Limitations under international and European law of the legalisation of cannabis in Germany

Legal opinion for the Bavarian State Government

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II. Synopsis

1. The legalisation of cannabis as planned by the Federal Government is contrary to the stipulations of international and European law.
2. The intended legalisation of cannabis is at odds with the relevant UN conventions on the control of narcotics, which also prescribe a prohibition on cannabis.
3. Only the use of cannabis for scientific or medical purposes in the strictest sense is excepted from the comprehensive criminalisation obligations arising from the UN conventions.
4. All other practices, in particular the cultivation, trade, import/export, sale and purchase, possession and consumption of cannabis must, in compliance with the clear and unambiguous stipulations of the UN conventions, be prohibited.
5. The UN bodies for the control of narcotics have consistently evaluated any comprehensive legalisation of cannabis as planned by the Federal Government as an infraction of the UN narcotics control conventions.
6. The "constitutional reservation" declared by a minority in the literature to be a pathway to extensive legalisation of cannabis does not in fact allow for the planned legalisation of cannabis. It refers solely to the option of a decriminalisation of personal consumption and direct preparatory acts for this purpose. The creation of a wide-ranging system of state organised or licensed provision of cannabis is not consistent with this. From the perspective of international law, decriminalisation of the personal consumption and cultivation of cannabis would also require an amended constitutional situation in Germany and Europe.
7. Only a withdrawal (pending amendments) from the UN conventions on narcotics control would allow the sweeping legalisation of cannabis as planned by the Federal Government to be implemented in compliance with international law. This path is demanding in terms of both legal framework and policy and is further complicated by the fact that the European Union itself is a party to one of the central UN conventions on the control of narcotics. Germany would therefore have to persuade the European Union as such to commit to this sort of withdrawal (pending amendments).
8. Against this background, all other Member States – despite, in part, political convictions to the contrary – have thus far deliberately refrained from comprehensive legalisation, in particular the trade in cannabis, precisely because of its incompatibility with international and European legal provisions.

9. Aside from the prohibition requirements of international law, which are also binding for the Union, the laws of the European Union as such also preclude the planned comprehensive legalisation of cannabis. Pursuant to these, in particular the planned state or state-licensed trade, cultivation and sale of cannabis for other than scientific or medical purposes are prohibited.
10. Only the question of the decriminalisation of private consumption and private cultivation directly aimed at this personal consumption is not covered by EU law as such.
11. According to the current jurisprudence of the Federal Constitutional Court, an application for abstract judicial review against a possible federal law legalising cannabis would not appear to be particularly promising, despite its contravention of international and European law. The jurisprudence of the Federal Constitutional Court holds that only the compatibility of the challenged provisions with constitutional law – but not with international and/or European law – can be a criterion for review in this respect. An amendment in the jurisprudence of the Federal Constitutional Court in this regard would appear unlikely, also in the light of the most recent jurisprudence ("right to be forgotten" decisions).
12. The Bavarian state government would have the option, however, of effecting Supreme Court clarification of the inconsistency of a federal legalisation of cannabis with international and European law before the ECJ by refusing to authorise the commercial sale of cannabis in Bavaria for recreational consumption with reference to its inadmissibility under international and European law. Under EU law, the Bavarian state government is not only entitled but also obligated to take appropriate action.

III. Preface

This study is limited to a legal analysis of the possibilities and limitations under international and European law of the legalisation of cannabis as planned by the Federal Government.

Account is therefore not taken of any political, medical, criminological and sociological aspects of the proper handling of cannabis, unless they in turn can have direct repercussions on the legal analysis.

Thus, insofar as the study sets out the legal possibilities and limitations of the legalisation of cannabis, no substantive statement on the basic question of the "right" narcotics policy, specifically on the best way to handle cannabis in social and regulatory terms, is associated with it. Therefore, beyond the questions of legality under current international and European law, no argument for an emphatically prohibitive nor for a permissive state and Union approach to cannabis can be drawn from the study.

IV. Legal doubts concerning the legalisation of cannabis

The Federal Government intends to implement a far-reaching legalisation of cannabis. In doing so, it wants to honour an arrangement to that effect included in the three-way "traffic light" coalition's coalition agreement.[1]

A. Plans of the Federal Government

The Federal Government has outlined the individual elements of the planned legalisation in a key issues paper.[2] According to this, cannabis and tetrahydrocannabinol (THC) will not be classified in future as narcotics. The production, supply and sale of cannabis are to be permissible within a licensed and state-controlled framework. Purchase and possession of up to 20 to 30 grams of "recreational cannabis" are to be exempt from punishment when for personal consumption in private and public spaces. Private cultivation is to be allowed to a limited extent.

B. Most far-reaching legalisation plans in Europe

The Federal Government has thus deliberately opted for a particularly far-reaching legalisation of cannabis, even by international standards. The legalisation plans pursued by the Federal Government are by far the most comprehensive and far-reaching among the Member States of the European Union. The changes in the legal approach to cannabis consumption that can be observed in some other Member States of the Union (e.g. the Netherlands, Luxembourg, Malta and Portugal[3]) clearly pale in comparison with the legalisation programme developed by the Federal Government. This would also appear remarkable because, as far as can be seen, all other EU Member States have in the past considered further steps to legalisation to be legally inadmissible, especially in the light of conflicting international and European law.[4]

[1] "Dare to make more progress", coalition agreement between the SPD, Bündnis90/Die Grünen and the FDP, p. 68: "We will introduce the controlled supply of cannabis to adults for recreational use in licensed premises."

[2] Federal Government's key issues paper, 2022, p. 3, https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/C/Kabinettvorlage_Eckpunktepapier_Abgabe_Cannabis.pdf.

[3] Portugal is also a party to the UN conventions for the control of narcotics but has pursued a decidedly public-health-oriented approach since the end of the 1990s. In the course of this, Portugal has decriminalised – but not legalised – all personal drug consumption. For more details on Portuguese narcotics policy: *Rego/Oliveira/Lameira/Cruz*, 20 years of Portuguese drug policy – developments, challenges and the quest for human rights, 2021, p. 6 ff., https://substanceabusepolicy.biomedcentral.com/articles/10.1186/s13011-021-00394-7.

[4] Canada, too, has openly admitted that its own cannabis legalisation policy, which is largely consistent with that planned by the Federal Government in terms of content, is not compatible with the legal provisions

It is precisely due to these legal limitations that the Netherlands, for example, has so far forgone any formal legalisation of cannabis.[5] It is indeed the case that the supply and consumption of small amounts of cannabis for private use are not prosecuted by the police.[6] This is, however, merely a matter of prosecutorial discretion in this regard. The liberal/green/social democratic coalition in Luxembourg also abandoned its originally comprehensive legalisation plans due to legal concerns and has presented a considerably more restrictive draft[7] which envisages only the decriminalisation of private consumption and restricted private cultivation. Malta is pursuing a similar concept.[8] In Italy, too, tendencies towards a comprehensive legalisation of cannabis have thus far failed to bear fruit precisely due to conflicting international and European law. The Italian Court of Cassation may have decided at the end of 2019 that the private cultivation of small amounts of cannabis for personal use is not punishable,[9] but, at the same time, the Italian Constitutional Court in 2022 rejected demands for a referendum on the legalisation of drug cultivation in Italy on the grounds of inadmissibility, citing Italy's obligations under international law to the contrary.[10]

of UN narcotics control legislation. See the statement to this effect by Canada's foreign minister, *Chrystia Freeland*, The Standing Committee on Foreign Affairs and International Trade (AEFA), Evidence, Ottawa, May 1, 2018, https://sencanada.ca/en/Content/Sen/Committee/421/AEFA/54008-e: "our government recognizes that this proposed approach of legalizing, restricting and strictly restricting cannabis will result in Canada contravening certain obligations related to cannabis under the three UN drug conventions: the Single Convention on Narcotic Drugs, 1961; the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances". On developments in Canada, see also: *Habibi/Hoffman*, Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries Like Canada Have Options, Ottawa Law Review (49) 2018, 427 ff.

[5] On criminal liability, see Wet van 12 mei 1928, tot vaststelling van bepalingen betreffende het opium en andere verdoovende middelen (Opiumwet), available in Dutch at https://wetten.overheid.nl/BWBR0001941/2022-07-01. The various substances are presented in two lists. List I contains the hard drugs such as cocaine that are classed as more dangerous, whereas List II contains the substances such as cannabis (soft drugs) that are considered less dangerous.

[6] See here information from the Dutch government on drugs policy, available in English at https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops.

[7] Draft bill No. 8033, https://gouvernement.lu/dam-assets/documents/actualites/2022/06-juin/14-tanson-lutte-toxicomanie/apl-cannabis-version-finale-062022.pdf.

[8] See Act of 18.12.2021: Act to establish the Authority on the Responsible Use of Cannabis and to amend various laws relating to certain cannabis activities (Authority on the Responsible Use of Cannabis Act, 2021), https://parlament.mt/media/113703/bill-241-authority-on-the-responsible-use-of-cannabis-bill.pdf.

[9] Sezioni Unite, verdict of 19.12.2019, https://www.nytimes.com/2019/12/27/world/europe/italy-marijuana-growing-cannabis.html.

[10] Corte Costituzionale, verdict 51/2022 of 16.2.2022, https://curia.europa.eu/jcms/jcms/p1_3763461/en/. See also here https://www.spiegel.de/ausland/cannabis-in-italien-referendum-ueber-legalisierung-des-cannabisanbaus-abgelehnt-a-760dc8a2-5dc7-4968-85bd-97916d17f04d.

C. Legal uncertainty of the Federal Government

Even the draft by the Bündnis 90/Die Grünen parliamentary group for a cannabis control law, which was introduced in 2015 and failed at the time but which serves in many aspects as a blueprint for the current legalisation plans of the Federal Government,[11] presupposed in its argumentation an incompatibility of the legalisation of cannabis pursued with Germany's international obligations under international law.[12] It therefore proposed that the Federal Republic should withdraw from the international prohibition agreements in question and then re-join with a cannabis-related reservation. Moreover, with regard to the compatibility with provisions of European law, the draft referred to certain doubts, which were ultimately considered unfounded or surmountable, however.[13]

Whether and to what extent the legalisation plans outlined are compatible with the provisions of international and European law is, by its own admission, also still unclear to the Federal Government.[14] For this reason, it has already submitted its key issues paper to the EU Commission "for examination against the applicable international and European laws".[15] It has announced notification with the EU Commission for a later draft.[16]

However, unlike the draft for a cannabis control act by the Grünen, the Federal Government apparently assumes it will be able to circumvent the hurdles of international law even without withdrawal pending amendments from the relevant UN conventions for narcotics control. The key issues paper states in this respect that the Federal Government will "take into account" its international and European law framework in implementing the coalition plan and issue "an interpretative declaration in this regard in reference to the

[11] On this assessment, see also: *Lichtenthäler/Oğlakcıoğlu/Sobota*, "Wenn die Ampel auf Grün schaltet...": Neuralgische Punkte einer Cannabisfreigabe, NK 2022, 228 ff. with further critical notes on the draft.
[12] Entwurf eines Cannabiskontrollgesetzes, German parliament doc. 18/4204 of 4.3.2015, p. 44: "However, there is little doubt that a system such as that of the cannabis control act, which allows for the supply of cannabis in licensed outlets for recreational use by adults, is not compatible with the international prohibition regime at this point in time." The draft was reintroduced in 2018 in unamended form and with the same arguments; see German parliament doc. 19/819 of 20.2.2018. See in all other respects also the motions of the FDP ("Cannabis – Modellprojekte stäarken", German parliament doc. 19/515) and of the "Linke" ("Gesundheitsschutz statt Strafverfolgung", German parliament doc. 19/832).
[13] Entwurf eines Cannabiskontrollgesetzes, German parliament doc. 18/4204 of 4.3.2015, p. 45 f.: "probably not standing in the way".
[14] See also the response of the Federal Government of 15.8.2022 to the brief enquiry of the CDU/CSU parliamentary group, German parliament doc. 20/3121: "The questions of international and European law associated with the plans are an important part of the discussions."
[15] Federal Minister for Health *Karl Lauterbach*, statement of 26.10.2022, https://www.bundesgesundheitsministerium.de/ministerium/meldungen/kontrollierte-abgabe-von-cannabis-eckpunktepapier-der-bundesregierung-liegt-vor.html.
[16] Federal Minister for Health *Karl Lauterbach*, statement of 26.10.2022, https://www.bundesgesundheitsministerium.de/ministerium/meldungen/kontrollierte-abgabe-von-cannabis-eckpunktepapier-der-bundesregierung-liegt-vor.html.

existing international law conventions, for example": "Against this background, the Federal Government prefers the option of issuing a interpretative declaration to the other parties to the international conventions and the international narcotics control bodies, according to which it declares this implementation of the coalition agreement – under certain strict conditions of state regulation and improvement of standards in the areas of health and youth protection and combating illegal drug trafficking – to be compatible with the purpose and legal requirements of the conventions."[17]

However, the Federal Government would also appear to be in some doubt as to the extent to which this unilateral "interpretative declaration" is actually capable of relativising Germany's obligations for narcotics control under international law. It speaks markedly vaguely in this respect of the international and European legal framework offering "limited options for implementing the coalition plan". "All paths to implementing the coalition agreement" are "associated with various risks under international and European law, which the Federal Government has examined and evaluated", it says.[18]

[17] Federal Government's key issues paper, 2022, p. 3, https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/C/Kabinettvorlage_Eckpunktepapier_Abgabe_Cannabis.pdf. Resolutely critical of the disqualification of this approach: *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice.

