the legal basis for some practices is not always clearly articulated. This made things difficult for some national experts who did not wish to report departures from strict legality. Nevertheless, although possibly embarrassing, this issue is potentially important in relation to the question underlying this study.
- It is intrinsically hard for researchers, who are professionally concerned with accuracy, to gather and report information on the basis of estimations.

The study set out to briefly summarise the climates of opinion in legal circles in the Member States. The opinions expressed here are not the official positions of Member States but simply an indication of the opinions to be found in legal circles. Presenting this

⁽⁵⁾ Percentages were asked for in the areas of: no further action without diversion, no further action with diversion, reduction of charges and diversion, charged with highest offence and also diverted, and charged with highest offence with no diversion (total = 100 %).

information is intended to help readers to understand some of the reasons behind prosecution (and non-prosecution) practices.

A descriptive (not explanatory) study

Throughout the study, there has been a temptation to come to some general understanding of — and statement about — the reasons for the various patterns of prosecution and non-prosecution of drug users in the Member States. For example, a general explanation that seemed plausible at one stage is as follows: prosecution practices might be seen as the day-to-day resolution of a two-way relationship between:

- the general principles and formal aspects of legal systems on the one hand; and
- the practical considerations in implementing drug policies on the other.

From such a two-dimensional perspective, it might be tempting to say that drug policies always push the police and prosecutors in the direction of greater leniency or informality, while legal systems push in the direction of greater formality and a higher level of prosecution.

However, this would be an over-simplification. On the basis of this study, the situation seems to be more complex. It seems that there is a third factor:

- in practice, at least in relation to minor offences, legal participants and, in particular, the police often tend towards informality (not only in relation to drug users).

These informal practices cannot always be ‘read off’ from the formal aspects of the legal system or from drug policies.

FORMAL FRAMEWORKS: ACTION AND DISCONTINUANCE BY THE POLICE, PROSECUTORS AND THE COURTS

This chapter contains a comparative description of what, on the basis of the formal aspects of national legal systems and legislation, one would expect to happen regarding the prosecution of a number of offences committed by drug users. The chapter draws upon the national reports which make up the second part of the study. This should be distinguished from what actually happens in practice (described in the chapter 'Actual practice').

Police decision-making powers

The following section describes the ways in which national legal systems and legislation provide formal frameworks for police decision-making regarding the use, possession and retail sale of drugs, and property crimes associated with drugs.

Overview

Since any action related to drug use/possession, retail sale of drugs and property crime is defined as a criminal offence, the police authorities in Belgium, Germany, France, Luxembourg, Austria and Portugal have no discretionary powers concerning further possible action: they arrest the suspect, fill in a report and transmit it to the prosecutor ⁽⁶⁾. Generally speaking, failing to report or record an offence is a breach of duty for which police

⁽⁶⁾ However, the fact that the police authorities are in a position to emphasise particular 'facts of the case', in some situations at least, as being most consistent either with simple possession/use or with trafficking gives them a certain degree of de facto power to reduce charges. It then remains to be seen whether the prosecutor and the court agree. In Portugal, new legislation introduced in July 2001 has meant that criminal sanctions are no longer applicable in cases of drug use or possession for use. Police now refer such offenders to a 'treatment-oriented commission'. A law decriminalising cannabis consumption was passed in Luxembourg in April 2001. This practice is now only subject to administrative sanctions.

officers can be reprimanded or even face criminal prosecution. In other words, the police have a duty to investigate and to inform the public prosecutor of any offence discovered on duty. Therefore, the law does not allow an offence to be dismissed (no further action). For the same reason, there is no possibility of diversion or a reduction in charges (7).

Other Member States have developed legal provisions which create opportunities for police discretion. For example, the Greek police, in cases of ‘minor offences’, have discretionary powers to refer an offender to the public prosecutor. Alternatively, the police themselves can settle the case (for instance, in the case of a user committing a public nuisance type of offence) [1]. In such a case, the head of a police department, following a hearing of the offender, may accept police objections and place the case in the archives.

In the Netherlands, there are also a few exceptions to the general rule that the police have no authority to dismiss a case, and these exceptions also concern ‘minor offences’ (apart from specific offences like shoplifting). For instance, handling a ‘user-quantity’ of drugs is treated as a minor offence.

The opportunities for police discretion are also limited for the Italian police. Once an offence is committed, the police must report it to the prosecutor without delay, no matter how slight the offence. However, personal use/possession is not reported to the prosecutor but to the administrative authority, since only an administrative action is possible in this situation.

In Finland, there are some exceptions to the rule that the police have to report all drug cases to the prosecutor. According to the Police Act [2], the police authorities must carry out their duties in the most effective and appropriate manner. Accordingly, they must prioritise their duties. Cases of use or possession for

(7) However, in France the police are now allowed — under the supervision of the prosecutor — to come to an arrangement with simple users. New Article 41-2 Penal Procedure Code, Law No 99-515, 23 June 1999, *Off. Gaz.*, 24 June, p. 9247.

personal use of dangerous drugs are not prioritised. On the other hand, the police prioritise the public sale of very dangerous drugs. Often, it is impossible for the Finnish police to investigate all crimes that they become aware of. Furthermore, the Pre-Trial Investigation Act [3] gives the police authority the option to refrain from taking further measures, depending on the pettiness of the drug offence — for instance, when no more severe punishment than a fine can be expected. This occurs whenever it is tactically beneficial not to start further investigations, or when a further investigation would be unmerited. For instance, if the user has just started a treatment programme.

In Denmark, dismissal of a case at police level can take the form of a formal decision under the Code of Criminal Procedure [4]. The police are also able to issue an ‘administrative fine’, by which the offender is required to pay a financial penalty without a court appearance (dependent upon the acceptance of the offender).

In Sweden, however, the decision to initiate a preliminary investigation has to be made by either the police authorities or the prosecutor. Whoever makes the decision concerning the preliminary investigation also leads it [5]. In general, the police authority leads the preliminary investigation in cases of ordinary offences, and the prosecutor heads more complicated cases. When the Swedish police receive information that a crime has been committed, they can refrain from any further action when the crime is a minor one and it is obvious that no sanction other than a fine will be imposed [6]. A Swedish policeman may also impose a fine on the spot by means of a summary order for breach of regulations. This applies to a number of petty offences [7]. However, the existing legal possibilities for police officers to refrain from reporting an offence and to waive the prosecution are not routinely applied as far as narcotic drug offences are concerned. Moreover, the Swedish police authority is not legally entitled to make decisions on diversion or a reduction of charges.

In contrast to the abovementioned Member States, whose legal system is based on the civil law system, the prosecution authorities

in Ireland, England and Wales are based on common and statute law. Consequently, all drug investigations are initiated and conducted by the police, since the system of investigation in these countries does not include a role for prosecutors. The role of the prosecutor is merely to examine the investigation files and direct the appropriate charges to be preferred. Irish legislation does not allow for dismissal of cases (except in the case of lack of evidence), diversion, reduction of charges or fines on the spot. It requires full prosecution through to court level. In England and Wales, however, the police have considerable discretion. They are allowed not to charge when a crime has been committed, to drop charges and/or to divert the offender into treatment (by giving informal or formal cautions) [8].

In several Member States (for instance Belgium, Denmark, France, the Netherlands, Finland), guidelines have been circulated by the Board of Prosecutors-General. These instruct the police in relation to investigation and prosecution for use/possession, the retail sale of drugs and drug-related crimes. These guidelines make it clear that criminal investigations must primarily be targeted at the production and retail sale of drugs, and that very dangerous drugs have a much higher priority.

In most of the Member States — Denmark, England and Wales, Greece (for minor offences), Italy (limited discretion), Finland (less serious offences), Sweden (minor crimes punishable by fines), the Netherlands (for some minor offences) — examined in this study, the police authorities generally have legal provisions in place to exert a certain amount of discretion and are not required to report every offence to the public prosecutor. They exercise this discretion by taking several circumstances into account: for instance, the types and quantities of drugs, criminal antecedents, personal circumstances and the extent of cooperation by the suspect. In other Member States (Belgium, Germany, Spain, France, Ireland, Luxembourg, Austria and Portugal), police forces do not formally have these powers.

Prosecution decision-making powers

The following section describes the ways in which national legal systems and legislation provide formal frameworks for prosecution decision-making.

Overview

In Belgium, Denmark, France, Luxembourg, the Netherlands and Sweden, the public prosecutor leads the inquiry and is responsible for initiating the criminal prosecution. The principle of expediency applies. This means that the public prosecutor, receiving records from the police services, decides whether or not to proceed with the case ⁽⁸⁾.

As far as England and Wales are concerned, the Crown Prosecution Service can by law decide to discontinue a case if, for example, it is satisfied that the probable effect upon a defendant's mental health outweighs the interests of justice in that particular case [9]. This process of diversion through the Crown Prosecution Service is used less than diversion at police level.

In Member States which traditionally adhere to the principle of legality (Germany, Greece, Italy, Austria, Portugal), the prosecutor has to take action in every criminal case. No discretion is allowed to the prosecutor, no matter how slight the offence. A prosecution only cannot go ahead when there is no legal framework allowing for it. This means that opportunities for not prosecuting drug users are strongly restricted by the legality principle.

However, in several countries, there are some opportunities for non-prosecution. For example, in Ireland, the police investigation file (which is required to make recommendations regarding

⁽⁸⁾ It should be noted that, while Sweden is one of the countries in which the principle of expediency is applied, Swedish legal experts are of the unanimous opinion that the principle of legality is valid in Swedish procedural law. However, there are many exceptions to this principle, which might lead to the conclusion above. Thus, it would appear that, even if the legality principle applies in Sweden, the principle of expediency prevails in practice.

prosecution) is submitted to the Chief State Solicitor's office for examination of the facts. The file and recommendations are then forwarded to the office of the Director of Public Prosecution, who will, after further examination, give his instructions, according to the nature of the charges. Irish legislation does not provide for dismissal of a case, a reduction in charges, on-the-spot fines or any other sanctions ⁽⁹⁾.

In general, there is no room for prosecutorial discretion in a criminal justice system that functions according to the principle of legality, since each reported drug offence has to be referred to the judge. However, as will be seen below, in certain cases, differences between legality- and expediency-based systems are not so pronounced. Even in Austria and Germany, two countries where the principle of legality operates, there is some provision for the discretionary power of the prosecutor.

Use and possession

In most Member States, prosecutors have several legal possibilities at their disposal when handling the use and possession of drugs for personal use: dismissal/no further action, diversion, reduction of charges and, of course, prosecution. The criteria used are identical in all cases:

- the type and quantity of drugs involved;
- the personality of the offender;
- the criminal history of the offender; and
- the private or public character of the user.

In Belgium, Denmark, France, the Netherlands and Sweden, prosecutors in cases of use and possession can always dismiss the case. Sometimes this dismissal comes with a reprimand or with a condition, such as treatment.

⁽⁹⁾ In Ireland, the 1984 Misuse of Drugs Act (Article 6, Section 27) explicitly orders the judge to give a fine only for the first and second offence, where the controlled drug is cannabis or cannabis resin and the court is satisfied that the person was in possession for personal use.

In Finland, in 1991 and 1994, the powers of the prosecutor were reformed to encourage the application of provisions on the ‘waiving of measures’ in drug cases [10]. However, the Finnish prosecutor does not have conditional dismissal at his or her disposal. Consequently, although the offender can be removed from the criminal justice system, the prosecutor is unable to impose treatment conditions.

In 1994, a decision by the German Federal Constitutional Court confirmed that it is possible for the German prosecutor to dismiss a case of possession of small amounts of dangerous drugs for personal use, following the principle of proportionality. The principle of proportionality requires that the punishment accord with the severity of the offence committed. According to the German Drug Act, depending on the circumstances, the prosecutor also has the option to take no further action on a case [11].

In England and Wales, the Crown Prosecution Service may decide to discontinue a case if it is believed that prosecution is not in the public interest [12].

The Greek Law on Drugs provides for the possibility of non-prosecution of the non-addicted user, after his/her case has been investigated by the judge and before it has been referred for trial [13].

While in France no action is normally taken against ‘simple users’, drug use is prohibited by law and French prosecutors employ a very restrictive interpretation of the definition ‘simple user’⁽¹⁰⁾.

⁽¹⁰⁾ In relation to simple use as an offence, Article L.3421-1 of the Public Health Code prohibits drug use but allows detoxification to substitute as the penalty. However, a problem arises from the fact that the text mentions ‘the fact of using drugs’, which refers to drug consumption. All other actions performed in connection with drug use (i.e. buying and possession) are defined as trafficking (Article 222-37, §1, Pen. C.). French law does not make any distinction between these acts when performed for personal use or for trafficking. If the trafficking qualification is mentioned in the action, no treatment can be ordered to replace the penalty. Moreover, in practice, prosecutors treat a user who imports (or grows) his own drugs, a user who shares his drugs with friends, or a user who buys a large amount of drugs (100 grams of cannabis, for example) as a trafficker, and so the offender will be prosecuted for trafficking.

It was actually a referendum in 1993 that made possession, acquisition or import for personal use of drugs an administrative offence, thereby changing Articles 73 and 75 DPR 309/90. Since Law 309 was passed in Italy in 1990 [14], only administrative action is possible in the case of possession, acquisition or import for personal use of drugs, no matter what the type of drug or where the use or possession is discovered. In such cases, the police do not refer the case to the prosecutor but to the administrative authority: the prefect.

The new law of 27 April 2001, introduced in Luxembourg, makes a distinction for the first time between substances. Simple cannabis use and possession will no longer be subject to penal sanctions but to monetary fines. However, other drugs will still be subject to penal sanctions (although these have been reduced in this new legislation).

In Portugal, until July 2001, drug use and possession of drugs were considered to be criminal offences punishable by imprisonment for up to three months or a fine. Occasional offenders might receive a suspended sentence.

The legal situation in Portugal changed after the adoption of Law 30/2000, which decriminalised use and possession for use of all illicit drugs. The new law maintains the status of illegality for all drugs. Individuals caught using drugs or in possession of a modest quantity of drugs for personal use (when no other offences are involved, such as sale of drugs or drug trafficking) will now be referred to a 'treatment-oriented commission'. The commission evaluates the offender's situation and offers treatment and rehabilitation. Sanctioning is not the objective of this process. Sale of drugs for commercial purposes remains a criminal offence that is handled by the law-enforcement authorities.

In many Member States (Belgium, Germany, Greece, France, Luxembourg, the Netherlands, Austria, Sweden), the prosecutor may opt for a form of diversion to settle cases of use or possession of drugs for personal use. Sometimes, the prosecutor takes mitigating circumstances into account and reduces the charges to allow for different sanctions.

The Dutch Penal Code also provides for a particular kind of waiver of prosecution, in the form of a transaction (settlement or compounding). The prosecutor proposes the payment of a sum of money by the suspect, in exchange for which the case is not brought to court. In cases involving a minor offence, like simple possession of small quantities of dangerous drugs for personal use, the prosecutor must settle the case if the suspect offers to pay the maximum fine in relation to the offence.

In the Belgian system, transactions ⁽¹¹⁾ have a legal basis [15] and are widespread. In 1994, a system of mediation ⁽¹²⁾ was established in the Belgian Code of Criminal Procedure [16].

Austrian law does not explicitly prohibit the simple use of drugs. Thus, in relation to simple possession offences, the prosecutor can generally impose probation, a fine or a community service order ⁽¹³⁾. Alternatively, mediation can take place [17]. Of these alternatives, the imposition of a fine is the usual sanction. As it is not possible to consume drugs without first possessing them, simple use is often subsumed under possession and is therefore normally criminalised [18]. A two-year probation period is generally foreseen in cases of possession of a small amount of drugs for personal use [19]. Cases of use or possession of a regular or gross amount of drugs, without intent to sell or supply, can also attract a two-year probation period ⁽¹⁴⁾. Whenever the State doctor recommends treatment, the suspect has to agree to the treatment instead of the probation order.

⁽¹¹⁾ A transaction is a unilateral offer by the public prosecutor to the offender for the offender to pay a certain amount of money within a limited time. If the offender accepts, the prosecution against him will be dropped. No criminal records are maintained, as no conviction is recorded.

⁽¹²⁾ In the framework of his discretionary powers to prosecute or not, the public prosecutor can decide to dismiss the case under certain conditions (e.g. payment of damages).

⁽¹³⁾ A community service order requires the offender to spend a prescribed period providing defined services which are considered to be of benefit to the wider community.

⁽¹⁴⁾ Article 35(2), *Suchtmittelgesetz*. Recently, a law has been passed in Austria (No 145/2001) redefining the definition of a gross amount of heroin, from 5 grams to 3. Small amount limits will also be reduced though these were not known at the time of publication. The code describes 'supply crimes' in paragraph 35(2) as crimes (in practice, mostly property crimes) committed by a drug user to supply for his own use with sentences of imprisonment not higher than five years and that are not judged by a jury.

In the context of a general trend in favour of harm reduction (rather than an orientation relying on compulsory abstinence), German prosecutors have access to measures other than custodial sentences, such as fines, restitution of damage, mediation and community service orders [20]. Depending on the severity of the offence, the German prosecutor can decide either to dismiss the case altogether [21] or to impose alternative penalties [22]. In cases of addiction, the prosecutor applies a principle of ‘treatment instead of punishment’ [23]. If, however, the prosecutor decides that treatment would not be effective and that the offender should be punished, he can opt for a punishment order with a criminal fine, which in the case of an appeal is converted to an indictment [24].

In Sweden, the prosecutor may impose a summary penalty order ⁽¹⁵⁾. Usually, summary penalty orders are applied to minor offences, which mean offences concerning the possession and use of less dangerous drugs. A summary penalty order may involve a sentence with conditions attached, with or without a fine. There is no legal option for reduction of charges in Swedish law.

The option of reducing charges does not formally exist in Denmark, but a suspect’s willingness to cooperate may be taken into consideration at the time of sentencing. At prosecution level, prosecution may be waived, with conditions attached to this waiver, such as referral for treatment.

If the offender has used drugs or is charged with possession of drugs for personal use, both Finnish and Irish prosecutors are provided with only two alternatives: bringing the case to court or waiving prosecution. There is no legal option for alternative approaches, such as reduction of charges, on-the-spot fines or other sanctions.

In those Member States where the prosecutor can opt for an alternative approach (Belgium, Denmark, Germany, Greece, France, Luxembourg, the Netherlands, Austria and Sweden), the

⁽¹⁵⁾ This means that the suspect is ordered to pay a fine according to what the prosecutor considers the offence to deserve.

prosecutor can still bring the case to court if he believes such an approach is not appropriate.

In general, in those exceptional cases where use or possession of drugs for personal use will reach the courts, the prosecutor will impose a fine — often after some reduction in the charges has occurred as a result of mitigating circumstances. Alternatively, the prosecutor may impose a conditional or suspended prison sentence. The prosecutor, however, will resume criminal proceedings if the offender drops out of treatment.

Retail sale of drugs

Concerning the retail sale of drugs, no substantial distinction is made in Austrian, Belgian and Italian law between retail sale to existing users who immediately use together, retail sale to existing users who buy and depart and retail sale in an open street/market.

However, in Belgium and Italy, as in most Member States (Germany, France, Luxembourg, the Netherlands, Portugal, Finland, Sweden, England & Wales), a clear distinction is made between the retail sale of drugs and major trafficking in drugs.

In Belgium, a further distinction is made regarding whether the retail sale is for purely commercial reasons or to support the personal use of drugs. If the retail sale is a commercial transaction, it will usually be treated in the same way as wholesale drug dealing. If it is for personal use, the quantity of drugs found is a guiding but not a decisive factor in determining the type of retail sale. In this kind of case, priority is given to the mediation procedure [25]. In more serious cases of retail sale (more dangerous drugs, large quantities, in public), the prosecutor normally proceeds with a prosecution and sometimes makes use of the provisions of the Probation Act [26].

In Finland, the sale of drugs is, in all circumstances, considered to be a significant criminal offence, which means that non-prosecution is out of the question [27]. Dismissal of the case is a legal possibility, but this rarely happens, as special emphasis is placed on preventing open drugs markets and open drug scenes [28]. If

dangerous drugs are involved or a substantial profit is sought, the offender will be charged with an aggravated narcotic offence [29].

One of the guidelines enacted by the Dutch Board of Prosecutors-General with a view to further harmonisation of Dutch drug policy makes a clear distinction between users and retail sellers [30]. It tolerates certain punishable drug offences if they occur indoors in coffee shops or 'user rooms'. This means that the prosecutor dismisses the case when the specific criteria described in the guidelines are met. Special attention is given to early intervention in cases involving dealing in small quantities by drug addicts and drug users. The prosecutor takes into account several criteria, such as the quantity and type of drugs and the duration and place of the activity. The definition of 'simple use' is very strict. Dutch judges have recently reformulated their guidelines to the Public Prosecution Service, with the aim of achieving greater consistency [31].

A user who imports his own drugs or grows them, a user who shares his drugs with friends or a user who buys a large amount of drugs is treated by the French prosecutor as a trafficker. The French prosecutor will generally proceed with a court hearing.

Austrian law distinguishes between the retail sale of a 'small', a 'regular' and a 'gross' amount of drugs. The main criteria are the amount of drugs sold, the circumstances of the sale and the type of drugs involved. In the case of the sale of a small amount of drugs, the Austrian prosecutor has the option of utilising alternative approaches such as probation orders, with or without conditions [32]. The usual condition would be treatment. In cases involving the sale of a 'regular' amount of drugs, Austrian prosecutors usually opt to prosecute. In cases involving the sale of a 'gross' amount of drugs, prosecution is compulsory.

In Greece, the sale of drugs is considered a drug offence which is normally prosecuted [33]. However, when the offender has been successfully treated, the prosecutor may withdraw the prosecution [34]. An addict may have his/her prosecution temporarily withdrawn if he/she volunteers for treatment [35].

In Italy, in the case of the retail sale of drugs (dangerous or very dangerous), charges are usually reduced, since the offence is generally treated as a petty offence [36] by the Italian prosecutor. Moreover, the prosecutor can make an 'agreement on penalty', within the sentencing limits. A further reduction of the penalty can be achieved by means of an agreement between the prosecutor and the defendant, which leads to an abbreviated proceeding intended to avoid trial. The parties, by mutual consent, may request that the pre-trial judge impose a penalty of a determined amount, provided that the sentence does not exceed two years of imprisonment [37]. When the retail sale of drugs has taken place in or near schools, treatment centres or prisons, the offence is considered by law to be more serious [38] and is normally prosecuted.

In cases of retail sale, both imprisonment and non-imprisonment measures are available to the Portuguese prosecutor. The decision depends on the kind of drug and whether the retail sale is private or public. When the defendant is a drug user, this is also taken into account. Very exceptionally, the prosecutor refers the addict to a treatment programme.

In Germany, a reduction in charges is significantly higher in cases of using or dealing dangerous drugs than in cases involving very dangerous drugs. In cases involving the retail sale of very dangerous drugs to existing users who immediately use together, the German prosecutor can opt for a dismissal, a reduction of charges or alternative approaches. If the person is addicted and there are no previous offences, the prosecutor can combine non-prosecution with a condition of treatment [39]. In the case of retail sale of very dangerous drugs to existing users who buy and depart or retail sale in public, the German prosecutor usually refers the matter to the criminal court. Only when there is evidence of addiction can the prosecutor opt for alternatives [40]. However, it is difficult for this to occur, as most such offences carry sentences of more than two years, which renders the person ineligible for treatment [41]. Other alternatives are rarely used.

Swedish drug laws provide for the waiving of prosecution in cases involving the retail sale of drugs when the offender has

been sentenced (or is being prosecuted) in another procedure and the imposed (or expected) sentence is considered sufficient [42]. However, prosecution is the usual outcome. Only those offences that are classified as minor can be punished by a summary penalty order [43].

In Denmark and Luxembourg, a clear distinction is made between dangerous and very dangerous drugs and between retail sale in public or private. Another distinction is made between whether buyer and seller use the drugs together or whether the buyer leaves the site after the deal. In the latter instance, the deal is felt to be more organised and to suggest a greater economic gain. Depending on the type and amount of drugs and the offender's criminal antecedents, the prosecutor can opt for the reduction of charges applicable to the case, such as community service, a fine or imposition of a prison sentence. In Ireland, the prosecutor has to prosecute persons over 18 years of age.

Property crime

The legislation of several Member States (Belgium, Germany, Greece, Italy, Portugal) takes into consideration the fact that a defendant is a drug user when sentencing or prosecuting a property crime committed by a person who shows signs of addiction. In Germany, when a drug user is involved in property crime, the drug charge which will be dropped, since it is considered to be less relevant [44]. In Belgium, the nature of the action is determined according to the seriousness of the offence and the individual situation of the drug user.

In other Member States (Denmark, Finland, Sweden), when property crimes are committed, the law makes no distinction in relation to whether or not the defendant is a drug user. In Sweden, whether or not the offender is a drug user makes no difference to the sentence. However, if he is a drug user, this may be reflected in the conditions of a suspended sentence (referral for treatment).

The public prosecutors in the Member States examined for the purpose of this study have at their disposal a range of measures as

a response to the different forms of property crime, from ‘no further action’ to prosecution.

The German [45] Penal Code explicitly provides for the non-prosecution of cases involving less serious property crimes (such as shoplifting). In most Member States (Belgium, Denmark, Germany, Greece, Italy, Austria, Finland, Sweden[46]), prosecutors impose some kind of diversion — be it a transaction, probation, mediation or referral for treatment. When more serious offences are involved (such as burglary or theft from a person), the typical reaction is to prosecute. In Germany, however, property offences which are more serious than shoplifting invariably result either in the State attorney applying for a criminal fine by court order (*Strafbefehl*) or in a regular indictment [47]. In France, prosecution always occurs if drug use is associated with property crime.

Each European system analysed here is confronted with the challenge of administering an enormous number of cases involving a drug component. It is clear that, in any system, handling all these cases according to the same procedure and treating them as if they were equally serious is neither feasible nor opportune. This implies a need for each criminal justice system increasingly to develop legal mechanisms to filter incoming cases. This issue goes beyond the traditional differences between civil and common law and between expediency- and legality-based prosecution. The practical aspects of these legislative rules is described, in relation to selected aspects of decision-making by prosecutors, in the following chapter (‘Actual practice’).

Court decision-making powers

This final section examines the ways in which court decision-making in relation to drug-related offences — including decision-making about discontinuance, in some cases — is directed and shaped by legislation across the 15 Member States.

Use and possession

In Germany, in cases of possession of all drug types for personal use, the courts can pass a custodial sentence [48], drop the case,

impose alternative sanctions such as fines [49] or order early release and outpatient treatment [50]. The German courts can also defer imprisonment so that compulsory treatment can take place [51].

In Greece, the addicted user remains unpunished (mandatory ‘no further action’) [52]. Therapy is possible at the request of the offender. As far as the non-addicted user is concerned, the courts have the option of either dismissing [53] or diverting [54] the case when necessary. In order to reduce the recourse to imprisonment, the Greek legal system provides for the possibility of the sentence being suspended (with or without supervision) [55] or for its conversion into a fine [56]. Both suspension and conversion are possible in cases of use or possession of drugs for personal use.

As far as Austria is concerned, the requirements for diversion at court level are the same as at the level of prosecution [57]. The judge can and in some cases must — depending upon the nature and severity of the charges — postpone a sentence and apply a conditional period of two years with treatment.

A Finnish Government proposal of 1992 requires that, if the offender has used drugs, he or she will be fined. It is also possible for the courts to apply conditions to a waived sentence [58]. Imprisonment is only used in exceptional cases.

The Belgian courts generally divert cases of use and possession of drugs for personal use, thereby utilising the provisions of the Probation Act [59]. The same options exist in France, depending on the charge, either simple use or possession associated with retail sale. Imprisonment is the principal sentence, but in most cases this will be deferred until detoxification has been completed. In France, the penalty depends on whether the drug use/possession is related to retail sale. The average prison sentence is 2.4 months for use and 4.8 months for possession (when related to retail sale).

Depending on what is prescribed by the relevant criminal-law provisions (minor, ordinary or serious narcotic drug offences [60]) there is a range of sanctions that can be imposed by Swedish

courts. These include fines, orders with conditions attached (which can be imposed on their own or in combination with a fine and/or a community service order), probation (which can be imposed on its own or in combination with imprisonment), a community service order and/or a so-called 'care contract' (which is a variant of probation designed for persons who commit crime because of their addiction) [61], imprisonment, and referral for treatment [62].

In England and Wales, the courts can impose a non-custodial sentence, which may (in certain circumstances) include a condition of treatment, if a probation order is given. In general, in those exceptional cases where possession for personal use is brought before a court, the law provides for the judge to have the option to impose a fine (often after having reduced the charge, thereby taking mitigating circumstances into account) and/or a conditional or suspended prison sentence. In the case of a prison sentence, this can involve the application of a probation order ⁽¹⁶⁾.

Retail sale

In most Member States (Belgium, Denmark, Germany, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, England and Wales), the courts have the option to impose a (conditional or suspended) prison sentence, together with a probation order, in cases of retail sale of drugs. This allows for mitigating or aggravated circumstances to be taken into account.

The Italian system has a post-trial stage, with courts of supervision which act as an alternative to custody. A person who receives a prison sentence of up to four years, or one who has four years left to serve for a drug-related crime, can ask the court for a suspended sentence in order to undergo treatment [63]. He or she can also apply to the court for probation [64]. According to a law enacted in 1998, the prosecutor has a duty to suspend the sentence when a conditional release or probation is applicable. However, in some Member States, more detailed legal provisions exist.

⁽¹⁶⁾ A probation order is a requirement to report regularly over a period of time for interview with professionals known as probation officers.

For instance, in Greece, the court has to suspend the sentence in a case of retail sale by an addicted drug user [65] who has been successfully treated [66]. In the case of an addict under therapy, suspension of the trial is mandatory until treatment is completed [67]. In Greek courts, when the seller, whether addicted or not, has sold a part of the small quantity of drugs he/she normally possesses for personal use [68], a financial penalty (converted from a custodial sentence) [69] or a suspension of sentence [70] is the most frequent outcomes. When the seller is not an addicted user [71], the Greek courts normally impose a custodial sentence [72]. Greek courts can decide to take no further action (i.e. suspension of sentence) in cases where addicts have been successfully treated. Financial penalties and suspended sentences are the most frequently used options under the Greek criminal justice system.

The French Penal Code provides for an intermediate punishment for retail sale [73]. Theoretically, this covers all kinds of retail sale, but the French Court of Cassation seems to consider that this is only applicable when the trafficker is also a user [74]. Use and retail sale almost invariably result in a custodial sentence of eight to 10 months on average. This compares with an average prison sentence of four to eight months for use and possession, and of two to four months for simple use.

Property crime

It is beyond the scope of this study to analyse the role of the courts in relation to property crime in general. However, a new development in the Netherlands should be mentioned whereby specific guidelines are provided for crimes like shoplifting, simple theft and burglary. These guidelines have adopted a new calculation system whereby 'points' are given to the criminal act and the situation in which it is committed according to a number of criteria, such as the value of goods stolen, the modus operandi used to conduct the offence and recidivism. Dependent on the number of points allocated to a criminal act, the judicial outcome can vary between a dismissal, a transaction or a prison sentence.

Most Member States make use of legal options to impose a conditional or suspended prison sentence, with or without the application of a probation order, as an alternative to custody. This allows mitigating or aggravating circumstances to be taken into account.

Convergence at the formal level

As far as police decision-making is concerned, some Member States (Belgium, Spain, France, Luxembourg, Austria, Portugal) have no discretionary powers concerning drug offences: the police are obliged to report every offence to the prosecutor's office, where the decisions are made regarding further conduct of the case.

In other Member States (Greece, Italy, the Netherlands, Finland, Sweden), there are some legal exceptions to the rule that the police have to report all drug cases to the prosecutor⁽¹⁷⁾. In Sweden, the decision to initiate a preliminary investigation is made either by the police authorities or by the prosecutor's office. In Italy, the police have no discretionary powers, since they must refer all drug cases either to the prosecutor (if the case is considered to be 'not for personal use') or to the *Prefetto* (if the case is considered to be 'for personal use'). Therefore, any real discretion lies in this evaluation.

Where drug investigations are initiated and conducted by the police on the basis of common and statute law (Ireland, England and Wales), guidelines are provided for the police. However, these guidelines are not drug-specific. The police may decide:

- to pass a file to the prosecutor with a recommendation for prosecution;

⁽¹⁷⁾ For instance, in Sweden, the rules outlined in *Polislagen* state that, if the police receive information that a crime which is subject to public prosecution has been committed, they may refrain from any further action if the crime, with respect to all circumstances, is a trivial one and it is obvious that a sanction other than a fine will not be an option. This rule, which is in effect a straightforward case of 'no further action', is formulated in paragraph 9, *Polislagen*, as an exemption from the strict obligation of all policemen to report all crimes subject to public prosecution.

- to issue a formal warning and not pass the case on to the prosecutor; or
- to take no action at all.

At the prosecution level, in some Member States (Belgium, France, Luxembourg, the Netherlands ⁽¹⁸⁾) the prosecutor decides independently whether or not to proceed with the case. In other countries (Germany, Italy, Austria, Portugal), the prosecutor is required to act in every case. Any opportunity for dismissal or diversion is strongly restricted by the principle of legality, whereby prosecution is compulsory. However, confronted with the challenge of administering a large number of drug cases, the prosecutor occasionally has the legal option to dismiss or divert a drug case.

In other words, it is evident that each criminal justice system in all Member States, regardless of its theoretical and historical framework, provides the authorities with (legal) discretionary powers to decide whether a case should be prosecuted or not, or whether it should be handled in an alternative way. As a consequence, the differences between systems which are based on the principle of legality and those which are based on the principle of expediency are becoming less obvious.

At the court level, most Member States have the option of imposing a conditional or suspended prison sentence, with or without the application of a probation order, as an alternative to a custodial sentence. Mitigating or aggravating circumstances can be taken into account.

There are clear differences between the legal systems of the Member States, but these are generally understood to be less pronounced today than was historically the case. This complex situation at the formal level might be expected to be reflected at the level of actual practice in decision-making regarding the prosecution of drug users.

⁽¹⁸⁾ In the Netherlands, in principle the police should report (and draw up an official report for) all drug cases. But the police guidelines allow, in a number of cases, for them to refrain from bringing a case to the public prosecutor and to settle the case themselves. This practice takes place on the grounds of general expediency.

Notes

- [1] Article 14, L.1481/84.
- [2] Police Act, 3, § 493/1995.
- [3] Pre-Trial Investigation Act, 2.2, § 449/1987.
- [4] *Vistnok omkring rpl.*, § 821.
- [5] Section 23(3) of the 1985 Prosecution of Offences Act.
- [6] Paragraph 9, *Polislagen*.
- [7] Section 48 (1–3, 13–20), RB. The offences that merit an on-the-spot fine are listed in a guide produced by the prosecutor-general's office (e.g. breach of the peace, etc.) (SFS, 199, 2047).
- [8] Home Office Cautioning Guidelines, Circular 59/90 and 66/90 (§ 4iii).
- [9] Section 23(3) of the 1985 Prosecution of Offences Act.
- [10] Chapter 1, Section 7–8, Criminal Procedure Act (1997/698).
- [11] Section 1, paragraph 31(a), *Betaeubungsmittelgesetz*.
- [12] Article 23(3) of the 1985 Prosecution of Offences Act.
- [13] Article 12, § 3, L.1729/1987.
- [14] DPR No 309, 9 October 1990, Article 75.
- [15] Article 216(bis) of the Belgian Code of Criminal Procedure.
- [16] Article 216(ter) of the Belgian Code of Criminal Procedure.
- [17] Article 90(a) of the Austrian Code of Criminal Procedure.
- [18] Foregger/Litzka/Matzka, *Suchtmittelgesetz* (1998), § 35, Anm IV.
- [19] Article 35(1), *Suchtmittelgesetz*.
- [20] Paragraph 153(a), *Strafprozessordnung*, Article 37, *Betaeubungsmittelgesetz*.
- [21] Paragraph 31, Section 1, *Betaeubungsmittelgesetz*.
- [22] Paragraph 153(a) of the German Penal Code.
- [23] Paragraph 37, *Betaeubungsmittelgesetz*.
- [24] Paragraph 407 of the German Code of Criminal Procedure.
- [25] Article 216(ter) of the Belgian Code of Criminal Procedure.
- [26] Probation Act of 29 June 1964.
- [27] Chapter 50, Section 1 of the Finnish Penal Code.
- [28] Police drug strategy 1999.
- [29] Chapter 50, Section 2 of the Finnish Penal Code.
- [30] Guideline of 10 September 1996 (*Staatscourant*, 1996, 187).
- [31] Bureau Voorlichting en Communicatie Rechterlijke Macht, *Naar eenheid strafoplegging drugsdelicten* (Towards uniformity in penal drug offences), Gravenhage, 4 October 2000.
- [32] Article 35(2) *Suchtmittelgesetz*.
- [33] Article 5, L.1729/1987; Article 12, § 4, L.1729/1987.
- [34] Article 21, § 1a, L.2331/1995.
- [35] Article 21, § 1a, L.2331/1995.
- [36] Article 73, DPR, 9 October 1990, No 309.
- [37] Article 444-448, Italian Code of Criminal Procedure.
- [38] Article 80, DPR, 9 October 1990, No 309.

- [39] Article 31(a), Section 1, *Betaeubungsmittelgesetz*; Article 153(a) and Article 37, *Betaeubungsmittelgesetz*.
- [40] Article 31(a), Section 1, *Betaeubungsmittelgesetz*; Article 153(a) and Article 37, *Betaeubungsmittelgesetz*.
- [41] Articles 35 and 37, *Betaeubungsmittelgesetz*.
- [42] Chap. 20, paragraph 7, 3, RB (Criminal Code).
- [43] Chap. 48, paragraph 1–12(a), RB (Criminal Code).
- [44] Paragraph 154, *Strafprozessordnung*.
- [45] Paragraph 153 of the German Code of Criminal Procedure.
- [46] Germany: paragraph 153(a) of the Code of Criminal Procedure; Greece: Article 21, § 1(a–f), L.2331/1995; Austria: Article 90(c, f) of the Austrian Code of Criminal Procedure; Belgium: Article 216(bis, ter) of the Belgian Code of Criminal Procedure; Italy: Article 444 of the Italian Code of Criminal Procedure, when the mitigating circumstances referred to in Article 62 of the Penal Code are applicable; and Denmark: Article 287 of the Swedish Penal Code.
- [47] Paragraph 407 of the German Code of Criminal Procedure.
- [48] Article 29, Section 1, No 1, *Betaeubungsmittelgesetz*.
- [49] Article 29, Section 5, and Article 31(a), Section 2, *Betaeubungsmittelgesetz*, or Article 153 of the German Penal Code.
- [50] Articles 56, 56(c) of the German Penal Code.
- [51] Article 35, *Betaeubungsmittelgesetz*.
- [52] Article 13, § 4(a), L.1729/1987.
- [53] Article 12, § 3, L.1729/1987. The court may decide not to punish the offender while conditions regarding his lifestyle are complied with (Article 100, A 2, Greek Code of Criminal Procedure).
- [54] Article 12, § 2, L.1729/1987.
- [55] Articles 99, 100, 100, A, of the Greek Penal Code.
- [56] Article 82 of the Greek Penal Code.
- [57] Article 37, *Suchtmittelgesetz*, and Article 90(a, ff) of the Austrian Code of Criminal Procedure.
- [58] Chapter 3, Section 5, and Chapter 50, Section 7, of the Finnish Penal Code.
- [59] Probation Act, 29 June 1964.
- [60] Paragraph 2, 1, 3, NSL. Use or possession for personal use are represented in all three categories of narcotic drug offences. The main criterion for classification is the seriousness of the offence (types and quantities of drugs involved).
- [61] Chap. 30, paragraph 9, *Brottsbalken*.
- [62] Chap. 31, paragraph 2, *Brottsbalken*.
- [63] Article 90, No 309, DPR, 9 October 1990.
- [64] Article 94, No 309, DPR, 9 October 1990.
- [65] Article 5 and Article 13, L.1729/1987.
- [66] Article 21, §1(e), L.2331/1995.
- [67] Article 21, §1b, L.2331/1995.
- [68] Article 12, §4, L.1729/1987.
- [69] Article 82, Greek Penal Code.

- [70] Articles 99, 100 and 120 of the Greek Penal Code.
[71] Article 5, L.1279/1987.
[72] L.1729/1987.
[73] Articles 222–39, French Penal Code.
[74] Crim. 6 April 1994, Lamyline; Crim. 30 October 1995, *Gaz. Pal.* 27
and 28 March 1996.

ACTUAL PRACTICE: ACTION AND DISCONTINUANCE BY THE POLICE, PROSECUTORS AND THE COURTS

This chapter summarises information regarding actual practice ⁽¹⁹⁾. Firstly, we describe police responses in relation to use and possession, sale and property crimes. Then, we examine the current situation for prosecutors and the courts. Lastly, we focus on a specific quantitative contrast: cannabis use in private compared to the public sale of heroin.

Police decision-making

Use and possession

There are a number of issues regarding use and possession that shape the various decision-making processes of the police forces of the Member States:

- variations in approach towards dangerous drugs (e.g. cannabis) and very dangerous drugs (e.g. heroin) ⁽²⁰⁾;
- the public/private distinction and its impact upon the police decision-making processes; and
- the degree to which certain countries have an active policy towards drug use that makes significant use of criminal law.

In a number of Member States, the dangerous/very dangerous drugs distinction appears to provide the opportunity for informal levels of police discretion. In Italy, cannabis is considered dangerous but less dangerous than some other drugs. The police sometimes omit to report use/possession which appears to be for personal use, in the case of a first offence, if the offender is under-

⁽¹⁹⁾ For details of the legal base of the various Member States, the reader is asked to turn to the chapter 'Formal frameworks' and to the specific national chapters in the second section of the book.

⁽²⁰⁾ For use of terms in this study, see the beginning of the 'Methodology' chapter.

age or if he/she is cooperative. It should be noted, though, that this practice has no formal legal basis. In France, the police do not formally use the type of drug as a distinguishing element in relation to use and possession offences. Consequently, all drug use/possession charges result in similar actions. It appears that the option of taking no further action, while occurring at both police and prosecutor levels, is generally taken under the auspices of the prosecutor. The notable difference in the French situation occurs in relation to the exercise of discretion for use/possession of cannabis, compared with heroin. While there is no difference in law between drugs, 60 % of all arrests occur in relation to offences which involve cannabis. Legally, drug offenders (based on the quantity of drugs and the absence of other offences) can be held at the police station (*garde à vue*) for up to 48 hours. In practice, however, drug users usually spend just a few hours in *garde à vue* before being released.

In the case of private or public use, there is limited discretion available to the Greek police for any crimes involving drug use, but in practice it is reported that they rarely intervene if use occurs in private. Likewise, in Portugal ‘no further action’ was the most common response to use and possession offences. In general, charges only reach the prosecutorial level when use/possession was either too visible or the drug too dangerous. Since July 2001, such cases have been referred to a special treatment-oriented commission.

Germany has a policy of dispersing open drug scenes, and this kind of public use, especially near minors, results in an estimated 90 % of cases being prosecuted. This is similar in France, England and Wales. When the police in France discover a case of public use, this generally results in an arrest, with the express intention of maintaining public order — the majority of these arrests are likely to occur during identity controls, road-traffic patrols and illegal immigration investigations. In England and Wales, the police often perceive public use to be related to the supply of drugs. In contrast, in Sweden, it makes no difference if drug use/possession occurs in public or private, because in both cases action would be taken.

National policy towards drugs has a clear impact upon police decision-making in some Member States. For instance, in Finland, although the police can exercise discretion *de jure*, it rarely takes place. This could be due to the high level of social concern over drug abuse, combined with a belief within the police service that prosecution for drug possession and use carries a significant deterrent effect. This focus upon the deterrent effect of social sanction is also apparent in Sweden, where the police have a limited level of *de jure* discretion. In practice, this is rarely used in decision-making except when confronted with ‘heavy misusers’⁽²¹⁾. In contrast to a high level of prosecution of new users, when faced with long-term users, the police are far less likely to continually process, report and prosecute them for use and possession, as this clearly has an insignificant deterrent effect.

Conversely, in Germany, in the majority of cases, the police have a duty to carry out investigations. In practice, they have a significant level of discretion, allowing for no further action as well as a reduction of charges⁽²²⁾ and diversion at the police decision-making stage. This level of police discretion is based on the prosecutorial principle of public interest. For instance, in the case of cannabis, police discretion combines with what is effectively a public interest policy that does not prioritise cannabis use, resulting in minimal police activity.

The approach is similar in the Netherlands, where possession is an offence and where the police have no formal authority to dismiss a criminal case. In practice, they have subsumed the role of the prosecutor. This is based on the expediency policy of the Public Prosecution Service (PPS), whereby cases that fall within the guidelines for PPS dismissal are not pursued. A similar practice, though on a smaller scale, is reported to occur in Belgium. Although there is no formal discretion available to the police

⁽²¹⁾ Heavy users who are not prosecuted for possession/use of narcotic drugs (because of the pointlessness of such a measure) can either be referred for compulsory institutional care, in compliance with the Act on the Treatment of Drug Misusers, or, if they seek help voluntarily, they can avail of social service care provided for by the Social Service Act. A third possibility is that the offender commits another crime and is prosecuted for it.

⁽²²⁾ In essence, the decision to reduce charges reflects efforts to minimise the level of penalty, thus removing the offender from the criminal justice system at an earlier stage.

services, police decision-making does, nevertheless, embody a certain degree of discretion. Consequently, not every offence is reported to the prosecutor ⁽²³⁾.

The use of guidelines regarding police decision-making seems to be a common mechanism in a number of Member States (such as Belgium, Denmark, England and Wales). For instance, police decision-making in Denmark is guided, in part, by information leaflets circulated by the Attorney-General's office. This information is based on court practice and parliamentary directives, and allows for the option of an administrative fine (a form of fine that results in no criminal conviction) for low-level offences. In England and Wales, the police have considerable discretion and are 'not obliged to prosecute every person against whom they have sufficient evidence'. Based on a policy of avoiding inflexible 'vending machine justice', the circumstances of the case determine the associated decision-making.

In England and Wales, as in Germany and France, it was noted that local conditions serve to skew aggregate national figures. For example, in England and Wales, formal cautioning rates regarding drug offences (most of which concern possession) vary greatly across the 43 police forces (between 16 and 77 %). In Germany, it is estimated that charges are pressed regarding simple possession approximately 50 % of the time, although this varies depending upon the jurisdiction.

Retail sale

The relative leniency of police decisions regarding use and possession is in stark contrast to decisions concerning the sale of drugs. This distinction between public and private sale appears to impact upon the degree of police discretion/leniency (based on the type of penalty) in most Member States. Public sale is more often targeted by the police than private sale. For example, in Portugal, police discretion, in effect, reduces the number of cases

⁽²³⁾ Belgian police are now able to send simple records to the prosecutor, although these are rarely acted upon.

of private sale that are referred for prosecution. The police anticipate the actions of the prosecutor and assess the perceived social damage of the criminal act (i.e. the level of visibility of the public sale). Thus, sale in private results in far lower levels of prosecution and subsequent penalty than public sale/use. Conversely, in Sweden, there appears to be little police discretion, regardless of the type of drug or the circumstances of sale.

Whether an offender sells to a wide circle of buyers or only to his associates, with whom he also uses the drug, also has an impact on police response. A user who only sells to associates who then use together in a group appears to be treated more leniently than a user who sells in public to others. Overall, however, any sale of illegal drugs attracts a more severe police response than simple use/possession. A good example of this situation is reported in Germany, where an estimated 40 % of all those identified selling heroin with subsequent group use result in either no further action or referral for treatment. The other 60 % could expect to be referred to the prosecutor. When German police are faced with dealers selling drugs in private or public where the user buys and departs (as well as in cases of sale), 90 % of cases are passed on to the prosecutor. Similarly, in the Netherlands, the police are three times more likely to refer the case to the prosecutor when a person sells to users who buy and then depart (e.g. dealing to 'all and sundry') than when a user sells to others who then use with him/her in a group.

Interestingly, it appears that the Danish police are increasingly encountering dealers carrying smaller amounts to take advantage of the quantity distinctions made between use/possession and sale. Instead of increasing their activity at the lower level of possession — which might result in an increase in prosecution of users — the police have had to resort to taking into consideration previous offences, such as aggravating circumstances. In England and Wales, these kind of offences are commonly dealt with as supply offences.

Property crime

Across all Member States, drug use does not appear to play any role in how the police respond to property crimes. The case will

be prepared for the prosecutor on its merits, as with any property crime case. In some Member States, such as England and Wales, special arrangements exist for referral, testing and treatment. However, these are not likely to increase or decrease the incidence of prosecution by the police in relation to property crimes.

In summary, in relation to use/possession for personal use, the public/private distinction is important in shaping the police response. In practice, police action initiating prosecution for private use/possession is rare, whereas it is much more common when public use is involved. Police practice in relation to users who sell drugs also seems to be influenced by the public/private dimension and the extent of sales, particularly to strangers. In general, the police are more likely to refer an offender for prosecution if his selling behaviour leads to a wide diffusion of drugs in society. The greater the diffusion, the higher the certainty of prosecution for retail sale. Finally, whether or not a person accused of property crime is a drug user or not generally makes little difference to police action, although it may be taken into account by the prosecutor or the court.

Prosecution decision-making

Here, we examine decision-making by prosecutors in relation to use and possession of drugs, retail sale of drugs and property crimes.

Use and possession

Across the majority of Member States, prosecutors have considerable discretionary power. Having said that, it needs to be remembered that, in a minority of States, prosecutors have no role to play in prosecution for possession of drugs for personal use: in Italy and, following changes in 2001, in Portugal, where the administrative authorities are responsible.

In Greece and France (according to national experts), virtually all reported offences are prosecuted. In Belgium, transactions ⁽²⁴⁾,

⁽²⁴⁾ A transaction is a unilateral proposal made by the public prosecutor whereby the offender is asked to pay a set amount of money within a specific time frame. If accepted, the prosecution is dropped and there is no criminal record maintained.

mediations ⁽²⁵⁾ and conditional dismissals ⁽²⁶⁾ can take the place of a court appearance. By way of contrast, this sort of conditional non-prosecution is not available to prosecutors in Finland, who have only two options open to them: to bring the case to court or to waive it. This allows the Finnish police, prosecutors and courts the option to take no further action against the offender. As with transactions in Belgium, a level of guilt is implied. However, unlike the Belgian system, in Finland, the user's intent to seek treatment may influence the prosecutor's decision to waive prosecution. This decision will not be conditional on acceptance of treatment. This is in contrast to other systems whereby a conditional dismissal requires the offender to undertake certain activities or fulfil certain requirements. In practice, when faced with a first-time offence of simple use/possession of small quantities of drugs, around 10 % of cases are waived.

Similarly, in Luxembourg, the prosecutor receives many reports of heroin and cannabis offences from the police (the police are not allowed to exercise any discretion), but these are rarely prosecuted in practice. Dismissal is the norm and, whilst treatment is possible, it is not conditional. The law passed in April 2001 greatly modified the approach of prosecutors to drug use offences.

In Austria, the prosecutor does not have the option of no further action or reducing charges. Diversion (with conditions) or a charge are the only two possible outcomes. Almost 100 % of heroin users in Austria are diverted into medical supervision for a two-year probation period, with the State doctor monitoring the offender's use. The two-year probation period requires the user to commit to treatment and refrain from drug-related crime within that period. If this is complied with, the charge is dropped and there is no criminal record. The prosecutor has to report the diversion to the Drug Observation Office (§ 35(8) SMG). The

⁽²⁵⁾ A mediation is a diversion mechanism that is based upon restorative justice principles. It involves victim-offender dialogue and can include material and moral compensation and restitution. No criminal record is maintained.

⁽²⁶⁾ A conditional dismissal is when either the prosecutor and/or the court impose certain conditions upon the offender (i.e. treatment or compensation). When these are fulfilled, the case is dismissed and no criminal record is maintained.

same is true for cannabis use, although only 50 % of these users are placed under medical surveillance. In the case of cannabis use, the State doctor's intervention is not mandatory if there has been no criminal record against the suspect within the previous five years.

In the Netherlands, the police (rather than the prosecution authorities) deal with offences concerning possession of drugs which are considered less (or not very) dangerous (most cannabis products). However, in the case of very dangerous drugs (e.g. heroin), cases of possession are always referred to the courts by the public prosecutor, unless very small quantities ('user quantities') are involved.

Apart from Greece — which, according to our national expert, passes 100 % of all cases from the police to the prosecutor and then on to the courts — Sweden refers the greatest number of cases of use/possession of heroin on to the courts. It appears that the decision to take no further action is rarely used by the Swedish prosecution authorities, except when there are other charges and there is felt to be no need to pursue all of them. When the decision of the prosecutor is not to prosecute, the alternative is usually a fine.

In Germany, 'public interest' and 'personal guilt' are the two criteria that determine whether no further action, reduction of charges and/or diversion ⁽²⁷⁾ take place. This is especially the case in relation to private use and possession. However, even for cases of use in public, around 60 % get diverted.

In Spain, prosecution is not applicable for drug use and very closely related acts such as obtaining drugs for personal use. However, possession, if manifested as public use, can lead to administrative penalties (see civil fines in common law countries).

⁽²⁷⁾ In Germany, the prosecutor's efforts regarding diversion centre on moving the drug offender into treatment (i.e. referring for counselling or finding a place on a therapy programme).

Retail sale

There is no leniency in the prosecutorial decision-making process in Finland regarding use/possession of drugs where retail sale ⁽²⁸⁾ is involved. According to one source: 'If the offender has sold drugs, non-prosecution is out of the question.'

In Germany, when the police report a case involving the sale of heroin within a group of users, prosecution is not pursued in around 50 % of cases (through taking no further action, reducing charges and other forms of diversion). It is assumed that sale in such circumstances is to support an addiction. However, German prosecutors indict at least 70 % of dealers working in public, because of the perceived importance of disrupting such markets. The remaining 30 % are sentenced on the basis of their addiction or other offences, rather than the dealing per se.

With regard to the sale of 'regular' amounts ⁽²⁹⁾ of drugs in Austria, diversion at the prosecution stage is limited to around 20 % of cases, depending on the quantity of the drug being sold, the individual's age, level of remorse and previous offending history.

In Sweden, around 90 % of lesser retail sale offences involving cannabis are referred to the court. A fine is an option for the remaining 10 %, although there is no obvious reason for the inconsistency. Any waiving of charges occurs in relation to use/possession when other offences, such as retail sale, are being prosecuted. This is clearly a decision to economise on the proceedings, rather than a response to the addiction/use itself.

Prosecution practice in the Netherlands regarding heroin and other very dangerous drugs depends on the premises where they are sold and the characteristics of the individuals to whom they were sold (i.e. youths, vulnerable people, etc.).

⁽²⁸⁾ By 'retail sale' we mean, by analogy with the other markets, sale to other consumers (even if in some cases these purchasers may share with others, a possibility discussed separately).

⁽²⁹⁾ A 'regular' amount lies between a small and a gross amount. The gross amount of cannabis is 20 grams THC (tetrahydrocannabinol) or more and the small amount is anything up to 2 grams THC, therefore a regular amount of cannabis means more than 2 and less than 20 grams THC.

Property crime

Most Member States do not consider addiction a reason for leniency when considering property crimes. Only Belgium and Portugal appear to be exceptions to this. In Belgium, mediation is possible for less serious property offences (e.g. burglary or bag snatching) when the offender has a drug addiction. It is less likely to occur with violent offences and those involving higher monetary damage. In Portugal, charge-reduction measures can be considered when the offender is a drug user.

In general terms, it appears that use/possession offences neither mitigate against nor worsen the situation from a prosecutorial perspective. However, use/possession charges are often dropped in favour of a property offence. For instance, in France, drug use is rarely incorporated into the prosecution, because the charges for property crimes are higher than those for drugs. When charges for drug use are not dropped, this is because the use is seen as an aggravating circumstance of property crime. The situation is similar in Germany, where burglary is regarded as a more serious offence and so the drug charges are normally dropped. The same is true for street theft. However, the majority of shoplifting offences by drug users in Germany are dealt with by fines and 'weak diversion'. Only recidivist cases are referred to the courts.

In Sweden, 40 % of shoplifting offences are referred to the courts, 40 % are fined by the prosecutor and in around 15 % of cases prosecution is waived. In Austria, shoplifting results in the imposition of either a fine or a probation order at prosecutorial level. In contrast, in cases of burglary, less than 5 % of offenders are given alternative sentences by the Austrian prosecutor.

To sum up, although prosecution is applicable in most Member States, prosecution practice in relation to cases concerning 'simple' use/possession for personal use usually permit an element of bargaining involving acceptance of help by the user. The majority of cases of sale by a user (particularly retail sale) result in prosecution for the sale per se; the drug use may be taken into account but it will not in most cases cause discontinuation of the prosecution. Likewise, the fact of drug use generally has little impact on the likelihood of prosecution for acquisitive crimes.

Court decision-making

In this section, we look at the overall patterns of disposals made by the courts in relation to use/possession, retail sale and acquisitive crime. This section is brief because, although some cases may be dropped at court level, the main decision-making processes regarding prosecution and non-prosecution are over by the time a case has reached the courts.

Use and possession

Some use/possession cases are referred to the courts in six of the 15 Member States (in Belgium, Greece, France, Luxembourg, Sweden, England and Wales). In Sweden, where the majority of use/possession offences are referred to court, this invariably results in a fine (in 80 % of cases involving the use of cannabis, but only 2 % for heroin), with imprisonment the most likely outcome for the more serious of such charges. In Greece, it is reported that use/possession always reaches the courts and typically results in a fine upon conversion of a custodial sentence ⁽³⁰⁾. In Austria, use/possession per se does not usually result in a court case, because of diversion practices at prosecution level ⁽³¹⁾. Similarly, in practice, use/possession cases rarely reach the courts in the Netherlands, Spain, Austria or Denmark, particularly if the drug concerned is cannabis and the amount small. Following the reforms of 2001, such cases do not go to court in Portugal.

Retail sale

In the majority of Member States, most cases of retail sale reach the courts, where they are responded to according to a variety of criteria regarding seriousness. In Sweden, the courts' decision-

⁽³⁰⁾ In Greece, about 2 % of individuals over 20 years of age receiving drug treatment were referred to the therapeutic agencies by the criminal justice system, and 12 % of those under 20.

⁽³¹⁾ Austrian law does not explicitly penalise users for the use/consumption of a drug in the same way as it does for possession. However, as it is not possible to consume a drug without having it in possession for at least a very short time, drug use is subsumed under possession and is thus criminalised in practice (Foregger/Litzka/Matzka, SMG, § 35, Anm. IV).

making processes depend upon the severity of the offence and the amount and nature of the drug involved. If the offence is defined as serious, offenders receive a prison sentence in 100 % of cases; 70 % of less serious offences are awarded prison sentences. While probation is sometimes granted, it is rarely combined with other conditions such as treatment.

In situations where the user buys and departs, and also for cases of sale in public, the German courts usually give dealers a prison sentence of more than two years. Those who are not imprisoned may be selected for diversion after a specific case review. In Austria, the courts generally have a 50 % conviction rate (with no alternatives possible) of dealers in regular amounts of heroin. The key criterion is the amount sold.

