

Legislations on narcotics in Europe in 2016: common points and differences

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On 19 April this year, during the United Nations General Assembly (UN-GASS) special session, the UN proposed a "non-binding" resolution to make more room for the health and social sector and prevention than strict repression in the management of the drug "problem". Back in 2001, Portugal decided to replace penal sanctions with medical/social measures in response to substance use offences and certain cases of drug possession (see below). Uruguay along with certain American States (such as Colorado, Alaska and Washington State, for example) legalised¹ cannabis in 2013.

European legislation, although presenting many similarities, does not have a uniform stance towards the repressive approach to the drug phenomenon. What differences and common elements can be identified by comparing

the different legislation? What is the position of the legal systems based on the scale ranging from health and social measures to the punitive approach? Which have the most severe criminalisation regimes and which are the most lenient?

This report is structured in three parts. It first presents the international legislative framework established by the United Nations and the

1. Depenalisation is defined as a process "tending to reduce the application of penal sanctions for a determined behaviour, with this reduction potentially leading to them being purely and simply scrapped" (Obradovic, 2016). Decriminalisation is defined as "the process tending not only to abolish the application of all penal sanctions for a determined behaviour, but to abolish its very status as a 'crime' (in the broad sense), i.e. a criminal offence" (Van de Kerchove, 1987). A substance is legal when its use, possession and resale are not prohibited by law.

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European Union. It then compares the different legal systems in the 28 countries of the European Union and Norway. In conclusion, the report focuses on the special case relating to new psychoactive substances (NPS), the development of which is putting the legislative systems in the different countries to the test.

THE INTERNATIONAL FRAMEWORK: THE 1961, 1971 AND 1988 CONVENTIONS ON NARCOTIC DRUGS

Global drug control was gradually set in place from the beginning of the 20th century further to the deregulation² of drug use in the 19th century (Castel and Coppel, 1991). However, it was only from the 1960s that a framework was introduced which inspired the laws on narcotic drug offences (DLO) in force in the 29 European countries studied in this report. This is laid down in three United Nations treaties: the 1961 Single Convention on Narcotic Drugs (amended by the 1972 protocol), the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

These conventions are binding on the signatory States and oblige them to transpose many asserted principles into their legislation. In particular, signatory States are required to draw up lists of narcotic substances at the very least including those stated in these treaties; to create organisations for the control of these substances; to adopt a number of legal and health measures destined to fight against possession and traffic, and reduce the "spread of the illicit use of drugs" (1961 Convention, Resolution III). While these texts unanimously aim to control the narcotic drugs market, users, however, face more ambivalent measures.

The inaugural Convention of 1961 amended by the 1972 Protocol presents the objective of creating and organising international cooperation between the countries, collectively defining a number of measures to combat and prevent the "evil" of drugs - as their use leads to "personal degradation and social disruption" (Resolution III). In more practical terms, this involves limiting use to medical and scientific purposes (Article 2) and subjecting production and importation/exportation to a system of control and prior authorisation (Article 30 and 31).

It draws up 4 lists of substances considered as narcotic drugs "according to their therapeutic value, risk of abuse and health dangers" (EMCDDA, 2005, p. 5). The 1961 Convention classes cannabis, heroin and cocaine among other substances in Schedule I, as "liable to be abused or have ill effects" (Article 3-5); and in Schedule IV (except for cocaine), "having regard to the particularly dangerous properties of a drug so included" (Article 2-5) and their limited medical or therapeutic value.

It also defines a group of offences. Article 36-1 stipulates that: "each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention (...) shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty."

2. During the 19th century, substance use seemed to extricate itself from control by cultural, professional and religious systems.

Methodological reference points

The information presented in this report is taken from the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) website. It presents the main elements relating to European legislation (<http://www.emcdda.europa.eu/topics/law/penalties-at-a-glance>) concerning the 28 countries of the European Union and Norway*. Furthermore, the annual reports, provided by all of the European focal points, offer detailed information notably on the national legal framework. Cross-matching of these two English-language information sources made it possible to clarify the legal frameworks specific to the 28 countries of the European Union and Norway.

The aim of this report was to focus on the content of the legislation relative to narcotics (laws, decrees, but also regulatory texts offering guidance on criminal policy, which exists in certain countries) without examining the aspects relating to the practical implementation thereof.

* Certain data concerning Turkey are also reported, although to a limited extent in terms of legislation, which is why the country was excluded from this report. Likewise, the European Monitoring Centre for Drugs and Drug Addiction does not record any data on Switzerland, which explains why this country is not included in this study.

The 1961 Convention therefore establishes the very clear prohibition concerning possession and traffic, which must be severely punished. Conversely, it does not oblige the signatory countries to class the use of narcotic drugs as punishable offences.

It also authorises the adoption of educational and health measures in the range of legal responses to the above-mentioned offences. The text perceives these measures as an addition to conviction (Article 36-1b). The intervention model asserted in the 1961 Convention, nonetheless, remains that of abstinence, presented as "one of the most effective methods of treatment for addiction is treatment in a hospital institution having a drug free atmosphere" (Resolution II).

