



European Liberal
Forum
PAPERS

ELF – RESEARCH PAPER
No 4 | May 2023

Reducing substance- related harm:

the EU needs to embrace
harm reduction

Abstract:

This paper presents a compelling argument for a paradigm shift in the European Union's approach to substance-related harm reduction, with a specific focus on tobacco and illicit drugs. Critiquing the prevailing EU policies, which are often driven by ideological considerations rather than evidence-based strategies, the paper highlights the adverse consequences of stigmatizing and criminalizing consumers. Embracing harm reduction as a more constructive alternative, the paper advocates for prioritizing the reduction of harm associated with risky behaviors over enforcing abstinence. It emphasizes the importance of differentiating between various tobacco products based on their harm profiles and proposes implementing harm reduction strategies such as targeted communication campaigns, regulated advertising practices, and differentiated taxation approaches. By adopting a harm reduction framework, the European Union can enhance public health outcomes and promote evidence-based policies.



Antonios Nestoras
Deputy Executive
Director, European
Liberal Forum



Vincent Delhomme
Assistant Professor of
EU Law, Leiden
University

Introduction

Since the Covid-19 pandemic, EU health policy has been in the spotlight. The European Commission wants to build an EU Health Union based on several pillars. One of these pillars is the fight against cancer, and the fight against non-communicable diseases more generally – e.g. diabetes, cardiovascular diseases, etc. To reduce the prevalence of these diseases in the European population, the EU acts on determinants of health, in particular lifestyles and unhealthy consumption: what we drink, eat, or smoke.

This is a laudable aim. There is nothing wrong with the State extending a helping hand to those who fall into addiction and protecting the most vulnerable consumers, the youth especially, from harmful products. Harmful lifestyle and their consequences cost society greatly, in terms of mortality and morbidity. This cost exists also in purely economic terms. However, State intervention needs to follow two principles: (i) these are health matters, meaning that the State must refrain from stigmatising and, worse, criminalising consumers of harmful substances; (ii) policy must be evidence-based, and not based on morals.

Unfortunately, the current EU approach towards harmful consumption does not follow these, basic and well-known, principles. This is especially visible in two fields: tobacco and illicit drugs. Although these two areas are regulated very differently – tobacco is a legal product, freely traded across the EU, illicit drugs are excluded from the legal circuits of trade and are mostly a matter of criminal law – they are curiously treated with striking similarities. The EU, and some Member States, pursue a repressive policy based on ideology rather than results, which seeks to ‘purify’ society from deviant practices rather than to help those in need to adopt behaviours less prejudicial to their health.

Instead, the EU needs to embrace harm reduction. What matters in the short term is not that people refrain from engaging in harmful behaviours, but diminish the harm resulting from these behaviours. The repression and stigmatisation of people are not constructive. They are a dead end. This rests on both normative and empirical grounds. Firstly, normatively, because it is not the role of the State to punish people for their moral errors. Notable exceptions can be considered second-hand smoking, interpersonal violence and accidents due to alcohol consumption – something that seems not yet taken into sufficient consideration by authorities. Secondly, empirically, because people have and will always engage in risky and harmful behaviours. This is a matter of fact. Risky behaviours are part of humanity, not least because those behaviours involve pleasure (and its related reinforcement mechanism) and are part of the fabric of society, of sometimes deeply engrained traditions.

This paper argues, for a radical change of approach on the EU’s part regarding the treatment of nicotine products and illicit drugs. For each of these fields, it describes the current regulatory framework and its shortcomings and offers

alternatives based on the scientifically proven concept of harm reduction. This concept is widely accepted in multiple industries. This paper argues that it should be extended also to the areas cited above.

Tobacco

Not all products are created equal

When talking about tobacco and tobacco control policies, one tends to forget that the tobacco field covers a range of products with different characteristics, patterns of consumption, and, most importantly, degrees of harm. Combusted tobacco products – among which cigarettes are by far the most widely consumed – are far more harmful than their alternatives, such as smokeless tobacco products, heated tobacco products, electronic cigarettes, or nicotine pouches¹. The reason is that, despite its strong addictiveness, and contrary to a widespread misperception, it is not nicotine in itself which is responsible for most of the harm resulting from smoking, but the tobacco smoke emitted during the combustion of cigarettes. The smoke from combustible cigarettes contains over 4000 chemicals and at least 70 known carcinogens.