Property crime

Courts in most Member States view property crime as the most serious offence. Whether the accused is a drug user or not is a secondary consideration in handling the prosecution. In Portugal, charge-reduction measures are sometimes considered when the offender is a drug user, although this is not necessarily the case in instances of violence and/or higher monetary damage. In Finland, a burglar may receive a conditional sentence based upon treatment for the addiction. Treatment cannot be imposed as a component of a sentence but treatment programmes are available in prisons and a probation officer can encourage an offender to participate.

In Sweden, the majority of shoplifting offences result in a fine. Burglary generally results in imprisonment, although the Swedish national expert notes that, in cases of alcohol misuse and road-traffic offences, probation and a care contract can be another option. In France, property crimes attract higher sentences. Imprisonment varies between 92 and 96 % of all cases, of which 75 % are ordered without deferment ⁽³²⁾. In Austria, the

⁽³²⁾ While double prosecution of drug use and other offences is rare in cases such as property offences, in the case of immigration offences, the use of double prosecution is systematic and the sentencing is most severe.

courts generally have a 60 % imprisonment rate (with no alternative offered) for burglary; only 5 % are diverted at court level. The Austrian courts do not deal with shoplifters; they are dealt with at prosecutorial level.

In Germany, the recidivist shoplifter is faced with a number of possibilities, including prison, fines and treatment. Sentences for burglary involving the use of drugs can be reduced, based on a perception of a lower degree of guilt. The same goes for street theft.

Where drug-related cases are concerned, the courts in all Member States — unsurprisingly — treat retail sale and acquisitive crime as more serious than possession/use. Indeed, in some Member States, possession/use is not a matter for criminal courts. Where things become more complicated is in relation to drug use being a mitigating factor or grounds for discontinuance/reduction of charges when prosecuting retail sale or acquisitive offences (with or without conditions) at the court stage. In this respect, jurisdictions vary and no common pattern is evident. Different systems have different approaches when addressing the requirements of legality and prevention.

Analysis: a quantitative summary of the police/prosecution/court process for two actions by drug users

Table 2 shows national expert estimates — based on consultation with informed persons — regarding the proportions of action taken by the police, the prosecutors and the courts. These estimates are given for two contrasting scenarios: a drug user who uses or possesses small amounts of cannabis in private and a drug user who carries out minor trading/retail sale of heroin in public.

As can be seen from Table 2, in the majority of Member States the priority given to action by the police and prosecutors varies with the type of offence. Where police discretion results in no further action and/or diversion, without reference to the prosecuting authorities, this is most likely to occur in relation to specific aspects of drug use/possession. It is least likely to occur in

relation to retail sale of drugs or major property crime (although a minority of Member States may treat minor drug dealing and property crime as closely connected to drug use). A practice of prioritisation, and a corresponding de-prioritisation, can be seen — with a broadly similar pattern mirrored at the next stage of decision-making, namely the prosecutor level.

A series of qualifications must be applied to Table 2. The first and most obvious is that the findings presented in the country reports and summarised here are based on the judgments of informed persons — not on field research or national statistics. Secondly, in relation to the estimates of police action/non-action in response to

TABLE 2: INTERVENTIONS AND DISCONTINUANCE

In the majority of Member States, relatively few cases of use/possession of cannabis in private go all the way from the prosecutor to criminal penalty at court. In contrast, nearly all cases of public retail sale of heroin are prosecuted to the point of criminal penalty.

| | RESPONDING TO DRUG-LAW OFFENCES | |
|---|--|---|
| | Example A A drug user who uses or possesses small amounts of cannabis in private | Example B A drug user who carries out minor trading/retail sale of heroin in public |
| POLICE DECISIONS The proportion (all figures in %) of cases which, having been observed and investigated by police, are sent to the prosecutor No 'blind eye', no discontinuance | <i>High proportion:</i> A = 100, B = 100, FIN = 100, EL = 100, IRL = 100, L = 100, I = 98 (the police refer cases to the administrative authority (<i>prefetto</i>) even though, in reality, they sometimes omit to report the offence) <i>Low proportion:</i> D = 20, NL = 0, DK = 0, E = 0 <i>Intermediate:</i> E&W = 70 (of those investigated, with some reduction in charges); F = 80 (inquiries in private by French police are rare, but, if they occur, then charges of possessing for purposes of retail sale are likely) | <i>High proportion:</i> A = 100, B = 100, DK = 100, FIN = 100, F = 100, D = 90, EL = 100, I = 100, IRL = 100, L = 100, NL = 85, P = 80, E = 94, E&W = 80 (some reduction in charges in England & Wales, little elsewhere) <i>Low proportion:</i> none mentioned <i>Intermediate:</i> none mentioned |

| | | |
|---|--|---|
| <p>PROSECUTOR DECISIONS The proportion (all figures in %) of cases which, having been received by the prosecutor, are sent on to court No discontinuance</p> | <p><i>High proportion:</i> FIN = 90, EL = 100, IRL = 100 (all with reduced charges), E&W = 90 (a few with reduced charges) <i>Low proportion:</i> A = 0, L = 10 (all with reduced charges), NL = 0, DK = 0, D = 0, E = 0 <i>Intermediate:</i> B = 30 (most with reduced charges), F = 60</p> | <p><i>High proportion</i> (with little or no reduction in charges): DK = 90, IRL = 100, FIN = 100, F = 99, EL = 100, E = 99 <i>High proportion</i> (with some reduction in charges): B = 85, D = 100, L = 85, P = 100, NL = 75 <i>Intermediate</i> (mostly with reduced charges): I = 20 <i>Low proportion:</i> none mentioned <i>Intermediate:</i> A</p> |
| <p>AT COURT The proportion (all figures in %) of cases which, having reached court, are proceeded with Charges may be reduced</p> | <p><i>High proportion:</i> FIN = 98, F = 100 or 70, EL = 70, IRL = 100, L = 95 (all with reduced charges) <i>Low proportion:</i> A = 0, D = 0, EL = 0, NL = 0, DK = 0, S = 0 <i>Intermediate:</i> B = 55 (all with reduced charges)</p> | <p><i>High proportion</i> (with some reduction in charges): DK = 90 (a few with reduced charges), FIN = 100, F = 100, EL = 99, L = 100, P = 100, B = 85, D = 100, S = 77, NL = 98, I = 100 (75 with reduced charges) <i>Low proportion:</i> none mentioned <i>Intermediate:</i> A</p> |
| <p>CUMULATIVE RESULTS Proportion of all suspected illegal acts seen and investigated by police which are pressed to judgment</p> | <p><i>High proportion:</i> FIN, EL, IRL <i>Low proportion:</i> A, D, EL, E, S <i>NB:</i> Situations vary between Member States, but only a minority of instances of possession/use seen by police are passed on to prosecutors and sent by them to court (see the text for exceptions)</p> | <p><i>High proportion:</i> Most Member States <i>Intermediate:</i> A <i>NB:</i> In nearly all Member States, the majority of cases of small-scale public trade of heroin are referred to the courts by police and prosecutors, and the courts press on to judgment (with a reduction in charges in some cases)</p> |

Source: National experts' reports.

acts of drug use/possession which are illegal under national law, most national experts refer to circumstances in which the police observe use/possession and take preliminary investigative action (e.g. stop the person and examine the substance). However, in

many Member States, a number of illegal acts of use/possession which are observed are not investigated (the numbers are not known and generally could not be estimated by national experts). If the baseline of the number of use/possession cases was reset at 'all acts of use/possession observed' (whether investigated or not), then the estimated percentages of instances not passed on by the police to the prosecutor (percentage of 'no further action' plus 'no further action/diverted' by the police) would be higher than reported here. This would be mirrored in lower cumulative estimates of the proportion of such observed acts which are pressed to judgment. Because of this dilemma, we have not displayed estimated percentages for the 'cumulative results'.

The overall pattern of decision-making by the police, prosecution and courts is rather like a funnel. The shape of the funnel depends on the operation, in practice, of the specific national legal system. Some examples of this 'funnel' process are as follows:

- *Police decision-making*

In some Member States, such as Germany and Portugal, at the initial stage of police assessment of the situation, the police are relatively unlikely to take action that results in passing a file to the prosecutor (although they may give advice). Clearly, what this means is that the prosecution authorities in these Member States make case-by-case decisions in fewer instances. By contrast, the police in Austria, Belgium, Luxembourg, Italy⁽³³⁾ and Ireland prepare and pass on a file in the great majority of instances of private cannabis use/possession.

- *Prosecutor decision-making*

Much discontinuance in relation to private cannabis use/possession occurs at the prosecution stage. This would appear to

⁽³³⁾ Use in itself is not an offence (criminal or administrative) in Italy. In the case of possession for personal use, administrative action is favoured. In this case, it will be the prefect rather than a court who takes action, following a police report.

TABLE 3: LIKELIHOOD OF FORMAL ACTION REGARDING CANNABIS POSSESSION/USE IN PRIVATE IN ALL THE MEMBER STATES

| | Police stage | Prosecutors | Court |
|-------------------|------------------------------------|--|--|
| Belgium | | | |
| Denmark | | | |
| Germany | | | |
| Greece | | | |
| Spain | | | |
| France | | | |
| Ireland | | | |
| Italy | | (Missing data) (1) | (Missing data) (1) |
| Luxembourg | | | |
| Netherlands | | | |
| Austria | | | |
| Portugal | | (Missing data) | (Missing data) |
| Finland | | | |
| Sweden | | | |
| England and Wales | | | (Missing data) |
| Overall picture | Diverse approaches at police stage | Diverse approaches, but discontinuance quite common at prosecution stage | Most Member States discontinue action at or before court stage |

Key

- = Relatively high tendency to take formal action without discontinuance.
- = Moderate tendency to action but also moderate discontinuance.
- = Relatively little (or no) action, or some action with much discontinuance.

Source: Table 2, derived from national experts' reports, based on consultations with informed observers.

(1) Since the 1993 referendum, only administrative action is possible in cases of use/possession for personal use of drugs, no matter what the type of drug or where the use/possession occurred. The police refer such cases to the administrative authority. The prosecutor and courts have no role in such cases.

apply to Austria and (to some extent) Germany. Discontinuance may in some cases be achieved through a form of bargaining with the alleged offender, with the prosecutor ‘holding in reserve’ the power to send him or her to court. Such bargaining may result in substitution of a lesser charge and/or an agreement that the person will attend a regime of treatment, or a small prosecutor’s fine. Only in a minority of countries, for example Greece and Ireland ⁽³⁴⁾, do virtually all accused persons go more or less automatically to court.

- *Court cases pressed to judgment/discontinuance*

Some cases of private cannabis use/possession do reach the courts (though the proportion varies greatly across Member States). In some countries, all charges for such an offence may be dropped at court (Austria, Greece, Sweden and, to some extent, Germany) in return for some degree of cooperation (i.e. treatment) by the accused person. In other countries (Luxembourg), the court will not drop the charge but will reduce it. In others (Ireland), the court will neither reduce nor drop the charge.

The common, underlying objective pursued, in the majority of Member States, is one of no completion of prosecution for ‘simple’ possession/use (i.e. not for trade). The means by which this is achieved — and at which stage of the process (police, prosecutor or court) — varies according to the Member State.

From this and other information presented in greater depth elsewhere in this study (see national chapters in Part 2), we conclude that there is a common European legal sensibility regarding the prosecution of ‘simple’ drug use and possession for personal use. The final chapter (‘Conclusions’, p. 74) of this section examines some of the implications of this situation. First, however, we will look at these and other patterns in greater detail.

⁽³⁴⁾ In Ireland, possession of cannabis is treated in a different way to possession of other drugs. First or second offences of possession for personal use are punishable by a fine. Further offences are punishable by imprisonment of up to one year (if convicted in a lower court: on summary) and up to three years if the case is serious enough to merit being brought before a higher court (indictment).

TABLE 4: CONTINUUM OF DISCONTINUANCE FOR POSSESSION/USE OF CANNABIS IN PRIVATE IN THE MEMBER STATES

States are grouped together according to the extent of discontinuance.

| <i>No discontinuance at any level</i> | <i>Discontinuance at one level only</i> | <i>Discontinuance at two levels</i> | <i>Discontinuance at every level</i> |
|--|---|---|---|
| (police, prosecutors and courts never pursue a policy of discontinuance) | (discontinuance is generally restricted to either police, prosecutor or courts) | (police and prosecutor can discontinue an action) | (police, prosecutors and courts all have significant tendencies to discontinue) |
| Finland Ireland | Greece Luxembourg Portugal | Austria Belgium France Sweden England and Wales Italy ⁽¹⁾ | Denmark Germany Netherlands Spain |

Sources: Tables 2 and 3, derived from national experts' reports (based on consultations with informed observers).

(1) Since the 1993 referendum, only administrative action is possible in cases of use/possession for personal use of drugs, no matter what the type of drug or where the use/possession occurred. The police refer the case directly to the administrative authority. The prosecutor has no role in such cases and never takes action. Only an administrative sanction is possible, such as suspension of a driving licence, a licence to carry arms, passport or any other equivalent document. This sanction is applied by the administrative authority (*prefetto*).

Climates of opinion regarding practices in the Member States

In order to put the findings on practices into some kind of policy context, the study coordinators set out a range of propositions designed to discover the boundaries of agreement between the justice systems of Member States. In each of the Member States, a national expert consulted with practitioners and researchers in and around the legal system to see what degree of consensus could be discovered at national level. Each proposition put forward by the national experts is set out in italics below and is followed by a summary of the agreement, disagreement or divided opinion which it elicited.

Consensus on proportionality

(1) Within the great majority of the Member States, there appears to be overall agreement with the proposition that:

In general, actions taken by the legal system in relation to drugs should be proportional to the harms which they seek to prevent. This principle should be followed by the police, prosecutors and the courts. Detailed guidelines for action should be provided at national (and, where appropriate, regional) level ⁽³⁵⁾.

However, in Italy, many legal observers would point out that any such guidelines could violate the principle of legality. In Spain, the criminal justice system is not seen as the appropriate means for curtailing drug consumption. However, administrative measures apply to public consumption.

(2) Regarding priorities for action in the light of proportionality, there also appears to be overall agreement in legal circles within the majority of Member States that:

The highest priority should be given (by the police and prosecutors) to retail sale of the more dangerous drugs ⁽³⁶⁾.

Two dissenting opinions on this matter (one of ‘divided opinion’ and one ‘no’) were centrally concerned with the principle of legality and its preventative function. In Sweden, opposition (‘no’ to the above proposition) was also due to concern that such an approach would negate the threefold government policy of reducing supply, reducing recruitment of new users and countering existing use per se. In Spain (‘divided opinion’), there were unresolved concerns concerning prioritisation of particular drugs in the context of prosecution of traffickers.

⁽³⁵⁾ In 12 countries there was agreement (Belgium, Denmark, Germany, Greece, France, Ireland, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden), in no country disagreement and in three countries (Spain, Italy, England & Wales) there was divided opinion.

⁽³⁶⁾ In 12 countries there was agreement (Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, England & Wales), in one country there was disagreement (Sweden), and in two countries there was divided opinion (Spain, France).

(3) Opinion in the great majority of Member States also appears to be in agreement with the proposition that:

Actions in these cases will always include criminal prosecution ⁽³⁷⁾.

However, legal opinion appears to be divided in Germany, as evidenced by the following comment: ‘Increasingly in German legal science and sociological research, it is maintained that — even with traffickers — the principle of proportionality ⁽³⁸⁾ has to be strictly adhered to and the principle of general prevention must not override it.’ The phenomenon of addicted traffickers/dealers calls for diversion as an option. Some German experts claim that established, localised dealers perform a degree of harm reduction (since they ‘serve a steady group of customers, and therefore develop some accountability for quality, dosage and general counselling of the clients’).

(4) In general, there is also agreement that:

Other priorities should be cases in which users of any drugs get involved in other serious crimes for reasons relating to their drug use, or those whose public use is associated with social nuisance and low-level trade ⁽³⁹⁾.

In the context of general agreement with this by Spanish legal opinion (as reported by the national expert), there was nevertheless mention of some aggravating factors, such as retail sale to minors, and some mitigating factors, such as being in withdrawal from drugs, or being intoxicated. However, these comments refer more to considerations at court level than to the police or prosecutors.

⁽³⁷⁾ In 14 countries there was agreement (Belgium, Denmark, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, England & Wales), in no country disagreement, and in one country there was divided opinion (Germany).

⁽³⁸⁾ In its broadest sense, the principle of proportionality means that any prohibitions and punishments included in written law, the manner in which the law is applied in practice, and the harshness of any punishment have to be justifiable in terms of the social harms prevented.

⁽³⁹⁾ In 13 countries there was agreement (Belgium, Denmark, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, England & Wales), in one country disagreement (Sweden), and in one country there was divided opinion (Germany).

(5) There was a mixed reaction to the idea that:

Action in these cases should include mediation with the victims; criminal or administrative proceedings [...]; conditional sentences (diversion from custody or diversion from larger fines, on condition that the user follows a programme [...])⁽⁴⁰⁾.

Of the six dissenting opinions, only two were a clear ‘no’ (the rest being ‘divided opinion’). In the case of one response of ‘no’, it was stated that alternatives to penal action should only be possible in cases of simple use (heroin and cannabis). The divided opinions refer to disagreements between the police and prosecutors regarding the value of mediation.

(6) Finally, in terms of consensus, it seems generally agreed that:

The lowest priority should be given — by the police and prosecutors — to action against use (or possession for personal use) of cannabis, and to action against use (or possession for personal use) of other drugs which are regarded as being not amongst the most dangerous, as long as the use is unconnected with nuisance or (other) crimes⁽⁴¹⁾.

What this implies in practice is more difficult to establish, as will now be seen.

Lack of consensus on what actions if any are proportional in the case of the lowest priorities

(7) On the basis of our enquiries, there is no overall agreement across the Member States’ experts about the following propositions (no consensus one way or the other):

⁽⁴⁰⁾ In nine countries there was agreement (Belgium, Denmark, Germany, Spain, Ireland, Italy, Netherlands, Finland, Sweden), in two countries disagreement (France, England & Wales), and in four countries there was divided opinion (Greece, Luxembourg, Austria, Portugal).

⁽⁴¹⁾ In 11 countries there was agreement (Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, England & Wales), in one country disagreement (Spain, where possession in a public place would be administratively sanctionable), and in three countries there was divided opinion (Belgium, France, Sweden).

Low-priority action should generally be: no further action by the police or prosecutors; forfeiture of prohibited objects; on-the-spot fines (transaction); short-term restrictions on entry to certain areas (related to social nuisance); plus giving of advice (as appropriate to national law) (42).

Of the eight dissenting opinions within the Member States, four were of 'divided opinion'. In Finland, experts had concerns around the exclusion of under-age users of cannabis (the 'stepping-stone' theory of drug use). Both in France and Sweden, experts point to their official government policies regarding the whole issue of cannabis. In the case of Portugal and Austria, the issues of efficacy and lack of popular support were also raised.

(8) No agreement was reported on the following proposition:

Use/possession per se should never result in imprisonment (in any circumstances) (43).

There appears to be a high level of divided opinion among Member States on this issue. The debate appears to be about: (1) whether or not imprisonment is an effective way of dealing with addiction, (2) whether its removal will have an impact on social norms, and (3) whether the threat of imprisonment acts as a deterrent (all of which are subjects beyond the scope of this report).

(9) No agreement was reported on the following proposition:

Use/possession per se should sometimes result in imprisonment (depending on circumstances) (44).

(42) In six countries there was agreement (Belgium, Denmark, Germany, Ireland, Italy, Netherlands), in five countries disagreement (Spain, France, Finland, Sweden, England & Wales), and in four countries there was divided opinion (Greece, Luxembourg, Austria, Portugal).

(43) In five countries there was agreement (Germany, Spain, Italy, Austria, Portugal), in three countries disagreement (France, Ireland, England & Wales), and in seven countries there was divided opinion (Belgium, Denmark, Greece, Luxembourg, Netherlands, Finland, Sweden).

(44) In six countries there was agreement (France, Ireland, Luxembourg, Netherlands, Sweden, England & Wales), in five countries disagreement (Germany, Spain, Italy, Austria, Portugal), and in five countries there was divided opinion (Belgium, Denmark, Greece, Luxembourg, Finland).

The considerations behind the diverse points of view are reflected in point 7 above.

(10) However, for the great majority of Member States, legal opinion is hostile to the proposition that:

Use/possession, if repeated three times, should generally result in imprisonment ⁽⁴⁵⁾.

While there were four with divided opinions on this issue, only one Member State agreed with this proposition (Ireland). Most disagreed, the majority strongly. In other words, a policy such as that adopted in the United States of ‘three strikes and you’re out’ (i.e. sent to prison) does not attract general support.

What is the significance of these opinions in the Member States as far as the generalisation of practices is concerned? This is a question to which this study cannot provide a definitive answer. Some possibilities might be as follows:

- The climate of opinion in a Member State helps to shape the practices of the police, prosecutors and the courts.
- Such climates of opinion are the result of existing practices, as practitioners bring their legal views more or less into line with their actions.
- Such climates of opinion have a loose, tenuous relationship with practices.

We consider that the second of these possibilities may apply (and perhaps also the first). It appears from the national reports in Part 2 that experts and practitioners do their best to achieve consistency between actual practice and their legal frameworks and principles.

⁽⁴⁵⁾ In one country there was agreement (Ireland), in 10 countries there was disagreement (Spain, France, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, England & Wales), and in four countries there was divided opinion (Belgium, Denmark, Germany and Greece).

In summarising the various climates of opinion in Member States, it is fair to say that, whilst we in the EU cannot always agree on the details of the way forward in policy terms, we generally subscribe to the same broad principles — especially on proportionality of action. This means, among other things, that there is a general climate of opinion in support of the lowest priority being given by the police and prosecutors to action against use (or possession for personal use) of those drugs regarded as dangerous (e.g. cannabis) and very dangerous (e.g. heroin) ⁽⁴⁶⁾. However, if the user becomes involved with crimes of theft or retail sale, it is generally felt that they should become a high priority for prosecution.

Common features

The courts sit at the end of a judicial ‘production line’ whose lower levels are staffed by the police and prosecutors. In this sense, courts take and shape what is passed on to them. On the other hand, the policies and status of the courts probably have a quite considerable influence on the practices of prosecutors and a significant, if less obvious, influence on everyday police practices.

The general dynamics of these relationships from one Member State to another are beyond the scope of this study (although the various national experts provide some insights in Part 2 of this study). However, we outline below some observations regarding the prosecution of drug-related cases.

- In the majority of Member States in which use/possession could be proceeded against administratively or criminally, there is a great deal of non-action, informal action or discontinuance at police level.
- When the police refer a case on to the prosecutor, there is then significant pressure on the prosecutor to discontinue (where

⁽⁴⁶⁾ For the sake of consistency, the categories ‘dangerous drugs’ (e.g. cannabis) and ‘very dangerous drugs’ (e.g. heroin) are utilised throughout the first section of this study. However, we recognise that national judicial systems, laws, practices and opinions may recognise a variety of categories of danger (or, in some cases, not make such strong distinctions). Some of these differences in categorisation and language will be evident in the national reports in the second section of this book.

possible under national law and when appropriate under national drug policy) or to accept a settlement (where possible), or at least to adopt a lesser charge (especially when the accused is cooperative).

- In those Member States in which neither the police nor the prosecutor ‘filter out’ any drug offences, there is more work for the courts. In this case, the pressure to find a conclusion that is proportionate shifts from the police or the prosecutor to the court.

It is notable that there is a greater general tendency for Member States to refer to the courts cases involving charges such as public sale of heroin (in small or ‘user’ amounts) rather than cases involving private use (or possession of small amounts) of a drug such as cannabis. The cumulative decisions of police, prosecutors and courts result in more people facing the courts for public sale of heroin than for private use/possession of cannabis ⁽⁴⁷⁾. This is clearly justified by the concept of proportionality of action: the degree of intervention should be justifiable by the harms thereby prevented. However, as shown in this chapter and in Table 2, the means by which discontinuance of action is achieved and the levels of the system at which this occurs varies considerably from one Member State to another.

⁽⁴⁷⁾ Only in Ireland do all adults over 18 found by police to have cannabis in private get sent to the prosecutor; all of them are then referred to the courts and they all subsequently face judgment with little probability of discontinuance or a reduction in charges.

CONCLUSIONS: COMMON OBJECTIVES AND THE SCOPE FOR COMMON ACTION

Main findings

Both within and between Member States, there is a degree of consensus in legal circles regarding the principles which should underlie prosecution. This consensus focuses in particular on proportionality and on the desirability of prioritising the prosecution of drug users (or non-users, for that matter) for retail sale of drugs and property crimes.

In terms of actual practices of the police and prosecutors, the study finds convergence in relation to minor retail sale or property crimes by drug users: Member States generally prosecute. Any fine-tuning of charges or other aspects of handling the case are carried out within the context of the ongoing prosecution process.

There are differences in the responses to use/possession. However, a degree of variability of response in practice is understandable because of several considerations. In terms of proportionality, the level of harm to society caused by drug use/possession/trade may be seen to vary according to the social context. In terms of national policies on drugs, some observers emphasise that there is a degree of 'leverage' resulting for the authorities if prosecution applies (crudely put: 'accept treatment or else go to court and maybe to prison'). In some countries, there are formal concerns about the principle of legality, which in some contexts emphasise the desirability of prosecution.

However, as far as responses to use/possession are concerned, differences in practice generally centre on the level of the system at which legal action is discontinued. Member States with a greater tendency to police intervention appear not to press the prosecution of the majority of cases to conviction. Thus, leaving aside national specifics about implementation of policies, we can

observe a common objective: not to proceed with conviction of the majority of cases of use/possession which first come to the attention of the police.

This opens up the possibility of a common agenda for all Member States which respects their specific legal systems, circumstances and policies. The emphasis should be upon very clear communication of objectives, leaving the means open.

Common action on prosecution of drug users

National guidelines are of course entirely a matter for individual Member States. However, with sensitive handling and the agreement of all Member States, a list of common principles could be identified, building on existing prosecution practices as revealed in this and other research. The following would offer a starting point:

- equality of treatment under law;
- proportionality of action, with the highest priority being given to retail sale and the lowest to drug use and possession for own use (small amounts, less dangerous drugs, not in public);
- maximum opportunities for diversion of drug users to services and treatment wherever appropriate, thus reducing future crime and expenditure;
- training for the police and prosecutors (basic training and in-service training);
- provision of information to citizens about drug policies and national law, thus ensuring public support; and
- policy debate at local, regional and/or national levels as appropriate.

A common EU position could be agreed on the objectives that prosecution of drug users might expect to achieve. This could take the form of a declaratory (non-binding) instrument on prosecution of drug users. However, there is still some way to go before this could be drawn up.

Prosecution of property offenders

Our second conclusion concerns acquisitive offences committed by drug users. These may be property offences motivated by the need to raise funds to purchase drugs or part of a general pattern of delinquency that includes use of illegal drugs.

The study coordinators and contributing national legal experts find no grounds to recommend that drug users who commit property offences should be prosecuted more or less vigorously than non-users.

It seems that, in general, the courts decide what account (if any) should be taken of the fact that an offender may be a drug user. As for police and prosecution decision-making, this study finds no basis in present practices or in law for any general recommendation concerning the prosecution or non-prosecution of drug-using property offenders.

However, national authorities may wish to continue to give consideration to the question of how to respond, within the context of the law, to the minority of drug users who (a) commit (other) offences and (b) may need social, welfare and/or health assistance, whether for difficulties associated with their drug use and/or for difficulties that preceded their drug use.

Future research and indicators

Our research would suggest that it would be useful to conduct a series of studies at European and national level to develop and fine-tune a research methodology capable of capturing the reality of police and prosecution decision-making in all Member States.

Direct observation of police and prosecution practice, combined with detailed interviewing of the police and examination of files, would yield more reliable information on police practices (and hence prosecution options) regarding drug users and others. This would be desirable for the following two reasons:

- Whether or not the police are under the supervision of judges or their work is reviewed by prosecutors, in all countries, it is incontrovertible that, to a large degree, police action shapes the information available to prosecutors and judges. Clearly, where non-action by the police is concerned, prosecutors and judges have very little information about and correspondingly low potential influence over police practice. Also, there may be no information recorded in the police's own management systems when it comes to non-action by the police ⁽⁴⁸⁾. Accordingly, any study that looked at police files might find little information about such non-action. One possible approach is to interview police officers (and prosecutors). In the present study, there were neither the time nor the resources to do this in a structured manner — instead, national experts were asked to conduct a quick 'poll' of practitioners. The best approach, however, would be to observe directly day-to-day practices, using interviews to help understand the underlying objectives.
- The legal framework in some Member States does not allow the option of police 'discretion'. This led to problems in the present study for some national legal experts, who suspected that there were not just a few but thousands of instances when the police saw drug use or possession of small amounts (sometimes in public) yet took no action, even when strict adherence to the drug laws would have meant that they should have done so ⁽⁴⁹⁾. This is often generally known, according to the national reports. Yet, national officials and independent observers involved in the present study sometimes could not bring themselves to acknowledge — for publication purposes — that this was occurring.

In summary, future research on prosecution of drug users should involve the following:

- interviews with police and prosecution staff, as well as expert consultation;

⁽⁴⁸⁾ Studies in the general field of police practice show the value of direct observation. For example, of 138 encounters between police officers and members of the public observed by researchers which should have been recorded by police, a form was filled out in less than a quarter of cases (Bland et al., 2000).

⁽⁴⁹⁾ The study coordinators suspect that there are similar, possibly more tractable, problems in relation to prosecution practices.

- direct observation of everyday practices; and
- political will, at the level of police and prosecution authorities in the Member States.

By following the above recommendations, it should be possible to develop a European indicator of prosecution of drug users (and indeed of retail sellers). Such an indicator could be used, together with other data, to improve our understanding of the functioning and impact of prosecution policies and practices, in the context of a broader understanding of the issues involved.

Legal framework for non-action by the police

In some jurisdictions, police decision-making that in practice results in non-prosecution can be a sensitive legal issue. According to the national experts, in some jurisdictions, police discretion is exercised in practice, even though the legal framework for such discretion is ambiguous. In other jurisdictions, police discretion is infrequently exercised, even when the option exists. Both these patterns of non-correspondence between legal possibilities and practice are evidenced in this study.

It would seem, in principle, undesirable that the police and prosecutors should be left in such a legally ambiguous position. We therefore respectfully suggest to those Member States whose legal processes do not present a basis for non-prosecution, yet whose drug strategies include diversion to treatment by the police and prosecutors, that they might consider the case for codifying this option.

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FRAMEWORK FOR THE COUNTRY REPORTS

In each Member State, a legal expert was asked to compile a report according to the framework outlined below. These chapters should be read in conjunction with the methodological remarks and reservations in the first section of the book. There, you will also find a description of use of terms, although the reader is asked to note that the language and legal definitions may vary from one national narrative to another in this second section of the book. The study coordinators and editors have not required the various national authors to adopt a common language or definitions if they believe that this would not be appropriate, either in terms of their specific legal systems or the climate of national opinion in their country.

The headings listed below are taken from the original questionnaire that each national expert had to complete in order to compile the relevant information required by the study for the national reports. Abbreviated versions of these headings have been used, where appropriate, in many of the country chapters.

3.1. OUTLINE OF THE LEGAL SYSTEMS IN FORMAL TERMS

3.1.1. Type of system, basis of law, strict liability or not, etc.

3.1.2. Overview of reactions that are **possible** by the police and prosecutors, responsibilities of the police, prosecutors and social partners in judicial decision-making in general. In particular, whether no further action (no further action), diversion and reduction of charges exist as possibilities⁽⁵⁰⁾; if so, their legal framework.

⁽⁵⁰⁾ Definitions as given in the 'Methodology' chapter above. **No further action:** the decision-maker chooses not to take any further formal action (this includes decisions made within or outside the bounds of national law); such a decision may or may not include an informal warning. **Reduction of charges:** either charging a person with a lower charge than might have been applied or charging at one level and then reducing the charge at a later stage in the legal process. **Diversion:** encouraging an offender or suspected offender to enter some kind of social or health programme, whether this is done by (1) giving advice in the context of no formal action, (2) giving advice in the context of formal action, or (3) offering alternatives to prosecution or bargaining for a reduced charge (conditions); the legal practices vary in the Member States.

3.1.3. Overview of reactions that are **typical** for 3.1.3.1 the police, 3.1.3.2 prosecutors, 3.1.3.3 courts. Criteria used. Whether previous offences are considered: would a **second offence of the same type** be a criterion likely to be taken into consideration; what would be the likely impact of a second offence when one was more serious and one less so?

3.2. CURRENT PRACTICE BY THE POLICE, PROSECUTORS AND COURTS IN RESPONSE TO SPECIFIC OFFENCES

An elaboration of the processes and the range of most typical outcomes — at the levels of the police and prosecutors and courts — in relation to the following.

Use/possession in private, where the amounts of drugs and/or circumstances of discovery are such that the national system considers that use/possession is in private and that drug dealing is not involved, in relation to:

3.2.1. Drugs considered by the law to be very dangerous, or in the top category (e.g. heroin). Here and for each of the following please include distinct subsections: (a) at police stage, (b) at prosecution stage, (c) at court stage

3.2.2. Other illegal/prohibited/dangerous drugs (e.g. cannabis)

Use/possession amounting to **public** use (open, visible):

3.2.3. Drugs considered by the law to be very dangerous, or in the top category (e.g. heroin)

3.2.4. Other illegal/prohibited/dangerous drugs (e.g. cannabis)

Dealing (retail sale) of drugs considered by law to be very dangerous, or in the top category (e.g. heroin):

3.2.5. In private, to adults (existing users, who immediately use together)

3.2.6. In private, to adults (existing users, who buy and depart)

3.2.7. In public, to adults (open/street market)

Dealing (retail sale) of other illegal/prohibited/dangerous drugs (e.g. cannabis):

3.2.8. In private, to adults (existing users, who immediately use together)

3.2.9. In private, to adults (existing users, who buy and depart)

3.2.10. In public, to adults (open/street market)

Property crime by drug users

3.2.11. Shoplifting (stealing from a shop) an item on sale for EUR 100

3.2.12. Burglary of a house (stealing items whose new replacement value would be about EUR 1 000)

3.2.13. Stealing from a person in the street money to the value of EUR 100, for example by snatching a bag or purse, **without** any physical hurt to the person

3.2.14. Stealing from a person in the street money to the value of EUR 100, for example by snatching a bag or purse, **with** physical hurt to the person (e.g. is pushed or falls down and is thereby injured)

(For each question in Section 3.2, experts were asked to include distinct subsections for (a) police, (b) prosecutors and (c) courts.)

3.3. NATIONAL VIEWS ON COMMON STANDARDS ON PROSECUTION OF DRUG USERS IN EUROPE

3.3.1. What should, ideally, in the opinion of key people — the police, prosecutors, and social partners — happen in practice? Please refer to national views on each of statements (i) to (x) in the draft 'common standards' statement (not shown here). What criteria should be used? What additional guidelines, etc., are needed, if any?

3.3.2. What, if any, additional **legal framework** is needed? Is any change required regarding the constituent elements of any of the offences discussed (this issue arises in the EU action plan)? Please reply with reference to all the offences described and give reasons why change is or is not needed — in the opinion of key opinion-formers.

3.3.3. One **key issue of special concern**, making proposals either for clarification/consolidation of existing practice, or for major changes in existing practice. (This may be on any matter covered in the study, as long as it concerns legal reactions in practice to drug users.)

Brice De Ruyver, Kristof Van Impe and Tom Vander Beken

Outline of the legal system of Belgium ⁽⁵¹⁾

Sentencing by trial is the exception rather than the rule

As in many other countries, in Belgium, appreciation has grown over the past few years that adjudication and punishment are not always the best responses to crime. It is recognised that criminal law, in itself, cannot wholly control a social phenomenon and that the courts may not be the only possible site of social regulation ⁽⁵²⁾. Besides that, the limits of the logistic capacity of adjudication and traditional criminal sanctioning through imprisonment have become very clear. Considerable backlogs in the courts and overpopulation of prisons (Beyens et al., 1993; Snacken, 1997) illustrate that the traditional criminal sanctioning system has reached its limits. Since the majority of sentencing practices is to be found in the procedures leading up to a case coming to trial, sentencing by trial is now the exception rather than the rule.

The public prosecutor is the spider in the criminal justice web

The Belgian public prosecutor plays a central role in the process of filtering offences through the criminal justice system. In principle, he receives reports from the police services and decides independently whether or not to proceed with the case. Because of this role, the prosecutor is regarded as ‘the spider in the web’ of the criminal justice process in general, and of criminal sentencing in particular (Parmentier and Peters, 1998).

The principle of expediency was not established by law until 1998. Article 28(quarter) of the Code of Criminal Procedure now

⁽⁵¹⁾ The initial sections of this chapter are based on Vander Beken, 2000, pp. 29–37.

⁽⁵²⁾ See, for example, the relevant policy notes of the most recent Ministers of Justice: De Clerck, 1996; Verwilghen, 2000.

stipulates that the public prosecutor, taking into account the criminal policy guidelines of the Minister for Justice and the Board of Prosecutors-General, must decide the expediency of the prosecution.

However, the Belgian public prosecutor's power of discretion is far more complex than merely the ability to decide whether a case is brought before the courts or not. Among his discretionary powers, there are several other options between the two extremes of dismissal and prosecution.

The public prosecutor and the police

According to the law, Belgian police officers are obliged to make written records of their findings and must immediately report to the public prosecutor (Article 29, Code of Criminal Procedure). In principle, they have no discretionary powers concerning further possible action, and failing to report or record an offence is a breach of duty for which they can be reprimanded by the disciplinary authority (the general prosecutor) or even face criminal prosecution. Beyond their initial report of the offence, they have no investigative powers of their own (Van den Wyngaert, 1993).

In practice, however, police services in Belgium do in fact exercise a certain degree of discretion and do not report every offence to the public prosecutor. Besides the fact that the police do not report some minor offences (Van Daele, 1997) or only issue a warning to the offender, the police very often play an intermediary role by guiding drug offenders who are in a very early phase of drug use into treatment and care facilities instead of bringing them into the criminal justice system (De Ruyver, 1993a, 1993b; Carmen, 1996–97; De Ruyver et al., 1998, 1999).

The public prosecutor and the executive

Until the middle of the 1990s, the Belgian public prosecutor functioned according to the principles of the 1808 Code of Criminal Procedure. This meant that the public prosecutor was independent of the executive and was in charge of the investigation

and of prosecution policy. The decision whether to prosecute or not rested fully in his hands (Van den Wyngaert, 1999).

While prosecution had been the rule in the past, it was to become the exception in a criminal justice system that was confronted with an explosion of new criminal legislation. This situation meant that public prosecutors had to make more use of their discretionary powers to dismiss cases or to find solutions to divert the cases out of the ordinary sentencing process. Over time, the situation became more and more congested, since the prosecution policy of the different public prosecutors was too disparate and uncoordinated. Therefore, new legislation in March 1997 put the Minister for Justice in charge of criminal policy and produced binding guidelines for public prosecution (Article 143(ter), Code of Criminal Procedure). This means that the public prosecutor is bound by the guidelines of the Minister for Justice and the Board of Prosecutors-General when deciding whether or not to prosecute.

Type of system

According to the Belgian Narcotic Drug Act of 24 February 1921, controlled substances include (apart from poisons, disinfectants and antiseptics not regarded as illicit substances) soporific and narcotic drugs and other materials which can be used for the manufacture of psychotropic drugs [1]. This list is established by royal decree [2]. Soporific and narcotic substances include opium, heroin, cocaine, morphine, methadone, cannabis and cannabis resin. Psychotropic substances include amphetamines, hallucinogens, pipradol and MDMA [3]. No distinctions are made between offences on the basis of the nature of the substance.

Several Member States penalise the use of drugs per se. However, this is not the case in Belgium. The courts proceed from the assumption that possession is the prerequisite for use, and possession of narcotic drugs — irrespective of type and quantity — is in itself an offence and constitutes valid grounds for prosecuting the user. In Belgium, only group use is punishable, by imprisonment for between three months and five years and/or a fine [4]. In cases of simple use, the sentence may be deferred or suspended,

provided the offender agrees to undergo treatment and supervision [5] (see below).

Belgian law punishes possession by imprisonment for between three months and five years and/or a fine. The term of imprisonment may be increased to 15 or even 20 years in the event of specific aggravating circumstances (such as drug offences involving minors aged less than 12, or committed in the course of occupational activities such as managing a firm) [6]. Possession for personal use can give rise to a suspended sentence, either with a probation order or not [7].

As stated before, the Board of Prosecutors-General (five prosecutors in all) is obliged to implement the policy guidelines of the Minister for Justice by issuing guidelines to the public prosecutors. Two circulars of the Board of Prosecutors-General have been enacted in the specific areas of prosecution for possession and retail sale of illicit substances. These circulars elaborate further on the implementation of the Belgian narcotic drug legislation. The prosecutors are bound by the circulars but may depart from them when practical considerations dictate. The circulars do not give enforceable rights to private persons.

Traditionally, the policy of prosecuting and punishing drug users has varied widely from one court district to another. In particular, there were considerable differences in dealing with cannabis use. A circular dated 26 May 1993 [8] set out a number of general principles in an attempt to unify policy on drug offences across all public prosecution departments. The circular makes a distinction between occasional users, regular users and dealers. According to the circular, regular users are to be given every possible opportunity to seek and obtain treatment. Addicts are usually regarded as sick persons who need to be protected from themselves and against whom society also needs protection. The gravity of the offence committed, the repetitive nature of the offence and the offender's intentions are taken into account when determining what action should be taken (in other words, whether the offender goes to prison or is given the opportunity to go for treatment). The Belgian criminal justice system offers possibilities at

all levels (investigation, prosecution, sentencing and execution of sentence). The courts can encourage treatment, but they have no compulsory powers in this respect.

The circular specifically called for a judicial response to any form of drug abuse, be it no more than a warning or an order to attend a treatment centre. It soon became obvious that this policy was inoperable, especially for the major cities. Consequently, a non-uniform drug-prosecution policy remained in practice.

In order to develop a clear picture of the drug problem, on 17 January 1996, the Belgian Government decided to establish a parliamentary working group [9]. In particular, the working group was asked to make an inventory of the multidimensional aspects of the problem, such as:

- health risks;
- implications for security and public order;
- judicial elements, such as (inter)national drug trafficking and drug-related criminality; and
- social and economic factors.

It was hoped that this process would give an overview of the bottle-necks in the drug policy. New detailed guidelines would then be formulated in order to implement a more harmonised national approach, on the assumption that a uniform policy is the key to a coherent, efficient and effective drug policy.

The parliamentary working group opted for a national policy which constitutes an approach that lies somewhere between the classic prohibitionist stance on the one hand (general prohibition and repression) and the anti-prohibitionist stance on the other (general legalisation and decriminalisation). The circular of the Board of Prosecutors-General of 8 May 1998 should be situated in this context. The contents of the circular are based on the outcome of the working group's deliberations.

The various responses open to the police, prosecutors and courts when addressing drug offences are elaborated below, specifically

taking into account the abovementioned circular of the Board of Prosecutors-General. In each instance, the modality will be briefly described and evaluated, the criteria used will be discussed and information on effectiveness will be outlined.

Overview of possible reactions and their legal basis [10]

According to the circular of 8 May 1998, a realistic and contemporary drug-prosecution policy should focus on the following priorities.

- In addressing individual cases of problematic drug use, a criminal approach should be the last resort.
- A criminal intervention with regard to drug users is only necessary when additional crimes have been committed and public order has been disturbed. The nature of this intervention must be determined by the seriousness of the case and the individual situation of the drug offender.
- Taking the availability of cannabis and its predominantly social acceptability into consideration, non-prosecution of (possession for personal) use of cannabis is recommended. In contrast, the punishment for possession of other illegal drugs remains the same: in the case of possession for personal use of illegal drugs other than cannabis, prosecution is recommended when public order is disturbed or when the drug use is problematic.
- Addicted drug users who commit drug-related crimes should be able to avail of one of the several diversion options.

Police

The Belgian police are not allowed to dismiss cases, neither are they authorised to proceed to a conditional dismissal. In practice, however, police services in Belgium do in fact exercise a degree of discretion and do not report every offence to the public prosecutor. Besides the fact that the police do not always report some minor offences (Van Daele, 1997) or just issue a warning to the offender, the police very often play an intermediary role by placing drug offenders who are in the early stages of drug use into treatment and care facilities instead of bringing them into the

criminal justice system (De Ruyver, 1993b; Carmen, 1996–97; De Ruyver et al., 1998, 1999).

Moreover, the police are confronted daily with the drug environment and have a good understanding of the local drug problem. This means that the police have an important function reporting on the drug situation to the public prosecutor's department (Peeters, 1991).

Prosecution

Transactions

The Belgian system does not recognise the plea of guilty, and the concept of plea bargaining is unknown. However, transactions (Dupont, 1984; Cuyppers, 1991; Arnou, 1993; Demargne, 1994; De Nauw, 1997) have a legal basis and are widely applied. A transaction is a unilateral offer by the public prosecutor to the offender, whereby it is proposed that the offender should pay an amount of money within a certain time limit. If the offender accepts, the prosecution will drop the charges. It is not possible to reopen the case at a later stage. As there is no conviction, there is no criminal record for the offender.

Transactions may be proposed, with respect to all offences with sentences not exceeding five years of imprisonment, if the (not disputed) damages have been paid and if there are mitigating circumstances which, should the prosecutor proceed with the case, would lead to a fine or confiscation, rather than a custodial sentence (Article 216(bis), Code of Criminal Procedure). If there is a history of recidivism, a transaction is not an option. The offender is not obliged to accept a transaction proposal ⁽⁵³⁾.

Payment of a transaction can be difficult for many drug offenders. Even small amounts can cause problems, since the financial situation of a lot of drug users is limited by their lifestyle. A fine often

⁽⁵³⁾ See Deweer, 27 February 1980, *Europees Hof voor de Rechten van de Mens.*, Series A, Vol. 35.

exacerbates the downward spiral of social deprivation. Moreover, the beneficial effect that several public prosecutors believe a transaction to have is most of the time negligible.

The usefulness of the transaction in settling drug offences seems in practice to be rather insignificant. Nevertheless, the circular of the Board of Prosecutors-General of 8 May 1998 states that the transaction is the most appropriate response to simple possession of cannabis or other illegal drugs. As far as possession of cannabis is concerned, this option should be applied in cases where non-problematic users regularly, with or without intent, are a social nuisance. In relation to possession of other illegal drugs, the transaction can be reserved to deal with situations where non-problematic users cause a public disturbance or when the risk of such disturbance is realistic. In the event of problematic use of cannabis or other illegal drugs, a transaction is inappropriate. In this situation, the offender is referred to a drug-treatment programme.

These possibilities do not preclude the option of dismissal on condition of payment of any expenses incurred (e.g. for urine controls) or seizure of the drugs.

Conditional dismissal (praetorian probation)

A dismissal according to drug policy can be combined with certain conditions for the offender (Vervaele, 1990–91; Van Cauwenberghe, 1994; Bauwens, 1994–95). This sort of prosecutorial action does not have any explicit legal basis and has to be seen as an aspect of the prosecutor's discretion as to whether to prosecute or not. The conditions for the dismissal can be decided on a case-by-case basis. Besides the obligation to redress damages, the conditions may entail the offender undergoing treatment or being prohibited from certain areas. The offender is not obliged to accept the conditions proposed by the public prosecutor and may opt for trial of his case by the courts (De Ruyver, 1996).

The system of conditional dismissal has the advantage of flexibility. Conditional dismissals are not limited to certain forms of

crime and make it possible to take the individual and social background of each case fully into account. The flexibility of this system is also one of the disadvantages, since there are no legal guarantees for the drug offender. When facing prosecution, the freedom of the drug offender to accept or refuse the proposed conditions is almost hypothetical.

The circular of the Board of Prosecutors-General of 17 April 1998 recommends conditional dismissal in cases of simple possession of cannabis as well as other illegal drugs. This modality should in principle be reserved for cases of problematic drug use rather than possession of cannabis. The notion of ‘problematic’ drug use should not be interpreted as a situation of persistent and regular use, but rather should refer to cases of dependence, addiction, lack of socioeconomic integration or crisis situations. When the conditions have been fulfilled, referral to a drug-assistance programme is possible. In cases of non-problematic drug use, conditional dismissal is only recommended when the drug user often, with/without intent, causes social nuisance and a transaction is not appropriate because of the drug user’s socioeconomic situation.

As far as possession of other illegal drugs is concerned, a conditional dismissal — besides allowing referral of a problematic drug user to a drug-assistance programme — can be used to refer a non-problematic drug user who, with/or without intent, causes social nuisance to an education programme. This measure is especially recommended in cases of young, experimenting (social) users who will benefit from an education concerning the health risks and the legal consequences of drug use.

In practice, since the introduction of mediation, conditional dismissal has only been sporadically applied because of its labour-intensive character. However, since the introduction of the circular of the Board of Prosecutors-General of 8 May 1998, some public prosecutors have rediscovered the conditional dismissal. This development can be explained by the fact that the circular no longer recommends mediation in cases of simple possession but reserves this response for cases where drug-related crime is involved. However, the uncertainty of several public prosecutors

concerning the correct application of the circular as to this specific point is significant. It is clear that the circular had not led to any significant changes, which implies that mediation is still applied by most of the public prosecutors in cases of simple possession of cannabis or other illegal drugs.

Settlement of a drug offence by a conditional dismissal is strongly dependent upon the particular public prosecutor in question, which has resulted in the number of drug users following therapeutic programmes in the context of conditional dismissal being rather small.

Mediation

In 1994, Article 216(ter) of the Belgian Code of Criminal Procedure initiated a system of mediation ⁽⁵⁴⁾. This system is based on the same principles as the conditional dismissal, described above.

In the framework of discretion to prosecute or not, the public prosecutor can decide to dismiss the case under certain conditions. Unlike the conditional dismissal, which is a practical (unregulated) form of exercising prosecutorial discretion, the system of mediation is described in the law ⁽⁵⁵⁾.

In general, mediation is possible for all offences for which the public prosecutor thinks that no sanction of more than two years of imprisonment would be imposed. Since this assessment has to be made *in concreto* and mitigating circumstances taken into account, nearly all offences penalised *in abstracto* with up to 20 years of imprisonment can lead to mediation (Van den Wyngaert, 1998).

The payment of damages is not the only condition which can be proposed to the offender according to Article 216(ter) of the Code

⁽⁵⁴⁾ Bosly, 1993; Declercq, 1993; De Wilde, 1993; Houchon and Peters, 1993; Declercq, 1994; X. (author not known), 1995; Demanet, 1995; Van De Kerckhove, 1995; De Souter, 1996–97; Hanozin et al., 1997; Nouwynck, 1997; De Jonge, n.d.

⁽⁵⁵⁾ By an act of 10 January 1994 which outlines the mediation procedure in criminal cases.

of Criminal Procedure, since mediation is also possible in cases of victimless offences, for instance in the case of drug offences.

When the offender's crime is directly related to an alcohol or drug problem, medical treatment or therapy can be proposed by the public prosecutor. The period of the proposed treatment or therapy may not exceed six months. Community service or specific training programmes for a maximum of 120 hours over a period of one to six months are also an option.

Mediation is frequently applied in settling drug offences. The majority of those who benefit from this process are (young) drug offenders whose drug use is social or experimental in character. Often offenders also have a history of drug-related crimes against property and violent offences.

Nevertheless, the public prosecutors appear to be rather prudent in applying this form of settlement. As a consequence, more serious cases are diverted from mediation. The majority of drug offenders who commit serious drug-related crimes come into the drug-assistance circuit through a probation order. In general, the percentage of drug offenders who attend treatment as a condition of mediation is rather small.

The fact that mediation is limited to less serious crimes increases the risk of a so-called 'net-widening' effect. Mediation should be the last resort when settling a case at the level of the public prosecutor's department and should therefore be reserved for more serious cases. This means that more serious criteria should apply for this modality, otherwise too many cases will have to be adjudicated by the courts.

As mentioned above, there is a distinct lack of clarity about the correct interpretation of the circular of 8 May 1998. Many public prosecutors believe that the circular requires mediation to be reserved for cases where drug-related crime is involved. On the other hand, a lot of public prosecutors are convinced that mediation should also be possible for offenders who are prosecuted for drug use. In reality, the fact that mediation is restricted to drug-

related crime does not imply that its field of application is limited, since drug-related crime is a very common form of crime.

Nevertheless, it is important to note that drug-related crime is often an indication of the problematic (financial) situation of the user, which means that it will usually be very difficult for him to pay compensation for damages. The fact that a drug user commits a crime shows that he cannot support his drug habit by legal means. This situation can hinder the application of the mediation process quite considerably.

There is no consensus among public prosecutors with regard to the question of whether the maximum period of six months during which the mediation conditions have to be adhered to is sufficient for satisfactorily concluding the case. When mediation is proposed for (fairly) serious drug/drug-related offences, most public prosecutors are of the opinion that the six-month period is too short. In contrast, when mediation is applied for less serious crimes, there are no difficulties.

The fact that the offender has to consent to the procedure of mediation is often quoted as an advantage. Nevertheless, taking the relative unattractiveness of the alternatives into consideration (prosecution and/or imprisonment), the reality of this supposition is suspect.

Alternatives to pre-trial detention

According to Article 35 of the Provisional Detention Act of 20 July 1990, the public prosecutor's department, the *juges d'instruction*, the committals boards and trial courts may, before the substance of a case is considered, order that an accused person who is remanded in custody be released on bail under certain conditions (Neve, 1991a, 1991b, 1995; Dejemeppe, 1992; Snacken, 1992; Klees, 1995; Mennes, 1996; Lauwaert, 1997). This is sometimes the case with drug addicts, where a treatment centre is more appropriate than prison. Theoretically, bail can be accepted for up to three months, but this is in fact renewable. The consent of the offender is not necessary, but it is important to point out

that an exception can be made when the physical or psychological integrity of the suspect is threatened. This means that nobody can be forced to undergo detoxification.

Pre-trial detention is the least used modality in prosecuting drug/drug-related offences. This can be explained by the fact that, although the public prosecutor's department can also opt for pre-trial detention, in reality this option is fairly exceptional.

As far as the *juges d'instruction* are concerned, on the one hand, they have a lack of time and facilities for maintaining contacts with drug services and, on the other, it is very difficult to find a place in an appropriate (residential) institution in the prescribed period of 24 hours. Many drug users who normally should be considered for pre-trial detention now end up in prison, albeit temporarily. It is clear that there is a need for some kind of transitional institution between the *juges d'instruction* and the drug-assistance services. As with other modalities, the danger of a net-widening effect exists, as one of the main purposes of the pre-trial detention — a decrease in the prison population — is not achieved.

As with mediation, the motivation of drug users who are considered for pre-trial detention can be questioned. This is even more pertinent in this case, since the alternative would be imprisonment.

More attention should be paid to the application of the imposed conditions, as well as to the consequences in cases of non-fulfilment. Practical assessment has shown that better results can be expected when clear arrangements are made between justice and drug-assistance institutions.

Finally, the fact that the drug user often comes before the courts after a period of time has elapsed can be problematic. If his attitude has changed in the meantime, punishment may no longer be appropriate. In cases where the offender's lifestyle has not changed and treatment in the context of a probation order is imposed, there often seems to be no connection with the treatment which was followed in the context of pre-trial detention.

Sentencing

As far as sentencing is concerned, the circular of 8 May 1998 sets out some general recommendations.

- Only drug users who commit a serious drug-related crime should end up in prison. In general, prison is not the appropriate place for people suffering from addiction problems.
- In view of the fact that the prime aim of a prison sentence is to protect the community, it is obvious that a prison sentence should — even more than for other categories of delinquents — be the last resort for people with addiction problems.
- This means that, when drug offenders are prosecuted and convicted, they should have the benefit, as far as is possible, of a probation order.

The probation order

The Probation Act of 29 June 1964 empowers the courts to impose certain conditions upon the offender during a period of probation (for a maximum of five years) (Del Carril, 1983; Lauwers, 1983; Lievens, 1983; Michel, 1983; Dautricourt, 1985; Klees, 1990; Verstringhe, 1993; Lauwers, 1996; De Nauw, 1996–97; Mahieu, 1998). The two forms of probation are as follows:

- the facts are considered proven but no conviction is pronounced; and
- a conviction is pronounced but the execution of the punishment is delayed.

It is important to note that the amendment of Article 9 of the Belgian Narcotic Drug Act of 24 February 1921 by an act of 14 July 1994 enlarged the field of application of probation for drug offences. The existence of earlier convictions is no obstacle for imposing a probation order for cases involving the illegal production, acquisition or possession of drugs for personal use, or for use in a group (Decourriere, 1985). This means that even retail sale is covered by the Probation Act, as long as the activity of dealing in small quantities of drugs supports personal use (*Gedrukte Stukken*, 1974–75;

Brosens, 1976–77; De Nauw, 1985; De Swaef, 1990–91). It is one of the responsibilities of the courts to decide if this is the case, which means that the interpretation of this aspect of the Probation Act strongly depends on the goodwill of the magistrate. An act of 10 February 1994 also created several new possibilities: in the context of a probation order, it is now possible to impose community service, training or treatment as a condition of probation.

Most drug offenders availing of drug-assistance services do so as a result of a probation order. The majority are users of hard drugs, with very long histories of problematic use and related criminal activities ranging from shoplifting and violence to hold-ups. Very often these offenders have already received assistance from a variety of drug services.

Aside from older clients, the majority of whom are heroin users, a lot of younger people now come into contact with the probation services. Ecstasy and speed are the main drugs of choice of this new category of users.

For many drug users who have been served with a probation order, there is significant confusion about the judicial decisions which have been taken and those which remain to be taken for other offences. They often believe that, after the probation period, they will have to undergo another punishment. Also, the long period which often elapses between the committal of the offence and conviction, or between conviction and the execution of the punishment, can cause considerable anxiety. Moreover, competition between the various drug services can create a net-widening effect, because more drug users are treated than is strictly necessary.

Finally, once the probation order is mentioned on the criminal record of a former drug user, considerable difficulty can be experienced finding a new job.

Conclusions and recommendations

Several options are available for settling drug offences at the investigation and prosecution levels. Moreover, each level of the

judicial framework is oriented towards drug assistance. However, the wide range of modalities available on the one hand and the vague criteria for their application on the other result in a significant variation in approaches to drug offences by the different public prosecutor departments and the courts. This means that the circular of 8 May 1998 has had little impact on creating a uniform drug policy and thus has not fulfilled the recommendations of the parliamentary working group.

Moreover, the terminology itself — terms such as ‘problematic use’, ‘possession of small quantities for personal use’ and ‘social nuisance’ — gives rise to different interpretations at both the levels of the police and the public prosecutor’s department.

In cases of repeat use or when an alternative form of settlement (mainly therapeutic treatment) fails, the drug user will usually be brought before the courts. The user is also normally brought before the courts when a serious crime has been committed. In this case, most public prosecutors consider the use of drugs as aggravating circumstances. The most important criteria which lead to prosecution are risk to health, disturbance of public order and the degree of dependency.

The conclusions of the parliamentary working group clearly state that repressive intervention in cases of drug use is only appropriate when other serious crimes have been committed (causing a public disturbance and demanding social action), yet many magistrates still opt to prosecute or impose a prison sentence.

The parliamentary working group has clearly indicated that the judicial response to the drug problem should not simply be repressive, but that preventative, administrative and drug-assistance staff should be involved from the outset. Although a complete symbiosis between the judiciary and the social services is unrealistic, a successful approach to drug offences demands further cooperation between the two sectors. Unfortunately, however, the working group’s recommendations have not yet been fulfilled.

In general, further clarification is needed regarding the role of the many different actors in the field and also regarding the terminology used in the circular of 8 May 1998.

