



**European Legal Database on Drugs**

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# **The role of the quantity in the prosecution of drug offences**

**ELDD Comparative Study**

**EMCDDA**

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## 1. Executive summary

All countries offer legal or judicial distinction to graduate the severity of the offence of drug possession and related actions (acquisition, storage). Frequently this is done by reference to the quantity of drugs involved, and certain quantities may be stipulated to mark the threshold between certain levels of offence or punishment.

Threshold quantities may be addressed at a number of different stages of the definition of the offence. At the most basic level, it may be a factor in the legal distinction between possession and trafficking of substances, or graded offences of possession such as minor or serious. Quantities may be mentioned, but described in general terms such as “small” and “large”. A few laws refer to the monetary value of the drugs, others refer to (multiples of) a calculated daily dose. Some laws actually define the quantities by the maximum number of grammes per substance, such as 1g of heroin. At the highest level of detail, the weight of the active chemical may be specified – for example, considering the various strengths of cannabis available, a law may state that the maximum quantity for personal use is 20g of THC for an amount of cannabis.

Across the EU, the real emphasis seems to be on the intent rather than the amount possessed, perhaps for both national and international reasons. At the national level, the EMCDDA study on prosecution of drug users shows a trend of diverting many users away from the criminal justice system. At the international level, the distinction between users and traffickers is highlighted in Articles 3 and 4 of the 1988 UN Convention.

With regard to small quantities in particular, all countries have legislation or guidelines permitting a more lenient outcome if the amount possessed is for personal use, and most refer to the quantity in some way as a guide. However, of the 16 countries, only four have tried to fix the “small” quantity by specifying a precise weight, and two of these refer to cannabis only. The great majority choose to mention some sort of “small” quantity in the law or guidelines, but leave it to prosecutorial or judicial discretion, with knowledge of all of the surrounding circumstances, to determine the true intention behind the offence. No country definitively uses the quantity to determine who is a user or a trafficker.

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## 2. Introduction

In all Member States, the choice of the type of prosecution and sentencing for drug related offences will depend on a mix of factors, in which the quantity of the substance handled seems to play a major role. Analysis of Member States' laws shows the existence of a specific offence for possession of substances intended for personal use, as distinct from other more serious offences such as possession for sale or trafficking, with 12 of the 15 countries specifically naming such an offence <sup>(1)</sup>. Yet the intention behind the possession is not always easy to infer, and so the quantity of the substance involved may be used as an indicator.

The distinction between the two types of offence, and by implication the quantity of the substance involved, may have a number of consequences for the offender at the local, national, and international levels. One of the visible trends in EU countries' legislations is increasingly to help users but punish traffickers (treatment instead of punishment)<sup>2</sup>, and so the prosecution process may determine whether people should be assisted or imprisoned. Inaccurate distinction may distort the principle of the law; a low threshold separating personal use and traffic might result in users being imprisoned as traffickers, and a high threshold could allow dealers to continue working with little interference. With any reasonable limits in place, street dealing may continue to take place using amounts lower than the defined limits in order to avoid prosecution for trafficking. Certainty of the law is a basic legal principle to guide citizens, yet there are some 400 different substances controlled across Europe, and setting limits for each one – or even for their active ingredient – may be considered impracticable at the national level. At the European level, the competences of Europol and the EU arrest warrant are brought into play for drug traffickers but have no relevance for those who possess drugs without the intention of trafficking. Finally, on an international legal level, there is the question that traffickers may be subject to extradition proceedings and confiscation of assets in situations where users would not.

The objective of this paper is to identify, in the countries of the European Union, if and how the amount of drug found is decisive to the forming of the charge and the outcome of the sentence; and if so, which are the amounts considered as the threshold between the different levels. In doing so, this paper is also looking at possible common trends in the European Union countries on the concept of defining amounts of drugs, and particularly limits of quantities for personal use.

## 3. Legal Framework

### International law

If we look at the international law on the matter, we see that art. 3.2 of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances effectively introduces a specific offence for possession, purchase or cultivation for personal use [subject to the constitutional principles and basic concepts of the country's legal system], distinguishing it from more serious offences set out in Art 3.1 such as, for instance, possession of drugs for the purpose of trafficking or sale (art.3.1(iii)). The distinction between the two is the intended purpose of the act, which may not always be easy to ascertain. Therefore, Article 3.3 permits that "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article [i.e. for sale or traffic] may be inferred from objective factual circumstances." It should be noted that the clause applies only to the offences in para. 1 and not para. 2 (personal use), and that it is permissive, rather than mandatory, to allow for legal defences reserved to domestic law<sup>3</sup>.

In this way, if it is not easy to prove the intention of the offender, the Convention effectively leaves the qualification of the offence to the Parties.

The consequences of the distinction are that many of the obligations under international law set out in the 1988 Convention do not apply to the offence of possession for personal use, but they should apply to the other offences. These obligations under Art. 4 of the Convention include the need to take measures to establish jurisdiction over such an offence, the requirement to establish the offence as extraditable in treaties between Parties, the provision of mutual legal assistance, confiscation of assets by a requested Party, etc.

Hence the international significance of the role of the quantity of substance when it is instrumental in the distinction in national law between acts intended for personal use and those intended for sale.

### **Law at European level**

Over the last 10 years, the European Union has considerably increased its normative work in the area of drugs, and more specifically the areas of law enforcement cooperation and drug trafficking. However, no European legal texts address the question of illegal possession of drugs for personal use, which seems to lie a bit outside the scope of European institutions.