The 1961 Convention lastly sets in places the INCB (International Narcotics Control Board)³, an authorised body "to promote the application by governments of the provisions of the drugs treaties" (EMCDDA, 2005, p. 8). Since then, it publishes opinions on the way in which the different countries apply the ratified treaties and has competence to "call upon the Government concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of this Convention" (Article 14 of the 1961 Convention).

The 1971 Convention proposed a framework for the production, trade in and distribution of a number of "psychotropic substances", classed in 4 schedules. These substances are not necessarily intended to be perceived as "narcotic" substances by the signatory States. The Convention nonetheless asks that their production be solely authorised by a system of "licences", and that their exportation and importation be restricted or, indeed, prohibited and that they be dispensed only on medical prescription, for the substances listed in Schedule I, II, III (Article 2 of the 1971 Convention). In 1971, the United Nations Fund for Drug Abuse Control (UNFDAC) was also created, intended to provide budgets for action against illicit traffic and the creation of educational and preventive programmes in particular.

The 1988 Convention more specifically aims to establish and consolidate international cooperation against illicit traffic (in terms of extradition, mutual legal and police assistance, control of substances used in the manufacture of narcotic drugs, together with the control of importation and exportation). It reasserts a number of elements found in the previous conventions while taking a firmer stance on certain positions. It notably obliges the signatory States to perceive as "particularly serious" (Article 3-5) traffic offences involving "an organized criminal group" or taking place in aggravated circumstances, such as with the "use of violence", in certain positions, involving minors or in certain public spaces. The text also establishes the control of acquisition and possession for personal use, asking signatory countries to assign these a criminal offence status "subject to its constitutional principles and basic concepts of its legal system" (Article 3-2). The Convention reasserts the role of health and educational measures in the penalty –as an alternative or in addition (3-4), while nonetheless considering that substitute measures shall apply only to offences "of a minor nature".

COMPARATIVE APPROACH TO EUROPEAN LEGISLATION

In keeping with the spirit of the international conventions, European legislation generally operates on a scale of penalties from use to aggravated illicit traffic. We will now study three cases which are particularly indicative of the way in which this legislation handles the diverse nature of drug-related offences: the case concerning users (by examining offences pertaining to use and possession), the case concerning aggravated illicit traffic, and the intermediate case concerning the "minor" possession/disposal/supply of narcotic substances, i.e. in a small quantity not for financial gain.

USERS: UNEQUAL LEGAL MEASURES IN EUROPE

Certain countries penalise users more leniently than others. This is apparent in the measures reserved for use and possession for personal use in the legal texts. Certain countries follow the international conventions and opt for an indirect criminalisation system, solely penalising possession for personal use. Others directly perceive use as an offence punishable by law.

3. However, the history of the INCB goes further back. Back in 1925, the League of Nations (LN) created the Permanent Central Opium Board in charge of control of the importation and exportation of substances considered to be dangerous. After the Second World War, the Commission on Narcotic Drugs, placed under UN control, monitored the results and application of the conventions. It also created two new boards: the Permanent Central Board and the International Narcotics Control Board (INCB). The 1961 Convention merged these two boards, leaving the INCB as the sole authorised institution to organise drug control.

Narcotics use

- Thirteen countries do not class use as an offence: Germany, Austria, Belgium, Denmark, the Netherlands, Italy, Poland, Czech Republic, United Kingdom, Ireland, Malta (except for use of opium preparations), Slovakia and Slovenia (see map 1). Possession alone constitutes an offence in these countries.
- Six countries only stipulate fines (penal or administrative) the amount of which generally ranges from EUR 100 (in Croatia for example, in the event of drug use in a public space) to EUR 30,000 (in Spain, notably for use in a public space): Bulgaria⁴, Croatia, Spain, Latvia, Lithuania and Portugal (see map 1).
- Nine countries penalise use offences with maximum penalties of deprivation of liberty: Estonia, Finland, France⁵, Greece, Hungary, Luxembourg (except for cannabis which is subject to penal sanctions without deprivation of liberty), Norway, Sweden and Cyprus (see map 1). In eight countries, these penalties are of a penal nature whereas, in Estonia, these are administrative in nature: use offences incur a fine of EUR 800 and detention of up to 30 days. Penalties for use can reach 5 years of imprisonment, except in Cyprus which makes provision for life imprisonment. This penalty may be associated with a fine. In France, for example, this can reach EUR 75,000 if the offence was committed by a person in public office, particularly while exercising their duties.
- Romania prohibits use in its legal texts but has not defined any specific penalties in terms of its punishment (see map 1).

Possession of narcotic drugs for personal use

Possession for personal use is prohibited in all European Union countries.