Smokeless tobacco products (STPs) are tobacco products that do not involve any inhalation, e.g. chewing tobacco, nasal tobacco, or pouches. In the EU, these are only niche products, consumed by a very small fraction of the population. The most widely consumed form of STP is snus, although its use is confined to Sweden because its sales are prohibited in the rest of the EU. Snus is a 'moist oral tobacco product which is placed behind the upper lip, either loose or in portioned sachets, which resemble miniature tea bags'². Consuming snus is substantially less hazardous than smoking³ and brings health benefits if used as a substitute for smoking⁴. While this has been recognized internationally to some extent, not all countries have included latest research results into their regulation. The sale of snus is banned in the EU, but the U.S. Food and Drug Administration FDA acknowledged snus' potential to reduce consumers risk of noncommunicable

¹ David J Nutt and others, 'Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach' (2014) 20 European Addiction Research 218.

² Elizabeth Clarke and others, 'Snus: A Compelling Harm Reduction Alternative to Cigarettes' (2019) 16 Harm Reduction Journal 62, 1.

³ Clarke and others (n); Konstantinos Farsalinos, 'Snus: Swedish Snus Is Different' (2019) 226 British Dental Journal 85; Lars M Ramström, 'Much Safer with Snus' (2019) 226 British Dental Journal 85.

⁴ Ellen Meier and others, 'A Randomized Clinical Trial of Snus Examining the Effect of Complete Versus Partial Cigarette Substitution on Smoking-Related Behaviors, and Biomarkers of Exposure' (2020) 22 Nicotine & Tobacco Research 473.

diseases significantly, as opposed to combustible consumption⁵. The wide consumption of snus in Sweden, as a substitute for cigarettes, explains why tobacco-related mortality is much lower in that country than in the rest of the EU⁶.

E-cigarettes are electronic devices used to inhale an aerosol or vapour – hence the use of the term ‘vaping’ – created from heating up a liquid that usually contains nicotine and different flavours.

Although the debate is rife within the scientific community – the WHO still refuses to clearly acknowledge that e-cigarettes pose a smaller risk to health than conventional cigarettes – ample evidence seems to demonstrate that users of e-cigarettes are only exposed to a small fraction of the risks posed by conventional cigarettes⁷. The long-term risks are still uncertain. The question of passive vaping is debated, with weak to moderate evidence establishing the existence of a risk for bystanders⁸, although it seems certain that the risk is significantly lower than that resulting from exposure to second-hand tobacco smoke.

Uncertainty remains as to the role played by e-cigarettes in smoking initiation or cessation, whether these products help smokers to quit and hence reduce their exposure to risk, or whether, on the contrary, e-cigarettes act as a gateway towards smoking, especially for young people⁹.

Finally, a last class of non-combusted tobacco products should be mentioned. These are the heated tobacco products (HTPs). Heated tobacco products are a form of tobacco that is heated in a device at a high enough temperature to release an aerosol, without burning the tobacco and producing smoke as a result. As HTPs have been in the market for a short amount of time, possible health risks associated with their consumption are still being investigated. Independent studies by government authorities (among them, the German BfAR)¹⁰ have

⁵ U.S. Food and Drug Administration, FDA, (2019), [Link](#)

⁶ Karl Fagerström and Elsy-Britt Schildt, ‘Should the European Union Lift the Ban on Snus? Evidence from the Swedish Experience’ (2003) 98 *Addiction* 1191; Lars Ramström and Tom Wikmans, ‘Mortality Attributable to Tobacco among Men in Sweden and Other European Countries: An Analysis of Data in a WHO Report’ (2014) 12 *Tobacco Induced Diseases* 14; Lars Ramström, Ron Borland and Tom Wikmans, ‘Patterns of Smoking and Snus Use in Sweden: Implications for Public Health’ (2016) 13 *International Journal of Environmental Research and Public Health* 1110.

⁷ Ann McNeill and others, ‘Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England’ (2018) Public Health England 20, (<https://www.gov.uk/government/publications/e-cigarettes-and-heated-tobacco-products-evidence-review>) ;accessed.

⁸ McNeil and others (n) 19.

⁹ Caitlin Notley and others, ‘The Unique Contribution of E-Cigarettes for Tobacco Harm Reduction in Supporting Smoking Relapse Prevention’ (2018) 15 *Harm Reduction Journal* 31.