Under the first, Community pillar, Article 152 of the Treaty of European Union gives competence to the Community only in 'complementing the actions of Member States in reducing drugs-related health damage', and fully excludes any harmonisation of the countries' laws and regulations in this domain. It therefore has little effect on the current issue, and would be an unlikely basis for any legal instrument concerning quantities of drugs.

Contrary to this, under the third, intergovernmental pillar of Justice and Home Affairs, Title VI art. 31(e) promotes actions towards the establishment of 'minimum rules to the constituent elements of criminal acts and to penalties in the fields of (...) illicit drug trafficking.' Such an action was defined in the EU Action Plan on Drugs 2000-2004, which specified that proposals should be brought forward before the end of March 2001. Following these proposals, the European Commission is currently drafting a Framework Decision on the matter. A Framework Decision is a legal instrument provided by the Treaty of Amsterdam which permits Member States to implement it according to their own laws within a certain time period, as opposed to a Regulation which is directly binding. The Decision in question requires a definition of what is drug trafficking and, by implication, what is not drug trafficking. In preparation, the Commission's survey of Member States included the question:

*Do the definitions of offences of various forms of drug trafficking currently take account of the following parameters as regards the actual facts constituting the offence?*

*- quantity of narcotic or psychotropic substances dealt;*

...

thus recognising that the quantity would be likely to play a significant part in deciding whether or not an offence would be classed as trafficking.

At the time of writing, the Framework Decision is not yet finalised. It is interesting to note that EU Member States showed no difficulties to find an agreement on definitions and penalties for drug

trafficking (i), but agreement on the threshold, where possession for personal use stops and drug trafficking starts, has been more difficult to reach, with different countries choosing to ascertain the threshold in different ways. If the threshold were to be defined by specified quantities of substances, then a uniform application of the Framework Decision would suggest uniform quantitative limits across the EU.

The issue would be further relevant with the application of the EU arrest warrant<sup>4</sup>, which may be invoked for the offence of drug trafficking but not possession for personal use. It applies to “persons who are fleeing from justice after having been finally sentenced” and “persons suspected of having committed an offence” (Preamble, para 1). According to Art. 2(2), “illicit trafficking in narcotic drugs and psychotropic substances”, as defined by the law of the issuing Member State, shall give rise to surrender pursuant to a European arrest warrant if it is punishable in the issuing Member State by a custodial sentence for a maximum period of at least 3 years, *without verification of the double criminality of the act* (emphasis added). All Member States allow for more than 3 years’ imprisonment to punish drug trafficking, though they might not define drug trafficking equally. Therefore, if the lower threshold of drug trafficking were to be defined either by different quantitative levels between Member States, or defined quantitatively in one Member State and not in another, then a case involving an amount of drugs between the two quantitative levels could result in a binding request for arrest and extradition of a suspect without double criminality, creating something of a quantum leap between an offence perceived to be minor in one country and serious in the other.

## Law at national level

### Austria

Austrian law distinguishes between possession for personal use and possession for dealing, and sentencing and penalties follow accordingly. The law refers to the concept of big quantity as the threshold between serious offences and other (less serious) offences, and to a “small amount” to permit deferral of prosecution.

Some quantitative limits exist. In 1980 the Committee of Health (Gesundheitsbeirat), required to find definitions for the concepts of big and small amount (in the process of amendment of the Narcotic Drugs Act, 1951), interpreted the concept of ‘small quantity’ as 10% of the big quantities, thus: heroin 0.5g; methadone 1.0g; LSD 0.001g; cocaine 1.5g; amphetamines 1.0g; THC (cannabis) 2.0g. These limits were introduced in an Ordinance, which was not binding upon the judiciary. However, the judiciary seems to have adhered to the guideline (Ministry of Justice, 1997).

In 1985 a Parliamentary committee held an opinion supporting the non-determination of the ‘small quantity’ concept:

*“Because of the differences between drugs, their big number, the different concentration of substances and because of the necessity to describe them by their chemical formulas, it seems to be impossible, at least, inadequate, to quote specific amounts in the statute itself. For this reason, using unspecified terms of law is inevitable.”*

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<sup>ii</sup> which would range between 5 and 10 years of imprisonment when large amounts of drugs are found or if the drugs are particularly harmful.

Regarding the minimum threshold for an offence to be considered as “serious”, the Ordinance n.377 of 10.12.1997 fixes the quantities for the active principles of all narcotic substances scheduled under Austrian law: MDMA 30g; cocaine 15g; heroin 3g<sup>(ii)</sup>; cannabis (THC) 20g; etc. The Ordinance n.378 fixes similar quantities for psychotropic substances. These quantities are set by the Federal Ministry of Labour, Health and Welfare in collaboration with the Federal Ministry of Justice. If an offence involves at least 25 times this quantity, s.28(4)(3) of the Narcotic Substances Act (BGBl. I 112/1997) raises the maximum prison sentence from 10 to 15 years.

Separately, the Narcotic Substances Act explicitly mentions the concept of “small amount” without precisely defining it. Section 35.1 says:

*“Should a person be charged with purchase or possession in violation of existing regulations of a small amount of narcotic substance for his own use, the public prosecutor’s office shall provisionally defer the charge for a probationary period of two years under the conditions set forth hereafter.”*

Commentary to the law <sup>(5)</sup> points out that the concept of small quantity must be determined on a case-by-case basis taking into account a subjective element – the level of addiction of the offender – and an objective element – the harmfulness of the substance.

Although big quantities are very precisely defined in the Austrian law, it seems that, over 20 years after the Committee of Health’s recommendations, determination of the small amounts of drugs intended for personal use is still left to the discretion of prosecutors and courts.

