

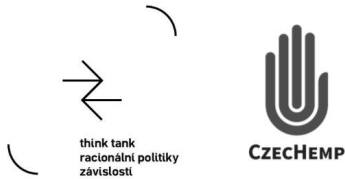
TREATY COMPLIANCE OPTIONS FOR CANNABIS REGULATIONS IN THE EU

policy brief

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

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

The **1961 Single Convention** has become ***ipso facto* part of Union acquis**. Far from being a barrier, this legal panorama enables **11 options** EU Member States could adopt to reconcile domestic reforms with EU law.



2 Dec. 2022

Treaty Compliance Options for Cannabis Regulation

Insights into the Policy Brief



Diskuzní setkání u kulatého stolu na téma

KONOPÍ a PSYCHEDELIKA
Česko potřebuje změnu!

Tuesday 14 February 2023
Kaiserstein Palace, Praha

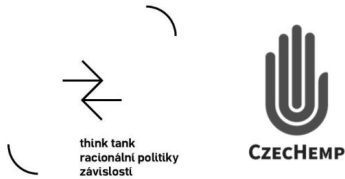
Kenzi Riboulet-Zemouli
kenzi.zemou.li

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1961 Single Convention on Narcotic Drugs

1971 Convention on Psychotropic Substances

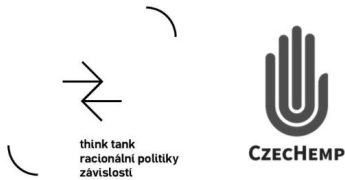
1988 Convention against Illicit Traffic

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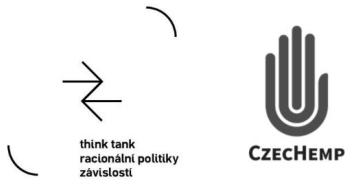
- Only pure isolated molecules / no herbal drugs
- Not affecting plants or cultivation

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~~1971 Convention on Psychotropic Substances~~

- Only pure isolates molecules / no herbal drugs
- Not affecting plants or cultivation
- **No relation with adult use of herbal cannabis**

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1988 Convention *against Illicit Traffic*

- Only illicit activities
- Not affecting legally-regulated (licit) activities

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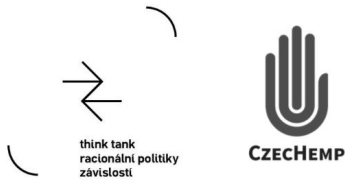
- Only illicit activities
- Not affecting legally-regulated (licit) activities
- No relation with legal and regulated activities

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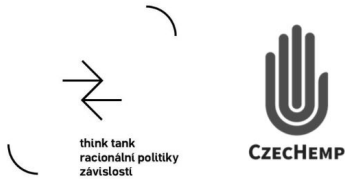
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1961 Single Convention on Narcotic Drugs

- Regulates herbal products and plant cultivation
- Regulates licit and authorized activities

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1961 Single Convention on Narcotic Drugs

- Regulates herbal products and plant cultivation
- Regulates licit and authorized activities
- **Relevant for any legal regulation of licit activities involving cannabis**

TREATY COMPLIANCE OPTIONS FOR
CANNABIS REGULATIONS IN THE EU

policy brief

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

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

TREATY COMPLIANCE OPTIONS FOR
CANNABIS REGULATIONS IN THE EU

policy brief

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

- Some EU acquis are directly and indirectly related to cannabis that are listed in the Conventions or rely

There is no EU law regulating licit cannabis-related activities.*

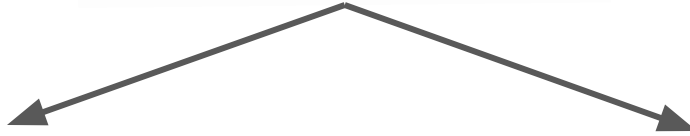
(all EU legal corpus focuses on illicit activities, and are therefore irrelevant)

- Therefore, the legal framework of **the 1961 Single Convention, *ipso facto* part of EU law, is the only legal régime for licit cannabis activities in the European Union.**

* In fact there are some legal provisions in EU acquis which directly affect and frame licit cannabis, but they are not relevant for adult use: regulations relating to the medical uses of cannabis, and other EU acquis on some industrial uses of varieties with low-THC. The only provisions relevant for licit adult use are found in Schengen acquis: cooperate and monitor cross-border trade. (see detail in the Policy Brief).



