

TREATY COMPLIANCE OPTIONS FOR CANNABIS REGULATIONS IN THE EU

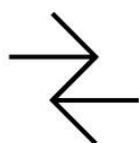
policy brief

***Models of decriminalisation and legal regulation
compliant with International Law and EU acquis***

This policy brief presents critical **challenges to international and European legal compliance** raised for national authorities while exploring decriminalisation and legal regulations of **non-medical cannabis**.

The **1961 Single Convention has become *ipso facto* part of Union acquis**.

Far from being a barrier, this legal panorama enables **11 options** EU Member States could adopt to reconcile domestic reforms with EU law.



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1. INTRODUCTION

National cannabis law reforms such as *decriminalisation* and *legal regulation* trigger complex questions of compliance with international law and European *acquis*. The legal grounds for regulations of cannabis departing from prohibition, within and possibly between Member States, need ascertainment.

The widely-accepted view that the 1961 Single Convention on narcotic drugs excludes all non-medical uses of cannabis can and should be questioned. Whether there is a violation “depends on the concrete design of the legal regulations” (Deutscher Bundestag, 2022a), particularly because the **interpretations of the Single Convention “are as diverse as the putative effects of [cannabis] itself”** (Dawkins, 1973, p. 360).

Cannabis policy is primarily a competence of EU Member States, but their legislative capacity is clearly limited under international and European law, albeit differently. In previous years, numerous political and strategic options have been outlined internationally (*e.g.* OAS, 2013). Following Germany’s announced plans for domestic cannabis regulations, several analyses and opinions have been published, often by legal experts new to the field of drug policy. Unfortunately, most only *scratch the surface*, and rely on assumptions rather than a methodological legal approach, while key provisions are also often overlooked.

A **policy void** has been created by arguably unreliable advice amidst the absence of proper assessments of EU Member States’ legal obligations. Recent developments in human-centred, evidence-based, and health-oriented drug policies, as well as key events (**UNGASS 2016, sustainable development agenda, change in international scheduling, ruling of the Court of Justice of the EU, an increasing number of domestic cannabis policy reforms**, including within the EU) call for a re-analysis of the legal context for cannabis reforms.

Massive violations of international law are perpetrated at the Eastern border of the European Union. While countries in the EU engage in cannabis policy reforms, the excuse of supposed breach of the drug control treaties has led to untenable accusations. Notably, European countries would “claim the right to judge other Member States’ implementation of international law [but] have themselves too often disregarded those principles in their drug-related engagement” (Permanent mission Russia, 2022). Besides the profound hypocrisy of this statement, it highlights the importance and political relevance of efforts to reconcile treaty obligations (or lack thereof) with domestic cannabis regulations.

The EU is founded on the values of the rule of law, and committed to upholding and promoting the strict observance and the development of international law (articles 2 and 3 (5) of the Treaty on European Union). It should seek pathways to alleviate rule tensions and the risks of norm decay or non-compliance cascade.

This policy brief summarises the feasible *and* viable policy options that allow EU Member States to regulate non-medical cannabis while complying with UN and EU legal frameworks.

Scope: this brief does not discuss options in flagrant violation of *jus cogens* or international law (including human rights law), options of claimed non-compliance (e.g. Canada; Boister and Jelsma, 2018, p. 459), unsubstantiated proposals (e.g. selective denunciation based on *rebus sic stantibus*, an historical error or a “fundamental change in circumstances” Dawkins, 1973, pp. 363–364) or other unsound proposals (e.g. relying on the regime of “special stocks” in the Conventions). Likewise, therapeutic, medicinal, wellness and other hemp-related uses of cannabis are not discussed in this brief (see UNCTAD, 2022).

This brief introduces key terms and concepts (1) before reviewing current international law and European acquis (2). Section (3) presents six compliant options (*A: denunciation of the Single Convention, B: internal amendment, C: external amendment, D: hierarchical superiority of human rights law, E: direct regulation of a non-medical industry, and F: direct regulation of an experiment for scientific purposes*). Questions relating to the internal market are discussed in section (4) before the final recommendation (5).

Recommendation

Step 1 (immediate)

- Decriminalise personal cultivation, possession and use.

Step 2 (short-term)

- Regulate non-medical cannabis industries under articles 2 (9) and 28 (2) of the 1961 Single Convention on narcotic drugs.
- Publicise the legal rationale in non-binding Statements between like-minded States.
- Address carefully cross-border issues, including anticipating a future progressive development of trade.

Step 3 (following step 2)

- Engage in dialogues with WHO and INCB for guidance and compliance on the harm reduction obligation (article 2 (9) (a)) and on statistical reporting (article 2 (9) (b)).
- Engage in an open-ended dialogue with the European Commission.

Step 4 (long-term)

- Explore and study an amendment of the Single Convention under article 47.

1.1. Lexicon

The definitions for “decriminalisation,” “depenalisation,” “legalisation,” “regulation” vary and, at times, overlap.¹ In this brief, within the limited context of cannabis, the following definitions are used:

- **Decriminalisation** (= depenalisation): altering domestic laws on the use and possession, and related preparatory activities to the extent that they are strictly necessary to personal use and possession.
- **Legal regulations** (= legalisation): altering domestic laws on use and possession and other activities (cultivation, transformation, transport, trade, import/export, sale...) in part or in whole.

If not stated otherwise, the term “**cannabis**” refers indistinctly to the cannabis plant, plant parts, resin, or any derivatives (except for pure THC, not included under “cannabis” in this brief).

“**TEU**” is the Treaty on European Union and “**TFEU**” the Treaty on the Functioning of the European Union (both in their consolidated version of March 2020). “**Schengen Agreement**” refers to the 1985 Agreement of 14 June 1985 between the Benelux, Germany and France on the gradual abolition of checks at their common borders, and “**Implementing Convention**” to the 1990 Convention implementing the Schengen Agreement of 14 June 1985 (Council, 2000).

The term “**Conventions**” alone refers together to these 3 international legal agreements:

- **Single Convention**: Single Convention on Narcotic Drugs, 1961, in its version amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs (UN, 1975),
- **1971 Convention**: Convention on psychotropic substances (UN, 1976a),
- **1988 Convention**: UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN, 1990).

“**Commentary**” refers to the official UN Commentary of the Single Convention (UN, 1973). “**Council**” refers to the Council of the European Union. When used alone, “**Commission**” refers to the European Commission, while the UN Commission on Narcotic Drugs is referred to as “**CND**.” “**High Representative**” is the High Representative of the EU for Foreign Affairs and Security Policy.

A list of acronyms is present at the end.

1.2. Decriminalisation: rationale, context, precedents, and legality

The non-criminalisation of minor, personal and non-violent drug-related activities is core to any evidence- and human rights-based approach to drug policies. While the March 2018 Council Conclusions recalled that “**alternative to coercive sanctions can be applied for a range of offences**” (Council, 2018), there is a shared consensus that *decriminalisation* refers primarily to **personal use and possession**. However, since use and possession are only possible after substance acquisition, the activities of **buying and cultivating for personal purposes** (in particular, so-called *home-growing* in the case of cannabis) also fall under the umbrella of *decriminalisation* as a consequence. Collective activities in the private sphere are also generally *de facto* encompassed (as seen in section 1.2.2 below).

An increasing number of governments or parliaments have taken initiatives to carve personal conduct out of their law criminalising drug-related activities (Eastwood *et al.*, 2016; INCB, 2019) to avoid interfering with

¹ For detailed definitions, see EMCDDA (2016, p. 2)

fundamental rights. In the absence of political initiative, **Constitutional or Supreme Courts have also often invalidated provisions criminalising personal conduct based on constitutionally-recognised human rights** (EMCDDA, 2019), for example:

- On the grounds of “**personal autonomy and privacy**,” the Supreme Court of **Hawaii** (1972), the Supreme Court of **Alaska** (Brandeis, 2015), and **Argentina’s Corte Suprema de Justicia** (Sistema Argentino de Información Jurídica, 2009) ruled in favour of decriminalisation.
- The *Corte Constitucional* of **Colombia** reached similar conclusions based on the **right to autonomous development** (del Río Forero *et al.*, 2022), and **Mexico’s Corte Suprema de Justicia de la Nación** based on the right to the **free development of one’s personality** (Ibarra, 2022).
- The Constitutional Court of **South Africa** relied on the **right to privacy** to decriminalise use, possession and cultivation in private (Zondo, 2018; Mhlantla, 2022). Going further, **Chile’s Corte Suprema de Justicia** expanded decriminalisation to **the cultivation of cannabis collectively in a private circle**, with reasoning echoing in part the legal “doctrine of shared consumption” behind **Spain’s** jurisprudence on cannabis clubs (Fernández Bautista, 2021; Marks, 2019).
- In Europe, the Constitutional Court of **Georgia** “held it to be unconstitutional to criminally prosecute people for consuming cannabis” in 2015 and 2018 (Žalimas *et al.*, 2018, p. 194). The *Corte Suprema di Cassazione* (2019; 2020) in **Italy** ruled that the cultivation of cannabis for personal use, regardless of the THC content, should not be considered a punishable offence, provided that it is cultivation based on simple methods and with a limited number of plants and yield.

What stems from all these Supreme or Constitutional Courts’ rulings is the **primacy of human rights (in particular, the rights to privacy and personal autonomy)** over measures to criminalise personal conduct, particularly in the private sphere.

Indeed, “**human rights law provides a normative framework, against which criminalization and penalties are to be assessed**” (Heilmann, 2011, p. 280). This primacy is even clearer insofar as there is no supra-national mandate or obligation to criminalise these activities. In 2016, INCB President declared:

“The evolution of drug control policy and practice, in many countries over recent years, from an approach relying primarily on criminal justice and incarceration to a more health-oriented approach is welcomed. This is entirely consistent with the conventions” (Sipp, 2016).

In its “Study on the impact of the world drug problem on the enjoyment of human rights,” the UN High Commissioner for Human Rights (UN Human Rights Council, 2015) called for decriminalisation, among other things, to address the **disparate impact on ethnic minorities, women and the youth**. As similarly stated by the Pompidou Group (2021), there are countless other benefits to a public policy which de-prioritises the repression of personal conduct and minor, non-violent offences:

“decriminalisation can facilitate the search for treatment for those dependent on drugs, [...] improve public health outcomes, and protect many people from the devastating impact of a criminal conviction.”

One of them is the possibility of **reducing public expenditure** (particularly on police, justice and other non-health related costs; Gonçalves *et al.*, 2015) and reallocating it to the fight against more serious crimes. In the context of developing regional and international crises, decriminalisation may prove helpful in mitigating the impact of austerity measures on drug-related health and social services (Pompidou Group, 2013).

In practice, **decriminalisation can take a myriad of legal shapes**. A difference is sometimes made between depenalisation, which may not require a change in the legal framework (*de facto*) and decriminalisation which does (*de jure*). However, **there is still no consensus on terminology**. Below, an indicative table

presents the spectrum of modalities (adapted from IDPC, s.d.) from the most repressive on the left to the one offering more legal certainty with regard to the non-criminalisation of personal activities on the right:

Criminalisation in law (<i>de jure</i>)				Decriminalisation in law (<i>de jure</i>)				Abolition of crimi- nalisation
Crimi- nalisation	Decriminalisation in practice (<i>de facto</i> or “depenalisation”) criminalisation still possible			Possible criminalisation in practice (<i>de facto</i> criminalisation)				
Systematic crimi- nalisation	Diversion from the criminal justice system	Police deviation	Absence of punishment	Discretion in the criminal justice system	Administrative discretion / sanctions	Police discretion	Absence of offence for use and possession	No mention of “use” and “possession” in the law
<i>Belarus</i>	<i>Several states and counties (USA)</i>	<i>France</i>	<i>The Netherlands</i>	<i>Poland</i>	<i>Portugal, Czechia</i>	<i>Spain</i>	<i>Uruguay</i>	<i>No known example</i>

In a briefing, the UN Commission on Narcotic Drugs (CND) clarified that:

“the Conventions do not absolutely *require* the punishment of possession, purchase or cultivation for personal use. That is why, under the Conventions, de-penalisation of possession, purchase or cultivation of controlled drugs for personal use is possible, under specific circumstances” (CND, 2014, p. 6).

1.2.1. Decriminalisation and international law

In international law, “decriminalisation” is the waiving (or non-application) of criminal or administrative sanctions to those uses and possession of drugs interpreted as *illicit under the drug control conventions* (under an interpretation of Articles 33 and 36 (1)). Despite persisting beliefs, **the three international drug control conventions offer evident flexibility** for governments:

“the use of alternatives to conviction and punishment, as provided for by the conventions, can form an integral part of a balanced and human-rights based approach to drug policy” (INCB, 2022b).

While the Conventions require some State answer to the illicit possession of narcotic drugs, this can be a warning, a reprimand, or even the provision of health information or (non-compulsory) diversion towards the healthcare system. As recalled by former INCB president Werneer Sipp (2016), where applicable, **constitutionally-protected rights (such as the right to privacy) allow to waive State responses to personal conduct involving drugs fully:**

“Indeed, the international drug control conventions require proportionate responses to drug-related offences. While ‘serious offences shall be liable to adequate punishment particularly by imprisonment’, there is no treaty obligation to incarcerate drug users having committed minor offences. The conventions provide for flexibility by States in determining appropriate sanctions, including non-punitive or non-custodial measures, for instance for possession of drugs for personal use.”

The key provisions codifying decriminalisation are the following (Eastwood *et al.*, 2016):

- Single Convention:
 - **Article 33**, possession of cannabis is allowed only “under legal authority,”
 - **Article 36 (1) (a)** on “penal provisions” requires Parties to punish all activities (except “use”). These activities must be “contrary to the provisions of this Convention” and the article is “subject to [the] constitutional limitations” of each Party,

- Under **Article 36 (1) (b)**, if those who commit an offence are in particular “abusers of drugs” a specific health-centred alternative to conviction/punishment can be applied (“treatment, education, after-care, rehabilitation and social reintegration”).
- 1988 Convention:
 - **Article 3 (1) (a) (ii)** requires Parties to establish as criminal offences under its domestic law the cultivation of cannabis plants contrary to the provisions of the Single Convention. This requirement does not apply to cultivation aligned with the Single Convention.
 - **Article 3 (2)** calls Parties to adopt measures “to establish as a criminal offence [...] possession, purchase or cultivation of narcotic drugs [...] for personal consumption.” These must be “contrary to the provisions” of the Single Convention. The article is “subject to the constitutional principles and the basic concepts of the legal system” of each Party. According to Amber Marks (2019), this article “relieves State parties from the Article's obligation to criminalise drug possession and cultivation for ‘personal consumption’ when doing so would conflict with their constitution or basic concepts of their legal system. Spain relied on Article 3 (2) in its decision not to criminalise conduct involving personal consumption.”
 - **Article 3 (4) (c)** states: “in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.”
 - **Article 3 (4) (d)**: “Parties may provide, either as an alternative to conviction or punishment, or in addition [...], measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.”

It has been known since 1961 that the Single Convention does not mandate the penalisation of personal conduct (Lande, 1976, p. 597); an impressive scholarship has developed in support of this fact. **The Convention’s Commentary explains that countries can “choose not to impose penalties on the unauthorised possession for personal use”** (UN, 1973, p. 402). Still, for some analysts, the international legal compliance of decriminalisation schemes may depend on the actual design of the law (Ambos, 2022).

Decriminalisation is not only supported by international law but also by global consensus. The **UNGASS 2016** outcome document, the 2019 CND Ministerial Declaration, and at the EU level, the **2018 Council Conclusions**, reaffirmed that the Conventions encompass the principle of proportionality in sanctions and allow for the development of alternative measures to conviction or punishment (UN, 2016; CND, 2019; Council, 2018).

Decriminalisation is recommended by the **UN Office on Drugs and Crime (UNODC)**, the **UN High Commissioners for Human Rights and for Refugees**, the **International Labour Organisation (ILO)**, **International Office on Migration**, **UNAIDS**, **UNDP**, **UNESCO**, **UNICEF**, **UN Populations Fund**, **UN Women**, **World Food Programme**, and **WHO**, among other UN entities (ILO *et al.*, 2017; UN, 2018; UNAIDS, 2019; 2021; UNDP, 2018; UNDP *et al.*, 2019; UNODC and WHO, 2018).