- Ten countries penalise possession by means of maximum administrative penalties or penal sanctions of deprivation of liberty: Austria, Cyprus, Estonia, France, Hungary, Lithuania, Norway, Romania, Slovakia and Sweden (see map 1). In the majority of these countries, this act falls within the scope of the criminal justice system, except in Estonia and Lithuania where it is penalised by detention (notably for a maximum of 30 days in Estonia). In France, the law does not make a distinction between possession for personal use or for illicit traffic, even though judges often make this distinction in practice. Article 222-37 of the French Penal Code prohibits the "transport, possession, supply, disposal, acquisition and illicit use of narcotic drugs, punishable by ten years of imprisonment and a fine of EUR 7,500,000".
- The legislation in the remaining 19 countries allows for a distinction between "minor" cases of possession, which incur administrative penalties or penal sanctions without deprivation of liberty, and other cases of possession: Germany, Belgium, Bulgaria, Croatia, Denmark, Spain, Finland, Greece, Ireland⁶, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Czech Republic, United Kingdom and Slovenia (see map 1). This distinction may result in either an increase of penalties or amendment to an illicit traffic offence – in "more serious" cases of possession. This may also entail switching from the administrative justice system to the criminal justice system.

In the majority of countries, the criteria used to define these "minor" cases correspond to the quantity or type of substance in possession. These can also be left to the discretion of the judge. Penalties generally range from the absence of prosecution (in Finland, the Netherlands and Poland, for example), a warning by the police (Denmark, Latvia, United Kingdom for the first offence, for example), to administrative penalties (such as in Italy for example, where penalties may involve suspension of driving licence, passport or residency permit, etc.), and other penalties of a financial nature but falling within the scope of criminal law (of up to EUR 2,500 in Luxembourg, for example).

4. Only the use of substances considered to be particularly dangerous (included in list 1) is prohibited by law and punishable by a maximum fine of BGN 2000 to 5000, no custody measures are envisaged.

5. Decree no. 2015-1272 of 13 October 2015, allowing recourse to penal transaction, is nonetheless in line with less stringent penalties for minor offences (punishable by a maximum of 1 year of imprisonment), including simple narcotic use. It thus allows public prosecutor's departments to have the offender pay a simple fine and avoid appearance in court.

6. From the third offence for cannabis possession, the penalties incurred involve imprisonment.

Among these countries: 7 have legislation stipulating special measures for cannabis possession: Belgium⁷, Ireland, Luxembourg, Malta, the Netherlands, United Kingdom and Czech Republic. In Luxembourg for example, cannabis possession is punishable by a fine of between EUR 251 and 2500.

The countries which define these "minor" possession cases according to the quantity of substance set limits in the majority of cases: either as average daily doses, or in grams, or in monetary value or based on a definition of "large" or "small" left to the discretion of the magistrate.

For instance, in Portugal, below a quantity corresponding to 10 days of average personal use (as defined in Article 2 of Law 30/2 000), the offence falls within the scope of the administrative justice system and the response is the same as for cases of use. Beyond this limit, the act falls within the bounds of the criminal justice system and is punishable by 1 year in prison and/or 120 days-fines. In the Netherlands, police investigation is not envisaged for cases of cannabis possession below 5 grams. As regards hallucinogenic mushrooms, the maximum tolerated quantity is 0.5 grams (dried) or 5 grams (moist). When small quantities of drugs "presenting an unacceptable risk"⁸ are discovered by the police in the context of personal use, the law stipulates that the penalty should be minimal or absent, as treatment is the primary target response.

To summarise

More than half of EU countries (18) have more lenient measures for drug users than the other countries, not applying penalties with deprivation of liberty for use or cases of "minor" possession: Germany, Bulgaria, Belgium, Croatia, Denmark, Spain, Finland, Italy, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, United Kingdom, Czech Republic and Slovenia (see map 1). However, this approach only concerns cannabis users in Belgium, Luxembourg, Ireland and the United Kingdom.

In contrast, the legislation in 6 countries stipulates maximum penalties with deprivation of liberty for offences involving drug use and possession, with no distinction being made between different types of cases: Cyprus, Estonia, France, Hungary, Norway and Sweden.

Users: individuals requiring penalties and treatment

In line with the international conventions in this respect, practically all European countries **(26) opt for the incorporation of health care liable to be prescribed either in addition to or instead of the penalty**. The only exceptions are Cyprus and Bulgaria. The 1992 Cypriot law provided for alternative treatment in specialist institutions, but has still not been brought into effect. Overall, Europe therefore shares this representation according to which drug users are at least partly victims of an overwhelming addiction, requiring medical and social support.⁹

Certain countries exclusively tend towards health and social-oriented measures for users. For example, in a very large majority of cases, Portugal replaces penal sanctions with health care (except when the quantity of drugs in possession suggests that the person could be involved in activities for financial gain). A number of countries nonetheless continue to refer to the alternative representation of a person requiring punitive measures, while also needing treatment. In short, as someone who requires treatment/support but who should also be punished. In fact, a good number of countries uphold the responsibility of the user in the decision to seek the treatment recommended by the justice system: they (often indirectly) penalise refusal to accept the treatment proposed by the judicial institution. Hence, in France, a compulsory drug treatment may be pronounced in the context of a supervised suspended sentence for individuals accused of drug-related law offences. If this obligation is not fulfilled, the penalty initially envisaged with the suspended sentence is then applied. In Latvia, individuals who voluntarily seek treatment before the verdict are exempt from penalties.