SINGLE CONVENTION
ON
NARCOTIC DRUGS, 1961,





SINGLE CONVENTION
ON
NARCOTIC DRUGS, 1961,

*In case of breaching
treaty obligations*



**International Court
of Justice**



**Court of Justice of
the European Union**



***Infringement
procedure***



SINGLE CONVENTION
ON
NARCOTIC DRUGS, 1961,



**International Court
of Justice**



*International Narcotics
Control Board*



**Court of Justice of
the European Union**



***Infringement
procedure***

TREATY COMPLIANCE OPTIONS FOR CANNABIS REGULATIONS IN THE EU

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

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

The **1961 Single Convention** has become ***ipso facto*** part of Union **acquis**. Far from being a barrier, this legal panorama enables **11 options** EU Member States could adopt to reconcile domestic reforms with EU law.

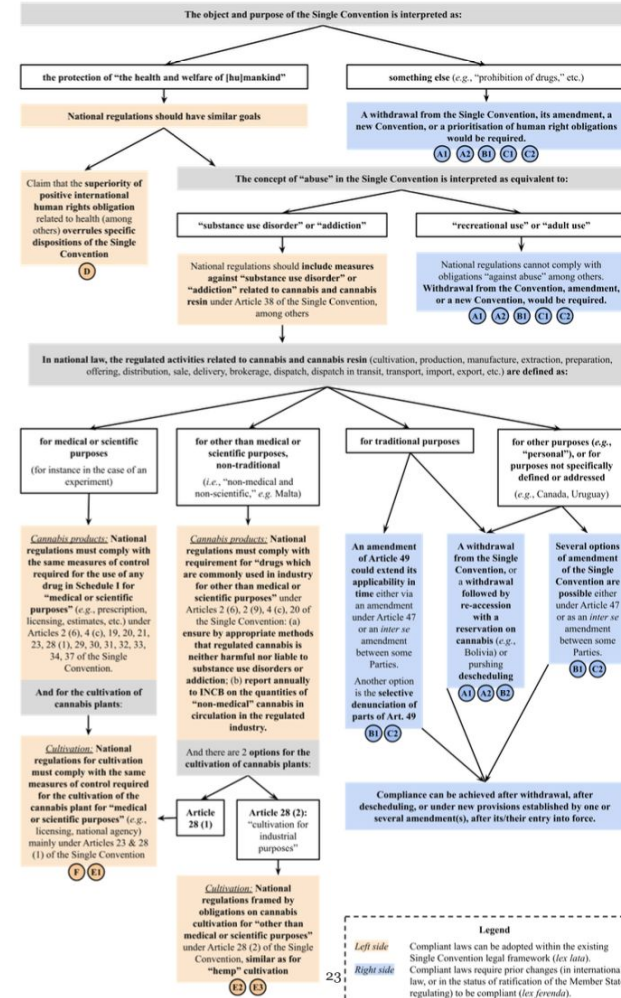


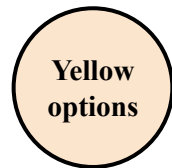
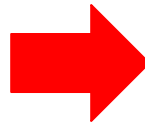
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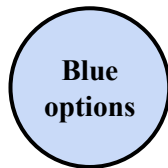
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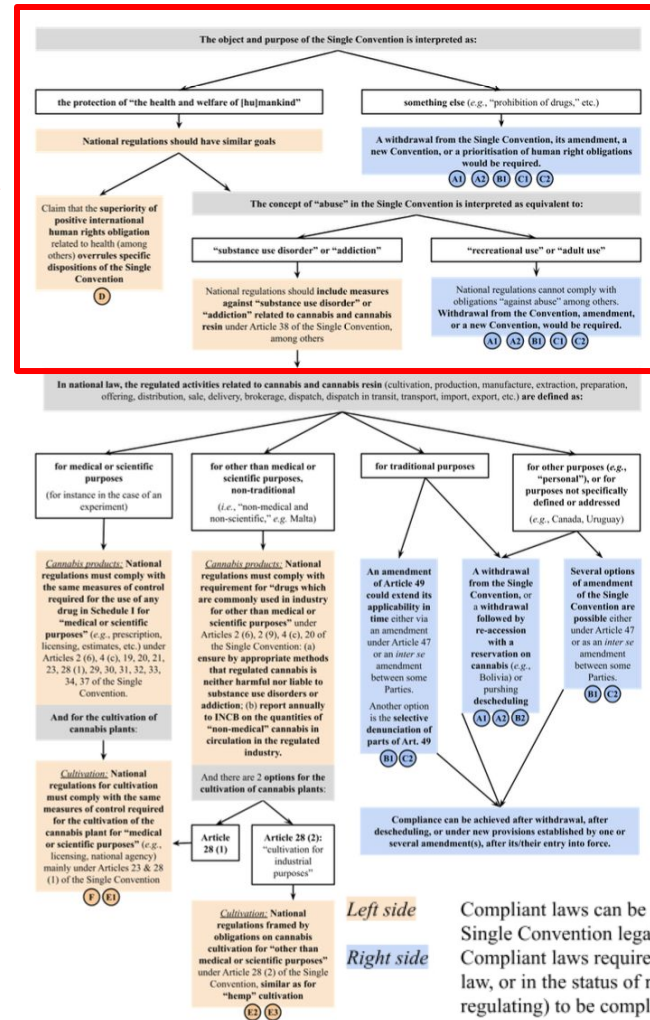
Yellow
options

Lex lata
(Convention
as it stands)



Blue
options

Lex ferenda
(Convention
needs changes)



Compliant laws can be adopted within the existing Single Convention legal framework (*lex lata*).
Compliant laws require prior changes (in international law, or in the status of ratification of the Member State regulating) to be compliant (*lex ferenda*).

1

The object and purpose of the Single Convention is interpreted as:

the protection of “the health and welfare of [hu]mankind”

something else (e.g., “prohibition of drugs,” etc.)