## **Belgium**

Traditionally the Narcotic Drugs Act of 24 February 1921 and amendments do not identify quantities of drugs as the threshold to determine drug related offences, as they make no distinctions between offences on the basis of the nature of the substance. Possession of narcotic drugs — irrespective of type and quantity — was therefore considered a criminal offence punishable by imprisonment for between three months and five years <sup>(6)</sup>.

In recent years however (1993 and 1998), the practical application of the law concerning drug use and possession has been the object of revision by the Federal Ministry of Justice, which has issued two policy directives (binding upon the judiciary), in order to harmonise the domain. The 1993 directive introduced the concepts of ‘occasional users’, ‘regular users’ and ‘dealers’ to differentiate prosecution among these three categories. The directive of 1998 states that a person found with a limited quantity of cannabis for personal use should receive “no further action” from the magistrate. It also introduced an extra distinction between possession for personal use and retail sale of drugs. Within this, distinction is made between the sale of small quantities purely for profit and their sale to finance personal consumption, with the former receiving an explicitly more repressive treatment than the latter. However, the directive notes that the quantity will be indicative but not determinant of the result, to catch low-level “drug-runners”, and the quantity is not defined. Neither the law nor successive guidelines address the question of quantitative limits.

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<sup>ii</sup> Recently the law BGBl. II 145/2001 modified the big quantity limit for heroin from 5.0 g to 3.0 g

In October 2002, a new draft Directive was proposed as part of a legislative package that would remove criminal penalties for possession of cannabis for personal use in certain circumstances. The draft Directive defines personal use as a quantity of cannabis that can be consumed at one single time, or at most in 24 hours, but one should consider that possession of more than 5g does not indicate possession for personal use. These drafts are currently under discussion.

## Denmark

Under Danish drug legislation, the Public Prosecutor's Circular 144 of 15 July 1969 states that possession of very small quantities with a view to personal use would lead to a warning if a first offence, and fines for a repeated offence. The Circular does not give a definition of a very small quantity.

Sections 191(1) and (2) of the Criminal Code address the more serious drugs offences, including sale or supply to a significant number of people. Moreover, when the two factors of considerable quantities and particularly dangerous drugs are together in an offence, the statutory maximum penalty of six years in prison may be increased to ten years.

Research confirms that the seriousness of the offence is normally determined on the basis of these two elements<sup>(7)</sup>. The amount, and nature, of the drugs are the factors that determine whether to prosecute under the Penal Code (Section 191) for trafficking, or under the Euphoricants Act for possession for personal use. If the amount found on a person exceeds 10–15kg of cannabis, 25g of heroin or cocaine, 50g of amphetamines, or approximately 200 ecstasy pills, it would lead (even for a first offence) to a charge under Section 191 of the Penal Code (up to six years' imprisonment, which may be increased to 10). A fine will be imposed for possession of up to 5g of heroin, amphetamine or cocaine or 10 ecstasy pills. When the substances are of up to 0.2g of heroin; or up to 0.2g of cocaine; or up to 0.5g of amphetamine; or up to two ecstasy pills; the person may receive a warning. When a person is found in possession of hashish he will receive a (police) warning for up to 10g and a fine for more than 10g. For a second offence, a fine is always imposed for amounts of up to 100g (€40 for 0–10 grams; €67 for 10–15g; €135 for 50–100g). For a third offence, the penalty will be raised by 'one class' (e.g. €67 for 0–10g, etc.). A fine can be imposed even after several offences (no predetermined amount).

In 1997 a new law, 'the pusher legislation', was adopted in Denmark to target professional drug pushers, who avoided serious sanctions by carrying only very small quantities. 'Sale of drugs' and 'possession with intention to sell' were also considered under the new law which had the objective of increasing penalties in cases of repeated dealing in small quantities of hard drugs. Under this law, dealing is meant to refer to sale – or possession with intent to sell – of one sales package containing as little as 0.001g of heroin or cocaine.

When there is not sufficient evidence to prove that dealing has taken place (or was intended), the amount of the drug in the offender's possession determines whether the prosecution will maintain that possession is with intent to sell<sup>(8)</sup>.

## Finland

Chapter 50 of the Finnish Penal Code lays out four situations where the quantity is mentioned but not defined by law: waiving of measures (50:7), drug user offences (50:2a), drug offences (50:1) and



aggravated drug offences (50:2). In fact, waiving of measures is possible for drug-user offences and drug offences, amongst others, provided the crime has been committed for own use. In all situations, the quantity is only one of the factors according to which the case is classified.

Measures may be waived on grounds of insignificance if the criminal act as a whole is insignificant compared to the average form of the crime in question. This depends on the quantity of narcotics, as well as their quality, the situation and circumstances. According to official directions from the Office of the Prosecutor-General in September 2002 (VKS:2002:3), the quantity alone is never sufficient grounds for waiving, but should at most correspond to that needed for a few instances of use. The directions give the following maxima:

- Hashish (<10 g), marijuana (<15 g) and Khat (< 1 kg); 5 to 15 day-fines in ordinary cases and 15–20 day-fines in habitual use.
- Amphetamine (< 3 g), its derivatives such as ecstasy (< 10 tablets) and LSD (< 10 tabs); 10–20 day-fines in ordinary cases and 20–25 day-fines in habitual use.
- Heroin (< 1 g) and cocaine (< 1.5 g); 10–25 day-fines in ordinary cases and 20–30 day-fines for habitual use.

Pharmaceutical substances classified as narcotics are divided into three categories correspondingly.<sup>9</sup>

The drug-user offence, referring to small quantities of substances for personal consumption, was created in September 2001. This superseded the previous criterion that the offence did not “weaken obedience to the law”. The above-mentioned Prosecutor-General’s directions included the new definition of ‘a negligible amount of drug’ – the same amounts given as for waiving – reflecting the maximum limit under which the cases can be processed by summary penal proceedings.