At the sentencing level, the Probation Act offers many possibilities for treating each case on its own merits. However, formulating probation conditions to suit the individual situation of each offender necessitates considerable social intervention. This is a very labour-intensive process for which, in practice, not enough resources are made available.

Drug users who commit a drug-related crime and hardened drug addicts are in the top category of offenders for whom a probation order is suitable. It is evident, therefore, that probation is understood to be reserved for fairly serious forms of drug-related delinquency.

As stated before, treatment is not always still appropriate at the moment of trial, because the attitude of the offender may have changed during the often lengthy period between the initial charges and conviction, or between the conviction and the execution of the punishment. Nevertheless, the fact that a drug addict has stopped using drugs in the interim does not exonerate him from the drug-related crimes he has already committed. Therefore, it is important that a community service order, as a probation condition, remains an option.

The probation period enables even those with severe addiction problems to benefit from the appropriate treatment. In order to avoid stigmatisation, it is better not to mention a first probation on the offender's criminal record.

Current practice

Use/possession in private of 'very dangerous' drugs

Police

The police normally have to report cases of use/possession in private of very dangerous drugs.

Prosecution

Dependent on the circumstances, the combination and the seriousness of the facts (e.g. problematic use, risk of disturbance of public order), the public prosecutor departments, as a rule, opt for either a transaction or mediation. However, if, taking the seriousness of the facts into account, the public prosecutor is convinced that diversion is not possible, he can always apply the Probation Act of 29 June 1964 instead of referral to court. At the sentencing level, the courts generally divert the case, thereby availing of the options provided in the Probation Act of 29 June 1964. Rather exceptionally, an unconditional sentence may be imposed.

Use/possession in private of ‘dangerous’ drugs

Police

Normally, use and possession for personal use of cannabis is the lowest priority. In accordance with Article 29 of the Belgian Code of Criminal Procedure and Article 40 of the act of 5 August 1992, police officers are allowed to make short, simplified reports for this offence.

Prosecution

As far as possession of cannabis products in small quantities for a single and incidental personal use is concerned, the public prosecutor’s department usually drops the case. Although, depending on the kind, the combination and the seriousness of the facts (e.g. problematic use), the public prosecutor’s department may opt for a transaction, a conditional dismissal or mediation. However, if, taking the seriousness of the facts into account, the public prosecutor is convinced that diversion is not possible, he can always apply the Probation Act of 29 June 1964 instead of referral to court.

Retail sale of 'very dangerous' drugs

No substantial distinctions are made in the law between retail sale to existing users who immediately use together, retail sale to existing users who buy and depart and retail sale in the open/street market.

Police

The police normally make a written report.

Prosecution and courts

As far as the prosecution and sentencing levels are concerned, a clear distinction is made between retail sale and dealing in drugs. As a rule, the latter will lead to a conditional/unconditional conviction of the dealer. As far as the former activity is concerned, a further distinction is made between whether the retail sale is committed for purely commercial reasons or to support personal use.

If the retail sale is committed for commercial reasons only, the offence will usually be treated in the same way as drug wholesaling and the reaction will be a repressive one, identical to the approach for organised crime.

In the case of retail sale for supporting personal use, the quantity of drugs found is a guiding but not decisive factor when assessing the nature of the retail sale. In addressing this kind of crime, as far as the prosecution is concerned, priority is given towards the mediation procedure. At the sentencing level, the courts usually make use of the options provided in the Probation Act. Nevertheless, an unconditional sentence is frequently imposed.

In more serious cases of retail sale (e.g. dangerous drugs, larger quantities, in public, etc.), the public prosecutor normally institutes a summons. In cases where drugs are used in a group, the public prosecutor does not necessarily institute a summons, because this is primarily considered to be a problem of individual possession.

Drug-related crime

In Belgian law, no real distinction is made between shoplifting (EUR 100), burglary of a house (EUR 1 000), or stealing from a person in the street (EUR 100), with or without inflicting physical injury.

Drug addiction is not seen as an excuse for drug-related crime. The official response is, generally speaking, determined on the basis of the seriousness of the acts committed on the one hand and the individual situation of the drug user on the other.

Police, prosecution and courts

The police will always record the reported offence. As far as the prosecution level is concerned, priority is given to the mediation procedure. In more serious cases of drug-related crime, the public prosecutor normally institutes a summons. At the sentencing level, most of the time, the courts avail of the options provided in the Probation Act. Nevertheless, on rare occasions an unconditional sentence is imposed.

Common EU standards on prosecution of drug users ⁽⁵⁶⁾

Since most of the European legal systems have been saturated by the explosion of the drug phenomenon, it is generally agreed that actions taken by the legal system in relation to drugs should be proportional to the harm which they seek to prevent. No Member State is under the illusion that its judicial system is capable of reducing individual cases of problematic drug use. On the contrary, there is an increasing awareness that a criminal approach should be the last resort when settling cases of problematic drug use.

More than ever, the drug phenomenon has to be seen as a multi-dimensional problem. This means that, in Belgium, several

⁽⁵⁶⁾ See De Ruyver et al., 2000.

governmental authorities at the different levels of policy-making are confronted with the problem.

Given the ongoing interaction between the complex and evolving drug situation on the one hand and the increasing emphasis on diversion on the other, policy-makers are increasingly confronted with the need to harmonise the several policy domains. In other words, a uniform policy is the key to a coherent, efficient and effective response to the drug problem by government. Detailed guidelines for action need to be horizontally as well as vertically integrated between the different actors in the field. The starting point for such a policy has to be clear socio-political aims and priorities.

The first aim of an integrated drug policy must be to dissuade people from drug use and reduce the overall illegal drug consumption level by developing a sound prevention policy.

The second priority must be the protection of society as a whole. Although the drug problem is considered to be an epiphenomenon of certain social problems, it also has very important consequences from a security perspective (drug-related crime, disturbance of public order, lack of security). In general, the drug user's right to choose has social limitations, since the freedom of the individual user must not restrict the freedom of others.

Drug-related crime has to be addressed in an integrated and individualised way. 'Integrated' in the sense that crime which has its origin in drug dependence can only be dealt with when the underlying drug problem is controlled (by treatment and education programmes) and 'individualised' meaning that it must be possible for problematic drug users to avail of a wide range of services, from simple harm-reduction programmes to high-quality therapeutic programmes.

Further elaboration of existing international cooperation mechanisms is also imperative. As far as drug production and trafficking (dealing) are concerned, a repressive policy should be followed. Fighting the supply side is a fundamental step in supply

reduction. This means that police and judicial cooperation at a national and international level has to be optimised, the legal arsenal has to be further adapted and financial resources have to be made available.

A further priority should be the development of a sound criminal policy towards drug users. Criminal intervention with regard to drug users is only needed when crimes have been committed by which public order has been disturbed and which consequently demands a social sanction. The nature of such intervention has to be determined according to the seriousness of the case and the individual situation of the drug-addicted criminal, which will inevitably lead to variations in the legal response. When a specific drug phenomenon is designated a low priority, this also implies a reduced level of intervention. This is predicated on the understanding that such an approach remains socially acceptable and that drug-assistance programmes are made available.

As far as the Belgian situation is concerned, the circular of the Board of Prosecutors-General of 8 May 1998 recommends that the following policy initiatives should be followed.

Taking the availability of cannabis and the generally accepted social character of this product into consideration, possession of cannabis for personal use should not be prosecuted. However, as far as possession of cannabis is concerned, the transaction should be the preferred approach in cases where non-problematic users often, with/without intent, cause social nuisance. In the case of possession of other illegal drugs, the transaction can be reserved to deal with situations where non-problematic users disturb public order or when there is a reasonable risk of this happening.

Conditional dismissal should, in principle, be reserved for cases of problematic drug use. When the conditions have been fulfilled, referral to a drug-assistance programme should be an option. In cases of non-problematic drug use, a conditional dismissal is recommended only when the drug user frequently, with/without intent, causes a social nuisance and a transaction is not appropriate because of the user's precarious socioeconomic situation.

Regarding possession of other illegal drugs, apart from the option of referring a problematic user to a drug-assistance programme, conditional dismissal should be used to place a non-problematic user (who frequently, with/without intent, causes a social nuisance) with an education programme. This is especially recommended in cases of young, experimental (social) users who will benefit from an education outlining the health risks and legal consequences involved in drug use.

According to the Board of Prosecutors-General circular, mediation should be reserved for cases involving drug-related crime.

When, at the prosecution stage, diversion is not possible and prosecution and conviction are necessary, the drug offender should be served with a probation order. In view of the fact that the primary aim of a prison sentence is to protect the community, it is clear that this should — even more than for other categories of delinquents — be the last resort for an offender with an addiction problem. Only in exceptional cases should a prison sentence (preferably combined with treatment) be resorted to.

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Notes

- [1] Act of 24 February 1921 on poisons, soporific and narcotic drugs, disinfectants and antiseptics (Belgian Narcotic Drug Act), as amended by the acts of 9 July 1975 and 14 July 1994.
- [2] Royal decree of 31 December 1930 on trade in soporific and narcotic drugs.
- [3] Royal decree of 2 December 1988 regulating trade in certain psychotropic substances.
- [4] Sections 2(bis) and 3 of the act of 24 February 1921 on poisons, soporific and narcotic drugs, disinfectants and antiseptics, as amended by the acts of 9 July 1975 and 14 July 1994.
- [5] Probation and Suspended Sentences Act of 29 June 1964.
- [6] Section 2(bis) of the act of 24 February 1921 on poisons, soporific and narcotic drugs, disinfectants and antiseptics, as amended by the acts of 9 July 1975 and 14 July 1994.
- [7] 1921 Drugs Act, Section 9, as amended by the act of 14 July 1994.
- [8] Circular of 26 May 1993 outlining a common drug policy.
- [9] Report of the parliamentary working group on the study of the drug problem, 5 June 1997, *Gedrukte Stukken*, Kamer, 1996–97, No 1062/1-3.
- [10] See De Ruyver et al., 1999, p. 41.

Jørgen Jepsen and Lau Laursen

Outline of the legal system of Denmark

Danish legal practice in relation to drug cases recognises — in principle, and generally in practice — no essential or noticeable differences between the three types of actor. The police are subject to instructions from the prosecution, primarily the Attorney-General, who regularly sends out circulars instructing the prosecutors, including police prosecutors. The most notable of these circulars came out in 1969, in which the Attorney-General distinguished between ‘soft’⁽⁵⁷⁾ and ‘hard’ drugs⁽⁵⁸⁾. Subsequent circulars have outlined the details of Danish prosecution policy. These circulars are binding on prosecutors at the lower level (in minor cases, these may be police prosecutors; normally these are attached to the police circuits), but they also include instructions on how the police should behave on the streets (e.g. when arrests should be made and when charges should or should not be brought or investigations undertaken).

The 1969 circular was followed in 1992 by a reminder of the policy of leniency towards cannabis, particularly in cases involving only suspicion of possession for personal use. The original circular was the result of collaboration between parliament and the Ministry of Justice when Penal Code provisions for higher penalties were introduced in 1969.

Since then, the Attorney-General and the prosecutors have issued instructions on which penalties the prosecution should demand when presenting drug cases in court and on practice at lower levels, where, for instance, an ‘administrative fine’ (issued by the police) was considered sufficient. These instructions are based on court practice and on statements from parliament in connection

⁽⁵⁷⁾ Almost exclusively cannabis.

⁽⁵⁸⁾ Primarily heroin and other opioids, cocaine, amphetamines, LSD and other hallucinogens, and lately also ecstasy.

with the promulgation of new legal provisions (e.g. the 'pusher legislation' in 1996), which are normally aimed at tightening up sanctions. The instructions, as a rule, outline detailed frameworks for penalties, relative to the type and amount of drug(s) involved and the nature of the offence (simple possession, small-scale dealing, trafficking). Also, statements summing up practice for the courts have been published from time to time, the latest by Copenhagen City Judge, Jørgen Andersen, in 1997. In these ways, a great deal of consistency has been achieved between parliament, the courts, prosecutors and the police.

Occasionally, in serious cases, a decision is brought all the way to the supreme court, as has been seen in recent years in cases when aliens have been expelled under the new, more strict, penal provisions of 1996. In some of these cases, the supreme court has reversed an expulsion order made by a lower court (city courts and high court) with reference to international human rights standards, in cases where tougher penalties have been imposed in connection with repeated sale of small quantities. Based on such decisions, the Attorney-General has instructed prosecutors to bring appeals in favour of drug offenders already sentenced to expulsion to have the earlier decision repealed and the expulsion order revoked.

Although there may be some time lag between new court practices and prosecutorial instructions, the latter are generally aimed at getting in line with the courts. Attitudes and interpretation of policy may differ slightly between prosecutors and judges, the former being somewhat more repressive, but there are no major differences.

As for the police, they are obliged to follow the instructions of the Attorney-General. Nevertheless, a statement on the Copenhagen 'Narko-Strategi 90' by the then chief of the Copenhagen police outlined a strategy of street control policy which was rather more repressive than envisaged by the Attorney-General circular of 1969 and subsequent circulars. In reality, the police at street level and on low-level operations have considerable discretion on whether to bring charges in a specific case. In connection with warnings and prohibitions on local movement, a not insignificant,

largely uncontrolled, discretion is exercised, which may lead to some inequality in reactions, but only at a local level and in police operations. Because of this, there is an amount of diversion activity which is not documented statistically. However, when charges have been brought, the principles laid down for bringing a case to prosecution enter into force.

The police prosecutors have some discretion on whether or not to impose an administrative fine (not paid on the spot but without a court appearance, provided the offender accepts), a warning or a (conditional) waiver of prosecution (mostly for juveniles). Conditional sentences, however, have to go through the courts.

Danish legislation on (illegal) drugs

Act on Euphoriant Drugs

The Act on Euphoriant Drugs (AED) was originally passed as Act No 169 (1955) with later changes enacted by Act No 1054 (11 December 1996). The AED may be summarised (author's translation) as follows:

'According to Section 1 of this act, the Minister for Health is authorised to decree that drugs which, according to international agreements or in the opinion of the Medical and Health Board, present exceptional danger on account of their euphoriant qualities shall be prohibited in Denmark, unless the Minister expressly permits their use. Apart from instances covered by such special permission, importation and exportation, sale, purchase, delivery, reception, production, manufacturing and possession of such drugs are prohibited. As the use of drugs normally implies previous possession, it is, in principle, an offence to be an (illegal) drug addict in Denmark.'

The exceptionally dangerous drugs mentioned are specified in a proclamation. Among the most relevant drugs to the present study are cannabis, marijuana, heroin, opium (intended for smoking) and LSD.

Section 2 of the Act on Drug Control deals with a group of drugs that do not present exceptional danger, but only danger on account of their euphoriant qualities.

Extracts from the penal provisions provided by the AED follow.

Section 3 (original version):

‘Violations of the present act or regulations issued in pursuance thereof shall be punished by fines, lenient imprisonment (*hæfte*), or imprisonment for up to two years. In a similar manner, a person is to be punished who by the communication of misleading or untrue statements or by fraudulent silence obtains or seeks to obtain permission or a licence pursuant to the present act or regulations issued thereunder or who acts in violation of the conditions of such a permission. Further, in the same manner, a person shall be punished who, by application for a prescription or requisition of one of the drugs mentioned in Sections 2 or 2(a) or concerning other prescriptions of drugs, provides untrue written information about his/her name, residence or position.’

Subsection 2 (added in December 1996):

‘In deciding punishment, a serious aggravating circumstance will be that the case concerns a particularly dangerous or harmful substance.’

Subsection 3 (added in 1982):

‘With the same penalty as stated in subsection 1, a person shall be punished who intentionally receives or provides for himself or others part of the proceeds acquired through a violation as mentioned in subsection 1, first sentence, and a person who, through storing, assisting in transfer or in any similar way, intentionally contributes to securing for another person the proceeds.’

The Danish Penal Code

Section 191:

‘(1) Any person who, in contravention of the legislation on euphoriant drugs, supplies such drugs to a considerable number of persons, or in return for a large payment, or in any other particularly aggravating circumstances, shall be liable to imprisonment for a term not exceeding six years. If the supply relates to a considerable quantity of a particularly dangerous or harmful drug, or if the transfer of such a drug is otherwise of a particularly dangerous character, the penalty may be increased to imprisonment for a term not exceeding 10 years.

‘(2) Similar punishment shall apply to any person who, in contravention of the legislation on euphoriant drugs, imports, exports, buys, distributes, receives, produces, manufactures or possesses such drugs with intention to supply them as mentioned in subsection (1) above.’

Section 191(a):

‘Any person who receives or provides for himself or others part of a profit obtained by contravention of Section 191 of this act, and any person who, by storing, transporting, assisting in the disposal or in any similar manner acts in order to secure for another person the profit from such contravention, shall be liable to imprisonment for a term not exceeding six years.’

Section 88:

‘(1) If, by one or more acts, a person has committed several offences, one common penalty shall be fixed for these offences within the statutory range prescribed, or, if punishments with a different statutory range apply, within the highest maximum. In serious aggravating circumstances, the penalty may exceed the most severe penalty prescribed for any of the offences by up to a half.’

Current practice

Due to the high level of correspondence between courts, prosecutors and the police, it is not appropriate to differentiate here between the three. In general, however, it can be said that the degree of repressiveness in practice and viewpoint increases as one goes along the hierarchical ladder.

The law and court practice until October 1997

The relevant legal provisions are the penal clause of the Act on Euphoriant Drugs (AED) and Sections 191 and 191(a) of the Penal Code (see above), which cover penalties for the more serious cases of drug trafficking. The AED outlines penalties such as fines, or imprisonment for up to two years. Section 191, subsection 1, of the Penal Code covers the more serious drug offences: trafficking on a commercial basis (i.e. to a larger number of customers, for larger sums of money, or other aggravating circumstances). Subsection 1 provides for penalties of up to six years of imprisonment, while subsection 2 provides for penalties of up to 10 years in cases of sale or transfer of considerable quantities of very dangerous drugs (not cannabis) or where the sale is otherwise of a 'particularly dangerous nature' (usually selling to minors). Section 191(a) of the Penal Code provides for penalties of up to six years for 'receiving' the proceeds from drug offences.

In practice, emphasis is put on the type and quantity of drug and on whether the case concerns importation, sale or other activities of a commercial nature. In cases of smuggling, sale/transfer or possession with the aim of selling/transferring of heroin or cocaine, the case is subsumed under Section 191 if the quantity is approximately 25 grams or more, whereas the corresponding limit for amphetamine is approximately 50 grams and for hashish approximately 10 kilograms. There is as yet no firm practice for ecstasy, but in one case, the importation of 410 ecstasy pills was subsumed under Section 191.

Practice since the ‘pusher legislation’ of 1997

In its deliberations on how to formulate the desired legal change in order to target professional drug pushers (who had hitherto avoided serious sanctions by carrying only very small quantities at a time), the Ministry of Justice considered, but subsequently rejected, the option of raising the maximum penalty in the AED. The real problem was to avoid raising penalties at the lower end of the scale. The Ministry suggested that, under current practice, in case of demands for penalties of more than four to six months of imprisonment, the prosecutor could subsume the case under the Penal Code rather than the AED. This would mean that there would be no need for a higher maximum penalty in the AED. Such a change, if carried through, would have led to more cases being subsumed under the AED instead of the Penal Code. Instead, the Ministry finally decided to make a change to the AED, whereby it would be ‘a considerably aggravating circumstance when the case concerns repeated dealing in a particularly dangerous or harmful substance’.

The new provisions apply both in cases when the suspect has had previous convictions for dealing in hard drugs, and in cases where several counts were presented for concurrent conviction and sentencing. Furthermore, the provisions apply not only to actual sale, but also to possession with the intention to sell.

The guidelines for conviction and sentencing under the new provisions were outlined as follows in the bill:

“Dealing” is meant to refer to sale — or possession with intent to sell — of one sales package containing from 0.001 grams to 0.2 grams of heroin or cocaine.

In cases of first offences, it is assumed that just five to 10 deals will result in a penalty of ordinary imprisonment from 30 to 60 days, as against 10 to 14 days of lenient imprisonment under current practice. More than 10 deals should as a starting point realise a penalty of three months of imprisonment, as opposed to 10 to 14 days of lenient imprisonment under current practice.

It is further intended that, in cases of second offences, just three deals as a starting point should carry a penalty of three months of imprisonment. In case of more than three deals, a relatively longer sentence should be imposed. In cases where, today, the standard penalty is 10 to 30 days of lenient imprisonment or ordinary imprisonment, the proposed change will imply at least a tripling of the penalty.'

According to this — unusually detailed — pre-legislative 'instruction' to the prosecutors (and indirectly to the courts), the expected changes were presented along the following lines in the Ministry of Justice bill. If the accused has a history of two or more previous sentences, the penalty for a further conviction will normally be set at more than three months of imprisonment. How much more than three months will depend on the number of deals currently under consideration in connection with the case in question. For hard drugs other than heroin or cocaine (e.g. amphetamines or ecstasy), the penalty should follow the guidelines as a starting point but should also take into account the relative dangerousness of the drugs involved. There is clearly no intention, within the field of application of the proposed law, of changing the relation between penalties for dealing in various types of 'hard' drugs. On this subject, the bill further states:

'It is not the intention of these proposals to change the sentencing for other types of violation of the AED or Section 191 of the Penal Code. It is intended that the increase in penalties in cases of repeated dealing in small quantities of hard drugs should not have an indirect effect either on less serious minor violations (e.g. possession for own use) or on more serious crimes (e.g. the smuggling of or dealing in larger quantities of narcotics).'

In addition to the changes in penalties, the rules on expulsion in the Aliens' Act were changed to facilitate the expulsion of aliens who are committed of repeated dealing in minor quantities of 'very dangerous' drugs.

The Copenhagen Chief Prosecutor's statement on practice after December 1996

In a written statement summing up the court decisions up to mid-1997, the Copenhagen Chief Drug Prosecutor, Carsten Egebjerg Christensen (1998), comments on developments under the new legislation. His main points are summarised below.

Egebjerg Christensen initially reviews the background for the 'pusher legislation' of December 1996 and the rather detailed directives for its application as outlined in the Ministry of Justice bill. The article deals with sanctions and court practice between December 1996 and July 1997 against minors dealing in 'hard' drugs, the latter defined as including heroin, cocaine, amphetamine and ecstasy — but not cannabis. The great majority of cases reviewed concern heroin and/or cocaine.

He notes initially that many of the suspects/defendants arrested by the police in the relevant part of Copenhagen city were themselves drug abusers who financed their own consumption through dealing on the street. The intention of the proposals was a doubling or tripling of the level of sanctions and they contained unusually detailed provisions for the different penal positions. Parliament can be assumed to have accepted these proposals in passing the bill into law.

The bill also defined what was to be understood by 'a 'deal': sale or possession with intent to sell of one sales package containing 0.01–0.2 grams of heroin or cocaine. The term 'repeated sale' was defined as including not only cases where the defendant had previously been sentenced for the same type of crime, but also when several counts were to be dealt with in the same sentence.

The bill also supported a high court decision of 1996 stating that pre-trial detention might be used under Section 762, subsection 1, No 2, of the Code of Criminal Procedure (*Retsplejeloven*), even if the expected sentence is at the low end of the imprisonment scale of sanctions (yet another innovation).

Some observations on sentencing and levels of penalties in relation to the nature of the offence are quoted (below) from Judge Christensen's summary.

Sentencing

In the context of the wide latitudes for sentencing in drug cases, it should be noted that in 1985 a superior court statement deemed that it 'would violate normal principles for sentencing to be at or near the legal maximum except in cases of particular seriousness'.

The principles for sentencing are outlined in general terms in Section 80, subsection 1 of the Penal Code, which states that consideration should be given to the seriousness of the crime and all available information on the offender, including his general, personal and social situation, his circumstances before and after the offence and his motives. If the offence is committed by more than one person acting together, this should be considered an aggravating circumstance (subsection 2).

The seriousness of the offence is normally determined on the basis of the dangerousness and quantity of the drug involved. Thus, in 1981, the supreme court upheld a decision by the superior court that an alien who, over a period of four years, had sold, imported and attempted to sell and import a total of 225 700 morphine pills originating from Pakistan should be punished with 10 years in prison. This decision took into consideration the large quantity, the dangerousness of the drug and the offender's position in the trafficking chain.

The dangerousness of the drug is often decided through comparison with heroin and cocaine, which are clearly considered to be the most dangerous drugs. In 1988, a statement (UfR 88/682) by the Forensic Board was quoted on the difficulties of making a direct comparison between amphetamine and heroin. In summary, heroin was found to be the most dangerous, while amphetamine was deemed equal to cocaine. On this basis, the supreme court decided that the level of penalties in cases of importation of

amphetamine should be raised. In another comparison, an expert opinion estimated the relative strength of phendimetrazin to amphetamine as 1:10.

In general, the quantity of drugs is considered very important in sentencing and great care is taken to establish the intention of the offender in this connection.

Sometimes, it is considered relevant to determine whether the strength (purity) of a particular drug concretely differs from what is normal. This is the case for hashish cultivated in Denmark, which is generally considered weaker than imported hashish. On importation of cocaine, a purity of 82 % has been considered an aggravating circumstance. On the other hand, in a case concerning importation of a considerable quantity of heroin, the supreme court stated that the fact that the drug had a low purity could not justify a reduction in the penalty.

In 1985, in yet another case (VL85/669), one of Denmark's two superior courts found it desirable 'that the fixing of a penalty to some extent should be separate from the quantity involved', and that emphasis should rather be put on the degree of involvement of the offender in question and to what extent the offender is a participant in organised crime. This would also alleviate the difficult problems of proof involved in establishing an exact quantity.

Also, the nature of the activity of the offender is considered as important as aggravating or mitigating circumstances (e.g. in cases of commercial retail sale, whether the offender is himself an addict). In two cases — in 1994 and 1997, respectively — a particularly active role was seen as aggravating (in the latter case, the persistent sale of hashish after a number of arrests).

Using minors in the trafficking is seen as aggravating, as may be the exploitation of others as accomplices (e.g. a spouse or a younger brother). Being only a carrier or storing drugs for others may also be seen as mitigating circumstances. Participating in a trip abroad is not in itself necessarily seen as being an accomplice under Section 23 of the Penal Code, even if the suspect

knew that the intention of another participant in the trip is to buy drugs (UfR 82/900 VL).

Cooperation of the accused, by confessing and testifying against other offenders, is generally seen as a mitigating circumstance. Reference to the personal situation of the offender is most often used in connection with conditional sentences.

The starting point for sentencing in cases of importation and sale of drugs in 'not insignificant quantities' is deprivation of liberty, even where the duration of the case has been very long (e.g. four years) or where there is a positive report about the personal situation of the offender (such a decision was made in 1997). Only in very special circumstances will a conditional sentence be considered; for example, a decision in 1996 (UfR1996.207) in which the supreme court found that a prison sentence would have very serious consequences for the offender.

Conditional sentences are a little more frequent in other drug cases. Just over 20 % of drug sentences in Copenhagen surveyed by Judge Andersen were conditional.

The principle of deterrence is sometimes referred to, in addition to the seriousness of the offence. In this connection, smuggling of drugs — even cannabis — into prisons for personal use or for others is mentioned.

In two cases in 1996, the Supreme Court refused to lower penalties for smuggling drugs into Greenland in deference to Greenland's desire to reduce the amount of drug smuggling into the country.

Statement by Prosecutor Lars Bo Hansen

The Prosecutor, Lars Bo Hansen, of the police circuit of Århus, made a statement on the most recent practices and guidelines for prosecution in drug cases, based upon court practice and a recent directive from the Attorney-General (as of end of August 2000). This statement is summarised below.

The primary distinction is between when to invoke the Penal Code (Section 191) as opposed to the AED. The amount of drugs is the deciding factor. For a first-time offence, a case should be subsumed under Section 191 of the Penal Code if the amounts exceed the following:

- 10–15 kilograms of cannabis;
- 25 grams of heroin or cocaine;
- 50 grams of amphetamines; or
- approximately 200 ecstasy pills.

No distinction is made between simple consumption (which is not, in principle, punishable) and possession for personal use. The deciding factor is whether possession is for personal use or with the intention to sell. When there is not sufficient evidence to prove that dealing has taken place, the amount of the drug in the offender's possession determines whether the prosecution will maintain that possession is with intent to sell.

A sharp distinction is made between cannabis ('dangerous' drug) and heroin/cocaine/amphetamine/ecstasy ('very dangerous' drugs).

In every instance, the police will seize the drugs (forfeiture is either based upon consent or upon a court decision).

The police will not normally do anything about possession for personal use. Their efforts are concentrated on sale/transfer and are based upon suspicion of sale. Charges of possession for own use normally result from incidental discovery of drugs in other connections, at least in a first-time offence.

An offence is considered to be a 'second offence' if it happens within two years of the first case.

Possession in private/public of 'very dangerous' drugs

In cases of possession of 'very dangerous' drugs, it does not matter whether the location is private or public.

When a person hitherto unknown by the police is found in possession of heroin, cocaine, amphetamine or ecstasy, he may receive a **warning** for possession of the following amount of drugs:

- up to 0.2 grams of heroin;
- up to 0.2 grams of cocaine;
- up to 0.5 grams of amphetamine; and
- up to two ecstasy pills.

A fine will be imposed for possession of 5 grams of heroin, amphetamine or cocaine or 10 ecstasy pills.

Possession for own use of these drugs may receive a fine the first couple of times. Thereafter, a suspended (conditional) sentence is demanded. If more than 5 grams of any of these drugs are found, the prosecutor will, for a first offence, demand a suspended (conditional) sentence with no fixed penalty.

Possession in private/public of 'dangerous' drugs

When a person hitherto unknown by the police is found in possession of hashish he will receive a (police) warning for up to 10 grams and a fine for more than 10. It is immaterial whether the location is private or public.

For a **second offence**, a fine is always imposed for amounts of up to 100 grams.

The fine for second offences will amount to:

- EUR 40 for 0–10 grams;
- EUR 67 for 10–15 grams;
- EUR 135 for 50–100 grams.

For a **third offence**, the penalty will be raised by 'one class' (e.g. EUR 67 for 0–10 grams, etc.). A fine can be imposed even after **several offences** (no predetermined amount).

If more than 100 grams of cannabis is found, a prison sentence will be invoked. If this is a first offence and there is no proof of sale, the result will be a (conditional) sentence without a fixed penalty.

For a second offence, the sanction is normally a suspended (conditional) sentence with a fixed penalty, typically 30 days' imprisonment.

Retail sale of 'dangerous' drugs in private/public

A strict distinction is made between cannabis and 'very dangerous' drugs.

In cases of first-time sale/transfer of less than 100 grams of cannabis, the sanction may be a fine. For second offences, a prison sentence is demanded (unless it occurred more than two years before).

In all cases of sale/transfer, there is a difference in degree of penalty according to whether it occurred in public (street) or in private (home). The reason for this is the requirement to 'protect the citizens, i.e. against the displeasure of watching a drug deal taking place', or to preserve peace and order. This goes for all types of drugs. The distinction is one of degree, not principle.

Another distinction is made between whether, after the deal, buyer and seller use the drug together or the buyer leaves the place of transaction (e.g. a flat) shortly after the deal. This relates to the milder attitude towards a deal between friends, as opposed to dealing with a stranger. This applies for the charge as well as for the final decision.

In the latter situation, the deal appears more commercial — the aim being, to a larger extent, economic gain — if the customer is a stranger. In both cases, however, it is usually assumed that the dealer sells in order to finance his own use (if the sale is on a minor scale and the seller is known by the police to be a drug user).

As indicated above, in both situations (private/public, sale to friends/to strangers) the differentiation is a matter of degree. There is no special scale of penalties for the different situations, e.g. private/public. The decisive criteria are the type and amount of drug and any previous record.

Retail sale of 'very dangerous' drugs in private/public

In cases of transfer/sale of 'very dangerous' drugs (e.g. heroin), the amount is not such a deciding factor. Sentencing at the rates listed below is the same even if it is a question of only one 'sales pack'.

The following are the sentences imposed for a first offence:

- one deal: 'lenient' imprisonment ⁽⁵⁹⁾ for 10 days (unsuspended);
- two to four deals: 'lenient' imprisonment for seven to 30 days;
- five to 10 deals: prison for 30 to 60 days.

The following are the sentences imposed for subsequent offences:

- one or two deals: prison for 30 to 60 days;
- three deals or more: prison for three months;
- for third (and subsequent) offences, one deal may result in: prison for four months.

Property crime

In the situations mentioned below, it makes no difference to the sentence if the offender is a drug user or not. However, if he is a drug user, this may be reflected in the conditions of a suspended sentence (e.g. treatment). Also, a special experimental sanction is currently being tried out in a few treatment facilities as an alternative to incarceration.

In general, drug use per se is not seen as particularly relevant in relation to sentencing, though it may be referred to as part of the background of the offence committed.

⁽⁵⁹⁾ There is no other sanction after 1 July 2000 (only imprisonment).

Strict liability does not exist in this type of offence, with one possible exception, which is like a burden of proof in reverse. When assets are impounded from a person charged with (and/or convicted of) a drug trafficking offence, primarily in the form of liquid assets, and the person (or his partner) is unable to document the legitimate origin of the funds, they may be confiscated (forfeiture) in connection with the sentence.

No further action lies within the discretion of the acting police officer on duty, but it may also take the form of a formal decision (*tiltale opgivet*) under the Code of Criminal Procedure.

‘Down-tariffing’ or reduction of charges does not formally exist but, as indicated above, the cooperation of a suspect may be taken into consideration when the prosecution is deciding on its demand for the penalty. However, this is not formalised in any way.

Diversion may take a number of forms:

- Waiver of prosecution (*tiltalefrafald*), with/without conditions, is used mainly for young persons and is relatively rare in drug offences. A condition may be that the offender must agree to cooperate with the welfare authorities. The waiver will be noted on the person’s record. It is granted by the prosecutor and requires a confession and the suspect’s consent.
- A suspended sentence (conditional with probation/supervision) may be seen as a form of diversion. It can only be instituted by a court sentence.
- An experiment has been in process for three years whereby drug-abuse treatment is a condition in a suspended sentence. It is imposed by the court on the basis of a pre-sentence report. It is presently only available in a limited number of locations.
- After sentencing, a transfer from prison to a treatment centre can be instituted by the court under Section 49, subsection 2, of the Penal Code.

In current Danish practice, the following sanctions are more or less standard:

Shoplifting

- The fine for a first offence is EUR 135.
- The fine for a second offence is EUR 202–269.

These fines cover occasional theft of little value, typically subsumed under Section 287 of the Penal Code.

Burglary

The starting point in burglary cases is a prison term, meted out as follows:

- First offence: suspended (conditional) sentence, no fixed penalty.
- Second offence: suspended (conditional) sentence, 30 days' imprisonment.
- Third offence: depends upon how long it is since the previous sentence. If it occurred more than two years earlier, sentencing can be anything from a suspended sentence (possibly in combination with a short unconditional sentence) to actual imprisonment. If less than two years, a conditional sentence may be used.

Stealing from a person in the street (without causing injury)

- First offence: a conditional sentence.
- Second offence: an unconditional prison sentence of 30 days.

Stealing from a person in the street (causing injury)

This crime is akin to robbery.

- First offence: an unconditional prison sentence.

Common EU standards on prosecution of drug users

The climate of opinion in Danish legal circles regarding the issues covered by the study is described in the first section of the book.

The only issue which has been subject to some discussion in Denmark is the implementation of the legal change regarding the deportation of aliens convicted of drug offences (and other serious crime). The legal guidelines gave discretion to the courts, but, over the period 1999 to 2000, the supreme court has interpreted the international human rights standards to mean that the lower courts do not have the power to decide this issue.

References

Egebjerg Christensen, C. (1998), 'Strafudmåling og udvisning ved småsalg af hård narkotika' ('The fixing of sentence and expulsion for minor deals in hard drugs'), *Juristen*, November, pp. 335–343.

Lorenz Böllinger

Outline of the legal system of Germany

Type of system

One of the fundamental principles of the German Federal Constitution is that any State intervention into individual rights has to be by statutory law. Thus, all restrictions on use or other offences concerning defined substances have to be provided for by federal law.

The main legislation with respect to illegal drugs is the *Gesetz ueber den Verkehr mit Betaeubungsmitteln* (*Betaeubungsmittelgesetz*: Narcotics Law; henceforth BtMG) of 28 July 1981 [1], which was re-promulgated on 1 March 1994 [2]. The BtMG of 1981 was designed to implement the international UN accords of 1961 and 1971 [3]. It has subsequently been amended by supply-oriented legislation and other major revisions in 1992 [4], 1993 [5] and 1994 [6]. Furthermore, it has since been annexed by various federal regulations, issued on the basis of the law without need to be passed by parliament: the *Betaeubungsmittelaussenhandelsverordnung* [7] (international traffic regulation), the *Betaeubungsmittelverschreibungsverordnung* [8] (medical prescription regulation) and 10 subsequent *Betaeubungsmittelverordnungen* [9], regulations which serve to periodically adjust the substance schedules and prescription modalities. Obviously, the laws and regulations are continuously being interpreted by administrations and courts. The last word in the sense of precedents is with the highest federal court of appeal, the Bundesgerichtshof, and, in a very few cases, the Federal Constitutional Court (Bundesverfassungsgericht). Paragraph 3 of the BtMG refers to three annexes (Anlagen I–III) containing lists of ‘controlled substances’. Annex I refers to substances which are ‘non-trafficable’ ⁽⁶⁰⁾ and non-

⁽⁶⁰⁾ ‘Non-trafficable’ is a BtMG statute law term that means ‘not allowed to be trafficked’.

prescribable ⁽⁶¹⁾, Annex II to those which are trafficable but not prescribable, Annex III to those which are trafficable and prescribable ⁽⁶²⁾. There is no legal differentiation between the categories 'very dangerous' and 'dangerous' drugs. The legislature leaves it to the courts to determine a hierarchy of drugs based on an empirically graded scale of 'danger for public health'. The relative danger is then used within the framework of legislation to grade the punishment.

The BtMG is primarily an administrative law designed to regulate the trade of listed substances. Import and export regulations as well as prescription modalities are also dealt with in the regulations. Contraventions against the administrative laws and regulations can be sanctioned by administrative fines of up to approximately EUR 25 000. Criminal offences are defined as certain uses of and dealing in listed substances (especially trafficking), as described in paragraphs 29–30(a), BtMG. The interpretation and methodological application of these norms follows the system of the *Strafgesetzbuch* (German Criminal Code; henceforth StGB) [10].

Any personal use of listed substances for private consumption is not subject to criminal or administrative sanctions, as it is considered to be a basic human right under 'Freedom of behaviour', Article 2 of the *Grundgesetz* (German Constitution). This civil liberty is interpreted as including the right to inflict harm on oneself. However, in most cases, the use per se depends on purchasing or otherwise obtaining and possessing the substance, all of which are specifically punishable. Mere use can also be punishable, according to specific clauses, if it occurs in the presence of minors, the mentally handicapped or military personnel.

Punishment has to be proportional to guilt and is graded according to the seriousness of the offence in terms of the relative danger of the substance, the amount of the substance and the amount of personal responsibility.

⁽⁶¹⁾ 'Non-prescribable' is a BtMG statute law term that means 'not allowed to be prescribed'.

⁽⁶²⁾ The annexes can be changed or amended by federal government regulations on certain legal grounds and on the basis of expert opinion. We shall return to these legal options later.

Overview of possible reactions and their legal basis

Since any behaviour related to drug use and drug trafficking is defined in paragraphs 29–30(b) as a criminal offence, only the criminal police are allowed to investigate proactively or respond to reports from victims or onlookers. The latter is rarely the case, since drug offences are ‘victimless crimes’. According to the *Legalitätsprinzip* (legality principle), as opposed to the *Opportunitätsprinzip* (expediency principle), the *Staatsanwalt* (prosecutor) and the administrative body for which he is responsible, the *Kriminalpolizei* (criminal police), are legally obliged to investigate any suspicion of an offence (paragraph 163, *Strafprozessordnung*: StPO — Criminal Procedure Code). However, by law (paragraph 152, StPO), criminal investigation is only allowed on condition of a substantial primary suspicion of a criminal act. This kind of suspicion can, in practice, be easily formulated by the police and does not have to be proven subsequently. The law requires the police to register the case immediately and report it to the prosecutor, who in turn has to direct any further police activity in the case.

In practice, the police in the bulk of cases proceed to investigate on their own initiative and in their own right, and only report their completed investigations to the prosecutor, who will then decide whether to prosecute or drop the case. Only in very serious cases, such as a capital offence, will the prosecutor in charge direct investigations himself. This informal procedure allows considerable discretion for the police. This, to some extent, facilitates no further action, reduction of charges and diversion at the police stage of the criminal procedure. It must be remembered, though, that in Germany the police have no formal legal right to take no further action or other diversionary measures. Empirical studies have shown, however, that the police exercise some discretion [11].

Within the realm of criminal investigation, the police are obliged to confiscate any object used for or derived from a crime, in this case illicit substances. Such items must be forfeited to the court without compensation at sentencing (paragraph 74, StGB). In general law (paragraph 27, StPO), any policeman outside the criminal

police force can — like any citizen — apprehend anybody caught in a criminal act. This theoretically also applies to the user.

In cases of drug dependency and a sentence of no more than two years of imprisonment for any of the offences described in paragraph 29 ff, BtMG, a fundamental principle of German drug policy applies: ‘treatment instead of punishment’. The court can order probation and refer the offender for drug therapy of some sort (paragraphs 56, 56(c), Section 3, StGB). The treatment order has to be consented to by the convict. The judge usually also orders surveillance by a probation officer.

The court can also defer a prison sentence and eventually grant probation if the convict undergoes drug therapy (paragraph 35, BtMG). Such therapy, when ordered by the criminal court, may justly be called ‘forced therapy’. Drug therapy can mean long-term, in-patient abstinence treatment (currently, in Germany, nine to 18 months of behaviour therapy or psychoanalysis-oriented treatment). It can also mean outpatient treatment such as methadone maintenance-to-abstinence and/or psychotherapy. The offender has to find a therapist or an appropriate place in a treatment centre. Under the same conditions, the attorney-general can defer prosecution, but only with the consent of the court of jurisdiction (paragraph 37, BtMG). Time spent in therapy can also count as prison time served (paragraph 36, BtMG). If the court denies consent to such deferment and passes a prison sentence, the convict can appeal that decision (paragraph 35, Section 2, BtMG). The *Oberlandesgericht* (court of appeal) then has to decide the case. If deferment is granted and the convict fails to start treatment, or if he drops out of treatment, the attorney-general can immediately issue a warrant of arrest and have him/her incarcerated.

The court can also serve a probation or a treatment order in relation to regular criminal law. Again, the convict has to consent. If he then fails to start therapy or if he drops out of therapy, the court has to open a hearing and decide whether to repeal the probation order. Finally, the court can order forced intramural treatment according to paragraph 64, Section 1, StGB. In this case, the court has to establish a causal link between substance dependence and the criminal

act. It also has to be convinced of the need for and efficacy of treatment. The court also has to deny (paragraph 64, Section 2, StGB) or repeal (paragraph 67(d), Section 4, StGB) committal to a treatment institution in cases where successful treatment is deemed hopeless.

Apart from criminal law, there is a multitude of social and health laws and regulations providing for prevention and treatment of drug abuse as well as for their financing. These are too numerous to cover in this report.

Overview of typical reactions

Police

Empirical research has shown that there are essentially three informal strategies determining police action by the criminal police force in charge (Kasecker and Schuster, 1998; Stock, 1998, p. 1036). There is considerable variation between the south of Germany and the north. The federal states of Bavaria, Baden-Württemberg and Saxony, constituting about 25 % of the population, are significantly more demand-oriented than the north and north-west, which are more supply-oriented.

The three strategies can also vary from one police unit or individual to another or from one court circuit to another. This is possible because of police discretion in everyday practice, as described above. The three strategies are described below.

- *Demand-oriented strategy.* This attempts to reduce demand by strictly enforcing the law, thereby offering a strong deterrent (61.4 % in Bavaria, 33 % in North-Rhine-Westphalia; a mean of around 45 %) (Aulinger, 1997; Geisler, 1998).
- *Tactical supply-oriented repression.* The police will bring charges for possession only when it is deemed to be related to drug trafficking or in order to squeeze information from the user (29 % in Bavaria, 35 % in North-Rhine-Westphalia; a mean of around 35 %) (Aulinger, 1997; Geisler, 1998).
- *Supply-oriented strategy.* Criminal law enforcement is seen as counter-productive (largely in terms of a public health and

harm-reduction approach) and should be enforced as little as possible (3.5 % in Bavaria, 23 % in North-Rhine-Westphalia; a mean of around 12 %) (Aulinger, 1997; Geisler, 1998). This strategy is definitely on the increase, as 12 police chiefs from large metropolitan areas of Germany have spoken out against a strict demand-reduction strategy during the author's interviews.

Depending on which strategy is followed, the social background and previous offences of the drug offender can influence procedure. While officially, according to the legality principle (paragraph 163, StPO), the police have to act exclusively and without discretion on the basis of an initial suspicion, in practice they generally act according to their viewpoints. Some officers will consider previous offences to be a reason for a more strict approach, whereas others will consider this to be a good reason for no further action or a reduction of charges (Aulinger, 1997; Geisler, 1998).

Informally, in the social context of the national drug policy debate, the police have also implemented some preventive measures (Dölling, 1996). They often engage in harm-reduction counselling in schools, community institutions and for NGOs. They also increasingly act on their own initiative as counsellors for individuals and help outreach workers get in touch with addicts and get them into treatment. Increasingly, the police bring suspects directly to methadone maintenance practitioners or to psychiatric wards, because they feel this is more sensible than police custody or pre-trial detention.

Crime investigation and prevention tactics are important determinants of police strategy. In many cases, the goal of the police is to bring gangs or cartels to justice, so they will often be lenient with minor offenders or use them as informants in order to achieve this.

Other influences on police behaviour, as has been confirmed by sociological research, are workload, personal attitude, political stance and job satisfaction. These factors vary considerably and cannot be followed up in detail here (Feest and Lautmann, 1971; Aulinger, 1997; Geisler, 1998).

Prosecution

Though the *Strafprozessordnung* (StPO; Criminal Procedure Code) states that the prosecutor should lead and determine any investigative action by the police, almost all such investigative activity has been informally ceded to the police force. This has been criticised in legal circles, but it is not questioned politically and, from the point of resources, it would, in practice, be impossible to adhere to the statute law. Also, unlike judges, prosecutors have to answer to their superior, the *Oberstaatsanwalt*, and ultimately to the State Minister for Justice. This means that prosecutors must follow the official strategy favoured by the State, the attorney-general or at least by the presiding prosecutor of a court circuit. Thus, they have much less discretion than the police.

However, to some extent, as with the police, the prosecutors also act along informal lines. By statute law they have to determine whether, in each individual case, ‘public interest’ and ‘personal guilt’ demand strict law enforcement or allow for no further action, reduction of charges or diversion. Of course, the interpretation of these terms allows some leeway. Some prosecutors argue for ‘public interest’ when the act of drug consumption took place near a schoolyard, others would call for the direct presence of a minor. One may say that being addicted diminishes guilt, another will argue for a high degree of guilt.

The 1994 decision by the Federal Constitutional Court made it obligatory for the prosecution to drop the case (*nolle prosequi*: no further action) when the following criteria are fulfilled: a small amount of cannabis for irregular personal use, in the absence of public interest. For other illicit substances, no further action based on these criteria is optional. By and large, prosecutors adhere to this guideline. However, as with the police, there are essentially three informal strategies determining prosecution action. Here, too, depending on which strategy the particular prosecutor follows, the social background and previous offences of the drug offender can influence procedure. The constitutional court guideline did not stipulate whether and how previous offences were to be assessed, so the current debate centres on whether the obligation to drop the case is also valid in cases of recidivism.

Increasingly — at least in cases that do not involve property crime — prosecutors tend to allow for such cases to be covered by the guideline, which in turn influences the police to show more leniency towards drug users. The traditional approach still has considerable support, despite having been criminologically discredited: a second offence, when one is more serious, with many prosecutors would definitely lead to a more severe charge; a less serious second offence might lead to a more moderate solution, but definitely not to no further action.

Despite prosecutorial guidelines, there is some variation in prosecution decisions: according to the imperative of general prevention, they tend to follow a tactical course, like the police, as well as needing to demonstrate to the public the efficiency of such state activities and their own competency. At the same time, with the objective of prevention, they often get addicted users into treatment instead of enforcing punishment. However, since prosecutors are normally overloaded with cases, there is a pressing need to process as many files as possible by no further action without really looking into the case. Constant time pressures and a general lack of resources force the prosecutor to keep his actions to a minimum, and organising diversion (such as drug counselling or therapy) is much more work than no further action or simply bringing charges (Aulinger, 1997; Geisler, 1998).

In the context of an ongoing trend towards harm-reduction initiatives rather than repressive abstinence orientation, individual prosecutors and attorneys-general are increasingly turning to diversion measures. They can do this in the legal context of paragraph 153(a), StPO, and paragraph 37, BtMG. The former allows them to abstain from criminal punishment and order an array of customised measures like fines, restitution of damage, mediation, counselling, community service, etc. A useful side-effect of this type of alternative to criminal punishment is that social discourse and awareness are promoted, thus counteracting the alienation associated with modern post-industrialist society. The latter type of action opens up the possibility of stopping the vicious cycle of criminalisation and entering serious psychotherapeutic treatment, thus reaching the underlying symptoms of addiction and loss of control.

Courts

By and large, the courts also follow a policy of decriminalisation and harm reduction. Unlike prosecutors, according to the terms of the federal constitution, judges are independent. However, the three strategies described above are present in the national drug jurisdiction. On the one hand, the courts have to comply with the formal criteria of the law when they opt for no further action or diversion, on the other, they also use a degree of informal discretion which allows similar legal interpretation as that described for the prosecutors (Hellebrand, 1998). Increasingly, the harm-reduction approach is also allowing the courts to use the array of alternatives to criminal punishment mentioned above. As shown by socio-legal studies, however, if a given court circuit, as a whole, or the presiding judge support a more repressive strategy, an individual judge can be at a disadvantage professionally if he deviates from this (Lautmann, 1972; position confirmed by author's interviews). The traditional pattern of jurisdiction considers previous offences and recidivism as meriting harsher punishment, especially when second and subsequent offences were more serious. However, here, too, we increasingly find judges being more receptive to criminological insight and respecting the need for constructive measures rather than punishment, which is widely considered to be rather counter-productive. This type of judge would argue that, even if there is a serious relapse, this would not necessarily mean that the offender's criminal and drug career would worsen. When a less serious relapse occurs, it could herald long-term improvement in the offender's situation.

Also, many judges are now trying to encourage treatment by making use of paragraph 35, BtMG, or by granting probation with a condition of psychotherapy (paragraph 56, StGB) (see Egg, 1988, 1992). Prosecutors who are in charge of overseeing such treatment measures are usually trying to keep treatment going by not revoking the deferment of punishment (source: author's interviews).

There remains one serious problem in the field of German jurisprudence, and that is a serious lack of uniformity in judgments and measures taken throughout federal Germany (Hellebrand, 1998, p. 1286).

Current practice

Use/possession in private of 'very dangerous' drugs

Police

Random controls and relatively rare cases of informant reports yield finds of small amounts (e.g. heroin 'hits') for the police. Even though legally obliged to act (paragraph 163, StPO), in some cases an acting officer may decide to take no further action. In some cases, an officer may send the offender for drug counselling or some other kind of treatment (source: author's interviews). Officially, the police and prosecutors uphold the premise that all cases must be proactively investigated without exception. There have been suggestions that a policeman could be charged with *Strafvereitelung* (hindrance of criminal justice, paragraph 258, StGB) if he does not act or that he could be subject to blackmail if he spared certain people further investigation.

In about half of the cases investigated, the police officer will routinely charge the perpetrator and send the file to the prosecutor (paragraph 163, StPO). The police cannot directly impose a fine for drug offences.

Prosecution

The prosecutor determines the level of guilt by evaluating the amount of the substance as indicated by the police investigation. In cases where certain threshold values are not exceeded, the prosecutor routinely drops the case (paragraph 31(a), Section 1, BtMG). Only when the offence involves larger amounts are the offender's pattern of use (regular/irregular), personality, social background, etc., taken into account. Depending on the degree of seriousness of the offence and the level of guilt, the prosecutor then decides either on no further action (paragraph 31(a), Section 1, BtMG: *nolle prosequi*) or on no further action plus diversion (paragraph 153(a), StGB: fine, community service, restitution order, etc.). In either case, he has to examine whether the quantity of the illegal substance found in possession fulfils the legal criterion of 'small amount'. As this legal term is only applied by

the attorneys of State, it has not yet been interpreted by a binding precedent court decision.

Guidelines differ significantly from state to state. As a general rule, it is accepted practice to set the limit to the needs of a first-time user or a one-day supply, e.g. three ‘hits’ of heroin. These threshold values vary throughout Germany, but the following examples are an approximation [12]:

- 1–2 grams of heroin or cocaine;
- 6–30 grams of cannabis; and
- 10–30 ecstasy pills.

The following criteria also influence the prosecution decision:

- if possession, purchase, cultivation, import, etc., are for non-regular personal use only;
- if there is no public interest, meaning the absence of any circumstances indicating danger of harm to others (e.g. use in the presence of minors, soldiers or the mentally disabled); and
- a positive assessment of the offender’s personality and social background.

In cases of addiction, the prosecutor can combine no further action and ‘strong’ diversion on the grounds of paragraph 37, BtMG (the ‘treatment instead of punishment’ principle). The criteria for this action are as follows [13]:

- imprisonment of no more than two years could be expected;
- drug addiction is diagnosed; and
- the perpetrator is able to prove that he is already in long-term drug treatment (in- or outpatient).

The prosecutor can revoke the treatment order and immediately continue the criminal procedure if the offender drops out of treatment. If he decides that paragraph 37 of the BtMG is not applicable and that the perpetrator should be punished, the prosecutor can either issue a *Strafbefehl* (paragraph 407, StPO: a direct punishment order amounting to a substantial penal fine) or he can refer the case to the courts, which will then be in charge of the procedure.

In a case of 'simple' use such as this, assuming it is the first offence, the prosecutor would most certainly (100 %) opt for no further action and possibly include some sort of diversion. Usually, though, the prosecutor avoids having to arrange for a place in community service or a treatment institution. In many cases of heroin offences, the offender is already in methadone treatment and has been caught with some additional drug (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews).

Courts

In rare cases where possession is charged, or when a *Strafbefehl* is appealed against, the court sets a date for a public hearing and summonses witnesses and experts. However, the court can subsequently decide to drop the case (paragraph 29, Section 5, or paragraph 31(a), Section 2, BtMG).

The main criterion for no further action according to paragraph 29, Section 5, of the BtMG is that a 'small amount' of an illegal substance is involved. This amount has to be interpreted for each substance. The courts have come to somewhat differing interpretations, which are reflected in the state guidelines for prosecutors (see above). In spite of strong challenges in legal and political circles, no authoritative decision has yet been reached. One generally accepted standard would be:

- a day's supply for cannabis, for example; and
- one month's supply for heroin, for example.

The court can theoretically also sentence (paragraph 29, Section 1, No1, BtMG: up to five years of imprisonment) for possession, purchase, cultivation, import, etc., of the various substances, for personal consumption only. A court can also give the offender parole and order outpatient treatment (paragraphs 56, 56(c), StGB). If the offender does not comply, a special court has to convene in order to revoke the parole, although this does not necessarily happen. The court can also issue a suspended sentence and order treatment (paragraph 35, BtMG: the 'treatment instead of punishment' principle). If the offender drops out of treatment, the

case goes back to the prosecutor, who then revokes the deferment of sentence and sends the offender to prison.

In practice, in a case of ‘simple’ use like this, assuming it is the first offence, the court usually (90 %) opts for no further action and/or some sort of diversion.

Use/possession in public of ‘dangerous’ drugs

In general, the criminal law enforcement system treats cases of use/possession of ‘dangerous’ drugs such as cannabis as constituting a low degree of ‘danger for public health’.

Police

Since a Federal Constitutional Court decision of 1994 agreed a general strategy of decriminalising any acts related to mere cannabis consumption, the police automatically avoid proactivity with regard to cannabis. They practise what, in police jargon, is called the ‘stumble principle’: only when one accidentally stumbles across cannabis possession must one react. Even then, there is the option of overlooking or down-tariffing to a non-drug offence. If the individual acting officer wants to investigate, theoretically all the options as described above for use/possession of ‘very dangerous’ drugs are available. In practice, in 80 % of cases involving cannabis, the police turn a blind eye and opt for no further action (source: author’s interviews). Since 1994, there has been a significant increase in no further action by the police. This increase is due to the fact that, since the 1994 decision of the Federal Constitutional Court, prosecutors have to practise *nolle prosequi* (no further action) in average use/possession cases.

Prosecution

If the police adhered to the strict letter of the law and brought charges — which is rare — the prosecutor would then have to decide on the case. Assuming it were a ‘small amount for non-regular personal use’ (6–30 grams of cannabis, depending on the

region in Germany) and a first or second offence, he would certainly (100 %) drop the case and opt for no further action (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). For cannabis offences, since the 1994 decision of the Federal Constitutional Court, he is obliged to drop the case (no further action according to paragraph 31(a), Section 1, BtMG) when the criteria (see 'Prosecution' in the section on use/possession in private of 'very dangerous' drugs) are fulfilled. When youths are involved in such offences, the prosecutor who specialises in juvenile offences is more likely to prosecute than is the case for adults, in order to initiate some kind of education process.

Courts

Very few cases of use/possession of cannabis ever get to court. If, for some reason, a case reached the courts, it would probably be dropped (paragraph 29, Section 5, and paragraph 31(a), Section 2, of the BtMG, or paragraph 153(ff) of the StGB), possibly in combination with a fine or 'soft' diversion (90 %) (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews).

Use/possession in public of 'very dangerous' drugs

In general, the criminal law enforcement system would consider there to be a significantly higher degree of 'danger for public health' in cases of use/possession in public of 'very dangerous' drugs, such as heroin.

Police

When public use is involved, especially in the presence of minors, the police are unlikely to opt for no further action. In all probability (90 %), charges will be brought (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). On the other hand, the police have little interest in chasing heroin users ('junkie jogging', in police jargon). Their main interest is in dispersing open street markets and drug scenes, because of the risk of a subculture developing. A recent change in police attitudes

has been to consider ecstasy as a 'hard' drug, but there is little proactive enforcement as the users are not conspicuous. Raiding raves for ecstasy use is very unpopular with the police, as it takes a lot of preparatory work, often is not very successful and carries a risk of mass rioting.

Prosecution

The same is true at prosecution level as for the police. However, the prosecutor must adhere to the criteria of paragraph 31(a) of the BtMG. In a case involving a small amount for non-regular personal use (usually three 'hits' or one day's supply), a first-time offence and positive social background, about 60 % of cases are dropped in spite of public use.

Courts

Of the cases that come to court, there would be a rate of around 50 % of no further action (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). The court would have to reflect the same criteria as the prosecutor.

Use/possession in public of 'dangerous' drugs

Police

The police only act (50 % probability) if the public use is very conspicuous and clearly in the view of minors or soldiers, which would be considered detrimental to the public interest by the prosecution (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews).

Prosecution

The prosecution would also determine the amount of 'danger' for onlookers and would proceed with the case in about 40 % of cases (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). It could opt for no further action and/or 'weak' or 'strong' diversion along the lines listed above for prosecution of use/possession of

‘very dangerous’ drugs in private. The definition of a ‘small amount’ of cannabis is up to 30 grams of a black-market substance.