The UN Secretary-General and the heads of 30 UN agencies have together promoted “the decriminalisation of drug possession for personal use” and “the principle of proportionality” (UN, 2018).

Recently anew the UN High Commissioner for Human Rights encouraged countries to decriminalise drug use (Bachelet, 2022), drawing on calls made by virtually almost all UN human rights experts bodies (*e.g.*, UN Committee on Economic, Social and Cultural Rights [CESCR] on various occasions), Special Rapporteurs (*e.g.*, on the Right to Health: UN, 2010) and other mechanisms (*e.g.*, UN Working Group on Arbitrary Detention), among a more extended list (UNDP *et al.*, 2019). On **14 October 2022**, the UN **CESCR**, in its *Concluding observations on the sixth periodic report of Italy*, expressed his concerns

“about the punitive approach to drug use and the insufficient availability of harm reduction programmes [recommending] that the State party review its drug policy and legislation to bring them into line with international human rights norms and best practices” (CESCR in: Forum Droghe, 2022, p. 9).

At the peak of the COVID-19 pandemic, 16 UN human rights experts and special rapporteurs also called for “moratoria [...] on enforcement of laws criminalising drug use and possession” (Pūras *et al.*, 2020). Also because of positive impacts on health, the Global Fund (2022) lists decriminalisation among its “Program Essentials” under the section “human rights.”

More recently, decriminalisation has been assessed against the backbone of international and European human rights law (Bone, 2021; Lines, 2017; van Kempen and Fedorova, 2019b). These studies, in particular, confirm the findings of UN bodies and national Supreme or Constitutional Courts about the **primacy of constitutional human rights to privacy, autonomy, health, or personal development, over measures criminalising personal use and consumption**. They also outline the extraordinary character of the criminalisation of personal activities, suggesting that “**the burden of proof is on the State to justify criminalisation**” (Barrett, 2011).

Besides all this, the INCB (2019) notes that:

“the discretion to adopt criminal justice policies that include alternatives to conviction or punishment for minor crimes that is provided for under the conventions remains **underutilized**”

Highlight: Decriminalisation and international law.

Decriminalisation is **supported by international drug control law, international human rights law, and case law**. Because of the amount of evidence suggesting the harmful effects of criminalization of personal conduct, particularly on health, States willing to continue criminalising must justify the validity of their policies and its adequation to international legal norms.

1.2.2. Decriminalisation and EU law

The central piece of EU law related to decriminalisation is the Council Framework Decision 2004/757/JHA of 25 October 2004 (the “Framework Decision”) laying down provisions in the field of illicit drug trafficking (Deutscher Bundestag, 2022b, p. 5; Jelsma, 2022, p. 95; van Kempen and Fedorova, 2019a, p. 115).

Article 2 of the Framework Decision is formulated to exclude from its scope all drug-related activities² when committed “exclusively for [...] own personal consumption as defined by national law.” Consequently, **personal activities related to drugs are not regulated under the Framework Decision**.

As discussed in section 1.2 above, activities which would otherwise be *punishable* as *illicit drug trafficking* are excluded from the Framework Decision when committed for personal consumption.

The Framework Decision further stipulates that **its scope is limited to activities “committed without right.”** A right to personal use and possession defined by domestic law would further support the exemption of these activities from the realm of the penal provisions established by the Framework Decision (discussed

² Production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of cannabis without right, or the possession or purchase of cannabis without right with a view to conducting one of the previous activities.

in section 2.3.2). Finally, article 4 establishes criteria for **proportionality of penalties**: “large quantities” and “drugs which cause the most harm to health” are to be treated more severely.

The 2018 Council Conclusions further promoted the use of alternatives to coercive sanctions for drug-related offenders.

Numerous Case law from the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) have strengthened and specified the number of human rights, in particular the **right to privacy, enshrined in article 8 of the European Convention on Human Rights and article 7 of the EU Charter of Fundamental Rights**.

In *Pretty v. the United Kingdom*, the ECtHR (2002) explains that personal autonomy is part of privacy:

“[...] the notion of personal autonomy is an important principle underlying the interpretation of [the] guarantees [of article 8 of the European Convention on Human Rights]. **The ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned** and even where the conduct poses a danger to health or, arguably, life, the Case law of the Convention institutions has regarded the State’s imposition of compulsory or criminal measures as impinging on private life.”

Another example is *Niemietz v Germany*, where the ECtHR (1992, §29) confirmed that “respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.” Codified together with the **freedom of association**, this right to develop private relationships with other persons constituted the basis for the **emergence of so-called cannabis social clubs**. These groups sharing cultivation and consumption in a private, non-profit and closed-loop model were given echo by the supreme Courts of Spain and Chile (Marks, 2019; see also section 1.2).

The **waiver (or expungement) of criminal and administrative records** for people convicted of offences which decriminalisation has repealed, is often seen as the natural next step, and a legal and ethical consequence of decriminalisation. It is shown to positively impact on vulnerable populations (Kilmer *et al.*, 2021), justifying recent announcements by President Biden in the United States (Politico, 2022; White House, 2022).

1.3. Legalisation: a more complex panorama

If the modalities of *decriminalisation* can be illustrated in a simplified table as in section 1.2, domestic cannabis regulations represent a much more

“complex and multifaceted challenge with hundreds of policy decision points, each presenting opportunities to either narrow or widen disparities. And social equity goals must be balanced with many other policy objectives concerning legalisation, such as raising tax revenue, protecting youth, minimising increases in problematic use, and attending to indirect effects on consumption of tobacco, alcohol, and other substances” (Kilmer *et al.*, 2021, p. 1040).

Reforming cannabis laws requires recourse to interconnected and multidisciplinary fields and policy areas at the domestic level (FAAAT, 2021; Rahwanji, 2019; TDPF, 2014). **This brief focuses on the options at the supra-national level.**

2. INTERNATIONAL AND EU LEGAL PANORAMAS

This section presents international and European laws affecting domestic cannabis regulations. With no exception, international and European law criminalises cannabis-related activities that are “illicit,” “illegal,” “without right” or “contrary to the provisions” of particular laws. **All levels of law point at the somehow ambiguous Single Convention as the benchmark for the legality of cannabis-related conduct.**

2.1. International law: drug control

The three international drug control conventions (see section 1.2.1), ratified by all EU Member States, establish legal requirements in relation to cannabis. Furthermore, the EU accessed article 12 of the 1988 Convention, but it is entirely unrelated to cannabis.

“As the [INCB] has reiterated on several occasions, the fundamental principles underpinning the three international drug control treaties [...] are the principle of a balanced approach, the principle of proportionality and respect for human rights” (INCB, 2019)

Dual in nature and not self-executing, the Conventions pursue harmonisation and coordination in both health policies on drug abuse and penal approaches to illicit trafficking. “A close look at the [Conventions] reveals that, although formally binding, the penal provisions prove remarkably soft” (Colson, 2019, p. 81).

“Cannabis flower and resin are scheduled under the [Single] Convention, its principal psychoactive compound THC is scheduled under the 1971 Convention, and the 1988 Convention mentions cannabis specifically in articles about cultivation and eradication” (Jelsma, 2022, p. 92).

2.1.1. 1971 and 1988 conventions

The **1971 Convention** lists THC (active ingredient of cannabis) in its schedules, but only applies to pure molecules separated from the plant materials or of synthesis. Article 2 of the 1971 Convention limits its scope to “substance[s] not yet under international control,” excluding cannabis which was already controlled under the Single Convention. **The 1971 Convention is therefore relevant only to pure isolated THC**, but not to cannabis even though it contains THC (Bayer, 1989, p. 23; Chatterjee, 1981, p. 458; INCB, 2014, p. 68; Schappe, 2001; Tupper and Labate, 2012; UN, 1976b, pp. 3, 25, 385–387).

The **1988 Convention** lists controlled precursors, but none relates to cannabis. The 1988 Convention also strengthens and supplements the 1961 and 1971 conventions (CJEU, 2010, §37), including via measures related to cannabis. Nevertheless, it does not codify *new* obligations for cannabis control.

Article 14 paragraph (1) states that the measures to eradicate *illicit cultivation* and to eliminate *illicit demand* must not be less stringent than the measures taken under the Single Conventions. Paragraph (2) obliges Parties to prevent the *illicit* cultivation of cannabis and eradicate cannabis plants cultivated *illicitly* in its territory. All provisions concern *illicit* cannabis, as defined under the Single Convention. Fundamentally a penal instrument reinforcing already-existing treaties, **the 1988 Conventions only adds-up penal provisions to activities already illicit under the 1961 and 1971 conventions:**

“In spite of its harsh wording and the specific reference to cannabis, the 1988 Convention clearly builds on the two previous treaties. [...] The key wording in this regard is ‘contrary to the provisions’ of the 1961 and 1971 conventions; and ‘illicit’ cultivation of cannabis plants” (Jelsma, 2022, p. 93).

In the 1988 Convention, *illicit* or *illegal* activities are the same as those of the preceding conventions (Boister, 2001, pp. 97–103), although “to make sense, it should read *conduct contrary to national legislation* as, in strict technical terms, the Parties criminalise the conduct, not international law” (Boister, 2001, p. 76).

EU accession to the 1988 Convention: Article 27 (2) of the 1988 Convention explains that “regional economic integration organisations shall declare the extent of their competence with respect to the matters governed by this Convention.” Under this provision, the Council (1990) declared the EU to be only “competent for questions of commercial policy relating to [precursors], questions which are dealt with in Article 12 of the Convention.” Article 12 is completely unrelated to cannabis. In the same declaration, the Council “reserve[d] the right to make further declarations in accordance with Article 27 (2)” to expand its competence. Because it never declared any other competence, the EU has only ratified article 12 of the 1988 Convention, and is therefore not bound *as such* by any of the other provisions of the 1988 Convention, contrary to what has too-often been claimed (*e.g.* in Deutscher Bundestag, 2022b).

Highlight: 1988 Convention and the EU.

In recent months, several documents have circulated, wrongfully assuming that the EU was in and of itself a Party to the 1988 Convention, in addition to each State being a Party in their own right. This is not entirely correct: **the EU has only ratified article 12 of the 1988 Convention, but not the cannabis-related parts of the Convention.**

The 1988 Convention is clear in explaining that regional organisations such as the EU need to declare precisely the extent of their competence under the Convention. Accordingly, the Council declared EU’s competence only under article 12 about commercial precursors policy. The competence of the EU can not exceed this declaration without further ratification by the Council. **The EU has therefore not ratified the 1988 Convention, it has only ratified its article 12.**

The 1988 Convention should not be at the centre of the discussions: the EU is not fully a party to it, and in any case, it does not create any additional specific obligation for States other than those established by the 1961 Single Convention. **Discussions should focus on the 1961 Single Convention** which is the only relevant legal basis.

Hence, besides pure THC and illicit conduct, **cannabis is not controlled under the 1971 or 1988 conventions. The international legal framework for licit cannabis is therefore determined under the Single Convention.** Accordingly, analyses of the nexus between global drug control and domestic cannabis regulations tend to focus on the Single Convention. According to INCB (2014, p. 68):

“Under the 1961 Convention [...], plants that are the sources of narcotic drugs, such as cannabis plant, [...] are subject to specific control measures. In contrast, [...] no plants are currently controlled under [the 1971] Convention or under the 1988 Convention. Preparations (*e.g.* decoctions for oral use) made from plants containing [active ingredients listed in the 1971 Convention] are also not under international control.”

2.1.2. Goals of the 1961 Single Convention

Usual interpretations of the Single Convention have argued that its goal and object is the prohibition of all kinds of non-medical and non-scientific use of drugs (Boister, 2001; Bruun *et al.*, 1975). These positions are difficult to reconcile with the letter and spirit of the Single Convention, where the few explicit mentions of the option to *prohibit* are discretionary upon the parties (Marks, 2019, p. 213). Prohibition is effectively contemplated in the Single Convention as a legal and legitimate option but not as an obligation:

“The decision in this respect lies with governments, since they are in a position to evaluate the prevailing conditions in their countries or territories, taking into account the world narcotics situation” (UN Secretary-General, 1966, p. 22)

All mentions of prohibition³ are conditioned to “the protection of the public health or welfare.” Besides this, the majority of the convention describes measures of *control* and for “international cooperation with respect to governing the proper or improper fluxes of narcotics” (Zitt, 2016, p. 526).

Prohibition does not constitute the Convention’s *goal* either (Riboulet-Zemouli, 2022, pp. 91–96). **The goal of the Single Convention is to protect the health and welfare of humankind.** Criminal laws and prohibition are merely *tools* or *means* to achieve these public health objectives. The objective of the convention is “humanitarian and social” in nature for Paul Reuter (1968); for the INCB (2022a, p. 15), it is:

“to safeguard the health and welfare of humankind through two overarching goals, namely: (a) ensuring the availability of controlled narcotic drugs and psychotropic substances for medical and scientific purposes and ensuring the availability of precursor chemicals for legitimate industrial use; and (b) preventing the diversion of controlled substances into illicit channels.”

The CJEU, concerning cannabis and “in accordance with settled Case law,” confirmed:

“the Single Convention is based, inter alia, on an objective of protecting the health and welfare of mankind. It is therefore appropriate to take that objective into account when interpreting that convention’s provisions. Such an approach is all the more compelling since a reading of the commentary on the Single Convention published by the United Nations relating to the definition of ‘cannabis’ for the purposes of that convention leads to the conclusion that, having regard to the purpose and general spirit of that convention, that definition is intrinsically linked to the state of scientific knowledge in terms of the harmfulness of cannabis-derived products to human health” (CJEU, 2020, §§73, 74).

Asking the question, “Do the drug Conventions commit governments to implement a prohibitionist regime?” the CND (2014, p. 1) answers:

“Although the Conventions restrict the use of controlled drugs to medical and scientific purposes, this limitation should not be considered as the justification for a repressive “prohibitionist” regime, but as the foundation of a drug control system protecting the health of people from the inappropriate use of narcotic drugs and psychotropic substances.”

Moreover, this *restriction* or *limitation* to medical and scientific use is not absolute. From this limitation to medical/scientific uses, a series of exceptions and exemptions can be carved out for other *purposes*.

Highlight: Prohibition is not an obligation.

The idea that *prohibition is at the core of the drug control conventions* needs to be overcome. **Prohibition is only one option** available for States; not mandatory despite persisting beliefs.

2.1.3. “Purposes” in the Single Convention

Article 4 (c) expresses the general obligations of States:

“Subject to the provisions of this Convention, [the parties shall take such legislative and administrative measures as may be necessary] to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”

³ Prohibition is possible for schedule IV drugs, article 2 (5) (b) and for cannabis cultivation, article 22. Article 39 allows countries to apply “more strict or severe” measures than those of the convention (UN, 1975, pp. 109, 120, 129).

Although this article “could be understood as a requirement for use to be prohibited in national legal systems, such a requirement is not spelled out” (de Ruyver *et al.*, 2002, p. 20). The CND (2014, p. 3) refers to:

“the popular discourse of equating drug control with a purely “repressive regime” and the limitation to medical and scientific use with “prohibition”. This is not the vision of the Conventions, which aim at protecting public health, providing a legislative and normative framework that addresses the use of controlled narcotics drugs and psychotropic substances within qualified clinical interventions.”

If the conventions establish a framework for medicines, it could be argued that it is a sophism to take from it that the conventions rule out any non-medicine aspect of drugs. A close reading of article 4 (c) and its Commentary confirms that the “general provisions” of the Single Convention are two-fold:

- it lays down the general legal framework, limited to medical and scientific purposes,
- by contrast, it also contemplates “exceptions expressly permitted by the Single Convention” (UN, 1973, pp. 110, 402).