¹⁰ Presentation by Dr. Elke Pieper BfR (German federal institute for risk assessment) at the ENVI committee of the European Parliament 30-11-2022 12:30 Novel Tobacco Products and their effects on health [https://www.europarl.europa.eu/cmsdata/259012/EP%20Presentation%201%20-%20Elke%20Pieper%20\(BfR\).pdf](https://www.europarl.europa.eu/cmsdata/259012/EP%20Presentation%201%20-%20Elke%20Pieper%20(BfR).pdf)

declared a reduction of toxicity vis-à-vis combusted products of up to 95%¹¹. The U.S. Food and Drug Administration also authorized the marketing of HTPs, confirming them to have an average lower toxicity of 70%¹². The relationship between HTPs and cigarettes consumption needs more research. Studies seem to indicate a progressive substitution effect between combusted products and HTPs, which would be beneficial for public health outcomes. More in-depth research on this topic, able to capture this behavioural change, is needed.

Those championing 'harm reduction' related to tobacco – a term that refers 'to strategies designed to reduce the health risks associated with tobacco smoking but which may involve the continued use of nicotine'¹³ – point to the difficulty that smokers have when trying to quit. 'Successful quit rates are abysmally low, relapse rates are high and in addition, a number of people wish to smoke'.¹⁴ This suggests that an approach based on the transition from cigarettes to other lower-risk products, such as e-cigarettes, tobacco for oral use, and HTPs should be preferred. Hence, from this perspective, these products should be regulated in a more nuanced way if compared to cigarettes, so that they remain as little attractive as possible to non-users of tobacco while constituting a suitable alternative to smokers.

The EU's prohibitionist approach

Since the 1980s, the EU has taken resolute action to reduce smoking prevalence in the EU population and positioned itself as a leader in global tobacco control. Action has been taken on four main fronts: (i) tobacco advertising, (ii) tobacco packaging and labelling, (iii) tobacco composition, (iv) tobacco pricing. Regarding advertising, the EU prohibits all commercial communications in cross-border media, such as television, radio, newspapers, and magazines.¹⁵ On packaging and labelling, the EU mandates the presence of combined text and graphic

¹¹ European Commission, 'Support study to the report on the application of Directive 2014/40/EU' (2021) 392-394, (<https://op.europa.eu/en/publication-detail/-/publication/9ce15083-b931-11eb-8aca-01aa75e-d71a1>); accessed; see also McNeil and others (n) 24; Małgorzata Znyk, Joanna Jurewicz and Dorota Kaleta, 'Exposure to Heated Tobacco Products and Adverse Health Effects, a Systematic Review' (2021) 18 International Journal of Environmental Research and Public Health 6651.

¹² U.S. Food and Drug Administration, FDA, (2020), [Link](#)

¹³ Sharon Cox and Lynne Dawkins, 'Global and Local Perspectives on Tobacco Harm Reduction: What Are the Issues and Where Do We Go from Here?' (2018) 15 Harm Reduction Journal 32.

¹⁴ O'Leary and Polosa (n) 219. See also Shannon Gravely and others, 'Changes in Smoking and Vaping over 18 Months among Smokers and Recent Ex-Smokers: Longitudinal Findings from the 2016 and 2018 ITC Four Country Smoking and Vaping Surveys' (2020) 17 International Journal of Environmental Research and Public Health 7084; Sophia Papadakis and others, 'Quitting Behaviours and Cessation Methods Used in Eight European Countries in 2018: Findings from the EUREST-PLUS ITC Europe Surveys' (2020) 30 European Journal of Public Health iii26.

¹⁵ Tobacco Advertising Directive and Audiovisual Media Services Directive.

health warnings on tobacco packets. It also prohibits the use of a number of promotional elements.¹⁶ On tobacco composition, the EU prohibits the use of a number of ingredients and additives, including characterising flavours such as menthol. It also prohibits the sale of Snus, apart from Sweden – which, given the outstanding Swedish results in the fight against combusted tobacco, appears self-defeating at best. Finally, regarding tobacco pricing, the EU sets minimum taxation rates.¹⁷

The EU has openly rejected harm reduction as of the point of this writing. What is striking with this regulatory framework, from a harm reduction perspective, is that it does not differentiate enough between products according to their risk profiles. Advertising for electronic cigarettes and HTPs is for instance fully prohibited. The EU is sometimes even stricter with products that pose fewer risks to health. It is the case of snus, which is prohibited.