[18] Federal Government's key issues paper, 2022, p. 3 f., https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/C/Kabinettvorlage_Eckpunktepapier_Abgabe_Cannabis.pdf.

D. Obligations for the prohibition of cannabis under international law in the jurisprudence of the Federal Constitutional Court

In its 1994 decision on the fundamental constitutionality of the criminal-law sanctioning of cannabis, the Federal Constitutional Court assumed (as did the Federal Government at the time[19]) that this prohibition complied with an obligation of the German Federal Republic under international treaty law. Through the Act Approving the Narcotic Drugs Convention of 1988 (IT 1988) and its subsequent ratification, Germany had also adopted the risk assessment of the United Nations with regard to the handling of cannabis "and a basis for its commitment to combat the use of narcotics with criminal penalties." In the light of these conventions, "the Narcotics Act also represents the contribution of the Federal Republic of Germany to the international control of narcotic drugs and psychotropic substances, to the control of the handling of these substances and to the fight against the illicit drug market and the criminal organisations involved in it, which are a common concern of the community of states uniting under the banner of the United Nations" and "according to their unanimous conviction could be implemented with prospects for success only by means of cooperation between the states".[20]

[19] The Federal Constitutional Court cited the statement issued by the then Federal Minister for Health on behalf of the Federal Government in the cannabis proceedings as follows: "The United Nations Conventions on Narcotic Drugs and Psychotropic Substances, ratified by the Federal Republic of Germany, as well as the 1988 Vienna Convention on Narcotic Drugs, which is currently being ratified, established the obligation of the parties to sanction the illicit possession, use and trafficking of drugs. This would also include cannabis products. The Schengen Supplementary Agreement also obliges the Member States to impose criminal sanctions against illicit trafficking, possession and use of narcotic drugs, in particular also cannabis products. Any legalisation of soft drugs would therefore contravene international law.", BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 91.

[20] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 127.

E. Legal concerns about cannabis legalisation in the literature

Doubts about the compatibility of extensive cannabis legalisation with international and European law are also widespread in legal literature.[21] This is the case even among those authors who are open to the idea of decriminalising cannabis use or more extensive legalisation steps.[22] In this respect, reference can also be made to the experience of the Luxembourg coalition government, which, like the German traffic light coalition, had taken office with the promise of a far-reaching legalisation of the trade in cannabis, but has now drastically cut back these plans, citing conflicting European law.[23] In the Netherlands, too, a study commissioned by the government already indicated at an early stage the incompatibility of a far-reaching legalisation of cannabis with international and European law.[24]

[21] *Homberg/Goetz*, Brief opinion on the legal hurdles in supplying the German market with cannabis for recreational use, Dentons Rechtsanwälte, 13.9.2022; *Homberg*, Geplante Cannabis-Legalisierung – Zwischen Wunschdenken und Rechtsrealität, LTO, 26.9.2022, https://www.lto.de/recht/hintergruende/h/cannabis-legalisierung-voelkerrecht-un-uebereinkommen-europarecht-schengen-vertragsverletzung/; *Scoville*, Does the Legalization of Marijuana violate international law?, Marquette University Law School Faculty Blog, 24.10.2014, https://law.marquette.edu/facultyblog/2014/10/does-the-legalization-of-marijuana-violate-international-law/.

[22] *Bewley-Taylor*, Politics and finite Flexibilities: The UN Drug Control Conventions and their future Development, AJIL Unbound (114), 2020, 285 ff.; *Bewley-Taylor/Jelsma*, The UN drug control conventions – The Limits of Latitude, tni.org, 2012, https://www.tni.org/files/download/dlr18.pdf; *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice; *Hofmann*, Das Cannabis-Dilemma – Rechtliche Hürden der Cannabis-Legalisierung in Deutschland und Europa, VerfBlog, 23.11.2021, https://verfassungsblog.de/das-cannabis-dilemma/; *Hofmann*, Welche Probleme das Cannabiskontrollgesetz lösen muss - Deutschlands Cannabis-Dilemma Teil 2, VerfBlog, 15.7.2022, https://verfassungsblog.de/cannabis-2/; *Hofmann*, Cannabis Legalization in Germany – The Final Blow to European Drug Prohibition?, European Law Blog, 11.1.2022, https://europeanlawblog.eu/2022/01/11/cannabis-legalization-ingermany-the-final-blow-to-european-drug-prohibition/; *ders*., Deutschlands Cannabis-Dilemma, ZIS 2022, S. 191 ff.; *Scheerer*, Cannabis als Genussmittel?, ZRP 1996, 187 ff.; *Walsh*, Can Cannabis be regulated in accord with International Law?, Washington Office on Latin America (WOLA), online analysis, 14.11.2018, https://www.wola.org/analysis/cancannabis-regulated-accord-international-law/. On a Europe-wide solution: *Fijnaut*, Legalisation of Cannabis in some American States, European Journal of Crime, Criminal Law and Criminal Justice, 22 (2014) 207 ff. Critical of the legality of state or licensed cultivation and trade: *Fijnaut/De Ruyver*, The Third Way – A Plea for a Balanced Cannabis Policy, 2015, 205: "Without any doubt the establishment of such a system is in conflict with the drug treaties of the United Nations and with European law."

[23] https://www.nzz.ch/international/luxemburg-laesst-die-kiffer-in-ruhe-ld.1651962.

[24] *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125; this English-language study refers back to the corresponding Dutch study of 2014. An older Dutch study by the Asser Institute already came to the same conclusion: T.M.C. Asser Instituut, Experimenteren met het Gedogen van de Teelt van Cannabis ten Behoeve van de Bevoorrading van Coffeeshops – Internationaal rechtelijke en Europees rechtelijke aspecten, The Hague: 2005. However, *van Kempen/Federova* have in the meantime attempted to qualify the findings of their original, first study in a second study with a focus on human rights. But the strong politological approach of the second study has left the exact legal premises and the scope of these relativisations rather undetermined; see *van Kempen/Fedorova*, International Law and Cannabis II: Regulation of Cannabis

Nevertheless, voices can be heard, particularly in the German debate, that attempt to demonstrate the path to a legalisation of cannabis in conformity with international and European law or fundamentally deny any corresponding conflict of standards.[25]

Cultivation and Trade for Recreational Use: Positive Human Rights Obligations versus UN Narcotic Drugs Conventions, 2019, https://www.cambridge.org/core/books/international-law-and-cannabis-ii/A856A0CE847E8ADAAEA19F760191FDBE.

[25] *Ambos*, Zur völkerrechtlichen Zulässigkeit der Cannabis-Entkriminalisierung, VerfBlog, 20.5.2022, https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung; *Ambos*, Nochmals: Cannabis-Entkriminalisierung und Europarecht, VerfBlog, 25.7.2022, https://verfassungsblog.de/nochmals-cannabis-entkriminalisierung-und-europarecht/; *Ambos*., Neun Seiten Substanzlosigkeit – Die Stellungnahme des „Fachbereich Europa" des Bundestags zu EU-Recht und Cannabis-Legalisierung, VerfBlog, 13.9.2022, https://verfassungsblog.de/neun-seiten-substanzlosigkeit/; *Steinke*, Die EU versucht, die Deutschen für dumm zu verkaufen, SZ v. 23.12.2022, https://www.sueddeutsche.de/meinung/cannabis-eu-deutschland-legalisierung-kommentar-1.5721134?reduced=true; *Lichtenthäler/Oğlakcıoğlu/Sobota*, „Wenn die Ampel auf Grün schaltet...": Neuralgische Punkte einer Cannabisfreigabe, NK 2022, 228 (232 ff); *Lutzhöft/Hendel*, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis; the legalisation options considered in the latter article as possibilities are, however, far behind the objectives of the Federal Government in terms of result. See also: *Riboulet-Zemouli,* High Compliance, a Lex Lata Legalization for the Non-Medical Cannabis Industry: How to Regulate Recreational Cannabis in Accordance with the Single Convention on Narcotic Drugs, 1961, ssrn.com, 17.3.2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4057428.

V. International legal limitations of cannabis legalisation

Limitations on the intended legalisation of cannabis may initially arise from international law. In almost no other area of policy are international cooperation and the corresponding intertwining of international law contracts as intensive and close-knit than in the field of drug control. This can be explained in particular by the international nature of drug trafficking, to which the international community has responded with a whole range of legal instruments and with the creation of its own institutions

At the same time, there are sometimes considerable differences between the various national legal systems in terms of the actual and legal approach to the drugs covered by this international treaty regime. This applies in particular to the consumption of cannabis, which is prosecuted uncompromisingly in some states, with sometimes draconian penalties, but widely tolerated in others.

The body of international law essentially consists of three important international conventions. These are:

1. The 1961 Single Convention on Narcotic Drugs, hereinafter referred to as "SC 1961").[26]
2. The 1971 Convention on Psychotropic Substances, hereinafter referred to as "PS 1971").[27]
3. The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, hereinafter referred to as "IT 1988").[28]

Like almost every other country in the world, the Federal Republic of Germany is a party to all three international conventions.[29]

[26] BGBl. II 1977, p. 112, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl277s0111.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl277s0111.pdf%27%5D__1658330820975.
[27] BGBl. II 1976, p. 1478, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl276s1477.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl276s1477.pdf%27%5D__1658329245159.
[28] BGBl. II 1993, p. 1137, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl293s1136.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl293s1136.pdf%27%5D__1658329170038.
[29] The Single Convention as 154 member states, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6; the 1971 Convention on Psychotropic Substances has 184 member states, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&clang=_en; the UN Convention of 1988 has 191 parties, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en.

A. Single Convention on Narcotic Drugs, 1961

The Single Convention on Narcotic Drugs of 1961 (SC 1961) harmonised an array of older conventions on drugs into a single legal text.

The Single Convention pursues two fundamental objectives: firstly, it aims to ensure the availability of certain drugs for medical and scientific purposes. This concerns, in particular, the supply and further development of analgesic medicines. Secondly, the Single Convention seeks to strictly limit the use of drugs to these medical and scientific purposes and – as stated in the preamble to the SC 1961 – to curb "addiction to narcotic drugs", which "constitutes a serious evil for the individual and is fraught with social and economic danger to mankind".[30]

1. Restriction and criminalisation

With regard to the legalisation of cannabis pursued by the Federal Government, initially Art. 4 c) SC 1961 is of central importance, which commits the parties to a policy of strictly limiting the use of drugs to medicinal and scientific purposes. The official text puts it thus:[31]

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

This fundamental standard limits the prohibition policy imposed on the parties by expressly excluding medical and scientific uses and thus leaving the states free to regulate these in any case to the extent that their statutory regulations do not thwart the restrictive prohibition regime of SC 1961. In Germany, the possibilities for prescribing cannabis-based medications as extended by the Act on the Amendment of Narcotic-related and Other Regulations[32], which came into force on 10 March 2017, are based on this exemption on prohibition for medical purposes.