An (ordinary) drug offence includes whether or not the drug was intended only for personal use; quantity, though one criterion, is not specified in law, and may be smaller than that for a drug-user offence. The sentence may be a fine or imprisonment; established legal praxis on the quantities justifying a prison sentence are:

- Hashish 100 g
- Amphetamines 10 g
- Ecstasy 40 units
- LSD 40 units
- Cocaine 4 g
- Heroin 2 g

An aggravated drug offence has “a large quantity” as one of the defining criteria (as well as large-scale, profit-oriented and organised actions), again with no legally defined minima. However, established legal praxis defines the “large quantity” as follows:

- Hashish 1000 g
- Amphetamines 100 g
- Ecstasy 300 units
- LSD 300 units
- Cocaine 30 g
- Heroin 15 g.

## France

French law makes no formal legal distinction between possession for personal use and trafficking. According to a Ministry of Justice directive of June 1999, possession not involving trafficking may be punished by a maximum of one year in prison, whereas possession involving trafficking would result in up to 10 years' imprisonment. The quantity is an aspect taken into account in the jurisprudence.

## Germany

Section 29.5 of the German Narcotic Act (Betäubungsmittelgesetz), states that the court can refrain from imposing punishment if the offender possesses narcotics in 'insignificant quantities for his own use'. Section 31 (a) also extends this possibility to the prosecutor, who may refrain from prosecution, amongst other reasons, if the offender possesses narcotics only for 'his own use in insignificant quantities'.

The Federal Länder are applying the letter of the law according to local characteristics, and this 'non-uniformity' has been mentioned by the decision by the Federal Constitutional Court of 9th March 1994 which requested Länder to implement a "basically uniform practice of application".

In order to implement this practice, the judicial authorities of some Länder have set detailed amounts to understand how much is an 'insignificant quantity'. For example, those possessing cannabis will not be prosecuted according to the following<sup>10</sup>:

"Upper" limits – waiving of prosecution is mandatory according to the decision of the Federal Constitutional Court:

- Up to 3 consumer units (up to 6g); 3 Länder (Bayern, Baden-Württemberg, Brandenburg)
- Up to the 'size of a matchbox'; 2 Länder (Nordrhein-Westfalen, Rheinland-Pfalz)
- Up to 10g; (Hamburg)
- Up to 30g; (Schleswig-Holstein)

"Lower" limits - up to which waiving of prosecution is also mandatory, but beyond which waiving is possible within the limits shown:

- Up to 6g mandatory, up to 15g is possible, above this (without upper limit) is possible but only if social measures are implemented at the same time (Niedersachsen)
- Up to 6g mandatory, above this (without upper limit) is possible, but only if social measures are implemented at the same time (Sachsen-Anhalt)
- Up to 6g mandatory, up to 30g recommended (Hessen)
- Up to 6g mandatory, up to 15g recommended (Berlin)
- Up to 6g mandatory, up to 10g is possible (Saarland)

However, not all Länder have set limits, and some have set limits only for cannabis while others have set limits for other substances such as heroin, cocaine and amphetamines. For this reason, the Federal government is again planning to work with the Länder-Ministers of Justice to agree on a fully unified approach.

## Greece

The Greek law on drugs includes the concept of possession of drugs for personal use (as opposed to possession with other intentions). However, when prosecuting offences, the main criterion is the state of addiction of the person; arrested offenders are in fact distinguished as addicts or non-addicts and sentenced accordingly. Art.12 of the Law 1729/1987, as modified by the Law 2161/1993, includes the criteria of a limited quantity and addiction in the outcome of the proceedings:

*Any person who for his own exclusive use, obtains or possesses in any way whatsoever drugs in a quantity which confirmedly serves exclusively his own needs or makes use of them, or cultivates plants of cannabis in a number or area which is justified only for his own exclusive use is punished by imprisonment. The ascertainment of the service of his own exclusive necessity for the particular substance is made by the co-estimate of the kind, the quantity and the purity of the substance, [as well as the level of addiction].*

According to the same article, the limits of quantity of each narcotic substance, considered as covering the needs of a user, may be determined by decisions of the Minister of Health, Welfare and Social Insurance. In fact, these limits have not been established, and are left to the discretion of the judicial authority<sup>11</sup>. Further amendments of this article permitted a non-addicted person to be sentenced to a fine in cases of possession of drugs for personal use.

It may be of interest to note that the original law of 1987 referred to possession of drugs "in a small quantity", whereas this was changed in 1993 to possession "in a quantity which confirmedly serves exclusively his own needs" – there was a move away from the size and towards the purpose.

Where the offender is charged with sale of drugs, the concept of small quantity is effectively the threshold between misdemeanors and felonies. Sale of drugs is considered a serious drugs crime (art.5 Law 1729/1987) but following the amendment of the law 2721/99, it is considered as misdemeanor when the above mentioned concepts (small quantity and addiction) are present in the offence, when a user provides or sells a part of the small quantity that he/she possesses for personal use (Article 12, paragraph 4, L.1729/1987).

However, neither the law nor the doctrine indicate which amount, if any, are established as small quantities.

## Ireland

Possession of drugs for personal use attracts more lenient penalties than possession for supply according to s.28 of the Misuse of Drugs Act 1977. The sentence will mainly depend on the frequency of the offence (first time or recidivist) and on the nature of the substance (cannabis or other drugs). The definition of "possession for personal use" is given under s. 15(2) of the Act as being a small quantity which in the view of the Court is deemed to be for immediate personal use. The concept of small quantity is thus named but not specified by the law, and is therefore taken into account by the judiciary (which act on the principle of discretion, as opposed to legality) together with other characteristics of the offence.