The EU is set to strengthen its tobacco control effort in the coming years. In the 2021 Beating Cancer Plan, the Commission spelled out for the first time its ultimate policy objective of creating a ‘tobacco-free generation’, with less than 5% of the European population using tobacco by 2040.¹⁸ This represents an ambitious target, as tobacco prevalence is still situated at around 23%, as per the latest Eurobarometer report. In that context, the Commission will make new proposals in all areas currently regulated under EU law. The Commission embraces the ‘endgame’ strategy, a term in vogue in the public health community to describe a world where tobacco products have been phased out completely, or their sales severely restricted.¹⁹ It is no surprise that the Commission recently decided to register a [European Citizen’s Initiative](#) calling for ending the sale of tobacco and nicotine products to citizens born in 2010 and onwards.

The Beating Cancer Plan confirms the EU’s approach towards alternatives to tobacco products, and its refusal to adopt a harm reduction strategy at the level of the general population. The treatment reserved to alternatives to combusted products is set to worsen. The Commission has just recently banned the use of flavours in HTPs²⁰ and wants to do the same with e-cigarettes. It also wants to extend the EU taxation framework to alternative to combusted tobacco products and to recommend that their use is prohibited in public places. A recent leakage of the incoming Tobacco Tax Directive by the Financial Times (FT)²¹, however, seems to suggest that something is changing – at least in the substance, if not

¹⁶ Tobacco Products Directive.

¹⁷ Tobacco Taxation Directive.

¹⁸ European Commission, ‘Europe’s Beating Cancer Plan’ (n) 8.

¹⁹ Patricia A McDaniel, Elizabeth A Smith and Ruth E Malone, ‘The Tobacco Endgame: A Qualitative Review and Synthesis’ (2016) 25 Tobacco Control 594; Ruth E Malone, ‘The Race to a Tobacco Endgame’ (2016) 25 Tobacco Control 607.

²⁰ Commission Delegated Directive (EU) 2022/2100 on the withdrawal of certain exemptions in respect of heated tobacco products.

²¹ Brussels to propose rise in cigarette taxes and first EU-wide vaping levy, The Financial Times, 27 th of November 2022, <https://www.ft.com/content/6f1c4211-5e54-4aa8-a391-0ec9bc5244de>

in the form. For the FT's article, the tax rates of combusted tobacco products would differ from the ones of non-combusted products, de facto recognizing the difference in harm – and creating a risk-based taxation. This is a step in the right direction, coming close to the solutions advocated by Frank-Ulrich Fricke and Emanuele Bracco in their recent respective publications for the European Liberal Forum.²² If the Financial Time's article were to be true, then, we should ask ourselves why the EU substantially recognizes the difference between combusted and non-combusted products, but does not want to formally support harm reduction, stopping short in regulatory decisions that could save European lives.

Another approach is possible

To a certain extent, tobacco control works. We have seen the prevalence of combusted products slowly diminish over the last decades. Still, progress is sluggish at best.²³ According to 2021 Eurobarometer data, almost one quarter (23%) of the EU and UK populations are daily users of cigarettes.²⁴ Some countries, such as France, have even seen the smoking prevalence in the poorer parts of the population increase over the last 20 years (from 31.4% in 2000 to 33.3% in 2020, as per French national data). It is estimated that, in the European Union, in 2017, over 810,000 deaths and 19.8 million disability-adjusted life years were attributable to smoking.²⁵ We would be lying to ourselves if we cherished these results. To do more and reduce the scale of human harm and suffering resulting from tobacco consumption, we need harm reduction.²⁶

The situation is even more concerning when thinking about the people who use combusted products. These tend to belong to the poorest parts of the population. Aggressive tax policies are working much better on the more affluent, who are switching out of combusted products. The result is that the poorest are more at risk of getting sick. Illnesses reduce low-income people's ability to work (also because they have more difficulties accessing high-quality health treatment and prevention). A decreased ability to work leads to a reduction in income, which in turn leads to a further decrease in the ability to access top-notch health

²² Frank-Ulrich Fricke, 'The Potential of Harm Reduction: A Novel EU Strategy on Tobacco Regulation' (2022) European Liberal Forum Policy Paper 16; Emanuele Bracco, 'Fiscal Forward Guidance How Tax Policy Can Be Used for Non-Fiscal Objectives' (2023) 3 Future Europe Journal 46.