The words “subject to” in article 4 (c) offer a balance between the limitation to medical/scientific purposes and those “cases in which **non-medical consumption or industrial use is exceptionally permitted by the Single Convention**” (UN, 1973, p. 113). This translates by distinct legal regimes:

- **Drugs for medical or scientific purposes**, including traditional medicine: the Convention extensively codifies medical/scientific uses of narcotic drugs (Bone, 2021, p. 105; Bruun *et al.*, 1974, p. 46; Rexed *et al.*, 1984, pp. 33–50) for what has sometimes been described as a *framework convention for the medico-pharmaceutical sector* (Riboulet-Zemouli, 2022).
- **Drugs for purposes other than medical and scientific:**
 - **Drugs for traditional non-medical purposes** used to be subject to special provisions under **article 49** for countries that so desired. The applicability of article 49 lapsed decades ago.
 - **Drugs for industrial non-medical purposes** may be exempt under **article 2 (9)** under specific conditions (denaturing or preventing abuse and harms, and a reporting to INCB).
 - Other provisions not related to cannabis (*e.g.* coca leaf exemption).
- **Drugs for “special purposes”** (“special stocks”) correspond to sensitive governmental stocks used at their entire discretion for situations which may be large-scale emergencies, military purposes, etc.

Within these regimes, prohibition ultimately always remains a compliant option.

2.1.4. Cannabis cultivation

For the cultivation of cannabis plants, the Single Convention codifies two regimes:

Article 28 (1) requires the same obligations for the cultivation of cannabis as those for the cultivation of opium poppy (*i.e.* article 23 of the Single Convention). Only “cannabis and cannabis resin” are mentioned. Yet, article 28 (1) is generally applied as the **standard regime of cultivation of any cannabis for medical or scientific purposes**, including “extracts and tinctures of cannabis” and “cannabis leaves.”

Article 28 (2) exempts some cannabis cultivation from all obligations under the Convention. Although only “fibre and seed” are mentioned, this regime is generally also applied to “cannabis and cannabis resin” when they are not used in medicine (for instance, to *herbal CBD products* and *resin*; UNCTAD, 2022). **Standard regime for the cultivation of hemp**, two possible interpretations of article 28 (2) can be made: either it

exempts only the cultivation of “fibre and seeds” (thus excluding CBD), or it exempts any cultivation for *industrial/horticultural purposes*.⁴

2.1.5. Personal activities

In the Conventions, “decriminalisation” refers to personal activities which are *unauthorised* or *illicit* but upon which no sanctions or penalties are applied. States can opt for “decriminalising” personal activities under articles 33 and 36 (1) of the Single Convention (see section 1.2.1 above).

However, some personal activities can be *authorised* or *licit* (e.g., personal use or possession for medical and scientific purposes). Legal regulation would vest personal activities for non-medical use with a legal status equivalent to medical/scientific purposes rather than a status of *decriminalisation* under articles 33 and 36 (1). States can opt for “legalising” personal activities under one of the options presented in section 3.

For Marks (2019, p. 222), **personal activities** could be defined as “everything that **pertains to the constitutionally protected realm of the private.**”

2.2. International law: non drug-related

In designing domestic regulations for non-medical cannabis, attention should be given to other legally-binding instruments, which can include obligations and/or guidance for certain licit activities involving cannabis.

In addition to international and European human rights law, when legislating over a plant, accounts should be taken of binding instruments in other fields than drug control, such as the Framework Convention on **Climate Change**, the Convention on **Biological Diversity** and its Nagoya Protocol, and the International Treaty on **Plant Genetic Resources** for Food and Agriculture (all ratified by all EU Member States and the EU itself), conventions of the International Labour Organisation (ILO), the “Geneva Act” Appellations treaty, among **others relevant international instruments** (FAAAT, 2021; Riboulet-Zemouli and Krawitz, 2021; Wyse and Luria, 2021).

2.3. EU acquis

Since the 7-point action plan of French President Mitterrand (1989), drug policies have become increasingly discussed at the EU level. Pertaining to all three *pillars* before 2009, the Treaty of Lisbon has only confirmed the **transversality of drug-related policies across EU legal areas** (Boekhout, 2004, p. 53–55).

Today, “[t]here is no harmonised EU law on cannabis use” (EMCDDA, 2018, p. 9) which is reflected in a broad diversity of domestic approaches (Boekhout, 2004; EMCDDA, 2016; Mravčík, 2015; Sánchez-Avilés, 2020). Nevertheless, provisions affecting domestic cannabis regulations are present in several EU laws and *acquis*.

⁴ The first of these two interpretations (limiting the scope of this article to fibre and seeds) is quite unorthodox in international law (McNair, 1961, pp. 399–410) and opposes the rules of botany: which legal regime would apply to the cultivation for the leaves, or for the non-fibre parts of the stem (hurd/shives) which not mentioned in any of these two provisions on cultivation? It also seems to go against the intent of the drafters of the Single Convention (Riboulet-Zemouli, 2022, pp. 54–59; UN, 1973, pp. 312, 314).

One of the **critical findings in this brief, about EU drug control law, is that the international drug control Conventions have become “*ipso facto* part of the Union acquis”** (Erlbacher, 2019, p. 1648) due to their mention in many Union acts and CJEU Case law.⁵ Two types of mentions exist:

- **Some EU acquis are directly applicable** to the substances that are listed in the Conventions or rely upon and complement legal provisions from the Conventions (*e.g.*, the Schengen acquis, or the 2004 Framework Decision, both analysed below).
- **Other pieces of EU legislation exclude from their scope** the substances listed in the drug Conventions (for instance, Regulation No. 178/2002 laying down the general principles and requirements of food law in the EU, which excludes from the definitions of “food” any “narcotic or psychotropic substances within the meaning of” the drug control Conventions). Because they exclude cannabis from their scope, these parts of EU law are not relevant (see also section 3.2.2.(ii)).

2.3.1. Primary legislation

In **primary EU law**, article 83 (1) of the Treaty on the Functioning of the European Union (TFEU) mandates the European Parliament and the Council on the “areas of crime” of “illicit drug trafficking.” Article 168 gives the EU the competence to “complement the Member States’ action in reducing drugs-related health damage” while respecting “the responsibilities of the Member States for the definition of their health policy.”

Integrated into the framework of the EU, the **Schengen acquis** commit Parties to coordinate their action against “illicit drug trafficking” (articles 8 and 9 Schengen Agreement, articles 71–76 Implementing Convention; analysed in: van Kempen and Fedorova, 2019a, pp. 103–112). Article 71 (1) calls for “measures to prevent and punish the illicit trafficking” to be adopted in accordance with the international drug control Conventions. The Schengen acquis also contain provisions for Parties:

- To seek to “**harmonise laws and regulations**” on narcotic drugs (article 19 Schengen Agreement);
- To “notify each other of the measures taken in order to monitor the legal trade” in drugs (article 76 (3) Implementing Convention);
- “**Not to jeopardise stricter control measures in the territory of other Parties** (art. 76 (1), Implementing Convention), notably if a country “departs from the principle referred to in Article 71(2) in connection with its national policy on the prevention and treatment of addiction to narcotic drugs and psychotropic substances” (Final Act, Implementing Convention).

Other pieces of primary legislation also focus on illicit activities such as the 2000 Convention on Mutual Assistance in Criminal Matters between the EU countries (EUCMA).

2.3.2. Secondary legislation

Three pieces of **secondary EU legislation** support this treaty core:

- Council Decision 90/611/EEC of 22 October 1990 accessing the 1988 Convention on behalf of the EU, although with a competence limited to trade in precursors (see section 2.1.1).

⁵ The implicit requirement for States to access the drug control Conventions before joining the EU (under Chapter 24) seems to corroborate that *ipso facto* incorporation into EU acquis.

- Regulation (EU) 1307/2013 of 17 December 2013, establishing rules for direct payments to *hemp* farmers under the common agricultural policy in its articles 32 (6) and 35 (3).⁶ *Hemp* corresponds to certain varieties of cannabis plants, as listed in a catalogue.
- Regulation (EU) 1308/2013 setting up common markets in *hemp* products and conditions of import.
- Council Framework Decision 2004/757/JHA (the “Framework Decision”, see section 1.2.2), the central piece of secondary legislation to consider in the context of domestic cannabis regulations (see section 1.2.2 ; Council, 2004).

The **Framework Decision 2004/757/JHA** especially has been extensively analysed (Deutscher Bundestag, 2022b, p. 5; Jelsma, 2022; van Kempen and Fedorova, 2019a, p. 115).

Indicative as to its goals, the explanatory memorandum refers to the Framework Decision as an instrument targeting “the transnational dimension of the offence” of illicit drug trafficking and as “a further development of the law enforcement side of the Schengen acquis” (European Commission, 2000).

Its Article 1 (1) mentions the drug control Conventions, relying on their definitions of “drugs” (although it departs from it in article 1a, adding new psychoactive substances to the definition of “drugs” in EU law). In article 4, the Framework Decision features another difference with the standard of the conventions: a **proportionality of penalties grounded on quantitative and qualitative distinctions** (“large quantities” and “those drugs which cause the most harm to health”).

As discussed in section 1.2.2 above, activities which would otherwise be *punishable* as *illicit drug trafficking* are excluded from the Framework Decision when committed for personal consumption. Article 2 (1) further stipulates that **the scope of the Framework Decision is limited to activities committed “without right.”** Activities which are *based on a right* are not specified. It can be assumed that they include the following:

- Rights contained in EU law, for instance:
 - ***hemp* cultivation** under Regulation (EU) 1307/2013 and use of hemp products under Regulation (EU) 1308/2013 (and others on cosmetics, foods...),
 - activities related to cannabis **medicines** under Regulation (EC) 726/2004 and Directives 2001/83/EC and 2004/24/EC,
 - activities of **police or customs** officers (*e.g.* pursuant to relevant Schengen dispositions, to the EUCMA...);
- Rights contained in domestic legislation, such as:
 - activities undertaken by **authorities**, for example, in handling seizures of drugs,
 - activities related to **personal consumption**, under article 2 (2) of the Framework Decision,
 - activities of ***coffee-shops*** in the Netherlands (a critical point).

There has long been a debate as to the extent to which a *right* covers *coffee-shops* in that sense, and how that might extend to legally-regulated contexts. There is a profound **ambiguity as to the exact meaning of “without right,”** although an indication can be found in the explanatory memorandum of the first draft proposed by the European Commission (2000): “Essential criteria [...] are the notions of acting ‘for profit’ and ‘without authorisation’.” The terms “for profit” have today been replaced by the concept of personal purposes, and “without authorisation” by “without right.”

This debate extends to the structural question of non-medical cannabis regulations and to the **conditions under which domestic regulations would constitute a *right* in the meaning of the Framework Decision.**⁷

⁶ Contrary to impressions, *hemp* crops or derived products which do not meet the criteria of this Regulation are not automatically illicit, but simply the rules set out in the Regulation do not apply (as confirmed in CJEU, 2020, §58, §96).

⁷ Jelsma (2022, p. 95), and van Kempen and Fedorova (2019a, p. 134) discuss this. Two EU Directives –not related to cannabis– state precise definitions of *without right*: “not permitted under national law” (Directive 2013/40/EU),

Although considered central to cannabis policy, **the Framework Decision deals exclusively with *illicit activities*** and is focused on “develop[ing] the Schengen acquis from the perspective of criminal law” (van Kempen and Fedorova, 2019a, p. 116). **It provides little guidance regarding *licit activities*** (the Regulations on *hemp* and medicines not being mentioned, for example). It may have limited relevance to lawfully-regulated activities in a Member State.

2.3.3. Interpretation, non-legislative acts

As part of the acquis, the Conventions must, therefore “be taken into account for the interpretation of (secondary) Union rules” (Erlbacher, 2019, p. 1648). Numerous **illicit activities in EU law remain defined by direct or indirect reference to the international drug control Conventions** (a situation similar to the 1988 Convention which criminalises activities which are “illicit” according to, or “contrary to the provisions” of the 1961 and 1971 conventions).

Joint Action 96/750/JH of 17 December 1996 on the “approximation of the laws and practices [...] to combat drug addiction and to prevent and combat illegal drug trafficking” should be considered for matters of interpretation (van Kempen and Fedorova, 2019a, 112–115). It was repealed in 2016, and is therefore *not* binding. But the Framework Decision which replaced the Joint Action “is entirely in keeping with [its] spirit” (European Commission, 2000). That spirit, again, was the coordination and cooperation of authorities in the “fight against drug addiction” and illicit trafficking. The Joint Action also stated:

“Member States shall ensure that their obligations under the United Nations Conventions on narcotic drugs and psychotropic substances of 1961, 1971, and 1988 are applied strictly and effectively” (Council, 1996).

In line with the Schengen acquis, the Joint Action called the Member States to “endeavour to **approximate their laws to make them mutually compatible** to the extent necessary to prevent and combat illegal drug trafficking.”

In this regard, article 19 of the Implementing Convention (placing drug laws among the fields of future harmonisation) is an essential to interpreting EU cannabis-related acquis throughout the Schengen area.

Finally, there are **non-legislative acts** of the Union to take into consideration:

- Council Resolution of 29 November 1996 on “measures to address the **drug tourism** problem,” still in force today, lays down a series of recommendations for administrative cooperation, noting that the phenomenon differs in every country. “Drug tourism” is also mentioned in the repealed Joint Action.
- Council Resolution of 16 December 1996 on “measures to combat and dismantle the illicit cultivation and production of drugs” is mainly focused on preventing “the use of **cannabis seeds for illicit cultivation.**” Still in force today, it invites Member States “to ensure the **banning of the cultivation of cannabis under glass, under polythene tunnels, and indoors,** with the exception of such cultivation, for example for the purposes of scientific research, where a special licence has been obtained [...]”⁸
- Council Resolution 97/C 10/02 of 20 December 1996 on “sentencing for serious *illicit* drug trafficking” is no longer in force since it became obsolete when the Framework Decision was adopted, but it is referenced in some pieces of law still in force today.
- Despite its straightforward title, **Council Resolution on Cannabis** of 26 July 2004 is not a general framework for cannabis. It mostly takes note of developments in the illicit cannabis market and

“medical, scientific or similar purpose [...] activities carried out under domestic legal powers” (Directive 2011/93/EU). However, these definitions are always limited in their scope to the specific context of the Directive containing them.

⁸ This provision may have a place in the discussion on the agricultural models to adopt for legal cannabis crops.

requests various research and analyses to Europol, the EMCDDA and the European Commission. It calls on Member States to increase youth prevention, and capacity-building among parents, teachers and healthcare professionals. Notably, it is the only piece of text which does not use the term *illicit*, calling on “Member States to take measures against cultivation and trafficking of cannabis within the Union.”

Although non-legislative acts, these documents have influenced numerous CJEU decisions, which form part of Union law.

2.3.4. Case law

In *Josemans*, the CJEU upheld specific restrictions to the fundamental freedoms about cannabis, finding “that a Dutch municipal authority could legitimately require ‘coffee-shop’ owners selling cannabis to deny entry to non-residents” (Tomkin, 2019, p. 727). For Craig and de Búrca (2011, p. 798), this is surprising “in view of the consistent previous case law” related to other activities for which Member States can justify special restrictions (or not) on grounds of public policy (*ordre public*), ethics or morality, as is the case for drugs (CJEU, 1999a; 2010; de Witte, 2013).

There are two notable differences in CJEU Case law between cannabis and other sorts of activities where ethical or moral approaches vary between the Member States:

- Several EU acts call for States to take measures against *drug tourism*, which is not the case for other activities restricted on the grounds of public policy, morality or ethics, that the CJEU analysed,
- The *fait accompli* is that currently, **all Member States prohibit cannabis**, which is also different from other activities. The Court stated that “[w]hile Member States had diverse approaches to regulating prostitution, there was a common prohibition on the trade of narcotics” (Tomkin, 2019, p. 727). Similarly, the CJEU noted that lotteries, while restricted in some Member States, are not “activities whose harmful nature causes them to be prohibited in all the Member States” (Craig and de Búrca, 2011, p. 798).