INTERMEDIATE CASES OF USERS WHO DEAL TO SUBSIDISE THEIR OWN PERSONAL USE

The legislation makes a distinction between small-scale supply and disposal and large-scale illicit traffic. The legal criteria defining this limit vary according to different legislation: this may include the quantity, subsidising of the dealer's personal use, or supply with a view to the buyer's personal use, as is the case in France.

7. From the third offence committed within a year of the second, this penalty may be amended to a prison sentence of between eight days and a month of imprisonment, together with a fine.

8. The Netherlands have created two lists of narcotic substances: list 1, comprising substances presenting an "unacceptable risk", commonly known as "hard drugs" and list 2, comprising "other drugs", otherwise described as "soft drugs".

9. This outlook was reasserted in the EU Action Plan on Drugs 2013-2016. (Council of the European Union, 2013)

■ In all European countries, supply offences are penalised more heavily than the use or possession of narcotic substances. These fall within the scope of the criminal justice system. The Netherlands is, however, the only country which authorises supply in coffee shops, in keeping with the recommendations on the subject (no advertising, sale of soft drugs only, do not cause any disturbance, do not sell to under 18s, do not sell more than 5 grams per day to the same customer).¹⁰

■ Aside from the Netherlands, most other European legislation allows for the special case of users who deal to subsidise their own personal use: it thus makes a distinction between cases of supply for financial gain, presenting a major danger in terms of public health and supply/disposal of small quantities of narcotic substances.

■ Nine countries have clear legislation for special cases of supply concerning small quantities and/or to subsidise personal use which is less heavily penalised (penalty not exceeding 5 years of imprisonment): Austria, Spain, Estonia, Greece, Hungary, Italy, Poland, Portugal and Sweden. In Hungary, for example, if the quantity of drugs offered can be estimated as "small", the maximum penalty is 2 years in custody. If the judge cannot qualify the case in this way, the envisaged penalties will be on a scale of 2 to 8 years of imprisonment.

■ Nineteen countries allow for (in addition for some countries¹¹) suspended sentences (total or commuted for a probationary period) for individuals considered to be dependent, in the majority of cases, receiving sentences of not more than 5 years of imprisonment: Germany, Austria, Belgium, Croatia, Denmark, Spain, Estonia, France, Greece, Ireland, Italy, Latvia, Malta, Norway, Poland, Portugal, Czech Republic, United Kingdom and Slovenia.

■ Only 7 countries do not fall into either of these two categories: Bulgaria, Cyprus, Finland, Lithuania, Luxembourg, Romania and Slovakia. In Finland and Luxembourg, the maximum penalties envisaged do not, however, exceed 5 years of imprisonment. In Bulgaria and Slovakia, sentences are liable to include treatment. When all is said and done, only Cyprus, Lithuania and Romania stand out from the other countries due to the particular severity of penalties envisaged for supply offences.

AGGRAVATED ILLICIT TRAFFIC: MORE CONSISTENT MEASURES

Translation of the concept of aggravated illicit traffic into law

The different legislations generally make a distinction between small-scale supply offences and other more serious, but less frequent offences which are more heavily penalised. Large-scale illicit traffic is among the supply offences committed in aggravating circumstances: such as targeting minors, in certain public spaces (such as schools, prisons, etc.), by individuals in certain positions (in public office, or a pharmacist or physician), causing serious damage to health, etc. Its translation into law varies considerably from one country to another: some make a distinction concerning the supply of large quantities, with a commercial aim, committed with the involvement of an organised criminal group, import/export, etc., while others define this offence only in terms of the supply of large quantities and/or the involvement of organised groups. Some countries also define limits to differentiate between different levels of illicit traffic.

Penalties for the illicit trafficking of large quantities of narcotic substances

In keeping with the spirit of the international conventions, penal measures for these types of dealers in Europe are much more consistent than for users. All European countries provide for heavier prison sentences, with at least 10 years of imprisonment. The quantity is defined as an element to be taken into account when evaluating the penalty in practically all European legislation (in 22 out of 29 countries)¹². The type of substance offered is also cited in half of European legislation (15/29)¹³ as a criterion for evaluating aggravated illicit traffic, while this is taken into account to a considerably lesser extent in measures concerning use and possession offences.

10. In Spain, cannabis distribution is authorised in "cannabis social clubs". However, in legal terms, this is not perceived as supply, but as "shared drug use" in a private space. In Spain, only drug use in public spaces is considered to be an offence. For more details on drug legislation in Spain, see Díaz-Gómez and Martín Gonzalez, to be published.

11. Austria, Spain, Estonia, Greece, Italy, Poland and Portugal.

12. Germany, Austria, Bulgaria, Cyprus, Denmark, Spain, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Norway, the Netherlands, Poland, Portugal, Czech Republic, Slovakia and Sweden.