²³ The Lancet, 'Tobacco Control: Far from the Finish Line' (2021) 398 The Lancet 1939.

²⁴ European Commission, 'Attitudes of Europeans towards tobacco and electronic cigarettes' (2021) Special Eurobarometer 506, 54, accessed (<https://europa.eu/eurobarometer/surveys/detail/2240>).

²⁵ European Commission, 'EU burden from non-communicable diseases and key risk factors' (n).

²⁶ Robert Beaglehole and Ruth Bonita, 'Tobacco Control: Getting to the Finish Line' (2022) 399 The Lancet 1865; Darek Yach, 'Tobacco Harm Reduction Matters' (2022) 399 The Lancet 1864.

treatment, in a vicious cycle that leaves the poor poorer, and the rich richer. Contrary to helping the poor, this policy just leaves them further behind.

Yet rather than pragmatically embracing harm reduction to save lives, the European Union stubbornly sticks to an ideological position and continues to discourage the use of alternatives. Rather than having a nuanced approach where alternatives to cigarettes are regulated as harmful products, but clearly presented as better than smoking, the Union seems to want to persist in treating all tobacco and related products in the same way. This ideological approach, which promotes a world free of any 'sins', is a failure. It is an example of punitive and not behavioural regulation. It condemns millions of smokers to continue to smoke, although alternatives exist.

What the EU could do, rather, is to use both regulation and taxation tools to clearly signal the difference in the risk profiles of cigarettes and other, better, alternative products. The policy goal should be: (i) to deter non-smokers, especially young people, from taking up the consumption of any damaging product; (ii) ensure that current smokers have access to alternative products and are aware that switching to these products is better for their health.

The following harm reduction policies could be adopted or promoted at the EU level:

- clearly communicate to the public that, although they are not risk-free, alternatives to combusted products are (far) less harmful. Such communication could be done via public campaigns but should ideally also be done directly on the packaging of alternative products.
- calibrated advertising for alternative products should be made possible. These should not be advertised in mass media, considering also exposure of young people, but should be allowed in tobacco retail outlets
- the use of alternative products should not be prohibited in cafés and restaurants (or, at least, not in all areas of such public places), given their vastly reduced risk to health. This would strengthen the appeal of alternative products in the eyes of current smokers and clearly signal that these are better alternatives.
- tax rates should be lower for alternatives to combusted products. The current approach towards tobacco taxation should be carefully monitored and calibrated, to ensure that tax increases do not fuel illegal trade in tobacco products and do not disproportionately hit the poor, which are also the less likely to change their habits. In this sense, serious enforcement against illicit products is a fundamental variable to obtain concrete success toward a reduced prevalence in the use of combusted tobacco products.
- the prohibition of Snus in the European Union should be re-evaluated. This decision should be left to Member States, which, according to the situation

on their territory, should evaluate whether tobacco Snus use is likely to help for harm reduction purposes.

- on the same token, nicotine pouches should allow for a further decrease in the overall damage created in society by combusted tobacco products. They should be treated accordingly, as a resource to reduce the overall cost of smoking.
- more independent research should be conducted regarding alternatives - following what has already been done, for instance, by German institutions - to determine the level of harm reduction of all alternatives.

Illicit drugs/Cannabis

The international and EU drug control framework

Contrary to common belief, the regulation of illicit drugs is not a domain reserved for sovereign States. Drug control is entangled in a complex net of international and European rules, meaning that Member States of the EU are not fully autonomous when it comes to their drug policy. Under European and international law, an EU Member State is not able to decide whether to conduct a full-blown legalization of cannabis, whereby the product would be freely sold, purchased, and consumed, and treated like any other legal harmful substance.

The use and trade of illicit drugs are subject to an international drug control regime placed under the auspices of the United Nations. This regime is composed of three international conventions: the UN Single Convention on Narcotic Drugs of 1961 (the 'Single Convention'), the UN Convention on Psychotropic Substances of 1971, and the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the 'Convention against Illicit Traffic'). All EU Member States are party to these three conventions. The EU is only a party to the Convention against Illicit Traffic. The international drug control framework, taken in its entirety, requires parties to adopt measures that prohibit the production, use, and trade of drugs. Exceptions exist for medical and scientific purposes.