In addition, it should be noted that the Court does not seem to consider **prohibition** as an international or EU legal obligation, but rather as a “**legal position [which] complies with**” the **Conventions** (CJEU, 2010, §37; 2020, §60). It stems from Court rulings that there is a prohibition in all the Member States on marketing cannabis “under international law and European Union law” (CJEU, 2010, §77), which should be construed as meaning *in compliance with*, not *under mandate of*. For the Court, **it is on the initiative of Member States that prohibition is implemented**, on the grounds of “harmfulness” (CJEU, 1982, §8; 1988, §17; 2010, §36; 2020, §59; see also section 2.1.2. above). The CJEU (2010, §41, §78; 2020, §61) understands that **drugs are prohibited “because of their very nature,” not because of treaty obligations**:

“since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes” (CJEU, 2010, §36).

There are some inconsistencies in the address of cannabis by the CJEU. In most Case law related to criminal proceedings under domestic drug legislations, the Court only mentions options of licit trade for cannabis in the context of “medical and scientific” or “pharmaceutical and medical purposes” (CJEU, 1982, §8; 1988, §17; 2010, §36) but failed to mention *hemp* as another strictly controlled trade under EU law. However, in the same judgements, sometimes in the same sentence, the Court referred to cannabis as “**hemp-based drugs**” (CJEU, 1988) and “narcotic drugs [...] derived from hemp” (CJEU 2010, §36; 2020, §59).

This is slightly startling, taking into account the parallel Case law where, for example, the CJEU prohibited quantitative restrictions and measures having equivalent effect on *hemp* (CJEU, 2003), including on CBD extracted from *hemp* (CJEU, 2010), insisting that CBD “extracted from the *Cannabis sativa* plant in its entirety [including] its flowering or fruiting tops [...] is not a drug within the meaning of the Single Convention.”

“Community law must be interpreted as precluding national legislation which has the effect of prohibiting the cultivation and possession of industrial hemp” (CJEU, 2003)

“Articles 34 and 36 TFEU must be interpreted as precluding national legislation which prohibits the marketing of cannabidiol (CBD) lawfully produced in another Member State when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds, unless that legislation is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose” (CJEU, 2020).

Zigzagging rulings, differences with settled Case law on similar activities, and a unique situation (the generalised prohibition among Member States), in addition to evolving doctrines at the CJEU (de Witte, 2013, pp. 1558–1576), suggest that **the Court’s opinion is likely to evolve as domestic laws do**. Increased reliance on procedural proportionality would balance and mediate the progressive normalisation of cannabis in part of the Union.

2.3.5. Treaty-making competencies of the EU

Treaty-making⁹ in the field of drugs is the most recent field of expansion of the EU’s competencies. Article 218 TFEU provides the ordinary treaty-making procedure, essentially in the hands of the Council. These dispositions are also valid for agreements that have not been directly accessed by the Union but by Member States, like the Single Convention (CJEU, 2014; Erlbacher, 2019, p. 1661; Schutze, 2018, pp. 207–212).

In 2017, a precedent confirmed that **the EU’s treaty-making capacity applies to the drug control Conventions**. Article 218 (9) and 83 (1) TFEU were interpreted as subjecting the actions of EU Member States during CND scheduling votes to an *imperative mandate* (Council, 2017a; Sánchez-Avilés, 2020). This fact was clarified last year when the European Commission (2021) activated an infringement procedure against Hungary for breaching these rules.¹⁰

Modalities of the treaty-making competencies of the Union depend on the area in which the alteration of an international agreement relates. The general procedure is as follows: The European Commission submits recommendations to the Council ahead of the opening of negotiations (for common foreign and security policy, the High Representative). The **Council decides by qualified majority** (except if the amendment covers a field for which unanimity is required for the adoption of a Union act) to nominate the negotiating team, to authorise the opening of negotiations, to adopt negotiating directives, and to designate a special committee to follow negotiations. It also authorises the signing of the amendment and its conclusion. The European Parliament needs to be fully informed throughout the procedure, and, in some cases, its consent is required before concluding the agreement.

⁹ Capacity to negotiate, sign, conclude, accede, amend, suspend, terminate international agreements. competencies of Member States, the Union, or both, are defined in TEU (Title V; Final Act) & TFEU (articles 2 (1), 3, 207 (3), 216, 218).

¹⁰ The EC opened the procedure on “Hungary for failure to follow the Union’s position when voting on the WHO recommendations on cannabis and cannabis-related substances at the UN Commission on Narcotic Drugs in December 2020. [...] The Union position –adopted by the Council in November 2020– is binding on EU Member States, who have to vote accordingly in the Commission on Narcotic Drugs, in line with Article 218 (9) TFEU.”

Notably, by derogation to article 218 TFEU, articles 3 (1) and 207 mandate a **special procedure for treaty-making on trade-related agreements giving more leeway to the European Commission** during the negotiations:

“[T]he EU is exclusively competent in a few policy areas (most prominently external commercial relations, broadly defined [...]) and shares treaty-making competencies with its Member States in various other policy areas, or supplements those Member State powers” (Klabbers, 2015, p. 54).

By contrast, in *Germany v Council*, the CJEU (2014) ruled that:

“it is clear [...] that the situations in which the Union has an external competence, in accordance with [Article 216 (1) TFEU], are not limited to the various scenarios set out in [Article 3 (2) TFEU].”

Highlight: Policy options and EU competencies.

The ascertainment of competencies is determinative regarding the policy options chosen in case of *lex ferenda* domestic cannabis regulations (*i.e.* requiring a modification of the conventions or a change in the ratification status), which would alter the rules and framework of a part of Union *acquis*). Crucially, the legal basis for treaty-making competencies can be challenged by Member States and, in some cases, by EU institutions.

The Union has a role to play in the event of a *lex ferenda* option (modifications of the rules and framework of the Union). This is not necessarily the case for ***lex lata* approaches that do not alter the formal framework, and rely on the exclusive State competence of treaty interpretation.**

In *Commission v Council (Appellations Agreement)*, the CJEU (2017) ruled that a failure to respect the specific procedure for negotiating trade-related agreements lead to annulment of the Council Decision that had opened the negotiations, devolving the Decision of legal effect. The negotiation of any international agreement concluded having a “direct and immediate [effect] on trade” (CJEU, 2017, §74) falls within the exclusive competence of the EU. In *Commission v Council (Rotterdam Convention)*, the CJEU (2006) explained:

“The **choice of the legal basis** for a Community measure, including one adopted with a view to conclusion of an international agreement, **must be based on objective factors** which are amenable to judicial review and include in particular the aim and content of the measure. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, **the act must be based on a single legal basis**, namely that required by the main or predominant purpose or component.”

3. POLICY OPTIONS

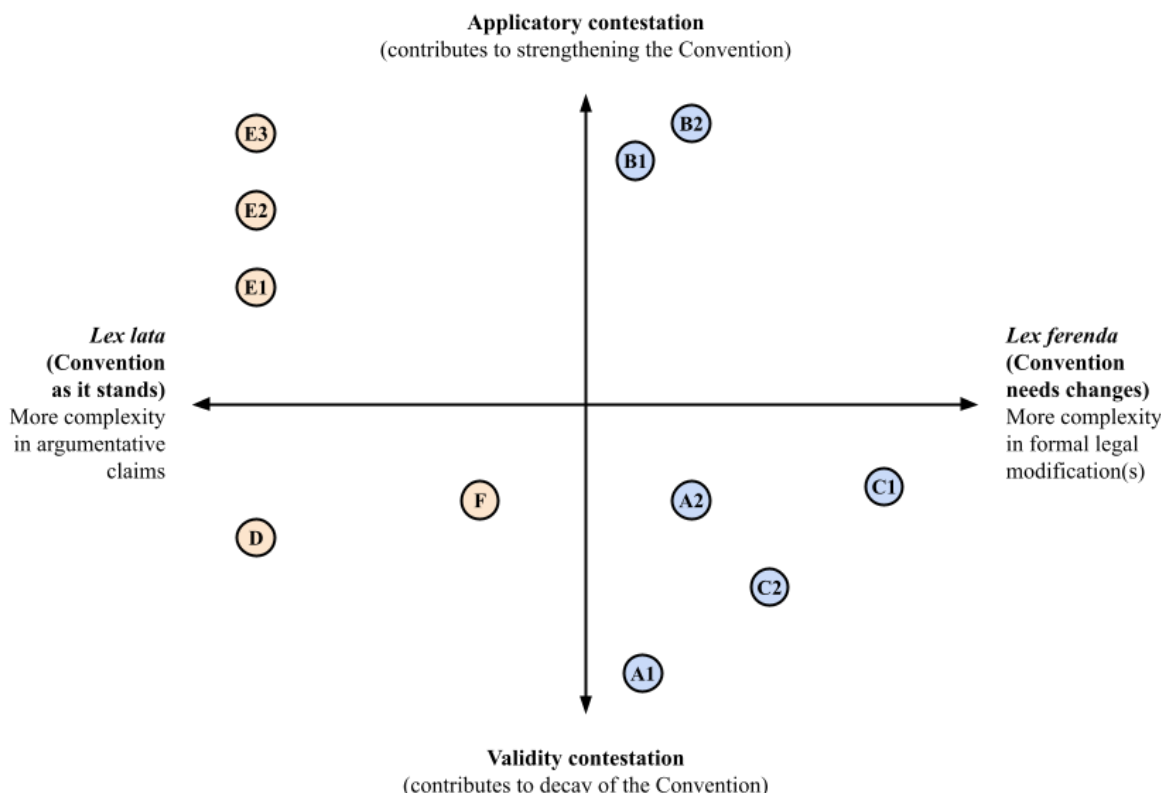
11 Options are presented here, encompassed within six general paths (A–F). This selection offers the opportunity to align the design and implementation of domestic cannabis regulations in compliance with international and EU obligations. Because of the interconnectedness of EU acquis with the international drug control conventions (section 2.1), the two legal frameworks should be considered jointly.

Among the options, some require textual changes in pieces of international law, or changes in the status of ratification, prior to implementing domestic cannabis regulations (*lex ferenda*; **options A–C**). Others consider that compliant regulations can be achieved without the need to formally modify the drug control Conventions (*lex lata*; **options D–F**).

Political pathways can also be categorised as follows (Deitelhoff & Zimmermann, 2013; Wunderlich, 2014):

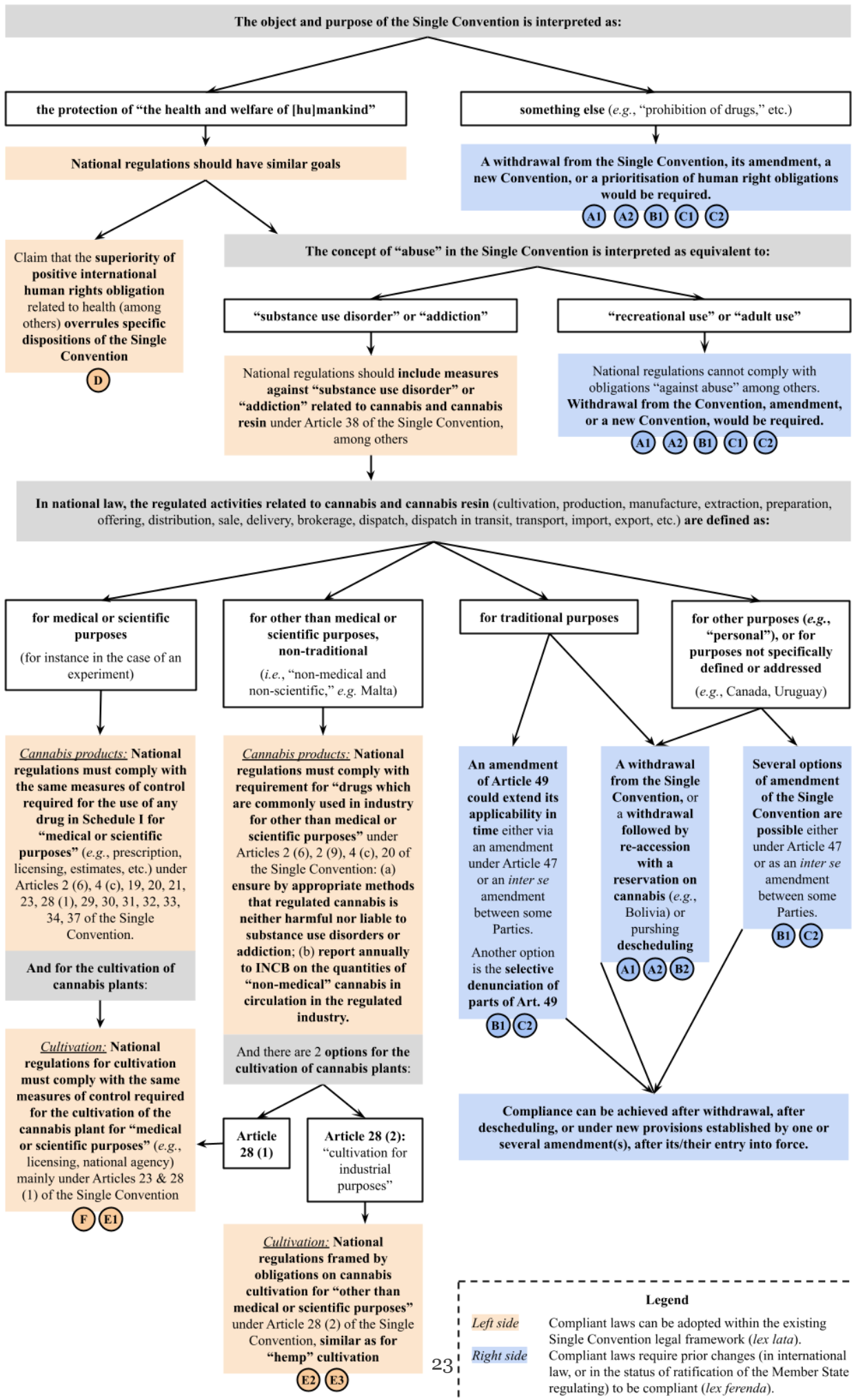
- Options A, C and to a lesser extent D, convey a rebuttal, critique or challenge of the mere *validity* of all or part of the Conventions. These options might be at odds with Title V TEU, and repeated calls by European leaders to protect and reinforce multilateralism (Macron *et al.*, 2021);
- Options B, E, and F are characterised by a proactive attitude of *norm entrepreneurship*, constructively challenging some enforcement aspects of the Single Convention without questioning its validity as a whole: relying on its provisions and claiming compliance.

With these two sets of criteria, the following matrix of options A–F can be drawn (indicative only):



In the matrix above, in yellow, *lex lata* reform proposals (laws can be adopted within the current Single Convention) are on the left side. *Lex ferenda* options (changes in international law or ratification status are required prior to regulation) are on the right side, in blue.

This visual presentation is similar in the flowchart summarising options A–F on the next page:



3.1. Options A: Regulation after denunciation of the Single Convention

There are two approaches to a withdrawal from (= denunciation of) the Single Convention.

3.1.1. Option A1: remaining outside

Withdrawing from the Single Convention (art. 46) and remaining outside, thus departing from all commitments (including questions unrelated to cannabis). States are relieved from international obligations six months after notifying their withdrawal.

This option presents a **high likelihood of negative impacts** on the licit trade in medical drugs and on the cooperation in the field of law enforcement and crime prevention (Don, 2014, pp. 234–235; Jeanroy *et al.*, 2022, p. 22). From a technical standpoint, this option will not resolve all issues. It might be left partly without effect insofar as the 1988 Convention refers to illicit activities as those defined under the Single Convention. A withdrawal from the 1988 Convention would, therefore, also likely be needed.

(i) Precedent

There is no precedent. Beyond the question of drugs, withdrawing from international treaties has been fueling several crises of multilateralism in recent years.

(ii) EU legislation

Because the Single Convention is *ipso facto* part of Union *acquis*, the mere legality of a withdrawal is questionable. Regardless, as in the case of the 1988 Convention, the practical effects of a withdrawal risk being superseded by the continued presence of references to the conventions throughout EU drug legislation.