13. Germany, Austria, Bulgaria, Cyprus, Denmark, Spain, Finland, Greece, Italy, Malta, Norway, Portugal, the Netherlands, United Kingdom and Sweden.

However, the following observations can be made:

- A minority of countries (11) which penalise large-scale illicit traffic via maximum penalties less than or equal to 15 years in prison: Germany, Bulgaria, Croatia, Finland, Lithuania, Latvia, the Netherlands, Poland, Romania, Slovenia, Sweden (see map 2).
- A majority of countries (18) which apply sentences on a scale of more than 15 years of imprisonment: Austria, Belgium, Cyprus, Denmark, France, Spain, Estonia, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, United Kingdom, Czech Republic and Slovakia (see map 2).

A more peripheral role for health and social measures

Regarding illicit traffic offences, the role assigned to the health and social sphere in the range of penal measures available to judges is generally more peripheral in nature than for use and possession offences. Certain countries, for example, define a strict framework in which these measures are liable to be applied. Hence, in Estonia, only penalties for individuals having committed supply offences due to drug addiction, ranging from 6 months to 2 years of imprisonment, may be replaced by treatment, subject to written consent by the perpetrator. This is also the case in Slovenia, where prison sentences may be commuted to supervised suspended sentences with treatment, as regards prison sentences of not more than 3 years of imprisonment for a supply offence. This framework is able to exclude individuals accused of larger-scale illicit traffic from measures with a health and social dimension.

SPECIAL CASE FOR NEW PSYCHOACTIVE SUBSTANCES (NPS)

New psychoactive substances or NPS (synthetic cannabinoids, cathinones, phenethylamines, etc.) "represent a highly diverse range of substances which imitate the effects of different illicit substances (ecstasy, amphetamines, cocaine, etc.). They have similar molecular structures, but are not completely identical"¹⁴. NPS are characterised by their diversity, rapid emergence and lack of a clear legal status. As evidence of this, 222 new molecules have been identified in France to date since 2008, and nearly 525 throughout Europe. The majority are sold online and used in a recreational setting. However, some of these substances may have legal uses, such as in medical research or in industrial production processes (45 of the 270 substances reported between 1997 and 2012 (Martinez, 2013)). They are marketed by smart shops or head shops in 13 European Union countries. However, some of these substances are liable to present a danger to health, which is why Europe has equipped itself with assessment instruments and is attempting to set in place different strategies to control the market.

Cultivation of cannabis for personal use in Europe

The 1961 Convention allowed the States freedom to penalise cannabis cultivation for personal use within the scope of Article 22*. In contrast, the 1988 Convention enjoins the countries to define «the cultivation of narcotic drugs for personal consumption», «subject [nonetheless] to its constitutional principles and the basic concepts of its legal system» (Article 3. 2).

The countries of the European Union have adopted very diverse stances regarding cannabis cultivation for personal use, generally in keeping with the legislative measures pertaining to its use and possession. Hence, in 8 European countries (Germany, Austria, Belgium, Spain, Greece, Hungary, the Netherlands and Portugal) cannabis cultivation for personal use is not a criminal offence or is in the process of decriminalisation. In Austria, since 2008, cannabis cultivation has no longer been considered a criminal offence, in the same way as use since 1971. In Portugal, cannabis cultivation for therapeutic purposes has been authorised since 2004. Belgium and the Netherlands have defined limits in which cannabis cultivation is not actively prosecuted, except where minors are concerned: in the Netherlands, cultivation for personal use, of no more than five plants, is not actively prosecuted.

In other European countries, cannabis cultivation is treated, in the legal texts, in the same way as any other offences relating to supply, without taking into account the general circumstances of the offence. In France, this is punishable by a penalty of 20 years of imprisonment or a fine of up to EUR 7,500,000.

14. <http://www.ofdt.fr/produits-et-addictions/de-z/nouveaux-produits-de-synthese/> [in French]
<http://www.emcdda.europa.eu/activities/action-on-new-drugs> [in English]

The different European Union countries have developed three approaches in order to regulate the NPS market:

- by creating special legislative provisions
- by adapting the criteria for inclusion of a substance on the lists of narcotic drugs, while applying existing legislation (see below)
- by mobilising European regulations relating to consumer safety

These methods for control are not exclusive to any of the countries which occasionally resort to several of these strategies.

COUNTRIES IMPLEMENTING SPECIFIC LEGISLATION

Eleven countries (Austria, Bulgaria, Hungary, Ireland, Latvia, the Netherlands, Poland, Portugal, United Kingdom, Slovakia and Finland) have set in place specific legislation on NPS either as a substitute for or in addition to existing laws. These countries have initially agreed on a somewhat common definition of NPS, perceiving them as a substance "that stimulates or depresses the central nervous system, and is associated with dependency, hallucinations or disturbances in motor function or behaviour" (EMCDDA, 2016). However, slight variations exist between different countries: in Ireland and Portugal for example, the disturbances induced by the substance should be "significant" in order for it to be prohibited whereas, in Austria, NPS are listed if they pose a possible threat to consumer health. In Ireland, Poland, Romania and the United Kingdom, these substances do not necessarily need to be named in order to be listed, which is not the case in Austria and Portugal where this list is liable to change, as the authorities have the power to test new substances (see different classification approaches below).