Courts

Depending on the circumstances of the individual case, the court may opt for no further action/diversion or for a sentence of a criminal fine (30 % probability) (Aulinger, 1997; Geisler, 1998; confirmed by author’s interviews). However, it is more likely that it would opt for no further action or a ‘soft’ diversion.

Retail sale of ‘very dangerous’ drugs in private (for use together)

In general, the criminal law enforcement system would consider this and the two following aspects of drug dealing to be of moderate ‘danger for public health’.

Police

If the offender appears to be addicted and if he is unknown to the police for other crimes, the police would not consider him to be the prototype of a dealer. Unless the police had specific information to the contrary, they would normally assess the level of ‘danger’ to be similar to that for personal use only and either opt for no further action, referral for treatment or counselling (40 % probability). There is a 60 % probability that the dealer would be charged (Aulinger, 1997; Geisler, 1998; confirmed by author’s interviews), in which case the police follow a strict procedure, as is predominantly the case in southern regions of Germany.

Prosecution

The prosecutor would view the case similarly to the police and probably opt for no further action, reduction of charges or diversion (50 %) (Aulinger, 1997; Geisler, 1998; confirmed by author’s interviews). If the offender is addicted or otherwise in need of help, and if there are no previous offences, the prosecutor, based on the

criteria of the StPO, paragraph 31(a), Section 1, of the BtMG, paragraphs 153(ff) and 37 of the BtMG, would combine no further action with 'weak' or 'strong' diversion (methadone treatment, counselling or referral for psychotherapy). For a second or third offence, the prosecutor would probably bring the case to court.

Courts

Depending on the circumstances of the case, the court would also opt for no further action on the basis of paragraph 153(ff) of the StPO, paragraph 29, Section 5, or 31(a), Section 2, of the BtMG and paragraph 35 of the BtMG.

Retail sale of 'very dangerous' drugs in private (for users who buy and depart)

Police

Even if a dealer is also a drug user, he/she is still considered to be a very significant 'danger to public health' and robust action is taken against them, without any discretion. The police proactively hunt for dealers. These now constitute the bulk of drug-related offenders in German prisons. The police, therefore, bring charges in at least 90 % of cases (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). The response will be even tougher when the user/dealer is known to the police and is considered extremely anti-social or when other crimes are involved.

Only in cases where it is evident that the dealer only sold to pay for his own supply of drugs may an individual officer choose to take no further action with regard to the offence.

Prosecution

Prosecutors take much the same approach as the police. They will usually automatically indict the user/dealer, regardless of whether it is a first or second offence (70 %) (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews). Only when

there is evidence of addiction and other social problems might they opt for no further action and diversion (as shown under 'Prosecution' in the section on use/possession of 'very dangerous' drugs in private). It would be difficult to opt for a diversion to enforced treatment, as dealers usually receive punishments of more than two years of imprisonment. According to paragraphs 35 and 37 of the BtMG, they are then not eligible for the 'treatment instead of punishment' principle. Other diversionary measures would be possible (paragraph 153(a), StPO) but are rarely used as they involve more work and the consent of the offender.

Courts

The courts will take the same approach as the prosecution. Only a few may be selected for diversion after a specific case review by the court (Aulinger, 1997; Geisler, 1998; confirmed by author's interviews).

Retail sale of 'very dangerous' drugs in public

Police

As far as level of guilt and punishment are concerned, the police do not usually make a distinction between a user/dealer who sells to individuals in private and one who sells in the open/street market, so the pattern described above applies here too.

There is one significant difference, however, on the basis of administrative law. Loitering or public nuisance is not punishable by law, but it can be subject to a banning order. In big cities and metropolitan areas, where open drug scenes and street markets tend to develop, the police sometimes make use of this instrument. Experience shows that, to some degree, it is possible to disperse such scenes. The drawback is that the drug market then largely retreats into private premises, which means that the police have less control over the black market.

Data from the interviews suggest that there are some differences in dealing with nationals and non-nationals.

Prosecution

There is no difference here to retail sale in private. From the prosecutor's perspective, it could appear that more of the user/dealers who operate in the open/street market are anti-social and drug dependent, possibly justifying enforced treatment measures. Another reason for very strict measures can be to regulate foreigners.

Courts

Court reactions are similar to those described above for retail sale in private.

Retail sale of 'dangerous' drugs in private (for use together)

Police

The police would not generally consider a user who sells cannabis to a co-user to be a drug dealer. So, unless there is evidence of large-scale sales, the consequences would be much the same as for cases of simple possession for personal use.

Prosecution and courts

This is the same as for the police.

Retail sale of 'dangerous' drugs in private (for users who buy and depart)

Police

Due to the perception that cannabis is less dangerous, a cannabis dealer can be treated somewhat less strictly by the police than a heroin or cocaine dealer. However, the perception that any drug dealer is dangerous generally prevails. Consequently, only around 20 % will receive no further action or 'weak' diversion (e.g. counselling) on a first offence. If known to the police from previous

offences, they will most certainly be charged. This would certainly happen in the case of foreigners with illegal or asylum-seeking status.

Prosecution

User/dealers of cannabis or ecstasy are decriminalised by prosecutors at a significantly higher rate than heroin or cocaine dealers. This is not only because of the lower degree of danger ascribed to these drugs but also because of the fact that such dealers usually come from socially integrated parts of society. If they belong to ethnic minorities or if they are illegal or asylum-seeking non-nationals, they will be prosecuted with the same degree of severity as a heroin dealer (author's opinion derived from interviews).

Courts

The same patterns and criteria apply for the courts as described for prosecutors. Similar considerations also apply for retail of cannabis in public to adults (open/street market).

Shoplifting

Police

Since only those perpetrators who get caught are reported to the police, the investigation rate is almost 100 %. The police exercise no discretion at all: when a person is reported for shoplifting, the police will bring charges without exception, leaving the decision to the prosecutor. Whether the perpetrator is a drug user, addicted or not, makes no difference to police practice.

Prosecution

For a first or second offence, any shoplifting charge is normally subject to no further action (paragraph 153, StPO) if the value of the stolen goods is below EUR 50. Only when there are certain aggravating circumstances will the prosecutor impose some kind of 'weak' diversion on the basis of paragraph 153(a) of the StPO

(a fine, social services, treatment, etc.), a punishment order or even an indictment. This is rare, though, as in cases of mass delinquency prosecutors avoid action which involves more than the minimum of work. On third and multiple offences of that category there will certainly be a punishment order or indictment.

For a first offence of shoplifting of goods of a value of up to EUR 100, the prosecutor will either impose diversion (less probable; paragraph 153a, StPO) or issue a punishment order (more probable).

Courts

On further investigation of an individual case, the court may discover special circumstances justifying no further action (paragraph 153, StPO). If not already dropped by the prosecutor, the court will also throw out unimportant drug offences (paragraph 154, StPO). For a third or multiple offences, the court might also impose a diversionary measure (paragraph 153(a), StPO) or sentence the offender to a fine or prison. If punishment involves prison, the court can parole this and order certain measures like restitution, social services or, in cases of drug addiction, treatment.

Burglary

Police

Burglary cases are routinely investigated, charged and referred to the prosecutor. The police authority and the criminal justice system would not tolerate no further action in cases involving significant damage. Any evidence of drug use would be irrelevant, so there would be no significant modification of procedure. The police estimate that 30–40 % of burglaries are committed by drug addicts (Kreuzer, 1998).

Prosecution

More serious property crimes than shoplifting are routinely and almost without exception addressed by *Strafbefehl* (a direct punishment order amounting to a substantial penal fine) or by referral

to the courts. If a drug problem is involved, the minor drug offences are dropped from the charge, as they are considered less relevant. The legal basis for this procedure is paragraph 154 of the StPO. In very minor cases, there may be *nolle prosequi* on the basis of paragraph 153 of the StPO. Property crime damage amounting to EUR 1 000 is considered quite high, so the expediency principle (paragraphs 153, 153(a), StGB) cannot apply. According to the legality principle, the prosecutor has to indict the case. When there is evidence of pathological drug dependence, the prosecutor orders a psychiatric examination. He must do this if he anticipates a verdict of diminished responsibility (paragraph 20, StGB) or possible committal for intramural treatment in a forensic hospital.

Only when the perpetrator has also been charged with drug offences and a punishment of less than two years in prison is expected can he be referred for enforced treatment (on the basis of paragraph 37, Section 1, BtMG) and sentence.

Courts

For the criminal offence of burglary, if a psychiatrist diagnoses significant pathological disturbance, or if the criminal act was committed under the influence of a legal or illegal substance or under the impact of withdrawal symptoms, the court can lower the sentence on the basis of a lower degree of guilt (paragraph 21, StGB). In cases of absolute diminished responsibility (paragraph 20, StGB), the court can commit an offender for intramural treatment in a forensic hospital (paragraphs 63, 64, StGB). However, this very rarely happens with drug addicts (less than 5 %) (Egg, 1992; Aulinger, 1997; Geisler, 1998).

Stealing from a person in the street (without causing injury)

Police, prosecution and courts

The degree of danger and guilt does not differ much from when such a crime involves physical hurt, as below. In German

jurisprudence and criminal law, snatching a purse is considered to be larceny, meaning an act of violence against a person, even if this does not imply actual physical hurt. Only when the victim does not resist — e.g. clinging to the purse — can it be considered simple theft. Even if the theft is considered to be less serious than burglary, the procedure is the same as described for burglary.

Stealing from a person in the street (causing injury)

Police, prosecution and courts

As mentioned above, this crime is generally considered to be larceny. There may only be a gradation of the degree of guilt and proportional punishment on the basis of the amount of force or violence applied. In an overall scale of criminal offences, larceny would rate higher than burglary. The procedure for the police, prosecution and courts is the same as described for burglary.

Common EU standards on prosecution of drug users

The principle of proportionality

In the author's view, this principle should be more strongly enforced in criminal-law practice. This would mean that the interpretation of legal terms and the resulting actions would be firmly grounded in the sub-principles of the proportionality principle as set out in German constitutional law: efficacy, necessity and appropriateness of any state measure. Research showing the doubtfulness and even counter-productivity of employing criminal law measures to fight against drug use (Kreuzer, 1998, with further references), the greater efficiency of harm-reduction measures, and the relative harm associated with the drug use should all be taken account of in the implementation of the law. There has been a shift of emphasis from the absolutist principle of abstinence to a more pragmatic approach embracing harm reduction, which has yet to be assimilated into the criminal law enforcement system.

There is no choice but to prioritise trafficking in the more dangerous drugs, but there should be more scientific research into the assumption and grading of dangerousness.

Action against trafficking should be more discriminating and pragmatic. In cases where small-scale traffickers are themselves addicted to drugs or when the case involves only small amounts for personal use, such offenders should also be eligible for diversion. A degree of pragmatic cooperation between small-scale dealers and the police could contribute to harm reduction and even help make the black market more transparent and easier for the authorities to oversee.

Control mechanisms for drug use and drug-related crime should focus more on the social background to drug addiction and anti-social careers, rather than concentrating on the symptom carriers. Human science research has shown that drug use should be assessed in terms of lifestyle, personal leisure choices, self-medication ⁽⁶³⁾ and social background, which would make it easier to address the associated problems.

Alternatives to punishment can improve the effectiveness of drug control by addressing such complex social problems adequately. Alternatives such as compensation (e.g. in drug-related property crimes), mediation (e.g. in cases of larceny) and community service could enhance social discourse and thus counteract the increasing alienation in modern society.

As long as drug control comes under criminal law and not public health, law-enforcement agencies should be trained in matters of public health. This means that links between the systems should be enhanced. As has already been seen in Germany, the police can participate in primary prevention measures. They can also contribute to secondary and tertiary prevention by directly or indirectly referring drug users to voluntary counselling and care institutions.

⁽⁶³⁾ 'Self-medication' means using illegal drugs autonomously without a doctor's advice or prescription for the purpose of soothing pain, healing disease or treating mental disturbances.

Drug use in most cases is, *per definitionem*, repetitive, since it is either a matter of lifestyle, self-medication or dependency, for which, according to the German constitutional order, a person may not be charged. The basic legitimising construct of German drug laws assumes damage or danger to others through the mere acts of consumption, possession, etc. According to the German constitutional court decision of 1994, the empirical basis of this assumption needs to be the subject of further empirical studies. When such results are obtained they will have to be weighed against the basic freedom rights of the constitution.

Changes to the legal framework

Most of the changes necessary in drug-law implementation by the police, prosecutors and courts could involve a simple reorientation of procedures, guidelines, etc., and a reinterpretation of legal terms. It is the author's view that:

- simple drug use should be decriminalised where it is still penalised;
- small-scale trafficking should be decriminalised, or at least down-graded; and
- syringe exchange, injection rooms, analysis of illegal drugs and other instruments of harm reduction should be automatically accepted as in the interest of public health and should not be punishable in any way.

One key issue of special concern

In science and epistemology, it is now generally accepted that research and theory formation should be grounded in an interdisciplinary approach and interaction between the practical field and empirical science. Modern drug research, linked to the neighbouring fields of legal drugs, psychopathology, criminology, social psychology, sociology and political science, represents a complex convergence in drug use and addiction. It has been shown that long-term problematic drug use and addiction is only a very small part of the whole area of experimental and transitional (as well as,

possibly, responsible) drug use (Böllinger et al., 1994; Albrecht, 1998). It has also been shown that drug use, like most behaviours, has advantages and disadvantages for the user and for society.

State-of-the-art drug theory demands that we see drug use as a matter of culture and public health rather than of deviance and criminality. What we have seen recently in the fields of science, social work and policing is a paradigm change from abstinence through repression to risk minimisation in the context of public health. Consequently, our attention has to focus on questions of how public health can be improved, how individuals can be empowered to live as healthily as possible, how social attitudes can be restructured in order to reduce alienation and encourage understanding and goodwill.

Officially, national and EU policies have not yet adapted to these changes, but many politicians do not deny these developments and imperatives when asked in private. The key challenge of this decade is the official implementation of the necessary changes and a complex public health/empowerment approach in the media, in politics, in the law and in formal guidelines for the police and social workers. This will take time. In the meantime, it is necessary to continue the meticulous process of changing societal attitudes and everyday practice, as well as putting in place changes in institutions and in the guidelines for the police and officials. The EU could develop a framework for such initiatives, by drawing up guidelines on how to implement a public health and empowerment-oriented policy and providing adequate resources.

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Notes

- [1] BGBl I 681, 1187 (BGBl = Federal Legislation Report 1981).
- [2] BGBl I 358 (1994). Original parliamentary bill and arguments: BT-Drs 9/27.
- [3] BGBl II 111 (1977) and II 1293 (1978).
- [4] BGBl I 1301 and 1593 (1992).
- [5] BGBl I 1407 (1993): implementation of UN 1988.
- [6] BGBl I 2835 (1994): implementation of the EU Council regulation 92/109/EEC of 14 December 1992 about precursor substances (Abl. EG Nr.L 370 S.76).
- [7] BtMAHV of 16 December 1981, BGBl I 1420.
- [8] Latest version: BtMVV of 20 January 1998, BGBl I 74.
- [9] BtMAendV of 23 January 1998, BGBl I 74.
- [10] Reformed 10 March 1987: BGBl I 945.
- [11] See the comprehensive articles by Schuster and Kasecker (1998) and Stock (1998).
- [12] See Körner, 2001, paragraph 29.
- [13] See Körner, 2001, paragraph 37.

Calliope Spinellis and Paraskevi Zagoura

Outline of the legal system of Greece

Type of system

The Greek legal system, in general, and Greek penal law, in particular, is statutory and it is based on the continental tradition (Spinellis and Spinellis, 1999, p. 18). The response to offences is regulated by two codes: the Penal Code of 1950 and the Code of Penal Procedure of 1950. Both codes entered into effect on 1 January 1951 and have been amended several times since. In addition to these, there are a considerable number of special statutes containing penal provisions (Special Penal laws — *Nebengezetze*; Spinellis and Spinellis, 1999, p. 9), one of which is the Law on the Suppression of the Propagation of Narcotic Drugs and on the Protection of Youth [1].

The main aims and characteristics of the law regulating the problem of drugs and drug policy in Greece are as follows (Mavris et al., 1999, p. 159):

- general and specific prevention/deterrence by means of the criminal justice system;
- an orientation towards penal sanctioning and not administrative or civil law;
- it is relatively centralised and gives little or no authority to local government;
- the principle of legality prevails, and not opportunity or expediency; and
- encouragement of treatment, under the jurisdiction of the criminal justice system.

More specifically, L.1729/1987 (amended) follows the structure and the spirit of the UN Convention of 1988 — which, since its

ratification (L.1990/1991), has been incorporated into Greek domestic legislation, overruling the existing laws (Article 28, paragraph 1, Greek Constitution). Two main categories of drug offences are very specifically regulated in Greek law: 'Felonies', under the subtitle 'Fundamental crimes', and 'Misdemeanours', under the subtitle 'Drug users'.

Felonies (fundamental crimes)

Fundamental crimes (Article 5, L.1729/1987) include all acts which correspond to Article 3, paragraph 1, of the UN Convention of 1988. The following offences constitute fundamental crimes:

- possession of drugs (and precursor substances, tools, etc.);
- production, cultivation and purchase of drugs (and precursor substances, tools, etc.);
- trafficking in drugs (and precursor substances, tools, etc.). e.g. sale, importation, transportation and supply of drugs; and
- organisation, funding and supervision of acts of sale.

Such cases are treated as a felony, for which punishment is imprisonment of at least 10 years and, in accordance with Article 3, paragraph 4(a), of the UN Convention of 1988, a monetary sentence and supplementary penalties; security measures are also provided.

For purposes of clarification, it should be pointed out that the Greek Penal Code (PC) follows a bifurcated system of sanctions: penalties and security measures. Penalties are categorised as:

- main penalties (i.e. custodial, monetary and community penalties); and
- supplementary penalties (i.e. deprivation of civil rights, ban on pursuing a profession, publication of the sentencing decision).

Security measures, imposed irrespective of the defendant's mental capacity, include:

- custody in a State therapeutic institution;

- committal of alcoholics and drug addicts to a therapeutic institution (Article 71, PC);
- prohibition of residence in certain areas; and
- confiscation of objects considered dangerous to the public (Spinellis and Spinellis, 1999, pp. 35–38).

The law on drugs (L.1927/1987) provides lenient penalties for an addicted offender. Such an offender is a person who has acquired a habit of drug use which he/she is unable to overcome unaided. In each individual case, a forensic expert makes such an assessment. For certain acts connected with the need to acquire drugs or to get money for drugs (including sale, purchase or possession of greater quantities than is justified for personal use), the addicted offender is punished with imprisonment of one to five years (and also with various supplementary measures). For other acts which constitute felonies, according to Article 5, L.1729/1987 (e.g. importation of drugs, sale of precursor substances, etc.), and which are not directly connected with the 'user/small dealer phenomenon', the penalty is imprisonment of up to 10 years (and various supplementary penalties and other measures; Article 13, paragraph 4(b), L.1729/1987).

Misdemeanours (drug users)

For this category of acts, Greek legislation adopts the principle of Article 3, paragraph 2, of the 1988 UN Convention and penalises as a misdemeanour the use, procurement, cultivation and possession of drugs for personal use (Article 12, L.1729/1987). Imprisonment of between 10 days and five years is the normal punishment. However, under certain circumstances such offences may receive no further action or diversion, etc. (see below). A mandatory judgment of no punishment (Article 13, paragraph 4(a), L.1729/1987) is available for an addicted offender.

As of 1999, Greek legislation has changed in regard to cases in which a user gives/sells to another user a part of the small quantity of drugs that he/she possesses for personal use. This is the first attempt to regulate low trade, which is in accordance with Article 3, paragraph 4(c), of the UN Convention of 1988 (acknowledging

degrees of seriousness of trafficking). This is now punished as a misdemeanour (Article 12, paragraph 4, L.1729/1987), with imprisonment of at least six months.

Overview of possible reactions and their legal basis

Police

Under the Greek legal system, the police do not have the discretionary power to dismiss a case or to handle it in alternative ways. On the contrary, according to Article 37 of the Code of Penal Procedure (CPP), all interrogation agents, including police officers (Article 33, CPP, and Article 13, paragraph 1, L.1481/84: 'Organisation of the Ministry of Public Order') [2], have to report every offence to the public prosecutor without delay.

In cases of minor offences — equivalent to the French 'contravention' — such as public nuisance, the Greek police have discretionary power not to refer an offender to the public prosecutor and can settle the case at the police station (Article 14, L.1481/84). In such cases, 'the heads of police departments, after prior hearing of the offender, may accept their objections and place the case in the archives'. However, none of the drug offences covered by the present study belong to the category of minor offences, so prosecution is the normal procedure (principle of legality).

Type of system

Offences are prosecuted exclusively by the public prosecutor at the court of misdemeanours, on receipt of a report from an authority, a complaint by the victim or any citizen, or in any other way (Spinellis and Spinellis 1999, p. 28 et seq.). The public prosecutor is obliged to prosecute the case, provided that it is based in the law, is not too vague and is clearly based on fact. The public prosecutor either conducts the investigation himself/herself or with the assistance of an investigative officer in order to establish if there is sufficient evidence to justify proceeding with prosecution. Greek criminal procedure is governed by the principle of mandatory prosecution (the legality principle), so

the public prosecutor has no discretionary power to prosecute or not, according to expediency.

The prosecution is effected in one of the following three ways:

- Prosecution can be initiated by a ‘summary’ investigation, conducted either by a magistrate or a police officer. This kind of investigation generally applies in cases of misdemeanour.
- Another possibility is an ‘ordinary’ investigation, conducted by an ordinary judge. This procedure is mandatory in felony cases. It is optional in misdemeanours if the public prosecutor is of the opinion that the summary investigation (which has already taken place) needs to be followed up by an ordinary investigation.
- The case can also be referred for trial before the competent court. This procedure is applied in cases of petty offences, misdemeanours of minor importance, when the facts are clearly proven, and misdemeanours when the offender is apprehended in the act.

After the investigation is completed, the public prosecutor may recommend to the judicial council (i.e. a court deciding *in camera*, without publicity) either to acquit the suspect (dismiss the case) without trial or to refer the case for trial (indict). The public prosecutor may also, after a summary investigation, refer the case directly for trial, without reference to the judicial council. The last possibility is limited to misdemeanour cases only.

The Greek Code of Penal Procedure (CPP) makes provision for the examining or investigating judge competent to conduct an ‘ordinary’ investigation, which is mandatory in all felony cases and optional in misdemeanour cases if the public prosecutor considers that the ‘summary’ investigation (by a magistrate or police officer) needs to be followed up. According to Article 239 of the CPP, the purpose of any form of investigation is to collect all necessary evidence in order to prove that an offence has been committed and to decide whether somebody should be referred to trial for such an offence. During the investigation, all efforts are made to discover the truth. The inquiry should aim at finding not only any incriminating evidence but also any information proving

the innocence of the accused. Furthermore, the investigation should collect any data concerning the character of the accused that could influence sentencing.

In particular, the investigating judge is competent to conduct all inquiries which he/she deems necessary in order to prove that a crime has been committed and by whom. The judge only considers the public prosecutor's recommendations if he/she believes that it would be useful (Article 248, CPP). The judge is also competent to order the temporary detention of the accused or to impose conditions such as bail, the obligation to report to a police station every day or a restriction on movement. However, in this case the investigating judge requires the agreement of the public prosecutor (Article 283, CPP).

Prosecution of drug and drug-related offences

A number of offences are classified as **misdemeanours**:

- use/possession of drugs for personal use;
- trade whereby a user provides to another user a part of the small quantity of drugs that he/she possesses for personal use (Article 12, paragraph 4, L.1729/1987);
- shoplifting;
- burglary; and
- stealing without any physical hurt to the person.

These crimes, after being investigated by the prosecution, are generally automatically referred for trial.

The following criminal acts are classified as **felonies**:

- sale of drugs ('fundamental' drug crime, Article 5, L.1729/1987);
- burglary, (i) when committed by two or more persons with the purpose of committing thefts or robberies and (ii) when committed by a person who commits thefts and robberies habitually or as a profession; and
- stealing, causing physical injury to the victim.

These crimes, after being investigated by the prosecution, are investigated by the examining judge and then referred for trial. During the pre-trial stage, diversion and no further action are only possible in a few cases.

Legal options during the pre-trial stage in cases of use/possession of any drug for personal use

No further action (Article 12, paragraph 3, L.1729/1987) is only possible for a non-addicted user and then only after penal prosecution, which is mandatory (legality principle). Such no further action occurs before or during the trial stage, depending on whether the case is referred to the judicial council (this rarely happens). The judicial council may issue an order for the non-punishment of the offender while imposing conditions regarding lifestyle and place of living (Article 100, A 2, CPP).

The main criteria for no further action (Article 12, paragraph 3, L.1729/1987), in order that the judicial council can issue an order declaring a non-addicted user to be unpunished, are the circumstances under which the offence was committed and the personality of the offender. This order is possible only when the above criteria lead to the conclusion that the behaviour was totally accidental and it is not likely that this or any other violation concerning drugs will occur.

Diversion (Article 12, paragraph 2, L.1729/1987) is possible for the non-addicted user, but only after prosecution (legality principle). It also is possible before or during the trial. Both the public prosecutor and the judicial council may accept a defendant's request to suspend the case and commit him/her to a therapeutic programme. After successful completion of such a programme, the judicial council may decide not to punish the offender (see discussion of a key issue below).

Either the public prosecutor or the judicial council may suspend the case and commit the offender to a therapeutic programme. The criteria for such diversion (Article 12, paragraph 2, L.1729/1987) are:

- no previous punishment for violation of the drug laws;
- no previous order for non-punishment as a circumstantial user; and
- the offender is willing to attend such a programme.

The judicial council may further order non-punishment if:

- the offender has not been convicted of any other drug offence since attending the treatment programme; and
- the offender can prove — by means of a certificate — successful completion of the programme.

Sale of drugs or property crimes committed by a drug user without causing injury

Regarding drug sales and property crimes without injury, no further action (Article 21, paragraph 1(a), L.2331/1995) is only possible for an addicted user who has been successfully treated, in which case the public prosecutor has the option not to prosecute.

According to Article 21, paragraph 1(a), L.2331/1995, definitive avoidance of penal prosecution may only take place when the following four criteria are met:

- the offender was an addict when committing the act;
- the offence was committed before voluntary attendance of a therapeutic programme was initiated;
- the act should either constitute a fundamental drug crime (Article 5, L.1729/1987; e.g. selling drugs) or have been committed to facilitate drug use (e.g. any property offence committed without violence or selling to a user a part of a small quantity of a drug substance that has been possessed for personal use/retail sale); and
- the perpetrator should by now have successfully completed treatment.

Diversion only applies to an addicted user who regularly attends treatment, in which case the penal prosecution may be suspended for a certain period (Article 21, paragraph 1(a), L.2331/1995), as

well as the arrest warrant itself (Article 21, paragraph 1(f), L.2331/1995). These measures are applied as incentives to addicts to continue therapy.

Leniency can be applied (including no further action) after successful completion of such therapy.

Suspension of the arrest warrant (Article 21, paragraph 1(f), L.2331/1995) and suspension of penal prosecution for a specific period of time (Article 21, paragraph 1(a), L.2331/1995) may occur only when all four of the previously mentioned criteria are met.

Courts

In order to reduce the use of imprisonment as a punishment, the Greek Penal Code provides for suspension of a sentence and for conversion into a financial penalty (Spinellis and Spinellis, 1999, p. 40).

A **suspended sentence** (with/without supervision) is generally applied in the following cases:

- Mandatory suspension without supervision can be applied if an offender who has not previously received a custodial sentence exceeding one month is now punished with a sentence not exceeding two years of imprisonment. In such cases, the court orders suspension of sentence for a specified period (three to five years), unless the court believes that a custodial sentence is absolutely necessary as a deterrent to future offending (Article 99, PC).
- Discretionary suspension without supervision applies in cases where an offender's sentence amounts to between two and three years. The court may order the sentence to be suspended for the same period (three to five years) (Article 100, PC). In this case, the court considers, *inter alia*, (i) the circumstances under which the offence was committed, (ii) the motives of the offender, (iii) the offender's background and character and (iv) the necessity of a custodial sentence for purposes of individual deterrence.

- Discretionary suspension with supervision is possible if (i) the requirements of Articles 99 and 100 (PC) are fulfilled and (ii) the offender's sentence amounts to more than three and less than five years of imprisonment. In this case, the court may order a suspended sentence on certain conditions and under the supervision and care of a probation officer for the same period (three to five years) (Article 100(A), PC). However, suspension of sentence with supervision has not yet been applied, in practice, due to the fact that the required body of probation officers has not been instituted.

With respect to the offences covered by the present study, a suspended sentence is possible under the above circumstances. However, a felony (an offence which merits at least five years of imprisonment) may ultimately be punished as a misdemeanour (imprisonment for up to five years) in cases where there are mitigating circumstances (former background, lifestyle, etc.) or when an offender is a drug addict.

Conversion (Article 82, PC) of imprisonment into a non-custodial sentence, after a series of amendments, is now possible for most prison sentences of up to three years. Thus, almost all such sentences are now converted into fines. This emphasis on non-custodial sanctions and measures is the result of recommendations by international organisations and pressures created by prison overcrowding.

Conversion of imprisonment into a financial penalty is possible in cases covered by this study. However, Article 82, paragraph 11, of the Penal Code specifies that conversion should not occur in cases of drug trafficking. Given that the term 'traffic' is not precisely defined in the law, questions sometimes arise concerning interpretation. The courts, adopting a wide interpretation of the term, consider as 'traffic' any act covered in the drug legislation that facilitates or contributes to the circulation of illegal narcotic substances. A narrower interpretation would be that the term refers to the act of sale of a drug (a felony according to Article 5, L.1729/1987). Nevertheless, the law allows, *expressis verbis*, conversion of a sentence to a fine in cases of retail sale when a user provides/sells a part of the small quantity that he/she possesses for personal use (Article 12, paragraph 4, L.1729/1987).

No further action and diversion via special procedures for use/possession of any drug for personal use

No further action and diversion are possible in cases of use/possession of any drug for personal use. The addicted user remains unpunished (Article 13, paragraph 4(a), L.1729/1987) and can be referred for treatment if he/she requests it.

For the non-addicted user, the following criteria apply:

- Where there is the option for no further action (Article 12, paragraph 3, L.1729/1987), the court may decide on non-punishment of the offender under certain conditions regarding lifestyle and place of living (Article 100, A 2, CPP).
- Where diversion is an option (Article 12, paragraph 2, L.1729/1987), the court may accede to a request by the defendant to suspend the trial and commit him/her to a therapeutic programme. After successful completion of such a programme, the court may opt for no further punishment.

The law provides for a mandatory non-punishment of the addicted user (Article 13, paragraph 4(a), L.1729/1987). Regarding the non-addicted user, the following criteria apply.

- For cases where no further action is a possibility (Article 12, paragraph 3, L.1729/1987), the court may decide not to punish the defendant if the circumstances under which the act was committed and the character of the offender lead to the conclusion that the offence was totally accidental and it is not likely that he/she will commit further drug-related offences.
- For cases where diversion is a possibility (Article 12, paragraph 2, L.1729/1987), the court may suspend the case and commit the offender to a therapeutic programme if he/she (i) has never before been punished for violation of the drug laws, (ii) has never been found unpunished as a circumstantial user and (iii) is willing to attend such a programme. The court may subsequently apply a non-punishment if the offender (i) has not been convicted of other drug offences in the meantime and (ii) is able to prove — by means of a certificate — successful completion of a therapeutic programme.

Retail sale of drugs or property crimes committed by a drug user without causing injury

Regarding the sale of drugs and property crimes without injury, the option of no further action (Article 21, paragraph 1(e), L.2331/1995) applies exclusively to an addicted user who has been successfully treated. On proof of treatment, a suspended sentence is mandatory at sentencing.

The option of diversion applies to an addicted user under therapy. In such a case, it is mandatory that the trial be suspended, so that treatment can be completed. The offender will have a right to leniency, including no further action (Article 21, paragraph 1(b), L.2331/1995). A prior court decision issued in the absence of the offender who was under therapy may also be suspended (Article 21, paragraph 1(d), L.2331/1995).

A mandatory suspension of sentence (Article 21, paragraph 1(e), L.2331/1995) is applied under the following criteria. The offender must have been an addict when committing the offence and it must have been committed before voluntary attendance of a therapeutic programme. The act should either constitute a fundamental drug crime according to Article 5, L.1729/1987 (e.g. selling drugs), or have been committed to facilitate drug use (e.g. any property offence committed without violence or sale to a user of part of a small quantity of a drug substance that is possessed for personal use — retail sale). The offender should also have completed successful treatment.

The criteria for diversion are as follows. A mandatory suspension of the trial (Article 21, paragraph 1(b), L.2331/1995) as well as a potential suspended sentence can be ordered in the user's absence (Article 21, paragraph 1(d), L.2331/1995) under the following conditions: the offender must have been an addict when committing the offence and it must have been committed before voluntary attendance of a therapeutic programme; the act should either constitute a fundamental drug crime according to Article 5, L.1729/1987 (e.g. selling drugs), or have been committed to facilitate drug use (e.g. any property offence committed without

violence or sale of a small quantity — retail sale); the offender must be willing to regularly attend for treatment.

A suspended sentence (of two to 20 years) can be granted to an offender who commits any of the fundamental crimes of Article 5, L.1729/1987 (including sale), if, on his/her own initiative, the offender contributes to the detection and/or closedown of a drug-trafficking network (Article 24, L.1729/1987).

Current practice

The typical reactions of the criminal justice system are defined and restricted by the legal framework (see above). Nevertheless, the following remarks are useful:

- Police rarely intervene in cases of use that take place inside a house or individually.
- In relation to use/possession, the chances of non-punishment (no further action) are enhanced when it is a less dangerous drug.
- When a group of users use together a drug which has been the object of sale among them immediately prior to use, prosecution for a **misdemeanour** according to Article 12, paragraph 4, L.1729/1987, is less likely than prosecution for a **felony** according to Article 5, L.1729/1987, but convictions could ultimately be either for felony or for misdemeanour.
- No further action/diversion are not an option in cases of theft with physical injury to the victim.

With respect to the offences covered by this study, the following distinctions should be made.

Police

On confirmation that an offence has been committed, the police proceed with the investigation (by questioning the witnesses and those arrested and by examining the evidence) and the drug-prosecution police department sends a report to the public prosecutor. This report is crucial for the criminal dossier, because it

describes the facts in detail for the public prosecution (misdemeanour or felony, with/without aggravating circumstances, etc.). In particular, the report usually includes the following:

- a description of the offence;
- an evaluation and legal history of the offender(s) and the degree of involvement; and
- an assessment of the seriousness of the arrest, using as criteria:
 - (i) the offender's willingness to cooperate with the police and
 - (ii) his/her penal status, based on criminal record (prior convictions), record of criminality (standing accusations) and, mainly, recidivism.

As the police lack discretionary powers, the case is referred to the public prosecutor.

Pre-trial

There are two main issues at the pre-trial stage: the form that the charges take and whether no further action or diversion are implemented.

The public prosecutor mostly depends on the police report and suggestions to formulate the charges. The facts of the case are further investigated before prosecution and a simple informal hearing into the circumstances of arrest is held. In particular, possessing narcotic substances can in fact lead to one of the two following (different and alternative) charges being brought:

- Prosecution for felony according to Article 5, L.1729/1987 (possession with the aim of trafficking). In cases of recidivism, the defendant is often referred with the aggravating circumstance of 'being exceptionally dangerous' or of 'acting professionally or by habit'.
- Prosecution for misdemeanour according to Article 12, paragraph 1, L.1729/1987 (possession for personal use).

Selling drugs may also lead to one of the two following (different and alternative) charges being brought:

- Prosecution for felony according to Article 5, L.1729/1987.
- Prosecution for misdemeanour according to Article 12, paragraph 4, L.1729/1987 (a user provides to another user a part of the small quantity of drugs that he/she possesses for personal use).

In general, prosecution for a misdemeanour is unusual. It usually occurs either because the legal provisions are relatively recent and their criteria of implementation are not yet fully understood or because the legal terminology (e.g. what constitutes a 'small' quantity of drugs) is ambiguous.

In both the above cases (possessing or selling), the criteria to determine whether the prosecution will be for felony or for misdemeanour are:

- the amount of drugs;
- whether the drug is packaged in doses or in larger quantities;
- whether weighing equipment, other implements and money were found at the scene of arrest;
- general information received by the police (usually anonymous) concerning the defendant and his/her lifestyle; and
- penal status and (importantly) recidivism.

Therefore, the same quantity of drugs may result either in prosecution for a felony or a misdemeanour.

It is immaterial to the prosecution whether property offences are committed by a drug user or not. The offence may constitute either a felony or a misdemeanour (depending on the circumstances — number of offenders, violence, etc.).

At the pre-trial stage, no further action and diversion are optional, but they are rarely applied, usually for the following reasons:

- the legal requirements are too many and met only by a minority of the defendants;
- they are not requested by the defendant; and
- the prosecution prefers to transfer the burden of such a choice to the courts (because of the principle of legality).

Courts

There are two main issues at the trial stage: the final form that the charges take and the subsequent sentencing.

Often, elements of the charges prepared by the penal prosecutor are abandoned as legally unfounded or unproven. Such is the case when a person is prosecuted for 'sale of unknown quantity of drugs to unknown users for an unknown price'.

The charges may also be modified, either because the court's method of evaluating the evidence is different (e.g. possession of drugs with the aim of trafficking may be viewed as possession for personal use) or because the court concludes that the defendant is an addicted user (in which case punishment will be more lenient).

Depending on the final charges brought, use and possession of drugs for personal use are ultimately handled as in Table 5. Sale of drugs (including retail sale) are handled as in Table 6.

The various options for sentencing of users who commit a property offence are listed below:

- Conversion into a financial penalty and suspension of sentence are often applied, under the legal requirements of the Penal Code.
- The no further action and diversion that are available for successfully treated defendants and those in therapy (these constitute a minority of the cases referred to trial) are rarely applied. No alternative options are legally permitted for theft with physical injury to the victim.
- It is generally recognised that drug use diminishes the user's mental ability to distinguish between right and wrong, so the courts normally impose a less severe sentence in such cases (Article 36, PC).

TABLE 5: SENTENCING FOR USE/POSSESSION FOR PERSONAL USE

| Sentencing by the courts (when legal conditions are met) | Use/possession by an addicted user (Article 12, paragraphs 1 and 13, L.1729/1987) | Use/possession by a non-addicted user (Article 12, paragraph 1, L.1729/1987) |
|--|--|--|
| Imprisonment (10 days to 5 years) (Article 12, paragraph 1, L.1729/1987) | Not applicable | Typically followed by conversion or suspension |
| Conversion of imprisonment into financial penalty (Article 82, PC) | Not applicable | Typical |
| Suspended sentence (Articles 99, 100, 102, PC) | Not applicable | Typical |
| Suspension of trial (diversion) (Article 12, paragraph 2, L.1729/1987) | Not applicable | Not likely |
| Unpunished (NFA) | Mandatory (and referred for therapy if requested) (Article 12, paragraph 1, and Article 13, L.1729/1987) | Very probable where use is considered circumstantial (additional restrictions are unlikely) (Article 12, paragraph 3, L.1729/1987) |

Summary of sentencing and diversion practice

The alternatives to prison can be summarised as follows.

- When a court orders conversion of imprisonment to a financial penalty and a suspended sentence, it first examines whether the legal requirements are met and then evaluates the defendant in terms of his/her character, former lifestyle, behaviour after the offence, remorse and willingness to make amends, as well as the background and contributory causes (derived from the court's analysis). The court decides whether a monetary sentence would suffice to discourage the defendant from committing other illegal acts. These mechanisms are common in the Greek criminal justice system.

TABLE 6: SENTENCING FOR SALE

| | | | |
|--|---|---|--|
| Sentencing by the courts (when legal conditions are met) | Sale by a non-addicted user (Article 5, L.1729/1987) | Sale by an addicted user (Articles 5 and 13, L.1729/1987) | The seller, addicted or not, sells part of the small quantity he/she possesses for personal use (Article 12, paragraph 4, L.1729/1987) |
| Imprisonment (5 years or more) (L.1729/1987) | Typical | Not applicable | Not applicable |
| Imprisonment (1–5 years) (L.1729/1987) | Very likely unless there are mitigating circumstances (e.g. former exemplary lifestyle) | Typical | Typically followed by conversion/suspension |
| Conversion into financial penalty (Article 82, PC) | Forbidden by law | Forbidden by law | Typical |
| Suspension of sentence (Article 99, 100, 102 PC) | Not likely | Not likely | Typical |
| Suspension of trial (diversion) (L.2331/1995) | Not applicable | Mandatory for an addict under therapy | Not likely |
| Suspension of sentence issued in the defendant's absence (diversion) (L.2331/1995) | Not applicable | Likely for an addict in therapy | Not likely |
| Suspended sentence (NFA) (L.2331/1995) | Not applicable | Mandatory for a successfully treated addict | Not likely |

- No further action and diversion are typically applied only if it is mandatory by law. When these alternatives are an option, they are applied with reluctance. This usually occurs either because of the legal requirements (all of these are seldom met) or because the criminal justice system fails.

- No further action is only typically applied in cases of infrequent use/possession for personal use. In fact, absence of a criminal record, a socially adjusted life (e.g. having a job, pursuing studies, family support), age (18–21 years) and inexperience constitute strong indications that the drug use was not typical behaviour. In such cases, non-punishment is the most likely outcome.

Given the fact that Greek law does not distinguish between very dangerous and less dangerous drugs, even intermittent use of heroin or any equally dangerous drug is not excluded from the above regulations. However, in practice, the courts adhere to the escalation theory, whereby it is generally accepted that intermittent use is more often associated with so-called 'soft' drugs (e.g. cannabis) than 'hard' drugs (e.g. heroin). The latter are more often associated with extensive use or addiction.

Whether the use takes place in public or in private is deemed irrelevant.

Statistical data confirm the above. The vast majority of drug offenders are convicted for acts of trafficking and not use/possession for personal use. Unpublished data from the Ministry of Justice (Spinellis, 1999, p. 720) indicate that the numbers convicted for violations of L.1729/1987 are constantly increasing, especially since 1990. This group, according to statistics for the year 2000, constitute 36.9 % of the total prison population. Conviction for trafficking offences 'decisively contributes to prison overpopulation, creates needs for medical interventions, and forms/deforms the profile of the detainee' (Spinellis, 1999, p. 719). It is evident that the overwhelming majority of detainees are involved in trafficking.

By contrast, use/possession for personal use generally remains unpunished (no further action by the courts). The authors estimate that, of the cases prosecuted for use/possession for personal use, 50 % result in non-punishment, usually conversion to a fine or a suspended sentence. In 1995, 752 (out of a total of 1 569 convictions for drug offences) were convicted for use and 257 of these received a suspended sentence (Spinellis, 1999, p. 741).

The implementation of diversion is not very developed as yet. Few cases are referred for therapy instead of imprisonment (unpublished data of the Ministry of Justice). Juvenile courts, which often avail of therapeutic diversion, constitute an exception. Data supplied by the treatment services covering the years 1995 to 1999 show that an average of 2 % of the patients aged 20 and above were referred to them by the criminal justice system, while an average of 12 % of the patients aged 20 and less were referred to them by the juvenile courts (unpublished data from Kethea).

Common EU standards on prosecution of drug users

What should happen in practice

This section reports on the views of key individuals involved with the drug laws and drug policy.

Persons interviewed

Ten interviews were conducted with key specialists [3] in the following areas:

- the criminal justice system (e.g. legislators, court officials, public prosecutors and law enforcers);
- criminal court trials (e.g. lawyers specialising in drug cases); and
- qualitative or quantitative research (e.g. criminologists).

A number of additional informal interviews were conducted among therapists, psychologists and social workers involved in the treatment of drug addicts.

It is important to note that experts such as those mentioned above look at the relevant information from very different perspectives. For instance, criminal justice officials continually interact with the text of the law, attempting to balance its teleological and literal interpretation. They are more likely to discuss what usually occurs in practice and less what should be the case. Their approach revolves around strict enforcement of the law and the

safe administration of justice. Lawyers are more likely to express evaluative judgments about the system itself, focusing on respect for the defendant's rights and humane treatment. At the same time, they stress the contradictions in the legal documents and the disparity between the law in theory and enforcement of law.

Health and social service providers who collaborate with the criminal justice system approach these issues according to their particular tasks and functions. For instance, therapists evaluate the physical and mental health of the addict, which they consider to be the 'legal interest' that has to be protected. Prevention agencies insist on a high-quality public health service and protection of vulnerable social groups. Social policy planners are concerned with the political implications of drug abuse, taking into account the prevalence of the phenomenon, the social cost and the special needs of addicted users, as well as the efficiency of any measures that are taken.

In general, all the aforementioned points of view need to be considered in order to comprehensively understand and evaluate the drug phenomenon and come up with a solution as to how the problem can be effectively handled.

The rest of this report on prosecution practice in Greece presents a summary and critique of the data that emerged from the above-mentioned interviews with references to the relevant literature.

Proportionality

It is generally accepted that the degree of involvement of the justice system in the drug problem should be proportionate to the harm it seeks to prevent. This policy conforms with the principle of general crime prevention (socialisation of the general public in respect of legal norms) and special crime prevention (rehabilitation of the offender).

Legal experts believe that the existing legislation embodies this kind of approach, since it classifies offences according to the social harm caused. 'Trafficking' (which is considered to be the greatest social danger) is punished more severely than 'minor

trafficking among drug users' (where the harm is limited to that specific social group), while drug use (self-inflicted harm) only warrants a minor sentence. There is a similar gradation in procedures, especially those which concern restrictions on the freedom of the defendant (for example, temporary incarceration for felonies only). Moreover, the ability of the offender to avoid committing further offences is also taken into consideration (treatment of a 'typical' offender should differ from that of an addict). The following rationale is developed by experts in the field.

The Greek Constitution embraces the principle *nullum crimen nulla poena sine culpa* — no one may be punished without guilt. This principle emanates from Article 2, paragraph 1 (protection of human dignity), and Article 5, paragraph 1 (nurture of the personality), of the Constitution as well as from Article 7, paragraph 1, according to which a sentence presupposes a crime. Furthermore, according to Article 14 of the Penal Code and legal experts in general, a crime presupposes guilt. A clear consequence of the same principle is that a sentence may not be disproportionately severe in respect of a person's guilt. Addiction, by definition, seriously affects the level of guilt. In the case of drug use, the presence of addiction effectively suspends guilt, since the addicted user cannot psychologically resist the need to acquire drugs. Moreover, in the case of a small-scale user/dealer, addiction considerably reduces guilt, since it is extremely difficult — certainly more so than for the average citizen — to avoid the act of trafficking when faced with the need to procure his/her daily dose.

It is self-evident that penal legislation should be enforced according to the principle of proportionality. This principle is evidenced in the Greek legal system in the following ways:

- a guilty defendant is only sentenced for acts that violate fundamental human rights;
- during the sentencing process, the judge takes into consideration the level of harm and the degree of guilt of the offender; and
- when imprisonment is ordered, it should (i) provide education/training, (ii) offer opportunities for social integration of the

detainees, (iii) avoid any humiliating effects and adverse consequences resulting from deprivation of liberty and (iv) develop the offender's self-respect and sense of responsibility (clearly, none of these should undermine the smooth functioning of the penal institution).

However, the experts interviewed believe that, if one studies the individual stages of the penal process, the policy of proportional intervention is not always applied. This may be due to any of the following:

- obstacles posed by legislation, such as the fact that the police do not possess discretionary power and the public prosecutor is restricted by the principle of legality;
- insufficient knowledge of the alternative possibilities provided by law;
- the burden of ordering alternative treatment is frequently referred from one stage of the legal process to the next, due to fear of the responsibility involved in taking such a decision; and
- a generalised rather than individualised approach is often taken to cases.

Summing up, the general consensus is that any future amendments of Greek drug legislation should strictly follow the principle of proportionality, for the following reasons. The drug user is the victim, while the dealer is the wrongdoer. The latter actively exploits and reinforces competition and social oppression in order to profit financially. Therefore, a clear distinction should continue to be made between a common drug user, an addicted small-scale dealer, an addicted regular dealer and a non-addicted dealer. This implies that an addicted regular dealer should not benefit from the same degree of leniency afforded to a simple drug user. Equally, a non-addicted regular drug dealer should not be treated with the same leniency as an addicted small-scale dealer.

Guidelines

It is generally agreed that a set of national guidelines needs to be developed, in order to encourage uniformity and coherence in

the law-enforcement processes (e.g. elimination of disparity in sentencing). However, the guidelines should not violate the discretionary power of the judge to evaluate the circumstances of the offence and the personality of the perpetrator, criteria which are taken into consideration at sentencing and which are seen as part of the defendant's right to individual treatment (case-law also follows this premise).

Opinions differed in some areas, such as about how a quantity of any substance should be defined. A law passed in 1987 provided for a ministerial commission to establish the quantities for each specific substance which could be regarded as satisfying the needs of a specific user for a specific period of time (Article 12, paragraph 1, L.1729/1987). However, this provision has not been implemented due to divided opinions.

- Some policy-makers agree that quantities need to be defined in order to create a coherent policy in criminal prosecution and trials of drug sale offences. In other words, possession up to a certain limit would suggest 'possession for personal use', whereas possession of quantities exceeding those defined in law would suggest 'possession intended for trafficking'.
- Some policy-makers argue that judges would be severely handicapped by the specification of quantities. As the law stands, they are able to take into consideration all the circumstances surrounding the offence (thus, the intent of trafficking is not established solely by the quantity) and the character and background of the offender (thus, the degree of addiction is the factor that determines the quantity purchased and possessed for personal use). Furthermore, they believe that the adoption of a restricted definition of quantities would not serve the fight against trafficking, because traffickers would adapt to the legally prescribed quantities, only circulating the substance in quantities that do not exceed those tolerated by law.

Prioritisation of drug offences

It is generally agreed that the police and public prosecutors' offices should give the highest priority to cases of drug trafficking,

especially when conducted within the framework of international organised crime. The law currently embraces the principle that the punishment of a dealer should depend on the form the offence takes, the degree of organisation of the drug network and the degree of involvement of the defendant.

However, certain criticisms have also been advanced, mostly related to:

- the case-by-case application of the provisions of the law (for example, which defendant should usually be characterised as a ‘person acting professionally or by habit’ or as an ‘exceptionally dangerous person’); and
- the severity of sentencing compared to other European countries — Paraskevopoulos (1997, p. 18) maintains that, although severe punishment of a dealer is necessary, such punishment does not address the social causes of the problem and that, as long as there is a demand for drugs, it will be difficult to completely eradicate trafficking.

Furthermore, it has never been demonstrated that increasing the severity of sentencing has a positive effect on reducing crime (Spinellis, 1982, p. 380). However, the harshness of Greek criminal legislation can clearly be traced, *inter alia*, to the country’s geographical position as a transit point for importing heroin into Europe (see, among others, Centre for Penal and Criminological Research, 1998). The same seems to hold true in western European countries with respect to the importation of cocaine.

In any case the experts agree on the following:

- The provision of material and human resources for detecting and neutralising major trafficking networks should remain a high priority (EKTEPN, 2000).
- Criminal prosecution and severe punishment should continue to be applied at all stages of the process, regardless of the kind of substance, to conform with all international agreements.
- The kind of substance and the amount should be taken into account when sentencing for dealing. This is dictated by the principle of proportionality, on which Greek criminal law is

based, which takes account of the seriousness of the offence and punishes accordingly.

- When it comes to users sharing drugs, the present tendency to regard this as an aspect of drug use rather than of trafficking, even though money may change hands within the group, is seen as appropriate.

Property crimes

It is a commonly accepted fact that many drug users — especially those who are socially and financially deprived — are also involved in violations of the Criminal Code and, to some degree, in drug trafficking or dealing. International research has attempted to explain this phenomenon (see especially the relevant viewpoints and research data in Grapendaal et al. (1995), Brochu (1995) and South (1995), where an attempt is made to identify the temporal and causal relation between various types of criminal activity). It is hard to deny that there is a persuasive argument for an interactive relation between crimes committed by drug users and the various contributory factors.

There is a consensus among interviewees and the legal literature that there are two types of property crime:

- the economic compulsive model, whereby an addicted user commits crimes in order to find the means for satisfying a drug habit (in this case, there is an option of no further action for a successfully treated perpetrator and of diversion for an offender undergoing treatment — L.2331/1995); and
- the pharmacological model, whereby an addicted user commits crimes because, when under the influence of drugs, he/she is unable to distinguish between right and wrong or to comply with what is right (in this case, there is an option of a less severe sentence according to Article 36 of the Penal Code).

There is a tendency to opt for less severe punishment for an addicted user. However, there is a discrepancy of opinion regarding prosecution of these cases. Some individuals favour prosecution for the following reasons:

- The criminal justice system as it stands is able to deal effectively with criminal behaviour in general. The system also provides constitutional safeguards for protection of the rights of the defendant.
- Out-of-court monetary compensation for the victim is meaningless, as the addicted offender lacks financial resources.
- The capacity/infrastructure of the public administration and police services are not sufficient to handle such cases.
- Diversion from the criminal justice system and referral to treatment agencies are desirable, but at a later stage in the proceedings, after taking into consideration the character of the offender (whether a user is addicted or if it is a first offence) and the extent of the damage.

On the other hand, those who believe that criminal prosecution should be avoided propose the following:

- The character of the offender (e.g. if a user is addicted) and the seriousness of the offence (e.g. with/without injury to the victim) should be taken into account.
- Even a symbolic, out-of-court payment of damages to the victim is desirable.
- An independent judicial authority should be established to impose administrative sanctions. This should operate outside the criminal justice system.
- Immediate referral to treatment and welfare services, following a request by the offender, should be administered in lieu of criminal prosecution.

Trafficking

Low-grade trafficking offences are regarded as inevitable, as they are the outcome of interaction with the criminal environment (use itself constitutes delinquent behaviour). Because of this, leniency is encouraged when handling an addicted user who is involved in trafficking (Articles 5 and 13, L.1729/1987) or a small-scale trafficker, regardless of the kind of substance (Articles 12 and 4, L.1729/1987). This is justified on the following grounds:

- an addicted trafficker offends out of necessity, as a result of his/her degraded physical, psychological and social condition;
- the social characteristics of a small-scale trafficker show that he/she is more like a user than a drug dealer; and
- the prison environment (including prison overcrowding) is not conducive to the user (addicted or not) receiving treatment (this does not conform with the principle of proportionality).

As already mentioned, there is a divergence of opinion among the experts who were interviewed with respect to mandatory prosecution. A number of experts believe that all cases should be processed by the criminal justice system and are against any alternative approach. Others believe that there is a need to enrich the criminal justice system with the option of treatment/diversion, depending on the circumstances and in compliance with certain clear criteria that would need to be incorporated into the law. Still others believe that immediate treatment without any prior intervention by the prosecuting authorities would be preferable.

Social nuisance

The interviewees believe that drug use should not be a criterion in cases of social nuisance. All such offenders should be punished, provided there is a relevant legal provision (e.g. disturbance of the peace, which is a minor offence according to Article 417, PC).

Distinction between hard and soft drugs

The experts point to the fact that the law does not distinguish between substances (no distinction between so-called ‘soft’ and ‘hard’ drugs), therefore any drug could be considered a low priority. Theoretically, this could result in one of two main possible outcomes:

- an addicted user remains unpunished, as possession of any narcotic substance for personal use is not punishable; and
- a non-addicted user is subject to lenient treatment, either because (a) the law provides that the degree of harmfulness of the substance and the category to which it belongs have to be taken into

consideration at sentencing or (b), in theory as well as in practice, the use and possession of a less dangerous drug (soft drug) usually receives non-punishment/no further action (circumstantial use).

Many experts consider it satisfactory that the existing legislation does not distinguish between substances. They suggest that the same should apply at all stages of the criminal proceedings. At present, there is evidence suggesting that suspension of the criminal proceedings with referral of the offender to a therapeutic programme (diversion) and no further action are not usually applied before the trial.

Other interviewees believe that the prosecutor should have the option not to prosecute a defendant (partial adoption of the principle of expediency), and that the drug should be confiscated and the offender referred to an advice/counselling programme. These experts believe that, in practice, it is impossible to enforce restrictive orders (e.g. an order to stay in a prescribed area). They also express reservations about on-the-spot fines imposed by the police. They believe that, *inter alia*, there is a discrepancy between means and goals (i.e. between the fine and the behaviour which it aims to deter). This debate remains unresolved in Greece.

Imprisonment

In general, non-punishment and subsequent non-imprisonment of the addicted user charged with use/possession for personal use is regarded by the legal experts as desirable and useful at both the social and individual level. They believe this is legally justified, either because it is felt that the addiction denies the user the power to choose freely or because there is 'a personal reason in favour of acquittal'.

With respect to imprisonment of the non-addicted user, there are diverging opinions.

- There is the view that considers the existing legislative framework to be satisfactory, since there is the option of a non-custodial sentence either by means of (i) the general provisions

of the Penal Code concerning conversion or suspension of the sentence or (ii) the special provisions, no further action and diversion which are included in the special legislation concerning drugs. Therefore, the law provides the possibility to take into consideration the circumstances, recidivism and special conditions in each particular case. However, in practice, such sentences are rarely imposed.

- An opposite view can be seen in the relevant literature, where it is proposed that use, per se, and possession for personal use should not be punished and consequently should not lead to imprisonment (see, for example, Paraskevopoulos, 1997, pp. 27–47). Punishment, especially imprisonment, cannot be justified on the basis of the traditional aims of punishment and sentencing (i.e. retribution and prevention). More specifically, a number of arguments have been advanced against prohibition of drug use via criminal provisions, such as that drug use is a victimless crime, that it is a self-inflicted harm, that the user is not ‘dangerous’ (under the Greek Constitution and Greek penal law, the condition of dangerousness is not punishable but an act that harms others is), that imprisonment of the user has detrimental consequences, etc. In conclusion, this section of the legal world favours the imposition of either a mandatory suspended prison sentence or other kinds of sanctions (fine, administrative) instead of imprisonment.

However, these matters also remain the subject of debate in Greece.

Changes to the legal framework

Responding appropriately to the user/dealer

In order to encourage the implementation of no further action and diversion, legal provisions concerning the prerequisites and procedures of their application should be simplified and special services for supervising the execution of no further action or diversion be established.

Given the user/dealer dilemma, no further action and diversion should also be an option in the case of low-level trade

(misdemeanour according to Article 12, paragraph 4, L.1729/1987) by a user/small dealer. Conversion into a financial penalty should also be an option for trafficking which is directly connected with the need for drugs (e.g. sale), when committed by an addicted dealer (felony converted to misdemeanour under Articles 5 and 13, L.1729/1987).

The existing (more lenient) penal treatment provided in Greek law for the addicted user should also be an option in cases of low-level trade (misdemeanour) and use/possession for personal use (misdemeanour).

One key issue of special concern

A key issue not so far discussed is forensic or psychiatric/judicial assessment. This assessment is needed in order to distinguish between a defendant who is a drug addict and one who is a drug user. However, problems of interpretation and enforcement of the law arise here. This subject is crucial, as the criminal procedure is different for an addicted offender, an offender who is a user or one who is a non-user. The forensic assessment determines whether a defendant is a drug addict or not. This assessment may:

- ensure non-punishment for use/procurement/possession of a drug for personal use and leniency for the defendant who is also accused of drug trafficking; and
- allow the option of a less severe sentence for other criminal acts committed by the same defendant (such as property crimes, with/without injury to the victim), because of limited ability to distinguish between right and wrong due to drug abuse.