National regulations should have similar goals

A withdrawal from the Single Convention, its amendment, a new Convention, or a prioritisation of human right obligations would be required.

(A1) (A2) (B1) (C1) (C2)

Claim that the **superiority of positive international human rights obligation** related to health (among others) **overrides specific dispositions of the Single Convention**

(D)

The concept of “abuse” in the Single Convention is interpreted as equivalent to:

“substance use disorder” or “addiction”

“recreational use” or “adult use”

National regulations should **include measures against “substance use disorder” or “addiction” related to cannabis and cannabis resin** under Article 38 of the Single Convention, among others

National regulations cannot comply with obligations “against abuse” among others. **Withdrawal from the Convention, amendment, or a new Convention, would be required.**

(A1) (A2) (B1) (C1) (C2)

2

The object and purpose of the Single Convention is interpreted as:

the protection of “the health and welfare of [hu]mankind”

National regulations should have similar goals

The concept of “abuse” in the Single Convention is interpreted as equivalent to:

“substance use disorder” or “addiction”

National regulations should **include measures against “substance use disorder” or “addiction” related to cannabis and cannabis resin** under Article 38 of the Single Convention, among others

We have here the first two treaty obligations:

1

→ cannabis legalization needs to be bill in the realm of public health

2

→ the law needs to include health measures to prevent and address substance use disorder and dependence