The initial trend was only to penalise supply. Penalties for this type of offence vary considerably from one country to another. These range from 2 to 3 years of imprisonment, such as in Austria, Ireland and Romania, with provision for a substantial increase in penalties in Austria (10 years), for supply with the aim of achieving considerable advantage or causing serious damage to health. Nonetheless, recent laws aim to penalise users. In Hungary, possession of a quantity of more than 10 g of substances classed as NPS, including without intent to sell, has been punishable by 3 years of imprisonment since January 2014. In Latvia, possession of this type of substance is an administrative offence punishable by a fine of EUR 280, since November 2014.

COUNTRIES APPLYING THEIR CURRENT LEGISLATION, ADAPTING THE PROCEDURES FOR INCLUDING NPS ON THE LIST OF NARCOTIC SUBSTANCES

Sixteen countries¹⁵ have, to date, chosen to add the NPS that they perceive as particularly dangerous to their list of classified substances, and to subject these substances to existing legislation. Different institutions may play a part in the listing procedure: the government directly, as in the United Kingdom where a special committee under government supervision has been created, the Ministry of Health and/or an organisation under its supervision. In France for example, the National Agency for Medicines and Health Products Safety (ANSM) proposes the classification of a substance, and the decision is made by the Ministry of Health (see below). The countries then follow different procedures and approaches to including a newly identified substance on the list of narcotic drugs.

Different procedures mobilised in different countries

European Union countries may have access to the European classification process with a view to prohibiting a substance throughout the European area (Article 8 of the Council Decision of 10 May 2005). It is in the countries' interests to choose this procedure if their national systems are not suited to assessing the risks associated with a substance, or, indeed, if a molecule gives rise to major problems within their territory. In 1997, the European Union paved the way for what was to become the European Early Warning System. This system is mainly operated by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and Europol¹⁶. Its role is to centralise, analyse, distribute and act on information originating from focal points of the European Information Network on Drugs and Drug Addiction (Reitox) and national observatories present in each Member State. EMCDDA and Europol submit a joint status report (Article 5 of the Council Decision of 10 May 2005) to the European Commission, on the use and illicit traffic of the substance, together with the health and social risks associated with the latter in the countries in which it is in circulation. The European Council then uses this assessment as a basis for deciding whether to place it under control (Article 8 of the Council Decision of 10 May 2005). European Union

15. Belgium, Cyprus, Croatia, Denmark, Finland, France, Greece, Hungary, Italy, Lithuania, Latvia, Norway, Poland, Czech Republic, United Kingdom and Slovakia.

16. European Union Law Enforcement Organisation: Law enforcement bureau which aims to facilitate intelligence sourced in all European countries in terms of crime, terrorism and narcotic drugs.

Member States then have a period of a year to implement "control measures and criminal penalties as provided under their legislation by virtue of their obligations" under the 1961 and 1971 international conventions (Article 9 of the Council Decision of 10 May 2005). In France, the authorities usually classify the NPS on the list of narcotic drugs before this process is complete.

However, conversely, some of these substances may be prohibited on a European level before being officially banned at national level. This was the case for BZP for a few months in 2008, or even more recently for 4,4'DMAR. Faced with the rapid emergence of NPS, certain countries have, however, adapted their procedures:

▶ Latvia, the United Kingdom and Slovakia have, for instance, set in place **"temporary (or emergency) classification procedures"**. In 2011, the United Kingdom decided to prohibit certain substances for a year, until their associated risks could be assessed. During this period, simple possession of the substance, in quantities compatible with personal use, was not punishable.

▶ Other countries, such as Belgium, Luxembourg, Norway, Poland, Sweden and Slovakia opted for **fast-track procedures** reducing the duration of the prohibition decisions by 1 to 3 months, by eliminating the consultation phases with intermediary consultation groups such as parliament or expert committees.

Different approaches to classification

The classification of the substance then follows two different approaches, the first involving changes to the rules for the inclusion of substances on the list of narcotic drugs:

▶ **The analogue approach**, used in Bulgaria, Malta and Latvia may be defined as follows: "similarity with an already prohibited substance enables a new substance to be deemed illegal. The molecules are compared one by one: the reference (e.g.: amphetamine), and the molecule concerned (e.g.: cathinone)", (Martinez, 2013, p 1).

▶ **The generic approach** adopted, for example, in Denmark, France and Luxembourg, is currently the most widely used. This approach "starts from a basic molecular structure (not necessarily psychoactive) and specifies the variants concerned by the prohibition" (Martinez, 2013).

However, these two approaches have their limits: the first raises the issue of the criterion upon which analogy is defined, while the second does not cover "all narcotic substances liable to be produced based on a single molecular structure" (Martinez, 2013), faced with the inventiveness of NPS producers.