The Criminal Justice Act 1999 adds Section 15A to the Misuse of Drugs Act 1977, to create a new offence relating to the sale/ supply of drugs with a street value of €12 700 or more. The offence is punishable by between ten years' and life imprisonment and an unlimited fine.

## Italy

The Italian drug law DPR 390/1990 introduced the notion of “average daily dose” to distinguish between possession for personal use and possession for trafficking. Originally, fixed quantities of drugs defined the threshold between misdemeanour and felony, but this was abandoned following a national referendum and the consequent Presidential Decree 171 of 5 June 1993. The result of the referendum was significant, as now the possession of narcotic substances for the purpose of personal consumption, irrespective of the quantity and type of substance possessed, is always and exclusively an administrative offence. What constitutes criminal behaviour is effectively left to the discretion of the police and judicial authorities, whose judgment should make it possible to differentiate between possession of narcotic substances for personal consumption (subject to administrative penalties) and for sale (subject to criminal penalties).

Jurisprudence confirms that the quantity is one of the elements to be taken into consideration while prosecuting, though the real intention behind the offence is more important. In some cases offences of possession of large quantities of drugs have attracted administrative sanctions, with the court being satisfied that the offender had no involvement in activities of sale or trafficking <sup>(12)</sup>. At the other end of the scale, Art. 80(2) allows for an increase in sentence if the act involves “substantial” amounts, but there are no reported guidelines for this.

## Luxembourg

The Law of 19 February 1973 (as amended in April 2001) considers possession for personal use distinct from possession for sale or trafficking. Possession, acquisition, and transport for personal use of substances other than cannabis can lead to penalties of imprisonment between 8 days and 6 months and/or a fine. If cannabis is the drug possessed, the offender will be sentenced to pay a “correctional” fine of €250 - € 500. Intermediary acts to the consumption of cannabis such as acquisition, transport and possession of personal use are also decriminalised. There is no mention of ‘small’ or ‘big’ quantities.

## Netherlands

The Dutch Opium Act distinguishes between substances in Lists I and II; respectively, those of unacceptable risk and other substances. It refers to, but does not define, “a small quantity intended for personal use” in ss.10(5) (possession or import/export of List I substances), 10a(2) (preparation for supply or import/export of List I substances), and 11(6) (cultivation, possession, manufacture, import/export of List II substances). In contrast, s.11(5) states that the statutory punishment for cultivation, possession, manufacture or import/export shall not apply if the amount is at most 30g of hemp or hashish; the idea is that more than 30g involves the risk that the drug may be transferred<sup>13</sup>. There is a proposal under consideration to exempt hemp and hashish from s.11(6). Regarding prosecution, the possession of small quantities of drugs for personal use is accorded a much lower priority than other drugs offences. According to the Opium Act Directive, Public Prosecutor Guidelines revised in 2001, a maximum of 5g of List II products will only incur a police dismissal. Anyone found in possession of one dose, or less than 0.2g, of list I (i.e. 'hard') drugs will generally not be prosecuted, unless to aid the user; the police will confiscate the drugs and consult a care agency. Sale and consumption of cannabis products are tolerated in selected establishments under specific circumstances, as is the stock level of such establishments – the Directive states that, in principle, no action will be taken against coffee shops with a trading stock not exceeding 500g. Under s.12 of the

Opium Act, if the value of the drugs is over one quarter of the amount of the fine, the fine may be increased to the next highest category, thus instigating a quantitative limit by value.

### **Norway**

According to s. 31 of the Act no. 132 on Medical Products, unlawful possession and use of narcotics etc. will be punished by fines or by imprisonment up to 6 months, or both. If the punishable offence relates to the transfer of a medicinal product not deemed to be a narcotic substance and aggravating circumstances exist, the offender is punished by fines or by imprisonment up to 2 years, or both. However, under the General Penal Code, s.162, a person who unlawfully acquires, sends etc a drug shall be guilty of a drug felony punishable by imprisonment of up to two years, and an aggravated felony shall be punished by imprisonment of up to ten years. Factors listed for aggravated offences include the quantity of the substance. Furthermore, it is stated that if a very considerable quantity is involved in the offence, the penalty shall increase further. There are no guides in the legislation to indicate the different quantitative thresholds.

Nevertheless, in three recent court decisions (Rt. 1999, p. 33 and p.1504 and the Supreme Court Rule of 6 September 2000), the Supreme Court very strongly expressed the need to clearly distinguish between the purchase and storing of drugs intended for personal consumption and the purchase and storing of drugs intended for sale. In the Supreme Court Ruling from September 2000, the first voting justice stated that this ruling, in his opinion, "must be perceived as an indication of a change of practice" compared to earlier. As such, it appears that the Supreme Court would like to move further than it previously has, towards creating a distinction between involvement with drugs intended for personal consumption and involvement with drugs intended for sale.

### **Portugal**

Portuguese drug law introduces the concept of daily doses with lists of maxima for the most used drugs (Law 15/93 art.71.1.c). Under Art. 5 of the Law 30/2000, anyone arrested in illegal possession of up to 10 daily doses will be charged and referred to the 'Commission for the dissuasion of drug addiction', an authority which will undertake an administrative procedure against the offender. The daily doses for drugs are set in Portaria n<sup>o</sup> 94/96 of 26 March as: Heroin 0.1g; Cocaine 0.2g; Marijuana 2.5g; Hashish 0.5g; Delta-9-THC 0.05g; Amphetamines 0.1g.

Beyond the 10 daily doses the offender will be charged and referred to the judiciary, and a penal action might be initiated against him/her (Art.2.2 of the Law 30/2000).