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[30] See *UN*, Commentary on the Single Convention on Narcotic Drugs, 1961, 3.8.1962, https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1961Convention/1961_COMMENTARY_en.pdf.

[31] The equally binding French wording of the English passages quoted here and below does not contain any deviations in terms of content.

[32] BGBl. 2017, Part I, p. 403 ff.

At the same time, the basic standard limits the permissible use of drugs exclusively to these medical and scientific purposes. The non-scientific and non-medical use of drugs may therefore not be permitted by the state in any form. This requirement alone speaks against the possibility of further legalisation of the use of drugs.

However, the Single Convention not only contains provisions that preclude the legalisation of drugs. It also goes further, at least in part, in demanding the explicit criminalisation of the use of drugs. Accordingly, drugs are not only not permissible. The parties are also obligated to expressly punish the use of drugs.

The basic standard of Art. 4 c) SC 1961 is to this end substantiated and compounded by Art. 36 para. 1 SC 1961, which contains specific requirements for criminalising the use of drugs:

> "a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty."

In its decidedly comprehensive listing of all conceivable forms of drug handling, the provision of Art. 36 para. 1 SC 1961 clearly endeavours to establish a criminalisation obligation of the parties that is as complete as possible.

However, this criminalisation obligation is subject to the general reservation of the "constitutional order" of the respective party. It is this constitutional reservation that is understood by a minority opinion in the literature as a gateway for a fundamentally deviating narcotics policy and thus also as legitimation for comprehensive legalisation of cannabis, as is planned by the Federal Government. This – legally unconvincing – argument will have to be discussed in more detail.[33]

[33] In detail under VII.B.

It is also striking that, in contrast to Art. 4 c) SC 1961, the criminal liability provisions of Art. 36 para. 1 a) SC 1961 also list "possession" but not the mere "use" of drugs. The criminalisation of this use, i.e. actual consumption of narcotics, could at most be attributed to "any other action [...] when committed intentionally". However, such other action need only be punishable if, in the opinion of the respective party, they are contrary to the Single Convention. Even though "use" without prior "possession" is only practical in certain constellations, the parties are hereby granted their own margin of discretion with regard to the question of the criminalisation of actual drug consumption. But this expressly does not apply to all actions prior to the consumption of the drugs.

Art. 36 para. 1 b) SC 1961 also contains a certain further retraction of the criminalisation obligations, according to which the parties may provide for "measures of treatment, education, after-care, rehabilitation and social reintegration" for drug abusers instead of punishment.

In summary, it can be stated that the parties to the Single Convention may not prima facie permit the non-scientific and non-medical use of drugs. In addition, they must define as an offence and thus criminalise all conceivable forms of this sort of use of drugs, with the exception of the direct consumption of drugs in a strict sense.

2. Cannabis as a narcotic within the meaning of the Single Convention

These provisions are substantiated by the definitions of "drugs" or "narcotics" also contained in the Single Convention. In a large number of detailed provisions and in the relevant defining annexes, the Single Convention expressly includes in the definition of narcotics all active-substance-relevant parts of the cannabis plant and the psychotropic components and products derived from it.[34]

In Art. 1 para. 1 b), SC 1961 defines "cannabis" as being the "flowering or fruiting tops of the cannabis plant [...] from which the resin has not been extracted". Cannabis and cannabis resin are defined as a "drug" in Art. 1 para. 1 j) in conjunction with Annex I SC 1961. Cannabis was originally subject to Annexes I and IV SC 1961 and thus to the strictest prohibition regime of the Single Convention. The Single Convention explicitly and deliberately does not differentiate between cannabis as a "soft" drug and other "harder" drugs.[35] In addition to the general prohibition requirements, the particular restrictions of Art. 2 para. 5 in conjunction with Annex IV SC 1961 therefore also applied to cannabis. The reason for the inclusion of cannabis in this group of particularly strictly regulated drugs was its widespread use at the time, which the parties deemed to be particularly dangerous.[36]

It should be noted here, however, that the Single Convention itself also contains a mechanism for the re-evaluation of drugs. According to Art. 3 SC 1961, the Commission on Narcotic Drugs (hereinafter: CND) of the United Nations Economic and Social Council (UN-ECOSOC) may, following a recommendation to that effect by the World Health

[34] There is unanimity in the literature with regard to this fact: *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125, p. 16 ff.; *Lutzhöft/Hendel*, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis.

[35] *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, p. 17, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125.

[36] *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, p. 17, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125.

Organization (WHO), recommend by a majority to that Council a reclassification or deletion of a particular drug.

As part of this re-evaluation process, cannabis and cannabis resin were removed from Annex IV at the end of 2020 at the suggestion of the WHO in view of their lower risk potential. At the same time, further downgrading was decided against due to the continued prevalence of cannabis and the health problems associated with it.[37] According to Art. 2 para. 1 SC 1961, cannabis as a "narcotic substance"/drug is therefore only subject to all general control measures that the Single Convention prescribes to the parties for the purpose of drug control.

Thus, for example, in addition to other quantity guidelines not relevant to Germany and apart from stock off-setting quantities, Art. 21 para. 1 a) SC 1961 states that "the total of the quantities of [cannabis] manufactured and imported by any country or territory in any one year shall not exceed the sum of [...] The quantity consumed, within the limit of the relevant estimate, for medical and scientific purposes". The intention of this provision is to limit the cultivation of cannabis as strictly and narrowly as possible to that for the medical and scientific purposes considered by the Single Convention to be permissible.

Art. 22 SC 1961 sets down provisions prohibiting cultivation altogether in states where it is not possible to ensure that the use of cultivated cannabis plants is limited to the medical and scientific purposes permitted by the Single Convention. In these states, the illicitly cultivated cannabis plants must be seized and destroyed.

According to Art. 28 para. 2 SC 1961, the Single Convention shall only not apply "to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes".

Art. 30 SC 1961 stipulates that the parties are obligated to require "medical prescriptions for the supply or dispensation of drugs to individuals". The provision reiterates that drugs, including cannabis, may only be supplied to individuals for medical purposes.

According to Art. 33 SC 1961, the parties "shall not permit the possession of drugs except under legal authority".

[37] Decision 63/17; cf. https://www.unodc.org/unodc/en/commissions/CND/Mandate_Functions/Mandate-and-Functions_Scheduling.html; on motivation, see: https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_62Reconvened/ECN72020_CRP19_V2006823.pdf.

Finally, reference should be made to the possibility set down in Art. 49 SC 1961 of a reservation regarding the prohibition of cannabis. Germany did not declare this sort of reservation at the time of signature (and the declaration is in any case permitted only for a limited time).[38] This provision is also important with regard to the legalisation of cannabis pursued by the Federal Government because it once again makes it expressly clear that national legal systems may not legalise cannabis under the conditions of the Single Convention. On the contrary, the provision itself requires parties that still had a legal cannabis market in 1961 to phase out this traditional legality within a transitional period of no longer than 25 years. The aim and stipulation of the Single Convention is thus expressly to end any then existing cannabis legality.

B. UN Convention on Psychotropic Substances

The Vienna Convention on Psychotropic Substances, hereinafter referred to as "PS 1971") was adopted in 1971 in supplement to the Single Convention of 1961.

Largely identical in terms of content to Art. 4 SC 1961, Art. 7 PS 1971 is a prohibiting standard that obligates the parties, in relation to the substances listed in Annex I of the Convention, to "prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them".

The substances listed in Annex I also include the active substance THC contained in cannabis in its various forms.

Nevertheless, PS 1971 is regarded by the prevailing view in the international legal literature as irrelevant or at least of secondary importance for the question of the legalisation of cannabis.

[38] See *Patzak/Volkmer/Fabricius*, Betäubungsmittelgesetz, [10]2022, Stoffe, Rn. 63. Any reservation in this regard in any case merely postponed the application of the prohibition regime for 25 years at the most. Moreover, according to Art. 49 para. 2a SC 1961, a corresponding reservation would only have been permissible had the consumption and trade of cannabis been "traditional" and "permitted" in Germany in 1961.

The real reason for this is not so much the wording of the provisions of PS 1971. The wording admittedly does refer primarily to the actual active substances as such and not to the cannabis plants and the products derived from them.[39] However, since PS 1971, too, speaks of "preparation" (Art. 1 f)), "manufacture" (Art. 1 i)) and "transformation" (Art. 1 i)), it obviously covers all cannabis products containing THC.

The non-application of the PS 1971 to the question of the legalisation of cannabis can therefore be clarified above all by the specific intention of this Convention. Namely, PS 1971 is intended to control those narcotic active substances which have not yet been prohibited by international treaties. Even if the wording of PS 1971 expresses this only very incompletely, the parties were not concerned with a new prohibition regime repetitive of and in parallel to the provisions of SC 1961. Rather, PS 1971 was intended to control further psychotropic substances not covered in the existing SC 1961. This limited regulatory intention of the parties becomes clear to some extent, especially in Art. 2 para. 1 PS 1971, according to which only "substance[s] not yet under international control" should be included in the list of prohibited substances of Annex I PS 1971.[40] Since cannabis and the usual cannabis products were and are all already covered by the SC 1961, a new prohibition was redundant. Against this background, the inclusion of the active substance THC in Annex I PS 1971 (which at least at first glance would appear to contradict this redundancy) can be understood as a provision which subjects only new uses of the active substance – which are not yet expressly covered by SC 1961 and which until now played no substantial role – to a further prohibition regime under international treaty as a precautionary measure.

For the purposes of this opinion, therefore, a particular examination of the legalisation of cannabis against the standards of PS 1971 is, with the prevailing interpretation of international law, dispensed with. It should be noted, however, that PS 1971, with its express inclusion of THC in its Annex I list of prohibited substances, once again underlined the intention of the parties at the time to regulate cannabis as comprehensively as possible.

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[39] For this reason, the relevance of PS 1971 for the question of the legalisation of cannabis is denied by *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, p. 11f., https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125.

[40] The UN Commentary on the Convention on Psychotropic Substances, 21.2.1971, p. 39 No. 14 ff. in particular also refers to this limiting formulation. Here, too, the precise meaning of the limitation remains vague in the end, when it states (in No. 16): "the definitions in the two treaties of the properties warranting international control are overlapping".

C. UN Convention against Illicit Traffic in Narcotic Drugs

The negotiations for the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; hereinafter referred to as "IT 1988") were the scene of a global debate between advocates for and opponents of the legalisation of cannabis. The advocates of legalisation "lost the battle"[41]: Art. 3 and 14 IT 1988 establish to this day a rather strict prohibition policy, which expressly and in accordance with the definitions of the Single Convention of 1961 extends to cannabis.[42]

The central prohibition standard of IT 1988 is its extensive Art. 3, which obligates the parties to establish a comprehensive regime of penalties and sanctions. Accordingly, all conceivable actions that are part of the illicit traffic in narcotic substances are to be punishable. Thus, according to Art. 3 para. 1a i) IT 1988, closely drafted in line with the corresponding provisions of SC 1961, penalties are to be imposed on the "production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention".

It is worth noting that, according to Art. 3 para. 1a iii) IT 1988, the parties must make punishable the mere possession or purchase of a narcotic or psychotropic substance only when and to the extent that the possession or purchase is "for the purpose of any of the activities enumerated in (i)". The express criminalisation obligation enshrined here therefore applies only to the possession or purchase of drugs aimed at trafficking activities, but not to the possession or purchase for exclusively personal consumption.