RECOURSE TO REGULATORY PROVISIONS RELATING TO CONSUMER PROTECTION AND MEDICATIONS FACED WITH NPS

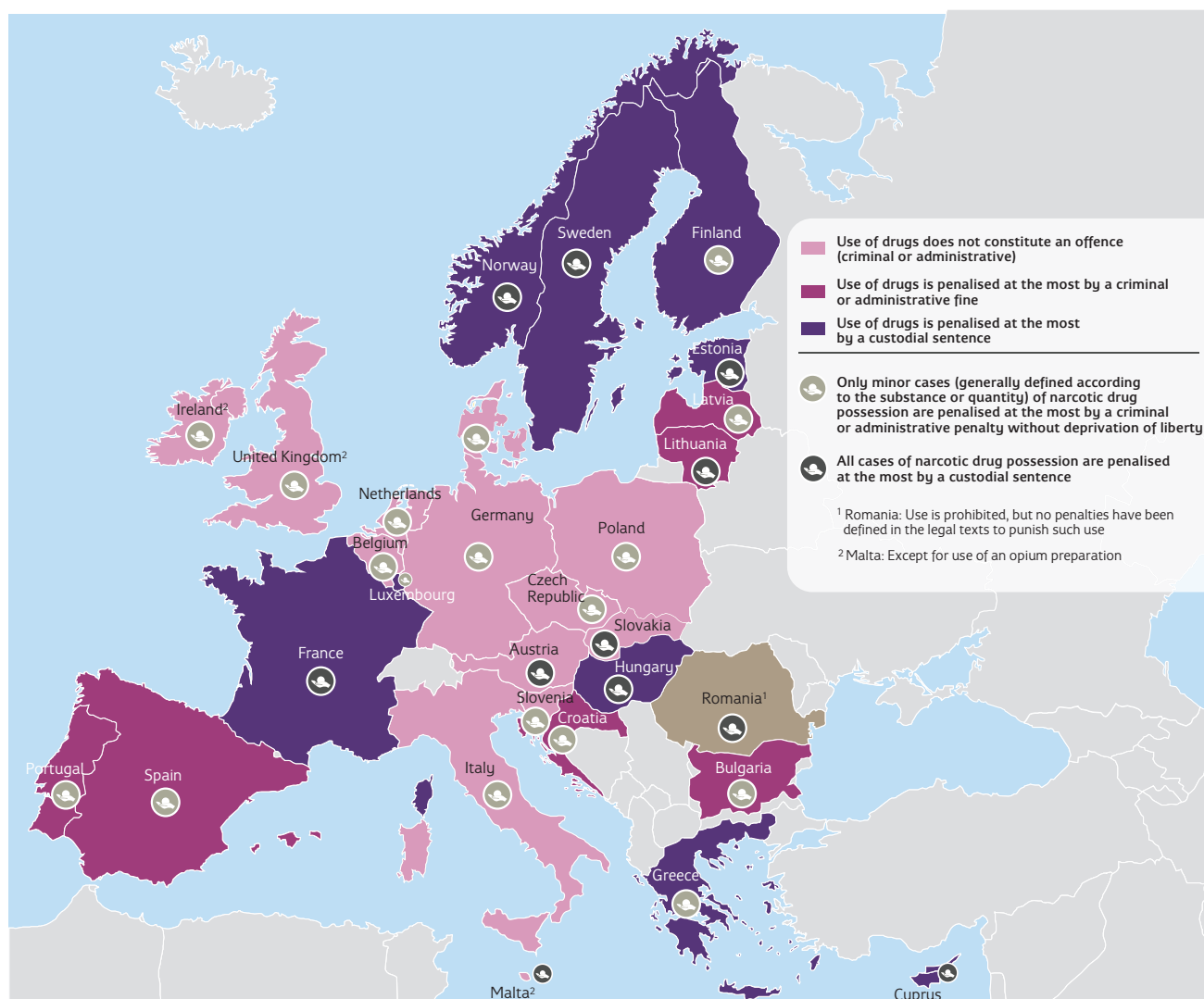
These European regulations are implemented by 8 countries (Austria, Italy, the Netherlands, Poland, Portugal, United Kingdom, Romania and Sweden). They aim to reduce the uncontrolled circulation of NPS without prohibiting their use. These policies are mainly employed in countries where these substances are sold in certain stores (smart shops or head shops).

The European consumer protection policy (Art. 2b. Directive 2001/95/EC) defines as a safe product any product which, "under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons". Penalties are applied if the language used on the packaging does not correspond to that of the country of sale or if the presentation does not mention the nature and use of the substance, together with its associated risks and side effects. The NPS are then subjected to the legislation on medicinal substances which enables the importation, marketing and distribution thereof to be controlled. Synthetic cannabinoids are controlled in this way in Italy, for example. In the United Kingdom, this type of legislation made it possible to prohibit the circulation of mephedrone which had previously been labelled as bath salts or plant food. Likewise, in Poland, the law on consumer safety was strengthened, which enabled 3,500 inspections to take place in 2010, and led to the closure of 1,200 stores in a single weekend.