Limited space prevents us from reviewing these issues more fully here ⁽⁶⁴⁾, but we suggest that the following guiding principle should prevail. The legal provisions concerning the forensic examination, and hence the assessment, have been laid down primarily to protect the rights of the defendant.

⁽⁶⁴⁾ The editor has omitted part of the original text. Readers are invited to approach the authors if they would like further information.

Consequently, these provisions should be respected and should operate in the courts in favour of the bona fide defendant (and not to benefit serious traffickers who take advantage of deficiencies in the system to gain a forensic assessment concluding that they are drug addicts). The courts should examine each case thoroughly and look for additional, conclusive evidence of addiction.

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Notes

- [1] L.1729/1987, as amended by L.2161/1993, L.2331/1995, L.2408/1996, L.2479/1997 and L.2721/1999.
- [2] Article 33, CPP, and Article 13, paragraph 1, L.1481/84, Organisation of the Ministry of Public Order.
- [3] Interviews were conducted with the following individuals: A. Fakos, Public Prosecutor with the Supreme Court, former Judge of the Court of Appeals, specialising in drug cases, former Vice-President of the Board of Directors of the Centre for Therapy of Drug-Dependent Persons (Kethea); Theodorakopoulou, Examining Judge; S. Stefanopoulos, Examining Judge; Karaiskos, Public Prosecutor with the Court of Misdemeanours; S. Mouzakitis, Public Prosecutor, Execution of Sentence; Loukas, Chief of Police, International Bureau of Narcotics, Ministry of Public Order; E. Anagnostopoulos, lawyer, Assistant Professor of Penal Law and Penal Procedure; G. Sylikos, lawyer, Dr Juris, specialising in drug cases and author of legal books and articles on the subject; V. Krytsili, lawyer and criminologist; K. Iatropoulou, lawyer.

Rosemary Barberet and Ines De Oya Dale

Outline of the legal system of Spain

In Spanish law, in order for a criminal act to be prosecuted, the penal law must assign a penalty to it. The current Penal Code was reformed in 1995 (*Boletín Oficial del Estado*, 1995). Violations of the code are categorised as misdemeanours (*faltas*) and crimes (*delitos*). While the legal process is fairly brief for misdemeanours, the process for crimes consists of two stages:

- an investigative stage, where a crime is reported by the police, prosecutor or victim to an investigative judge (*juez de instrucción*), who opens the investigation and supervises it with the assistance of the judicial police; and
- a hearing stage, which is held in public and based on adversarial methods with a prosecutor.

There is a system of procedural guarantees, such as the right to remain silent, the right to confront witnesses, the right to privacy and the right to ask for evidence to be produced, etc. There are no alternatives to trial, so the majority of cases are processed in this way (Martín Canivell, 1997).

Overview of possible reactions and their legal basis

Behaviours relating to the consumption and trafficking of illegal drugs are regulated by the criminal and administrative laws in Spain. Use/possession of any drugs in public or private is a matter for administrative law.

Use/possession in public

Consumption or possession of drugs **in private**, unless possession is for the purposes of trafficking, is not a criminal offence in

Spain. However, consumption **in public** constitutes an infringement of administrative law for which there is a fine of between EUR 301 and 30 051 ('Protection of the citizen's security', Article 25, Organic Law 1/1992). In such cases, the drugs are also confiscated. This fine can be suspended if the person attends an accredited drug-treatment programme as regulated by a royal decree (1079/1993) on exemption from administrative sanctions conditional on treatment.

There are no data available regarding the enforcement of this law, but the legal experts consulted seemed to think that police discretion is widespread. For example, young people regularly smoke hashish at public concerts and on the street, but fining all of them would take an inordinate amount of police resources. Furthermore, fines are notoriously hard to collect in Spain. Finally, a special report must be filled out in order to confiscate the substance, which entails more work and thus may deter police action. However, some experts believe that warning drug users that they may be fined is an effective tool for maintaining public order and being able to move them on if necessary.

The legality principle and discretion

The Spanish legal system is based on the legality principle, which means that all legal representatives (police, prosecutors, judges) are obliged to prosecute every crime that is brought to their attention. If they fail to do this, they themselves can be charged with a crime under Article 408 of the Penal Code ('Failing to pursue a crime'). This means that, although in practice discretion may be exercised, there is no legal basis for this. Furthermore, admitting to discretion is tantamount to admitting to a crime as specified in Article 408. This is why few of those consulted admitted officially to exercising discretion. However, discretion exists, even though it is impossible to estimate to what degree. It is important to remember that this issue is a particularly sensitive one in Spain, since discretion was a criticised feature of the criminal justice system under the authoritarian regime of General Franco.

Special conditions for drug-related offences

The Organic Law (10/95) which reformed the current Penal Code in Spain sets out special provisions for drug users who commit crimes. In specific circumstances, the law is relatively lenient towards drug users, favouring alternative sanctions such as:

- treatment instead of a prison sentence;
- exemption in terms of diminished responsibility; and
- sentence reductions.

As can be seen, Spanish criminal law generally regards drug users as less criminally responsible and more in need of treatment than punishment. This is reflected in surveys conducted among judges (SIAD, 1998).

Regarding the definition of criminal responsibility, the Penal Code recognises that diminished responsibility or mitigating circumstances are a possibility in cases of drug consumption. The criteria for this option are as follows:

- the level of drug use, and the effect that this has on the user's awareness and ability to make choices; and
- the drug consumption in question must be directly related to the offence.

Article 21.2 of the Penal Code states that, in general, consumption of toxic drugs, alcoholic beverages, narcotics and psychotropic substances by a perpetrator of a crime will allow the accused to be considered for mitigating circumstances. Article 20.2 states that, if consumption of the abovementioned substances results in full intoxication, or if, when committing the crime, the accused is suffering from withdrawal symptoms, due to his/her dependence on said substances, to such an extent that he/she is unaware of the illegality of the behaviour or is unable to act in accordance with that understanding, the perpetrator is exempt from criminal responsibility. This exemption does not apply, however, if it can be demonstrated that the accused deliberately ingested the drug in order to commit the crime, or that the

accused could have foreseen that he/she might commit the crime while intoxicated and thus have prevented it.

When consumption of the abovementioned substances does not result in full intoxication or does not affect the perceptual abilities of the accused, it will still be considered as a mitigating circumstance and, consequently, there will be a reduction in the sentence prescribed by law for the crime committed. The judicial body responsible for sentencing in these circumstances can impose a length of sentence in the lower half of the scale provided for the particular crime (Article 66.2, Penal Code). In cases which qualify for such mitigating circumstances, or for any of the other mitigating circumstances contained in Article 21 of the Penal Code, the sentencing body may, with a written explanation, impose a lesser sentence by one or two degrees (Article 66.4, Penal Code).

In those cases where a total exemption of criminal responsibility is declared, Article 102 of the Penal Code allows the sentencing body, on the basis of psychosocial reports, to substitute imprisonment with a stay in a public or private accredited residential drug-treatment facility. This may not be for longer than the relevant prison sentence had criminal responsibility been established, and the sentencing body must determine the maximum length of stay in their instructions for sentencing. A perpetrator thus referred may not leave the drug-treatment centre without the authorisation of the judge or sentencing body.

The Penal Code provides this option not only for cases which warrant exemption from criminal responsibility, as per Article 20.2, or in the other situations discussed above, but also when the judicial body is confronted with a case where the nature of the crime or the personal circumstances of the perpetrator suggest that he/she is likely to reoffend (Articles 95 and 96, Penal Code). In these circumstances, the perpetrator may be referred to a residential drug-treatment centre. These centres may come under the jurisdiction of the regional government. In Andalusia, for example, the drug commission of the local government's Department for Social Affairs is responsible for the accreditation of such centres.

Those who are declared exempt from criminal responsibility under Article 20.2 may also be subject to the following measures, outlined in Section 3 of Article 96:

- prohibition from visiting or residing in certain areas;
- confiscation of a motor vehicle licence;
- confiscation of a firearms licence;
- disqualification from a profession; or
- expulsion from the national territory (in the case of illegal immigrants).

They may also be subject to measures that are described in Article 105. The following of these can be applied for a period not exceeding 10 years:

- outpatient treatment in a medical centre;
- obligation to reside in a certain area;
- prohibition from visiting certain places, such as establishments that sell alcoholic beverages; or
- family custody, whereby the person is subject to the custody and care of his/her family (with their permission), who will exercise that custody under the direction of the penitentiary judge, without disrupting the educational or vocational activities of the subject.

The following measures can be applied for a period not exceeding five years:

- confiscation of a firearms licence; or
- confiscation of a motor vehicle licence.

In all of the circumstances outlined above, the penitentiary judge, the corresponding services of the Ministry of Justice and the Interior or the local government administration are responsible for informing the sentencing body regarding the subject's compliance with these conditions.

In the same way, in cases where the subject is found to be exempt from criminal responsibility according to Article 20.2, the

sentencing judge or body may set a length of time of between one and five years as the period for which a subject may be disqualified from a profession, either when the subject committed the crime as an abuse of his/her professional position or when it is estimated that there is a danger that the subject will reoffend.

Article 87 of the Penal Code provides for the application of a suspended sentence in the case of a drug user, when the sentence is less than three years. This measure would only apply in the following circumstances:

- if the offender is a non-habitual criminal (although he/she may be a recidivist);
- if the offender is attending a drug-treatment programme at the time of sentencing;
- if the offender completes the treatment programme; and
- if no further offences are committed for a period ranging from three to five years.

The arrangements set in place for dealing with drug users allow a significant amount of interaction between the prosecutor and the defence attorney, such that procedures can be agreed on this issue by the prosecutor and defence attorney (though **not** down-tariffing of the offence) which will be binding to the judge.

Those drug users who are convicted of a crime and sentenced to imprisonment (and not referred to a treatment centre) are obliged to undergo treatment while they are serving their sentence. There are two different scenarios for this procedure:

- If the addicted offender was already undergoing an outpatient detoxification treatment prior to sentencing: the day after entry into prison, he/she will be examined by the prison treatment team, the physician and the psychologist, and a suitable treatment programme will be initiated (with due regard to the offender's prior treatment), under the supervision of this team.
- If the offender was not undergoing any type of drug treatment prior to sentencing: the inmate must voluntarily request an interview with the prison treatment team, and they will

determine the best treatment for the addict, depending on his/her personal circumstances.

Although, in theory, the relevant mitigating circumstances for drug users could be applied to *faltas* (misdemeanours) as well as *delitos* (crimes), in practice, they are only really applied for crimes. The Penal Code allows for sentencing to be totally individualised for misdemeanours anyway, and the sentences are relatively light.

Therefore, Spanish law makes a special case of drug use, and the judiciary is largely in favour of this. However, in practice there are few facilities for alternative placement for drug users, which results in more prison sentences being served than perhaps there should be.

Drug trafficking

Articles 368 to 378 of the Penal Code regulate the penalties assigned to drug trafficking, which is considered a crime against public health. The penalties are more severe if it is a drug which causes serious damage to health (which does not generally include cannabis and its derivatives) and in the following circumstances:

- if the drugs are sold to minors (under the age of 18) or to the mentally handicapped;
- if they are introduced into schools, prisons or military establishments;
- if they are sold in public establishments by employees of the establishment;
- if a significant amount of drugs is involved;
- if they are offered to an addict who is undergoing drug treatment;
- if the drugs are adulterated, making them more dangerous to health;
- if the accused is involved in organised trafficking;
- if the accused is involved in other activities related to organised crime;

- if the accused abuses a position of authority to commit the crime; or
- if a minor under the age of 16 is used in the process of committing the crime.

In all the examples given by the coordinators of the present study (see 'Formal frameworks' in the first section of this book), the seller would be accused of the crime of drug trafficking and would be arrested, and the drugs would be confiscated. Although it is most likely that special circumstances would apply to an addict arrested for buying drugs, since he or she consumes the drug, this decision would occur at a later stage. The police do not make any sort of assessment as to whether a buyer is a drug addict, although they may subsequently be asked to testify as to what they know or have seen. The sale of drugs in establishments that are open to the public, by an employee or someone that is responsible for the establishment, is regarded as an aggravating circumstance.

Property crimes

Theft from a shop by a drug user for goods up to a value of EUR 100 would be considered a misdemeanour in Spanish law, since this is defined as any crime incurring damages below a ceiling of EUR 301. The penalty for shoplifting is either a fine or arrest and a weekend's detention in prison. When the shoplifter is in custody, a report is made and, if there are no charges pending, the suspect is released until he/she is called to court on a given date. The police have no room for discretion in such cases, since it is usually the shopkeeper who reports the crime and the police will be expected to enforce the law.

Burglary valued at EUR 1 000 or more is considered to be a crime (not a misdemeanour). The police usually detain the suspect and refer the case to the judge or release him/her. The penalty for burglary is a prison sentence of two to five years.

Robbery up to a value of EUR 100, if it involves violence or intimidation, results in the offender being remanded in custody

and the case referred to the judge. The penalty is a prison sentence of two to five years.

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FRANCE

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Introduction

The specifications for this study, though applicable to many European countries, are not totally relevant to the implementation of French legislation on drug control. The specification refers to three criteria — where the drug use takes place, the nature of the substance used and associated criminality — which are not crucial in the French system.

The specifications also suggest that there is a degree of tolerance in the implementation of drug legislation, whereas, in reality, in France any such ‘tolerance’ only results from the limitations of police action. Finally, the tables reflect national implementation of drug legislation, when there are significant differences in local implementation in France. The purpose of the following comments is to further clarify developments in regard to the French situation.

- Sufficient data are not available to give a clear idea of the implementation of the drug laws. The police and justice system statistics are not compatible, because they are based on two different classification systems and the criteria used for each are too general to employ in this study. For example, it is impossible to distinguish between procedures when drug use is associated with burglary, stealing or violence. There is also no general qualitative research on the subject. A few studies have been published, but on limited topics only.
- There is no tolerance operating in French legislation on drug control. If certain kinds of use are not prosecuted, it is only because the police are not able to investigate all offences, or because the judicial authorities have developed informal processes which are more efficient in practice. However, the main objective of the police, prosecution and courts is to stop

drug use by strengthening penal action. When the police discover a user, he/she is arrested. The priority for the police is to monitor public space, not private places, which can lead to a degree of 'tolerance' regarding simple use in a private place.

- The police do not investigate drug-use offences. This contrasts with trafficking, for which the police undertake significant investigations. Regarding drug use, specific police action is exceptional. Most arrests will be done as a result of another police action, such as identity checks in the street, road-traffic operations, investigations of illegal immigrants and of drug trafficking, etc.
- The implementation of the law is not uniform. There are important differences at local level. In 1991, half of all the sentences for drug use were imposed by the jurisdictions of three courts of appeal (Paris, Aix-en-Provence and Douai). Paris only imposed 12.5 % of the total sentences for drug use. Out of 181 courts of first degree, 42 passed sentence for less than 10 cases of drug use; by contrast, the courts of Paris and suburbs imposed more than 3 500 sentences for drug use (Timbart, 1995 ⁽⁶⁵⁾). The same differences appear in decisions at local level. Around one-third of prosecutors were frequently referring offenders for detoxification, whereas another third never used it.

In practice, implementation of the law can be described as follows:

- The police focus on street offences rather than on private drug consumption.
- There is no major difference, depending on substance, in how users are treated. Indeed, most of the arrests are related to cannabis use (up to 87 %), as it is the most available illicit drug.
- Generally, when drug use is discovered, an arrest is made and confinement ensues for a duration of up to 48 hours, and up to 96 hours when the case is related to trafficking, including possession.

⁽⁶⁵⁾ This study is only based on the statistics for sentencing. This is a major problem, because of the confusion in definitions that we have already outlined. At the same time, the study is interesting because it looks at the kind of sentence brought for different categories of offence.

- For cannabis, there will be no further action in most cases. The procedure will end with a police summons under the supervision of the prosecutor. Further action will only be taken if the user has been arrested before or if another offence was committed at the same time.
- For harder drugs like heroin, first-time arrest will lead to diversion through medical detoxification (Article L.3423-1, PHC). If the user refuses treatment, or if he/she fails in the treatment, penal action will be taken. The process is the same if the user has been arrested in the past. Medical detoxification will be part of the sentence pronounced by the court, mostly as a condition of a suspended prison sentence.
- There is no diversion at all when drug use is associated with another drug offence like possession, transportation, retail sale, etc. The prosecutor and the court will respond according to the most serious of the offences committed. If the user shares his drugs with others, he will be treated as a trafficker. The same is true if he goes abroad to purchase drugs, even if it is only for his own consumption.
- When drug use is associated with another offence, use will be seen as secondary and treated as an aggravating circumstance.
- In all cases, a previous arrest will significantly increase the sentence.

The main criteria in these decisions will be:

- no other offence recorded (either previously or at the same time);
- small amount of drugs seized during the arrest;
- background circumstances (such as income, or providing evidence that use is not associated with traffic); and
- whether the offender is undergoing medical treatment (this will have an effect in cases of simple use).

Outline of the legal system of France

Type of system

The French penal procedure is not based on a strict legality principle but on expediency. The police come under the prosecutor's

supervision and the prosecutor has to decide whether or not a penal reaction is justified.

Overview of possible reactions and their legal basis

The police make the first decisions in response to the facts. This can be the option of down-tariffing (choosing a lower charge), but also of 'up-tariffing' (by choosing a trafficking qualification like 'possession'). Theoretically, all cases must be submitted to the prosecutor. In practice, the police decide which cases to submit to the prosecutor. The police can apply a restriction on movement of up to 24 hours. This can be extended by another 24 hours, with the agreement of the prosecutor. If the investigation concerns trafficking, the restriction on movement can be up to 96 hours. This can be applied to any person, even a drug user [1].

The expediency principle allows prosecutors to decide whether to file a case (Article 40 of the Penal Procedure Code). The prosecutor can opt for no further action or can refer the case to court. A decision not to proceed is sometimes linked to a condition, in which case the prosecutor will offer the user the option of undergoing medical treatment for a couple of months. If the user agrees, no further action will be taken. Article L.3423-1 of the Public Health Code also outlines a specific alternative to penal action for users who successfully follow a detoxification treatment. This is only possible for a first arrest. A second arrest for drug use can merit a penal action, but the prosecutor can still decide not to prosecute.

One problem is that treatment is only appropriate for addicts. It is useless for an occasional user of cannabis. For these users, prosecutors developed a summons procedure, and this practice was sanctioned by a law of 23 June 1999 (*Journal Officiel de la République Française*), 24 June, p. 9247, new Article 41-1, 1°, PPC). The same text instituted a procedure of penal transaction (Article 41-2, PPC). A transaction can be proposed by the prosecutor or the police (under the prosecutor's supervision) in cases of simple use only. It can be a fine of half the penal fine (i.e. EUR 1 906 for drug use), or other measures like suspension of a driving licence or community service. This proposal is made after the 24 or 48 hours of restriction on movement. The offender can

refuse a transaction, as with all penal alternatives. If he agrees, the proposal is submitted to the president of the court for approval (the president can refuse or agree to it).

The courts can modify the charges and decide on the penalty. The laws only give the maximum penalty, and courts are allowed to decide on alternatives to prison sentences or fines, like suspending the offender's driving licence or weapon licence, etc. Courts can also decide to suspend a prison sentence, with or without conditions.

Overview of typical reactions

Police

First, the police decision to prosecute will depend on if it is the first or only offence. If the user has been arrested before, the case will be referred to the prosecutor. The same will be the case when two offences have been committed at the same time.

The second criterion will be the type and quantity of the drug. If the police believe that the user is also supplying drugs, even for free, there will be an action.

A few other criteria should also be mentioned. It appears that the approach to a case varies considerably depending on which police unit makes the arrest. A study done on Paris (Barré, 1994) shows that specialised drug units are less severe with drug users than general street units. The latter will bring stricter charges in cases of possession, which is a trafficking offence in France. No medical alternative to penal action is possible and the sentence is for 10 years of imprisonment. If the case then goes to a drug unit, it will be reclassified as a simple use offence.

Prosecution

French prosecutors always state that no action is taken against simple users. However, their definition of a 'simple user' is very restrictive. A user who imports his drug or grows it, who shares

his drug with friends, or who buys his drug in large amounts (100 grams of cannabis, for example) qualifies as a trafficker.

Even if they have wide powers, prosecutors will usually refer drug cases to court, except when the case is related to simple use. Diversion is more likely to occur at police level (under the supervision of the prosecutor) than at the level of the prosecutor. Medical alternatives are quite rare and depend a lot on the location of the case. In 1997, Paris ordered 2 000 detoxification treatments for 4 500 sentences and Bastia only ordered four treatments for 200 sentences (OFDT, 1999 ⁽⁶⁶⁾).

As at police level, the main criterion is the number of offences. There is no diversion if the person has previously been arrested for drug use or commits another offence. Another criterion is completion of medical treatment. If the user does not complete treatment, the offender will be prosecuted.

Courts

The courts have recourse to two forms of diversion: deferment in sentencing and deferment of a penalty.

After the trial, the court can postpone sentencing for a couple of months. If the offender follows a detoxification programme or starts working legally during this time, the sentence will be reduced or there will be no penalty. This kind of solution can be used for cannabis use, or even heroin use when previous detoxification treatment has been unsuccessful. Another solution is to order imprisonment with deferment, on condition of treatment. If the user attends treatment, he will not go to prison. This is a more positive solution, especially for heroin users.

However, in all cases, diversion is only an option for simple use. If the user is also a trafficker or if he/she is prosecuted for

⁽⁶⁶⁾ The OFDT is the French counterpart of the EMCDDA. This book synthesises all available data about the drug situation in France. A few chapters cover penal actions taken against drug users.

possession, there will be no diversion. This is also the case when another offence, like a property crime, has been committed at the same time. A penal sanction is automatic. When the drug use accompanies a violation of immigration laws, the courts automatically order a prison sentence. In the majority of such cases, the sentence will cover three offences: use, violation of the immigration laws and possession. New regulations relating to trafficking allow the courts to forbid the foreigner to leave France.

One final criterion must be mentioned: if a simple user does not attend his/her trial, the sentence will be increased. This usually leads to imprisonment with no deferment.

Current practice

Use/possession in private of 'very dangerous' drugs

Police

Almost invariably, there will be no arrest of a drug user in a private place. This does not mean that there is any kind of 'tolerance' regarding drug use in private, but that the police do not generally investigate private places, as their main focus is on public places. Any arrests for drug use that do take place in a private place will usually occur because an offence other than drug use is investigated by the police. This can be a road-traffic offence or simply a complaint by neighbours about noise or 'strange behaviour'. Arrests will also take place in what are called 'private places open to the public', like department stores, bars or night-clubs, hotels, etc.

The approach to the latter cases will be the same as for drug use in public (see below). Most arrests will be followed by prosecution, either to justify the police investigation or because another offence was committed as well as drug use.

Prosecution

For the same reasons, there will be very little diversion at prosecution level. Cases will be referred to court according to the charges brought by the police.

Courts

Sentencing is more severe than for simple use, because of the fact that more than one offence has been committed. The sentence will be imprisonment in up to one-third of cases. In another third of such cases, sentencing will be for imprisonment with total or partial deferment under a condition of detoxification (Timbart, 1995; Barré, 2001). A detoxification order — which is specially formulated by the Public Health Code for drug users (Article L.3424-2) — will not be served by the prosecutor or the courts, because this measure applies to drug offences alone.

Use/possession in private of ‘dangerous’ drugs

Police

At the police level, the nature of the drug does not affect the implementation of the law. Narcotic drugs are filed under four categories, but offences are not based on the type of drug. The same applies to all of the more than 180 substances filed as narcotic drugs [2]. For cannabis use in a private place, the same comments apply as for ‘very dangerous’ drugs.

It should also be noted that the manner in which the case comes to court seems to influence the sentence. When the police issue a warrant, imprisonment will be decided in 33 % of the cases only. If the case follows a short procedure, imprisonment will be ordered in 69 % of cases. If there is an inquiry by the judge, imprisonment is ordered in 79 % of cases. This can be explained by the different characteristics of the cases.

Prosecution

Some differences apply at the prosecution level. As medical detoxification is not applicable for less serious drugs, this procedure is followed. On the other hand, the prosecutor will often stop the procedure on condition that the offender attends for a medical check-up over a period of a few months.

Courts

At the court level, the situation is very similar to that for very dangerous drugs, especially when another offence has been committed. It could be that the length of imprisonment will be less, but no information exists on this subject.

Use/possession in public of ‘very dangerous’ drugs

Police

When the police receive information on heroin use in a public place, arrest is automatic. In most cases, arrest is followed by a restriction on movement of up to 48 hours. This can be increased to 96 hours if the arrest occurs during a trafficking investigation. A few cases will end, after this restriction, with no further action (after a simple warning). Note that there is no specific legal basis for such a procedure. It is simply that the French penal system is not based on the principle of strict liability. The prosecutor has to decide whether or not prosecution takes place or the case is dismissed (Article 40, PPC). In practice, it is the police who make this decision, under the supervision of the prosecutor. This means that no further action is both a police and prosecutor decision.

Prosecution and courts

There is a contradiction in the data available. Statistics show that there is a significant number of arrests — around 15 000 a year — but all the prosecutors and judges say that there is no action taken against users. According to the prosecutors, action will only be taken in three circumstances:

- if the perception is that the drug user will commit another offence in the future (this puts his offence on record);
- if the user has failed to complete a previous detoxification programme; and
- if another offence has been committed.

One explanation could be that heroin use that takes place on the street is treated as trafficking even when there is no actual evidence of trafficking. However, this is not the whole story. The main explanation is the fact that drug use can be categorised in a number of different ways, from simple drug use to trafficking. Possession, importation, transportation and buying of drugs are all defined as trafficking offences. In practice, this qualification allows the police to follow the same procedure as that used to fight against terrorism, including proactive investigation techniques like the use of undercover agents. The time allowed for deprivation of movement is double that for normal procedures, which allows the prosecutor and courts to proceed quickly if necessary. In general, a sentence is passed for drug use and possession, importation and transportation. In 1997, 15 685 sentences were imposed for drug use. Of these, only 3 368 were for drug use only and 10 075 were for drug use and a trafficking offence (OFDT, 1999).

When users share their drugs, when one user buys drugs for a group, or when a user is arrested at the border having purchased drugs abroad, the prosecutor and courts will often only mention the trafficking offence (possession, retail sale or importation). In fact, when confronted with drug users, normal practice is either to stop the procedure at police level or pursue a 'high-tariff' policy by bringing charges for trafficking.

Use/possession in public of 'dangerous' drugs

Police and prosecution

More than 87 % of drug-law offence arrests involve cannabis use (Ministry of the Interior, OCRTIS, *Narcotics drugs use and trafficking*, 2000, p. 11). French law does not distinguish between substances, so there is no major difference in approach to that for heroin use.

At the police and prosecutor levels, there may be some distinction made between cannabis and heroin use. Most actions will end at police level, after a deprivation of movement for up to 48 hours and police summons (under the supervision of the prosecutor). Even if the official figures do not distinguish between drugs,

there will be no further action after this summons in 72 % of arrests (Barré, 1994 ⁽⁶⁷⁾).

Two criteria are taken into account when deciding such cases:

- the quantity of drugs seized is used as an indicator of simple possession or of intent to traffic or share, so this must be small; and
- no other offence, such as theft, must have been committed either previously or at the same time.

Other factors, such as the user's income, are taken into account by the police. If the user is unemployed, this can be seen as evidence of trafficking to buy drugs (Barré, 1994). Ultimately, police decisions on drug offences are mostly empirical and arbitrary.

Courts

At the court level, the type of substance has very little influence. There may be a higher rate of deferment, but no data exist to confirm such an analysis.

The key issue of possession (of either heroin or cannabis)

Nearly half of the sentences imposed for a drug offence mention possession (Timbart, 1995). There is no special category to cover possession for use. Possession is always treated as a trafficking offence (Article 222-37, PC).

However, in practice, 'possession' covers simple use and trafficking. Indeed, in the statistics, prosecution of possession offences appears to come midway between trafficking and simple use: the punishment is much more severe than when the offence is simple use, but it is less severe than for other trafficking offences. The

⁽⁶⁷⁾ This is a study of the police units in Paris. It shows the confusion in practice in the distinction between drug use and possession for trafficking. The author believes that the drug legislation is used by the police as a tool to control some sections of the public, especially illegal immigrants.

average prison sentence is up to 4.8 months for possession. It is only 2.4 months for simple use but up to 10.8 months for retail sale (OFDT, 99). Qualifying simple use as possession leads in practice to a significant increase in the punishment. As use is treated as a trafficking offence, there can be no medical diversion or non-prosecution. The case goes to court in all such instances. At court level, strict imprisonment, with no deferment, is the most common punishment.

The main problem is to know the criteria which will influence the decision to act for possession rather than for use or trafficking. Current data do not give a clear answer to this question. A study (Barré, 1994) of Paris police units shows that the decision depends to a large degree on the unit which arrests the user. Specialised narcotic units often categorise as drug use an offence which street units would categorise as possession. A small rate of re-categorising of an offence is noted when the case is passed either from one police unit to another or to the prosecutor. However, when discussing use as either simple use or trafficking, it cannot be said that a qualification of simple use is a 'low-tariff' decision; it is only a 'normal tariff' decision. As mentioned above, the criteria for assessing such cases seem to be 'empirical' and arbitrary (Barré, 1994), and depend more on the acting police officer than on the facts.

Retail sale

There are very few data available on this topic. A recent study (Barré, 2001) of one court confirms that the response to cases of retail sale is similar to that for trafficking, rather than to that for drug use offences. There is a low level of diversion; the penalty is generally somewhere between that for a drug use offence and for a trafficking offence.

Police

Interviewees considered that there are some instances of reduction of charges. If the offence is qualified as possession or use, the normal penalty will be halved. A reason that is sometimes

given for this is that the offender cooperates by identifying his supplier. However, there are no data to confirm that such a process occurs.

Prosecution

Usually, the prosecutor will preserve police charges and the case will be submitted to the courts.

Courts

A special kind of diversion sometimes operates in the courts. The Penal Code foresees an intermediate punishment for retail sale. Trafficking is punishable by up to 10 years in prison (Article 222-37, PC), whereas sale of drugs to a user is punishable by up to five years (Article 222-39, PC). Theoretically, this offence covers all retail sale offences, but the Court of Cassation seems to consider that this offence is only applicable when the trafficker is also a user and when retail sale is exceptional and not usual for the offender (Crim., 6 April 1994). The sentence for retail sale by a user is, indeed, lower than when the seller is not a user. However, even with this option of down-tariffing, imprisonment for at least 10 months is imposed in most cases.

Property crimes

Little data are available on acquisitive crimes by drug users. However, 19 % of sentences for drug use also mention a property crime. Such data do not make a distinction between the various property crimes and so reflect only a part of the full story. The fact that a crime is committed by a drug user is quite likely not to be mentioned by the prosecution in many cases. This is due, in part, to the difference between penalties. The maximum penalty for drug use is only one year of imprisonment, whilst other property offences can lead to penalties of up to three years of imprisonment or more. There appears to be no real interest, in practice, in prosecuting for both drug use and a property crime.

Police and prosecution

Usually, in cases of property crime, there will be no further action for drug use. The fact that the offender is an addict or simply a drug user may be mentioned in the procedure, but there is no specific sentencing for this aspect of the case. When drug use is mentioned, it is usually as a secondary offence, whereas it is the property crime that is the principal offence and so this will be the main focus of the case.

Prosecution of both the property crime and the drug use will occur in two instances:

- when the prosecutor wants the drug use to be on record in case of a future arrest of the offender; and
- when the prosecutor wants the courts to hand down a more severe penalty.

In practice, drug use is treated as an aggravated circumstance of a property crime, even if no legal basis exists for this. Sentencing will be higher when the offender uses drugs.

Courts

At the court level, the sentence is mainly imprisonment: between 92 and 96 %, depending on the nature of the property crime. Fines and alternative punishments represent only 3 % and 2.5 % of sentencing. In all, 75 % of sentences are ordered without deferment.

Immigration offences

Police and prosecution

This situation can be summarised as follows. Nearly 5 % of sentences for drug use also mention an offence relating to the immigration laws and 12 % in cases of possession. An arrest usually occurs after an identity check. The fact that the foreigner is an

illegal immigrant and a drug user will lead automatically to a restriction on movement of up to 48 hours. This will be followed either by temporary imprisonment or, more often, custody until the date of the trial. There is no diversion at all at either police or prosecution level.

Courts

Sentence will be most severe at court level. Strict imprisonment is decided in 92 % of cases, and double prosecution (for the immigration offence and the drug use) is automatic (OFDT, 1999).

Common EU standards on prosecution of drug users

French opinion is divided on drug issues. The police and courts want strict implementation of the law, even for simple use, and refuse to distinguish between substances. Social workers and doctors generally favour treatment. One key factor is that most French citizens are against any kind of legalisation of drugs, even though there has been an increase in tolerance concerning drug use. Most French citizens are also satisfied with the current legislation. Criticism generally comes from scientists, specialists in the drug question and, unsurprisingly, drug users themselves.

In response to the specific questions posed by the study coordinators, the French climate of opinion can be summarised as follows:

(1) In general, actions taken by the legal system in relation to drugs should be proportional to the harms which it seeks to prevent. This principle should be followed by the police, prosecutors and the courts. Detailed guidelines for action should be provided at national (and where appropriate regional) level, etc.

Proportionality is clearly desirable, as it is a constitutional principle. The difficulty is deciding how to balance the issues in order to achieve it. At this stage, drug use often seems to be seen as an aspect of violence and crime. Indeed, fighting drug use is a way of reducing overall crime.

(2) The highest priority should be given — by the police and prosecutors — to trafficking in the more dangerous drugs.

Opinion on this is divided. Recent regulations by the Ministry of the Interior insist on the need to arrest all users, even of cannabis, to prevent the use of more dangerous drugs in the future.

(3) Action in these cases will include criminal prosecution.

Most of the population, including scientists, would agree with this.

(4) Other priorities should be cases in which users of any drugs get involved in other serious crimes for reasons relating to their drug use, or those whose public use is associated with social nuisance and low-level trade.

Most people would agree with this, but the same level of priority must be assigned to these acts as to trafficking of most dangerous drugs. No distinction should be made between the two.

(5) Action in these cases should include mediation with the affected parties; criminal or administrative proceedings; conditional sentences (diversion from custody or diversion from larger fines), on condition that the user follows a programme, etc.

General opinion would disagree with this proposal. Alternatives to penal action are only seen as appropriate in cases of simple use of cannabis or heroin (harm-reduction treatment).

(6) The lowest priority should be given — by the police and prosecutors — to action against use (or possession for personal use) of cannabis, and to action against use (possession for personal use) of other drugs which are regarded as being not amongst the most dangerous, as long as the use is unconnected with nuisance or (other) crimes.

Again, opinion is divided. As mentioned above, the Ministry of the Interior regulations demand that cannabis users should be arrested. Many medical experts also believe in the expediency of a firm response to cannabis use, even in the penal legislation.

(7) Low-priority action should generally be: no further action by the police or prosecutors; forfeiture of prohibited objects; on-the-spot fines (transaction); short-term restrictions on entry to certain areas (related to social nuisance); plus giving of advice (as appropriate to national law).

It is generally felt that such alternatives do not correspond to the level of seriousness of the offence. The police and prosecutors are required to take action against all kinds of traffic and use. However, most opt for alternative measures to penal sanctions for less serious offences.

(8) Use/possession per se should never result in imprisonment (in any circumstances).

Opinion is divided on this subject.

(9) Use/possession per se should sometimes result in imprisonment (depending on circumstances).

Agreement on this is fairly general but not unanimous.

(10) Use/possession if repeated three times should generally result in imprisonment.

General opinion is that this should not be the case.

Conclusions

Opinion is divided on all aspects of the drug question, as shown above. The police and courts demand a strict implementation of the law, even for simple use, and refuse to distinguish between substances. Social workers and doctors are generally in favour of treatment. The only consensus of opinion concerns the deficiencies of the current legislation. However, it is difficult to know how to proceed.

A recent study confirms that most of the French population share the same concerns (Beck and Peretti-Watel, 2000 ⁽⁶⁸⁾): they are not happy with prohibition, but they think that legalisation will increase the problem and not reduce it. Even though 51.2 % believe that prohibition will not help to limit cannabis use, 82.5 % reject legalisation and 65.1 % reject controlled legalisation. The only justification perceived for drug use seems to be medical reasons. In fact, 67.4 % agree with giving cannabis to limit pain in medical treatment.

Policy on drugs is beginning to change in France. A new strategy published in June 1999 gives priority to treatment, including harm reduction, whilst maintaining prohibition and penal sanctions for simple drug use. The recodification of the Public Health Code does not make any changes to this approach. This has resulted in a kind of 'schizophrenia' in policy. A recent example illustrates this.

During the summer of 2000, a judge who was investigating a heroin trafficking offence ordered the police to seize the medical files of addicts undergoing methadone treatment in a medical centre funded by the Ministry of Health. Medical experts deplored such a decision, but the prosecutor explained that the judge was legally allowed to take such a decision. Clearly, there is a need for a change in the law and for transparent guidelines to be put in place. Unfortunately, there is no political will to do so.

Changes to the legal framework

What, if any, changes need to be made to the legal framework in France? This is a major consideration in the French situation, as the laws on drug control are not efficient. Since 1990, the

⁽⁶⁸⁾ This study is based on a telephone questionnaire put to 2 000 people aged between 15 and 75 during April 1999. This type of research must be approached with caution, but it gives an idea of some general perceptions of French citizens. It shows that people do not necessarily think that prohibition will reduce drug use, but that most of the people (more than 80 %) believe that the system proposed to replace it will be worse. Prohibition appears to be a choice simply by default, as no serious alternative has been suggested.

legislation has been modified more than once a year, yet the efficacy of the legislation has not increased (Caballero and Bisiou, 2000).

Two major changes need to be considered. The first is the need for a clear distinction between trafficking and other acts associated with drug use. As shown above, drug use automatically implies possession, or growing drugs, importing them, or buying them, etc., and all these activities are currently assimilated under trafficking. This allows for confusion between trafficking and use. A considerable number of drug users are prosecuted for trafficking by importation, buying, etc., so the clear distinction between trafficking and use which underlies French legislation disappears in practice.

The second major change needed is for possession of drugs for personal use to be categorised as a specific offence, as in most other European countries.

Finally, and more generally, in the author's view it is essential to stop employing the same exceptional procedures for drug offences as are used for terrorism. Human rights are suffering as a result of current procedures. It would not reflect well on France if the European Court of Human Rights had to prosecute France for ill-treatment of a drug possessor.

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Notes

[1] Articles 63, 77, 154 and 706–729 of the Penal Procedure Code.

[2] Decree law of 7 February 1990, OJ, 7 June, p. 6678.

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Outline of the legal system of Italy

Type of system

In the Italian system, the police must always report an offence to the prosecutor or administrative authority without delay, thus the opportunities for police discretion are strictly limited. Every offence reported to the prosecutor must be registered, then the prosecutor has to initiate an investigation.

According to the Italian Constitution (Article 112), the prosecutor is obliged to take action in all criminal cases. No discretion regarding prosecution is allowed to the prosecutor by law, nor can he/she suspend or withdraw the action, no matter how slight the offence. The only alternative allowed by law is dismissal, which is authorised by the pre-trial judge if there is not sufficient evidence for a conviction or there are insufficient legal grounds. The opportunities for diversion are strongly restricted by the legality principle, according to which prosecution is compulsory and every case must end in a judgment. This principle means that not only will the case proceed to court if there is sufficient evidence, but also that the prosecutor must investigate all reported offences.

The prosecutor directs the investigations and has the power to furnish the police with guidelines. He can summon and question witnesses, victims and suspects, record their statements and collect any other evidence necessary for the inquiry. Under the supervision of the prosecutor, the police may carry out specific acts of investigation and proceed to seize the *corpus delicti* and any other illegal objects. The police may only search a person or premises in specific cases.

When a person is caught in the act of committing a serious crime or when there is a risk that the suspect will attempt to escape, the

police have the power to make a provisional arrest (*arresto in flagranza*). However, they must report the arrest to the prosecutor within 24 hours and he/she must request the judge to validate the arrest within the following 24 hours (Code of Criminal Procedure, Articles 380–391).

Detention of a person suspected of a crime can only be ordered by a judge, at the request of the prosecutor, when there are reasonable grounds to believe that the suspect is about to destroy evidence, to escape or to commit an offence.

When the investigation is concluded, the prosecutor may either file charges or request leave for a dismissal. Unless the accused waives the right, the charges must be submitted to the pre-trial judge in a preliminary hearing to determine whether there will be a trial. The judge must hear both the prosecutor and the defence counsel, and may dismiss the charges if he is not satisfied that there is sufficient evidence.

The trial court is also bound by the legality principle, and the penalty, if the defendant is found guilty, is fixed by law. The law lays down a minimum and a maximum penalty for every offence. The judge chooses the appropriate level of sanction (custodial or non-custodial), which must be commensurate with the seriousness of the offence and the attitude of the accused.

Overview of possible reactions and their legal basis

According to the principle of legality, the Italian prosecutor has no discretionary powers: prosecution is compulsory.

At the investigation stage, the police act under the direction or supervision of the prosecutor. Only in the earliest stages of the investigation are the police partially independent from the prosecutor. When researching the *notitia criminis* (information about a crime) and conducting on-site investigations, the police can act independently from the prosecutor, but the principle of legality strictly limits the opportunities for police discretion because they

must report every offence to the prosecutor without delay (Code of Criminal Procedure, Article 347).

No discretion is allowed to the prosecutor nor to the police by law, and there appears to be no margin for discretionary power in practice either; or, at least, the police and prosecutors do not admit to exercising such powers, as this would not be legal. However, it is reasonable to assume that a degree of discretion is exercised.

In practice, it would be impossible to investigate and prosecute all reported offences because of the organisational difficulties and limited manpower resources. This means that the prosecutor may decide which cases are to be prioritised, with the consequence that minor offences often cannot be prosecuted in the requisite time. Moreover, at the investigations stage, the police and the prosecutor are not strictly controlled by the judge, as he/she is not entitled to exercise judicial control *ex officio*.

At present, the law does not provide a scale of offences according to level of seriousness, but such a measure could offer valuable guidelines for the prosecutors. Nevertheless, it is reasonable to assume that the initial stage of the decision-making process is normally based on criteria regarding the seriousness of the offence and the needs of the community.

At the end of the investigation process, the prosecutor is obliged to take action, unless there are grounds for dismissal. The prosecutor formulates the charges and, at this stage, down-tariffing may occur, but only when there are extenuating circumstances.

Down-tariffing does not mean that the prosecutor has the power to offer a reduction in charges or dismissal of other charges, but that he is allowed to treat an offence that is less serious as an extenuating circumstance. The offence remains the same (e.g. retail sale of heavy drugs), but the prosecutor has the power to take extenuating circumstances into consideration and to bring charges whereby guilt is lessened (e.g. petty retail sale of 'very dangerous' drugs instead of retail sale). This kind of down-tariffing only affects the level of the penalty in terms of quantity: the

penalty for retail sale of hard drugs is imprisonment of between eight and 20 years, while for petty retail sale of hard drugs the penalty is imprisonment of between one and six years. This kind of evaluation is bound to legal parameters, thus it is not discretionary and it must be validated by the judge.

A further reduction of the penalty can be achieved by means of an agreement between the prosecutor and the defendant, leading to an abbreviated procedure which avoids a trial. The parties, by mutual consent, may request the pre-trial judge to impose a penalty of a predetermined amount, provided that the sentence does not exceed two years of imprisonment (Code of Criminal Procedure, Articles 444–448). This is not exactly the same as a plea bargain, because the defendant is not required to plead guilty and the judge may still order acquittal, but the advantages for the defendant are substantial, since the applicable penalty, after an evaluation of all the extenuating circumstances, is still further reduced by one third. It should be noted that, according to the law, the maximum possible penalty for a suspended sentence is two years of imprisonment, which is usually granted by the judge, especially for a first-time offence.

Neither at the investigations stage nor at the trial stage is diversion possible. In the Italian system of criminal law, the response to an offence consists of a formal and official process of investigation, prosecution, trial and sentencing. As a consequence, diversion always implies initiation of criminal proceedings and, apart from for juvenile offenders, it may occur only after the defendant has been convicted and a sentence imposed. It is important to stress that all forms of diversion have a legal basis, and that the judge has exclusive power to decide on this issue.

Overview of typical reactions

The 1990 Drug Act [1] declared the personal use of drugs illegal (Article 72), so that mere possession of drugs exceeding an ‘average daily dose’ was considered a penal offence (Article 73). Possession for personal use of an amount up to the ‘average daily dose’ was subject to administrative sanctions or voluntary

treatment (Article 75), but repeated violations or repeated refusals to undergo the treatment could lead to penal sanctions (Article 76).

In 1993, anti-prohibitionists put the question of personal use to a referendum, which resulted in the abrogation of Articles 72 and 76, as well as of the parameter referred to as an 'average daily dose'. Possession of drugs for personal use was thereby decriminalised. At present, penal sanctions are applicable only to retail sale and not to possession for personal use, no matter what the amount of drugs. Irrespective of the kind of drug, what counts as 'for personal use' varies from person to person, although there is an upper limit to what can be considered as 'for personal use'.

There are no official data regarding this study's main areas of concern. However, the figures in Table 2 (p. 61) are a good estimate, relying on interviews with prosecutors, lawyers and judges practising in different districts, and with police officials at national and local levels.

Police

As mentioned above, once an offence, no matter how slight, comes to the attention of the police, they must report it to the prosecutor without delay. However, personal use/possession is not reported to the prosecutor but to the administrative authority, since only administrative action is possible in this situation.

When a person is caught in the act of selling drugs or committing a serious property crime (e.g. burglary of a house or stealing money from a person in the street), the police have the power to make a provisional arrest of the person in question, no matter what the type of drug or what the value of the stolen items. During the investigation, the police are obliged to seize any drugs and other suspicious objects.

In general, the police are required to disregard whether an offence is a first or second offence.

Prosecutors

Apart from personal use/possession, the prosecutor is obliged to take action for all the offences considered by this study. There is no room for no further action or diversion; down-tariffing is only possible when the prosecutor is satisfied that there are extenuating circumstances.

Italian law regards less serious offences of retail sale of any drug, in private or public, as an extenuating circumstance. The law outlines various criteria that the prosecutor and the judge can use in order to evaluate whether the offence should be considered slight or not (DPR 9.10.1990, n.309, Article 73, paragraph 5).

The first of these criteria is the amount of the drug sold. If the amount is small, the prosecutor is very likely to consider the offence to be slight.

Moreover, retail sale can be considered less serious when it is clear, from the mode and circumstances of the action, that the sale is not organised or commercial. When this is the case, it is reasonable to assume that dealing drugs is not the only source of income of the person in question, so the risk of further such offences is less likely.

Retail sale can also be considered less serious when the drug in question is not of high quality (this refers to the percentage of active ingredients in the drug and not to the type of drug). In such cases, the law considers the drug itself — and thus the offence — to be not very dangerous.

It is not necessary for every criterion to be met in order for the prosecutor to decide that the offence is slight. In fact, he/she does not evaluate the criteria separately but balances them while considering the offence as a whole.

At this stage, the question of previous offences of the same type and of pending charges is very important. A lack of such offences may, first of all, affect the prosecutor's evaluation of the offence

in question by showing that the retail sale of drugs is not a commercial activity for the person charged. Secondly, if the offence in question is slight, the prosecutor is very likely to grant consent for an 'agreement on penalty', because the risk of further offences is not very high.

Regarding property crimes, Italian law considers an offence as an extenuating circumstance when the economic damage to the victim is slight (Article 62, Penal Code).

The prosecutor must also take into consideration the circumstances of the offence. It is considered to be slight if it did not affect other people or goods. The prosecutor again usually balances all the above criteria. Therefore, when the offence involves physical injury, it is very unlikely that the prosecutor will consider it to be slight, no matter how insignificant the economic damage.

A lack of previous offences of the same type and of pending charges is important. Although this does not affect the evaluation of the offence, it shows that the risk of further offences is not very high and, provided the offence is slight, the prosecutor can grant consent to an 'agreement on penalty'.

Courts

The courts confirm the charges and, when the guilt of the suspect is proved, they determine the penalty. According to the law, the penalty must be proportional to the seriousness of the offence and the criminal character of the person charged, and it is the job of the courts to balance these two elements.

There is no provision for dropping a case or diversion at this stage. Down-tariffing is only possible when there is judged to be an extenuating circumstance.

Generally speaking, extenuating circumstances lessen the severity of the penalty, since they allow the judge to consider the offence as less serious. Apart from the specific circumstances surrounding each offence (such as those mentioned above with regard to drug

crimes and property crimes), some extenuating circumstances concern the seriousness of the offence as a simple fact, others concern the criminal disposition of the person charged. Some of these extenuating circumstances (common extenuating circumstances, *Circostanze attenuanti comuni*) are defined by law (Article 62, Penal Code), and others (generic extenuating circumstances, *Circostanze attenuanti generiche*) are provided for but not defined by law: in other words, the judge has the power to take into consideration any other circumstances which may justify a lessening of the penalty (Article 62(bis), Penal Code). Case-law and legal experts agree that such decisions are subjective and mostly concern the criminal disposition and guilt of the person charged.

The courts use the same criteria as prosecutors to assess the offence, but they have to consider the offender's character as well.

In relation to the areas of interest covered by this study, the courts take into consideration the fact that an offender is a drug user. If this is proved, the judge may grant generic extenuating circumstances, no matter what the charge. Such circumstances lessen the severity of the penalty.

In particular, the courts take into consideration the fact that a drug user can be 'forced' by his addiction to deal drugs or commit property crimes in order to get money to pay for his habit. In such a case, the offence is treated as less serious because it was committed out of necessity.

The courts also take account of any previous offences committed by the person charged. This is useful for understanding his character and does not necessarily preclude the judge from granting generic extenuating circumstances. In any case, the risk of further offending is very high when the offender is a drug user, especially if he is addicted and has no source of income.

Post-trial

Since imprisonment is not considered to be the appropriate response to criminal drug users, diversion from custody is

possible after sentencing for drug-related crimes in general, no matter what the type of offence. The Italian system has a post-trial stage, with specific courts, surveillance tribunals (*Tribunali di Sorveglianza*). Diversion from custody is possible at this stage only.

There are two diversion options for a person sentenced to imprisonment of up to four years or who has four years left to serve for a drug-related crime. The first of these is that he can apply to the surveillance tribunal for a suspended sentence, on condition that he undergoes treatment (Article 90, DPR 9.10.1990, n.309).

When the court considers the offence that has been committed to be drug-related, it assesses whether the proposed treatment is suitable for curing the addict and preventing him/her from committing further offences. Since the assumption that there will be no recurrence of offending is a deciding condition for granting this form of diversion, special attention is paid to the nature of any previous offences when assessing the suitability of the proposed treatment. If the evaluation is positive, the court grants a suspended sentence, although this can be revoked if the person evades treatment or is sentenced to imprisonment for a second offence.

Since a suspended sentence can be granted only once, the offender has a second option. He can apply to the surveillance tribunal for probation, which means being assigned to the social services in order to undergo treatment. The treatment has to be arranged and provided by the social services (Article 94, DPR 9.10.1990, n.309).

If it is shown that the applicant is a drug addict (irrespective of whether the offence was drug-related or not), the court assesses whether the proposed treatment is suitable for curing the offender. Special attention is paid to the nature of any previous offences when considering the suitability of the treatment, even if this form of diversion does not depend on the assumption of no reoffending. If the evaluation is positive, the court refers the person to the social services. This form of diversion can be granted only twice.

According to a law enacted in 1998 which modified Article 658 of the Code of Criminal Procedure (l.27.5.1998, n.165), the prosecutor is obliged to suspend a sentence of imprisonment of up to four years, when the above conditions exist, in order to enable the offender to apply for a suspended sentence or probation, thus avoiding serving the prison sentence.

Current practice

The Italian system does not always distinguish between the situations defined by this study, so some of them will be discussed here in combination, particularly when the most typical outcomes are similar. The post-trial stage will be covered only once, since the relevant decision-making process does not depend on the type of offence committed.

Use/possession in public or private of 'dangerous' drugs

The Italian system considers use/possession of drugs for personal use only to be the least serious drug offence. Since the referendum of 1993, only administrative action is possible for use/possession of drugs for personal use, no matter what the type of drug or where the use/possession is discovered. The administrative sanction can be suspension of a driving licence, of a licence to carry arms, of a passport or of any other equivalent document.

The type of drug affects the sanction only in quantitative terms: for cannabis, the suspension will last between one and three months, while, for other drugs, it will last between two and four months (DPR 9.10.1990, n.309, Article 75).

Police

In cases of use/possession for personal use, the police confiscate the drugs and any other suspicious objects. They are obliged to report the offence to the administrative authority without delay, so there is no room for no further action, diversion or down-tariffing.

In practice, the police sometimes do not report use/possession for personal use of cannabis. This only happens in cases of a first offence, if the person is under-age and if they are willing to cooperate. However, this kind of no further action is not legal.

Prosecution

The prosecutor has no role in the administrative procedure.

Administrative authority

Within five days, the administrative authority will summon the offender to hear his/her reasons for the offence. In the case of 'dangerous' drugs, when it is reasonable to assume that the person will not use drugs again, the authority will simply reprimand him/her and close the case at that point. This type of procedure only applies to first-time offences and 'dangerous' drugs.

In cases of reoffending or use of 'very dangerous' drugs, the user is offered the option of undergoing voluntary treatment instead of receiving an administrative sanction. The administrative authority will only allow the user to undertake the treatment after evaluating its suitability to cure his/her addiction. The treatment has to be provided by the social services (DPR 9.10.1990, n.309, Article 75). If the evaluation is positive, the proceedings are suspended and, if the offender successfully completes the treatment, the case is dismissed. Otherwise, the authority will impose an administrative sanction. In practice, most offenders apply for the voluntary treatment and the administrative authority usually consents to this. However, only a few people complete the treatment. When treatment is abandoned, the administrative authority is obliged to impose sanctions.

Retail sale of 'very dangerous' drugs in public or private

Whoever sells, offers, deals, gives or delivers 'very dangerous' drugs illegally shall be sentenced to imprisonment of between eight and 20 years. If, taking into account the nature and

circumstances of the offence, it can be considered a petty offence, the penalty shall be imprisonment of between one and six years (DPR 9.10.1990, n.309, Article 73).

The Italian system does not distinguish between sale in private and in public. It also does not take into consideration whether a buyer uses the drug immediately or buys and departs.

Police

The police report cases of retail sale of heroin to the prosecutor without delay. When a person is caught in the act of dealing drugs, the police must make a provisional arrest, unless the offence is considered to be slight, in which case arrest is not compulsory. However, in practice, the police usually arrest the dealer, no matter how slight the offence.

The police always confiscate the drugs and any other illegal objects.

Prosecution

In cases of retail sale of heroin, charges are frequently reduced. In fact, the prosecutor often treats such an offence as petty, according to the criteria provided for by law (Article 73, DPR 9.10.1990, n.309).

Moreover, the prosecutor has the power to grant consent to an 'agreement on penalty'. However, even this kind of procedure can only take place in cases of petty offence, due to the sentencing limits established by law (two years of imprisonment).

When the retail sale of heroin takes place in or near a school, prison, barrack, hospital or treatment centre for drug users, the offence is considered by law to be more serious (Article 80, DPR 9.10.1990, n.309). Under such circumstances, there is less likelihood of an 'agreement on penalty', as this can only be granted if the offence is considered to be slight. However, since

the prosecutor evaluates each offence individually, he will sometimes still treat it as slight. Otherwise, the case will proceed to court.

Courts

There is no provision for dropping a case or diversion at this stage, not even in practice. However, a reduction in charges often occurs.

Courts often treat an offence that is less serious as an extenuating circumstance, especially if the person charged only sold a small amount of the drug concerned. Moreover, if a dealer is himself a drug user, which means that he is likely to deal drugs in order to pay for his own habit, the courts often grant generic extenuating circumstances.

When the retail sale of heroin took place in or near a school, prison, barrack, hospital or treatment centre for drug users, the offence is generally treated as serious, although the courts often grant other extenuating circumstances.

Thus, a person charged with retail sale of heroin often receives a lesser penalty than the maximum possible by law.

Retail sale of ‘dangerous’ drugs in public or private

The law does not distinguish between the kind of drug sold (‘dangerous’ or ‘very dangerous’) — the offence remains the same (illicit sale of drugs) — but it is relevant in regard to the level of penalty.

Police

Police action is the same for ‘dangerous’ as for ‘very dangerous’ drugs. The only distinction that can be made is between sale and use/possession (the latter incurring only administrative action).

Prosecution

Charges are often reduced in cases of retail sale of 'dangerous' illegal drugs. In fact, such an offence is usually treated as a petty offence by the prosecutor.

The prosecutor usually grants consent to an 'agreement on penalty', irrespective of whether the offence is considered slight or not. For such offences, the agreement on penalty very often closes the case.

When retail sale of soft drugs takes place in or near a school, prison, barrack, hospital or treatment centre for drug users, it is considered by law to be more serious. Agreement on penalty can only be granted if the offence is deemed to be less serious when all the circumstances are taken into account.

Courts

Charges can be reduced at this stage, according to the same criteria as those described for 'very dangerous' drugs.

Shoplifting

In Italian law, shoplifting is treated in the same way as theft. Anyone who steals things that belong to someone else is punished with imprisonment of up to three years (Article 624, Penal Code).

Police

When a shoplifter is caught in the act of stealing from a shop, the police have the power to make a provisional arrest, although this is not compulsory.

Prosecution

The prosecutor very often considers shoplifting as a petty offence, because it does not affect people or other goods and the

economic damage caused to the victim is very slight. Therefore, charges are very often reduced for shoplifting.

Leaving aside the extenuating circumstance of a small amount of economic damage, the prosecutor usually also agrees to an 'agreement on penalty', which usually closes the case.

Courts

Charges are often reduced at this stage, often because of the extenuating circumstance of the small amount of economic damage inflicted. Moreover, the courts will also take into consideration the fact that the shoplifter is a drug user and is therefore likely to steal from a shop out of necessity. This usually results in the court granting generic extenuating circumstances, as well. Thus, a person charged with shoplifting very often receives a lesser penalty than the maximum possible by law.

Burglary

Burglary of a house with intent to steal is treated as a more serious type of theft (Article 625, Penal Code). However, a new law passed in March 2001 (L. 26, March 2001, n.128) made burglary of a house an offence in its own right that does not constitute a more serious type of theft. Such a case warrants a penalty of imprisonment of between one and six years (*Furto in abitazione*, Article 624(bis), Penal Code).

Police

When a person is caught in the act of burgling a house, the police must make a provisional arrest, unless the economic damage caused to the victim is slight, in which case the offence can be considered slight and arrest is not compulsory. In practice, the police usually make an arrest, as burglary is generally considered to be serious no matter how slight the economic damage.

Prosecution

The prosecutor rarely treats burglary as a petty offence, because it usually affects other goods and is also likely to affect people. This offence is indeed potentially very dangerous, thus the prosecutor takes into consideration the nature and circumstances of the offence, which are considered to be more important than the economic damage. Therefore, even if the economic damage inflicted on the victim is very slight, the prosecutor rarely reduces the charges.

The prosecutor has the power to consent to an 'agreement on penalty', but he will do so only in the rare instances where the burglary can be considered a petty offence.

