DIFFERENCES IN LEGISLATION AND JUDICIAL PRACTICE BETWEEN MEMBER STATES OF THE EUROPEAN UNION, IN THE MATTER OF DRUG POSSESSION FOR OWN CONSUMPTION AND DRUG POSSESSION FOR ILLICIT TRAFFIC AND CONSUMPTION

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Abstract

Legislation in the drug regime in the Union Europe is not uniform and it differs from state to state. The difference existent in the legislation of the states of the European Union reflects in the different attitude of the institutions empowered in preventing and combating traffic and illicit drug consumption, in the way the law is being applied as well as the priorities and resources allocated by these institutions to specific problems.

Most part of the crimes related to the breach of the legal regime of drugs aims at drug possession for own consumption or for illicit traffic. The reality indicates that the implication of drug consumers in committing crimes of illicit traffic in the member states of the European Union is based on two motivations. In the first place, the drug addicts are implicated in illicit traffic with the purpose of obtaining amounts of money necessary in order to finance own consumption, which is very costly. The second motivation would be their involvement in illicit traffic with the purpose of obtaining consistent incomes or other material goods.

Given these motivations, in the judicial criminal practice of the member states of the European Union the issue of precisely establishing if those quantities of drugs the offender was caught with were for personal consumption or for illicit traffic. According to the purpose followed by the offender based of the evidence administrated in the file, the judicial classification differs as well as the sanction that would be applied by the judicial instance.

Keywords:

Drug, drug possession for own consumption, illicit traffic, consumers, medical treatment.

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Regarding the crimes of drug possession and consumption there is n universal recognition of the gravity of the problem but also a substantial difference regarding the content and trajectory of the drugs policies and this is due partly to the non implication of the community institutions in harmonizing the legislation. Thus, the Frame Decision no.2004/757/JHA[1] harmonizing the criminal legislation of the member states regarding the illicit drug traffic does not institute the obligation of incriminating the activities effected for personal consumption, but leaves it at the discretion of the national legislations. Not having any obligation in this area, the member states follow the tradition of self incrimination, resulting in numerous different visions at the level of the European Union, focused on different criminal policies. Therefore, we encounter the policy of incrimination, the policy of reducing the risks, the policy of decriminalization in consumption (generalized or for each type of drugs), the policy of controlled legalization.

Drug consumption is differently regulated, staring from a sanctioned crime with a punishment going to life in prison (Cyprus) and getting to an illicit action, allowed by law (Spain). We can notice a concern in all the legislations regarding attenuated penalty for drug consumption and especially the addicted consumer.

[1] Council's Frame Decision no. 2004/757/JHA on October 25th 2004 establishing minimal dispositions regarding the constitutive elements of crimes and penalties in illicit drug traffic.

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If in what concerns the drug traffic the legislation at the level of the member states of the European Union tends to harden regarding drug consumption, alternative criminal solutions are being searched as well as treatment programs for addicts.

Personal drug consumption is a judicial concept that refers to the simple use of certain illicit substances, being separated by those illicit acts such as possession, transport or supply this means that the simple act of smoking, injection, inhalation, swallowing drugs is an illegal act, distinct from possession. Anyhow, the legislation in some states makes a distinction in this area, classifying use of drugs separately from possession.

Illegal drug possession is the most common, if not universal, crime in the regime of drugs and is focused on the illegal possession of a drug as well as buying a drug declared as being illegal. Many laws take into consideration the buying, storing etc. and this is the reason which a difference should be made between these concepts.

We can notice the tendency existing in the European Union in the decriminalization of the use and possession with personal purpose of drugs of high risk. We cannot talk about a total harmonization regarding the legislation on drugs in the member states of the European Union. The idea is that when the individual consumption of drugs is not related to traffic or other aggravating circumstances, the judicial authorities, by different means (directives, newsletters etc.) incline towards not convicting the consumers to imprisonment (idea that is in accordance with the provisions of the 1988 Convention) opting for administrative, medical or social measures.

Still, there are imprisonment convictions for the addicted drug consumers, in states where the consumption represents a crime. Only 7 member states incriminate drug consumption: Cyprus, Finland, Greece, Luxemburg, Malta and Norway.

We must underline the fact that drug possession with the purpose of personal use is formally forbidden in all the Union's states but the penalties differ from case to case, in seven states the law stating that drug possession is forbidden and makes the object of "non custodial sanctions" which means that the prosecutor, when fulfilling the mentioned conditions, cannot solicit the application of imprisonment penalties but has to resort to non custodial penalties. For example, in the Czech Republic, Spain, Italy, Portugal the dispositions mentioned above include all the types of drugs, while in Ireland, Luxemburg and Belgium these refer to cannabis only.