In September 2013, the European Commission issued a bill mid-way between the classification as narcotic substances and a framework for trade in NPS (Martinez, 2013). This aims to avoid routine classification and to prioritise a framework for supply. Implementation thereof would prevent consumer access to these substances and above all criminalise those involved in supply. The European Commission proposes classification according to 3 categories: 1) substances presenting a low risk, for which circulation is possible; 2) those presenting a moderate risk, with free access in a medical and industrial context, but prohibited for use; 3) those presenting a high risk, included on the list of narcotic substances.

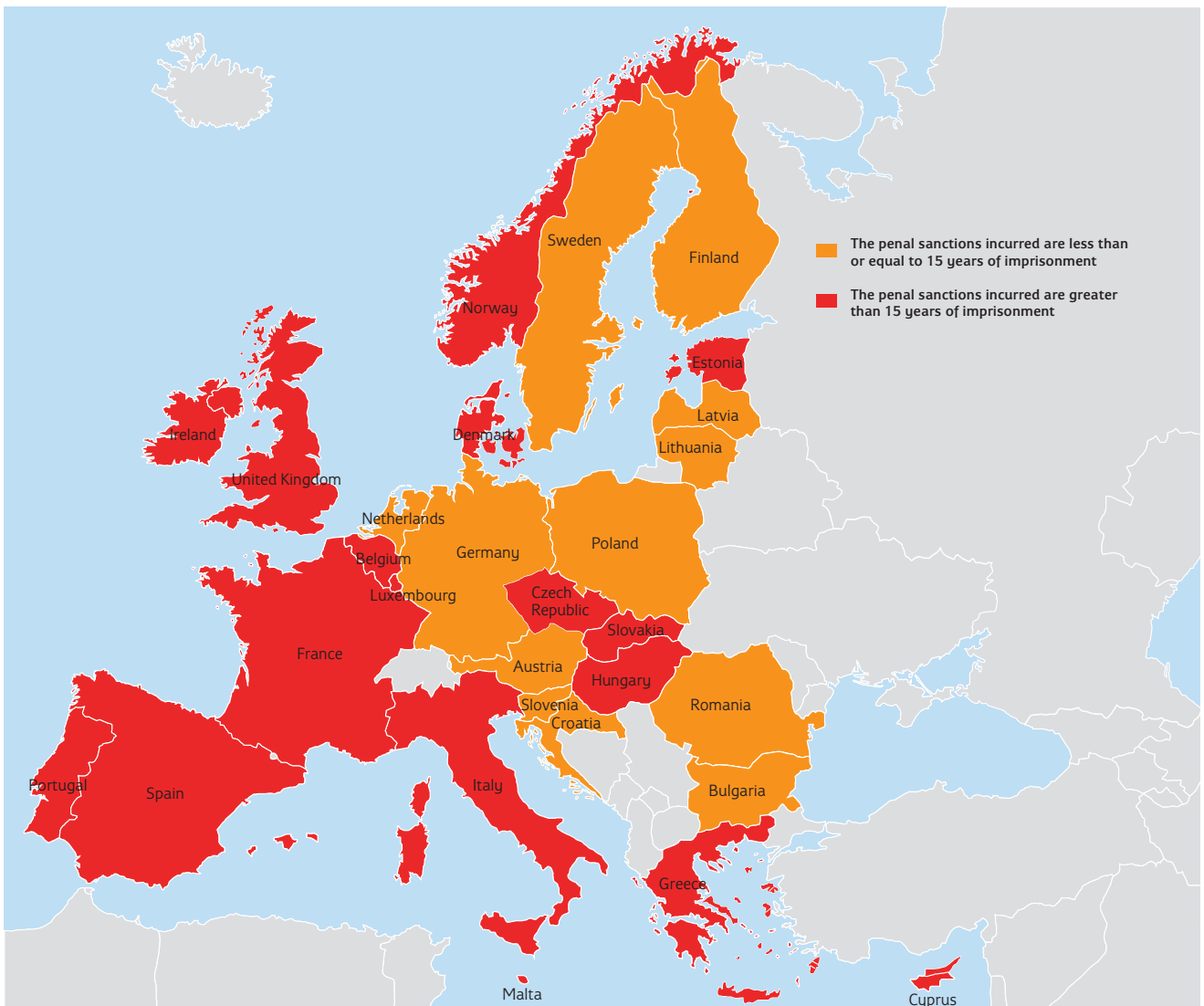
The most recent adjustments concerning this bill, however, recognise the right of the Member States to decide to classify a substance within their territory, even if the European Union has previously decided not to do so at the outcome of its risk assessment.

Map 1. Legislation and regulations relating to offences involving the use and possession of narcotic substances in the EU-28 (+ Norway), September 2016



Source: OFDT 2016 / EMCDDA 2016

Map 2. Legislation and regulations relating to offences involving aggravated illicit traffic of narcotic substances in the EU-28 (+ Norway), September 2016



Source: OFDT 2016 / EMCDDA 2016

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