### **Spain**

Once criminal proceedings have been started, the quantity involved is one of the main elements taken into account to assess if it is for drug trafficking or not<sup>14</sup>. The law does not specify which quantity is considered for personal use or for drug trafficking, it is up to the judge or tribunal to decide so. If the examining judge considers that the quantity of the drug apprehended (by the police) is exclusively for the personal use of the offender and that any involvement of this person in sale or trafficking can be excluded, he will most probably close the case taking no further action. Other elements, apart from the quantity involved, are also considered, for instance if the offender is a drug user or not. If it is proven that the offender is a drug user, the case will be ended by dismissal or acquittal.

Under Art 368 of the Criminal Code, the basic penalty for selling drugs (trafficking) is from 1 to 3 years of imprisonment if the drugs do not cause serious health damage, and from 3 to 9 years if they do. There will also be a fine of twice the value of the drug in the former case, and three times the value in the latter. Jurisprudence lays down some quantitative amounts to better define offences of illegal drug trafficking: Cannabis 1kg, Cocaine 100-120g, Heroin 60-100g.<sup>15</sup> However, under Art 369.3, the sentence for drug trafficking can be more severe, including a fine of four times the value of the drug, if a notably large quantity is involved. In October 2001, the Criminal Court of the Supreme Tribunal modified the approach regarding this aggravating circumstance. The reasoning behind the change reflects the need to balance sentences passed for big drug trafficking operations and those others in which much smaller quantities of drug are involved. Due to the present Penal Code, sentences passed for drug trafficking are more severe than before and therefore a clear limit between the usual and the notably large has to be drawn. This notably large quantity makes quite a difference to the prison sentence, so the aggravating circumstance can only apply to those cases with true and evident importance.

The aggravating circumstance of the notably large quantity is now applicable when the quantity involved exceeds 500 times the daily dose of a drug user (toxicity and purity are considered). According to a report produced by the National Toxicology Institute, the usual daily dose for a cocaine addict is 1.5 grams therefore 500 doses amount up to 750 grams of cocaine. The same 500 doses account for 300 grams of heroin and 2.5 kilograms of hashish. From the quantity apprehended, the quantity regarded for personal use and the adulterants will be subtracted.

### **Sweden**

Swedish drug laws do not expressly refer to the intention behind illegal possession (personal use or trafficking) for prosecution purposes. According to the Narcotic Drugs (Punishments) Act, anyone found in illegal possession of narcotic drugs might be sentenced to imprisonment for not more than three years (SFS 1988:286). However, the nature and the quantity of narcotic drugs are considered when classifying the offence as petty, ordinary, or serious. Under s.2 of this Act, petty offences ("having regard to the nature and the quantity of drugs involved") will be punished by a fine or imprisonment for at most six months. Under s.3, serious offences, which have involved "especially large quantities of narcotic drugs", will result in a sentence of two to ten years' imprisonment.

Doctrine affirms that, in practice, drug offences are classified by the courts as petty if the quantity of drugs involved is lower than 60g of cannabis, 5g of amphetamine, 0.6g of cocaine, 0.05g of heroin, 0.1g of methadone, 0.15g of opium, three LSD trips, three ecstasy tablets, 2 kg of khat or 150 tablets of diazepam. Drug offences are normally classified as serious if the quantity of drugs exceeds the following: 2kg of cannabis, 250g of amphetamine, 50g of cocaine, 25g of heroin, 50g of methadone, 75g of opium, 160 LSD trips, 160 ecstasy tablets, 400kg of khat, 20 000 tablets of diazepam (<sup>16</sup>).

### **United Kingdom**

The British drug law distinguishes between mere possession of drugs and possession of drugs with intent to supply. Sentencing is also dependent on the classification of the substance (most dangerous, dangerous, less dangerous; A, B, C). Therefore, sentences will tend to be more lenient where the judge is convinced that there is no involvement in activities of sale and the substance possessed, produced or imported is just destined for personal consumption. In investigating and prosecuting

offences, quantity is one of the criteria used by the police and prosecution service, but no guidelines or specific quantitative limits have been reported.

#### 4. Discussion

From examination of the situation throughout the Member States, it is clear that the legislation may address threshold quantities at a number of different stages of the definition of the offence. At the most basic level, there is usually a legal distinction between possession and trafficking of substances, or grades of offences of possession such as minor/petty, “standard”, and major/serious – the law may divide such offences into misdemeanors and felonies – and the quantity may be a factor taken into account when making the distinction. The next stage would be to mention the quantities of the substances with general descriptions such as “small” and “large”. A few laws refer to the value of the drugs, others refer to (multiples of) a calculated daily dose. Some laws or guidelines actually define the quantities by the maximum number of grammes per substance, such as 5g of heroin. At the highest level of detail, the weight of the active chemical may be specified – for example, considering the various strengths of cannabis available, a law may state that the maximum quantity for personal use is 20g of THC for an amount of cannabis.

With synthetic drugs in particular, if the threshold is defined by weight, there may be a separate issue of packaging the drug in pill or tab form; does this weight limit include the weight of the pill material, or the paper of the LSD tab? In fact, most countries that define limits of these substances refer to the number of pills or doses, rather than specific weights of the active substance. As the amount of the latter varies very little per pill or dose, at least for the most common substances of MDMA and LSD, this would seem to be a comparatively simple and still reasonably accurate method of quantifying the threshold.

Although over 400 substances are controlled among the different Member States, in practice, quantitative limits only seem to have been assigned to the most common substances, if at all. Finally, if quantities are not specified by legal instruments or guidelines, jurisprudence or judges’ associations may have defined limits to aid consistency.