(iii) Intermediary recommendation

Withdrawing from a legal agreement ratified by 186 countries would also likely incur high political costs and be perceived as undermining the rule of law as a whole: “the potential ramifications of withdraw from the Single Convention outweigh any benefits” (Don, 2014, p. 235). **Option A1 is not recommended.**

3.1.2. Option A2: re-accessing

Withdrawing from the Convention (art. 46) and re-accessing with a reservation on cannabis (art. 50). Reservations to the Single Convention under article 50 (3) can only be made by a “State which desires to become a Party.” The Convention “expressly prohibits the statement of reservations following initial accession to the treaty” (Don, 2014, p. 235). Hence, the Convention needs to be denounced before a reservation for cannabis could be placed, upon re-accession. The reservation and re-accession becomes effective if it is not “objected to by one third of the States” within a year.

(i) Precedent

Bolivia left the Single Convention on 29 June 2011 (with effect 1 January 2012) under article 46 (2). It then re-accessed on 29 December 2011 with a reservation for the cultivation, trade, possession and use of coca leaves “for cultural and medicinal purposes,” but its accession took effect on 10 February 2013 (UN Secretary-General, 2013), effectively remaining fully **outside of the Single Convention for 405 days.**

15 countries objected to Bolivia’s reservation (including six EU countries) but “fell far short of the one-third of parties (sixty-two) required to block it from becoming effective” (Crook, 2013, p. 462).

(ii) EU legislation

The same hurdles as those outlined in Option A1 would arise. An EU Member State withdrawing from the Conventions risks infringement of European law for a prolonged period.

Reservations made upon recession raise the questions of the EU’s treaty-making competencies (section 2.3.5): a Member State may be at risk of not being the sole decision-maker of the modalities of its reservation. *A minimum*, information to the Commission and other EU Member States, and possibly consultations within the Council, would be needed (see also below Option B1).

Previous objections made by EU Member States to Bolivia’s reservation in 2011 are an additional negative precedent, and “the unique circumstances requiring Bolivians to protect coca as cultural patrimony may not be transplantable to emerging cannabis policy” (Bone, 2021, p. 90).

(iii) Intermediary recommendation

This Option has often been presented as giving Member States back their full sovereignty. However, in the European context, it seems that any reservation upon re-accession would be subject to consultations within the Council, likely triggering greater involvement of the Union, and possibly conditioning the terms of the reservation. It also carries similar political costs as Option A1 (and other *validity contestation* approaches) and would leave the Member State a year or more in infringement of EU acquis.

Therefore, **Option A2 is not recommended.**

3.2. Options B: Regulation after internal amendment of the Convention

The Single Convention contains two modalities of amendment, “the two least controversial options [...] which use uncontested and established treaty procedures” because they “show respect for treaty procedures and willingness to discuss emerging dilemmas with treaty parties” (Jelsma, 2022, p. 97, 98). Article 47 of the Convention provides for amendments to the main body of text; article 3 for amendments to the schedules.

3.2.1. Option B1: amending articles

Amendment under article 47 is *a priori* the most logical option. By adopting an amendment to enable domestic cannabis regulations, “those countries who wish to pursue such legislation would be permitted to do so, and those countries who remain in opposition would be able to remain parties to the original treaty” (Don, 2014, p. 237). Two pathways exist:

- **Silent procedure:** a draft amendment is circulated to all state parties. If no objection is raised within 18 months, the amendment enters into force for all parties. This procedure is unlikely to happen for cannabis.
- **Diplomatic conference:** where the draft amendment would be negotiated, with provisions adopted with a two-thirds majority. States are free to attend and stay or not at the conference. “Once an amendment has been proposed and adopted, parties are free to decide if they will become a party to the amendment” (Don, 2014, p. 236).

The applicability of this option to cannabis in the existing geopolitical context has long been questioned (Bruun *et al.*, 1975, p. 52; Jelsma *et al.*, 2018). Different proposals on *what* to amend have been made:

- Modifying article 47 to facilitate reservations without the need for prior denunciation (Riedel, 2017, pp. 742–746; Zitt, 2016),
- Modifying article 49 to extend the temporary reservation (Riedel, 2017, pp. 740–742),
- Modifying article 2 (9) (Riboulet-Zemouli, 2022, p. 120),
- Altering a series of provisions throughout the Convention (Room and MacKay, 2012).

(i) Two precedents

In **1972** the Single Convention was successfully amended, following a procedure initiated in 1971 by the **United States** (Bruun *et al.*, 1975, p. 18; Room and MacKay, 2012, p. 9). It entered into force in 1975.

In **2009**, “**Bolivia** proposed amending the Convention to delete its provisions barring coca leaf. This proposal did not gain sufficient support and failed” (Crook, 2013, p. 461). Two years later, Bolivia opted for denunciation under Option A2 (Riedel, 2017; Room and MacKay, 2012, p. 10; Zitt, 2016).

(ii) EU legislation

Given precedents on voting procedures at the CND (see Option B2 below), an amendment of the Single Convention is likely to “affect common [EU] rules and alter their scope” (Article 3 (2) TFEU), hence falling under **exclusive competence of the Union** (see section 2.3.5 above). In this context, the amendment would bind all Member States (article 216 TFEU). **The amendment may also be formulated so that the EU could access it.**

If it is framed outside of the Union’s exclusive competence, an amendment process may not be possible in closed-loop. It would likely be subject *a minima* to “prior consultations within the Council” (article 28 (3) TEU) and in any event to consultation, cooperation, and an approach of solidarity with other EU Member States (art. 32 TEU). **Incorporating the amendment into Union rules risks being problematic if not all EU Member States join it.** Such an approach of shared competencies may be attempted, although it is also likely to weaken the overall negotiating position if the Member States are divided (Erlbacher, 2019, p. 1651) as is the case on this topic.

The steps to take by an EU Member States to initiate an amendment process would depend on the area of competence within which it is framed.

The process under **article 218 TFEU** (see details in section 2.3.5. and appendix 2) is informed by prior recommendation of the European Commission or High Representative. The Council nominates the negotiating team and issues negotiating directives. Decisions are taken by the Council, usually via qualified majority (unanimity is required in areas where common acts are adopted by unanimity). The European Parliament must be kept informed, and its prior consent is sometimes required before concluding. If the amendment was framed as a trade agreement, special provisions under **article 207 TFEU** would apply, giving **more prominence to the Commission in the negotiating process** (it nominates the negotiator instead of the Council). A qualified majority is also required, except in some cases involving trade in services, intellectual property, and direct foreign investment, where unanimity may be required.

The legal basis for entering the negotiation of an amendment could be **challenged by a Member State**. In addition, under article 218 (11) TFEU, “the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice” on the compatibility of the amendment with EU treaties.

(iii) Intermediary recommendation

Option B1 is not recommended in the short term but could be **recommended in the longer-run** once significant support is obtained (at least equivalent to a qualified majority vote).

3.2.2. Option B2: amending schedules

Amendment of the schedules under article 3. The modification of drugs' listing in the schedules is a process of amendment (articles 1 (1) (u) and 3; McNair, 1961, p. 748; UN, 1973, p. 29). Lowering cannabis within the schedules would alter the modalities of its control for medical/scientific purposes. Entirely withdrawing cannabis from the schedules would impact domestic (non-medical) cannabis regulations much more.

This option has an important legal hurdle: even in the case of a full descheduling, **cannabis might remain subject to the obligations of schedule I because it is mentioned explicitly in article 2 (6) that cannabis is subject “to the measures of control applicable to all drugs in Schedule I”** (Riboulet-Zemouli and Krawitz, 2022, pp. 11–12). This sentence would require an amendment (under article 47, see Option B1 above) to release cannabis effectively from the obligations attached to Schedule I.

Member States can request the WHO to re-assess cannabis but cannot influence the outcome. The criteria WHO uses to issue its recommendations require that **any cannabis-like substance** be listed in the schedules, making it difficult to recommend a withdrawal (see Jelsma, 2022).

Finally, **this option is the only proposal whose outcome would be binding upon all State Parties** to the Convention, even those disagreeing with a withdrawal. According to the Commentary:

“The Schedules may be amended in a different way than the other parts of the Single Convention. A special procedure, that of article 3, is provided for their revision. Amendments of the Schedules, but not that of other sections of the Single Convention, can become binding on Parties to that treaty without their express or implied consent” (UN, 1973, p. 29).

(i) Precedent

In 2020, schedule IV was amended by a CND vote, and “cannabis and cannabis resin” was deleted from it (remaining in schedule I). The scientific review process by WHO leading to the vote had been initiated four years earlier (Riboulet-Zemouli and Krawitz, 2022) and yielded a total of 9 recommendations. Removal from schedule IV was the only recommendation accepted: one did not call for a vote, three were rejected and four were not voted upon.

(ii) EU legislation

Amendments to the schedules “have direct repercussions on the scope of application of Union law in the area of drug control” and are “directly incorporated into common Union rules” (Council, 2017b):

“The CND’s scheduling decisions also have legal effects in the EU legal order by virtue of Union law, namely Framework Decision 2004/757/JHA. Changes to the schedules [...] have direct repercussions for the scope of application of this EU legal instrument” (Council, 2017a).

The decision-making procedure is now well-established through the Horizontal Working Party on Drugs.

There is an unintended consequence of this Option in EU law: if cannabis was entirely withdrawn from the schedules, it would no longer be “a narcotic drug” in the meaning of the Single Convention. In consequence, the pieces of EU legislation which were not applicable, because they exclude narcotic drugs from their scope, could start becoming relevant to unscheduled cannabis. This is for instance the case for the general principles

and requirements of food law in the EU (laid down in Regulation No. 178/2002). See also the introduction of section 2.3.

(iii) Intermediary recommendation

If the WHO recommended a withdrawal, **the procedure would be similar to the one followed for scheduling decisions at CND every year.** It is unlikely that there would be a supporting majority at CND. Still, in the event of a majority in favour of descheduling, a procedure under article 47 would have to be made, likely under exclusive EU competence (see Option B1).

The technical difficulties linked to treaty provisions, and the polarised discussions around previous cannabis recommendations in 2018–2020, suggest that further efforts to deschedule may not be achieved easily or quickly, and are “unrealistic” (Jelsma, 2022, p. 98). Finally, because of its unintended consequences at EU level and since it is the only option which would be binding upon all Parties, **Option B2 is not recommended.**

3.3. Options C: Regulation after external amendment of the Convention

Another option consists in the conclusion of a new legal agreement intended to amend, complement, or replace the Single Convention. Here also, there are two approaches.

3.3.1. Option C1: new convention

There have been **proposals for “new conventions** intended to supersede the existing ones for countries adopting the new convention(s)” (Room and MacKay, 2012, p. 68).

(i) Precedent,

Like other regional instruments, the Shanghai Cooperation Organisation’s 2004 Agreement on combating illicit trafficking could be considered as a precedent in this regard.

(ii) EU legislation

The arguably strenuous idea of an EU-specific “drugs convention” may resolve many issues outlined in section 2. In practice, the process outlined in sections 2.3.5 and 3.2.1.(ii) is likely required.

(iii) Intermediary recommendation

Because it remains vague and has not been subject to any research, **Option C1 is not recommended.**

3.3.2. Option C2: *inter se* amendment

often called “***inter se* amendment**,” it consists in amending the Single Convention without relying on the procedure of article 47, but instead, on the 1969 Vienna Convention on the Law of Treaties (VCLT). The “*inter se* option for treaty modification” proposes that:

“a group of two or more like-minded states could conclude agreements among themselves that permit the production, trade, and consumption of cannabis for non-medical and non-scientific purposes” (Jelsma *et al.*, 2018, p. 7)

This option “require[s] a clear commitment to the original treaty aim to promote the health and welfare of humankind and to the original treaty obligations vis-à-vis states not party to the agreement” (Boister and Jelsma, 2018). There are advantages to the *inter se* amendment generally (Groenendijk, 2011): besides the improvement of the textual framework (like in Option B1), the mechanism could allow **overcoming the political divide** and altogether avoid the need to discuss the text of an amendment with pro-*status quo* States, finding “a balance between the stability of treaty regimes and the necessity of **change in absence of consensus**” (Boister and Jelsma, 2018, p. 493).

Technically, some legal questions remain open. If the amendment mechanism of article 47 of the Single Convention were binding upon all Parties, recourse to an external *inter se* amendment process would be legitimate. Nevertheless, **reliance on external mechanisms seems unnecessary because article 47 already allows for amendments to the Single Convention between a group of States, only binding upon them.**¹¹

Finally, the VCLT (ratified by 25 member States but not by France and Romania) took effect in 1980: some argue that it “cannot, in any case, apply to the Single Convention because of its **non-retroactivity clause**” (Dawkins, 1973, p. 364; see also McDade, 1986). Therefore, the process should rely upon **customary international law instead of the VCLT**, making it more delicate.

(i) Precedent

There is no precedent.

(ii) EU legislation

This method shares many challenges with Option B1 (section 3.2.1) with added specificities. **Acquis and practice support the conclusion of *inter se* agreements as a matter of principle**; ordinary EU treaty-making provisions (article 218 TFEU) do not apply to *inter se* agreements concluded between Member States of the Union (Erlbacher, 2019, p. 1661):

“The process of European integration is full of examples that started as *inter se* cooperation before being embedded in the EU legal order. [...] Yet, the conclusion of *inter se* agreements in the past was almost exclusively pursued in areas lying outside the scope of EU law, or at least in areas where the Union had not taken any action at all” (Dimopoulos, 2015, pp. 288–289).

In contrast, two substantive alterations of the Union’s legal framework contributed to “rendering the use of *inter se* unnecessary” (Dimopoulos, 2015, p. 290), calling for **caution in addressing *inter se* in present times**:

- The Treaty of Amsterdam introduced the “**enhanced cooperation**” mechanism (now Article 20 TEU and 326–334 TFEU). Regarded as a measure of last resort, *enhanced cooperation* can apply between at least 9 countries, outside of the areas of common commercial and common foreign and security policies;
- The Lisbon Treaty deleted previously-existing provisions facilitating *inter se* between EU Member States (an **exception for Benelux** countries has remained, in article 350 TFEU).

EU Member States can still conclude *inter se* agreements under strict conditions, except in the cases of exclusive competence of the Union (Dimopoulos, 2015). However, the **principle of loyalty** (article 4 (3) TEU) “prohibits undermining or circumventing the mechanisms for cooperation provided by the Treaties,

¹¹ Consequently, it may be legitimate to consider such external mechanism for an amendment of the schedules *inter se*.

such as enhanced cooperation” (Klamert, 2019, pp. 53–54). Except for Benelux countries, *enhanced cooperation is likely to be seen as the preferential mechanism over the conclusion of inter se agreements*. Requests to initiate *enhanced cooperation* are made to the European Commission, which may or may not submit it to the Council. The latter grants authorisations to proceed, after consent of the European Parliament (article 329 TFEU).

So far, proposed *inter se* amendments have been framed in terms of legal cross-border trade in non-medical cannabis (Boisteer and Jelsma, 2018; Jelsma *et al.*, 2018; Jelsma, 2022, pp. 99). If involving non-EU countries, this would account in effect to a **multilateral trade agreement**, an area of exclusive EU treaty-making competence, giving a **greater role to the European Commission in the negotiations** (see section 2.3.5 and appendix 2; Erlbacher, 2019, pp. 1646–1665) in a process which “**usually takes several years**” and “involves over 30 stages” (European Commission, 2018). The principles of pre-emption and conferral should be borne in mind (see Dimopoulos, 2015; Schütze, 2006).

(iii) Intermediary recommendation

Although sharing many challenges with the regular amendment procedure (Option B1), this approach has some comparative benefits politically. In purely legal terms, however, Option B1 is preferable. In the event of a failed attempt with Option B1, the *inter se* option may take more relevance (Jelsma, 2022, p. 98) than if it was pursued as a first-choice option.

Suppose the *inter se* was to engage in trade relationships with non-EU third countries, the area of *common commercial policy* risks being triggered. Avoiding it would require the conclusion of a non-trade-related agreement. If engaging only EU States, the amendment could, for instance, address the internal market of cannabis on the grounds that the Union has not yet done so. The *enhanced cooperation* would appear as the optimal basis to proceed; it also presents better safeguards and offers minimum rights to non-participating Member States (Dimopoulos, 2015, p. 302).