Estonia, Lithuania and Latvia could be also integrated in this group as the possession of small quantities of drugs for personal consumption is considered as a "non criminal action". At the same time, knowing that " a non criminal action" can be sanctioned with "imprisonment" in a "house arrest" for a period of time of 15, 30 or 45 days, it is difficult to categorize there three countries among the ones mentioned above.

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In the member states of the European Union, accusation for drug possession in small quantities takes into account if the substance is for personal consumption or not. Thus, in some states, the laws, newsletters or other judicial instruments offer the authorities a larger discretion and in other states imprisonment for drug possession for personal use have been reduced. For example, drug possession in small quantities for personal consumption is not incriminated in Spain, is administratively sanctioned in Estonia, Italy, Czech Republic and Latvia, is not punished in Portugal and is considered as being minor offence in Slovenia, Sweden, Lithuania, Norway and Poland.

In other countries, drug consumption and associated crimes continue to belong to the criminal area. In practice, a person accused with drug possession will not necessarily be convicted. In general, the discretionary power of instances is mostly wide- depending on the national specificity, individual circumstances (if addicted or not), the place in which the crime was committed (rural or urban), the quantity of drugs possessed, the nature f the drug, which makes impossible to adapt to common rules, even in the case of one state.

Each state has its own combination of more or less factors in establishing possession as crime or contravention. Also, where the member states provision as maximum penalty for possession 3 years in prison, others can go up to 20-30 years. Regarding the legislation, these factors can be listed in the definition of the offence, aggravating circumstances or punishments.

In sum, the factors taken into consideration in Europe are the following:

- Factors 'quantity" and "intention" can be combined creating the factor "for personal consumption" or "with the intention of supplying/ distributing". This is certainly the most significant factor in deliberating the sentence and is defined almost in all the member states;
- The factors "quantity" , "intention" and "type of drug" can contribute to the creation of the factor "serious/ less serious crime". The examples can be found in the Polish and Swedish legislation;
- The type of drug can be named (usually cannabis) or described as "extremely dangerous". Belgium, Ireland and Luxemburg have specific punishments for cannabis possession; Spain, Cyprus, The Netherlands, Portugal and United Kingdom provision punishments related directly to the type of drug;
- Possession by an addicted consumer is treated usually more indulgently by the courts; Greece, Hungary have specific legislations for addicted consumers.

Certain laws specifically dispose severe punishments for recidivists or in case of aggravating circumstances such as minor involvement. Of course, all the factors can be taken into consideration by the prosecutor or the judge.

In the judicial practice of the member states of the European Union in view of applying a penalty, there is a wide spread tendency to make a distinction between buying and possession of drugs for personal use (either pathological or

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for recreation)and between buying and possession of drugs for traffic (selling drugs, buying in order to make business, respectively obtaining amounts of money for financing personal consumption).

Thus, in some member states of the European Union, the judicial authorities that punish possession in small quantities have to establish if the substance possessed is for personal use or not.

Also, the **quantity and nature of the drugs possessed** are other two major factors that are taken into consideration by the judicial instance when deliberating a sentence. In practice, a person accused by the simple possession of drugs will not be necessarily accused also for traffic.

Therefore, in some states, a difference is being made between possession for personal use and possession for trafficking by the express provision of some thresholds under which the possession is presumed to be with the purpose of consumption. These thresholds are established in Slovenia, even in the Criminal Code, in Hungary, Greece, Cyprus in special laws, in Austria by decrees, in Czech Republic by instructions from the general prosecutor, in Lithuania by lists of recommendation from the Ministry of Health and in Latvia by government regulation. Some states establish the thresholds according to the number of doses possessed (Slovakia, Czech Republic) or according to the de determined quantity possessed, reported for each type of drug (Austria, Cyprus, Latvia, Lithuania, Hungary).

In other national legislations, it is not always clear where the demarcation should be made between the quantity accepted by the authorities as being destined for personal consumption and the one exceeding this destination. In this case, each instance has to decide according to the circumstances applicable to each case. Therefore, according to the national legislation, individual circumstances (the possessor was drug addict or not), second offence in drug possession for personal consumption, the place the crime was committed (urban or rural), the quantity of drugs possessed and their nature, the instance can decide if the drugs were for personal consumption or for traffic. A problem appears regarding those brought before court but are not addicts or are not addicts at that time. These consumers are named "occasional" or "weekend consumers".

The nature of the drugs is also granted a very important consideration from the court. In this matter, there is a consensus between the member states of the European Union, regarding the measures that have to be taken.