Courts

Charges are sometimes reduced at this stage. The courts take into consideration the extenuating circumstance of a small amount of economic damage, but they always evaluate the nature and circumstances of the offence as well. Moreover, the courts will also take the fact that a burglar is a drug user into consideration, sometimes granting generic extenuating circumstances.

Before the law was reformed, the fact that the theft had taken place in a house was an aggravating circumstance. By making burglary a specific offence, the new law affects the penalty for burglary of a house: the judge can no longer treat it as a more serious type of theft and so cannot balance the previous aggravating circumstance with the extenuating circumstances.

Stealing from a person in the street (without causing injury)

This offence is another type of theft, and is punished with imprisonment of up to three years (Article 624, Penal Code).

Police

When a person is caught in the act of stealing money from a person in the street, the police must make a provisional arrest, no

matter how slight the offence. There is no provision for discretionary powers or no further action by law and, seemingly, this is the case in practice too — or, at least, the police do not admit to it because it is not legal.

Prosecution

The prosecutor very often treats this as a petty offence, because it does not affect people or other goods and the economic damage caused to the victim is very slight. As in the case of shoplifting, the prosecutor usually consents to an ‘agreement on penalty’, which very often closes the case.

Courts

Charges are often reduced at this stage. The courts take into consideration the extenuating circumstance of a small amount of economic damage and the fact that the offender is a drug user. This means that they often grant generic extenuating circumstances as well. Thus, a person charged for bag-snatching without any physical hurt to the victim very often receives a lesser penalty than the maximum possible in law.

Stealing from a person in the street (causing injury)

Italian law treats this offence as a more serious type of theft, and the penalty is imprisonment of between one and six years (Article 625, Penal Code). Depending on the methods used in the commission of the offence, it can be treated as a kind of rape or violation, for which the penalty is imprisonment of between three and 10 years (Article 628, Penal Code). This law also introduced the offence of ‘bag snatching’ (Article 624(bis), Penal Code), which warrants a penalty of imprisonment of between one and six years.

Police

When a person is caught in the act of stealing money from a person in the street, the police must make a provisional arrest.

Prosecution

The prosecutor rarely treats this as a petty offence, because it causes physical harm to the victim. Therefore, even if the economic damage caused is very slight, the prosecutor only reduces the charges in rare circumstances. The prosecutor has the power to consent to an 'agreement on penalty', but he will do so only when the theft can be considered a petty offence.

Courts

Charges are sometimes reduced at this stage. The courts take into consideration the extenuating circumstance of a small amount of economic damage, but they always take account of the method and the circumstances of the offence as well. If the bag-snatcher is a drug user, the courts may grant generic extenuating circumstances.

Post-trial diversion

As already mentioned, diversion from custody is an option for the surveillance tribunal, but only after sentencing.

For drug-related crimes in general, there are two forms of diversion available to a person sentenced to imprisonment of up to four years or who has four years left to serve. These are a suspended sentence and probation.

When diversion is an option, the offender often applies for a suspended sentence and will usually be granted it by the courts because it is generally felt that voluntary treatment is the right solution for criminal drug users. Nevertheless, only a few are able to complete the treatment. In many instances, they either evade treatment or are sentenced to imprisonment for a second offence, in which case the courts revoke the suspended sentence.

Since a suspended sentence can only be granted once, a criminal who reoffends often applies to the surveillance tribunal to be referred to the social services in order to undergo treatment. In

the case of a drug addict, the court usually grants the request, since the aim of the law is to encourage voluntary treatment. This form of diversion can be granted only twice.

This means that first, second or third drug-related offences do not usually lead to imprisonment (this is reserved for any subsequent offences).

Common EU standards on prosecution of drug users

Proportionality and prioritisation

There is no question that action taken by the legal system in relation to drugs should be proportional to the harm which it seeks to prevent. Guidelines for action would only be compatible with the Italian legal system if they were written into the national legislation, because a prioritisation of choices is likely to entail a violation of the principle of legality and therefore of compulsory prosecution.

The experts agree that, in theory, the highest priority should be given to trafficking in the most dangerous drugs and to any serious crimes committed by users because of their addiction. The lowest priority should be given to action against use/possession for personal use of cannabis and other drugs regarded as being less dangerous. In particular, the experts agree that use/possession per se should never result in imprisonment, as treatment is the only suitable approach when dealing with drug users.

The Italian system already takes into consideration the level of seriousness of the offences addressed by this study. Criminal action has to be taken in cases of trafficking or sale of any drugs, while administrative action is taken in cases of personal use. This reflects the principle of proportionality.

Some experts believe that special attention should be paid to juvenile offenders, who may progress from cannabis or other drugs regarded as being less dangerous to problematic drug use (escalation theory).

Changes to the legal framework

In the experts' opinion, some changes are required regarding the constituent elements of any of the offences discussed, even when Italian law describes them quite clearly.

Article 75 (DPR 9.10.1990, n.309) makes provision for administrative action in the case of personal use/possession of any drug, but it does not determine the amount of drugs which can be considered to be for personal use. This assessment is left to the police and the administrative authority, leaving room for discretionary powers. However, some experts believe that clearly defined parameters should be provided for by law. Article 73 (DPR 9.10.1990, n.309) makes provisions for the crime of retail sale of drugs. However, the same problem as above (personal use/possession) exists with regard to the extenuating circumstance of a less-serious offence: the law does not define the amount of drugs that constitute a petty retail offence. This evaluation is left to the prosecutor and the courts, but some experts believe that clearly defined parameters should be outlined in the legislation.

No further changes are thought to be necessary regarding the constituent elements of any of the offences discussed, but it is generally felt that the range of sanctions provided by law could be expanded. The Italian system does not provide for on-the-spot fines (transactions), short-term restrictions on entry to certain areas (related to social nuisance) or any other type of low-priority action.

On-the-spot fines or mediation with the victim are not thought likely to be very useful, because drug users often have no income or resources so would not have enough money to pay a fine or compensate the victim.

Some experts believe that the system should allow implementation of short-term restrictions on entry to certain areas where drugs are sold or used.

One key issue of special concern

The key issue that surfaced during discussion of the concerns of this study is the contradiction that is apparent in the legal response to retail sale of drugs and that for personal use/possession.

As described above, administrative action is the only option in cases of use/possession for personal use of drugs, while criminal action is the only option for retail sale of drugs. Thus, demanding drugs is treated as less serious than supplying them, which means that drug users will continue to buy and use. In consequence, it could be argued that, as long as there is a demand for drugs, dealers will sell them.

This vicious circle shows that, in the long run, the legal system is bound to fail in its attempt to eradicate drug use. The experts feel that there are two possible solutions to this contradictory situation: either decriminalise and regulate the supply of drugs or criminalise the demand.

Legal references

Italian Constitution

Article 112: 'Il pubblico ministero ha l'obbligo di esercitare l'azione penale' (The public prosecutor has the duty to bring criminal proceedings)

Code of Criminal Procedure

Article 347: 'Obbligo di riferire la notizia di reato' (Duty of the police to report any *notitia criminis* to the prosecutor without delay)

Articles 380–391: 'Arresto in flagranza' (Provisional arrest by the police)

Articles 444–448: 'Applicazione della pena su richiesta delle parti' (Sentence at the request of the parties, agreement on penalty)

DPR 9.10.1990, n.309

Article 73: 'Produzione e traffico illecito di sostanze stupefacenti o psicotrope' (Production and traffic of drugs, including retail sale)

Article 75: 'Sanzioni amministrative' (Administrative action in the case of personal use/possession of any drug)

Article 80: 'Aggravanti specifiche' (Aggravating circumstances: retail sale of drugs in or near schools, prisons, barracks, hospitals or treatment centres for drug users)

Article 90: 'Sospensione dell'esecuzione della pena detentiva' (Suspended sentence for drug-related offences)

Article 94: 'Affidamento in prova ai servizi sociali' (Probation in cases of drug addiction)

Penal Code

Article 62: 'Attenuanti comuni' (Common extenuating circumstances, defined by law)

Article 62(bis): 'Attenuanti generiche' (Generic extenuating circumstances, not defined by law)

Article 624: 'Furto' (Theft)

Article 625: 'Circostanze aggravanti del reato di furto' (Specific aggravating circumstances for the crime of theft)

Article 628: 'Rapina' (violation)

Further reading

Direzione Centrale per i Servizi Antidroga (1998), *Relazione annuale*, Roma.

Ministero dell'Interno (1998), *Relazione annuale al Parlamento sullo Stato delle Tossicodipendenze in Italia*, Roma.

Notes

[1] 'Testo unico delle leggi in materia di disciplina degli stupefacenti', DPR 9.10.1990, n.309.

Gilles Herrmann

Outline of the legal system of Luxembourg

Type of system

Narcotic offences are covered by the law (concerning the sale of medicinal substances and the fight against drug addiction) of 19 February 1973 (hereinafter referred to as ‘the 1973 law’) that was modified by the law of 27 April 2001.

The modified 1973 law essentially remains a repressive law, towards drug consumers as well as dealers. Indeed, according to Article 7, ‘those who illegally use one or more hard drugs in a place other than one of those provided by the government [...] or who, for their personal use, transport, possess or acquire it, for payment or for free, will be punished by imprisonment of between eight days and six months and a fine of between EUR 248 and 2 479, or by one of these sentences only’. The use of cannabis is punished by a fine of between EUR 248 and 2 479.

Article 8 of the 1973 law provides a penalty of between one and five years of imprisonment and a fine of between EUR 496 and 1 239 468, or one of these sentences only, for any person who:

- manufactures, imports or sells illicit drugs;
- acquires, possesses or transports drugs with a view to having them used by others;
- acts as an intermediary to acquire illicit drugs;
- uses drugs in a group or in the presence of third parties; or
- facilitates the use of drugs by others.

The imprisonment sentences are more severe if any of these offences are aimed at minors or if membership of a criminal gang is involved (conspiracy).

Even though the 1973 law does not specifically provide for alternative measures to prison for drug-addicted delinquents, the following options, constituting a medical alternative, are available during the investigation, the pre-trial stage and at trial.

In accordance with Article 23 of the 1973 law, cases involving personal use of drugs (individually or in a group) and/or cases involving offences against Article 8 of the 1973 law are dropped if the offender, before the illegal use was discovered, undertook treatment for drug addiction. Moreover, the public prosecutor can offer the offender the option of voluntary treatment for the addiction. If the offender successfully completes the treatment proposed by the prosecutor, the charges have to be dropped.

According to the terms of Article 24 of the 1973 law, when preliminary charges are brought for personal use of drugs and when it is established that the offender is the subject of medical treatment, the investigative judge may order treatment for drug addiction at the request of the prosecutor or the accused person.

Article 25 of the 1973 law makes provision for the juvenile court to refer an addicted minor for treatment.

Finally, Article 26 of the 1973 law provides for the courts to order a drug addict to undergo treatment, in which case the verdict can be postponed. If the accused meets all the conditions imposed by the courts, the charges for illegal use may be dropped.

The above measures are only available to drug users and no other categories of delinquents.

In addition to the special measures set forth in the 1973 law, the courts can still avail of the reformed sentencing measures or of any of the extenuating circumstances which are an option for all offences, as outlined in the Code of Criminal Law and the Code of Criminal Investigation. The extenuating circumstances outlined in Articles 73 to 79 of the Code of Criminal Law allow the judge the option of ordering community service or a fine, or even to forgo sentencing in favour of a police fine (between EUR 25 and 248).

Articles 619 to 634(1) of the Code of Criminal Investigation allow the judge the option of either postponing the verdict, with/without a trial period, or suspending the sentence, with/without probation and with a trial period.

The last measures are the ones most used (mainly the extenuating circumstances and suspended sentencing). The legal option for a medical alternative, provided by the 1973 law, are only rarely used, for cases where the judge is convinced that the drug addict is sincere in his desire to be treated.

The legal system of Luxembourg makes a clear distinction between offences against property and offences which relate to narcotics.

Articles 461 to 488 of the Code of Criminal Law set out the penalties for theft, making a distinction between common theft and aggravated theft. Theft is defined as any fraudulent removal of something that does not belong to the offender.

In accordance with Article 463 of the Code of Criminal Law, common theft is punished by imprisonment of one month to five years and/or a fine of from EUR 248 to 4 958 (a minor penalty). All aggravated thefts receive criminal penalties. Thus, according to Article 467 of the Code of Criminal Law, theft committed by breaking and entry, climbing or using false keys is punished with five to 10 years of imprisonment. In accordance with Articles 468 (and subsequent articles) of the Code of Criminal Law, theft committed with violence or threats is punishable by imprisonment of five to 10 years. The sentence can be even heavier if the offence is committed under conditions that are considered extremely serious (e.g. at night, by several perpetrators, in an occupied house).

The Luxembourg legislation in matters of crime and property offences is almost identical to Belgian legislation, so this will not be elaborated on further here.

Overview of possible reactions and their legal basis

Police

Article 12 of the Code of Criminal Investigation requires the judiciary investigators to inform the public prosecutor without delay of any crimes, offences and infractions of which they have knowledge. Upon completion of their investigations, they must immediately forward to him their original report as well as a certified copy.

Article 13(2) of the Code of Criminal Investigation requires police agents to assist the judiciary investigators in recording crimes, offences and infractions and drawing up reports thereof. (In general, crimes will ultimately be brought to the criminal court, offences to the *tribunal correctionnel*, a lower court, and infractions to the police court, an even lower court.) They must also record in official reports the statements taken from all persons likely to provide clues, evidence and information about the authors and accomplices of such offences.

The result of these two articles of the Code of Criminal Investigation is that the police are obliged to record the offences and send a report to the public prosecutor. They must, in fact, inform the public prosecutor of all offences and, consequently, have no option of no further action, as this would constitute an offence in itself. A police official who does not report an offence risks being suspended from his job (with the exception of some offences for which they have the right to receive taxed warnings ⁽⁶⁹⁾).

The fact that the police have no alternative but to record and report any offence against the 1973 law or a property crime to the public prosecutor is very important in Luxembourg. Frequent references will be made to this in this chapter.

⁽⁶⁹⁾ The police can administer taxed warnings (i.e. small fines of between EUR 25 and 149) for minor offences such as road traffic offences. In cases of immediate payment of such a taxed warning, the public prosecutor will not be informed by the police of the offence.

Prosecution

According to Article 23 of the Code of Criminal Investigation, any complaints and accusations are reported to the public prosecutor, who decides on the appropriate procedure for each. Any constituted authority, public officer or civil servant who, in the course of his/her duties, acquires information that a crime or offence has been committed has to advise the public prosecutor accordingly without delay.

The public prosecutor is thus informed of all offences and, in accordance with the terms of the article, has the power to institute legal proceedings. This means that he/she is the sole decision-maker at this point in the proceedings, with the power to take no further action or to refer the case to the courts.

The prosecutor is the only one who can close a case without criminal consequences. He may do this without any other action, or he may give a written or verbal warning to the offender. He may also, as described above regarding Article 23 of the 1973 law, close a case when the offender has completed treatment for drug addiction.

The choice of the public prosecutor to institute legal proceedings or not remains under the supervision of the General Public Prosecutor and the Minister for Justice, who may order him to prosecute in accordance with Article 19 of the Code of Criminal Investigation. If the public prosecutor proceeds with the prosecution, he can either bring charges directly before the competent court or request that the investigating judge open preliminary investigations if none have yet taken place. He is in fact obliged to order an investigation in the case of a crime (Articles 49 and 50 of the Code of Criminal Investigation).

The public prosecutor can request the immediate application of extenuating circumstances and sentencing of the accused, by the chamber in council of the *tribunal correctionnel* (in a session not open to the public), to a simple fine by means of a penal order (Article 216(1), Code of Criminal Investigation). When a crime

has been committed, the prosecutor can request that the chamber in council decriminalise the case (Article 130(1), Code of Criminal Investigation), in which case the accused is referred to the *tribunal correctionnel* and not to the criminal court. In the case of an offence, he can request that the accused be referred to the police court and not to the *tribunal correctionnel* (Article 131(1), Cci). When the chamber in council decides to apply extenuating circumstances and refer a case to a lower court, such a court will have to accept the chamber in council's decision. The public prosecutor, therefore, has extensive powers at all levels of the procedure.

Social workers

In principle, social workers have no powers in the decision-making process when an offence has been committed by a drug addict, but the public prosecutor may request their advice, in order to make his decision with full knowledge of the case. He/she may want to know whether a particular drug user is likely to successfully complete a treatment programme for drug addiction and so be capable of rehabilitation. This is usually the case when minors or first-time offenders are involved. Legally, social workers cannot influence the sentencing of an offender.

Overview of typical reactions

Police

This is the same as described above in the section 'Overview of possible reactions'.

Prosecution

Typical decisions taken by the public prosecutor and his deputies are the specific closing of a case (and destruction of the drugs in cases of drug consumption), or referral (for decriminalisation or no penalty) of a case to a lower court and, rarely, a request for

sentencing to a fine by means of a penal order and an order for the drug user to attend a treatment programme.

When deciding whether to proceed with a case, the prosecutor first of all takes into account the seriousness of the offence and any disturbance to law and order, taking particular note of the quantity of the drugs and any damage caused. Thereafter, he will base his decision on the circumstances and character of the accused, such as his convictions record, his age and his social situation.

Courts

By the time a drug offence reaches the courts and tribunals, the case often has already been assessed by the chamber in council as qualifying for extenuating circumstances and so has been brought to a lower court. This means that the accused no longer risks the heaviest possible punishment as provided for by the legislation. The courts have no option of definitively closing a case once it is submitted to them. They have to deliver a judgment or risk denying justice, which is punishable by law.

The courts and tribunals, however, still have the option of ordering a lower sentence and admitting extenuating circumstances. In this case, typical decisions are:

- a simple fine;
- community service;
- suspension of a verdict; or
- a prison sentence, with a complete or partial deferment of sentence (with/without the condition of a trial period).

Such decisions are taken with due regard to any extenuating circumstances, such as the seriousness of the offence and the damage caused and the character and circumstances of the accused, such as age, any former convictions and social environment.

Current practice

Use/possession in private of ‘very dangerous’ drugs

Police

This is the same as described in the section ‘Overview of possible reactions’.

Prosecution

In the Grand Duchy of Luxembourg, the drug addict is not considered to be a criminal but rather a sick person in need of help. So, a case of simple use of drugs, even ‘very dangerous’ ones, rarely comes before the courts.

When the police report a drug addict for use/possession of ‘very dangerous’ drugs and he has never been reported before, the public prosecutor will send him a written warning to say that he was found in violation of the 1973 law and that any further violation could mean legal prosecution. Thereafter, the case is filed by the prosecutor without legal consequences. Unfortunately, such a warning is generally ignored and the drug addict is subsequently found in violation again. The majority of such cases are then recorded, and this without any further warning.

If it transpires, either from the police report or from other information available to the court, that the drug addict wishes to undergo addiction treatment, the prosecutor refers him to a Ministry of Health doctor, who will supervise the treatment. The prosecutor will monitor the case during the treatment period, but, even if the treatment fails, the case will be closed.

There are, however, rare cases where a drug user is brought before the courts, usually when the user has also committed other, more serious, offences. The offender then has to appear before the competent court for all the offences, including consumption of drugs.

Finally, in the case of drug use in a group, the public prosecutor normally requests sentencing of a fine by means of a penal order.

Courts

In practice, cases of simple use of ‘very dangerous’ drugs are almost never referred to the courts and tribunals. When such a case comes before the courts, it is usually in combination with other offences against the Code of Criminal Law and the sentence handed down is for all the offences taken together. In such cases, sentencing is only severe for extremely serious offences or multiple offences.

In regard to consumption of ‘very dangerous’ drugs in a group, the users are generally, at the request of the prosecutor, fined by means of a penal order. A penal order is an order taken by the chamber in council during a non-public hearing and by default (without the accused being present). The fine will always be appropriate to the income of the accused and lower than the maximum provided for by law.

Use/possession in private of ‘dangerous’ drugs

Police

This is the same as described in the section ‘Overview of possible reactions’.

Prosecution

As in the case of ‘very dangerous’ drugs, a user of ‘dangerous’ drugs (such as cannabis) is not considered to be a criminal but a sick person. In practice, only cases of consumption in a group and/or in the presence of or with minors will come before the courts. In this case, the file will be decriminalised and brought before the police courts (which can only impose a fine), or it will be settled through a penal order.

In all other cases of drug consumption in private, the public prosecutor will, in the majority of cases, send a written warning to the offender and will subsequently file and close the case. If a warning has already been sent for previous offences, the case will simply be filed.

Courts

On the rare occasion when a case of consumption of 'dangerous' drugs is referred to the courts, the accused is generally simply fined. However, if the court deems that there is no need for sentencing because of the young age of the offender or because he/she promises to stop using drugs, the court suspends sentencing in order to give the accused the chance to demonstrate his/her goodwill.

Use/possession in public of 'very dangerous' drugs

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

Generally, very little distinction is made between use of heroin in private and in public, and the responses by the prosecution are the same.

Nevertheless, a larger number of such cases are referred to the courts, as in certain circumstances there can be greater disturbance to law and order, particularly when the consumption occurs in schools or in a penal institution. In such cases, for a first-time offence, the prosecutor usually requests that a fine be imposed by means of a penal order, but, for a second offence, he refers the case to the court.

If the drug use occurs in a public place which is less visible to the public or which is completely hidden (which is usually the case), the responses are the same as for use in private.

Courts

With the exception of drug use in a group, in schools or in a penal institution, for which punishment is more severe, sometimes even a prison sentence, the court decisions are identical to those for cases of use in private.

Use/possession in public of 'dangerous' drugs

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

Use and possession of soft drugs in public is prosecuted in almost the same way as for use in private, once again with the exception of use in a group, in schools or in penal institutions. In such cases, for a first-time offence, the offence is usually decriminalised and referred to the police court, where it is treated as a petty offence. A second offence is punished with a more significant fine by penal order, or the case may even be referred to the *tribunal correctionnel*.

Courts

Once again, with the exception of drug use in a group, in schools and in penal institutions, for which the courts impose more severe sanctions, and even prison sentences (though still below the maximum level possible), the court decisions are identical to those for cases of use in private.

Retail sale of 'very dangerous' drugs in private (for use together)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

Such cases usually involve addicted couples/friends who consume together or who divide the 'work' between them: one

furnishes the money, the other the drugs. When such is the case, the prosecution response is identical to that for simple use: a warning (in the case of a first-time offence) and the filing and closure of the case, referral to a treatment programme or a request for a fine to be imposed.

If, however, the case involves a person who sells heroin to other users and allows them to use the drug immediately on the premises, the case is either referred for a fine to be imposed by a penal order (for a single, first-time offence) or, for all other cases, it is brought before the criminal court.

Courts

In the case of addicted couples, the courts usually apply broad extenuating circumstances and hand down a fine or a suspended prison sentence.

In cases involving sale of heroin to other users for immediate use on the premises, a more severe punishment is imposed, such as a custodial sentence (though this is usually below the maximum level of sentencing possible by law).

Retail sale of 'very dangerous' drugs in private (for users who buy and depart)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

For this offence, it is very rare for the prosecution to file and close the case, unless it proves impossible to bring the culprit before the courts. However, if the culprit is known and has a fixed domicile, he is usually subpoenaed to appear before the criminal court. Moreover, since such files can be quite complex, the

dealer is often arrested and kept in custody (especially if the quantity of drugs in his possession exceeds 4 grams) and the investigative judge is charged with investigating the case.

Courts

The decisions of the courts are very varied and depend mainly on the conviction record of the accused, the time frame of the offences in question and the quantity of drugs sold. Therefore, a first-time offender is only sentenced to community service or a suspended prison sentence, while a recidivist who sells large quantities of 'very dangerous' drugs over an extended period of time may receive a prison sentence of several years without the possibility of having the sentence suspended.

Retail sale of 'very dangerous' drugs in public

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

This is the same as described for the prosecution (above) for 'very dangerous' drugs sold in private for users who buy and depart.

Courts

This is the same as described for the courts (above) for 'very dangerous' drugs sold in private for users who buy and depart.

Retail sale of 'dangerous' drugs in private (for use together)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

Such cases almost exclusively concern friends who use together, one of whom acquires the drugs. As long as it is a first or second offence, and if no minors are involved, the accused is sent a written warning and the case is filed without criminal consequences. In cases of multiple or repeated offending, or if minors are involved (even without using), the case is either referred to the police court or a penal order is requested.

Courts

It is very rare that such cases appear before the courts, except in cases of multiple or repeated offending. In this case, extenuating circumstances are always taken into consideration, particularly when the offenders are very young, and so the sentence is only a fine or community service.

Retail sale of 'dangerous' drugs in private (for users who buy and depart)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

This offence does not concern users who want to use drugs with their friends but real dealers, so that it is very rare (as with the sale of 'very dangerous' drugs) for the case to be put on file and closed.

Depending on whether the case concerns a first-time offender who sold a small amount on a few occasions or a recidivist who sells more significant amounts over an extended period of time, the prosecution decisions vary between referral to the police court, after availing of extenuating circumstances, and arrest with referral to the criminal court.

Courts

The decisions of the courts are very varied and depend mainly on the conviction record of the accused, the time frame of the offences in question and the quantity of drugs sold. Therefore, a first-time offender is only sentenced to a fine or community service, while a recidivist who sells large quantities of drugs over an extended period of time may receive a suspended prison sentence or even a custodial sentence.

Retail sale of 'dangerous' drugs in public

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

This is the same as for the prosecution (above) for retail sale of 'dangerous' drugs in private for users who buy and depart.

Courts

This is the same as for the courts (above) for retail sale of 'dangerous' drugs in private for users who buy and depart.

Shoplifting

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

The procedure for a shoplifting offence depends to a large degree on the offender's record, his/her social situation, the goods stolen and their value. Thus, a first-time offender who only steals a few items of small value receives a written warning, after which the case is recorded and closed.

If a person steals food to sustain himself, the case is recorded and closed, whether it is a first-time offence or not. If, however, a person steals luxury items, which is mostly the case with drug addicts, who use them to finance their drug habit, the case is referred to the police court.

In cases of multiple offending, the case is ultimately referred to the *tribunal correctionnel*.

Courts

Except in cases of multiple or repeated offending, where community service or even prison sentences are handed down, shoplifting is usually punished with a simple fine.

Burglary

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

Burglary, or breaking and entering into a house, is regarded by the Code of Criminal Law as a serious offence, since it is punishable by a criminal sentence of imprisonment of five to 10 years. For this offence, it is not an option for the case to be put on record and closed. In fact, when a burglar is caught red-handed, he is immediately arrested and brought before the investigative judge, who is then obliged to initiate preliminary investigations.

When the file is completely investigated, the public prosecutor can either prosecute the accused before the criminal court or, in the case of extenuating circumstances, request referral of the suspect to the *tribunal correctionnel*. In the latter case, the accused faces a prison sentence of one to five years.

In practice, the vast majority of such cases are decriminalised and referred to the *tribunal correctionnel*, since current penal policy does not consider them serious enough for referral to the criminal court. It is only cases of repeated and extremely serious theft that are referred to the criminal court.

Courts

As with the prosecution, the courts regard burglary as a serious offence, though not serious enough to hand down the maximum sentence. The tribunals usually hand down a prison sentence, often at least partially suspended, unless it was committed by a habitual offender who is accused of multiple offences, in which case a heavy custodial prison sentence is handed down.

Stealing from a person in the street (without causing injury)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

A drug addict who commits a simple theft in the street without violence towards the victim is not usually arrested and so preliminary investigations are not initiated by the investigative judge. Usually, such cases are immediately referred to the relevant *tribunal correctionnel*, depending on the level of penalty.

In the case of a first-time offence that has only caused minimal damage, extenuating circumstances are admitted and the offender (who is usually very young) is referred to appear before the police court.

Courts

The decisions of the court vary depending on the offender's record, age, the number of offences and the damage caused. Thus, a first-time offender is often only ordered to pay a fine or do community service, whereas, in cases of recidivism and multiple offences, a prison sentence may be imposed, possibly fully or partially suspended.

Stealing from a person in the street (causing injury)

Police

This is the same as described in the section 'Overview of possible reactions'.

Prosecution

The decisions taken for theft with assault and battery in the street are exactly the same as those for burglary (breaking and entering), since the penalties are the same.

It should, however, be noted that, in serious cases involving a weapon where the victim is injured, the offender is referred before the criminal court.

Courts

The court procedure is also similar to that for burglary (breaking and entering), except for in serious cases such as those mentioned above, when the criminal court will impose a prison sentence of more than five years, possibly with a partial suspension of the sentence.

Common EU standards on prosecution of drug users

What should happen in practice

The reaction to an offence committed by a drug user must be proportional to the harm it aims to prevent. All the legal experts of Luxembourg are in agreement with this statement, and the principle is applied in practice. In fact, as long as the drug addict remains a simple user, any damage caused is to himself/herself and the legal response remains minimal as long as public order is not greatly disturbed. However, if the drug addict causes harm to others, the response will become firmer according to the seriousness of the offence.

The highest priority is given to trafficking of ‘very dangerous’ drugs. Such traffickers may be considered to be trafficking in death. Since the first objective of Luxembourg’s drug policy is to prevent addiction and risk of death, it is fundamentally important to pursue the dealers. As long as there are plenty of ‘very dangerous’ drugs on offer, the price will be relatively low. This situation will increase the temptation for consumers of other drugs (even the legal ones, such as alcohol and tobacco) and access to ‘very dangerous’ drugs will remain easy. Consequently, all efforts must be concentrated on fighting dealers in ‘very dangerous’ drugs, in order to limit the availability of such drugs. The penalties handed down to the dealers must have a deterrent effect, so that at least some of the offenders do not start dealing again after their release. All the legal experts, the police and the social workers are in agreement on this. It is not possible to tolerate any trafficking of hard drugs if an efficient fight is to be conducted against drug addiction.

Another high priority must be serious offences (other than drug offences) committed by drug addicts. The majority of crimes and property offences are committed by drug addicts to finance their drug consumption, which is an enormous infringement of public order. A significant reduction of such offences would inevitably reduce public order disturbances, which would encourage the public to regard drug addicts as sick people. It is possible to foster this view of drug addicts by continuing to be vigilant against drug use and sale of drugs in public. In general, the visible aspects of drug use should be prosecuted more severely than those that are invisible to the public, such as consumption of drugs in private.

For drug offences committed in private, other procedures, such as criminal mediation, decriminalisation, postponement or suspension of a sentence, or enforced treatment for drug addiction, are an option — particularly in cases of minimal public nuisance or a first-time offence.

The courts in Luxembourg impose a prison sentence, sometimes suspended, and then offer the accused the option of following a treatment programme in order to avoid imprisonment. However, many social workers believe that such a response is inappropriate, since such treatment is only effective when an addict chooses to follow it of his own free will and not when he/she is forced to do so, which has in fact been demonstrated to be the case over recent years.

In Luxembourg, it is generally agreed that drug users are primarily sick people in need of treatment and that simple drug use should not be subject to criminal proceedings. Measures such as warnings, fines and forfeiture of drugs are more appropriate, and are already applied in practice by the various competent authorities in Luxembourg in cases involving minor disturbance to public order. There is, however, consensus among the legal experts that these measures should not be the only ones available, since there are cases where even simple drug use seriously disturbs public order (particularly when it occurs in schools, for example), for which specific penalties should be developed. The social sector

tends to take the opposite view, believing that drug use, per se, should never be penalised, especially consumption of 'dangerous' drugs such as cannabis.

There is consensus among the experts that the police, who are in direct contact with the users, should not have the power to apply no further action. Such decisions should be reserved for the magistrates, who can objectively assess a case based on the facts. There are differing viewpoints as to whether use/possession of drugs for personal use should warrant imprisonment. Social workers generally believe that, if an addict is to be considered as a sick person, consumption of drugs should never be penalised, or, at most, a fine should be imposed. The legal experts, on the other hand, consider that the option of imprisonment for drug use should remain, even if it is only for users of 'very dangerous' drugs, since situations sometimes arise where imprisonment is the only solution to ongoing public nuisance.

Changes to the legal framework

As mentioned above, a legal reform was passed by the Luxembourg parliament on 27 April 2001. This amendment has significantly reduced the penalties for drug consumption:

- a simple fine for use/possession of cannabis; and
- a fine and/or a prison sentence of less than one year for use/possession of other controlled substances.

The new law provides for special circumstances where no penalty will be imposed for use of 'very dangerous' drugs, as long as the addict uses in one specific location agreed by the Ministry of Public Health and the Ministry of Justice.

Conclusions

Luxembourg's current legal system, whereby the public prosecutor can decide to prosecute or not, is a very flexible system which

readily allows procedures to be modified when changes are made to prosecution policy in matters of drug consumption.

In fact, the legal framework allows the prosecutor to make decisions ranging from prosecution of a user before a court to recording and closing a case without penal consequences. Since the public prosecutor is linked to the Ministry of Justice, any political changes to prosecution practice in matters of drug use may be immediately put into practice.

The new law does not change this system but incorporates the procedural practices of the last few years into the existing law concerning sale of chemical substances and the fight against drug addiction.

As far as all the other offences committed by drug addicts are concerned, no modification to the Code of Criminal Law is foreseen. The abovementioned system, where the prosecutor can decide whether to prosecute or not, in fact also allows flexibility in the prosecution of such offences, so that any social or political changes in the future can be reflected in legal practice.

THE NETHERLANDS

Anton van Kalmthout and Jack Derks

Outline of the legal system of the Netherlands

To understand the practices of the police, public prosecution service and courts regarding illegal drugs in the Netherlands, it is necessary to describe the following:

- the regulations described in the Dutch Opium Law (*Opiumwet*); and
- how these regulations are implemented in daily practice.

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• Country reports

Type of system

The Opium Law

The Opium Law distinguishes between drugs which carry unacceptable risks and other drugs. So-called ‘hard’ drugs come under the first category. These drugs (heroin, cocaine, etc.) are recorded in List I of the Opium Law. Drugs in the other category, so-called ‘soft’ drugs (cannabis products), are recorded in List II. Offences against the Opium Law are penalised as outlined below.

Possession of drugs, regardless of whether they are soft or hard drugs (i.e. in List I or List II), is punishable in law according to Articles 2, 3 and 4 of the Opium Law. However, the amount of drugs in question affects the seriousness of the offence. The law imposes a maximum quantity that can be viewed as a ‘user-quantity’. If someone possesses a ‘user-quantity’, the offence is not a criminal one but only a ‘trespass’, which means that, although it is still an offence, it is just a minor one, an infringement of the rules rather than a criminal act.

This is important, because such minor offences not only result in minor punishments but also have a much lower priority in police

investigations and prosecution practice. Furthermore, and this is different to many other countries, the Opium Law does not penalise the use of drugs per se, regardless of whether they are hard or soft drugs.

The expediency principle

In the Netherlands, criminal investigation and prosecution operate under the so-called 'expediency principle' (*opportuiniteits beginsel*). This means that the Dutch public prosecution service (which is the only body in the Netherlands authorised to prosecute) has full authority to decide whether or not to prosecute. The service frequently avails of the option not to prosecute, in which case it imposes a waiver of prosecution, which can be either conditional or unconditional. Articles 167 and 242 of the Criminal Code allow the prosecution service this option, especially in cases of minor offences, which frees up the service for more serious criminal cases.

One form of waiver of prosecution is a transaction. All criminal offences that are punishable with less than six years of imprisonment (this currently means 90 % of all criminal cases) and also all minor offences can be settled by the prosecutor by offering the suspect the option to compensate for the offence. In such cases, the prosecutor proposes that the suspect either pays a particular sum of money or fulfils other specified conditions. If the offender complies with these conditions, the prosecutor does not bring the case to court. The amount of money demanded by the prosecutor cannot exceed the set fine for the criminal offence. Regarding a minor offence, the prosecutor is obliged to settle the case if the suspect offers to pay the maximum fine set for the offence (Article 74, PC).

Current practice

As the public prosecution service decides on the criminal procedure in more than 50 % of all cases where there is an identified perpetrator, there is significant lack of uniformity in the decision-making process. For this reason, over recent years, the College of

Public Prosecutors (College van Procureurs Generaal) has issued an increasing amount of detailed guidelines which include the criteria necessary for deciding whether there are grounds for refraining from prosecution and/or proposing a transaction in specific cases. The guidelines also specify the amounts of money that must be paid for particular offences. In order to foster uniformity in the sentencing by judges or courts, a large number of guidelines are issued outlining the criteria for deciding on a specific punitive measure. These guidelines are not binding for a judge, but they are recommendations and are regarded as directives by the public prosecution service.

Police

Officially, when the police have information about a criminal offence, they have no authority to choose not to follow it up. However, the practice has evolved whereby the police will dismiss a case if this is judged to be in line with the expediency policy of the public prosecution service. Clearly, it makes no sense for the police to invest a lot of effort into investigating and documenting a case that will never be prosecuted by the public prosecutor. There are a few exceptions to the general rule that the police have no authority to dismiss a case, and these concern minor offences and — a recent introduction — specific designated offences such as shoplifting.

A special form of dismissal of criminal procedure exists for minor offences by juveniles. Article 77(e) of the Penal Code gives the police the power to propose an alternative procedure to criminal procedure to a young suspect. This option is known as HALT (*Het Alternatief*, The Alternative), whereby the young person spends a maximum of 20 hours participating in an educational programme organised by the HALT service. Participation by the young person in this programme will prevent the public prosecutor from proceeding with the case. Here, also, the Dutch Criminal Code only provides a general framework. The implementation of the ideas in this framework, the offences recommended for it and other criteria are outlined in special guidelines.

Drugs

A significant number of these guidelines specifically concern offences related to illegal drugs. It is clear from these guidelines that the policy for criminal investigation and prosecution is primarily to target the production, trafficking and import and export of drugs (and not possession alone), and that hard drugs like heroin and cocaine have a much higher priority than soft drugs like cannabis. There is just one exception, and that is the cultivation of cannabis plants for hashish and/or marijuana. This is because the cultivation of *Cannabis sativa* in the Netherlands (so-called *Nederwiet*) has escalated to such a degree that it became necessary to tighten up the relevant guidelines. Thus, the policy of toleration of soft drugs was replaced by much stricter controls and investigation of people growing cannabis, not only in situations such as a greenhouse but also in their homes.

The most important guideline concerning offences related to illegal drugs is that of 10 September 1996 (*Staatscourant 1996*, 187). This maintains the differentiation between prosecution of hard drugs and soft drugs, and it makes a clear distinction between users and traffickers. It also tolerates certain punishable drug offences if they take place indoors, in coffee shops or user-rooms. Toleration in this respect means that no further action is taken if the specific criteria described in the guideline are fulfilled. This policy of toleration and non-prosecution has been adopted on the grounds that it has more positive effects on public health and inner-city public order than a strict enforcement of the law.

Apart from the toleration described in the paragraph above, the guideline also states that certain drug offences have a low priority for investigation. The grounds for making an offence a low priority are:

- if an offence is relatively minor in character; and
- lack of sufficient police resources for investigating such offences.

The main criterion for low priority is use/possession of a small quantity of drugs intended for personal use. In the case of hard

drugs, a user-quantity is set at 0.5 grams, and for soft drugs it is 5 grams. For cases of possession of small quantities and an indication of intention to deal — and this goes for hard drugs as well as for soft — a separate prosecution policy is enforced.

The crux of the guideline is that all cases of possession (apart from possession of a small quantity for personal use), dealing, trafficking, preparation or transfer of hard drugs will be investigated. Any arrest will be followed by detention at a police station and pre-trial detention. During the pre-trial detention, special attention is given to early intervention in cases of small-scale dealing by drug addicts and drug users. The severity of the sentence asked for in court by the public prosecutor (the 'penal demand') depends on several criteria, such as quantity of drugs, the duration and type of activity and the nature of the substance in question. In cases of dealing, other criteria to be considered are whether the activity took place near a school and whether a sale was to juveniles, psychiatric patients or other vulnerable groups.

Possession

The guideline takes a broad view of possession, as can be seen from the following examples:

- less than 0.5 grams leads to the police dismissing the case and confiscating the drugs;
- amounts of between 15 and 300 grams lead to a penal demand of six to 18 months of imprisonment; and
- more than 300 grams leads to a penal demand of 18 months to four years.

If a dealer sells on the street or from his home, the severity of the penal demand depends on the duration of the dealing. For example:

- less than one month leads to a demand for imprisonment of up to six months; and
- more than three months means imprisonment of more than 18 months.

The penal demand for methadone is different:

- possession of methadone for anything other than the intended medical use leads to a demand for conditional imprisonment of between one week and one month; and
- possession of methadone and an indication of intent to deal leads to an unconditional prison sentence of one to six months.

No criminal investigation takes place with regard to possession of small quantities for personal use. If the police come across such a case, the offender will not be put into police detention. In some cases, prosecution can take place, but only as a means of supporting efforts to treat the offender.

Amounts

For cases of possession, sale/trafficking, processing, preparation or delivery of soft drugs, the responses are as follows:

- less than 5 grams: the police dismiss the case and confiscate the drugs;
- 5 to 30 grams: a fine of between EUR 23 and 68;
- 30 grams to 1 kilogram: a fine of between EUR 2.30 per gram and EUR 4.60 per gram;
- 1 to 5 kilograms: a fine of between EUR 2 273 and EUR 4 546, and/or imprisonment of two weeks per kilogram;
- 5 to 25 kilograms: three to six months of imprisonment and a fine of EUR 11 364 (maximum);
- 25 to 100 kilograms: six to 12 months of imprisonment and a fine of EUR 11 364 (maximum); and
- more than 100 kilograms: one to two years of imprisonment and a fine of EUR 11 364 (maximum).

In cases of recidivism, the penal demand can be increased by 25 %. The penal demand can also be more severe if the sale is to vulnerable groups (as above).

Cultivation

The guideline lists separately the penal demands in cases of cultivation of cannabis (again, quantity is the main criterion):

- less than five plants: a fine of EUR 23 per plant (in cases of recidivism, a fine of EUR 34 per plant);
- 10 to 100 plants: a fine of EUR 57 per plant or imprisonment of 0.5 days per plant;
- 100 to 1 000 plants: two to six months of imprisonment and a fine of EUR 1 364 (maximum); and
- more than 1 000 plants: six months to two years of imprisonment and a fine of EUR 11 364 (maximum).

This guideline only applies to adults. When a juvenile offender is discovered to have grown cannabis, criminal investigation and prosecution is obligatory. In cases of recidivism within five years, the penalty can be increased. This is also the case if it can be shown that the cannabis was grown for commercial purposes. The guideline outlines the criteria for establishing whether this is the case.

Theft and burglary

Other guidelines are also relevant to the present study. For example, the 1999 guideline for ‘simple theft’ (*eenvoudige diefstal*; *Staatscourant* 1999, 117) outlines a new calculation system which was recently implemented in the Netherlands. This system allocates points to the criminal act and the situation in which it is committed, with the help of a number of criteria such as:

- the value of the stolen goods;
- recidivism; and
- the *modus operandi* of the crime (e.g. if the offender committed it alone or with others).

Depending on the number of points that are allocated to an offence, the response can be a dismissal or a transaction, or prosecution proceedings are initiated with a penalty as formulated in the guideline.

A similar system is used in cases of burglary. The guideline for prosecution and sentencing for burglary (*Richtlijn Strafvordering Inbraak en Verbreking*) was also published in 1999 (*Staatscourant* 1999, 117) and a similar guideline exists for shoplifting, the guideline for prosecution and sentencing for shoplifting (*Richtlijn Strafvordering Winkeldiefstal*). Depending on the number of points, calculated according to criteria such as the value of the stolen goods, recidivism and the *modus operandi*, etc., the criminal procedure can be anything from a police transaction to a court summons.

Recent developments

On 4 October 2000, the Hague Bureau for Information and Communications of the Judiciary (Bureau Voorlichting en Communicatie Rechterlijke Macht, 's-Gravenhage [1]) published a novel innovation in Dutch drug policy.

This communication outlines how Dutch judges have taken the initiative in refining the public prosecution service guidelines in order to reach a more consistent penal policy for drug offences. They have put together a list of so-called 'points of orientation' for violations of Articles 2 and 3 of the Opium Law by an offender operating alone.

For cases of trafficking of hard drugs in private or public (Article 2, subsection 1(b), Opium Law), the following points are listed:

- fairly regular selling, delivering or providing user-quantities of hard drugs over a period of less than one month: imprisonment for three months;
- fairly regular selling, delivering or providing user-quantities of hard drugs over a period of more than one month but less than three months: imprisonment for six months;
- fairly regular selling, delivering or providing user-quantities of hard drugs over a period of more than three months but less than six months: imprisonment for 12 months; and
- fairly regular selling, delivering or providing user-quantities of hard drugs over a period of six to 12 months: imprisonment for 18 months.

For cases of cannabis cultivation in greenhouses, etc. (Article 3, subsection 1(b), Opium Law), if the operation is business-like and the cannabis is grown on a commercial scale with the intention to sell the plants after harvesting, the main criteria for mitigating sentencing are that the offender has not been prosecuted before for the same offence and the cannabis has not been grown as part of an organised network.

The initial procedure for implementing this 'point of orientation' is for the financial proceeds to be taken and the equipment confiscated or withdrawn from the illegal market.

The following penal demands are listed with regard to cannabis cultivation:

- 50 to 100 cannabis plants: a fine of EUR 907;
- 100 to 500 cannabis plants: imprisonment for six weeks; and
- 500 to 1 000 cannabis plants: imprisonment for 12 weeks.

Notes

- [1] *Naar eenheid strafoplegging drugsdelicten* ('Towards uniformity in sentencing for drug offences'), Bureau Voorlichting en Communicatie Rechterlijke Macht, 's-Gravenhage, 4 October 2000.

Verena Murschetz and Stefan Ebensperger

Outline of the legal system of Austria

Type of system

Austria has a legal system based on civil law (as opposed to common law), which means the law is not based on cases but on written codes. The codes that are relevant for this study are the *Strafprozeßordnung* (StPO; 'Code of Criminal Procedure') and the *Suchtmittelgesetz* (SMG; 'Code of Drug Law'). The main principles of Austria's criminal law are as follows.

'Legalitätsprinzip', Article 18, B-VG (Austrian Constitution), requires that all law enforcement and the judiciary have to be based on the codes of law.

There is no punishment without culpability/guilt. This principle ensures that there is no strict liability in criminal law. Generally, the required *mens rea* is either purpose, knowledge, recklessness or negligence. Drug and property crimes involve at least the recklessness factor.

The sentences imposed are either imprisonment or monetary fines.

The judge is the principal figure in a criminal trial and, as soon as control of the proceedings has passed to him/her, it is his/her responsibility to ensure that all the necessary investigation takes place in order to ascertain the truth *ex officio* [1]. The judge looks at the evidence, examines the witnesses and decides what evidence to hear. He/she has to be satisfied that all the important issues are examined and all the necessary evidence has been heard. Even for undisputed evidence, as well as for confessions, the judge can require corroboration if he/she is not convinced of the

truth. This is referred to as the principle of material truth-finding [2]. Following this rationale, the prosecution is committed to objectivity, meaning that prosecutors should investigate inculpatory and exculpatory circumstances with the same degree of scrutiny. They are obliged to file charges, but only when they have sufficient evidence that the suspect is the offender. The judge is presumed to have the ability to assess the evidence and to disregard it if unreliable. As a safeguard, the judge is required to explain his/her judgment. Only the most severe cases are tried by a jury [3].

Although prosecution charges are for a specific offence, when the case comes to trial the prosecutor cannot demand a specific sentence, which is why a reduction of charges or plea bargaining are not possible.

Since 1980, Austrian drug law applies a principle of ‘therapy instead of punishment’.

The information given in this chapter only applies to adult offenders. There are special provisions for juvenile delinquents which are not discussed in this study.

Overview of possible reactions and their legal basis

Police

The police are obliged to notify the prosecution of any offence discovered when on duty [4]. Therefore, ‘no further action’ (no further action) is not allowed by law. There is no option of diversion or reduction of charges [5].

Prosecution

All criminal acts have to be officially prosecuted, which means there has to be an official reaction. This can either be a diversion or an official charge. No further action is not considered to be an official reaction and therefore is not allowed by law. The duty to prosecute prevails even if there is no public interest [6]. Reduction of charges is not possible [7].

Overview of typical reactions

Police

No discretion allowed.

Prosecution

Prosecution is mandatory. The typical reaction to less serious drug or drug-related crimes is diversion. The relevant legal statutes are described below.

Diversion according to § 35(1), SMG

The diversion statutes in the SMG were especially formulated for drug and drug-related crimes. As there is no official charge, there is no trial before a judge. The offender is served with a two-year probation order, which means that, if he commits no other drug or drug-related crime in the next two years, the case is dropped permanently and there will be no criminal record. However, the prosecutor has to record the diversion in the diversion register. The main criteria [8] for diversion are listed below:

- A small amount of drugs, where the amount is considerably smaller than a gross amount. The severity of the user's addiction and the danger of storing the drug are taken into account. What constitutes a small amount is not a set quantity, as with the gross amount, but depends on certain criteria. By law, the judge should decide in each case what a small amount is. In practice, the following quantities are used [9]: cannabis — not more than 2 grams of THC (for an addict); heroin — not more than 3 grams. According to the new law (145/2001), the gross amount of heroin has been reduced from 5 grams to 3 grams. Therefore, sufficient time has not yet elapsed for a corresponding small amount to develop through jurisprudence.
- Use/possession. In Austrian drug law, simple use of a drug is not explicitly penalised by the code, unlike possession. However, as it is not possible to consume a drug without having it in possession for at least a very short time, use is subsumed under possession and is therefore criminalised in practice as well [10].

- A medical check-up by a State doctor (*Bezirksverwaltungsbehörde als Gesundheitsbehörde*) if health-related treatment is necessary. Such treatments are medical surveillance, psychological therapy, substitution treatment (where an illegal drug such as heroin is replaced by a another supposedly less harmful drug, such as methadone) or any other treatment for drug addiction. If the State doctor deems treatment to be necessary, diversion is only possible if the offender agrees to follow the suggested treatment. In that case, the prosecutor orders the diversion, which means that there is no formal charge and the suspect gets a two-year probation order. If the treatment is followed and the user does not commit a drug or drug-related crime within the probation period, the charge is dropped permanently and there is no criminal record. The prosecutor has to report every case of diversion to the Drug Observation Office [11]. A medical check-up by the State doctor is not mandatory if the drug used is cannabis and there has been no other criminal information recorded for the suspect in the previous five years. In this case, it is normal practice for the prosecution to refrain from referring the suspect for the check-up [12].
- A request is forwarded to the Drug Observation Office located in the Ministry of Labour, Health and Social Issues to check if there are any records of prior drug or drug-related offences for the suspect, including notifications by the police to the prosecution, charges brought, diversions, convictions or even acquittals.
- A two-year probation period is applicable.

A second offence is also taken into consideration, but such an offence has hardly any impact because, in 90 % of cases, the prosecution applies diversion [13].

Diversion according to § 35(2), SMG

As with § 35(1), this statute was especially formulated for drug offenders. Diversion means that there is no official charge, therefore there is no trial before a judge. The offender is served with a two-year probation order, which means that, if he commits no other drug or drug-related crime in the next two years, the case is dropped permanently and there will be no criminal record. However, the prosecutor has to record the diversion in the diversion register. The main criteria for diversion are listed below:

- Use/possession of a regular or gross amount of any illegal drug without the intent to sell (a 'supply crime') [14]. A 'supply crime' is very strictly defined in Austrian law. The term is more narrow than 'drug-related crime'. A supply crime is any property crime which carries a maximum sentence of five years of imprisonment committed by a drug user to supply for his own use. In practice, for a drug-related crime to constitute a supply crime, the prosecution and courts require that the objectives of the crime be: the drug itself; money (not an item worth money); or receipts in order to obtain drugs. This very narrow definition means that the specific provisions for supply crimes rarely apply.
- A low level of culpability.
- Probation is no less a deterrent to reoffending than conviction.
- A mandatory medical check-up by a State doctor (*Bezirksverwaltungsbehörde als Gesundheitsbehörde*) if health-related treatment is necessary (as above, 'Diversion according to § 35(1), SMG').
- A request is forwarded to the Drug Observation Office located in the Ministry of Labour, Health and Social Issues to check if there are any records of prior drug or drug-related offences for the suspect, including notifications by the police to the prosecution, charges brought, diversions, convictions or even acquittals.
- A two-year probation period is applicable.

Diversion according to § 90a ff, StPO

These diversion statutes apply to all offenders (concerning drug, drug-related and 'regular' crimes). There is no official charge, therefore, there is no trial before a judge. The offender can be served with: a probation order of one to two years, which means that, if no other crime is committed within that period, the case is dropped permanently and there is no criminal record; a fine (which is still a criminal proceeding); or community service. In some cases, a process of mediation is conducted between the offender and victim whereby the offender reimburses the victim for the harm done. If the offender follows the required diversion measures, the case is dropped permanently and there is no criminal record. In practice, a fine is the most common diversion measure [15]. The main criteria for diversion are listed below [16]:

- A low level of culpability.
- An offence which does not carry a sentence of more than five years of imprisonment.
- A sentence would not serve as a deterrent.
- The facts of the case are clear.

This diversion is usually applied to drug-related or supply crimes if the requirements of § 35(1) or (2), SMG, are not met. The most common offences are shoplifting and stealing. In practice, there is 100 % diversion for first-time offenders. A second offence usually results in conviction, as prosecutors and courts regard a sentence as a deterrent.

Courts

The requirements for diversion are, in practice and by law, the same as for the prosecution. The relevant paragraphs are § 37, SMG, and 90a ff, StPO. In practice, the only drug offences that come before the courts are those that are not diverted by the prosecution but that are formally charged.

Courts are given special tools in cases of conviction of a drug offender who uses drugs [17]:

- If the sentence imposed is for not more than two years of imprisonment or is a monetary fine and if the offender agrees to treatment, the judge has to postpone the execution of the sentence for up to two years (§ 39(1), first alternative, SMG).
- If the sentence imposed is for not more than three years of imprisonment and the offender agrees to treatment, the judge can postpone the execution of the sentence for up to two years (§ 39(1), second alternative, SMG).
- In the case of a ‘supply crime’ ⁽⁷⁰⁾, where the sentence threatened by law is for not more than five years of imprisonment and the offender agrees to treatment, the judge can postpone the execution of the sentence for up to two years (§ 39(2), SMG).

⁽⁷⁰⁾ See the section on diversion according to § 35(2), SMG.

In all three cases, the postponement is revoked and the sentence executed if the offender does not complete the treatment or is convicted of another drug or drug-related ⁽⁷¹⁾ crime within the prescribed time. The execution of the sentence is then deemed necessary to keep the offender from committing further offences (§ 39(5), SMG).

In all three cases, if the offender successfully completes the drug treatment ⁽⁷²⁾, the judge has to set a probation period of one to three years [18]. If the offender is not convicted of another crime during the probation period, the sentence has to be permanently revoked (§ 40, SMG).

In cases of conviction of any offender and sentencing of not more than three years or a monetary fine, the judge can set a probation period of one to three years [19]. If the offender is not convicted of another crime during the probation period, the sentence has to be permanently revoked (§ 43, StGB) [20].

In cases of conviction of any offender and sentencing of not more than three years of imprisonment, the judge can rule that part of the sentence has to be executed immediately and the other part postponed under a probation period [21]. If the offender is not convicted of another crime during the probation period, the sentence has to be permanently revoked (§ 43 a, StGB) [22].

Current practice

The current police practice regarding all crimes is formal notification to the prosecution ⁽⁷³⁾. Therefore, police practice will not be discussed further here.

⁽⁷¹⁾ See the section on diversion according to § 35(2), SMG.

⁽⁷²⁾ Successful completion does not necessarily require that the offender be free of drugs after treatment, but that he have at least substituted the drug of his habit (e.g. heroin with methadone).

⁽⁷³⁾ See 'Overview of possible reactions and their legal basis', first paragraph.

Use/possession in private of 'very dangerous' drugs

Prosecution

The police formally notify the prosecution of an offence. Current practice is diversion according to § 35(1), SMG. If a small amount of heroin for personal use only is involved, the Drug Observation Office is asked if there are any records regarding the suspect and a check-up by the State doctor is ordered. The State doctor then informs the prosecutor if treatment is necessary. Treatment is ordered in about 50 % of cases concerning adults (about 90 % in cases concerning juvenile delinquents). In the other cases, diversion takes the form of a two-year probation period without treatment. Medical surveillance is the most common form of treatment. In 99 % of all such cases, the suspect agrees to treatment and the prosecutor then orders diversion (§ 35(1), SMG) and reports this to the Drug Observation Office. The State doctor checks the suspect every few months and reports the results to the prosecutor. These checks take place over the prescribed two-year period until the doctor concludes that no further treatment is necessary. In 95 % of all cases, treatment is successful and the charge is permanently dropped.

Courts

In practice, this specific offence is 100 % diverted at prosecution stage and therefore never comes before the courts. In theory, by law, the same requirements apply as for the prosecution, except for the check of the Drug Observation Office records and the referral for medical check-up by the State doctor, which will already have been ordered by the prosecution and will therefore be on file.

Use/possession in private of 'dangerous' drugs

Prosecution

The police formally notify the prosecution of an offence. Current practice is diversion according to § 35(1) and (4)SMG. If a small amount of cannabis for personal use only is involved, the Drug Observation Office is asked if there are any records regarding the

suspect. If there have been no charges concerning possession of cannabis within the previous five years, diversion will take the form of a probation period of two years. In the case of other charges being recorded in the previous five years, a medical check-up by the State doctor is mandatory. In 50 % of cases (concerning adults only), medical surveillance is ordered and then is accepted by the suspect (in the other 50 %, diversion is ordered without medical surveillance). In 95 % of cases where medical intervention is ordered, treatment is successful and the charge is dropped.

Courts

As for 'Courts' above.

Use/possession in public of 'very dangerous' drugs

Small amounts

See 'Prosecution' and 'Courts' above.

Regular amounts (no retail sale)

Prosecution

The prosecution is formally notified by the police. Current practice is for diversion according to § 35(2), SMG. The prosecutor has to assess if the suspect acted with less than a high level of culpability and if diversion with two years probation is a more appropriate response than conviction to deter the suspect from reoffending. In practice, these criteria are presumed if it is a first offence. The prosecutor also checks the suspect's criminal record, inquires of the Drug Observation Office if they have any records for the suspect and orders a check-up by the State doctor. The State doctor informs the prosecutor if treatment is necessary. The offender is referred for treatment in about 50 % of cases. For the other 50 % of cases, diversion takes the form of a two-year probation period without treatment. The most common treatment is medical surveillance. In 99 % of cases, the suspect agrees to treatment and the prosecutor then orders diversion (§ 35(1), SMG) and reports this to the Drug

Observation Office. The State doctor checks the suspect every few months and reports the results to the prosecutor. These checks take place over the prescribed two-year period until the doctor concludes that no further treatment is necessary. In 95 % of all cases, treatment is successful and the charge is permanently dropped.

Courts

As for 'Courts' above.

Gross amounts (no retail sale, no intent to sell)

Prosecution

Diversion according to § 35(2), SMG, is ordered in 90 % of cases. Prosecution requirements are the same as for 'very dangerous' drugs. Treatment is ordered in all cases. Very few cases are diverted according to § 90a ff, StPO, which are the diversion statutes designed for other offences as well as drug offences (74).

Courts

Only about 10 % of cases are charged and come before the courts. In these cases, the same requirements apply as for the prosecution, except for the check of the Drug Observation Office records and the referral for medical check-up by the State doctor, which will already have been ordered by the prosecution and will therefore be on file. The judge will set a trial date, examine the accused and the witnesses and divert according to § 37, SMG. In almost all of these cases, the judge orders treatment, with the agreement of the offender.