Unless limited to Benelux, unless Option B1 has previously failed, or unless there are nine EU Member States to start an *enhanced cooperation*, and because of critical legal uncertainties added to complexities at the EU level, **Option C2 is not recommended**.

3.4. **Option D: Direct regulation justified by the superiority of human rights law**

States have **obligations under international and European human rights law to protect the right to health and other human rights**. It is possible to claim (and substantiate) that this obligation is better met through domestic cannabis regulations than prohibition. At the same time, States claim that their obligations under international drug control law prevent them from regulating as well as from respecting their human rights obligation.

This option is based on the idea that the superiority of the body of human rights law over drug law allows for prioritising the former over the latter, providing legal grounds for domestic regulations. For Heilmann (2011, p. 284):

“human rights are—despite not being spelled out in the drug conventions—a tacit component of all legitimate drug control measures. Human rights law is applicable at all times when Member States enforce domestic control measures based on the conventions. The obligations under the international drug control regime cannot be invoked for a measure that unjustifiably runs counter to human rights.”

In recent years, substantial scholarly contributions have further deepened the analysis of these questions (Bone, 2021; Lines, 2017). Van Kempen and Fedorova (2019b) showed that “[t]he regulation of [...] recreational cannabis, because of the interests of individual and public health, security and crime control, can find its basis in positive human rights obligations.” They postulate that five conditions need to be met in order for States to prioritise their human rights obligations over the drug control ones:

1. relevant human rights-based interest embedded into the law;
2. a claim of greater effectiveness of human rights protection under a regulated environment;
3. large, democratic support for reforms in the country;
4. the creation of a system which does not negatively affect other States;
5. policies discouraging the use, in particular via increases in public awareness of cannabis harms.

Besides these valuable criteria, **there are legitimate concerns about the direct applicability of this method**: “the application of human rights law to the recreational use of drugs remains controversial, and there is still much to be resolved” (Marks, 2019, p. 222). Doubts remain as to whether such a dynamic human rights-based interpretation can be leveraged effectively by a State:

“Positive human rights obligations can help to justify cannabis regulation if that can more effectively protect the right to health, the right to life or the right to privacy, and there are good arguments to prioritise human rights [...]. Still, pointing out those contradictions does not automatically resolve the resulting non-compliance with the UN drug conventions” (Jelsma, 2022, p. 97).

In practice, in case of conflicts between human rights and other legal instruments, a solution of harmonious compromise should be sought. The *invalidation* or *overruling* of particular provisions based on the superiority of other provisions should be a last resort in any circumstance. This option should therefore only be pursued if there is no other, more harmonious manner to reconcile the conflicting provisions. The various options described in this brief suggest they are more reliable ways forwards, making Option D probably a **better fit as a complement** to other Options.

(i) Precedent

There is no precedent. Uruguay and Canada used some arguments related to human rights, but never formally endorsed this approach. Enacting such an option might require the adoption of a CND resolution to support it (an unsuccessful attempt was made by Uruguay more than a decade ago; CND, 2008). Optionally, the International Court of Justice (ICJ) may be called to resolve the issue (article 48, Single Convention).

(ii) EU legislation

This method would require further identifying conflicting provisions at the level of EU acquis and European human rights law (done in large part by van Kempen and Fedorova, 2019b) and justifying the hierarchical superiority in this field at the European level. The degree of acceptability of this method among EU institutions, in particular the CJEU, as well as Council and the Commission, remains unknown.

(iii) Intermediary recommendation

Rather than an *option* to follow as a self-sufficient way to justify domestic cannabis regulations, the analyses of interrelations between human rights and international drug law, and conflicting obligations of States, might be better used in support of whichever other Option is chosen. Notably, the argument of positive human rights obligations complements Options B, C and E.

In any event, the five conditions listed above should be used as guidance in designing domestic cannabis regulations that protect, promote and enhance human rights. **Option D is recommended only as a secondary and reinforcing argument.**

3.5. Options E: Direct regulation of a “non-medical industry”

This Option does not require changes in treaty texts or in ratification statuses. It consists of the design of domestic **regulations under the rules of articles 2 (9) and 28 of the Single Convention**. Based on the Commentary (UN, 1973, pp. 110, 402), this option interprets the *limitation to medical and scientific purposes in article 4 (c) as modulated by exemptions for non-medical and non-scientific purposes*. Key to this option is article 2 (9), which provides that:

“Parties are not required to apply the provisions of the Convention to drugs used in industry for non-medical and non-scientific purposes. Article 4(c) is expressed to be ‘[s]ubject to the provisions of this Convention’. Exceptions to the general obligation of Parties in Article 4(c) to limit drugs to medical and scientific purposes are provided in Article 2(9) [...] and Article 49” (Room and MacKay, 2012, p. 86)

Article 49, not applicable anymore, provided the option to allow *traditional* non-medical use temporarily. **Article 2 (9) is still applicable today, and gives the option to allow industrial non-medical use.**

The wording of article 2 (9) is vague, at times appearing inconsistent. It is better understood with the doctrine of *effet utile* in international law, according to which **the maximum effectiveness needs to be given to every word** of a treaty provision (a principle embedded into the concept of *pacta sunt servanda*).¹²

This doctrine triggers an *inter-temporal* interpretation (Elias, 1980; Kolb, 2016, p. 158), meaning that article 2 (9) can be interpreted within the language and context of our times (as long as this remains aligned with the object and purpose of the treaty), thereby giving full effect to the article. Under these general rules of interpretation, **a correspondence can be established between the Convention’s industrial, non-medical and non-scientific purposes in article 2 (9) and what is today commonly known as the cannabis industry** (Riboulet-Zemouli, 2022, pp. 86–90), giving effect to the provision, as long as such cannabis industry contributes to the health and welfare of humankind.

Room and McKay (2012, p. 85) believe that under article 2 (9), “drugs cannot be recovered or restored from their industrial use for consumption.” However, there is no mention of this in the Single Convention, and no other form of ban on the consumption of cannabis that is exempt under article 2 (9).

The exemption under article 2 (9) is not absolute, and it includes two measures of control:

- **Upstream: harm reduction.** Obligation to *prove* that the *cannabis industry* contributes to the health and welfare of humankind. Subparagraph (a) requires States to take **any appropriate measures to reduce abuse and harmfulness** from non-medical cannabis. For this, they can either “denature” the drug, or they can apply “other means” of reducing harm and abuse. This provision articulates with other health-centred measures on *abuse* elsewhere in the Convention (*e.g.* article 38; see appendix 1).

¹² International Law Commission (ILC): “**Principle of effectiveness** (*ut res magis valeat quam pereat*): Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular **provisions are to be interpreted so as to give them their fullest weight and effect** consistent with the normal sense of the words and with other parts of the text, and **in such a way that a reason and a meaning can be attributed to every part of the text**” (ILC, 1965, pp. 53–62) see also Kolb (2016, pp. 154–155).

- **Downstream: data reporting.** Subparagraph (b) requires the **basic statistical returns to INCB** (via its Form C)¹³ of annual amounts of cannabis circulating in the industry (Chatterjee, 1981, p. 420).

UN Secretary-General's (1966, p. 5) *Administrative guide for the Single convention* confirms that:

“Parties are not required to apply the provisions of the Convention to drugs, *i.e.* substances covered by Schedules I and II which are commonly used in industry for other than medical and scientific purposes, subject to the provisions contained in Article 2, paras. 9(a) and (b).”

Some commentators argue that these provisions only apply to *hemp* (*i.e.* CBD products). However, the Single Convention mentions neither THC nor the concept of threshold or limits. There are precedents of non-denatured drugs being exempt under this provision (UN, 1973, pp. 72; Riboulet-Zemouli, 2022, p. 49). All this corroborates the applicability of this article to all cannabis, placing *industrial non-medical* cannabis in a legal regime akin to that of *industrial hemp*.

In such a situation, the ***non-medical cannabis industry established under article 2 (9)*** would ***not be contrary to the provisions of the Single Convention*** (as in the wordings of the 1988 Convention and EU legislation) as long as the obligations mentioned above are met (Jeanroy *et al.*, 2022). Similarly, the concept of possession “under legal authority” (article 33) also includes other than medical and scientific purposes (Room and MacKay, 2012, pp. 126–127; UN, 1973, p. 113). Possession of cannabis obtained via the licit non-medical cannabis industry would be allowed under the Convention.

Generally, **compliance with article 2 (9) places the State in a level of compliance similar to that of medical/scientific activities**: grounded on treaty provisions. Doubts remain regarding the attitude that INCB will adopt regarding its role of collecting and compiling statistical returns on non-medical cannabis under article 2 (9) (b).

On cannabis cultivation, there are two distinct possibilities. Article 2 (6) of the Single Convention explains that “cannabis [is subject to the provisions] of article 28” but does not precise which paragraph, opening the way for two compliance options, under either article 28 paragraph (1) or paragraph (2):

3.5.1. Option E1: article 2 (9) and 28 (1), unilaterally

With cultivation under article 28 (1). This path is the same regime of obligations applicable to the cultivation of cannabis and opium poppy for medical and scientific purposes.

In the case of option E1, the manufacture, export, import, distribution of, trade in, use and possession of cannabis would be exempt from the measures of drug control. In contrast, cannabis cultivation would remain subject to the full extent of drug control obligations.

Besides considerations of international and European law, the **burdensome system of regulations for cultivation may be excessive or inappropriate** for the regulation of a non-medical industry crop. The appropriateness and viability of licensing schemes (and other obligations thought for the medical and pharmaceutical sector) is an important consideration when considering needs for tailored transitional measures in some jurisdictions such as socially-sensitive policies or policies aimed at containing the illicit market by reintegrating small-scale and low-level drug offenders into licit schemes (Kilmer *et al.*, 2021; Rahwanji, 2019).

(i) Precedent

¹³ Form C distributed by INCB already includes a section in “Part II.B” where non-medical cannabis exempted under article 2 (9) must be reported alongside cannabis for other purposes (Riboulet-Zemouli, 2022, pp. 52, 111).

There is no precedent.

(ii) EU legislation

As other *lex lata* approaches, Option E1 avoids the complex question of EU competencies. However, the inconsistency between the legal regimes applied to cultivation and other activities may cause some issues, and could be challenged.

(iii) Intermediary recommendation

In terms of policy coherence, adopting Option E2 instead of Option E1 appears more logical. **Option E1 is not recommended** unless specific issues arise during the implementation of Option E2.

3.5.2. **Option E2: article 2 (9) and 28 (2), unilaterally**

With cultivation under article 28 (2). This exemption (no particular obligation) is **similar to the regime applicable to *hemp* cultivation** under the Single Convention (discussed in Riboulet-Zemouli, 2022).

Although based on well-ascertained and conservative means of interpretation, this option can be difficult to apprehend, because it relies entirely on treaty interpretation, which “is to some extent an art, not an exact science” according to the ILC (1967, p. 218). Perhaps for this reason, some commentators have challenged the applicability of this Option, particularly E2. Importantly, however, the **interpretation of treaties is the exclusive mandate of States**, and not that of external institutions or stakeholders.

Nevertheless, the **textual echo between the “industry” in article 2 (9) and “industrial” in article 28 (2)** invites favouring Option E2 over E1, vesting the former with more policy coherence and good faith than the latter.

The waiver of direct obligation over cannabis cultivation (except a general obligation to avoid *diversion* towards the illicit economy) allows Member States to adopt regulatory controls tailored to their specific circumstances, including by relying on the use of contemporary approaches to regulatory oversight (*e.g.* use of technology that did not exist in 1961, is not contemplated in the Convention, and could not be possible with Option E1).

(i) Precedents

There are two precedents.

In **Malta**, the stated goal of the 2021 law is “to regulate the use of cannabis for purposes other than medical or scientific purposes and to carry out work [...] to implement harm reduction from the use of cannabis” (Parliament of Malta, 2021) using treaty language present in Article 2 (9). **Malta’s undefined “industry” takes the form of the non-profit cannabis social club model.** Malta also relies on article 28 (2): the regulations prevailing for medical cannabis cultivation do not apply to non-medical crops (Jeanroy *et al.*, 2022).

Switzerland also appears to adopt this approach (Swiss Confederation, 2021; 2022). Though the name of the regulations (pilot studies) suggests that Switzerland follows a “scientific purposes” approach (option F), a close look at the law shows they are not:

- the law regulates cannabis “for non-medical purposes,”
- pilot studies conducted by authorised private sector entities (different *industrial* models),
- the law is built within a robust public health and harm reduction approach,

- no prescriptions, pharmaceutical rules, or licensing on cultivation are required,
- no estimates are collected (although they are required for *scientific purposes*), but statistics on the quantities of cannabis circulating within the pilot studies are collected (as article 2 (9) (b) requires).

Note: because of their regulations’ novelty, none of these two countries has yet submitted returns under **article 2 (9) (b)**. The Commentary explains that **these returns are the compliance mechanism giving effect to “the non-application of the full narcotics regime”** (UN, 1973, pp. 73, 248).

(ii) EU legislation

The incorporation of the Single Convention into EU *acquis* facilitates the address of this Option. A non-medical cannabis industry regulated by law, compliant under article 2 (9) of the Single Convention, would certainly **not be “without right” in the meaning of the Framework Decision**.

In CJEU case law, the assessment of the ““need for, and proportionality of”” morally-sensitive regulatory measures (such as domestic cannabis regulations) relies “solely by reference to the objectives pursued”” (cited in de Witte, 2013, p. 1572), corroborating the **need for a strong public health and harm reduction focus (already required under article 2 (9) (a) of the Single Convention)**.

As other *lex lata* approaches, Option E2 avoids the complex question of EU treaty-making competencies. By relying on the core sovereign capacity of States to interpret treaties, it fundamentally anchors decision-making processes at the domestic level. Interestingly, “industry” is one of the policy areas where the EU only has “supporting competencies” to intervene in support, coordination or complement of member States’ action, and harmonisation of laws or regulations is not necessarily required (articles 6 (b) and 173 TFEU). Similarly to all Options, the ascertainment of EU competencies requires more research.

Highlight: Treaty interpretation competences.

The interpretation of international treaties is the sole competence of States, as long as there is no formal modification (*lex ferenda*).

In consequence, **institutions such as the European Commission or the INCB do not have any specific mandate or competence to challenge or contradict *lex lata* domestic reforms based on an interpretation of treaty provisions** in good faith under Options E.

(iii) Intermediary recommendation

Its transposition into domestic law requires minimal efforts: defining regulated uses as “other than medical and scientific purposes” and embedding harm reduction and measures to prevent substance use disorders within the law. Administrative **costs to report to INCB**, although limited, should be taken into account, like the necessary **expenditures in harm reduction and health services** (these budgets are needed in all Options, but they are a direct legal obligation under article 2 (9) (a)).

Pursuing this Option requires a background in international law, an understanding of complex principles and obscure wording, and efforts to overcome preconceived ideas (*e.g.* the feeling that something *must* be there somewhere to prohibit). **Implementing this Option requires commitment and involvement in argumentative efforts** and, generally, a proactive defence of the model in the multilateral arena. In particular, this Option calls for diplomatic efforts, proving good faith in efforts to reduce harms and abuse using “other means” than “denaturing” under article 2 (9) (a).

The two carefully-designed precedents are encouraging: the two are in Europe, one in the Union. Option E2 is simple and presents few risks. It is immediately implementable, and the only option where it is possible in good faith to remain in compliance with the text of the Single Convention (therefore with the 1988 Convention and EU acquis), using accepted rules of international law.

Option E2 is recommended in the case of a State acting individually.¹⁴

3.5.3. Option E3: article 2 (9) and 28 (2), multilaterally

With cultivation under article 28 (2), in a joint approach of like-minded Member States agreeing on a shared interpretation. Sovereign domestic reforms are welcome “as long as it runs in parallel with multilateral dialogue [...] demonstrating a clear desire to resolve emerging challenges” (Jeanroy *et al* 2022, p. 45). While Option E2 can be relied upon for action by a single country, it could also be leveraged by a group of like-minded countries. In parallel to regulating independently on their territories, a group of States could express their shared interpretation of article 2 (9) of the Single Convention via a **non-binding Joint Declaration**, Statement, or Memorandum of Understanding...