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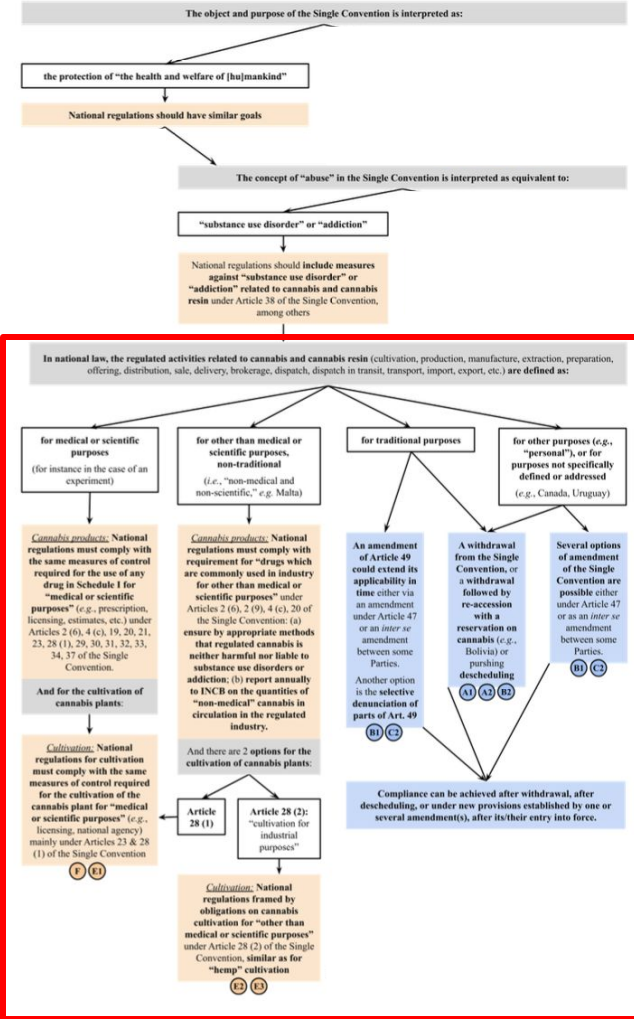
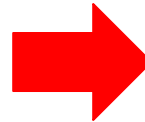


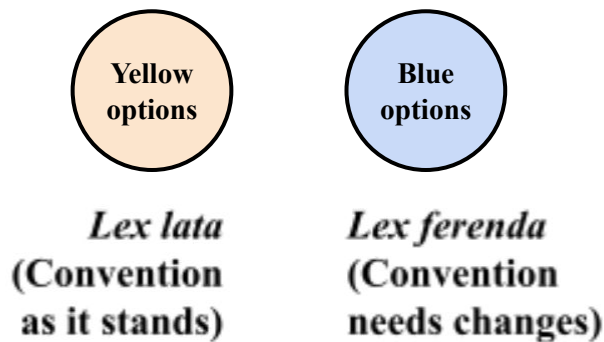
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závislostí



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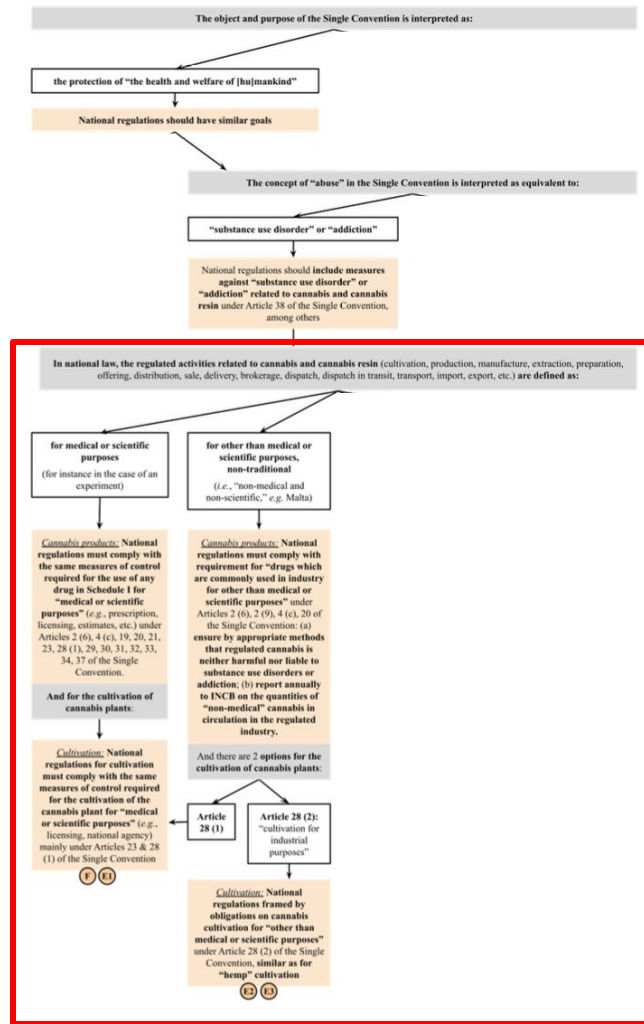
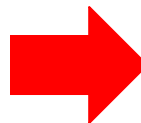


Left side

Compliant laws can be adopted within the existing Single Convention legal framework (*lex lata*).