References to small, medium, large quantities in laws and guidelines, which may determine the offence and/or the penalty, can be summarised as shown in Table 1. Where more than one reference is made to quantity in the legislation, these are separated by a semi-colon (;).

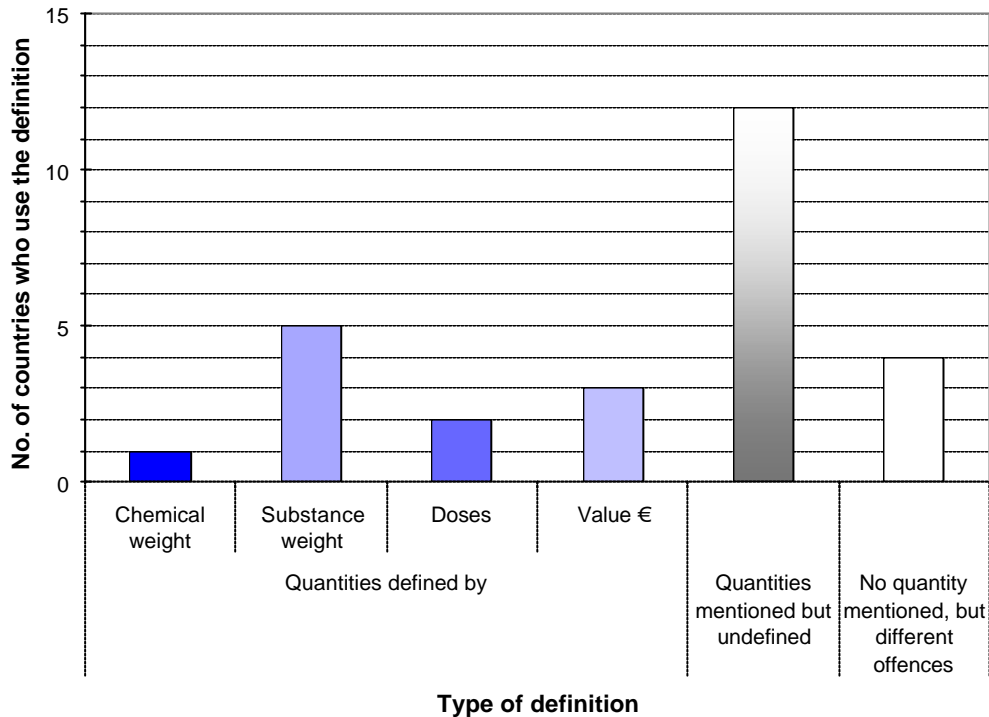
**Table 1 - Quantity definitions in laws and guidelines**

	Quantities defined by				Quantities mentioned but undefined	No quantity mentioned, but different offences (personal use/ traffic)
	Chemical weight	Substance weight	Doses	Value €		
<b>Belgium</b>					Limited for personal use; small	
<b>Denmark</b>		Fines for 10g, 15g etc; Large is 10kg of cannabis			Very small for personal use; Considerable quantities	
<b>Germany</b>		"insignificant" quantities defined in grams in some Länder			Insignificant quantities not defined in some Länder	
<b>Greece</b>	Quantity to be determined by Ministerial decision (in theory)				A quantity which confirmedly serves exclusively his own needs (not defined in practice); Small quantity for personal use	
<b>Spain</b>			Notably large quantity – 500 doses	Fine for trafficking can be 2-4x the value of the drug	Quantity exclusively for personal use	
<b>France</b>						Possession not involving trafficking
<b>Ireland</b>				Supply of amount with market value over €12 700	Small quantity for personal use	
<b>Italy</b>					Substantial quantities	Personal consumption
<b>Luxembourg</b>						Personal consumption
<b>Netherlands</b>		At most 30g of hemp or hashish; No investigation if less than 5 grams; stock maximum 500g		Value should be less than ¼ of fine	Small quantity intended for personal use	
<b>Austria</b>	Serious offence; 25x this much increases sentence further				Small amount for own use	
<b>Portugal</b>			Average consumption for 10 days			
<b>Sweden</b>					Petty offence, regarding nature and quantity; especially large quantity	
<b>Finland</b>		Various weights given in Prosecutorial Guidelines			Large quantity	
<b>UK</b>						Possession / with intent to supply
<b>Norway</b>					Aggravating factor includes quantity; Very considerable quantity	



A chart based on the above table illustrates at a glance the number of countries who have chosen to use a certain definition (or not) of a quantity in their laws.

**Chart 1 - Definitions of quantity, by country**



It can be seen that 12 out of the 16 countries will refer to a quantity in a law, but allow prosecutorial or judicial interpretation to determine if the law applies to the quantity in question. 11 out of the 16 choose to define a quantity somehow, but are divided as to how. Totals are greater than 16, as some countries may use one or more methods depending on the particular offence addressed.

A number of countries use a combination of approaches, either in terms of different measuring units (small amounts by weight, large amounts by monetary street value) or in terms of different legal instruments (Ministry regulation of large amounts, judicial guidelines for small amounts).

To define the threshold of a minor or lesser offence, four<sup>iii</sup> countries out of 16 define specific quantities, whereas nine<sup>iv</sup> mention small quantities but leave them undefined, and the remaining five do not list the quantity as a criterion of the offence (total is 18 as the Netherlands and the German Länder can be counted in two categories). So the great majority of countries leave the judiciary to decide such a threshold, taking all the circumstances into consideration.