Gross amounts (with intent to sell)

Prosecution

The prosecution is formally notified by the police. Current practice is for the prosecution to formally press charges in 100 % of such cases. Diversion is not an option.

(74) See 'Diversion' according to § 90a ff, StPO.

Courts

100 % of these cases end in conviction. The sentence for possession of a gross amount of very dangerous drugs with the intent to sell is 1–3 years of imprisonment. In these cases, the courts can apply § 39, SMG, which allows postponement of the sentence on condition of treatment ⁽⁷⁵⁾. If the sentence imposed is not higher than two years, the judge also has the option to order a probation period of one to three years [23]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked. The application of § 39, SMG, or § 43, 43a, StGB, depends on the circumstances of the case. There are no statistics available and the key people questioned could not give estimates of how often which provision is applied, but it was mentioned that the offender often commits another crime within the probation period.

Use/possession in public of ‘dangerous’ drugs

Small amounts

See ‘Prosecution’ and ‘Courts’ for use/possession in public of very dangerous drugs.

Regular amounts

See ‘Prosecution’ and ‘Courts’ for use/possession of regular amounts (no retail sale) of very dangerous drugs.

Gross amounts (no retail sale, no intent to sell)

Prosecution

This is the same as for regular amounts.

Courts

This is the same as for use/possession in private of very dangerous drugs.

⁽⁷⁵⁾ See the first and second bullets under the ‘Courts’ heading in the ‘Typical reactions’ section.

Gross amounts (with intent to sell)

Prosecution

The prosecution is formally notified by the police. Current practice is for the prosecution to formally bring charges in such cases. Only about 5 % are diverted according to § 90c, StPO, and this usually occurs because the offender confesses, gives a good impression, seems remorseful, is just above the juvenile age and has no criminal record. These very rare cases of diversion generally occur when the prosecutor is not a drug ‘hard-liner’.

Courts

All of the 95 % of cases formally charged end in conviction. The sentence for possession of a gross amount of dangerous drugs with the intent to sell is one to three years of imprisonment (§ 28(1), SMG). In these cases, the courts can apply § 39, SMG, which allows postponement of the sentence on condition of treatment ⁽⁷⁶⁾. If the sentence imposed is not more than two years, the judge also has the option of setting a probation period of one to three years [24]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked. The application of § 39, SMG, § 43 or 43a, StGB, depends on the circumstances of the case. There are no statistics available and the key people questioned could not give estimates of how often which provision is applied, but it was mentioned that the offender often commits another crime within the probation period.

Retail sale of ‘very dangerous’ drugs in private (for use together)

Small amounts

Prosecution

The prosecution is formally notified by the police. Current practice is for 100 % diversion according § 35(2), SMG. The

⁽⁷⁶⁾ See the first and second bullets under the ‘Courts’ heading in the ‘Typical reactions’ section.

prosecutor has to assess if the suspect acted with less than a high level of culpability and if diversion with two years' probation is a more appropriate response than conviction to deter the suspect from reoffending. In practice, these criteria are presumed if it is a first offence. The prosecutor also checks the suspect's criminal record, inquires of the Drug Observation Office if they have any records for the suspect and orders a check-up by the State doctor. The State doctor informs the prosecutor if treatment is necessary. The offender is referred for treatment in about 50 % of cases concerning adults (about 90 % in cases concerning juvenile delinquents). For the other 50 % of cases, diversion takes the form of a two-year probation period without treatment. The most common treatment is medical surveillance. The State doctor asks the suspect if he agrees to the treatment. In 99 % of cases, the suspect agrees to treatment and the prosecutor then orders diversion (§ 35(2), SMG) and reports this to the Drug Observation Office. The State doctor checks the suspect every few months and reports the results to the prosecutor. These checks take place over the prescribed two-year period until the doctor concludes that no further treatment is necessary. In 95 % of all cases, treatment is successful and the charge is permanently dropped.

Courts

In practice, this offence is 100 % diverted at the prosecution stage and therefore never comes before the courts. In theory, by law, the same requirements apply as for the prosecution, except for the check of the Drug Observation Office records and the referral for medical check-up by the State doctor, which will already have been ordered by the prosecution and will therefore be on file.

Regular amounts

Prosecution

The prosecution is formally notified by the police. Current practice is for the prosecution to formally bring charges. There is only about 20 % diversion according to § 35(2), SMG. For diversion, the same requirements apply as for retail sale of a small

amount⁽⁷⁷⁾. These cases are usually diverted if the offender confesses, gives a good impression, seems remorseful, is just above the juvenile age and has no criminal record. Diversion generally occurs when the prosecutor is not a drug 'hard-liner'.

Courts

Of the 80 % of cases which are formally charged, about 50 % end in conviction. The sentence for retail sale of a regular amount of heroin is up to six months of imprisonment or a monetary fine. In the event of such a sentence, the judge has the option of setting a probation period of one to three years [25]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked. In the case of a prison sentence, the judge can apply § 39, SMG, which allows postponement of the sentence on condition of treatment⁽⁷⁸⁾. In western Austria, in most cases, the judge sets a probation period according to § 43, StPO, and does not execute the sentence.

Gross amounts

Prosecution

The prosecution is obliged to formally bring charges. No diversion statutes apply.

Courts

No diversion statutes apply. Retail sale of gross amounts of any illegal drug has to receive a sentence of up to five years of imprisonment. If the sentence imposed is not more than two years, the judge can order probation for a period of one to three years [26]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked. If the judge passes a sentence of imprisonment of not more than two or three years, he can apply § 39, SMG, which allows postponement of

⁽⁷⁷⁾ See 'Prosecution' of small amounts.

⁽⁷⁸⁾ See the first and second bullets under the 'Courts' heading in the 'Typical reactions' section.

the sentence on condition of treatment ⁽⁷⁹⁾. The application of § 39, SMG, § 43 or 43a, StGB, depends on the circumstances of the case. There are no statistics available and the key people questioned could not give estimates of how often which provision is applied, but it was mentioned that the offender often commits another crime within the probation period.

Other circumstances and factors

In Austria, neither the circumstances of the sale (as described in the specification for the study; see 'Introduction' to the second section of the study, above) nor the kind of drugs sold are taken into consideration when deciding whether to apply diversion. The main criterion is the amount of drugs sold.

Shoplifting

Prosecution

The prosecution is formally notified by the police. Current practice is diversion according to § 90c, StPO ⁽⁸⁰⁾, in which case the prosecution does not bring formal charges but diverts, on condition that the offender pays a fine (this is not a monetary sentence, as there is no criminal record). The fine depends on the monthly income of the offender. The other alternative is diversion, conditional on probation according to § 90f, StPO. In either case, the prosecutor has to assess whether the suspect acted with less than a high degree of culpability and if the sentence is unlikely to keep the offender or others from committing further crimes. In practice, these criteria are presumed if it is a first offence. If diversion is ordered, the prosecutor has to record it in the diversion register.

Courts

In practice, shoplifting is always diverted at the prosecution stage and therefore never comes before the courts. In theory, by law the same requirements apply as for the prosecution.

⁽⁷⁹⁾ See the first and second bullets under the 'Courts' heading in the 'Typical reactions' section.

⁽⁸⁰⁾ See 'Diversion according to § 90a ff, StPO'.

Burglary

Prosecution

The prosecution is formally notified by the police. Current practice is for the prosecution to formally bring charges. There is only about 5 % diversion according to § 90a ff, StPO ⁽⁸¹⁾. These rare cases are diverted when the offender confesses, gives a good impression, seems remorseful, is just above the juvenile age, has no criminal record and there is little harm done to the house itself. The diversion is usually ordered on condition of payment of a fine or probation.

Courts

Of the 95 % of cases that are formally charged, 95 % end in conviction (only 5 % are diverted). The requirements for diversion are the same for the courts as for the prosecution (above). The sentence for burglary is between six months and five years of imprisonment. If the sentence imposed is not more than two years, the judge has the option of referral for one to three years of probation [27]. In 43 % of cases, the judge orders probation instead of the sentence (§ 43, StGB). In 17 % of cases, part of the sentence is executed and part is postponed on condition of probation (§ 43a, StGB) [28]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked.

Stealing from a person in the street (without causing injury)

This offence is, legally and in practice, treated in the same way as shoplifting. Therefore, the same criteria apply ⁽⁸²⁾.

⁽⁸¹⁾ See 'Diversion according to § 90a ff, StPO'.

⁽⁸²⁾ See 'Shoplifting'.

**Stealing from a person in the street (causing injury)
when considered a robbery
(injury must be caused purposely, knowingly or recklessly)**

Prosecution

The prosecution is obliged to formally bring charges. No diversion statutes apply.

Courts

No diversion statutes apply. This offence (142, StGB) has to receive a sentence of one to 10 years of imprisonment. If the sentence imposed is not more than two years, the judge can order probation for a period of one to three years [29]. In 7 % of cases, the judge refers the offender for probation instead of the sentence (§ 43, StGB). In 29 % of cases, part of the sentence is executed and part is postponed on condition of probation (§ 43a, StGB) [30]. If the offender is not convicted of another crime during the probation period, the sentence is permanently revoked.

Common EU standards on prosecution of drug users

What should happen in practice ⁽⁸³⁾

Ideally, most resources should be used for ‘very dangerous’ drugs, as they cause the most harm. Drugs such as heroin cause physical and mental addiction which trigger drug-related crimes such as property crimes, forgery of documents and prostitution, and result in endangering others. When prosecuting ‘very dangerous’ drugs, the law should make a distinction between users of these drugs and drug dealers. In the latter group, a distinction should be made between simple dealers and those that deal to finance their drug use, and the former should be treated more severely (higher sentences). Because of the high risks involved, especially in terms of danger to others, ‘very dangerous’ drugs should not be

⁽⁸³⁾ National experts were asked to report on the national climate of opinion in regard to a series of propositions (set out in the ‘Introduction’ to the second section of the study).

decriminalised. Administrative proceedings alone would not be appropriate, as such sanctions have no discriminating effect and are therefore less of a deterrent than criminal sanctions [31]. Criminal proceedings are also necessary because the Austrian Constitution only allows administrative agencies to impose sentences of up to six weeks of imprisonment [32].

A great deal of resources should be put into drug prevention. Education about drugs should start in school, not taught by teachers but by social workers in the field. A distinction should be made between very dangerous and other illegal drugs. In the literature, some articles have been written supporting the controlled distribution of heroin by the State to severely addicted users (Bertel, 1999; Schwaighofer, 1999).

Serious drug-related crimes should be prosecuted. Only ‘supply crimes’⁽⁸⁴⁾ are treated differently in Austria. In such cases, drug use/addiction counts as a mitigating circumstance and decreases the level of guilt. This is a principle that not all key people are agreed upon. Some legal experts believe that, in all cases of drug-related crime, drug use/addiction should mitigate the level of guilt [33] and make diversion applicable.

Criminal proceedings are more appropriate than administrative proceedings for dealing with serious drug-related crime. Serious crimes should always be criminally prosecuted, whether committed by a drug offender or a ‘regular’ offender, but the fact of drug use should be taken into account. This could be done through diversion such as § 35 and § 37, SMG⁽⁸⁵⁾, and conditional sentences (e.g. the drug user follows a programme) such as § 39 and § 40, SMG⁽⁸⁶⁾.

The lowest priority should be given to prosecution of cannabis use. According to the experts, cannabis is a drug that does not cause any physical addiction, and inflicts little bodily harm if not

⁽⁸⁴⁾ See the section ‘Diversion according to § 35(2), SMG’.

⁽⁸⁵⁾ See the information for the prosecution and courts in the ‘Typical reactions’ section.

⁽⁸⁶⁾ See the information for the prosecution and courts in the ‘Typical reactions’ section.

used excessively. It does not trigger drug-related crime (Schmidbauer and Vom Scheidt, 1999) and is not a 'threshold' drug that leads to use of more dangerous drugs such as heroin (Schwaighofer, 2000).

The various experts have very different views on how use/possession of cannabis should be treated by national law. The main areas of dissent centre on discussions on decriminalising cannabis use.

Bertel (1999) is of the opinion that smoking a joint should not be prosecuted and use/possession of small amounts of cannabis should be tolerated. To put this into effect, national law would have to be changed either in order to allow legal discretion regarding charging/not charging of such offences (current law mandates formal notification of the prosecution in all cases according to § 84, StPO) ⁽⁸⁷⁾ or to legalise use/possession of small amounts of cannabis.

Schwaighofer believes that criminalisation of possession of regular to small amounts of cannabis for personal use is not justified. He argues that administrative proceedings would suffice, with actions such as on-the-spot fines or no further action plus advice (according to § 21, Abs 2, VStG). These measures would be in accordance with international agreements signed by Austria such as Article 36(1) of the 1961 Single Convention on Narcotic Drugs (which obliges the contracting parties to criminally prosecute any intentional possession of drugs such as cannabis), Article 3, Abs 1, lit a Z i, of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Article 22 of the Convention on Psychotropic Substances, because Austria reserved the right to allow administrative proceedings with adequate sanctions in minor cases.

Schwaighofer believes that another possibility regarding simple possession of cannabis which would be consistent with the international treaties would be exemption from punishment, as it is an

⁽⁸⁷⁾ See the information for police in the 'Typical reactions' section.

essential feature of Austrian law to remove petty offences from criminal sanctions (Schwaighofer, 1999, 2000). He points out that, in the Netherlands, where similar international agreements have been signed up to, use of cannabis is not prosecuted in practice.

Hauptmann (1998) argues that all drugs, including cannabis, should be illegal. He favours stronger enforcement of the drug laws and higher sentences. In his opinion, 'soft' drugs in particular are not sufficiently enforced and no further action is unacceptable. He also believes that administrative proceedings are inadequate for dealing with drug offences.

Most of the key police officers and prosecutors questioned during this study [34] were in favour of maintaining the status quo: mandatory notification of the prosecution by the police and diversion at the prosecution stage according to § 35(1), SMG ⁽⁸⁸⁾. Restrictions on entry into certain areas are non-existent, but are considered to be positive actions in connection with a sentence. They felt that no further action by the police or administrative proceedings are inadequate for addressing cannabis use, arguing that it is a drug that leads to consumption of more dangerous drugs. They also believed that administrative sanctions are less of a deterrent and that such an approach to cannabis use would not be approved by the population. However, some key police officers favour the decriminalisation of cannabis use and possession [35]. Also, some of the judges questioned were in favour of administrative sanctions for use of cannabis.

As actions taken by the legal system should be proportionate to the harm it seeks to prevent, use/possession per se should never result in imprisonment if it is a first offence. In the case of very dangerous drugs, simple use/possession should be diverted by the prosecution and courts to a fine or a short probation period. For actions regarding use/possession of cannabis, see the detailed discussion in the 'Typical reactions' section above.

Use/possession offences repeated three times should not generally result in imprisonment. Imprisonment should be the *ultima ratio* sentencing tool. Imprisonment, where no mitigating

⁽⁸⁸⁾ See the information for the police in the 'Typical reactions' section.

circumstances apply and no surrounding facts are taken into account, is incompatible with the Austrian legal system, just as a 'three strikes and you're out' rule would be. Actions taken by the legal system should always be proportionate, therefore all the circumstances of the offence have to be taken into account. The most common factor to be considered with such offences is the amount of drugs in the offender's possession. Generally, possession of small or regular amounts receive a sentence of a monetary fine. The penalty for possession of gross amounts is imprisonment, which in some cases will be conditional: either participation in a treatment programme or a probation order.

Changes to the legal framework

Generally speaking, the police, prosecutors and judges are content with the current drug law (SMG) in Austria (newly drafted in 1998). Some legal experts feel that the current drug legislation is still too harsh regarding 'dangerous' drugs and that the principle of 'therapy instead of punishment' should be enforced.

Very dangerous drugs are already criminally sanctioned, therefore no additions to the legal framework are needed. At present, the police and prosecution do not prioritise trafficking in more dangerous drugs. The police are obliged to formally notify the prosecution in all cases, as the law does not differentiate between 'very dangerous' and 'dangerous' drugs.

To give higher priority to trafficking in more dangerous drugs, the law would have to be changed and a distinction made between 'very dangerous' and other illegal drugs. One possibility would be the legalisation of cannabis, which is very controversial in Austria and not favoured by practitioners in the field ⁽⁸⁹⁾.

Serious drug-related crimes are currently criminally prosecuted and the fact of drug use is taken into account. A minority of legal experts support a different (wider) understanding of the term

⁽⁸⁹⁾ See discussion in the section 'What should happen in practice'.

‘supply crime’⁽⁹⁰⁾, whereby all drug-related crime would be treated as ‘supply crime’ [36].

Police and prosecutors, by law and in practice, treat cannabis in the same way as ‘very dangerous’ drugs. The only difference concerns possession of a small amount of cannabis for personal use, where the medical check-up by the State doctor is not mandatory⁽⁹¹⁾. The courts do, however, distinguish between ‘very dangerous’ and other illegal drugs when sentencing. The sentences for use or sale of cannabis are usually lower than those regarding ‘very dangerous’ drugs.

Any drafting of no further action provisions for the police and prosecution would be very contentious, as this would be incompatible with Austrian criminal procedure. Taking use/possession of cannabis out of criminal law and putting it under administrative sanctions would be possible, but this is not favoured by many practitioners in the field⁽⁹²⁾.

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⁽⁹⁰⁾ See the section on diversion according to § 35(2), SMG.

⁽⁹¹⁾ See the prosecution information in the ‘Typical reactions’ section and ‘Use/possession in private of “dangerous” drugs’.

⁽⁹²⁾ See discussion in the section ‘What should happen in practice’.

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Notes

- [1] §§ 3, 96, 254, StPO.
- [2] Bertel, C. and Venier, A. (2000), *Strafprozessrecht*, 6th ed., Manz Verlag, Vienna, 54 ff.
- [3] § 14(1), StPO. These would include political crimes, as well as murder, aggravated robbery and other crimes which are punishable by at least five years of imprisonment.
- [4] Foregger/Kodek, StPO⁷, § 34, Anm. I.
- [5] § 84(1), StPO.
- [6] Foregger/Kodek, StPO⁷, § 34, Anm. I.
- [7] § 34(1), StPO.
- [8] Foregger/Litzka/Matzka, SMG, § 35, Anm. II ff.
- [9] Foregger/Litzka/Matzka, SMG, § 35, Anm. IV.1 and IV.2.
- [10] Foregger/Litzka/Matzka, SMG, § 35, Anm. IV.
- [11] § 35(8), SMG.
- [12] According to an oral statement by a prosecutor at the court in Innsbruck.
- [13] According to oral statements by prosecutors at the courts in Innsbruck and Vienna.
- [14] Foregger/Litzka/Matzka, SMG, § 35, Anm. VI.
- [15] § 90c, StPO.
- [16] Bertel, C. and Venier, A. (2000), *Strafprozessrecht*, 6th ed., Manz Verlag, Vienna, 562 ff.
- [17] Foregger/Litzka/Matzka, SMG, § 39, Anm. I ff.

- [18] § 40(1), SMG.
- [19] § 40(1), SMG.
- [20] Bertel, C. and Venier, A. (2000), *Strafprozessrecht*, 6th ed., Manz Verlag, Vienna, 796 ff.
- [21] § 40(1), SMG.
- [22] Bertel, C. and Venier, A. (2000), *Strafprozessrecht*, 6th ed., Manz Verlag, Vienna, 796 ff.
- [23] § 43(1), StPO.
- [24] § 43(1), StPO.
- [25] § 43, StPO.
- [26] § 43 or 43a, StPO.
- [27] § 43(1) or 43a, StPO.
- [28] See *Gerichtliche Kriminalstatistik für das Jahr 1998*, 136.
- [29] § 43 or 43a, StPO.
- [30] See *Gerichtliche Kriminalstatistik für das Jahr 1998*, 138.
- [31] Fuchs, H. (2000), *Österreichisches Strafrecht, Allgemeiner Teil*, 4th ed., Springer Verlag, Vienna, p. 5, and the following.
- [32] Article 3(2), BVG, PersFr.
- [33] Ebensperger (2000), *Richterzeitung*, p. 80.
- [34] *Sattelegger*, Varesco.
- [35] Schmidbauer, M. (2001), *Salzburger Nachrichten* (journal), p. 4.
- [36] Ebensperger (2000), *Richterzeitung*, p. 80.

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Outline of the legal system of Portugal

The main aims of the Portuguese legal system are protection of the citizens, prevention and repression of crime and rehabilitation of delinquents as a means of protecting society in general. The imposition of any penalty presupposes the existence of a specific misdemeanour and the penalty should always be implemented in the context of the education and social reintegration of the offender.

In general terms, the prosecutor, in collaboration with the courts, is responsible for the processes of investigation and application of the law. The prosecutor's main duties are the following:

- taking and examining all reports and complaints;
- leading the inquiry, assisted by the police;
- formulating the prosecution and effectively supporting it at trial;
- lodging appeals; and
- promoting the implementation of penalties and security measures.

The courts are responsible for judging the case, initiating pre-sentence investigations, deciding on the charges and leading the legal proceedings related to the inquiry.

There is no possibility of no further action in the legal process, but diversionary measures are an option for crimes for which penalties do not exceed three years of imprisonment, and reduction of charges is an option for all crimes.

The police must assist the judicial authorities, acting under their direction and jurisdiction. The police are charged with performing the following duties, even if on their own initiative:

- gathering information on crimes;
- limiting as far as possible the consequences of such crimes;
- discovering who are the agents of a crime; and
- immediately taking the necessary action in order to facilitate the investigation.

Whenever they are informed of an act of a criminal nature, the police must report the offence to the prosecutor, who then holds the inquiry. So, the police have no legal option of no further action, diversion or down-tariffing.

These principles regarding the way the Portuguese legal system is organised in general apply also to legislation on drugs.

Drugs legislation

Principles

Law 15/93 of 22 January 1993, formulated by the Ministry of Justice, is currently in force in Portugal. This law makes a clear distinction between crimes of trafficking and crimes of use. The first are associated with violent or organised criminality, so it is generally recognised that there is a need for severe penalties and measures identical to the ones used against terrorist organisations. The normal control measures per se are considered to be insufficient, so these need to be augmented by exceptional measures to bring the trafficker to justice.

This law punishes the use of drugs in an 'almost symbolic way'. The main aim of the legal system is to enable 'the drug addict or the regular user to free himself from the slavery that overwhelms him by adequate incentives of medical treatment and rehabilitation'. On the other hand, for occasional users, 'no labelling or marginalisation is desirable', and some mechanisms are in place to minimise the contact these subjects have with the judicial system. The overall intention is that the law should be a deterrent to drug use.

However, in the last few years, criminal-law enforcement has been seen as counter-productive in relation to use and possession of drugs

for personal use, especially in terms of public health and a harm-reduction approach. So, the legal situation changed in July 2001 after the adoption of Law 30/2000, which decriminalised use and possession for use of all illicit drugs. Law 30/2000 maintains the status of illegality for all drugs. Individuals caught using drugs or in possession of a modest quantity of drugs for personal use will now be referred to a treatment-oriented commission. The commission evaluates the offender's situation and offers treatment and rehabilitation.

When other offences are involved, such as sale of drugs or drug trafficking, Law 15/93 is still in force. An important innovation of this law is the inclusion of a panoply of non-confinement measures for crimes that are known to be directly caused by addiction (related delinquency). Therefore, for the first time in Portuguese law, a drug offence is understood to mean not only drug use per se but also crimes that are a result of addiction, which reflects more accurately the reality of the situation.

The legislation, by acknowledging that users often traffic in drugs as a means of supplying their own drug needs, creates a framework for treating such trafficking as less serious, 'taking into account the means that were used, the mode or the circumstances of the action, the quality or the quantity of the plants, substances or preparations'. The legislation also creates a category of 'trafficker/user', the criterion for which is possession of an amount that does not exceed the requirements for individual drug use for five days.

Whether the crime is one of drug use or a crime directly related to drug use, such cases can be referred for therapy and social reintegration.

Penalties

Law 15/93 establishes a distinction between the penalties for drug use ('use and treatment') and those for trafficking offences ('trafficking, money laundering and other infringements').

The penalty for drug trafficking is a prison sentence of between four and 12 years and between five and 15 years for licensed

individuals (e.g. doctors, chemists). For less serious trafficking offences, the penalty is imprisonment of up to two years or a day-fine of up to 240 days. The penalty for a trafficker/user is imprisonment of up to three years or a fine.

In Law 30/2000, in cases of use and possession for use of any illicit drug, a treatment-oriented commission can apply any of the following options:

- conditional suspension of the proceedings (if the subject is a non-recidivist and a non-addicted user);
- suspension of pronouncement of the sentence (if the drug addict agrees to voluntary treatment);
- a fine (if the subject is a non-addicted user);
- a reprimand;
- a non-financial sanction (e.g. prohibition from visiting certain places, prohibition from association with specified persons, confiscation of a firearms licence or confiscation of personal objects); or
- suspension of sanction (if treatment is not possible for the drug addict or he does not agree to it or if the user is not addicted and suspension of the sanction would be the most effective measure).

To sum up, for trafficking offences, this law attempts to refine the methods of criminal investigation, as well as to broaden the intervention targets. Regardless of the fact that drug use is no longer considered as a crime, it is punished in order to encourage the drug addict to follow a treatment programme and start a process of social rehabilitation. It is important to note that it is the offence itself that is censured and not the offender.

Current practice

Use/possession

Police

Since July 2001, when Law 30/2000 was adopted, use and possession of drugs for personal use have been decriminalised. The

police now have to notify a treatment-oriented commission of all cases of use/possession that come to their attention.

However, it is too early at present to evaluate this change from a judicial to an administrative procedure for use/possession of drugs.

Prosecution

The prosecutor has no role in the administrative procedure.

Courts

The courts have no role in the administrative procedure.

Administrative authority

After Law 30/2000 came into force, a treatment-oriented commission was constituted. It is too early to evaluate its current practice at present.

Retail sale

Police

The police have two options when confronted with a case of retail sale of drugs. They can either arrest the suspect and report him/her to the judicial authorities (this happens in the majority of cases) or take no further action. The main criteria for making this decision are:

- the seriousness of the retail sale;
- the adequacy of police resources; and
- whether a penalty would be effective.

However, opting for an interventionist approach is not totally discretionary, and depends on whether the case involves retail sale in public or private and the kind of drugs that are involved.

Retail sale of drugs in private is considered to be less serious than public retail sale. Thus, approximately half the cases of retail sale in private result in no further action. Retail sale in public, in most cases, is the object of police intervention, as it is considered to be more serious from a social point of view.

The police are inclined to be more interventionist in cases of retail sale of hard drugs than in cases that involve soft drugs, because the latter are considered to be less dangerous, both for the user and for society in general.

Prosecution

The prosecutor can either order a prison sentence for retail sale of drugs or a non-custodial measure. The choice depends on the kind of drugs sold and whether the sale occurred in a public or private place.

Depending on the dangerousness of the substance sold, the prosecutor usually adopts charge-reduction measures in cases that involve less dangerous drugs. Similarly, cases of retail sale of drugs in private usually receive lighter penalties than sale in public, because the former is considered less serious and less socially reprehensible.

Therefore, it is fair to say that retail sale of less dangerous drugs in private receives a light penalty, while retail sale in public of drugs considered to be more dangerous by law is punished more severely.

When the prosecutor proposes to reduce the charges for individuals accused of retail sale of drugs, the fact that a defendant is a drug user is taken into account. Nevertheless, it is very unusual for the prosecutor to refer an addict accused of retail sale to a treatment programme. When this happens, it is in the belief that medical treatment will be more effective than a repressive response.

Courts

As with the prosecution, the criteria of 'dangerous'/'very dangerous' drugs and public/private retail sale determine the nature of the

penalties imposed by the courts. Thus, in cases of retail sale of soft drugs in private, the judge generally applies reduction of charges, usually a non-custodial penalty. Cases of retail sale of hard drugs in public are punished more severely, often with imprisonment.

For drug addicts accused of retail sale, the courts only rarely apply diversionary measures whereby the defendant must follow a treatment programme. Once again, this option is availed of in the belief that medical treatment is more effective than a repressive response.

In summary, retail sale by a user results in responses by the police and the judicial authorities that are either punitive or lenient. In spite of these discretionary possibilities, the fact that the sale occurred in private or public and the kind of drugs that were involved affect the level of severity of the sanction applied.

Property crimes

Police

The law decrees that, for all crimes against property committed by drug users, the police must arrest the suspect and refer him/her to the prosecution. The police procedure is the same if the offender is a drug addict or not.

Prosecution

The prosecutor generally takes into consideration the fact that the defendant is a drug user and reduces the charges. The amount of financial damage and any violence used are taken into consideration when sentencing. When the damage is slight and no violence was used, the charge is usually reduced. When there is more serious damage and violence is used, the legal response tends to be more punitive.

When a crime against property is committed by a drug user, diversion to treatment very rarely occurs.

Courts

The procedure followed by the courts when examining cases involving drug users is identical to the prosecution:

- the charge is often reduced, in recognition of the fact that the offender is a drug user;
- the amount of financial damage involved and any violence inflicted on the victim are taken into account; and
- diversion to treatment is rare.

Common EU standards on prosecution of drug users

Most Portuguese citizens agree that the penalties applied by the legal system should be proportional to the harm that they are intended to prevent. This principle should be strictly observed by the police, prosecutors and courts. Detailed guidelines for action should be provided at a national (and, when appropriate, regional) level, based on the following points.

The highest priority should be given — by the police and prosecutors — to trafficking in the more dangerous drugs, because such substances are responsible for the spread of drug use, they damage public health and their use generates further criminal acts. Drug trafficking should always be prosecuted. Depending on the seriousness of the trafficking offence, the legal process should impose strict penalties, without jeopardising people's rights and guarantees.

High priority should also be given to serious crimes committed by drug users because of their addiction, or public use, which is associated with social nuisance and low-level trade. This refers to crimes committed by drug addicts to supply their own use and not organised trafficking. However, there is a lack of consensus in Portugal about the appropriate legal response to such crimes. In fact, the addicted user who commits such crimes arouses extreme reactions in people generally. There is a divergence of opinion as to whether such an offender should be treated as a criminal (severe penalties) or as a sick person (diversion to treatment).

Between these two extremes, there is considerable ambiguity around whether it is better to prioritise the addiction or the delinquency.

It is generally felt that some legal mechanisms could be improved (particularly regarding mediation). The principal gaps are not of a legislative nature but are practical and administrative considerations relating to diversionary measures:

- diversion is generally disregarded by the courts;
- lack of resources to effectively implement diversion; and
- lack of collaboration between the health system and the judiciary.

It is also felt that low priority should be given — by the police and prosecutors — to action against use/possession for personal use of cannabis or other drugs which are regarded as being less dangerous, as long as the use is unconnected with nuisance or other crimes. This can be regarded as a voluntary act which does not involve victims. It is also true to say that legal sanctions have proved ineffectual in eradicating such use.

National opinion is divided regarding use/possession, however. Some sectors of the society want these acts to be decriminalised, or at least that any intervention by the legal system be limited to mere administrative sanctions. Others support the view that use/possession should be subject to criminal prosecution, but with emphasis on therapy and reintegration into society.

The decriminalisation option is emphasised in the national strategy against drugs, approved by the Portuguese Government in 1999, and is adopted in the new Law on Drugs in force since July 2000. Finally, regardless of the different positions on drug issues in general, there is a consensus of opinion that use/possession, per se, should never result in imprisonment (in any circumstances).

FINLAND

Aarne Kinnunen and Heini Kainulainen

Outline of the legal system of Finland

In Finland, the criminal justice system is still the main social response to the drug problem. In this system, the principle of legality governs criminal proceedings. In principle, the police must investigate all the crimes that are reported. Moreover, the prosecutor has a duty to prosecute when the required evidence regarding an offence and the offender is at hand. The sanctioning system of the courts lays emphasis on traditional principles, such as legality, proportionality and predictability. The Finnish Penal Code establishes specific punishment scales for each offence. Normally, sentencing takes place within the specified limits for the minimum and maximum penalty for the particular offence in question. In sentencing, penalties can be graded according to their severity. As the seriousness of the offence and the culpability of the offender increase, penalties become more severe. The number of prior convictions or previous crimes increases the penalty.

During the past 25 years, criticism has been levelled against the severity of the Criminal Code and the excessive use of custodial sentences in Finland. This criticism has coincided with a growing disapproval of the ‘treatment ideology’. Efforts to treat addicted or mentally disturbed offenders within the criminal justice system were strongly criticised, even though the philosophy of treatment never really had time to become established as a criminal political ideology in Finland — unlike many other European countries. The outcome of these processes was a ‘humane neo-classicism’, a criminal political ideology that stressed both the need for legal safeguards against coercive care and the objective of less repressive measures in general. The prison population in Finland decreased dramatically. Over the past 25 years, the number of prisoners

has fallen by half ⁽⁹³⁾ (Törnudd, 1993; Lappi-Seppälä, forthcoming).

The approach to drugs has been strict in Finland since the 1950s. Finland was the first Nordic country to criminalise drug use. This was done in 1966, after a lively debate. Parliament's argument was that the purpose of the legislation was not to punish drug users but to reinforce a negative position on drugs among the population (Hakkarainen, 1992). In practice, this intention was soon forgotten. A study by Osmo Kontula showed that two thirds of all drug offences involved the use or possession of relatively small amounts of drugs for personal use (Kontula, 1986).

The drug legislation was revised in 1994. The use of drugs was maintained as a criminal offence. The central provisions of drug legislation are laid down in Chapter 50 of the Penal Code (1993/1304). According to the first section of the chapter, drug offences include manufacturing, growing, smuggling, selling and dealing in drugs, as well as the possession and use of drugs. The maximum penalty for an ordinary drug offence is two years of imprisonment. Drug dealing and trafficking are designated more serious offences than use and possession of drugs for personal use. Section 2 of Chapter 50 of the Penal Code deals with aggravated drug offences. The minimum penalty is 12 months of imprisonment and the maximum is 10 years. The type and amount of drug serve as important criteria when defining whether the crime is aggravated or not.

The Finnish system of penal sanctions recognises a specific legal procedure called 'waiving of measures'. The provisions in question give the police, the prosecutor and the judge the power to

⁽⁹³⁾ Imprisonment in Finland may be either conditional or unconditional. In practice, unconditional imprisonment is used when the offence is especially serious or the offender has several prior convictions. It is also possible to impose a community service order instead of unconditional imprisonment. The duration of community service may vary between 20 and 200 hours. If the offender is under the age of 18, the unconditional sentence is only used in extraordinary circumstances. In 1994, a new sanction for offenders between 15 and 17 years of age — the juvenile penalty — was introduced on an experimental basis. The penalty has two elements: (i) supervision and (ii) any work or activity similar to community service.

waive further measures under specific circumstances that are defined in detail in law. Accordingly, the law speaks of 'non-reporting' (in respect of the police), 'non-prosecution' (in respect of the prosecutor) and 'waiving the sentence' (in respect of the courts). The waiving of measures always involves an element of reproach and it is always clear that the suspect is, in fact, guilty. Therefore, the waiving of measures does not apply to cases where, for example, the prosecutor does not bring charges because there is not sufficient evidence. It is also different to when the police prioritise certain cases and do not investigate all crimes with the same resources.

In drug cases, it is at the discretion of the prosecutor whether prosecution is waived or the case is taken to court. If the drug case is minor, some prosecutors waive prosecution (and some do not). If the case is brought to court, the drug user is typically sentenced to a small fine. In the following paragraphs, these questions are discussed in more detail.

Current practice

Possession of drugs

Police

Generally, if a person has used drugs or has a small amount of drugs in their possession, the police investigate the offence. After a pre-trial investigation, the police report drug cases to the prosecutor. This is a rule with few exceptions (Kinnunen, 1996, forthcoming).

According to the Police Act, § 3 (493/1995), police duties must be discharged in the most effective and appropriate manner. When necessary, cases must be prioritised. This can happen because it is impossible to investigate all crimes that the police become aware of. Furthermore, the Pre-Trial Investigation Act, § 2.2 (449/1987), gives the police the option to refrain from further measures on the grounds of the pettiness of an offence, in which case no more severe punishment than a fine can be expected.

In certain cases, the police may see investigation as unreasonable, for instance if the user has just started a treatment programme (Kinnunen, forthcoming). Furthermore, in some cases, it may be tactically beneficial for the police not to proceed with an investigation, for instance if they hope to gain information about larger drug crimes from the user (Kinnunen, 1996). However, as strict as it may seem, general police policy seems to be that it is important to maintain the deterrent effect of the criminal justice system by investigating all drug crimes as far as is possible ⁽⁹⁴⁾. The police have relatively broad powers in the pre-trial investigation. As mentioned above, the penal scale for drug use ranges from a fine to a maximum of two years of imprisonment. Due to the heavy penalties, the police are empowered to use several coercive measures, such as arrest and remanding in custody (Pre-Trial Investigation Act, 449/1987; Act on Coercive Measures, 450/1987). For example, a search of premises can be made even in the most minor cases of drug possession. It is thought that a search of premises may bring to light larger amounts of drugs (although this very seldom happens) or stolen property. On the other hand, most people find a search of their premises unpleasant and in this way the police hope to reinforce the deterrent effect of the criminal justice system against users (Kinnunen, forthcoming).

Prosecution

In Finland, the provisions on waiving of measures were reformed in the parliament act that came into force in 1991. These reforms expanded, in particular, the powers of the prosecutor and sought to encourage prosecutors to apply the provisions on waiving of prosecution more widely. In addition, when the provisions on drug offences were reformed in 1994, emphasis was placed on applying the provisions on waiving prosecution specifically in the case of drug use.

⁽⁹⁴⁾ In a telephone conversation, a police officer from Tampere described it in this way: 'When it comes to drug users, prosecutors will waive measures on certain crimes. Police want these cases to be 1-gram possession, not 10-gram possession. If police do not bring 1-gram cases to prosecutors, they will start to waive measures on 10-gram cases.'

According to Sections 7 and 8 of Chapter 1 of the Criminal Procedure Act (1997/698), a prosecutor can refrain from taking further measures on the following grounds:

- if it is a very minor offence;
- if the offender is a juvenile;
- if the sanction is unreasonable; and
- (in cases where the offender has committed several offences) if a single sanction is to be imposed for several offences.

There is also a special provision on waiving of measures in connection with drug offences in Section 7 of Chapter 50 of the Penal Code (1993/1304):

‘(5) Waiving of measures is possible if the suspect has only been guilty of drug use, (a) as long as in view of the circumstances the incident is not conducive to weakening general respect for the law, or (b) if the drug user agrees to undergo treatment for his or her drug abuse.’

In Finland, the prosecutor does not have so-called ‘conditional non-prosecution’ at his/her disposal. The prosecutor cannot, for example, force the offender to attend the treatment programme he/she has agreed to follow.

Heini Kainulainen (1999) has published a study that examined Finnish practice in waiving of measures for drug offences. There has been a considerable increase in waiving measures for drug offences during the 1990s. In 1990, prosecution was waived in respect of 35 persons suspected of drug offences. The corresponding figure in 1998 was 922. In 1998, about 10 % of drug cases investigated by the police led to non-prosecution. This increase in the number of cases of non-prosecution can be largely explained by changes in the law (see above). Regarding the number of persons for whom prosecution was waived, we should also take into consideration the fact that the reported number of drug offences has increased sharply during the 1990s. In 1990, the police recorded 955 drug offences. In 1998, the corresponding number was 9 461.

In practice, the provisions of non-prosecution are applied when the offences in question are quite petty drug offences. In the study,

it was shown that there are considerable differences in practice in how the provisions of non-prosecution have been applied. Some prosecutors almost never waive prosecution for a drug offence. In addition, there are different interpretations among those prosecutors who do waive measures. For example, some prosecutors consider the use of drugs in a public place to be a basis for bringing charges against the offender and some do not.

In order to ensure uniform application of the penal law, a function of the General Prosecutor is to give guidelines to all prosecutors. Kainulainen's study showed that prosecutors were in a key position to enforce the waiving of measures for drug offences. However, the study showed that there were considerable differences between districts, and even between individual prosecutors, in how the provisions on waiving prosecution were applied. Therefore, the General Prosecutor circulated new guidelines to prosecutors on 20 January 2000 (<http://www.om.fi/vksv/2947.htm>). The aim of these guidelines was to harmonise the application of the law in drug cases.

If the offender has had several prior convictions or the prosecutor discovers the existence of previous drug offences, it is considered that non-prosecution is not appropriate. Furthermore, if the offender has sold drugs, non-prosecution is out of the question and the prosecutor will definitely bring charges against the offender.

Courts

A government proposal for the current drug legislation (180/1992) stressed that, if the offender has used drugs, he/she should usually be sentenced to a fine. Imprisonment should seldom be used. In practice, most of the drug cases which are brought to court involve drug use. The most common punishment is a fine, usually anything up to 30 'day-fines' ⁽⁹⁵⁾.

⁽⁹⁵⁾ In Finland, a fine is imposed as a 'day-fine'. The number of day-fines is determined according to the seriousness of the offence, while the value of a day-fine depends on the financial situation of the offender. The number of day-fines varies between 1 and 120. The minimum monetary value of a day-fine is EUR 6.7. Most drug offenders have a modest financial situation and are therefore obliged to pay only the minimum value of the fine (Kinnunen, 1999).

It is also possible to apply provisions on waiving of measures. These are similar to the provisions the prosecutors have and are found in Section 5 of Chapter 3 and Section 7 of Chapter 50 of the Penal Code. In practice, judges seem to interpret these identical provisions very differently to prosecutors. The number of drug cases in which the courts decide to waive punishment has remained quite low. For example, in 1998, sentence was waived for about 2 % of the total number of people charged with such offences ($N = 70$ people). A study by Kainulainen (1999) showed that a number of cases were brought to court where the provisions on waiving of measures could have been applied. However, in practice, the waiving of punishment is considered only in exceptional cases. Generally, people charged with drug use are sentenced to a small fine. Indeed, it is notable that the application of the provisions on waiving of sentence has become rather strict.

If the offender has had several prior convictions, the sentence is still a fine. Imprisonment is used only in very exceptional cases (if the defendant has, for example, used considerable amounts of drugs over the years).

If the offender has sold drugs, the main criteria taken into consideration in sentencing are the type and amount of drugs. (The situations mentioned in Sections 3.2.5 to 3.2.10 of the study framework are not relevant in Finnish courts.) The age of the offender is taken into account, as well as previous criminal offences. The conditions for waiving of measures and for conditional sentences are much less restrictive for young offenders. Furthermore, young offenders (between 15 and 17 years of age) receive the benefit of a mitigated sentence.

The number of sentences imposed by the court for narcotics offences varied between some 350 and 1 050 each year up to the early 1980s, with substantial increases during the 1990s. In 1998, the number of sentences imposed for cases that included a drug offence amounted to 4 840. Also in 1998, about 70 % of offenders received a fine. It is estimated that half of the sentences imposed for drug offences during recent years are for drug use. The principal drugs are cannabis and amphetamine.

Use/possession of drugs (for personal use)

Police

Generally, use/possession is a crime that the police must investigate, as can be seen from the following.

- No further action can happen in cases of small drug crimes when it is uneconomical to investigate all persons involved (Section 1 of Chapter 50 of the Penal Code).
- Police can give priority to more serious crimes and/or refrain from taking further measures (§ 3 of the Police Act).
- Police can refrain from taking further measures on the grounds of the pettiness of the offence, in which case it can be expected that no more severe punishment than a fine will be imposed (§ 2 of the Pre-Trial Investigation Act).

The police prioritise ‘very dangerous’ (e.g. heroin) drugs over ‘dangerous’ (e.g. cannabis), but in practice police policy is to investigate cases involving soft drugs as well, if this is possible for procedural and economic reasons. One example that illustrates the difference between police policy on ‘very dangerous’ and ‘dangerous’ drugs is anonymous telephone tips from the public: if ‘very dangerous’ drugs are involved, the police will investigate, whereas cannabis use is not normally prioritised. Furthermore, when ‘very dangerous’ drugs are found in the possession of a drug user, it is more likely for a search of premises to be made. When only a small amount of soft drugs is involved, and the police are engaged in more important investigations, it can happen that the police skip the search of premises (Kinnunen, forthcoming).

It is usually immaterial whether the drug use or possession happens in a public or private setting. It may be easier for a police officer to turn a blind eye to drug use in public, but this can only happen in certain areas of larger cities. On the other hand, the police sometimes mobilise surveillance of public places, festivals, etc.

Prosecution

If the offender has used drugs or is charged with possession of drugs for personal use, the prosecutor has two alternatives to

choose from: to bring the case to court, or waive prosecution (see above for legal basis). There has been a considerable increase in waiving of measures for drug offences during the 1990s (see above). In practice, the provisions of non-prosecution have been applied when the offences in question are quite petty drug offences (where the suspect generally is guilty only of using drugs). These cases may involve a young, first-time drug user who has smoked a hashish pipe or a joint that was passed around the room. The cases in which prosecution has been waived generally involve 'dangerous' drugs, most commonly hashish, where only a small amount of the drug, if any, was found in the possession of the suspect. Often, such offenders have only used the drug the one time, or at least have only randomly experimented.

Kainulainen's 1999 study showed that there are considerable differences in practice in how the provisions of non-prosecution are applied. Some prosecutors almost never waive prosecution for a drug offence. In addition, there are different interpretations of the provisions among those prosecutors who do waive measures. For example, some prosecutors consider the use of drugs in a public place to be a basis for bringing charges against the offender, whereas, according to law, the use of drugs is criminalised, whether it takes place in private or public. The government proposal (180/1992) for the current drug legislation stated that it is possible to waive measures in certain cases, for instance where the offender used drugs in a private place, such as alone at home. Therefore, it is possible to argue that, in cases of public use, general respect for the law would be weakened if it were possible to waive prosecution. However, it seems that, for prosecutorial discretion as a whole, it is not really relevant whether the drug use took place in private or public.

According to the Penal Code, it makes no difference whether a person has used 'dangerous' or 'very dangerous' drugs. The definition of 'very dangerous' drugs is only relevant when making a distinction between drug offences and aggravated drug offences. However, some prosecutors seem to believe that waiving the prosecution is only possible if the person has used 'dangerous' drugs (or medicine that is classified as an illegal drug). In practice, only a small number (12 %) of non-prosecutions have involved 'very dangerous' drugs. However, if the offender has

agreed to undergo treatment for his/her drug abuse, non-prosecution is possible even if the offender has used hard drugs. In practice, there are only a few cases where the basis for non-prosecution is the agreement of the offender to seek treatment.

Courts

According to the law, it makes no difference whether the offender has used 'dangerous' or 'very dangerous' drugs. However, court practice shows that offences involving 'very dangerous' drugs are regarded more seriously than those involving 'dangerous' drugs such as cannabis. In court practice, it also makes no difference whether or not the use of drugs took place in public or private. The only criteria relevant for discretion are the type and amount of drugs.

Retail sale of drugs

Sale of drugs is in all circumstances considered a criminal offence and is invariably treated as such (Section 1 of Chapter 50 of the Penal Code). No further action does not happen in practice. The police prioritise cases of public sale and buy-and-depart sale. This is an essential part of police policy, where special emphasis is placed on preventing open drug markets and discouraging drug users from congregating in Finland (*Police drug strategy*, 1999).

Non-prosecution is out of the question if the offender has sold drugs. The prosecutor will automatically bring charges against the offender and pass sentence. If dangerous drugs and a substantial financial profit are involved, the offender can be charged with an aggravated narcotics offence⁽⁹⁶⁾. This normally occurs if the offender has handled about 1 kilogram of hashish, 100 grams of amphetamine or 15 grams of heroin (Kinnunen, 1999).

⁽⁹⁶⁾ Section 2 of Chapter 50 of the Penal Code (1993/1304) states that: 'If (1) the object of the offence is an extremely dangerous narcotic substance or a large quantity of a narcotic substance, (2) a substantial financial profit is sought, (3) the offender acts as a member of a group organised for the extensive commission of such an offence, (4) a serious danger is caused to the life or health of several people or (5) the narcotic substance is distributed to minors or in an otherwise unscrupulous manner, and the narcotics offence, also when assessed as a whole, is to be deemed aggravated, the offender shall be sentenced for an aggravated narcotics offence to imprisonment for at least one and at most 10 years.'

Shoplifting

For property crimes, it makes no difference whether or not the offender is a drug user. Property crimes are automatically investigated, and either the police impose a fine (the prosecutor must confirm the fine) or the case is brought before the prosecutor in the normal manner. Shoplifting is an offence according to Chapter 28 of the Penal Code. If the complainant makes no claims, the police do not investigate the case. In most of such cases, the police do a simple pre-trial investigation and impose a fine.

The prosecutor has a number of options.

- The prosecutor can confirm the fine imposed by the police.
- The prosecutor can decide not to bring charges (non-prosecution), for example if the offender is under age or he/she has taken part in mediation.
- The prosecutor can bring charges.

Whichever of these options the prosecutor pursues, the offender is generally sentenced to a fine, which would normally be between 10 and 20 day-fines.

Burglary

Burglary of a house is an offence according to Chapter 28 of the Penal Code. Once again, it makes no difference whether or not the offender is a drug user. The police must investigate the crime and the case is brought before the prosecutor.

In court, the offender is generally sentenced to imprisonment (somewhere between two and six months). If it is a first-time offence, the prison sentence is usually conditional. If he/she has a previous conviction, the sentence is usually unconditional imprisonment. If the defendant suffers from a severe drug problem, community service is generally out of the question. If the defendant wants to have treatment for his/her drug abuse or is already in treatment, this can sometimes have an effect on sentencing. Sometimes, a conditional sentence is imposed, so that the offender can continue with treatment.

Stealing from a person in the street (without causing injury)

This is an offence according to Chapter 28 of the Penal Code. Here again, it makes no difference whether or not the offender is a drug user. However, the circumstances of the offence affect the outcome. If the victim did not, for example, notice the theft when it happened, the consequences are the same as for shoplifting. If the offender threatened the victim, it makes the crime more serious.

Stealing from a person in the street (causing injury)

In this kind of crime, the police must investigate and the case is brought before the prosecutor. It makes no difference whether or not the offender is a drug user. This is an offence according to Chapter 28 of the Penal Code.

Such cases are generally brought before the courts. The offender is usually sentenced to imprisonment (between five and 10 months). If it is a first-time offence, the sentence is usually conditional. If the offender has a previous conviction, he/she will generally be sentenced to unconditional imprisonment. If the defendant suffers from drug abuse, community service is usually out of the question. If the defendant wants to have treatment for his/her drug abuse or is already in treatment, this can sometimes have an effect on the sentence. Sometimes, the prison sentence is conditional, so that the offender can continue with treatment.

Common EU standards on prosecution of drug users ⁽⁹⁷⁾

In general, actions taken by the legal system in relation to drugs should be proportional to the harms that it seeks to prevent. This is one of the leading principles of the Finnish legal system, and it is generally agreed that the police, prosecutors and courts should

⁽⁹⁷⁾ The information presented here is based on several informal discussions with the police, prosecutors and judges. A mini-survey was conducted with five policemen in Helsinki, five policemen in Tampere and six social workers or health personnel in a treatment unit in Helsinki.

adhere to it. In fact, this is the view of all the key people interviewed.

There is general agreement that the highest priority should be given to trafficking in the more dangerous drugs. However, it is quite widely held among the police and social workers that the prevention of trafficking in cannabis should also be prioritised. According to several respondents, it would be a sign of relinquishing Finland's restrictive drug policy if drugs were treated differently according to type. Criminal prosecution is seen as the only appropriate reaction to these crimes. Generally, very little consideration is given to any other control measures, such as the option of civil or administrative measures (see Dorn, 1999).

Other cases considered high priority are those where users (of any drugs) get involved in other serious crime for reasons relating to their drug use, or where public use of drugs is associated with social nuisance and low-level trade. Retail sale of drugs is also seen as a priority. The treatment services are regarded as particularly important, because a large proportion of retail sellers are problem users.

All the social workers questioned preferred mediation for property crimes and referring drug users to treatment instead of criminal sanctions. In the case of young offenders, harsh penalties are seen as destructive and counter-productive. Most of the policemen who cooperated in the survey were in favour of developing the treatment system and trying to find new methods of rehabilitating drug users.

There seems to be general agreement in the police force that there are no low-priority drugs and all illicit substances should be controlled by the criminal justice system. In fact, population surveys show that this is the opinion of the vast majority of Finns (see, for example, Hufvudstadsbladet, 2000). This was also the opinion of most of the social workers who answered the mini-survey, although this group are in favour of waiving the measures when users of cannabis are in question.

Low-priority action should generally be 'no further action' by the police and prosecutors. According to police officers, this should

only be permitted for procedural and economic reasons. General opinion seems to be that, as use of cannabis is believed to lead to use of more dangerous drugs, cannabis should also be controlled. However, social workers and health personnel emphasised the importance of treatment and advice instead of punitive measures.

When asked if use/possession per se should never result in imprisonment in any circumstances, the policemen answered that all cases are different and so it is not possible to make such categorical generalisations. However, social workers were quite clearly in favour of this view.

Asked if use/possession per se should sometimes result in imprisonment (depending on the circumstances), the clear answer from the policemen was ‘yes’. (Court practice is different though — see above.) However, the circumstances must be aggravating:

- the user refuses to undergo treatment;
- exceptionally large amounts of drugs are involved; or
- the user is in an occupation where an exceptionally high level of concentration is needed, such as an aeroplane pilot or bus driver.

The personnel of the treatment clinic shared the opposite view, stating that a prison sentence can never cure drug addiction.

The question of whether ‘use/possession if repeated three times should generally result in imprisonment’ was seen by both policemen and social workers as an American kind of thinking that is inappropriate for Finland. Generally, the answer was no, but policemen thought that, in some cases, repeated offences of possession of drugs should — again depending on circumstances — lead to imprisonment.

Key issues of special concern

Earlier in this national report, we described how Finnish criminal political policy has developed over the past 25 years into a form of humane neo-classicism. At the same time, the aims of the

criminal policy were defined to accord with the aims of general social policy. Cost–benefit analysis was also introduced into criminal political thinking. In making choices between different strategies and means, the probable policy effects and costs were to be assessed. The traditional main goals of the drug policy (such as simple prevention, elimination of criminality, protection of society) were replaced by more sophisticated formulas (Lappi-Seppälä, 2000). From the 1970s onward, the aims of criminal policy in Finland were usually expressed as a twofold approach:

- minimisation of the costs and harmful effects of crime and crime control; and
- a fair distribution of these costs among the offender, society and the victim (Törnudd, 1996).

By stressing that not only the costs of criminality but also the costs and suffering caused by the control of crime must be taken into account, this definition comes close to what are understood to be the basic values and arguments of modern harm-reduction methods in the drug question. In this sense, harm reduction was already embodied in Finnish criminal policy in the 1970s.

But why has it been so difficult to adopt these general criminal political aims when addressing the drug question? As described earlier in this study, drug users are treated relatively harshly by the Finnish criminal justice system and it has been difficult to develop an effective drug-treatment system. The answer might be found in the way the Finnish conception of the drug problem is constructed.

Police, prosecutors and judges share strict and negative attitudes about drug use. In fact, this mirrors the general mindset of the Finnish population. Drug abuse is perceived as one of the most serious social problems. In 1994, Finns were of the opinion that drug abuse is even more serious and more urgent than alcohol abuse (Järvinen, 1996; 1997).

Public opinion strongly supports the official restrictive policy of the country (Hakkarainen, 1996; Ministry of Internal Affairs, 1999).

In 1992, only 4 % of the total population was of the opinion that drugs should be legalised. These attitudes remained more or less unchanged through the 1990s (Kontula, 1997). In a recent population survey (Hufvudstadsbladet, 2000), 87 % of Finns were of the opinion that drug dealing should be punished more harshly than is now the case. This also goes for possession of soft drugs (64 %). Up to 60 % think that severe punishments would reduce drug use.

Until recently, the prevalence of illegal drugs has been modest in Finland and still is low when compared to most other western democracies. Most Finns have not experimented with drugs and do not know drug users personally. There are no open drug scenes in Finland. Retail sale of drugs in Finland usually takes place in private residences. The most common way of distributing drugs is through friends and acquaintances. For outsiders, it is difficult to access drugs. Private residences also often serve as places where drugs are used (Kinnunen, 1996.) Thus, information on the drug problem is generally received via the media, where drugs are a high-profile issue. In fact, it is interesting that the media give much more coverage to the drug issue than alcohol, even though drug use is quite a marginal phenomenon in Finland in comparison with drinking.

Studies conducted in Finland indicate that, in general, newspapers tend to report on the drug issue in a criminal context, emphasising the threat represented by drugs to Finnish society (Järvinen, 1997; Jaatinen, 1998). Newspaper articles describe how drugs are infiltrating more and more into clean and innocent Finland. Popular dislike and fear of drugs are intensified by reports describing various diseases and crimes caused by drug use (Järvinen, 1997). This stereotypical representation of drug users supports the general cultural attitude towards drugs. In the early 1990s, news items on the drug problem often originated from foreign countries, but this has been changing more recently and nowadays almost all drug-related news items feature national or local events (see, for example, Kaukonen and Halmeaho, 1998).

One of the main goals of Finnish drug policy has been to bolster negative attitudes towards drugs in the population. This is done

partly through introducing the notion of blame with sanctioning into the criminal justice system, and partly through education and media coverage. The police have been a key actor in this, ensuring that as many instances of drug crime and drug use are uncovered and investigated as possible. Furthermore, they use the media to report on successful operations and to remind the population of the dangers of drug use and of the connection between drugs and crime. Attitudes towards the police are extremely positive in Finland. Unfortunately, the courts are not valued to the same degree (Niskanen et al., 1999).

Drug issues have been coloured by the prohibitionist nature of Finnish narcotics control policy (Hakkarainen, 1994). This has been one of the factors that have hampered development of a Finnish drug-treatment system (Kinnunen and Lehto, 1998). This has made it difficult to introduce harm-reduction measures in Finland, although much of this has changed during the past five years. More problem users pass through the hands of the police and the courts than through any other agency dealing with drug misuse. This gives the criminal justice system the potential for playing a vital role in bringing treatment services to problem drug users.

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Josef Zila

Outline of the legal system of Sweden

Type of system

Swedish criminal substantial and procedural law is based on the continental system. The laws are defined in statutes. There is very limited scope for judge-made laws.

Criminal law

In the area of criminal substantial law, the central statute is the *Brottsbalken* (Penal Code), which was adopted in 1962 [1] and came into force in 1965. There are approximately 400 criminal-law statutes — so-called ‘special criminal law’ — apart from the *Brottsbalken*. The division of the criminal law into ‘common criminal law’ (the *Brottsbalken*) and ‘special criminal law’ has no particular significance but simply results from legislative tradition⁽⁹⁸⁾. All narcotic drug offences are covered by special criminal law. However, the general provisions on criminal responsibility, as well as the regulations for penalties (which are outlined in the *Brottsbalken*), also apply for the prosecution of drug offences (or any offences not covered by the *Brottsbalken*).

The most important law regarding narcotic (‘very dangerous’) drug offences is the 1968 *Narkotikastrafflag* [2] (NSL; Narcotic Drugs Criminal Act). Cases of import or export of drugs come under the 2001 *Lag om straff för varusmuggling* [3] (SSL; Smuggling Criminal Act). Generally, the penalties for smuggling of goods are more lenient than those for narcotic drug offences. The sanctions for smuggling narcotic drugs correspond to the

⁽⁹⁸⁾ Roughly speaking, the *Brottsbalken* mostly provides for so-called ‘traditional’ offences, whereas the ‘special criminal law’ includes what are sometimes called ‘modern’ offences.

sanctions prescribed by the NSL. Another law that criminalises unlawful handling of narcotic drugs is the 1992 *Lag om kontroll av narkotika* [4] (Act for Control of Narcotics). If the regulations specified in this act on the legal handling of drugs are contravened, such an offence may be punishable in accordance with the criminal provisions of the act even it does not constitute a narcotic drug offence or smuggling.