Right side

Compliant laws require prior changes (in international law, or in the status of ratification of the Member State regulating) to be compliant (*lex ferenda*).





In national law, the regulated activities related to cannabis and cannabis resin (cultivation, production, manufacture, extraction, preparation, offering, distribution, sale, delivery, brokerage, dispatch, dispatch in transit, transport, import, export, etc.) **are defined as:**

for medical or scientific
purposes

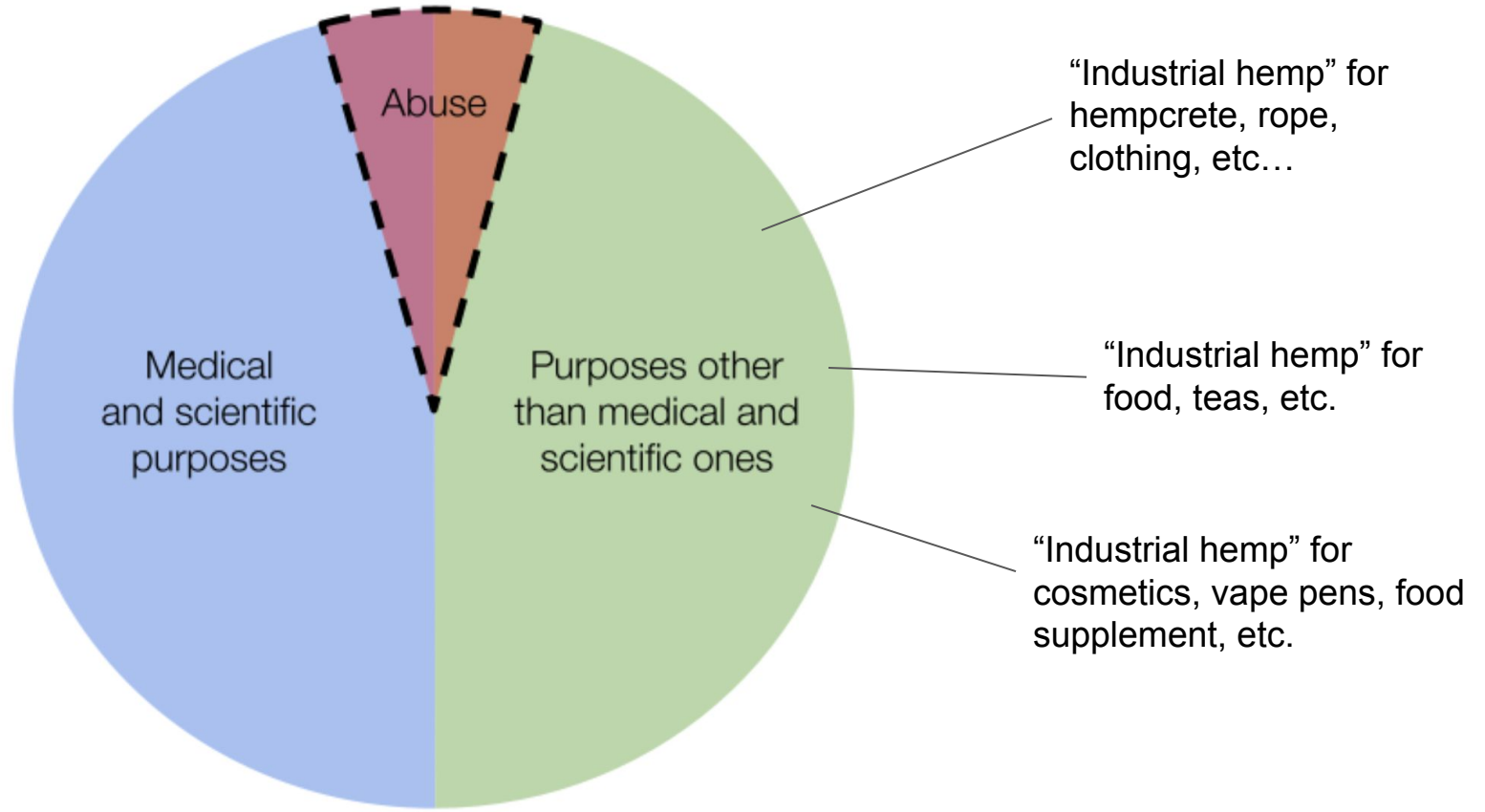