Regarding trends in legislation, seven countries<sup>v</sup> have defined or redefined some sort of limit within the last 10 years in order to use the quantity as an indicator for non-prosecution of individuals caught with drugs that appear to be for personal use. One country (Denmark) has lowered this limit in order

<sup>iii</sup> Netherlands, Portugal and Finland, plus some German Länder

<sup>iv</sup> Belgium, Denmark, some German Länder, Greece, Spain, Ireland, Netherlands, Austria, Sweden

<sup>v</sup> Belgium, Germany, Greece, Italy, Netherlands, Portugal, Finland

to prosecute low-level dealers. At the other end of the scale, four countries<sup>vi</sup> have legislated within this time to establish or clarify a quantity as an indicator of a particularly serious offence.

**Table 2 - Trends in legislation**

	Small quantities (re)defined	Big quantities (re)defined
Belgium	1993, 1998. Draft in 2002	1993, 1998
Denmark	1997 pusher legislation	
Germany	1994 Federal Constitutional Court, some limits by 1997, working on new limits in 2003	
Greece	1987 small quantity, 1993 for own use, 1999 sale of small quantity	
Spain		2001 seriously big quantity
France		
Ireland		1994/1999 big quantity
Italy	1990 limits, 1993 no limits	
Luxembourg		
Netherlands	1996 30g to 5g	
Austria	1980 small doses (recommended)	1997 serious/ really serious offence
Portugal	1993 10 daily doses	
Sweden		
Finland	2001 small quantity for own consumption; 2002 specified limits	
UK		
Norway		

This paper may be extended by drawing up a table showing different countries' thresholds for small, medium and serious offences, but they would not be directly comparable as the table would not illustrate the variety of sentences that the legislation specifies for the offence; one country's "small" offence may lead to deferral of prosecution, whereas another may be punishable by up to 3 months in prison. In addition, accurate comparison of the implementation of these laws should also be taken into account, requiring consideration of the average sentence actually handed down by the courts. Separately, there is room for analysis of the different national concepts of a single dose of a drug, in law or jurisprudence, and whether such differences are due to different social conditions, different scientific experts, or different drug policies.

As we have already seen, according to the 1988 UN Convention it is the intention of the offender which is most important as the distinction between offences, not the quantity involved. This is key to the spirit of the Convention, and the provisions on international arrest and extradition. The analysis of the Member States' drug legislation confirm the elements to distinguish between possession for personal use and possession for other (more serious) purposes. This distinction may answer also to a principle of proportionality of the law, in which it seems a natural norm that the drug trafficker is

<sup>vi</sup> Belgium, Spain, Ireland, Austria

punished more strictly than the consumer, for the harm he induces in the society. Therefore the principles underlying the offences do not differ between countries, only their application.

Although a number of countries use a specified quantity as a determinant between prosecution or non-prosecution of a person using or possessing drugs, and as a determinant between trafficking and serious trafficking, it appears that none choose to consider the quantity itself as effectively proving the intention of personal use or trafficking. This is important, as strict interpretation of such a threshold, without taking other indicators into account, would risk distorting the purpose of the law.

In conclusion, it can be seen that most countries in the EU do not choose to set specific quantities in their legislation, but the majority legally recognise some form of concept of "small quantity" and that it will affect the direction and outcome of the action against the offender. A few do not address the issue in the written law at all, but will allow the judge to take all circumstances into consideration when considering the intention of the offence.

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<sup>1</sup> ELDD Main Trends : Trends in the illicit possession of drugs

[http://eldd.emcdda.org/trends/trends\\_possession.shtml](http://eldd.emcdda.org/trends/trends_possession.shtml)

<sup>2</sup> ELDD Main Trends : Alternative measures to prosecution

[http://eldd.emcdda.org/trends/trends\\_alternatives.shtml](http://eldd.emcdda.org/trends/trends_alternatives.shtml)

<sup>3</sup> Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, para 3.99 – 3.100

<sup>4</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States:

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0584&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0584&model=guichett)

<sup>5</sup> Kodek G., Fabrizio E., E. Das Neue Oesterreichische Suchtmittelgesetz, Juridica verlag, Wien 1998 in Ugon D.A., La rilevanza del concetto di piccola quantità nella applicazione della legge sugli stupefacenti in Italia, Austria, Germania, Cedam, Padova 2000

<sup>6</sup> De Ruyver, Van Impe, Vander Beken in Prosecution of drug users in Europe, EMCDDA 2002

<sup>7</sup> Jepsen, Lausen, 2002 in Prosecution of drug users in Europe, EMCDDA 2002

<sup>8</sup> Statement of Lars Bo Hansen in Prosecution of drug users in Europe, EMCDDA 2002

<sup>9</sup> Finland Drug Situation 2001; report to the EMCDDA by the Finnish National Focal Point

<sup>10</sup> Aulinger, S (1997), "Rechtsgleichheit und Rechtswirklichkeit bei der Strafverfolgung von Drogenkonsumenten: die Anwendung von s.31a BtMG im Kontext anderer Einstellungsvorschriften", Schriftenreihe des Bundesministeriums für Gesundheit, 89, Nomos Verlag, Baden-Baden.

<sup>11</sup> ELDD Country Profile – Drug Use and Possession

[http://eldd.emcdda.org/databases/eldd\\_country\\_profiles.cfm?country=GR#c3](http://eldd.emcdda.org/databases/eldd_country_profiles.cfm?country=GR#c3)

<sup>12</sup> Ugon D.A., La rilevanza del concetto di piccola quantità nella applicazione della legge sugli stupefacenti in Italia, Austria, Germania, Cedam, Padova 2000

<sup>13</sup> Opium Act Directive, Board of Procurators General, 2001

<sup>14</sup> see footnote 2

<sup>15</sup> see footnote 2

<sup>16</sup> Sterzel, 1998, pp. 8–6, in Zila, Prosecution of drug users in Europe, EMCDDA 2002