With the abolition of internal frontiers in the Schengen zone, and the creation of an Area of Freedom Security, and Justice, EU competencies in criminal matters have grown, with a focus on crime having a cross-border nature. Illicit drug trafficking is of course one of these types of crimes. The EU legal framework on illicit drugs is complex and does not always shine with clarity.²⁷ Sufficient is to say that it obliges the Member States to criminalize a number of actions linked to drug trafficking, including the 'production, manufacture, extraction, preparation,

²⁷ The two applicable texts are the Council Framework Decision 2004/757/JHA and the Convention implementing the Schengen Agreement.

offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs'.²⁸ The offenses must be punishable by 'effective, proportionate and dissuasive criminal penalties'.²⁹ As regards, personal consumption, Member States remain free to criminalize, or not, behaviours related to personal consumption, including personal consumption itself or cultivation.³⁰ Most Member States do so, the notable exceptions being Portugal, which became in 2001 the first European country to abolish all criminal penalties for personal drug possession, and the Netherlands, where drug possession remains prohibited but the authorities apply a policy of tolerance.

The failures of the EU and the global approach

In spite of the global efforts of the last fifty years to eradicate it, illicit drugs consumption and trafficking endure. In the EU, this is especially true of cannabis, which is widely consumed and available, reflecting particular social norms of acceptance. Since 2013, the prevalence of drugs, drug-related deaths, drug availability, and purity have increased across most types of drugs and across most Member States.³¹ The last years have seen record cocaine seizures in the European ports of the North Sea, Antwerp, and Rotterdam in particular, accompanied by an increase in criminality and gang violence.

In 2021, it was estimated that around 83 million or 28.9% of adults (aged 15-64) in the EU had used illicit drugs at least once in their lifetime, which should be regarded as a minimum estimate due to reporting biases.³² The most consumed of these drugs is by far cannabis, with an estimated lifetime use of 78,5 million adults (27,2% of the population), followed by cocaine with 13,8 million (4,8%) and MDMA with 10,4 million (3,6%).³³ As regards cannabis, levels of lifetime use differ considerably between countries, ranging from around 4% of adults in Malta to 45% in France.³⁴

As the recent [publication](#) of the European Liberal Forum has shown, France illustrates particularly well the failures of the current punitive approach towards

²⁸ Council Framework Decision 2004/757/JHA, Article 2(1)(a).

²⁹ Ibid, Article 4.

³⁰ Ibid, Article 2(2).

³¹ European Commission, 'Evaluation of the EU Drugs Strategy 2013-2020 and EU Action Plan on Drugs 2017-2020' (Staff Working Document) SWD (2020) 150 final, 20-28.

³² European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 'European Drug Report: Trends and Developments' (2021) Publications Office of the European Union, (https://www.emcdda.europa.eu/publications/edr/trends-developments/2021_en) accessed, 12.

³³ ibid 13.

³⁴ ibid 12.

drugs. France's punitive regime is one of the most severe in Europe, but France is nevertheless the country with the largest cannabis consumption. In addition to being ineffective, this policy has a cost: it allocates significant public spending to arrest users who harm only themselves, diverting police officers from more useful tasks. It is ineffective to prevent crime and fosters the development of gang violence which primarily affects the most vulnerable consumers. A debate surrounding the 'war on drugs' is growing worldwide, putting into question the effectiveness of prohibition and repression strategies to reduce consumption and harm, with disastrous consequences in terms of crime and respect of fundamental human rights.³⁵ As expressed by the United Nations Commissioner for Human Rights,

Data and experience accumulated by UN experts have shown that the “war on drugs” *undermines health and social well-being and wastes public resources while failing to eradicate the demand for illegal drugs and the illegal drug market*. Worse, this “war” has engendered narco-economies at the local, national, and regional levels in several instances to the detriment of national development. *Such policies have far-reaching negative implications for the widest range of human rights [...]*.³⁶

As an organization putting the protection of fundamental rights at its core, the EU, although it is not directly responsible for the enforcement of drug policies and for most of the negative consequences described above, cannot avoid some soul-searching on the issue.