In apparent contrast, according to Art. 3 para. 2 IT 1988, each party "subject to its constitutional principles and the basic concepts of its legal system, [...] shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the

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[41] *Fijnaut*, Legalisation of Cannabis in some American States, European Journal of Crime, Criminal Law and Criminal Justice, 22 (2014) 207 ff.

[42] *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, p. 51 f., https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125. On the individual provisions of the Convention see also: *UN,* Commentary on the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, 1988, 20.12.1988, https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1988Convention/1988_COMMENTARY_en.pdf.

1961 Convention, the 1961 Convention as amended or the 1971 Convention". A restriction to trafficking activities is not included in this provision.

These seemingly contradictory requirements can be explained against the background of the different relativisations of the criminalisation obligations contained in the respective provisions. While the parties may rely on limitations of their constitutional law or the tenets of their legal systems in order to limit the criminalisation of the possession, purchase or cultivation of drugs for personal consumption, this is not to be possible beyond this personal consumption. Thus, it is only the possession, purchase or cultivation for personal consumption that does not necessarily have to be penalised by the parties under all constitutional circumstances. On the other hand, there is no constitutional reservation for any activities aimed at the commercial cultivation and trafficking of drugs. These activities must therefore be criminalised under all circumstances.

D. Legal position of the UN bodies

Ultimately, when assessing the limits of the legalisation of cannabis under international treaties, account must also be taken of the practice of international law, in particular the decision-making practice and the legal position expressed therein by the bodies set up by the United Nations itself to monitor compliance with international drug control.

1. The UN bodies

The United Nations established two supervisory bodies for better international implementation of the Single Convention.

The first is the Commission on Narcotic Drugs (CND), whose main task is to monitor, in cooperation with the parties and the World Health Organisation, developments in the area of drug abuse and drug development and to ensure the resulting changes in the lists of substances covered by the Single Convention.

The second of the supervisory bodies is the International Narcotics Control Board (INCB), created in 1968, which exercises a monitoring function. In particular, the INCB monitors drug production in the state parties and reviews the information submitted by them. If the INCB identifies undesirable developments in a state party, it can propose consultation, inspections, support and remedial measures. The INCB may also draw the attention of United Nations bodies, the CND and the other parties to the grievances identified. Finally, the INCB is entitled to publish regular reports on the monitoring activities

it carries out. The INCB sees itself as an "independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions".[43]

2. Legal position on the legalisation of cannabis

The INCB has commented several times in the past on questions of the legalisation of cannabis in various state parties. It has consistently and under all circumstances designated legalisation that was not strictly limited to scientific or medical applications as incompatible with the requirements of the Single Convention and thus contrary to international law.[44]

The INCB also considers the private cultivation of cannabis even for medical purposes to be incompatible with the Single Convention, since the associated lack of state supervision promotes the risk of illicit use.[45]

However, in its annual reports, the INCB has also had to take note of the trend towards the legalisation of private cannabis use observed in the legal systems of a number of state parties. Nevertheless, even in its latest report, the INCB has consistently adhered to its legal position – also with regard to the legal development in various states of the USA, for example – that the legalisation of cannabis for recreational use is incompatible with the legal requirements of the Single Convention.[46] In consultations with the relevant parties, the INCB has sought to work towards a legalisation policy that is as restrictive as possible and, in particular, towards the continued legal and actual limitation of trade in cannabis.[47]

[43] See the INCB website: https://www.incb.org/.
[44] See, for example: *INCB*, Uruguay is breaking the International Conventions on Drug Control with the Cannabis Legislation approved by its Congress, incb.org, 11.12.2013, https://incb.org/documents/Publications/PressRelease/PR2013/press_release_111213.pdf; *INCB*, INCB holds consultations with Uruguay on cannabis legalization for non-medical purposes, incb.org, 4.1.2021, https://www.incb.org/incb/en/news/press-releases/2021/incb-holds-consultations-with-uruguay-on-cannabis-legalization-for-non-medical-purposes.html; *INCB*, Statement by the International Narcotics Control Board on the entry into force of Bill C-45 legalising cannabis for non-medical purposes in Canada, incb.org, 17.10.2018, https://www.incb.org/incb/en/news/press-releases/2018/statement-by-the-international-narcotics-control-board-on-the-entry-into-force-of-bill-c-45-legalising-cannabis-for-non-medical-purposes-in-canada.html.
[45] See INCB annual report 2021, Rn. 611, https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf, in which the INCB speaks out against a corresponding change in the law in Peru.
[46] See INCB Annual Report 2021, Rn. 224 f., https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf. At the same time, the INCB pointed out the increasing use of cannabis in the USA and the danger of the trivialisation of the associated dangers that federal legalisation would bring about. See also the corresponding criticism of the Luxembourg government's legalisation plans (Rn. 256), of the legal situation in the Netherlands (Rn. 266), in Uruguay (Rn. 636) and in various European States (Rn. 819).
[47] See INCB Annual Report 2021, Rn. 197 ff., 545, https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf, with reference to the corresponding situation, for example in Mexico after the decision of the Mexican Supreme Court on the constitutional right to private cannabis consumption.

VI. European law limitations of the legalisation of cannabis

European law, too, contains provisions for drug control. These regulations result firstly from the need for joint action against illicit drug trafficking and organised cross-border crime in an area largely free of physical internal borders. Secondly, for their part they serve the joint implementation of UN drug control law. The necessity of this arises from the fact that not only are all Member States parties to all relevant UN conventions, but the European Union as such is also a party to the 1988 UN Convention against Illicit Drug Trafficking.[48]

European legal limits to the planned legalisation of cannabis therefore result firstly from the 1990 Convention Implementing the Schengen Agreement of 1985[49] and secondly from the Council Framework Decision 2004/757/JHA of 2004.[50]

A. The Convention Implementing the Schengen Agreement

The 1990 Convention Implementing the Schengen Agreement of 1985 (hereinafter "CISA 1990") serves to combat the risks arising from the abolition of border controls between the parties of the Schengen Agreement. The parties include Germany and all of its neighbours.

Title III Chapter 6 CISA 1990 contains a whole series of regulations on the use of drugs.

Accordingly, the contracting parties undertake pursuant to Art. 71 para. 1 CISA 1990

> "as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances".

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[48] The signing of the Convention was already at the time accompanied by intensive discussions on the question of the legalisation of cannabis. In particular, the European Parliament set up two committees of enquiry at the time the Convention was signed, the majority of which also supported a prohibitive European control policy with regard to cannabis; see European Parliament, Report drawn up on behalf of the committee of enquiry into the drugs problem in the Member States of the Community, 1986–1987, pe 106.715/B/fin.corr. (Rapporteur: *J. Stewart-Clark*); European Parliament, Report drawn up by the committee of enquiry into the spread of organized crime linked to drugs trafficking in the Member States of the European Community, 1991–1992, pe 152.380/fin. (Rapporteur: *P. Cooney*).

[49] Convention Implementing the Schengen Agreement of 14.6.1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ EU L 239 of 22.9.2000, 19 ff.

[50] Council Framework Decision 2004/757/JHA of 25.10.2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ 2004, L 335/8.

At the same time, the contracting parties undertake pursuant to Art. 71 para. 2 CISA 1990

> "to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances".

While the aforementioned provisions require the prevention of the supplying of cannabis, Art. 71 para. 5 CISA 1990 contains provisions concerning demand: "The Contracting Parties shall do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances of whatever type, including cannabis. Each Contracting Party shall be responsible for the measures adopted to this end."

In line with its central objective of combating the dangers of cross-border drug trafficking, CISA 1990 thus aims primarily at preventing the supply and trafficking of drugs. On the other hand, the corresponding provisions on demand and thus on drug consumption are less clear and stringent in this respect, in that these measures are the responsibility of the individual contracting parties. This is clearly intended to allow them some scope for regulation with regard to the question of combating drug addiction and consumption.

B. Framework Decision on Drug Trafficking

Express limitations for a legalisation of cannabis under European law are also established by Council Framework Decision 2004/757/JHA of 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (hereinafter. "FD 2004").

As is evident from its title, the Framework Decision expressly seeks to establish a minimum framework for penalties in the area of drug trafficking. The Framework Decision accordingly contains minimum requirements for the Member States' necessary criminalisation of drug trafficking.

According to Art. 2 para. 1 FD 2004, each Member State shall

> "take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:
>
> a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
>
> b) the cultivation of opium poppy, coca bush or cannabis plant;
>
> c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a); [...]".

On the one hand, this wording expresses the clear criminalisation obligations of the Member States. The Member States are, accordingly, not free to decide for or against an drug control policy based on penal law. This means that, in particular, every manifestation of the cultivation, production and trafficking of drugs must be punishable.

On the other hand, the obligation to criminalise is already limited at this point to the extent that the mere possession and purchase of drugs must be criminalised only if these are committed in the pursuit of cultivating, producing or trafficking the same. Any possession or purchase of drugs not in pursuit of these objectives, but rather serving solely legal purposes or private consumption, is therefore exempt from the criminalisation obligations.

According to Art. 2 para. 2 FD 2004, conduct referred to in paragraph 1 shall

> "not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law".

According to this provision, Member States are also not required to criminalise acts of drug cultivation, production and trafficking if those acts are carried out exclusively for the "personal consumption" of the "perpetrators".

This latter exception to the fundamentally strict criminalisation obligation constitutes the basis under EU law for the decriminalisation of private cannabis consumption and, to some extent and within narrow limits, also of private cannabis cultivation in a number of EU Member States. According to general interpretative practice, by the European Court

of Justice in particular,[51] it is to be narrowly interpreted in all its elements as an exception to the rule.[52]

[51] For example: ECJ, Rs. C-546/11, ruling of 26.9.2013 – Dansk Jurist- og Økonomforbund, Rn. 41; ECJ, Rs. C-212/13, ruling of 11.12.2014 – Ryneš, Rn. 29; ECJ, Rs. C-289/16, ruling of 12.10.2017- Kamin und Grill Shop, Rn. 20, settled case-law. See also GA *Jääskinen*, opinion of 10.7.2014, Rs. C-212/13 – Ryneš, Rn. 48; GA *Sharpston*, opinion of 14.11.2013, Rs. C-390/12 – Pfleger, Rn. 45; GA *Colomer*, opinion of 25.6.2009, Rs. C-205/08 – Umweltanwalt von Kärnten, Rn. 69; GA *Colomer*, opinion of 9.12.2004, Rs. C-327, 328/03 – ISIS Multimedia und Firma, Rn. 52; GA *Alber*, opinion of 25.4.2002, Rs. C-108/01 – Consorzio del Prosciutto di Parma und Salumificio S. Rita, Rn. 99; GA *Alber*, opinion of 25.4.2002, Rs. C-469/00 – Ravil, Rn. 94; GA *Bot*, opinion of 20.6.2013, Rs. C-309/12 – Gomes Viana Novo, Rn. 26.

[52] See in more detail: *Herberger*, "Ausnahmen sind eng auszulegen" – Die Ansichten beim Gerichtshof der Europäischen Union, 2017; *Schilling*, Singularia non sunt extendenda: die Auslegung der Ausnahme in der Rechtsprechung des EuGH, EuR 1996, 44 ff.; *von Danwitz*, Regel und Ausnahme im Steuerrecht – Gedanken aus der Perspektive des Europarechts und der Praxis des Gerichtshofes der Europäischen Union, HFSt 12, 2019, p. 16 ff.

VII. Unqualified legal approaches to a comprehensive legalisation of cannabis

As demonstrated above, both the relevant international conventions and the laws of the European Union demand a state policy of the criminalisation and suppression of the cannabis trade as well as, at least in part, the cultivation and the consumption of cannabis.

However, numerous approaches for a relativisation of these criminalisation requirements of international and European law are discussed here and there in the literature. The following examinations apply to the legal validity and/or practicability of these relativisation approaches[53].