Thus, cannabis possession for personal consumption tends to be treated with less severity by the judicial authorities than heroin possession, as it is states that heroin and cocaine are more dangerous drugs for the health of the consumer than cannabis. For example, possession of cannabis is punished with fine in Ireland and Belgium for the first and second perpetration, imprisonment intervening at the third perpetration. Also, in Luxemburg, cannabis consumption as well as transportation, possession or acquisition of this drug are

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decriminalized, for personal use. In The Netherlands, legislation makes the difference between cannabis and other categories of drugs. Cannabis consumption is not incriminated and the possession of this drug for consumption is tolerated up to 5 grams. Unlike other categories of drugs, in The Netherlands cannabis purchase is allowed from special locations, named "coffee shops".

This has not passed unnoticed. Thus, in a global report on drugs it is indicated that in many countries, crimes related to cannabis are treated more tolerantly that the ones related to other narcotics. Regarding cannabis, the same report underlines the fact that is fell in a grey area, this drug increasing in popularity and surpassing all the others. The report draws attention on the fact that yielding to cannabis is very important because if the most popular drug being consumed illicitly, data at global level indicating that more than a half of the young population used this drug. The report also mentioned that the cannabis plant has become as dangerous for the health of the consumers s well as the other plants as the cocaine plant and the poppy, from which the opium is extracted, because the dealers have invested very much in growing the potency of the euphoric effects of cannabis, making it more attractive of the illicit drug market. Therefore, cannabis is no longer a harmless plant as it was often presented in the media, but a psychoactive drug that deserves more attention. (Dima, T., Hotca, M., A., McCann, T., B., (2007) : 198).

Recurrence is considered to be an aggravating circumstance in case of possession although is probable for a drug addict to commit this crime more than once during one's life.

Accordingly, the tendency that exists in the European Union can be noticed, namely the decriminalization of the use and possession for personal use of low risk drugs or more of this type of drug. Thus, among the member states, The Netherlands is the best example in this context, allowing the procurement and consumption of light drugs only in special places and marijuana possession and use for personal purposes is no longer punished with imprisonment.

Therefore, as indicated above, we cannot talk about a harmonization regarding the legislation on drugs in the member states of the European Union. Drug possession, use, production, import, export still attracts different sanctions as the one performing such activities is governed by one legislative system or another.

Thus, this person can be governed by a system in which:

1. Such an activity is disapproved, but the state does not intervene (the so called decriminalization):

- Tolerance regarding the accusation of minor activities, although the law provisions sanctions for: possession and use for personal purposes of small quantities of drugs;
- Legislative tolerance: laws do not even forbid such a conduct (use, not possession of drugs in Germany, Italy or The Netherlands).

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2. The state intervenes but not through criminal penalties but administrative or civil ones. For example, in Spain, possession and use of drugs for personal purposes attracts administrative sanctions.

3. The state intervenes through criminal penalties: imprisonment (the type and quantity of drugs are considered).

From analyzing the judicial practice results the conclusion that the social and medical approach seems to be the preferred strategy of the member states of the European Union when the offenders that consume rugs are physically or mentally addicted and when the circumstances of committing the crime would usually justify a minor penalty.

Another conclusion would be that in the member states of the European Union imposing the medical treatment for the offender consumer represents an alternative to imprisonment, playing a repressive role only when significant quantities of drugs are involved in the cause or when there are aggravating circumstances implicated. This is the reason why when consumers or addicts are trialed for illegal possession of drugs in order that the sanctions are applied, the instance makes a difference between a simple addict and a consumer that makes illicit traffic. In such cases, the reason for the illegal possession is fundamental in establishing and applying punishments. Thus, in Austria, Greece, Poland and Hungary, addicted consumers are less sanctioned than in comparison to occasional consumers. In Bulgaria, addicts are not punished for drug possession for consumption, in Cyprus they are not sent to trail but undergo a process of treatment and in Italy administrative sanctions are applied. In all legislations of the member states programs of treatment are provisioned, for treating addictions.

In fact, using the systems of social assistance and treatment, rather than imprisonment, has to be considered as part of the legal measures on drug consumption.

On the other side, we have to mention the fact that debates regarding the decriminalization of illicit drug consumption is shared by two major groups of actors qualified as "prohibitions" respectively "anti prohibition" organizing in competitive networks (cities, nongovernmental organizations etc.) and the confrontations, sometimes very animated, do not contribute always to clarifying the exchanges and finding efficient answers to these problems.

In consequence, the problematic of decriminalization of drug consumption in general and cannabis in particular remains a subject extremely controversial, raising complex and difficult issues.

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