The Future of Legalisation

As debates on the adequacy of the global prohibitionist approach towards drugs grow, some EU Member States have proposed or adopted reforms aimed at decriminalizing cannabis use and/or at legalizing its commerce, fully or in

³⁵ Robin Room and Peter Reuter, 'How Well Do International Drug Conventions Protect Public Health?' (2012) 379 *The Lancet* 84; Fiona Godlee and Richard Hurley, 'The War on Drugs Has Failed: Doctors Should Lead Calls for Drug Policy Reform' (2016) 355 *British Medical Journal* 6067.

³⁶ Office of the United Nations High Commissioner for Human Rights, 'End "War on Drugs" and Promote Policies Rooted in Human Rights: UN Experts' (2022), (<https://www.ohchr.org/en/statements/2022/06/end-war-drugs-and-promote-policies-rooted-human-rights-un-experts>) accessed, emphasis added.

part. Indeed, cannabis exhibits a considerable degree of normalisation despite decades of prohibition and strict law enforcement.³⁷ If national provisions on private cannabis production and use fall outside EU law's purview, this is not the case of provisions that would legalise the production and sale of cannabis.

A recent [study](#) of the French think-tank GenerationLibre, published with the European Liberal Forum, provides an overview of the various cannabis legalisation experiments carried out worldwide. It reveals the superiority of models based on a regulated free market over those based on a state monopoly. Only the former are able to stop the black market and eliminate the associated problems: crime, mobilisation of the repressive means of the state, and the impossibility of developing prevention policies. For the moment, only few European Member States are contemplating a reform of their cannabis laws.

Since December 2021, Malta authorises adults to carry up to seven grams of cannabis and to grow at home a maximum of four plants per household, for personal use.³⁸ The new 'Law on the Responsible Use of Cannabis' also provides 'for the possibility of creating a regularised and safe source from which a person can obtain cannabis and cannabis seeds in limited and controlled amounts, under strict conditions', so-called cannabis-clubs.³⁹ A bill is currently under discussion in Luxembourg that would also allow the cultivation of up to four cannabis plants per household, but would not decriminalise the possession and use of cannabis in the public space.⁴⁰ The Luxemburgish and Maltese laws, which do not amount to a full-scale legalisation, appear to benefit from the exemption contained in Article 2(2) of the Framework Decision on Illicit Drug Trafficking, as the behaviours made licit only relate to personal consumption.

Furthermore, Czech Republic, similar to the approaches in Malta and Luxembourg, decriminalized cannabis consumption and cultivation in the year 2010. The possession of up to 10 grams as well as the cultivation of up to five plants has been legalized. The Czech government further intends to build on existing laws and plans on adopting a revised cannabis framework, not restricted to private cultivation but extended to cannabis supply-chain regulation.⁴¹

In two complementing frameworks, Germany currently plans to decriminalize private consumption and cultivation through the set-up of social clubs as

³⁷ Mark Asbridge and others, 'Normalization and Denormalization in Different Legal Contexts: Comparing Cannabis and Tobacco' (2016) 23 *Drugs: Education, Prevention & Policy* 212.

³⁸ Government of Malta, 'Press Release - New Law on the Responsible Use of Cannabis Enters Into Force' (2021), ([https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2021/December/18/pr212248en.aspx#:~:text=Act%20LXVI%20of%202021%20\(Chapter,our%20society%20perceives%20and%20treats\)](https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2021/December/18/pr212248en.aspx#:~:text=Act%20LXVI%20of%202021%20(Chapter,our%20society%20perceives%20and%20treats);)); accessed.

³⁹ *ibid.* See Mafalda Pardal and others, 'Mapping Cannabis Social Clubs in Europe' (2020) 19 *European Journal of Criminology* 1016.

⁴⁰ Gouvernement du Luxembourg, 'Projet "Cannabis récréatif"' (2021), (https://gouvernement.lu/fr/dossiers.gouv_mj%2Bfr%2Bdossiers%2B2021%2BCannabis.html); accessed.