A. Withdrawal pending amendments from the international convention

An obvious and widely discussed way to eliminate the international law obligations to prohibit cannabis could be withdrawal from the international drug control agreements under international law in question. But since the Federal Government evidently does not fundamentally and comprehensively reject the international treaty regime for controlling drugs, a legally demanding attempt at a withdrawal pending amendments would be the only option.[54]

[53] Only the singular approach of *Lichtenthäler/Oğlakcıoğlu/Sobota*, "Wenn die Ampel auf Grün schaltet...": Neuralgische Punkte einer Cannabisfreigabe, NK 2022, 228 (233 ff.) is not discussed in more detail in the following. According to it, the legalisation of cannabis planned by the Federal Government should be regarded altogether as a scientific experiment and should therefore be permissible under international treaty law as the provision of cannabis for scientific purposes. The corresponding theses obviously misconstrue both the intentions of the Federal Government and the reach of the relevant exemption of UN law.

[54] The occasionally alternatively or additionally discussed path of an "inter-se" agreement amending the requirements of the UN drug control regime between states seeking an amendment to the cannabis prohibition has rightly been given less consideration. According to Art. 41 para. 1 b) ii) of the Vienna Convention on the Law of Treaties (VCLT), this sort of agreement presupposes, for example, that the "inter-se" arrangement "does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole". However, it is precisely this sort of basic derogation that would be the (impermissible) goal of a agreement to this effect. This is ignored by *van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft). Moreover, according to Art. 41 VCLT, an "inter-se" agreement would modify the obligations of an international law treaty only between the parties to the "inter-se" agreement ("as between themselves alone"), but not in relation to the contracting states that are not party to this agreement. Accordingly, *Boister/Jelsma*, Inter se Modification of the UN Drug Control Conventions – An Exploration of its Applicability to Legitimise the Legal Regulation of Cannabis Markets, International Community Law Review 20 (2018), 457 ff. regards "inter-se" agreements primarily as a legal policy instrument.

Thus, even the aforementioned draft by the Bündnis 90/Die Grünen parliamentary group for a cannabis control law[55] proposed that the Federal Republic of Germany should withdraw from the international prohibition agreements in question and then re-join with a cannabis-related reservation.[56]

1. Risks under international law and diplomacy

Such an approach would not be without legal and diplomatic risks for Germany. Bolivia has in the past successfully implemented this sort of withdrawal pending amendments with regard to the coca plant that is traditionally consumed in Bolivia.[57] However, according to Art. 50 para. 3 SC 1961, the successful implementation of this procedure presupposes that no more than one third of the other parties object within twelve months. In Bolivia's, this veto quorum was not met, although sixteen states – including Germany – opposed the Bolivian request.[58]

The success of a corresponding approach by Germany aimed at relativising the cannabis prohibition cannot be predicted with certainty. Unlike in Bolivia in the case of the coca plant, it would be difficult for Germany to claim a traditional culture of cannabis consumption. Moreover, Germany's legalisation plan goes particularly far in an international comparison. A sufficiently large number of states that are sceptical or hostile to the trend towards the legalisation of cannabis could use such an attempt to withdraw pending amendments as an opportunity to demonstrate their resoluteness in terms of a repressive drug policy.

2. Withdrawal under international law, and European law

Beyond this, it also seems doubtful as to whether Germany could effectively rid itself at all of its corresponding obligations by withdrawing from the international drug control conventions pending amendments.

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[55] Entwurf eines Cannabiskontrollgesetzes, German parliament doc. 18/4204 from 4.3.2015, see here IV.C.
[56] Entwurf eines Cannabiskontrollgesetzes, German parliament doc. 18/4204 of 4.3.2015, p.45 f.:
[57] For a critical viewpoint, see: *INCB*, Annual Report 2011, p. 4.
[58] See here *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice. Initially, 17 states raised objections, but Mexico then formally withdrew its objection, see *Walsh*, Analysis of the trend to legalize the non-medical use of drugs with an emphasis on cannabis, wola.org, 25.5.2022, https://www.wola.org/analysis/incb-hearing-legalization-trend-of-non-medical-use-drugs/.

This could, in particular, be obstructed by the European Union's independent obligation to prohibit cannabis as already outlined above.[59] As already pointed out, the European Union as such is also a party to the UN Convention against Illicit Drug Trafficking. Since both all the Member States as well as the European Union itself are parties, we are dealing here with what is known as a "mixed convention".[60]

According to Art. 216 Abs. 2 TFEU, international agreements concluded by the European Union are binding not only on the institutions of the European Union but also on the Member States. An isolated withdrawal pending amendments by Germany would therefore fail to fundamentally change the legal situation. Rather, as a Member State of the Union, Germany must continue to fulfil the obligations entered into by the Union as its own obligation under European law.

From a national perspective, the ratification by the European Union of the Convention against Illicit Drug Trafficking makes the obligations on cannabis prohibition under international law all the more significant. Namely, they become obligations under EU law and thus participate in the primacy of EU law. In addition, the EU Commission and other Member States may denounce a German breach of these international obligations of the Union by way of bringing contractual infringement proceedings pursuant to Art. 258, 259 TFEU before the ECJ.[61] This applies, in any event, to those elements of the obligations under international law assumed by the European Union which, according to the internal division of competences, fall within the competence of the EU. Such competence exists without further ado with regard to cross-border drug trafficking issues. Moreover, the European Union has already exercised its competences for a far-reaching prohibition of cannabis with the CISA 1990 and the FD 2004.

A legally tenable withdrawal pending amendments from the international drug control conventions would therefore require simultaneous withdrawal by the European Union, in any case from the UN Convention against Illicit Drug Trafficking, and thus a joint approach coordinated with the other EU Member States at the same time. As a result, EU legislation on combating drugs could – and would have to – be adapted accordingly. An

[59] See above, VI.
[60] On the legal effects of a mixed convention in more detail, see: *Schmalenbach*, in: Calliess/Ruffert, EUV/AEUV, [6]2022, Art. 216, Rn. 42 ff.
[61] General opinion, see only *Cremer*, in: Calliess/Ruffert, EUV/AEUV, [6]2022, Art. 258, Rn. 34.

isolated course of action by Germany vis-à-vis international law would thus show little promise in this respect.

B. Constitutional justification?

Not least because of the considerable – and long underestimated – difficulties presented by a withdrawal pending amendments under international treaty law, sections of the literature amenable to legalisation have long since been attempting to develop interpretative approaches for relativising cannabis criminalisation obligations under international treaty and European law. These should permit the legalisation of cannabis even without withdrawal from the international agreements on drug control and in compliance with the drug criminalisation requirements of European law.[62]

1. Textual references

Some of the literature sees the key approach to relativising the prohibition of cannabis under international and European law as being the "constitutional reservation" already mentioned above.[63][64] This initially involves the relativisation of the particularly stringent prohibition obligations of international law. Art. 3 para. 2 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs makes the obligation of the parties to penalise the possession, purchase and cultivation of narcotic drugs or psychotropic substances for personal consumption by criminal law subject to a reservation ("subject to its constitutional principles and the basic concepts of its legal system"). A corresponding reservation can also be found in Art. 36 para. 1 SC 1961, as already mentioned above.[65]

On the occasion of the ratification of the IT 1988, the Federal Government issued the following interpretative declaration[66]: "It is the understanding of the Federal Republic of Germany that the basic concepts of the legal system referred to in article 3, paragraph 2

[62] For more detail here, see also *van Kempen/Fedorova*, International Law and Cannabis I: Regulation of Cannabis Cultivation and Trade for Recreational Use: Positive Human Rights Obligations versus UN Narcotic Drugs Conventions, 2019, https://www.cambridge.org/core/books/international-law-and-cannabis-ii/A856A0CE847E8ADAAEA19F760191FDBE.
[63] See above V.A.1.
[64] Substantially: *Ambos*, Zur völkerrechtlichen Zulässigkeit der Cannabis-Entkriminalisierung, VerfBlog, 20.5.2022, https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung. Expressly restricted to the constitutionally prescribed decriminalisation of private cannabis consumption in small quantities by adults: *Sommer*, Sondervotum zu BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 248 ff.
[65] See above V.A.1.
[66] On the distinction between interpretative declarations under international law and reservations in accordance with Art. 2 para. 1 d) WVRK: *v. Arnauld*, Völkerrecht, [4]2019, Rn. 214.

of the Convention may be subject to change". This was intended to express the German view that the IT 1988 did not oppose a possible decriminalisation at a later date.[67]

2. Potential criminalisation of only personal consumption

Before the potential assertion of this constitutional reservation can be examined in more detail, it must first be pointed out restrictively that, according to the clear wording and classification of Art. 3 IT 1988 as already described above[68], the reservation can only justify a decriminalisation of the possession, purchase or cultivation of cannabis "for personal consumption". Art. 3 para. 1a IT 1988 does not allow for constitutional reservation for any cultivation, production, transport, trade or supply of cannabis that does not serve direct personal consumption.

The 1988 UN Convention against Illicit Traffic in Narcotic Drugs thus expressly differentiates – and in this respect further consolidates the provisions of the Single Convention of 1961 – between supra-individual drug trafficking, which must in any case and without exception be criminalised by the parties (Art. 3 para. 1a IT 1988), and individual possession, purchase and cultivation for personal consumption, which in principle is also to be criminalised, but against the criminalisation of which a constitutional reservation may be invoked (Art. 3 para. 2 IT 1988).

This differentiation between supra-individual drug trafficking and individual trade for personal consumption can also be found in the provisions of EU law already described above, which in turn serve to implement IT 1988 in particular.

Despite this clear differentiation, there are isolated attempts in the literature to justify the Federal Government's planned authorisation of national production and general trade in cannabis as a necessary correlate of private consumption under international and European law by means of the constitutional reservation. However, the relevant arguments remain remarkably vague and, on closer inspection, appear to be little more than circular legal policy postulates. Contrary to the wording of the provisions, these say the constitutional reservation should also extend to a state or state-controlled system of cannabis production and trade, because this is the only way to "achieve a consistently legal (state-

[67] In the evaluation as here: Wissenschaftliche Dienste des Deutschen Bundestags, Cannabis-Legalisierung im Lichte des Völkerrechts, WD 2-3000-057/22, p. 5, in reference to Kurzprotokoll der 76. Sitzung des Rechtsausschusses des 12. Deutschen Bundestages am 12.5.1993, p. 45-47, in which then Federal Minister of Justice *Leutheuser-Schnarrenberger* noted (p. 47) that the declaration allowed "the 'whether' of punishment in the lower ranges of offences possibly to be deliberated at some point in the future".
[68] See above, V.C.

controlled) cannabis market" and avoid "Dutch conditions – emergence of criminal structures for the illegal production/supply of the then legally dispensed drugs ('backdoor problem')".[69] A similar direction is taken by arguments contending that, against a background of the option of decriminalising private consumption, "the constitutionally guaranteed principle of the consistency of law" also requires the legal, state-organised supply of adult consumers with cannabis.[70]

Irrespective of the legal policy evaluation of a legalisation of cannabis, these arguments fail to convince legally. According to the clear wording and clearly recognisable intention of the respective legislators, the constitutional reservation under international treaty law, as well as the reservation under European law in favour of personal consumption, serves solely to enable the decriminalisation of the individual behaviour of drug consumers. The parties to the UN conventions or the EU Member States are granted the option of decriminalisation in this respect only. From the point of view of international treaty law, this is a concession to possible constitutional limits on the criminalisation of consumers alone and thus a clearly defined exception in the UN's otherwise comprehensive drug prohibition system. It cannot be inferred from this exception that a model of state-organised or licensed drug cultivation and trade that runs counter to the prohibition approach is permissible. Any assumption to the contrary is in legally unsurmountable contradiction to the numerous provisions, in particular of the UN conventions, which explicitly aim at the suppression without exception of the supply of drugs in particular.[71] It should also be

[69] *Ambos*, Zur völkerrechtlichen Zulässigkeit der Cannabis-Entkriminalisierung, VerfBlog, 20.5.2022, https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung.

[70] *Lutzhöft/Hendel*, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis.