Robert Kolb (2016, p. 131) describes such a situation where a group of states dissent to the treaty interpretation of the majority, and agree together on a distinct interpretation: “**This interpretation is not binding on the States having disagreed to it. However, it may bind the States agreeing to it.**”

Such a non-binding approximation of positions is to be preferred over unilateral moves, and could serve valuable purposes for treaty discussions in the longer term. A Joint Declaration geared around a shared interpretation of provisions within the Single Convention could also **articulate claims of compliance under human rights law** (Option D). It could also reaffirm commitments to other aspects of international cooperation in the field of drugs, as well as commitments not to jeopardise the domestic cannabis policies of other States.

(i) Precedent

There is no precedent.

Highlight: Joint Declarations shape changes.

There is no precedent of joint declarations mentioning explicitly article 2 (9) of the Single Convention.

Nonetheless, the “**Joint Statement**” released on 15 July 2022 by Germany, Luxembourg, and Malta (Gouvernement luxembourgeois, 2022) may account for an early foundation for Option E3. Indeed, the Joint Statement’s title references “**the regulation of cannabis for non-medical and non-scientific uses**” –terminology present only in article 2 (9) of the Single Convention. Furthermore, the object and purpose of the Convention is interpreted as a concern for the health and welfare of humankind, leading to base cannabis-related reforms and policies on public health objectives.

The **gradual build-up of a package of interpretive elements**, via a series of Joint Statements of this kind, can be a positive way to progressively and constructively reinforce Option E3’s acceptance.

¹⁴ States taking action on their own should keep in mind the *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* of the ILC (2013, pp. 162–166).

(ii) EU legislation

Insofar the intention is not to conclude a binding instrument, and its scope does not interfere with EU exclusive competence, there is no particular dispositions for the conclusion between States of non-binding Memoranda of Understanding, Joint Declaration, Joint Statements, etc. (Erlbacher, 2019, p. 1662).

(iii) Intermediary recommendation

Option E3 is recommended if several States agree on a shared interpretation of treaty provisions. It is also recommended as a costless first step to future joint action. Without being binding, it has legal value in establishing a clear position, proving good faith and advancing the debate constructively.

3.6. **Option F: Direct regulation as an experiment (scientific purposes)**

This option proposes that domestic regulations “formulate a scientific research objective for the legalisation scheme” such as “a comprehensive, population-wide cohort study in which all individuals purchasing cannabis are automatically enrolled into a study examining the inter-generational health effects of long-term cannabis use” (Fultz *et al.*, 2017). The applicable provisions of the Single Convention would be the **same measures as the ones for medical cannabis**, for all activities.

This option does not require changes in treaty texts or ratification status. Importantly, it may also not require domestic legal reforms since **many drug laws already include protocols for conducting such scientific experiments** under dispositions which comply with the Conventions’ obligations.

In addition, the extent and type of regulatory measures mandated under the Convention for scientific experiments are highly **unfit for non-medical use**. Under the scientific experiment scheme foreseen under Option F, the full extent of drug control measures would apply:

- medical prescriptions upon dispensation,
- medicalisation (including for people with no use disorder),
- general requirements of a pharmaceutical supply chain,
- comprehensive estimates and statistical returns on all activities,
- in addition to the inappropriate measures for cultivation outlined in section 3.5.1 (Option E1) and potentially added barriers at the domestic level (complex application and validation procedures for experiments), etc.

These administrative constraints are likely to incur elevated costs. They also represent significant barriers to entrepreneurship and access to legally-regulated markets, likely to **indirectly favour the continuation of illicit markets** (FAAAT 2021; Kilmer *et al.*, 2021; Rahwanji, 2019).

From the legal standpoint, analysing whether the meaning of “medical and scientific” could be understood as “public health purposes,” van Kempen and Fedorova (2019a, pp. 40–46, 218; 2019b, p. 272) show that it **does not hold the test of good faith**, and is therefore to be discarded. Even under an approach of harmonisation with positive human rights obligations, they find that “there are still various objections with this solution.” Whether domestic cannabis regulations can reasonably be considered a scientific purpose remains doubtful and difficult to sustain in good faith. Case law from the ICJ concur:

“a State cannot manipulate a ‘scientific’ loophole as a way to breach a key treaty provision, in this case to camouflage a commercial whaling operation as scientific research” (Lines and Barrett, 2018, p. 450).

(i) Precedent

There is no precedent.

Switzerland and the Netherlands did adopt laws framing regulatory trials with cannabis. However, these laws are not related to this option since none comply with the Convention's obligations for "scientific purposes," which are equivalent to the requirements for medical purposes. Switzerland's experiments are framed under Option E2 (see section 3.5.2.(i)), while the Dutch "*wietexperiment*" embedding into the Conventions' framework remains unclear.

(ii) EU legislation

Undertaken under pre-existing domestic laws (already in compliance with all levels of drug legislation), such an experiment would not *a priori* face significant hurdles at the EU level. As other *lex lata* approaches, Options F avoids the complex question of Union treaty-making competence share. There is large-enough room for Member States to engage in such a scientific experiment under domestic legislation.

(iii) Intermediary recommendation

Because of the obligations it conveys, unfit for a non-medical market, burdensome for governments and, more importantly, due to the difficulty to reconcile it with the core principle of good faith in the interpretation and implementation of international law, **Option F is not recommended.**

4. INTERNAL MARKET

Establishing an industry limited to internal borders seems the most straightforward solution. It presents advantages, for example, to allow a smooth and unaltered development of a domestic cannabis industry.

In contrast, such a protectionist approach risks “insulating national policies from transnational rights that companies and citizens derive from the EU legal order” (De Witte, 2013, p. 1557). It would also oversee the structural impact and codependency of transnational markets on the continent, whether licit or illicit.

Consequently, the oversight and regulation of commercial exchanges within the European single market (between the Member States having regulated) should be contemplated –*act rather than suffer*.

Indeed, non-medical cannabis products are “goods” within the economic community (as case law suggests). As such, they are subject to the general rules of the internal market like any good, in particular, **unhindered trade across borders**. No piece of EU law expressly prohibits imports and exports of *licit non-medical cannabis*. Nevertheless, individual States can rely on **article 36 TFEU** to impose the following:

“**prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health [...]**”

Such prohibition or restriction under article 36 has not yet been applied to non-medical cannabis, since it has never been lawfully marketed in the Union. However, some Member States have relied on it to restrict or prohibit imports of *hemp* products (e.g. CJEU, 2003) or medicinal cannabis.

Therefore, in the case of an EU State lawfully commercialising cannabis on its territory, other **Member States not regulating should make derogations under article 36 TFEU to continue prohibiting the imports of cannabis**.

On the other hand, after several Member States have regulated, they may not be in a position to prohibit imports and exports between themselves. **The prohibition of imports can almost only be justified if there is a similar ban for all trade within the territory** (CJEU, 1979). Otherwise, prohibiting imports after having regulated domestic markets risks being considered a discriminatory measure under article 36:

“[...] Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

In addition to article 36 TFEU, numerous other derogations to free trade motivated by *public interest* have been established by CJEU case law (**mandatory requirements**; Craig and de Búrca, 2011, pp. 677–689). Article 36 is likely to prevent EU Member States that have regulated at the domestic level from prohibiting imports. Therefore, in order to apply coherent and proportional measures to regulate influx of cannabis, others than a ban on imports, States may want to opt for controlling cross-border trade using the mandatory requirements (Armstrong, 2015, pp. 518–531; Klamert *et al.*, 2019, pp. 506, 513, 533).

Highlight: Prohibition remains an available option.

Licit cannabis products are goods. As such, their legalisation will inevitably, although progressively, bring them under the general frameworks related to trade in goods in the EU.

As time passes and an increased number of jurisdictions allow licit cannabis, controlling cross-border trade will remain possible: **countries that do not legalise can continue to prohibit imports, by declaring it under article 36 TFEU.** And countries having legalised could apply mandatory requirements.

Generally, however, it will be for each EU State on a case-by-case basis to justify that the restrictions to trade that they apply are not incoherent, disproportional, or discriminatory.

4.1. Multi-tiered trade relationships

Considering **three hypothetical EU Member States**:

- State α and State β have regulated their non-medical cannabis industry in compliance with international and EU law
- State γ decided to maintain prohibition within its borders.

Without a doubt, State γ will **remain fully entitled to continue prohibiting imports of non-medical cannabis in its territory** originating from States α or β .

In contrast, case law suggests that, even if desired, **State α may not be able to prohibit imports from, or export to, State β** (de Witte, 2013, pp. 1575; see CJEU; 2001). State α would nonetheless remain able to apply more circumscribed and proportional measures like quotas or requirements on labelling, advertising, prior authorisation mechanisms, and so on (Klamert *et al.*, 2019, pp. 518–522, 535–537; see also section 2.3.4). Any restriction should apply equally to all market players (domestic and foreign). **Upon becoming licit, any limitation to the free movement of cannabis goods and services between two legal countries must be strictly necessary, suitable and appropriate.**

Suppose States α and β wish to commerce, but their territories are not adjacent. In that case, it is unlikely that **transit** would be allowed via State γ , except of course in the case of its express authorisation (art. 36 TFEU; art. 74, 76, and declaration in the Final Act of the Schengen Implementing Convention; see appendix 2).

When States α and β trade in non-medical cannabis across their border, the reliance on some baseline **pieces of EU legislation with general application** could be contemplated. For instance:

- The provisions of Directive 2001/95/EC on **general product safety** should be considered (European Parliament, 2010) in the absence of harmonised EU regulation.
- Regulation (EU) 2019/515 “on the **mutual recognition of goods lawfully marketed in another Member State**” establishes a simplified voluntary procedure. Appreciated by all stakeholders (Jan, 2020), this tool could arguably become a required process in a newly-created trade segment. It would not be discriminatory, at least not in early stages of the development of cross-border cannabis trade.

4.2. Cannabis-specific EU trade law

Besides general internal market rules, there is one obligation and some commitments directly affecting the licit trade in cannabis.

The only obligation under EU *acquis* on cross-border trade in cannabis is contained in article 76 (3) of the Schengen Implementing Convention. It mandates States to “notify each other of the **measures taken in order to monitor the legal trade.**”

Tourism involves the free movement of people, and freedom of services. But there are commitments of EU Member States, with legal ties, against so-called “**drug tourism**” (Deutscher Bundestag, 2022b, p. 5). Besides non-legislative acts, *drug tourism* is mentioned in case law (sections 2.3.3 and 2.3.4) and echoed in the Implementing Convention (provisions mentioned in the paragraph above). A requirement exists for States to take measures to avoid *drug tourism* which “concerns both the maintenance of public order and the protection of the health of citizens” (CJEU, 2010, §65).

Cannabis has been accessible to any traveller in Dutch *coffee-shops* for decades. The few incidents that arose are disturbances in localised, dense, touristic areas... not issues affecting other countries’ territories (Monshouwer *et al.*, 2011; Pereira and de Paula, 2017; Wen *et al.*, 2019). So far, it has been possible to restrict access to non-medical cannabis only to residents. However, this exceptional derogation to the freedom of services, justified partly by the fact that only one Member State allowed access, may not last forever (section 2.3.4).

Banning cannabis tourists risks continuing to offer a market segment to criminal actors. Rather than discriminatory restrictions on access, States’ approach should be twofold. **First, internally**, adopt sound regulations, learning from the Dutch experience, to prevent unintended impacts of cannabis tourism on the local population. Kang and McGrady (2020) call “policy makers and industry professionals [to] engage in continual conversations on how to plan and manage this new tourism segment for community and state development.”

Second, vis-a-vis neighbouring States (which constitutes the core meaning of the dispositions on *drug tourism* in EU *acquis*), it is desirable to take diligent actions to prevent any *unwarranted trade* (exports) by tourists. Monitoring the phenomenon, and education and awareness-raising among travellers, are essential. Followed by Canada and the United States, this approach has raised no particular concerns so far (Canadian Government, 2021; US Embassy in Canada, n.d.). Authorities are coordinated and provide extensive information and guidance to travellers, including in airports, train stations, etc., warning:

“It is illegal to take cannabis across the Canadian border, whether you are entering or leaving the country. You could be charged with a criminal offence if you try to travel to other countries with any amount of cannabis in your possession. This applies to all countries, whether cannabis is legal there or not” (Government of Canada, 2021).

Public policies could encourage “multimodal tourist attractions (combining cultural, agro-, or eco-tourism, with therapeutic/health tourism or with leisure-led tourism)” (FAAAT, 2021, p. 49) to prevent the apparition of cannabis-only centred tourism practices.

Highlight: A world of cannabis tourism

Cannabis has centuries-old links with travel and tourism. Today, all jurisdictions having reformed its access contemplate cannabis tourism in some form or another. Banning tourism or prohibiting foreigners from accessing legal cannabis risks perpetuating an illicit market or creating a grey area in the nascent legal economy.

Tourism related to cannabis should be allowed but framed within the existing touristic offering (to avoid massification and unsustainable practices), publicly monitored, and accompanied with targeted education and awareness-raising campaigns for foreign visitors.

* *

The elements outlined above are applicable independently of the Option (A–F) chosen as long as trade takes place between two States where non-medical cannabis is lawfully marketed, without *prima facie* breach of treaty obligations, and without transiting via (or impacting otherwise) those States that retain prohibition in their territory.¹⁵ These elements do not constitute a definitive legal statement. Yet, they suggest that the panorama of the legal status of **trade in licit non-medical cannabis in the EU may not be impossible**, and is certainly not as difficult to apprehend as it can seem at first.

The (short) discussion of trade-related aspects of non-medical cannabis in this section is barely scratching the surface of a complex topic, in large parts still understudied. In particular, analyses of the difficult question of trade between EU and non-EU States are highly desirable.

¹⁵ Option F could be an exception: special regulations for the trade in products used in research settings might exist.

5. RECOMMENDATION

Countries have choices to comply with their international obligations. Constructive and non-disruptive approaches which protect and promote the rule of law and international peace and stability must be favoured.

In this regard, it is essential to **dialogue** and adopt an **incremental approach**.

This is why the recommended path to follow is based on **four steps**:

→ Step 1: Decriminalise personal cultivation, possession and use

As discussed in section 1.2, **decriminalisation is a consensual policy**, recommended by a wide variety of stakeholders in the international arena, common in the EU, and with positive impacts ranging from improvements for health and human rights to savings in State budgets.

Variations and adjustments to domestic decriminalisation schemes remain possible for Member States. Chosen modalities have different impacts and benefits, and should be carefully weighted (Fernández Ochoa, 2022; Kilmer *et al.*, 2021).

Action in this direction should be taken as early as possible.

→ Step 2: Regulate a non-medical cannabis industry under current legal framework –Option E

Option E under **article 2 (9) of the Single Convention** can supplement decriminalisation, in the short-term.

It provides the most suited basis for a **malleable regulated industry, adapted to local contexts and specificities**: pilot studies of dispensing models, cannabis social clubs, farmers' market-type, more classical commercially economic schemes, or (ideally) a mixed-model economy.

State taking action on its own (E2): Regulations under Option E2 optimise existing legislation whilst avoiding challenging the validity of a Single Convention that States have accepted for decades. This Option presents few risks, enabling a seamless shift away from perceived obligations to ban cannabis, without affecting other commitments or the treaty itself. It provides valuable **margins for governments to manoeuvre** and allows **claims of double compliance** under both the Single Convention and international human rights law (Option D) **without invalidating or ignoring any treaty provision**.

Collective approach (E3): States might also consider taking joint actions under Option E3: several States sharing the same interpretation under Option E publicise it via a non-binding Declaration or Memorandum, also reaffirming trust in international cooperation, human rights, and commitment to respecting the policy choices of other States. Countries acting in such a way could **progressively establish commercial exchanges between themselves**. Relying on the procedure of mutual recognition of goods under Regulation (EU) 2019/515 could assist this process.

At this stage, political and legal actions continue to be the full sovereign competence of States, and do not call for the involvement of European institutions –as long as reforms do not alter the rules or framework of the Union. The involvement of EU institutions is recommended at the following stage.