⁴¹ Czech Republic (2022); [Link](#)

well as building regional model projects for legalized and commercial supply-chains for cannabis. This is in line with EU legislation, as the trade with cannabis is allowed if used for scientific purposes. In the German approach, the model project will be closely monitored to minimize illicit trade and protect the youth while closely tracking health developments in society. The resulting outcomes will be discussed with the EU commission and other member states to inform and advance European drug policy and initiate a discussion around the future of cannabis regulation in the EU.⁴²

Rather than participating to the global 'war on drugs', the European Union should rather revise its approach and promote a policy based on evidence and effectiveness, which puts the respect for the fundamental rights of drug users and citizens at large at its core. A recent step in the right direction are the Council Conclusions on Human rights-based approach in drug policies, adopted in December 2022. Concrete acts must follow.

Such policies could be the following for the EU:

1. The Canadian Model

In 2018, although being a member of the UN Single Convention, Canada legalized cannabis for recreational use. This approach has been repeatedly rebuked by the responsible body, the International Narcotic Control Board (INCB). Unlike EU law, which provides for the possibility of concrete proceedings and penalties against member states, however, the INCB's options hardly go beyond these reprimands, which is why this disregard for international law has had little influence on what happens in Canada. Canada claims to stand by the Single Convention's principles regarding all drugs except cannabis.

2. Inter se agreements

While searching for solutions to challenges imposed by the Single Convention, inter se agreements have been repeatedly brought into play. Art 41 (1)⁴³ of the Vienna Convention on the Law of Treaties states that two signatory states to a convention may amend the treaty effective among themselves.

While there are some legal hurdles, inter se agreements may be a good solution for establishing an EU cannabis market. In any case, these would be less problematic than simply ignoring the Convention (see "Canadian Model"). The proposed solution, inter se, would nevertheless require a broad European consensus to enable the establishing of trade routes within the EU single market.

⁴² German Health Ministry (2023); [Link](#)

⁴³ "Two or more parties to a multilateral treaty may enter into an agreement to modify the treaty solely in relation to each other (...) if the possibility of such modification is provided for in the treaty or if the modification in question is not prohibited by the treaty and (...) does not interfere with the other parties in the enjoyment of their rights under the treaty or in the performance of their obligations and (...) does not relate to a provision from which departure is incompatible with the full realization of the object and purpose of the treaty as a whole compatible"

3. Amendment of the Single Convention

Theoretically, the EU could also seek an amendment to the Single Convention as codified in Art. 47, though this option is of a rather theoretical nature. In the case of a proposed amendment, even a single state objecting may be sufficient to convene a conference under the UN Charter. This procedure is far more time-consuming and resource-intensive while having less realistic prospects of success.

4. Revision of legal framework and instruments

Revising current European legal instruments, such that EU law does not oppose countries that decide to go towards full legalisation of cannabis.

5. Decriminalization

Promote policies that decriminalise simple possession and use of drugs among Member States and on the world stage. Furthermore, an option would be to increase police and justice cooperation to target the largest criminal networks and their doings. ■

Author bio

Antonios Nestoras is the Deputy Executive Director of the European Liberal Forum (ELF). His career spans more than 12 years in the academic, think-tank and European public administration fields, and his work has been published in peer-reviewed journals, think-tank reports and EU media. He holds a double PhD in Social and Political Science from VUB and the University of Antwerp.

Vincent Delhomme is Assistant Professor of EU law at Leiden University, the Netherlands and Guest Lecturer at Université Saint-Louis – Bruxelles. His research focuses on the regulation of health and environmental risks in the internal market.

About ELF

The European Liberal Forum (ELF) is the official political foundation of the European Liberal Party, the ALDE Party. Together with 47 member organisations, we work all over Europe to bring new ideas into the political debate, to provide a platform for discussion, and to empower citizens to make their voices heard. Our work is guided by liberal ideals and a belief in the principle of freedom. We stand for a future-oriented Europe that offers opportunities for every citizen. ELF is engaged on all political levels, from the local to the European. We bring together a diverse network of national foundations, think tanks and other experts. In this role, our forum serves as a space for an open and informed exchange of views between a wide range of different EU stakeholders.

A liberal future in a united Europe

DOI: 10.53121/ELFRP4

ISSN:2736-5816



 /europeanliberalforum
 @eurliberalforum
#ELFpapers

Graphic Design: Altaïs
Cover image: pixabay.com

Copyright 2023 / European Liberal Forum European EUPF.

liberalforum.eu

This publication was co-financed by the European Parliament. The European Parliament is not responsible for the content of this publication, or for any use that may be made of it.