[71] As here in terms of argument and findings: *Bewley-Taylor/Jelsma*, The UN drug control conventions – The Limits of Latitude, tni.org, 2012, https://www.tni.org/files/download/dlr18.pdf; *Fijnaut/De Ruyver*, The Third Way – A Plea for a Balanced Cannabis Policy, 2015, 205; *Hofmann*, Das Cannabis-Dilemma – Rechtliche Hürden der Cannabis-Legalisierung in Deutschland und Europa, VerfBlog, 23.11.2021, https://verfassungsblog.de/das-cannabis-dilemma/; *Hofmann*, Welche Probleme das Cannabiskontrollgesetz lösen muss - Deutschlands Cannabis-Dilemma Teil 2, VerfBlog, 15.7.2022, https://verfassungsblog.de/cannabis-2/; *Hofmann*, Cannabis Legalization in Germany – The Final Blow to European Drug Prohibition?, European Law Blog, 11.1.2022, https://europeanlawblog.eu/2022/01/11/cannabis-legalization-ingermany-the-final-blow-to-european-drug-prohibition/; *Hofmann*, Deutschlands Cannabis-Dilemma, ZIS 2022, p. 191 ff.; *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice; *van Kempen/Fedorova*, International Law and Cannabis I, Cambridge 2019, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125; *Scheerer*, Cannabis als Genussmittel?, ZRP 1996, 187 ff.; *Walsh*, Can Cannabis be regulated in accord with International Law?, Washington Office on

pointed out here that, contrary to the aforementioned legal policy theses, refraining from criminally prosecuting only consumers merely qualifies but does not fundamentally devalue a fundamental prohibition strategy. Both the UN drug control law and the corresponding provisions of EU law have consciously and expressly opted solely for this sort of treaty option for the purposes of partially relativising the prohibition requirements but, at the same time, against any option for their complete negation.[72]

The constitutional reservation can therefore at most justify the exceptional decriminalisation of personal consumption and its individual personal and direct preparatory acts, but not of a state or state-directed system of drug production and drug trade.

3. Constitutional justification according to the Basic Law?

Recourse to the constitutional reservation also relies on the decriminalisation of cannabis consumption being constitutionally required in Germany. A connecting factor in this regard could be, in particular, the general freedom of action pursuant to Art. 2 para. 1 of the Basic Law (GG). This could be understood to be the "right to intoxication" or at least as a constitutional limitation to the criminalisation of cannabis. Moreover, limitations on the prison sentences in place for drug-related offences could arise from the right to liberty laid down in Art. 2 para. 2 sentence 2 GG. The unequal treatment of cannabis and legal drugs such as alcohol or nicotine could, on the basis of Art. 3 para. 1 GG, also be seen as constitutionally problematic.[73]

a) The Cannabis Ruling of the Federal Constitutional Court

In any case according to prevailing opinion, however, German constitutional law did not and does not oppose cannabis criminalisation. Constitutional complaints and judicial review proceedings which explicitly claimed the alleged unconstitutionality of the

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Latin America (WOLA), online analysis, 14.11.2018, https://www.wola.org/analysis/cancannabis-regulated-accord-international-law/.

[72] This clear legal situation could also otherwise be the reason why even the aforementioned advocates of the opposing position regard the robustness of their own theses as limited. In this regard, it is said for example that "the frictions [...] with the applicable international drug control regime could not be completely and normatively interpreted away" *Ambos*, Zur völkerrechtlichen Zulässigkeit der Cannabis-Entkriminalisierung, VerfBlog, 20.5.2022, https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung. And others, in view of the legal uncertainties that they too admit, ultimately recommend only a "pragmatic approach for 'legalisation light'", which should be limited to "facilitating the access of adult consumers to cannabis within the existing medical regimen", *Lutzhöft/Hendel*, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis.

[73] For example, also in the constitutional audit approach: BVerfG, decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 116.

criminalisation of cannabis have had no success before the Federal Constitutional Court. On the contrary: in its Cannabis Ruling of 1994, the Federal Constitutional Court expressly determined that the constitution neither grants a "right to intoxication" nor opposes a general criminalisation of cannabis.[74] In this regard, the Federal Constitutional Court relied in particular on the legislator's margin of discretion and assessment, which the Court was able to review only to a limited extent.[75] In doing so, the Federal Constitutional Court also expressly underlined Germany's international obligations to criminalise cannabis and for its part viewed these obligations as a supplementary argument for the constitutionality of the criminalisation of cannabis.[76]

According to these constitutional requirements, the Federal Constitutional Court has declared not only the prohibition of "trading" in cannabis, which is subject to criminal penalties, to be constitutionally unobjectionable,[77] but also the fundamental criminalisation of the purchase and possession of small quantities of cannabis for occasional personal consumption.[78] However, the Court has regularly emphasised the marginal unlawfulness and culpability of the latter and has only judged the relevant criminal provisions to be constitutional "because the legislator has enabled the prosecuting authorities to dispense with punishment [...] or law enforcement [...] to take the minimal unlawfulness and culpability of the act into account in individual cases". In these cases, "the prosecuting authorities would have to refrain from prosecuting the offences specified in Section 31a BtMG pursuant to the principle of proportionality".[79]

b) Constitutional reassessment?

In order to be able to assert the constitutional reservation under international treaty law at all, Germany would therefore have to assert an amended constitutional law situation compared to the past and, in particular, compared to the decision of the Federal Constitutional Court of 1994.

[74] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 116 ff.
[75] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 122, 124, 151.
[76] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 127, 151.
[77] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 157 ff.
[78] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 160 ff.
[79] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Leitsatz 3.

In principle, this sort of change in the constitutional law situation would not appear to be ruled out.[80] As already mentioned, the Federal Government already pointed to such a possibility in the course of the ratification of the Convention against Illicit Drug Trafficking.[81] Nor was the constitutional assessment of the comprehensive criminalisation of cannabis undisputed in 1994 in the Second Senate of the Federal Constitutional Court. The decision was accompanied by two dissenting opinions, in which, on the one hand, Judge *Graßhof* considered even further cannabis criminalisation to be constitutional[82] and, on the other hand, Judge *Sommer* considered the criminalisation of private cannabis consumption in small amounts by adults to be unconstitutional.[83] Four orders for suspension and referral by three local courts, which see the criminal provisions of the Narcotics Act to be unconstitutional insofar as they relate to cannabis products, are currently with the Federal Constitutional Court. The courts again assert that the criminalisation of cannabis disproportionately interferes with the general freedom of action protected by Art. 2 para. 1 GG. In addition, the criminal liability of the use of the intoxicant cannabis is said to be unjustifiable against the background of the legality of the intoxicant alcohol, and therefore violates Art. 3 para. 1 GG.[84] Contrary to these legal opinions, however, the Federal Court of Justice recently confirmed the constitutionality of the prohibition on cannabis and expressly waived a referral of this matter to the Federal Constitutional Court.[85]

It is therefore not easy to predict how a current constitutional assessment of cannabis criminalisation might turn out. We may still see a relevant decision by the Federal Constitutional Court in 2023.[86] In addition to the fundamentally changed assessment of the Federal Government, the (in part) changed legal-policy assessment in other Member States of the European Union and in the USA is likely to have an influence on the evaluation. Compared to the grounds for decision in 1994, however, the basic medical assessment is also likely to have changed in the opposite direction. In 1994, the Federal Constitutional Court still assumed in its constitutional assessment of the prohibition that

[80] On the corresponding development of the jurisprudence of the Mexican supreme Court: INCB Annual Report 2021, Rn. 197 ff., https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf.
[81] See above VII.B.1.
[82] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 191 ff.
[83] BVerfG, Decision of 9.3.1994, 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Cannabis, Rn. 222 ff.
[84] Pending proceedings 2 BvL 3/20, 2 BvL 14/20, 2 BvL 5/21, 2 BvL 7/21.
[85] BGH, Decision of 23.6.2022 – 5 StR 490/21, Rn. 18.
[86] *Suliak*, Cannabis-Legalisierung vor dem BVerfG – Sorgt Karlsruhe für die Entkriminalisierung?, https://www.lto.de/recht/hintergruende/h/cannabis-legalisierung-bverfg-entkriminalisierung-ampel-karl-lauterbach-btmg-richtervorlage/.

cannabis consumption was largely harmless to health. Compared to the situation at that time, the actual circumstances have changed, especially in regard to the sharp increase in the potency of cannabis products on offer as well as the medical findings on the connection between cannabis consumption and psychotic illnesses. The former was discussed only to a clearly negligible extent in the decision of 1994 and the latter not at all.

Even when this means a prediction with regard to a possible constitutional re-evaluation of the cannabis criminalisation is weighed down by uncertainty in the detail, it does seem very improbable, given the legislator's discretionary leeway, that the court will infer from the Basic Law a constitutional obligation to decriminalise not only private consumption and perhaps also private cultivation, but also an obligation to decriminalise commercial cannabis production and the trade in cannabis too. Thus, in all likelihood, the legalisation of precisely this production and this trade planned by the Federal Government will not be able to be based on a corresponding constitutional situation in the future either.

4. Constitutional reservation and European law

Finally, the legally complex relationship of the constitutional reservation argument with European law must be discussed.

The constitutional reservation arises from the relevant provisions of international treaty law. In contrast, the relevant provisions of European law do not contain any corresponding reservations. This sort of reservation can be found neither in the Convention Implementing the Schengen Agreement nor in the EU Framework Decision of 2004.

Nevertheless, the thesis appears in the literature that the constitutional reservations of international treaty law could take effect also vis-à-vis the cannabis prohibition requirements of European law in question.[87] Though not always completely clear, the argumentation emphasises in particular the suggestion that the European drug control provisions merely reproduce "the international law requirements in essence".[88] The reproductive character of the European provisions justify, it is said, understanding the constitutional reservation expressly not contained in the European provisions as an implicit limitation also for these provisions. According to this interpretation, the constitutional reservation

[87] *Ambos*, Nochmals: Cannabis-Entkriminalisierung und Europarecht, VerfBlog, 25.7.2022, https://verfassungsblog.de/nochmals-cannabis-entkriminalisierung-und-europarecht/.
[88] *Ambos*, Nochmals: Cannabis-Entkriminalisierung und Europarecht, VerfBlog, 25.7.2022, https://verfassungsblog.de/nochmals-cannabis-entkriminalisierung-und-europarecht/; previously *Ambos*, Zur völkerrechtlichen Zulässigkeit der Cannabis-Entkriminalisierung, VerfBlog, 20.5.2022, https://verfassungsblog.de/zur-volkerrechtlichen-zulassigkeit-der-cannabis-entkriminalisierung.

of international treaty law would have to be transferred or "read into" the European drug control provisions. Consequential to this interpretation, European law could not go beyond the international law requirements and could "therefore be also rightly given less consideration".[89]

Under closer analysis, this legally at least challenging thesis is hardly convincing. After all, the European law provisions at least also serve the implementation of international law drug control requirements. In this way, Art. 71 para. 1 CISA 1990 for example obligates the parties with regard to the supply of cannabis to adopt all necessary measures to quash all unauthorised trade "[...] in accordance with the existing United Nations Conventions". But even Art. 71 para. 2 CISA 1990, which obligates the parties to prevent the export, sale, purchase and supply of cannabis, foregoes reference to international treaty law. The same applies to the subsequent paragraphs of Art. 71 CISA 1990. The 2004 EU Framework Decision on combating illicit drug trafficking, which is more important for the question of the criminalisation of cannabis, foregoes reference to the provisions of international treaty law entirely. Accordingly, the text itself clearly speaks against the thesis of an implicit general reservation in favour of the national constitutional framework in the drug control provisions of European law.