Finally, it is worth mentioning two criminal laws which do not strictly concern narcotic drugs but which criminalise behaviour similar to abuse and trafficking of narcotics and often are discussed together with narcotic drug offences. The laws in question are the 1991 *Lag om förbud mot vissa dopningsmedel* [5] (Criminal Act on Drug Abuse) and the 1999 *Lag om förbud mot vissa hälsofarliga varor* [6] (Act Prohibiting Substances which are Dangerous to Health). Both laws have a structure and wording very similar to the *Narkotikastrafflag*. According to the Criminal Act on Drug Abuse, drug use per se is an offence, in the same way that the NSL prohibits the use of narcotic drugs. The act prohibits possession and supply of substances ‘which, owing to their inherent properties, endanger life or health, and that are used or could be used for the purpose of becoming intoxicated or any other such effect’. The law is intended to cover substances that have not yet been classified as narcotic drugs, as well as substances that are considered dangerous but would not be classified as narcotic drugs (because, for instance, they are an intoxicant but are not addictive).

Only drug offences which have been committed intentionally are punishable. However, a few offences are punishable even if they have been committed through gross negligence [7]. Criminal intent has always to be proved, as strict liability is not accepted in Swedish criminal law.

Narcotic (‘very dangerous’) drug offences are defined in paragraph 1 of the NSL. A person who commits such an offence is described as:

‘any person who unlawfully (1) transfers narcotics, (2) manufactures narcotics intended for misuse, (3) acquires narcotics for the purpose of transfer, (4) procures,

processes, packages, transports, keeps or in some other similar way handles narcotics which are not intended for personal use, (5) offers narcotics for sale, keeps or conveys payment for narcotics, mediates contacts between seller and purchaser or takes any other such measures, if the procedure is designed to promote narcotics traffic, or (6) possesses, uses or otherwise handles narcotics [...]

The punishment prescribed for these offences is imprisonment for not more than three years.

According to paragraph 2 of the NSL, if the offence described under paragraph 1, particularly with respect to the quantity and kind of drug, is judged to be a petty one, the punishment should be a fine or imprisonment of not more than six months. According to a statement made by the Minister for Justice regarding one of the amendments to the NSL, the provision on petty drug offences was intended to be applied only in cases of simple use/possession for personal use of very small quantities of drugs. At the time the proposal in question was submitted (1993), possession of 80 grams of cannabis or 8 grams of amphetamine was treated as a petty offence, but the Minister for Justice judged these amounts to be too high. The minister also wanted the option to classify possession of more dangerous drugs (e.g. heroin, cocaine or LSD) as a petty offence to be strictly limited [8]. Since this amendment was adopted [9], Swedish courts have adhered to the principle of the minister's statement.

For 'serious narcotic drug offences' (paragraph 3, NSL), the punishment is imprisonment of between two and 10 years. Such an offence is an offence under paragraph 1:

- if it is part of a large-scale or commercial organisation;
- if it involves particularly large quantities of narcotics; or
- if it is in any other way of a particularly dangerous or unscrupulous nature.

Procedural law

The criminal procedure law is set out in the *Rättegångsbalken* (RB) of 1942 [10] (Code of Judicial Procedure). Other laws that contain procedural provisions that relate to this study are the *Lag med särskilda bestämmelser om unga lagöverträdare* [11] (Juvenile Offenders Act), the *Lag om vård av missbrukare i vissa fall* [12] (Act on the Care of Alcoholics and Abusers) and the *Lag med särskilda bestämmelser om vård av unga* [13] (Act on the Care of Young People). Police procedure is regulated both by the RB and the *Polislagen* [14] (Police Act).

The criminal procedure consists of two stages: a preliminary investigation and a trial. The preliminary investigation is mainly regulated by Chapter 23 of the RB ⁽⁹⁹⁾ and the court trial by Chapters 45 to 48 of the RB.

The principle of legality applies in Swedish criminal procedure. This means that criminal proceedings must be initiated with regard to any offence that is subject to public prosecution (Chapter 23, paragraph 1, RB). However, there are numerous exceptions to this rule, some of which will be described in their proper context below.

The decision to initiate a preliminary investigation is made either by the police authority or the prosecutor. Whoever makes the decision also leads the preliminary investigation (Chapter 23, paragraph 3, RB).

In certain cases, the prosecutor conducts the preliminary investigation even if it was initiated by the police authority. The RB regulates the division of powers between the prosecutor and the police authority in the following way. If the police authority initiates the preliminary investigation in a case that is fairly complex, the prosecutor assumes responsibility for conducting the investigation as soon as someone is reasonably suspected of the offence.

⁽⁹⁹⁾ In addition, there are a number of statutes and other legal regulations outside the RB which are of direct relevance to the preliminary investigation. One such is the *Förundersökningkungörelse* (Preliminary Investigation Ordinance; SFS, 1947, 948). Since 1995, the 1950 European Convention on Human Rights has been part of the Swedish legal system and is directly applicable.

The division of powers follows instructions issued by the prosecutor-general in consultation with the National Police Board [15]. In general terms, the police authority leads the preliminary investigation for ordinary offences, and the prosecutor leads in more complicated cases. In certain cases, it is only the prosecutor who can lead the preliminary investigation. Also, certain decisions can only be made by the prosecutor, regardless of whether it is the prosecutor or the police that leads the investigation. Court proceedings can only be conducted by the prosecutor.

Other laws which concern drug use

There are a number of laws outside the sphere of criminal law which are of relevance to this study.

- If a drug user voluntarily seeks help, the relevant law is the *Socialtjänstlagen* (Social Services Act) [16]. The care options that are available to drug users, provided or mediated by the social services according to this law, are housing assistance (5 500; 28 % ⁽¹⁰⁰⁾), individually needs-tested outpatient care (10 400; 53 %), voluntary institutional care (3 200; 16 %) and voluntary residence in a private home (300; 2 %).
- According to the *Lag om vård av missbrukare i vissa fall* (Act for the Treatment of Drug Abusers) [17], it is possible to refer a drug user for compulsory institutional care. Such a decision is made by the *Länsrätten* (administrative court), at the request of the Social Welfare Board. In 1999, 260 drug users were referred for treatment according to this act ⁽¹⁰¹⁾.
- The law that makes it possible to arrange a compulsory care order for juveniles on the grounds of drug abuse is the *Lag med särskilda bestämmelser om vård av unga* (Care of Young Persons Special Provisions Act) [18]. This decision is also made by the *Länsrätten*, at the request of the Social Welfare Board.

⁽¹⁰⁰⁾ The figures in the brackets indicate the number (and the percentage of all the recipients) of persons who received that form of help/treatment in the year 1999 (*Socialtjänst*, 2000).

⁽¹⁰¹⁾ See footnote 99.

Statistics for drug offences in Sweden

So far this report has only focused on offences covered by the NSL. 'Smuggling of narcotic drugs' offences have not been described here ⁽¹⁰²⁾, nor any of the offences covered by the other laws mentioned above. The information in this report is based on the criminal statistics of the year 1997. The following statistics show the general situation regarding drug offences in Sweden. The data include both adult and juvenile (aged 15 to 17) offenders.

In the year 1997, 30 378 offences against the NSL were reported ⁽¹⁰³⁾ to the police or prosecution authorities. Of these, 24 710 (81 %) concerned simple possession/use, 5 501 (18 %) concerned trafficking and 167 (1 %) concerned the production of narcotic drugs.

Of all the reported offences, 22 314 (73 %) were dealt with by the police. Of these, 18 401 (82 %) concerned simple possession/use, 3 801 (17 %) were trafficking offences and 112 (1 %) concerned the production of narcotics. Of all these offences handled by the police, 61 % (of the offences reported in 1997 and earlier) resulted either in indictment, or fines imposed by a prosecutor, or no further action (*nolle prosequi*).

Overview of possible reactions and their legal basis

As mentioned above, the preliminary investigation is divided between the police and prosecution authorities. The situation as regards the decision-making process involved in the preliminary investigation can be summarised as follows. All the decisions which can be made by the police can also be made by the prosecutor.

⁽¹⁰²⁾ Every offence of 'smuggling of narcotics' constitutes, at the same time, a narcotic drugs offence by the NSL, at least the possession of drugs. According to Swedish law before 2001, in such cases the courts should find the accused guilty of a crime against both the NSL and the VSL. This means that, statistically, all smuggling offences should be included in the statistics on drug offences as well. However, the courts do not apply the law consistently, which means that some smuggling offences do not appear in the statistics about drug offences. However, the number of such cases is negligible.

⁽¹⁰³⁾ Reported offences include both those offences that are reported by the public and those discovered by the police themselves. The offences discovered by the police constitute approximately 70 % of all reported offences.

However, there are several decisions in the course of the preliminary investigation which can only be made by the prosecutor. Bearing this in mind, the decisions that are, in practice, typically made by the police are described in the next subsection as possible reactions of the police, whereas those decisions that can only be made by the prosecutor are described in the subsection on the prosecution.

Police

When the police receive a report of an offence or uncover an offence themselves, they have to decide on the following:

- if the reported action constitutes an offence or not;
- if it could constitute an offence but the offence is not indictable, either because the suspect is a minor under the age of 15 or because the time limit within which charges can be brought has expired; or
- if the reported action constitutes an offence that will be impossible to prove [19].

If charges cannot be brought, the preliminary investigation is closed.

All the decisions mentioned above are an integral part of any crime investigation and can hardly be considered as constituting any kind of no further action or diversion. However, according to the *Polislagen*, if the police receive information that a crime which is subject to public prosecution has been committed, they may refrain from any further action if all aspects of the crime are trivial and it is obvious that the penalty could only be a fine. This rule, which in fact constitutes no further action, is formulated in paragraph 9 of the *Polislagen*, and is an exception to the strict obligation of all police officers to report all crimes that are subject to public prosecution.

According to Chapter 48, paragraphs 1–3 and 13–20, of the RB, the police can impose an on-the-spot fine for breach of regulations for a number of petty offences. This decision has the same effect as a final judgment. The offences that can be prosecuted by imposing

an on-the-spot fine are listed in an instruction of the prosecutor-general [20]. However, no drug offences are included in the list.

There are no legal possibilities for the police authorities to apply diversion or down-tariffing.

Prosecution

There are a number of measures that the prosecutor can avail of in the course of preliminary investigations in order to drop a case or bring it to completion.

The prosecutor may discontinue a preliminary investigation, (i) if continued inquiries would incur costs that are not in reasonable proportion to the seriousness of the offence and if prosecution would only lead to a penalty of a fine, and (ii) if it can be assumed that prosecution will not be initiated pursuant to the provisions on waiver of prosecution (see below) or on special examination of the prosecution ⁽¹⁰⁴⁾, and if substantial public or private interests are not ignored by discontinuing the preliminary investigation (Chapter 23, paragraph 4(a), RB).

According to Chapter 20, paragraph 7, of the RB, the prosecutor may waive prosecution in cases where one of the following prerequisites applies, provided no compelling public or private interest is thereby disregarded:

- if it can be assumed that the offence will only result in a fine;
- if it can be assumed that the penalty incurred would be a conditional sentence and there are special reasons justifying waiver of prosecution;
- if the suspect has committed another offence and no further investigation is needed in respect of the present offence; or
- if psychiatric care or special care in accordance with the act concerning persons with functional impairments is arranged.

⁽¹⁰⁴⁾ The term 'special examination of the prosecution' refers to a number of provisions in the substantial criminal law, according to which some offences shall only be prosecuted if certain prerequisites exist. This is not relevant in relation to drug offences.

A prosecution may also be waived in other cases, if it is clear by reason of special circumstances that no sanction is required to prevent the suspect from engaging in further criminal activity.

According to Chapter 48, paragraphs 1–12(a), of the RB, a prosecutor may impose a penalty on the suspect by means of a ‘summary penalty order’. In this case, the suspect, subject to his/her agreement, is ordered to pay a fine, which is assessed by the prosecutor to suit the offence. A summary penalty may also be a conditional sentence with/without a fine. Fines may be imposed by summary penalty order in cases of offences for which fines are included in the range of penalties.

According to paragraph 46 of the *Lag om vård av missbrukare i vissa fall* (Act on the Treatment of Drug Abusers) [21], if a person for whom treatment has been provided under this act is suspected of a criminal offence for which the punishment is not more than one year of imprisonment, and if the offence was committed before the treatment began or during the treatment period, the prosecutor shall consider whether it is appropriate to prosecute.

Obviously, many of the measures mentioned above constitute both no further action and a kind of diversion (the summary penalty order). This categorisation is, however, approximate only. A waiver of prosecution, for instance, may be withdrawn ‘if some special reasons so require’ (Chapter 20, paragraph 7(b), RB). This means that a waiver of prosecution could also be classified as a kind of diversion, according to the definition applied in the present study. Regarding the authority of prosecutors to impose penalties as mentioned above, such a situation has to be seen as rather unusual in an adversarial criminal process. Whether or not a summary penalty order, as regulated in Swedish law, could be categorised as a diversion is open to discussion.

There is no legal option of down-tariffing in Swedish law, nor for individual restrictions on movement for suspected or convicted persons ⁽¹⁰⁵⁾.

⁽¹⁰⁵⁾ The prosecuting authorities have the option to subject the suspect to a number of coercive measures in order to facilitate the investigation (detention, prohibition of travel), but these measures are never influenced by the fact that the suspect is a drug user.

Trial

In principle, only the courts can make a judgment in a trial. If the defendant is found guilty, the court may either refrain from imposing a (new) sanction or impose a sanction.

There are three possible reasons why a court would not impose any sanction:

- if it would be manifestly unreasonable to impose a sanction (Chapter 29, paragraph 6, *Brottsbalken*);
- if the defendant committed the crime while suffering from a serious mental disturbance (Chapter 30, paragraph 6, *Brottsbalken*); or
- if the defendant has received a prior sentence of imprisonment (or other specified sanction) and the court decides that the first sanction shall apply to the more recent crime (Chapter 34, paragraph 1, *Brottsbalken*).

The first two conditions rarely apply.

In other cases, depending on the provisions of the relevant criminal legislation, the following sanctions and combinations of sanctions may be imposed ⁽¹⁰⁶⁾:

- imprisonment;
- a fine;
- a conditional sentence (which may be imposed in combination with a fine or with community service);
- probation (which may be imposed on its own, or in combination with imprisonment of not longer than three months, or with community service, or with so-called contract care) [22]; or
- committal to special care.

⁽¹⁰⁶⁾ Only imprisonment or a fine (or both) are mentioned in the criminal provisions in Swedish law. If only a fine is prescribed by a provision, no other sanction may be imposed. If imprisonment is prescribed (alone or together with a fine), the court can also impose any of the other sanctions mentioned here. Which sanction is imposed depends on criteria stated in the law.

There are three possible forms of care that a convicted person can be committed to:

- care of young persons according to the *Socialtjänstelagen* or the *Lagen med särskilda bestämmelser om vård av unga* (see the first and third bullet points under the subsection ‘Other laws which concern drug use’, above) [23]
- care of drug abusers according to the *Lag om vård av missbrukare i vissa fall* (see the second bullet point under the subsection ‘Other laws which concern drug use’, above) [24]; however, if the penalty for the crime is more severe than imprisonment of one year, treatment is only ordered if there are special grounds for doing so; and
- care of persons suffering from a serious mental disturbance or who committed the crime while suffering from such a disturbance according to the *Lagen om rättspsykiatrisk vård* [25] (Act on Forensic Psychiatric Care) [26].

Swedish law does not distinguish between criminal sanctions and other measures, which makes it difficult to describe the different reactions provided in Swedish law according to the terms of this study. However, if we describe the different provisions in Swedish law according to their material substance, the following categorisation can be applied:

- strictly speaking, the only penalties are imprisonment and a fine;
- the criteria of no further action apply to the situations where the court refrains from imposing any sanction;
- conditional sentences, probation in combination with community service or with contract care, and committal to special care of minors, as applied in Swedish law, can be categorised as different forms of diversion; and
- committal to a treatment programme for drug users or to forensic psychiatric care (both of which enforce treatment).

Forfeiture

Forfeiture is very widely applied in connection with the prosecution of drug offences. The regulations for forfeiture, as applied to drug offences, are provided in the NSL, paragraphs 6 and 7.

Any narcotics used (or where there was that intention) for committing any offence according to the NSL, or the value thereof together with any gains accrued from such offences, shall be declared forfeit, unless this is manifestly unjust.

Property used in committing an offence according to the NSL, or the value of such property, may be declared forfeit if this is justified in order to prevent the crime or for any other special reason. The same applies to property which has been used in a manner constituting a crime according to the NSL.

Hypodermic syringes or needles, or other objects which are designed to be used for drug use or related activities, which are found in the possession of any person who has committed a drug offence, or are found on the premises or in the grounds used by such a person, or are found in connection with drugs that have been the subject of a drug offence, shall, regardless of who owns the property, be declared forfeit, unless this is manifestly unjust.

Decisions on forfeiture are always either additional decisions that may be made at all levels of the prosecution or, in relation to 'preventive' forfeiture, such a decision can be made separately.

In practice, at the level of the police operation, it is a question of a decision to seize property that can be assumed to be forfeit (paragraph 7, NSL). At the prosecution level, a prosecutor may make a decision on forfeiture in connection with a summary penalty order. For prosecution of drug offences, forfeiture is a matter of routine.

Overview of typical reactions

Police

It has already been mentioned that the majority of narcotic drug offences which are reported consist of offences discovered by police activities (approximately 70 %). Social service bodies and other institutions report the rest of the offences. A relatively low number of reports come from the public. Under such

circumstances, and with respect to the principle of legality in Swedish law, it is to be expected that the majority of the drug crimes reported (approximately 75 %) are investigated. The reports that are handled by the police are mainly those mentioned above in the 'Overview of possible reactions' section.

The legal option for police officers to refrain from reporting an offence and, in effect, waive the prosecution (see 'Overview of possible reactions') is, in principle, not applied at all as far as drug offences are concerned. According to the statistics, this legal provision was applied in only two cases (out of 22 314) in the year 1997. The option of an on-the-spot fine (see 'Overview of possible reactions') does not come into question, since no drug-related offences comply with the prerequisites set out in Chapter 48, paragraphs 13 and 14, of the RB. Thus, diversion and no further action by the police do not exist, in practice, for the offences covered by this study.

However, one aspect of the investigation of drug offences should be mentioned. Considering the prevailing principle of legality in Sweden, the fact that the use per se of narcotic drugs is criminalised and the fact that addicted users, usually known to the police, do not take account of criminal law and police operations, then the question arises as to how the police can be expected to handle the situation without setting aside the law. It is reasonable to assume, therefore, that it would be unrealistic to prosecute this category of drug user over and over again. According to one police officer, the police generally ignore this category of drug user. Therefore, the criminalisation of use per se is generally applied in relation to new users, in the hope of stopping them persisting in such drug use [27].

In conclusion, it seems that, in practice, even if the legal options for expediency are limited (especially after the offence is reported), the police have considerable flexibility in deciding whether an offence will be prosecuted or not. In effect, the expediency principle operates at a point immediately before prosecution is initiated. In other words, it exists, from a legal point of view, as a 'grey area' in police activity, before an offence is

'officially' recorded. This is only true, however, if the crime in question is possession/use per se. In cases of drug trafficking, the option for expediency is much more limited. However, it is very difficult to get more precise information about the actual situation.

The fact that a suspect has previously committed or been sentenced for a drug offence has no relevance at the police stage of the investigations.

The percentage of use of no further action at the police stage of an investigation varies between 6 and 10 %. These figures are based on the statistics that show how many reported offences are treated with no further action by the police, when such action results either from the fact that no report was made, that the offence cannot be proved or that a decision is made according to Chapter 23, paragraph 4(a), of the RB.

Prosecution

In 1997, prosecutors in Sweden handled 20 336 cases, including drug offences. In 16 906 (83 %) of these cases, the drug offences concerned possession/use per se, 3 342 (20 %) concerned drug trafficking and 88 cases concerned the production of narcotics (this category will not be discussed further).

In 65 % of all the cases that included narcotic drug offences, public prosecution in court was initiated (60 % for possession/use per se and 87 % for drug trafficking). In the remaining cases, prosecutors either waived prosecution (i.e. no further action for 10 % of all prosecuted drug offences, 11 % of possession/use and 3 % of trafficking offences), or imposed a fine (i.e. diversion for 18 % of all the offences, 21 % of possession/use offences, 5 % of trafficking offences) (Kriminalstatistik, 1999; Narkotikastatistik, 1999).

Approximately 10 % of the measures taken by prosecutors are not accounted for in the statistics. At a guess, these could be cases where the suspect had left Sweden or the time limit for bringing charges had expired.

The above data give a good indication of what happens at this stage of the preliminary investigation, after the prosecution authorities take over the case from the police. Unlike the situation at the police stage, the cases handled by the prosecution are relatively well documented. There is no 'grey area' equivalent to the stage of the police operation before a crime is recorded.

A prosecution may be waived, as mentioned above ('Overview of possible reactions'), for a number of different reasons. Waiver of prosecution according to Chapter 20, paragraph 7, points 1 and 2 (i.e. in cases of trivial offences), could be regarded as 'pure' no further action. However, the great majority of decisions to waive prosecution (93 %) were made, in practice, according to point 3 of this provision, which refers to the situation when a suspect has committed another offence and, in the opinion of the prosecutor, no additional sanction is necessary. Thus, it is clear that, in the majority of cases of drug offences for which a waiver of prosecution is usually applied, the reason for such a decision is not that it is the established procedure for prosecuting drug offences, but simply that it is a practical consideration.

One of the reasons mentioned above ('Overview of possible reactions') for abstaining from prosecuting a suspect is when the offence was committed before or during treatment for drug use. However, it is surprising that this option is, in practice, rarely availed of: in 1997, the prosecutors in Sweden made such a decision in two cases only.

Summary penalty orders are generally applied by the prosecution for practical reasons (the legal criteria are described above in the 'Overview of possible reactions' section). There is no special policy regarding the use of this measure in relation to drug offences. Usually, summary penalty orders are applied to petty offences, which means, as far as drug offences are concerned, offences of possession/use per se. In fact, in 1997, 97 % of all summary penalty orders imposed on drug offenders were for possession/use per se. Only 3 % of the cases for which penalty orders were applied concerned drug trafficking.

As mentioned above, the main reason for prosecution to be waived is when a suspect is either being prosecuted or has already been sentenced for another offence and the sanction for that is considered sufficient. In this situation, the previous offence is, of course, an important issue, but it is interesting that no further action or diversion can be applied even if the suspect has committed a new and more serious crime.

There are no formal obstacles, according to Swedish law, to applying a new waiver of prosecution to a suspect who has already had prosecution waived for the same type of crime. However, the total number of cases where prosecution is waived because the offence is not serious is very small; for instance, in 1997, prosecution was waived for a drug offence in only 68 out of 1 800 cases. Bearing in mind the strict view taken in Sweden in relation to drug offences, it is hard to believe that prosecution for a second offence of the same type could again result in a waiver of prosecution, not to mention the same situation occurring when a second offence is more serious than the first. If, on the contrary, the second offence is less serious than the first one, the possibility of waiving the second prosecution is, of course, higher. However, the figures concerning the total number of waivers of prosecution in trivial cases speak for themselves.

In trafficking offences, waiver of prosecution and summary penalty orders are used very seldom, and then only in very trivial cases. The typical outcome of the preliminary investigation in such cases is initiation of court proceedings.

To sum up, it is clear that the fact that a suspect has committed a previous drug offence influences the prosecutor's decision whether to waive the prosecution or not. This is probably also true for summary penalty orders, although a previous offence is less important in this case. The summary penalty order is a normal method of punishment, and not a sanction that should be seen to favour the suspect. When a prosecutor is considering whether to waive prosecution against a minor drug offender, a previous offence may cause the prosecutor to apply a summary penalty order instead.

Courts

If prosecution in court has been initiated, the only possible outcome of the trial (regardless of decisions made on the basis of the procedural rules) is either acquittal or conviction.

In 1997, 2 997 people were sentenced for narcotic drug offences in cases where the drug offence was the principal crime. Of these sentences, 1 112 concerned petty narcotic drug offences (paragraph 2, NSL) ⁽¹⁰⁷⁾, most of which (1 068 sentences, i.e. 97 %) were for simple possession/use. The large majority of penalties imposed for these offences were a fine (853 sentences, i.e. 80 %). However, 57 offenders were sentenced to imprisonment. The sanctions that are classified by this study as diversion (probation, committal for treatment and conditional sentences; see the 'Overview of possible reactions' section) were applied in 80 cases ⁽¹⁰⁸⁾. In 77 cases, the courts abstained from imposing any sanction; in all these cases, the reason for abstaining was the fact that the convicted person had already been sentenced for another offence and the sanction was found to be sufficient for the current offence. Of the petty drug offences, 27 were drug-trafficking offences.

Of the 1 530 sentences for narcotic drug offences (paragraph 1, NSL), the majority were for simple use/possession (966 sentences, i.e. 64 %). In comparison with the penalties for petty drug offences, use/possession per se, classified as a drug offence according to paragraph 1 of the NSL, resulted much more frequently in imprisonment (613 sentences, i.e. 63 %). There were 400 (26 %) sentences for drug trafficking (69 % of the sentences for this crime were imprisonment). Thus, imprisonment is the most frequent punishment for drug offences according to paragraph 1 of the NSL. Various kinds of diversion (probation, conditional sentence, committal to special care) were applied in approximately 40 % of the cases; only 1 % were sentenced to a fine.

There were 261 sentences handed down for serious drug offences (paragraph 3, NSL), 97 % of which were imprisonment.

⁽¹⁰⁷⁾ For definitions of drug offences, see the section 'Type of system'.

⁽¹⁰⁸⁾ This amount also includes 30 cases of committal of minors to special care.

Possession of narcotic drugs can constitute a serious drug offence: 125 persons sentenced for this crime were found guilty of possession (and one case of use/possession per se).

An analysis of the statistical figures shows clearly that imprisonment is the most frequent outcome of sentencing by the courts for narcotic drug offences according to paragraphs 1 and 3 of the NSL, whereas a fine is generally applied for petty drug offences according to paragraph 2 of the NSL. Relatively few drug offences lead to diversion (probation, conditional sentence and committal to special care) at this stage of the procedure. Only 80 drug offenders, for instance, were referred to so-called 'contract care', which is a sanction (a variant of probation) specially designed for people who commit a crime because of their drug use (Chapter 30, paragraph 9, *Brottsbalken*). None of the 3 000 people sentenced for drug offences in 1997 were committed to special care for drug users according to Chapter 31, paragraph 2, of the *Brottsbalken*.

Offences which concern use/possession per se are represented in all the three categories of narcotic drug offences according to Swedish law (i.e. petty, 'normal' and serious offences). The main criterion for classification of a crime into one of these categories is the dangerousness of the offence, which, in practice, mainly depends on the type of drug and the amount ⁽¹⁰⁹⁾.

Recidivism does not play any role in the decision concerning the dangerousness of a particular crime. However, the court is required to take into account, among others things, any previous convictions of the accused when considering imprisonment (Chapter 30, paragraph 4, *Brottsbalken*).

⁽¹⁰⁹⁾ In practice, drug offences are classified by the courts as petty drug offences if the quantity of drugs concerned is lower than 60 grams of cannabis, 5 grams of amphetamine, 0.6 grams of cocaine, 0.05 grams of heroin, 0.1 grams of methadone, 0.15 grams of opium, three LSD trips, three ecstasy tablets, 2 kilograms of khat or 150 tablets of diazepam. Drug offences are normally classified as serious if the quantity of drugs exceeds the following: 2 kilograms of cannabis, 250 grams of amphetamine, 50 grams of cocaine, 25 grams of heroin, 50 grams of methadone, 75 grams of opium, 160 LSD trips, 160 ecstasy tablets, 400 kilograms of khat, 20 000 tablets of diazepam (Sterzel, 1998, pp. 8–6).

Current practice

Use/possession in private of ‘very dangerous’ drugs

Use/possession in private of ‘very dangerous’ drugs is described as a ‘narcotic drug offence’ according to paragraph 1 of the NSL.

Police

If the police decide to bring charges for this offence, which is usually the case (see the section ‘Overview of possible reactions’), a preliminary investigation is initiated (either by the police or the prosecutor; usually the police). However, if the suspect is a hardened addict, a recidivist or is known to the police and/or social services, the reaction, in practice, is more uncertain. One possible outcome is no further action, which, of course, is against the principle of legality in Swedish law.

Prosecution

The most likely outcome of the preliminary investigation for this offence is that the case will be referred to the courts. A waiver of prosecution based on the fact that the offence is a trivial one (Chapter 20, paragraph 7, points 1, 2 and 3, RB) or a summary penalty order are, in principle, out of the question. In the latter case, the waiver is based on the fact that the suspect has been sentenced in another trial and the sanction for that offence is considered sufficient for the current one.

Courts

The outcome in the courts depends mainly on the quantity of the drug in question (see the ‘Courts’ subsection of ‘Overview of typical reactions’). If the quantity is negligible, there is some possibility that the act will be classified as a ‘petty offence’ according to paragraph 2 of the NSL, in which case the penalty is likely to be a fine. If the quantity is larger, the offence will be classified as a ‘narcotic drug offence’ according to paragraph 1 of the NSL. The

punishment then depends on the circumstances of the individual case. The most probable outcome is either imprisonment or probation. Since both these sanctions can be applied when the accused has prior convictions (recidivism), the choice between imprisonment and probation will be based on the amount of the drug. If the accused is found guilty of a first-time narcotic drug offence, a conditional sentence (combined with a fine) is a realistic outcome.

Use/possession in private of ‘dangerous’ drugs

If the amount of the drug concerned is small, this offence is usually classified as a ‘petty narcotic drug offence’ according to paragraph 2 of the NSL. The typical procedure is as follows ⁽¹¹⁰⁾.

Police

The police response is, in principle, the same as described for ‘very dangerous’ drugs. The legal option for the police not to record trivial offences (paragraph 9, *Polislagen*) is not applied, in practice, for drug offences. An on-the-spot fine is also out of the question. This means that the majority of drug offences which concern ‘dangerous’ drugs are subject to preliminary investigations.

Prosecution

Since simple use/possession of ‘dangerous’ drugs (such as cannabis) is classified as a ‘petty drug offence’, there is considerable scope to waive the prosecution or apply a summary penalty order. The typical outcome of a preliminary investigation in such cases is the imposition of a fine by the prosecutor by means of a summary penalty order. No further action consisting of a waiver of prosecution is a frequent outcome, but the majority of such cases involve the situation where the suspect has been sentenced (or is expected to be sentenced) in another trial and the sanction imposed (or expected) is considered sufficient for the current offence.

⁽¹¹⁰⁾ However, if the amount of the drug is larger, the offence is classified as a ‘narcotic drug offence’ according to paragraph 1 of the NSL, in which case the procedure described for use/possession in private of ‘very dangerous’ drugs applies.

Courts

The typical outcome in court for cases of simple use/possession of 'dangerous' drugs is a fine. When the offence was committed by a minor, the typical sanction is committal to special care (Chapter 31, paragraph 1, *Brottsbalken*).

Use/possession in public of 'very dangerous' drugs

Swedish law does not distinguish between use/possession of 'very dangerous' drugs in private or in public. In other words, whether the offence occurs in private or not has no legal relevance at all, or certainly negligible relevance in comparison with other criteria (the quantity and nature of the drug). For this reason, the same procedure applies as described for use/possession in private.

Use/possession in public of 'dangerous' drugs

The same applies as for 'very dangerous' drugs.

Retail sale of 'very dangerous' drugs in public or private (either for use together or for users who buy and depart)

This act constitutes either a 'narcotic drug offence' or a 'serious narcotic drug offence' according to paragraphs 1 and 3 of the NSL respectively. The classification will depend on the amount and/or nature of the drug.

Police

The usual and most frequent procedure (in almost 100 % of all reported offences) is initiation of preliminary investigations. Only those offences which are impossible to prove are not investigated.

Prosecution

The usual outcome, in practically 100 % of cases, is that the case is brought to court. In a few cases, prosecution may be waived.

This waiver is based on Chapter 20, paragraph 7, point 3, of the RB (i.e. sentencing for another offence is considered sufficient).

Courts

The outcome in the courts depends, first of all, on whether the offence in question is classified as a 'serious narcotic offence' or not. The punishment for such an offence is imprisonment in almost 100 % of cases. The main criteria for classifying an offence as 'serious' or 'normal' are the amount and type of drug.

If the offence is not found to be a serious one, imprisonment is still the most probable outcome (70 %). The next most frequent outcome is probation (20 %). A combination of probation and other measures (committal to care, community service, etc.) occurs occasionally.

Retail sale of 'dangerous' drugs in private or public (either for users who buy and depart or for use together)

This offence may constitute 'petty', 'normal' or 'serious' drug offences according to Swedish law. The determining factors are the quantity and nature of the drugs involved. The probable classification in practice will be 'normal' (paragraph 1 of the NSL).

Police

The most frequent measure in this case will be initiating of the preliminary investigation. Only those offences which are impossible to prove are not investigated. The police have no recourse to no further action in relation to narcotic drug offences. However, a situation similar to charge reduction may occur if a suspect can be convicted of possession/use of drugs but not of dealing, even if it is obvious that dealing has taken place. In such a case, it is possible that the police will be satisfied with what it is possible to prove. This is, in fact, a variant of the situation that occurs when an offence cannot be proved and is accordingly not investigated. It is conceivable that the ability to prove that an offence has taken place may differ according to the circumstances.

Prosecution

The most common outcome of the preliminary prosecution is that the prosecution refers the case to court (approximately 90 % of such offences handled by the prosecutors). Only retail sale offences that are classified as 'petty' and minor 'normal' ones can be punished by means of a summary penalty order. A waiver of prosecution because the offence is a trivial one is, in principle, out of the question.

Courts

The majority of cases of retail sale result in imprisonment (over 70 %), followed by probation and conditional sentencing. In 1997, 10 % of convicted offenders were sentenced to a fine. Such fines are only applied, in principle, to offences classified as 'petty'.

Shoplifting

There are no statistics to show what percentage of shoplifters⁽¹¹¹⁾ are drug users. The fact that the offender is a user does not affect how the case is handled during the preliminary investigation. The measures applied are the same. The only exception is the option to sentence the offender to probation in combination with so-called 'contract care' (committal to care). However, this sanction is intended as an alternative to imprisonment, and this sanction does not apply to shoplifting. In fact, no users convicted of shoplifting were sentenced in this way in 1997.

Police

The most frequent course of action taken by the police is to initiate preliminary investigations. However, in a significant number of shoplifting offences, the police authorities abstain from further action according to paragraph 9 of the *Polislagen*.

⁽¹¹¹⁾ The offence in Swedish law that corresponds to 'shoplifting' as described in this paragraph is *snatteri* (Chapter 8, paragraph 2, *Brottsbalken*). However, *snatteri* also includes other trivial property offences as well as shoplifting.

Prosecution

The prosecutors refer shoplifters to court in a minority of cases (approximately 40 %). Fines are imposed for 40 % of shoplifting offences and prosecution is waived in 15 % of cases.

Courts

The great majority of cases that reach the courts result in a fine. Other sanctions (such as probation or imprisonment) can be applied, but this only occurs infrequently. However, since probation and imprisonment are usually ordered in cases of recidivism, it is possible that drug users are over-represented in this group.

Burglary

The procedure for burglary by a drug user does not differ from the procedure for anyone else suspected of the crime (it is regarded as theft in all cases according to Chapter 8, paragraph 1, of the *Brottsbalken*).

Police

The police usually initiate preliminary investigations for all cases of burglary.

Prosecution

Most burglaries are subjected to prosecution in the courts. A fine can be imposed by the prosecutor, but this rarely occurs (in less than 1 % of cases).

Courts

It is very difficult to estimate the outcome of the court procedure as far as drug users are concerned. As mentioned above, the fact that the defendant is a user is irrelevant. However,

since burglars are very often recidivists, the probability of being sentenced to imprisonment or probation is much higher for this group than for some other groups. This is also true for probation in combination with so-called 'contract care', which is intended for drug-related offences. This sanction is most frequently applied in relation to road traffic offences (mainly alcohol-related), assaults and theft. However, this sanction is used fairly infrequently.

Stealing from a person in the street (without causing injury)

This offence is treated in the same way as burglary.

Stealing from a person in the street (causing injury)

Swedish law classifies this offence as robbery (Chapter 8, paragraphs 5 and 6, *Brottsbalken*). The situation is the same as for the previous three offences (described above). There is no distinction made when an offender is a drug user.

In general, the police initiate preliminary investigations in such cases and the prosecutor refers the case to court. Waiving of prosecution and summary penalty orders are not an option for robbery.

In the courts, approximately 50 % of those convicted are sentenced to imprisonment and 30 % to probation. In some cases (10 %), probation is imposed in combination with 'contract care'.

Common EU standards on prosecution of drug users

What should happen in practice

It is generally agreed in Sweden that actions taken by the legal system in relation to drugs should be proportional to the harm it seeks to prevent. There are, however, very different views concerning the seriousness of the drug problem and the most effective way of fighting against its spread.

On the one hand, the government⁽¹¹²⁾, the National Institute of Public Health⁽¹¹³⁾, the Social Welfare Board⁽¹¹⁴⁾ and other authorities (especially the police) emphasise the seriousness of the drug problem and the need to prevent (at all costs, say opponents) it from spreading. Repressive methods (above all, criminalisation) are preferable, according to this opinion. However, this attitude does not necessarily emanate from a belief in the need to punish drug users so much as the need to have the control instruments which criminalisation makes possible (e.g. urine testing etc.). The motivation of this policy is mainly ideological, and not so much based on the facts. Anyway, this position is widely supported in public opinion and by a voluntary organisation, the National Association for a Drug-Free Society⁽¹¹⁵⁾. The overall aim, stated also in a governmental memorandum, is defined as a 'drug-free society'.

On the other hand, there is a relatively small group of researchers in criminology, especially at the Stockholm University [28], who are critical of what they call the one-sided and narrow-minded repressive policy concerning narcotic drugs. This group is active around the magazine *Oberoende* ('Independence', or, maybe better, 'Freedom from addiction'), published by the National Association for Aid to Drug Abusers [29]. The main arguments against the official policy can be summarised as follows.

- The repressive policy of today violates personal integrity to a degree which is out of proportion in relation to the seriousness of drug offences defined as 'normal' (80 % of all prosecuted drug offences concern use per se).
- In pursuing this one-sided repressive policy, treatment of drug users has been sacrificed.
- This policy, in spite of the fact that it has been practised and intensified for at least 20 years, has not had any positive results. Abuse of drugs in society has increased (Lindström, 1998; Lenke and Olsson, 1999).

⁽¹¹²⁾ The government policy is formulated in the government's memorandum, 'En narkotikapolitisk redogörelse: regeringens skrivelse 1997/98', 172 ('Report on narcotic drugs policy').

⁽¹¹³⁾ Folkhälsoinstitutet.

⁽¹¹⁴⁾ Socialstyrelsen.

⁽¹¹⁵⁾ Riksförbundet Narkotikafritt Samhälle (<http://www.rns.se>).

The critics of the repressive drug policy have proposed that the utopian slogan 'drug-free society' be abolished and a more realistic policy practised, aimed more at treatment of users than prosecution (Tham, 1998). The position of this group of critics is a difficult one.

There is, of course, a strong connection between the ideological climate in relation to narcotic drugs in a society and the everyday activity concerning, in this case, the criminal prosecution of drug offences. With respect to the very clearly defined official policy, which is subscribed to by most of the key people implementing the policy, it was not difficult to obtain unequivocal statements concerning priorities in the prosecution of narcotic drug offences.

Changes to the legal framework

All forms of illegal handling of narcotic drugs are criminalised in Sweden. It would be hard to find something that could add to the substantial criminal law. Those who advocate the repressive approach are concentrating, at present, on two procedural questions.

It was proposed, in a research document commissioned by the government, that electronic surveillance (bugging) should be introduced into Swedish law [30]. The proposal was explicitly motivated in reference to the fight against drug crime.

The second idea, which is under public discussion, concerns the possibility of the police authorities taking urine samples from young people under the age of 15 in order to determine if they have used narcotic drugs. According to Swedish law, minors under 15 have no criminal liability. This means that the police could not take any measures according to criminal procedural law, which is considered to be a problem in the fight against drug crime. A public debate of this question has just started.

Key issue of special concern

There is one aspect of Swedish practice concerning prosecution of drug offences that deserves special attention. Swedish criminal

policy is, in general, relatively restrained as far as the use of imprisonment is concerned. This is, however, absolutely not true in relation to narcotic drug offences. The frequent use of imprisonment as a penalty, even for quite trivial drug offences, is clearly influenced by the abovementioned ideological climate in Swedish society and the consequent low level of tolerance towards this category of offences. This inconsistency in criminal policy would be even more obvious if comparison were made with other types of offences. Moreover, it appears from this study that, while imprisonment is used for drug offences much more frequently than for other offences, the two sanctions that are specifically intended for drug users (probation in combination with 'contract care' and committal to treatment according to the Act on the Treatment of Drug Abusers) are used relatively rarely, particularly by the prosecution. There are a number of possible explanations for this situation, but one could be that the sanctions are not well designed.

One of the key issues of Swedish criminal policy as far as prosecution of drug offences is concerned, especially offences of use/possession per se, is that there is a need, first of all, to limit the use of imprisonment and, secondly, to introduce new measures specifically designed for this category of offenders.

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Notes

- [1] SFS, 1962, 700 (i.e. *Svensk författningssamling*, 'Swedish Law Report', 1962, No 700).
- [2] SFS, 1968, 64.
- [3] SFS, 2000, 1225.
- [4] SFS, 1992, 860.
- [5] SFS, 1991, 1961.
- [6] SFS, 1999, 42.
- [7] Paragraph 7, SSL; paragraph 3, NSL
- [8] Proposal to the parliamentary session, 1992/93, 142, pp. 16–17.
- [9] SFS, 1993, 211.
- [10] SFS, 1942, 720. The code came into force in 1948.
- [11] SFS, 1964, 167.
- [12] SFS, 1988, 870.
- [13] SFS, 1990, 52.
- [14] SFS, 1984, 387.
- [15] Official Code of Statutes of the Prosecutor-General (RÅFS), 1997, 12.
- [16] SFS, 1980, 620. SFS, 2001, 453.
- [17] SFS, 1988, 870.
- [18] SFS, 1990, 52.
- [19] These rules are part of the provisions of Chapter 23, paragraphs 1 and 4, RB.
- [20] SFS, 1991, 2047. The law which provides for on-the-spot fines is the *Ordningsbetskungörelse* ('Ordinance on fines imposed by the police'; SFS, 1968, 199).
- [21] SFS, 1988, 870.
- [22] The nature of the individual sanctions and conditions for imposing them are regulated in chapters 25 to 28 of the *Brottsbalken*. The rules for determining the sanctions in each case are mainly provided in chapters 29 to 30.
- [23] Chapter 31, paragraph 1, *Brottsbalken*.
- [24] Chapter 32, paragraph 2, *Brottsbalken*.
- [25] SFS, 1991, 1129.

- [26] Chapter 31, paragraph 3, *Brottsbalken*.
- [27] Interview with Bengt Persson, Police Officer at Narcotic Drugs Division, Gothenburg.
- [28] Henrik Tham, Hanns von Hofer, Leif Lenke, Ted Goldberg, Sune Sunnesson and others.
- [29] Riksförbundet för Hjälp åt Narkotika — och Läkemedelsberoende (<http://www.rfhl.se>).
- [30] *Svenska offentliga utredningar* (SOU; Swedish official reports), 1998, 46.

Philip Bean

Outline of the legal system of England and Wales

Type of system

England and Wales operate under a common-law system; that is to say, a system of law, which is judge-made, that has evolved in areas not covered by legislation. For example, murder is a common-law crime developed by judges and not defined by the criminal code. In modern times, judges can no longer create new offences under common law, but they can still apply common-law principles to certain offences provided that they are consistent with legislation enacted by parliament.

It would be wrong to see the common law as grounded in a stable set of principles or established doctrines. A more realistic view is that the arguments and assumptions which influence criminal law sometimes conflict, and are sometimes invoked selectively. In practice, this means that it is difficult to talk of a specific set of procedures which will be used whenever certain conditions apply. It is for this reason that it has often been difficult to give other than tentative answers to some of the questions posed by the study. Moreover, judicial interpretations and decisions will vary.

Generally speaking, common law and the traditional offences, including drug offences, that are penalised by statute require proof of *mens rea*. This Latin term indicates — and again only generally speaking — that a person should not be convicted unless it can be proved that he/she intended to cause harm, or that he/she knowingly risked causing harm. Beyond the *mens rea* requirement, which may differ in its precise form from crime to crime, there is a range of possible defences against criminal liability, so that even people who intentionally inflict harm may be

acquitted if they acted in self-defence, while insane, under duress and so on. Being under the influence of alcohol or other drugs is not a defence.

The police and other enforcement agencies, including HM Customs and Excise, have considerable discretion. They are not obliged to prosecute every person against whom they have sufficient evidence, and they are not obliged to actively look for offenders whenever they suspect crimes are being committed. On the other hand, they cannot prosecute unless the offence charged is actually laid down by statute or common law.

This level of discretion again makes it difficult to answer many of the questions posed. Law-enforcement agencies, including the courts, operate and base their decisions on what they call ‘the circumstances of the case and the character of the defendant’. So, for example, if an offender has previous convictions or has committed a second offence, whether of the same type or not, this may or may not be considered important by the police, the Crown Prosecution Service (CPS) or the courts. It is likely that it will be, and generally it is, but it need not be. British justice has always claimed that it must respond to local conditions and avoid what is called ‘vending machine justice’, which means putting in some standard indicators and coming out with a standard sentence.

Also, under a common-law system, the courts, in the person of a magistrate, do not undertake any of the prosecution — except in Scotland, through the Procurator Fiscal. The courts hear the evidence, decide on the suspect’s guilt and pass sentence. The courts are not involved in diversion.

Overview of possible reactions and their legal basis

For convenience, the term ‘diversion’ is used here as a generic term which includes no further action and down-tariffing. Diversion is not new, going back at least to Henry VIII and probably earlier. Traditionally, diversion offered some protection to persons from the consequences of their wrongdoing. In its modern form, it

could allow the CPS to discontinue a case 'where the CPS is satisfied that the probable effect upon the defendant's mental health outweighs the interests of justice in that particular case' (quoted in Home Office, 1990, p. 142). Or it could allow the police not to proceed with the charge and to divert the offender into treatment, or anywhere else thought to be appropriate. It could also allow offenders who have been sentenced to be transferred out of the penal system into the treatment services and, on occasion, to be transferred back if successful treatment occurs, i.e. before the sentence is served. However, and this is the nub of the debate, 'The government recognises that this policy can be effective only if the courts and criminal justice agencies have access to health and social services' (Home Office, 1990, paragraph 2).

The main routes by which offenders can be diverted out of the criminal justice system are as follows:

- the police take no further action or formally caution the offender;
- the Crown Prosecution Service chooses not to prosecute or to discontinue a prosecution;
- the courts use their powers to give bail (or make non-custodial penalties, although this is not, strictly speaking, diversion but is often included as such); or
- the courts and others use powers under bail and arrest referral schemes, or, on receipt of psychiatric advice, remand a person to hospital for assessment or treatment and dispose of the case by way of a hospital or guardianship order.

Many of the largest and most significant diversion schemes involve the police, who may divert offenders even before they are taken to the police station. These forms of diversion are more commonly referred to as cautions, of which there are two main types, the informal and the formal.

The informal caution

The right of a constable to take no action against certain types of offenders is held under common law — and can be asserted even

against the wishes of his chief constable (who is, in fact, also a constable). Most citizens have been subject to an informal caution at one time or another, usually for minor motoring offences. There are no data on the numbers of informal cautions issued annually, nor for individual police forces. If the person cautioned requires treatment, this strategy offers no health care, and, if the person is homeless, it simply puts him or her back on the streets. The police have no duty to look at the community care needs of such an individual, and little time or expertise to do anything on an informal basis (Jones, 1992). Informal cautions do little to change the offender's plight, status or whatever, nor are they intended to.

The formal caution

In England and Wales, the police may formally caution an arrested offender (this procedure is not used in Scotland). Cautioning is essentially an administrative act based on the discretion of the police and has no statutory recognition. Home Office cautioning guidelines are contained in Circulars 59/90 and 66/90 (paragraph 4(iii)), but local force policies standing orders are just as important. For example, the cautioning rates of the 43 police forces in England and Wales in 1992 for drug offences varied widely, ranging from 16 % in West Yorkshire to 77 % in Kent. Such differences can be explained by the policies of the local police, who act according to local conditions (Home Office, 1994).

Formal cautioning has three main objectives: (i) to deal quickly and simply with less serious offences, (ii) to divert such offences from the courts and thereby reduce the burden on the criminal justice system and (iii) to reduce the chances of reoffending (Home Office Circular 59/90).

The following three conditions must be met before a caution can be administered:

- there must be evidence of the offender's guilt sufficient to give a realistic prospect of conviction;

- the offender must admit the offence; and
- the offender (or, in the case of a juvenile, the parents or guardian) must understand the significance of a caution and give consent to being cautioned.

When the first two conditions are met, the police officer concerned is required to consider the nature of the offence, the likely sentence, the offender's age, previous criminal history, attitude to the offence, the views of the victim, and the state of the offenders' physical or mental health before issuing a caution (Home Office Circular 59/90, p. 49)

Home Office Circular 66/90 sets out government policy for the two types of caution. For the informal caution, paragraph 4(iii) of the circular states:

'If the criteria for a caution (formal) are not met the police should consider whether any action needs to be taken against the suspect. In some cases the public interest might be met by diverting persons from the criminal justice system and finding alternatives to prosecution such as admission to hospital under Section 2 or 3 or to guardianship under Section 7 of the 1983 Act or informal support in the community by Social Services Departments.'

For the formal caution, the circular states:

'Where it is suspected that a person may have committed an offence, consideration should be given — in consultation with the Crown Prosecution Service where appropriate — to whether any formal action by the police is necessary, particularly where it appears that prosecution is not required in the public interest in view of the nature of the offence. If the suspect is able to meet the requirements for a caution to be administered he might be cautioned.'

Cautions offer the most likely opportunity for future development, for cautions operate at the point at which treatment can be provided. Some agencies talk of 'the need to find a solution to the

problem of people with problems being prosecuted inappropriately' (Mind, 1993), but that avoids the difficult question: who should be diverted to what?

Diversion through the Crown Prosecution Service

This is less used but equally important. Section 23(3) of the 1985 Prosecution of Offences Act provides the Crown Prosecution Service with the power to discontinue criminal proceedings where this would be in the public interest.

The power to discontinue under Section 23 is available only during the early stages of the case in a magistrates court and must be effected before the trial, or before committal to a crown court (NACRO, 1993, p. 10). The code also draws attention to the possibility of obtaining a medical report where the strain of criminal proceedings may lead to a worsening of the accused's mental health — noting that sometimes there may be additional strain due to the discovery of the offence, and noting, too, that the accused's mental state will be relevant when any later issue of *mens rea* or unfitness to plead is considered. Information from reports, including those by probation officers, may prompt the use of discontinuance. Powers given to the CPS to terminate proceedings are either under an application to the court to withdraw the case, or to offer no evidence and invite the court to acquit or discharge the defendant.

It is important that the CPS works with other agencies, and collaborates with them. The CPS is highly dependent on the police, probation and psychiatric services, etc. for information, particularly where the offender is being offered psychiatric treatment. For example, a psychiatrist may want to recommend to the court that an offender be dealt with in the magistrates court in order to allow a hospital order be made. (This raises questions as to whether the CPS should discontinue proceedings altogether, and whether a conviction should remain on the offender's record. Such a decision must be made 'in the public interest' — the CPS may want the conviction to stand if the offence involves violence.) Or the police or probation service may want to suggest a particular outcome, given the offender's condition. The CPS

should know this, and a key feature of recent CPS policy has been an interest in working together with other agencies to improve practice. It is now formally stated in the influential Home Office Circular 66/90 (1990) that 'the development of effective liaison with health and social service authorities will play an essential role in developing satisfactory arrangements to respond constructively in such cases' (paragraph 4(iii)).

There are no figures available on the numbers or types of offenders (or offences) where the CPS used their powers. Accordingly, it is difficult to know how to assess the role of the CPS in the overall scheme of things. Some critics see diversion as another excuse for the CPS to use their power to discontinue — in a study of Leicester Magistrates Court, over 40 % of all cases were discontinued (Bean, 1998). Critics adopting a less cynical view see the role of the CPS as crucial but underused. If diversion is to be a feature of government policy, then the CPS has an important role to play. The question is, how best to perform that role? There are many possibilities, one of which is to expect greater cooperation from other agencies, including the police (and the police surgeons, who could inform them of their assessments). Another possibility would be to clarify their own position so that other agencies know what to expect of them.

There are no statutory provisions for courts to divert offenders. The provision under which the courts use diversion was intended for adjournments and remands. Adjournments allow the offender to be diverted out of the criminal justice system more easily, whereas remands retain the offender within the system (so that a decision can be made for sentence, or for trial). Consecutive or continuous adjournments are not permitted.

An adjournment *sine die* by the magistrates court allows the case to be reopened if required, although in practice this rarely occurs. Remands usually involve relatively short periods, either in custody or on bail, where the aim is to obtain more information, usually through a psychiatric report and/or a probation report. Decisions can then be made which could lead to a *sine die* adjournment, or a sentence of which treatment forms a part, such

as a probation order with a condition of treatment, or a hospital order. (These sentences are sometimes mistakenly seen as diversions, but they do not involve the offenders being diverted out of the criminal justice system.) Remands and adjournments thus become closely interwoven.

Treatment may be as an in-patient or as an outpatient during an adjournment or remand, although, if the offender fails to report or fails to keep appointments, it is unlikely that the magistrates will continue their support (James, 1996, p. 23). The range of facilities and the types of schemes being offered are wide.

Bail and arrest referral schemes are used where an offender requires assessment or treatment, in which case an early investigation of the options by way of bail can be of assistance. Bail schemes are usually administered by the probation service, which may involve the services of a consultant psychiatrist. The accommodation is usually in local bail hostels (the West Midlands Probation Service in Birmingham has one such hostel). If the offender is on police bail, the police may choose not to prosecute if the offender is being successfully diverted; the police will sometimes refer to the CPS for advice on this (NACRO 1993, p. 15).

There are various types of arrest referral schemes, some of which may involve nothing more than supplying the offender with an address to seek assistance or accommodation; others involve treatment agencies attending the police station and offering advice on treatment; still others offer incentives contingent on receiving treatment. There is no information on the number of such schemes or on their effectiveness.

Second offences

Given that there is a high level of discretion available, the police, the CPS and the courts have no difficulty considering or taking into account a second offence of the same type, whether more serious or not. The use made by the police of cautions varies enormously: in Liverpool, it is possible to receive a third caution for a third offence of possession of heroin, whilst in rural

Wiltshire a first offence of possession of cannabis will receive a sentence. What can be said as a general rule is that a second or subsequent offence will produce a greater penalty, but this is only a general rule and will vary according to many factors.

Current practice

Only 10 % of drug offenders in England and Wales receive an immediate custodial sentence, and this figure has remained steady for over a decade. Such sentences will be for the most serious offences, such as 'possession with intent to supply' or 'supplying dangerous drugs'. The quantity of drugs involved will usually be large, so that prison sentences are reserved for the serious traffickers. There is no data on the sentencing of other offenders who may be drug users.

Use/possession

Drugs considered to be for personal use, albeit where the use is in private and where the amounts are small, will generally attract a fairly light sentence.

- The police may decide to caution if it is a first offence, and may also caution if it is a second or third offence, 'depending on the circumstances of the case and the character of the offender'.
- The CPS may also decide to discontinue the case, if they believe prosecution is not in the public interest.
- The courts will almost certainly give a non-custodial sentence, which may, if the circumstances are appropriate, include a condition of treatment if a probation order is given.

As a general rule, the less dangerous the drug is, the greater the likelihood that the offender will be cautioned.

No distinction seems to be made, whether by the police, CPS or courts, as to whether the drugs are for public or private use, except that, if they are for public use, there may be a suggestion

that supplying drugs was being considered, in which case there would be a slightly stiffer sentence.

Retail sale

Supplying drugs, or intending to supply, always carries a more severe sentence. If, however, the user can convince the respective authorities that dealing was only on the basis of 'helping out a friend' who was also a user, then the sentence would be less than if seen as professional dealing. Even so, the police and the CPS would expect a case of this nature to go to court.

Dealing in private or dealing in public carries the same level of opprobrium.

The police, the CPS and the courts take dealing seriously and, if the amount involved is large, irrespective of the drug (cannabis or heroin), the sentence would be severe. The longest sentences are reserved for dealers, whether they are couriers or not. A courier bringing into Britain a kilogram of heroin could expect 10 years in prison. A high-level trafficker could expect 15 years or 20 years, depending on the amounts involved.

Property crimes

The reaction of the police, the CPS and the courts to relatively minor property crimes committed by drug users is difficult to assess. Drug users say that they try not to disclose their drug use, as (i) it will prevent them getting bail and (ii) it will produce a heavier sentence. There is no evidence, other than anecdotal, for this. That the police, CPS or the courts may attach a condition of treatment to a probation order is one likely result, so in that sense there is some evidence to support the view that drug users will get something of a heavier sentence. This apart, a first offence for a minor property crime would invariably lead to a caution. A subsequent offence could lead to a fine, a probation order or even prison if the offender was persistent.

Burglary is always treated seriously, whether it is committed by a drug offender or not. A custodial sentence is likely, three months for a first-time offence. The police and CPS would not intervene.

If the victim was frightened, the charge would be robbery, in which case a custodial sentence would be expected. The police or CPS would not intervene.

Common EU standards on prosecution of drug users

It is difficult to say what should happen ideally, or what should be common standards on prosecution of drug users.

Drug users are, in one sense, no different from other offenders and require the same standards of guilt and procedures to be applied as for others. They differ in that they tend to be persistent offenders and they also often require treatment as part of their sentence. There have been numerous debates in Britain about how best to proceed. Some, it has to be said, are more political than others, mainly concentrating on cannabis, whilst others have looked more closely at promoting better treatment facilities. It is probably fair to say that the police have lost their appetite to prosecute small-time drug users, whether as street users or not. The probation service is also concerned about how best to deal with drug users, who take up a disproportionate amount of their time and resources.

Changes to the legal framework

It is difficult to know what additional guidelines are needed. Treatment facilities are in short supply; better facilities here would help. However, my own view is that the police, the CPS and the courts do not make enough effort to confiscate drug users' assets. This is an area which needs more attention.

There are no compelling reasons for any additional legal basis. There are numerous reports on cannabis and whether it should be decriminalised and this remains a political question. The police see no reason to change the existing system except to become more efficient, and the CPS and the courts think likewise.

The main area for concern relates to asset seizures. Our research suggests that not enough attention is given to this. The police afford it low priority and existing legislation is too slow and too cumbersome, allowing the drug offender to dispose of his assets before they are seized by the courts. Nor do the courts have a clear view of their role, in what could be a vital weapon against high-level drug dealing.

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