→ **Step 3: Engage in dialogues with WHO, INCB, and the European Commission**

Efforts at the domestic level should not be isolated from the United Nations system. **WHO and INCB** are the two international bodies mandated under the Conventions to which **article 2 (9) seems to talk**. The requirements of harm reduction and prevention of substance use disorders under article 2 (9) (a) would benefit from guidance and assistance, including sharing good practices, at the WHO level. The reporting requirements under article 2 (9) (b) would benefit from a frank and open dialogue with the INCB.

A domestic regulation of cannabis complying with international law and EU acquis under Option E2 or E3 falls entirely **outside of the area of competence of the European Commission** at the stage of its design (step 2). While the Commission must remain foreign to the sovereign design and adoption of legislative provisions on non-medical cannabis regulations, it could be most needed to help States implement, follow-up, and coordinate after their domestic policy reforms. The Commission could also have an important role to play to mediate between States with different legal approaches to cannabis.

This step should be entered only after step 2 has been completed.

→ **Step 4: Initiate long-term talks towards a future regular amendment**

In the longer-term, action should be prepared or anticipated.

As cannabis law reforms multiply, the likelihood of an amendment of the Single Convention will augment. To adopt a posture of applicatory contestation such as Option E can strengthen the norm while deviating its focus away from prohibition. This further **increases the plausibility of treaty modifications in the longer term**. Previous collective steps such as Option E3 also help prepare the terrain.

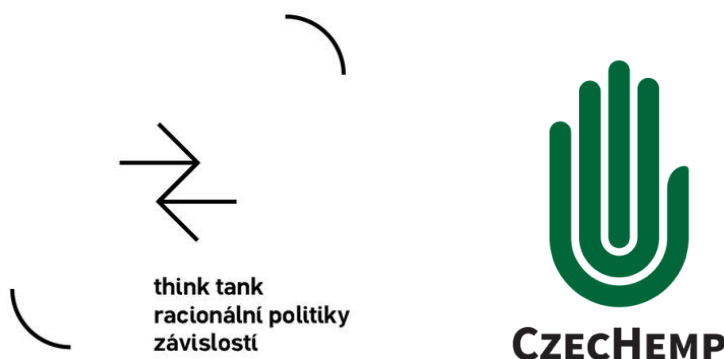
Building over the dialogues with the European Commission and WHO/INCB, **early stages of discussion around a future regular amendment procedure under Option B1** (article 47 of the Single Convention) should be launched. Option B1 represents a non-disruptive and well-ascertained approach, and should be anticipated and prepared for in the long term.¹⁶

Framing such a future amendment under the competencies of “health” and “industry” may be a solution to retain leeway domestic action, while keeping in line with the Single Convention. Starting early on with **open-ended exploratory analyses of Option B1** is recommended.

The European Commission, the European Parliament and/or the EU Economic and Social Committee could be well-suited to accompany this.

¹⁶ It is only if Option B1 fails that enhanced cooperation mechanisms (Option C2, or even C1) may be considered.

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Acronyms

CBD	Cannabidiol
CJEU	Court of Justice of the European Union
CND	Commission on Narcotic Drugs (UN Economic & Social Council's subcommission)
ECtHR	European Court of Human Rights
EMCDDA	European Monitoring Centre on Drugs and Drug Addiction
EU	European Union
EUCMA	Convention on Mutual Assistance in Criminal Matters between the EU countries
FAO	Food and Agriculture Organisation of the UN
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organisation
INCB	International Narcotics Control Board
OAS	Organisation of American States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THC	Tetrahydrocannabinol
UNAIDS	Joint United Nations Programme on HIV and AIDS
UNDP	UN Development Programme
UNCTAD	UN Conference on Trade and Development
UNGASS	UN General Assembly Special Session
UNODC	UN Office on Drugs and Crimes
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

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Appendix 1. International law influencing domestic cannabis regulations.

This list is not comprehensive.

International drug control conventions		
Single Convention on narcotic drugs, 1961, as amended by the 1972 Protocol	Article 2 (1)	“Except as to measures of control which are limited to specified drugs, the drugs in Schedule I are subject to all measures of control applicable to drugs under this Convention and in particular to those prescribed in article 4 (c), 19, 20, 21, 29, 30, 31, 32, 33, 34 and 37.”
	Article 2 (6)	“In addition to the measures of control applicable to all drugs in Schedule I, [...] cannabis [is subject to the provisions of] article 28.”
	Article 2 (9)	“Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that: <ol style="list-style-type: none"> a. They ensure by appropriate methods of denaturing or by <u>other means</u> that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the <u>harmful</u> substances cannot in practice be recovered; and b. They include in the statistical information (article 20) furnished by them the amount of each drug so used.”
	Article 4 (c)	“The parties shall take such legislative and administrative measures as may be necessary: <ol style="list-style-type: none"> (a) To give effect to and carry out the provisions of this Convention within their own territories; (b) To co-operate with other States in the execution of the provisions of this Convention; and (c) <u>Subject to the provisions of this Convention</u>, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”
	Article 19	<i>Requirements on</i> “Estimates of drug requirements” (for medical and scientific purposes)
	Article 20	<i>Requirements on</i> “Statistical returns to be furnished to the Board” (for medical and scientific purposes but also non-medical purposes)
	Article 21	<i>Requirements on the</i> “Limitation of manufacture and importation” (for medical and scientific purposes)
	Article 23	<i>Requirements related to</i> “National Opium Agencies”, <i>also applying for the cultivation of the cannabis plant and the production of cannabis and cannabis resin/cannabis for medical and scientific purposes, as per article 28 (1).</i>
	Article 28 (1)	“If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.”
	Article 28 (2)	“This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.”
Article 28 (3)	“The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.”	

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Article 29	<i>Measures of control for</i> “Manufacture” (for medical and scientific purposes)
Article 30	<i>Measures of control for</i> “Trade and distribution” (for medical and scientific purposes)
Article 32	“Special provisions concerning the carriage of drugs in first-aid kits of ships or aircraft engaged in international traffic [...]”
Article 33	“The Parties shall not permit the possession of drugs except under legal authority”
Article 34	“Measures of supervision and inspection” (for medical and scientific purposes)
Article 36 (1) (a)	“Subject to its constitutional limitations, 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, and any other action which in the opinion of such Party may be 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.”
Article 36 (1) (b)	“Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.”
Article 37	<i>Requirements related to</i> “Seizure and confiscation” (for illicit activities)
Article 38	<p>“1. The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.</p> <p>2. The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of abusers of drugs.</p> <p>3. The Parties shall take all practicable measures to assist persons whose work so requires to gain an understanding of the problems of abuse of drugs and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of drugs will become widespread.”</p>
Article 49	<p>“1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories: [...] (d) The use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes; and (e) The production and manufacture of and trade in the drugs referred to under [...] (d) for the purposes mentioned therein.</p> <p>2. The reservations under paragraph 1 shall be subject to the following restrictions:</p> <p>(a) The activities mentioned in paragraph 1 may be authorised only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961;</p> <p>(b) No export of the drugs referred to in paragraph 1 for the purposes mentioned therein may be permitted to a non-party or to a territory to which this Convention does not apply under article 42; [...]</p> <p>(f) The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41;[*][**]</p> <p>(g) The production and manufacture of and trade in the drugs referred to in paragraph 1 for any of the uses mentioned therein must be reduced</p>

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		<p>and finally abolished simultaneously with the reduction and abolition of such uses.</p> <p>3. A Party making a reservation under paragraph 1 shall:</p> <p>(a) Include in the annual report to be furnished to the Secretary-General, in accordance with article 18, paragraph 1 (a), an account of the progress made in the preceding year towards the abolition of the use, production, manufacture or trade referred to under paragraph 1; and</p> <p>(b) Furnish to the Board separate estimates (article 19) and statistical returns (article 20) in respect of the reserved activities in the manner and form prescribed by the Board. [...]"</p> <p><i>[*] This can be interpreted either as 1989 (based on the entry into force of the unamended Single Convention, in 1964) or 2000 (based on the entry into force of the Single Convention as amended, in 1975).</i></p> <p><i>[**] Note: the discontinuation referred to here is a "restriction" to which are subject countries that have submitted a reservation under this article, not necessarily valid for the Parties that do not have made a reservation under this article.</i></p>
<p>United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</p>	Article 3 (1) (a) (ii)	<p>"Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally [...] The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs <u>contrary to the provisions of the 1961 Convention</u> and the 1961 Convention as amended"</p>
	Article 3 (2)	<p>"Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention."</p>
	Article 3 (4) (c)	<p>"Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare."</p>
	Article 3 (4) (d)	<p>"The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender."</p>
	Article 14 (1)	<p>"Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention."</p>
	Article 14 (2)	<p>"Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as [...] cannabis plants, cultivated illicitly in its territory.</p> <p>The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment."</p>
	Article 27 (2)	<p>"In their instruments of formal confirmation, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention."</p>

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International human rights law and related		
European Convention on Human Rights	Article 8	<p>“1. Everyone has the right to respect for his private and family life, his home and his correspondence.</p> <p>2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”</p>
Int. Covenant on Civil and Political Rights	Article 17	<p>“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.</p> <p>2. Everyone has the right to the protection of the law against such interference or attacks.”</p>
Int. Covenant on Economic, Social and Cultural Rights	Article 15 (1)	<p>“The States Parties to the present Covenant recognize the right of everyone:</p> <p>(a) To take part in cultural life;</p> <p>(b) To enjoy the benefits of scientific progress and its applications; [...]”</p>
International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty)	Article 9 (2)	<p>“[...] In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers’ Rights, including:</p> <p>a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;</p> <p>b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture; and</p> <p>c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.”</p>
	Article 9 (3)	<p>“Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.”</p>
Convention on Biological Diversity	Article 8 (j)	<p>“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices”</p>
	Article 15	<p>“[...] 4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.</p> <p>5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party. [...]</p> <p>7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, [...] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”</p>
Nagoya Protocol on Access to Genetic Resources and the	Article 5 (2)	<p>“Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilisation of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the</p>

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Fair and Equitable Sharing of Benefits		communities concerned, based on mutually agreed terms.”
	Article 6	<p>1. In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilisation shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.</p> <p>2. In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.</p>

Appendix 2. EU acquis influencing domestic cannabis regulations.

This list is not comprehensive.

Primary legislation		
Treaty on the Functioning of the European Union <i>(direct relation to cannabis)</i>	Article 83 (1)	“The European Parliament and the Council may [...] <u>establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension</u> resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are, the following: [...] <u>illicit drug trafficking</u> [...]”
	Article 168 (1) and (7)	<p>“1. [...] The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention. [...]</p> <p>7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.”</p>
Treaty on the Functioning of the	Article 168 (3)	“3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.”

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European Union <i>(other articles mentioned in the brief)</i>	Article 2 (1)	“When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts”
	Article 3 (1) (e)	“The Union shall have exclusive competence in [...] common commercial policy.”
	Article 3 (2)	“The Union shall also have exclusive competence for the conclusion of an international agreement [...] in so far as its conclusion may affect common rules or alter their scope.”
	Article 34	“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”
	Article 35	“Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.”
	Article 36	“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”
	Article 207 (3)	<i>In the context of common commercial policy:</i> “Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. [...] The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council [...]”
	Article 216	“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”
Article 218	<i>Laying down the procedure for the negotiation, signature, and conclusion of international agreements:</i> “1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure. 2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them. 3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team. 4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted. 5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.	

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		<p>6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:</p> <p>(a) after obtaining the consent of the European Parliament in the following cases:</p> <ul style="list-style-type: none"> (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. <p>The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.</p> <p>(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.</p> <p>7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.</p> <p>8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.</p> <p>9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.</p> <p>10. The European Parliament shall be immediately and fully informed at all stages of the procedure.</p> <p>11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”</p>
	Article 218 (7)	<p><i>If an international agreement provides for its modification by simplified procedure or by a body set up by the agreement, the Council may authorise the negotiator to approve modifications on the Union's behalf:</i></p> <p>“When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.”</p>
	Article 218 (9)	<p><i>If a body set up by an international agreement is called upon to adopt acts having legal effects (except acts supplementing or amending the institutional framework of the agreement), the Council shall adopt a decision establishing the positions to be adopted on the Union's behalf:</i></p> <p>“The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy,</p>

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		shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.”
Treaty on European Union	Title V	<i>Defining the Union's external action and on any matter of foreign and security policy.</i>
	Final Act, Declaration No. 36 on Article 218 TFEU	“Declaration on Article 218 [TFEU] concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice: The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three[*] in so far as such agreements comply with Union law.” <i>[*] Chapters of the TFEU, related respectively to judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation.</i>
	Final Act, Declaration No. 36 on Title V of Part Three TFEU	“Declaration on non-participation by a Member State in a measure based on Title V of Part Three [TFEU]: The Conference declares that, where a Member State opts not to participate in a measure based on Title V of Part Three [TFEU], the Council will hold a full discussion on the possible implications and effects of that Member State's non-participation in the measure. In addition, any Member State may ask the Commission to examine the situation on the basis of Article 116 of the [TFEU]. The above paragraphs are without prejudice to the entitlement of a Member State to refer the matter to the European Council.”
Charter of fundamental rights of the EU	Article 7	“Everyone has the right to respect for his or her private and family life, home and communications.”
Schengen acquis		
Schengen Agreement (1985)	Article 8	“Parties undertake to combat vigorously <u>illicit</u> drug trafficking on their territories and to coordinate their action effectively”
	Article 9	“Parties shall reinforce cooperation between their customs and police authorities, notably in combating crime, particularly <u>illicit</u> trafficking in narcotic drugs”
	Article 19	“The Parties shall seek to <u>harmonise laws and regulations</u> , in particular on: narcotic drugs [...]”
Implementing Convention (1990)	Article 71 (1)	“as regards the direct or indirect sale of [...] cannabis, and the possession [...] for sale or export” Parties undertake to adopt “in accordance with the existing United Nations [drug control] Conventions all necessary measures to prevent and punish the <u>illicit</u> trafficking”
	Article 71 (2)	“prevent and punish by administrative and penal measures the <u>illegal</u> export of [...] cannabis, as well as the sale, supply and handing over of [cannabis], without prejudice to the relevant provisions of Articles 74, 75 and 76”
	Article 72	“ensure that legislation [enables] the seizure and confiscation of the proceeds of the illicit trafficking”
	Article 74	About the “ <u>legal trade</u> in narcotic drugs and psychotropic substances” checks arising from international drug control obligations

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		should be transferred to within countries.
	Article 76 (1)	Adopt measures “so as not to jeopardise” stricter control measures in the territory of other Parties
	Article 76 (3)	“Parties shall notify each other of the measures taken in order to monitor the <u>legal trade</u> ”
	Final Act, Joint Declaration on Article 71 (2)	“In so far as a Contracting Party departs from the principle referred to in Article 71(2) in connection with its national policy on the prevention and treatment of addiction to narcotic drugs and psychotropic substances, all Contracting Parties shall adopt the necessary administrative measures and penal measures to prevent and punish the <u>illicit</u> import and export of such products and substances, particularly towards the territories of the other Contracting Parties.”
Secondary legislation		
Council Decision 90/611/EEC of 22 October 1990		Accessing to the 1988 Convention, with a declaration of competence limited to precursors.
Council Framework Decision 2004/757/JHA	Article 1	Defining “drugs” for the purpose of EU law as “a substance covered by the 1961 United Nations Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, or by the 1971 United Nations Convention on Psychotropic Substances” among others.
	Article 2	<p>“1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:</p> <p>(a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;</p> <p>(b) the cultivation of opium poppy, coca bush or cannabis plant;</p> <p>(c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);</p> <p>(d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.</p> <p>2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.”</p>
	Articles 3–11	Laying down a series of proportionate minimum administrative and penal provisions on illicit activities involving drugs defined in article 1, and other dispositions.
Regulation (EU) 1307/2013	Articles 32 (6) and 35 (3)	Establishing rules for direct payments to <i>hemp</i> farmers under the common agricultural policy.
Regulation (EU) 1308/2013		Establishing rules (<i>e.g.</i> for imports) of <i>hemp</i> products.