Moreover, general, fundamental European law principles also speak against the assumption of a general constitutional reservation to be asserted by the EU Member States themselves in the European drug control provisions: unlike international law, European law constitutes its own constitutional legal framework, which with the Charter of Fundamental Rights of the European Union in turn establishes a self-contained constitutional-law sphere and with the European Court of Justice its own supreme authority for the protection of constitutional rights. Because and to the extent that the European Union itself is a party to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, only the Union as such can invoke a potential constitutional reservation vis-à-vis the drug control obligations undertaken by it under international law. Quite rightly the literature therefore points out that a constitutional objection relevant to European law and with regard to the drug control obligations could only come from corresponding constitutional rights case-law of the ECJ.[90] In other words, because and insofar as the

[89] *Ambos*, Nochmals: Cannabis-Entkriminalisierung und Europarecht, VerfBlog, 25.7.2022, https://verfassungsblog.de/nochmals-cannabis-entkriminalisierung-und-europarecht/, at end.
[90] *Thym*, Ein Weg zur Cannabis-Legalisierung führt über Luxemburg, VerfBlog, 29.8.2022, https://verfassungsblog.de/ein-weg-zur-cannabis-legalisierung-fuhrt-uber-luxemburg/.

European Union has accepted international law obligations for controlling drugs, it is the Union's responsibility alone, and therefore ultimately that of the ECJ, to definitively decide on the constitutional and fundamental rights conformity of these obligations. The question of "constitutional reservation" under international law is also Europeanised in this respect.

Only this latter interpretation corresponds – as *Thym* has pointed out in the context of interest here[91] – with the relevant jurisprudence of the ECJ on the assertion of international law reservations in "mixed" international treaties, i.e. those signed by both the European Union and by its Member States. Thus, for example, the ECJ recently rejected as contrary to European law an attempt by Ireland, acting alone, to assert an international law reservation in the area of international copyright law. Because and insofar as the Union is a party to the international treaty in question, it was said to be the EU's responsibility alone to decide on the assertion of such reservations vis-à-vis third countries.[92]

Accordingly, the Europeanisation of the fight against drugs at the same time allows – to the extent sufficient in terms of content[93] – no isolated assertion of national constitutional reservations. Ultimately, only this sort of understanding corresponds with the meaning and purpose of the joint and overriding European law provisions on controlling drugs. These should guarantee a common and in any case broadly uniform drug control policy to serve the overriding goals of a area free of border controls and of the common internal market.

The question of the potential development and assertion of a joint European constitutional reservation vis-à-vis the Union's international law obligations for controlling drugs would therefore solely depend on any future decisions of the European Court of Justice. However, the development of these are even less certain than the future development of the relevant jurisprudence of the Federal Constitutional Court.[94] Relevant decisions by the ECJ on the constitutionality of a criminalisation of cannabis are still absent for the most part. However, reference can be made in this respect to the decision Josemans vs. Burgemeester van Maastricht from 2010, in which the ECJ classified cannabis as contraband in

[91] *Thym*, Ein Weg zur Cannabis-Legalisierung führt über Luxemburg, VerfBlog, 29.8.2022, https://verfassungsblog.de/ein-weg-zur-cannabis-legalisierung-fuhrt-uber-luxemburg/.
[92] ECJ, Rs. C-265/19, Ruling of 8.9.2020, Recorded Artists, Rn. 87 ff.
[93] More detail on the limitations of the European law obligation for the criminalisation of cannabis, above VI.
[94] See here VII.B.3.b).

reference to the corresponding provisions under international and European law, without questioning this illegality in reference to allegedly opposing fundamental rights.[95]

Reference should also be made to the more recent ECJ decision on the free movement of goods in regard to legally produced cannabidiol (CBD).[96] With this ruling, the Court of Justice deemed a French prohibition on the marketing of CBD as incompatible with the free movement of goods.

In doing do, the Court confirmed its "Josemans" jurisprudence (referred to above) as a starting point, according to which the free movement of goods does not apply to illegal drugs like cannabis. The "harmfulness of narcotics, including those based on hemp are generally recognised" and putting them into circulation is prohibited in all Member States. The only exception is the strictly monitored trade serving use for medical and scientific purposes.[97] It must be emphasised here that, in justifying the prohibition on cannabis, the Court of Justice expressly refers to the corresponding provisions of EU law and to the signing of the IT 1988 by the Union.

CBD is not to be understood factually or legally as "cannabis" within the meaning of these provisions and thus not as an illegal drug. For the definition of a drug, EU law refers in particular to the UN Convention on Psychotropic Substances and the Single Convention on Narcotic Drugs. No reference is made to CBD in the first-mentioned of these conventions and a literal interpretation of the Single Convention could lead to it (as a cannabis extract) being classified as a narcotic. However, such an interpretation would contradict the fundamental idea behind this convention and its goal of protecting the "health and welfare of human beings".[98] According to the current state of scientific knowledge, which should be taken into account, the CBD in question, unlike

[95] ECJ, Rs. C-137/09, Ruling of 16.12.2010 – Josemans vs. Burgemeester van Maastricht; also, in the classification of illegality: ECJ, Rs. 289/86, Ruling of 5.7.1988 – Happy Family and ECJ, Rs. 294/82, Ruling of 28.2.1984 – Einberger II.
[96] ECJ, Rs. C-663/18, Ruling of 19.11.2020 – CBD.
[97] ECJ, Rs. C-663/18, Ruling of 19.11.2020 – CBD, Rn 59.
[98] In the meantime, however, the INCB has pointed out in its most recent annual report that the WHO's proposed explicit exclusion of CBD from the definition of "cannabis" in Annex I SC 1961 at the 63rd CND session in December 2020 did not find a majority, see INCB Annual Report 2021, Rn. 800, 812, https://www.incb.org/documents/Publications/AnnualReports/AR2021/Annual_Report/E_INCB_2021_1_eng.pdf. In criminal proceedings concerning the trade in CBD flowers, the Federal Court of Justice considered a criminal conviction to be admissible, also taking into account the ECJ jurisprudence, because in the case in question a simple enrichment of the THC content contained in the CBD flowers by the end consumer was possible and intended, BGH, Decision of 23.6.2022 – 5 StR 490/21, Rn. 9 ff.

tetrahydrocannabinol (THC), does not appear to have any psychotropic or harmful effects on human health.

In its jurisprudence up to now at least, the European Court of Justice has not revealed any doubts about the constitutional admissibility of the fundamental prohibition of cannabis. Even if a change in this jurisprudence cannot be ruled out in principle, here too – just like the parallel question of a change in the jurisprudence of the Federal Constitutional Court – in light of the legislator's scope for decision-making, barely any moves towards a constitutional obligation to legalise not only private cannabis consumption, but also to establish a state cannabis supply can be expected.

C. Justification under European law by means of statutory licence?

Against this background, a further interpretative approach that aims to relativise specifically the obligations for criminalising cannabis under European law would not appear expedient either.

As far as can be discerned, the idea in question originally stems from the statement of grounds for the aforementioned draft for a cannabis control law, which was rejected by the Bundestag and aimed at a legalisation of cannabis that was largely in line with the Federal Government's key points. This draft law attempted to relativise the criminalisation obligations arising from EU law by referring in particular to the wording of Art. 2 RB 2004, according to which Member States are to ensure that the production and trafficking of drugs is made punishable "when committed without right".[99]

The draft bill argues that these provisions therefore do not at all stand in the way of the comprehensive legalisation of drugs by a Member State. Creating exactly this right would require only the appropriate national legislation. In this logic, the obligations for drug prohibition under European law would be entirely within the regulatory discretion of the respective Member State legislator.

In any case, this thesis, in its unadorned resolve, has rightly found (almost) no advocates in the relevant legal literature.[100]

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[99] Entwurf eines Cannabiskontrollgesetzes, German parliament doc. 18/4204 of 4.3.2015, p. 45. On this draft bill, see IV.C.

[100] Vaguely in this direction, however, are the intimations in Lutzhöft/Hendel, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis. More explicit:

Firstly, it is in recognisable conflict with the thesis put forward by the advocates of legalisation with regard to the constitutional reservation under international treaty law that European law merely strives to reproduce the requirements of international treaty law and must therefore be understood and interpreted as ancillary.[101] Especially because of this relationship between the EU and UN laws[102], it must be assumed that the words "without right" relate to those rights that could legitimise the use of drugs also under UN law. As explained above, however, the UN law includes in these rights only those issued by the parties for medical and scientific purposes. It should also be pointed out that – as already mentioned above[103]– the Single Convention also contains a clause in Art. 33 SC 1961, according to which the parties shall not permit the possession of drugs "except under legal authority". Against the background of the clear prohibition intentions and the clear criminalisation requirements of international treaty law, however, this clause has not been discernibly understood at any time by the UN drug control bodies or by the contracting parties as an option for the general legalisation of drug consumption that goes beyond the legalisation of scientific and/or medical use. Only negative opinions on this can be found in the literature, too.[104]

The meaning and purpose of the provisions of the CISA 1990 and the RB 2004 also speak against an understanding of the "without right" clause in the sense of a comprehensive and unconditional "opt-out" option for the individual EU Member States. Thus, for example, as its title reveals, the RB 2004 aims at "laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking". However, minimum provisions would no longer exist at all if the decision on the criminalisation of drug production and trafficking were to be left to the arbitrary decision of the individual Member States. The recognition of a blanket "opt-out" option would after

Lichtenthäler/Oğlakcıoğlu/Sobota, "Wenn die Ampel auf Grün schaltet...": Neuralgische Punkte einer Cannabisfreigabe, NK 2022, 228 (234 f.), who, however, admit themselves that "this sort of interpretation may not convince everybody, especially against the background of the genesis of the Framework Decision".

[101] See here VII.B.4.

[102] In more detail on the apparent intention of the EU legislator for the implementation of the UN law requirements: *van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft).

[103] See here V.

[104] See here, for example,*van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft); *van Kempen/Federova*, International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy, 2019, p. 133, https://www.cambridge.org/core/books/international-law-and-cannabis-i/F0D2A2A07FC311DAB48499DA9DCC8125.

all fail to meet the explicit health and criminal policy objectives that the EU legislator has linked to EU drug control law.[105]

A comparison with the corresponding provisions of other EU acts of law ultimately demonstrates that the "without right" clause cannot be understood as a wide-reaching "opt-out" clause and a "carte blanche" for the Member States. For example, Directive 2011/93/EU on child pornography obliges Member States to criminalise intentional acts relating to child pornography if they are committed "without right". Here too, however, the "without right" clause obviously does not allow the Member States to decriminalise child pornography across the board by national legislative decision.[106]

The "without right" clause can therefore only be understood as permitting Member States, within the meaning of UN law, to authorise the use of medicinal and scientific drugs. It does not have any further significance.[107]

D. Cannabis production and trade as an element of drug control?

The aforementioned ideas[108] of the Federal Government go even further, however; according to them, state licencing for the production and marketing of cannabis is to be understood as a building block of a drug control policy and thus also justifiable under international and European law. According to the key issues paper published by it, the

[105] For more detail on these objectives and the historical interpretation of the "without right" clause: *van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft).

[106] On the contrary, recital 17 of Directive 2011/93/EU states that the expression "without right" in relation to child pornography only allows Member States to "a defence in respect of conduct relating to pornographic material having for example, a medical, scientific or similar purpose. It also allows activities carried out under domestic legal powers, such as the legitimate possession of child pornography by the authorities in order to conduct criminal proceedings or to prevent, detect or investigate crime. Furthermore, it does not exclude legal defences or similar relevant principles that exempt a person of responsibility under specific circumstances, for example where telephone or internet hotlines carry out activities to report those cases." I owe the indication in question to *van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft).

[107] Despite a recognisably different interpretative intention, this is ultimately also the practical finding of the detailed examination by *van Kempen/Federova*, Die Regulierung von Cannabis unter Anwendung der "ohne entsprechende Berechtigung"-Klausel in Artikel 2 Absatz 1 des EU-Rahmenbeschlusses 2004/757/JI über illegalen Drogenhandel, 2023 (draft). These authors may well hold a more extensive understanding of the clause to be possible in principle, but this presupposes, firstly, a prior dissolution of the international legal obligations of at least the respective contracting party and, secondly, a guarantee that the fundamentally prohibitive EU regulatory objectives and the fight against drugs of neighbouring EU Member States are not impaired. The possibility of these cumulative requirements being achieved in the context of the legalisation of cannabis planned by the Federal Government would seem negligible for the foreseeable future.

[108] See IV.A and IV.C.

Federal Government intends to issue a corresponding "interpretative declaration" that declares the "implementation of the coalition agreement – under certain strict conditions of state regulation and improvement of standards in the areas of health and youth protection and combating illegal drug trafficking – to be compatible with the purpose and legal requirements of the conventions".[109] In its clarifications of this process, the Federal Government refers back to the interpretative declaration on Art. 3 Abs. 2 IT 1988 that was submitted by Germany upon ratification of the IT 1988.

The legal significance of any relativisation of the drug control obligations under international law by means of Art. 3 para. 2 IT 1988 is, however, clearly overstretched with this justification approach.[110] In this regard, it should first be pointed out that, contrary to the assumption made by the Federal Government, the derogating provision in Art. 3 para. 2 of the IT 1988 does not permit an interpretative reversal of the drug prohibition approach of UN law. The comprehensive legalisation of commercial cannabis production and distribution planned by the Federal Government cannot be reinterpreted as a prohibition policy by other means.

The literature also rightly refers in this regard to the contradictory nature of the Federal Government's assessment under international law to the contrary. Namely, the Federal Government itself assumes, as stated in its key issues paper, that, in any case "according to preliminary assessment", the "international trade of cannabis for recreational use on the basis of or in line with existing international framework conditions is not possible". International law, it says, allows "trade in drugs only for medical or scientific purposes and only under strict conditions". The Federal Government itself thus holds international trade and thus the import of cannabis into Germany to be unlawful under international

[109] Federal Government's key issues paper, 2022, p. 3, https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/C/Kabinettvorlage_Eckpunktepapier_Abgabe_Cannabis.pdf. Arguing for EU law in a similar direction: *Lutzhöft/Hendel*, Legalisierung impossible? EU- und völkerrechtskonforme Optionen für eine Legalisierung von Cannabis zu Genusszwecken in Deutschland, 2022, https://www.twobirds.com/de/insights/2022/germany/legalisierung-impossible-eu-und-voelkerrechtskonforme-optionen-fuer-eine-legalisierung-von-cannabis, according to which the Joint Declaration of the Contracting Parties to the Schengen Convention, which allows derogations from cannabis prohibitions at national level "prevention and treatment of addiction to narcotic drugs and psychotropic substances", supports the view that the introduction of a controlled cannabis market is permissible insofar as the measure serves the state drug control policy. However, these authors also subsequently declare this approach to be insufficiently legally robust.

[110] Likewise: *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice: "can be easily contested and dismissed on legal grounds".

(and EU) law.[111] However, contrary to what is implicitly assumed here, UN drug control law requires not only the criminalisation of cross-border trafficking, but also the criminalisation of any cultivation and trade that does not serve scientific or medical purposes in the narrow sense described above.[112]

As already described in detail above,[113] Art. 3 para. 2 IT 1988 allows only the possibility of relativising the criminalisation obligations with regard to personal drug use. In this respect, the provisions of UN drug control law – as well as the relevant EU law – clearly distinguish between the possible decriminalisation of the actions of drug users that have to be prohibited under certain constitutional conditions on the one hand, and supra-individual and commercial drug production and supply that is to be punishable under all circumstances on the other.

Even the domestic and European constitutional justification for the decriminalisation of individual drug use would appear against this background of international law according to the above explanations[114] to be non-existent at present and also extremely challenging to bring about. It cannot be achieved by a unilateral declaration of interpretation by the German Federal Government alone, and, in any case, a declaration like this cannot justify a fundamental departure from the drug control approach pursued by UN law.

[111] Federal Government's key issues paper, 2022, p. 11, https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/C/Kabinettvorlage_Eckpunktepapier_Abgabe_Cannabis.pdf.

[112] Extensively critical on this: *Jelsma*, German cannabis regulation on thin ice – The government's risky approach to international legal obstacles puts the entire project in jeopardy, 2022, https://www.tni.org/en/article/german-cannabis-regulation-on-thin-ice:"The treaties, however, impose exactly the same restriction on domestic production and internal trade. International trade is not more prohibited than a closed national market for recreational purposes".

[113] See V.C and VII.B.2 above.

[114] See VII.B.3 and VII.B.4 above.

VIII. Judicial protection options of the Bavarian State Government

The Bavarian State Government's options for obtaining judicial protection through federal law against a legalisation of cannabis that violates international and European law are limited within the state. However, a clarification by the highest court can be achieved at least indirectly through the European Court of Justice.

A. Procedure of abstract judicial review

A common constitutional court procedure for clarifying differences of opinion regarding the constitutionality of federal laws is that of abstract judicial review pursuant to Art. 93 para. 1 No. 2 GG, Sections 13 No. 6, 76 ff. BVerfGG.

Corresponding applications for judicial review may be filed by a state government or a quarter of the members of the Bundestag.

1. European law as a standard for review?

According to the jurisprudence of the Federal Constitutional Court, however, the standard for abstract judicial review is solely the compatibility of the provisions of the federal law in question with the Basic Law. In the past, the Federal Constitutional Court has expressly interpreted the term "Basic Law" particularly narrowly. It therefore considered the complaint that the provision of a federal law infringed provisions of EU law to be inadmissible. The sole standard for review is said to be compatibility with the Basic Law, but not with the law of the European Union.[115]

This restrictive interpretation should also not impact reliance on Art. 23 para. 1 GG and thus on Germany's constitutional obligation to participate in the development of the European Union. While Art. 23 para. 1 GG is indeed a provision of the Basic Law which could be applied as a review standard in judicial review proceedings, a violation of Art. 23 para. 1 GG that is also relevant to constitutional procedural matters should not result from the possible violation of a federal standard against provisions of EU law alone.

From the Court's point of view, this also follows from the fact that a possible infringement of EU law does not in itself call into question the validity of a national standard.[116] This line of argument is based on the distinction between primacy of validity and primacy of

[115] BVerfG, Decision of 1.4.2014, 2 BvF 1, 3/12 (Gigaliner) Rn. 43.
[116] BVerfG, Decision of 1.4.2014, 2 BvF 1, 3/12 (Gigaliner) Rn. 43; in reference to BVerfGE 126, 286 (301 f.).

application, stemming from the jurisprudence of the European Court of Justice, according to which an infringement of EU law by a national standard does not invalidate that rule, but merely compels its inapplicability.

The Federal Constitutional Court therefore does not consider itself competent for testing whether or not a national standard in ordinary law is incompatible with a provision of EU law.[117] This review standard is neither extended by means of Art. 23 para. 1 GG and the amenability towards EU law expressed therein[118] nor modified for the procedure of abstract judicial review in that the Federal Constitutional Court decides in these proceedings with no connection to proceedings before the regular courts, in which a referral to the European Court of Justice could and would have to be made where relevant.[119]

Notwithstanding this comparatively recent and substantively unambiguous decision of the Federal Constitutional Court, a change in this jurisprudence on the inadmissibility of asserting the incompatibility of federal law vis-à-vis European law in proceedings for abstract judicial review would not appear to be excluded completely. It could be triggered by the recent jurisprudence of the Court on the admissibility of the assertion of fundamental rights under the European Charter of Fundamental Rights in the constitutional complaint. With this new line of jurisprudence ("Right to be forgotten I/II"),[120] the First Senate of the Federal Constitutional Court abandoned the previously opposing jurisprudence of the Court; the Second Senate has since followed suit. In particular, the "separation thesis" has been abandoned, according to which the competences of the European Court of Justice under European law on the one hand and the constitutional competences of the Federal Constitutional Court on the other are to be clearly separated. Pursuant to this new line of jurisprudence, the Federal Court of Justice now also monitors compliance with EU fundamental rights in cooperation with the European Court of Justice. This means that at least the fundamental rights of the European Charter of Fundamental Rights

[117] BVerfG, Decision of 1.4.2014, 2 BvF 1, 3/12 (Gigaliner) Rn. 43; in reference to BVerfGE 31, 145 (174 f.); 82, 159 (191); 110, 141 (155); 114, 196 (220); BVerfG, Ruling of 28.1.2014, 2 BvR 1561/12 et al.
[118] BVerfG, Decision of 1.4.2014, 2 BvF 1, 3/12 (Gigaliner) Rn. 43; in reference to BVerfGE 110, 141 (155); *Kaiser/Schübel-Pfister*, in: Emmenegger/Wiedmann, Linien der Rechtsprechung des Bundesverfassungsgerichts, Vol. 2, 2011, p. 545 (568 f.).
[119] BVerfG, Decision of 1.4.2014, 2 BvF 1, 3/12 (Gigaliner) Rn. 43; in reference to BVerfGE 114, 196 (220).
[120] BVerfG, Decision of 6.11.2019, 1 BvR 16/13 (Right to be forgotten I); 1 BvR 276/17 (Right to be forgotten II).

have expressly advanced to become applied as a standard of review by the Federal Constitutional Court in constitutional complaint proceedings.

A transfer of this basic approach to the procedure of abstract judicial review[121] and to the assertion not only of the fundamental rights of the Charter of Fundamental Rights but also of the other provisions of EU law would still appear conceivable and would be as a result of the recent development in jurisprudence outlined above. It would, however, therefore require twofold further development and for this reason seems rather unlikely at present.

2. International law as a standard for review?

In contrast, the isolated assertion of a violation of international law in the planned legalisation of cannabis in the procedure of abstract judicial review would appear to be less promising.

Pursuant to the jurisprudence of the Federal Constitutional Court, international treaties – insofar as they do not fall under the special areas specified in Art. 23-25 GG – are ranked domestically merely as an ordinary federal law. The lex posterior principle should apply to them without restriction. It should it not be possible to derive the unconstitutionality of laws contrary to international law and/or the primacy of international treaty law over the law or a restriction of the lex posterior principle, neither with recourse to the unwritten principle of the Basic Law's amenability to international treaty law nor from the principle of the rule of law.[122]

B. Clarification by the European Court of Justice

However, Bavaria could indirectly ensure supreme court clarification by the European Court of Justice with regard to the incompatibility of the planned legalisation of cannabis with international law. While the federal states indeed lack the legal standing to bring infringement proceedings in accordance with Art. 258, 259 AEUV,

because and insofar as a comprehensive legalisation of also the commercial production of and trade with cannabis contravenes EU law, Bavarian state authorities would be obliged, in view of the primacy of Union law with which they must directly comply, to

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[121] Dismissive in this regard: *Klein*, Kompetenzielle Würdigung und verfassungsprozessuale Konsequenzen der "Recht auf Vergessen"-Entscheidungen, DÖV 2020, 341 (346 f.), but which expressly does not rule out a corresponding further development. Based on this: *Classen*, Über das Ziel hinausgeschossen? Anmerkung zu den zwei Beschlüssen des BVerfG zum Recht auf Vergessen vom 6.11.2019, 1 BvR 16/13, 276/17, EuR 2021, 92 (98).

[122] BVerfG, Decision of 15.12.2015, 2 BvL 1/12 (Treaty Override).

refrain from participating in the development of structures of a production and trading system like this that is contrary to EU law. Bavarian authorities would therefore have to refrain from applying, for example, the requirements contained in any future legalisation of cannabis law of the Federal Government for the approval of production sites and sales outlets, with reference to the contrary priority law of the European Union.

Should complaints be brought against these denials – which is more than likely to occur – the German courts seized of the respective complaints could stay the proceedings pending before them and request a decision on the compatibility of commercial cannabis cultivation and trade from the European Court of Justice by way of preliminary ruling pursuant to Art. 267 TFEU. A decision of the European Court of Justice negating this compatibility would be binding on all German authorities.[123]

[123] On the effect and binding nature of rulings of the ECJ in preliminary decision proceedings: *Wegener*, in: Calliess/Ruffert, EUV/AEUV, [6]2022, Art. 267, Rn. 49 ff.