SCIENTIFIC PURPOSES

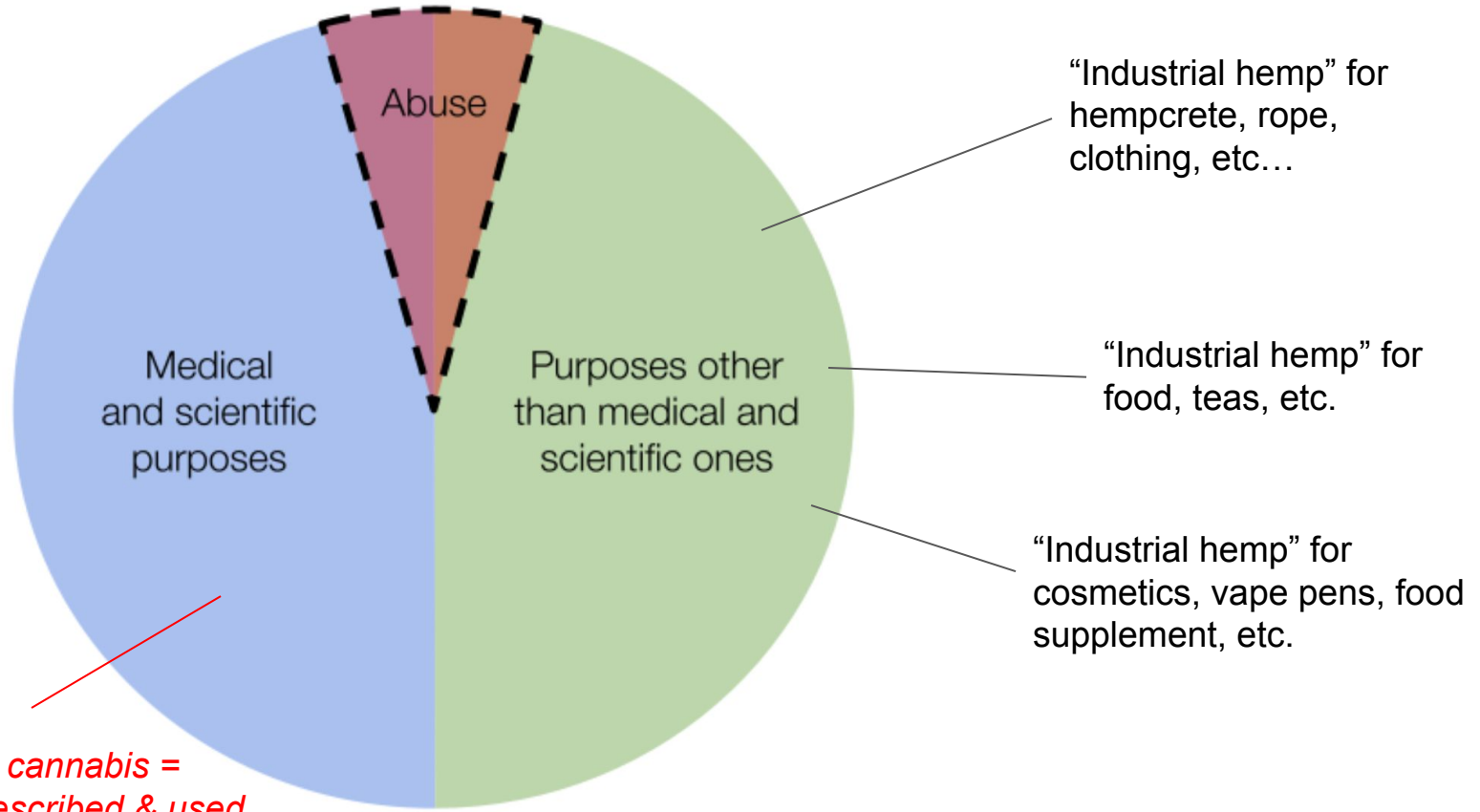
*SCIENTIFIC
EXPERIMENT*

for other than medical or
scientific purposes,
non-traditional

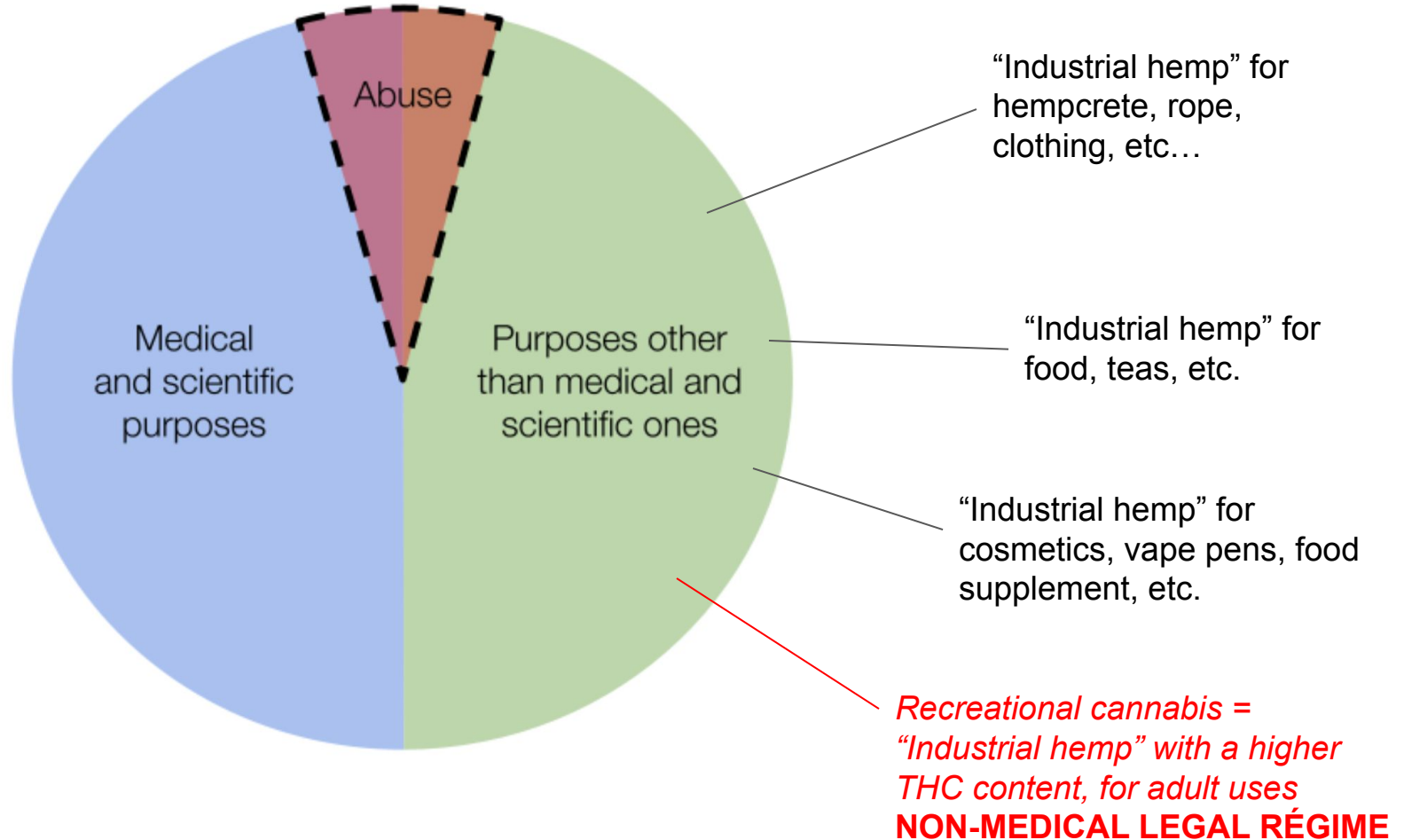
NON-MEDICAL PURPOSES

*NON-MEDICAL
INDUSTRY
(ART. 2 PARA. 9)*



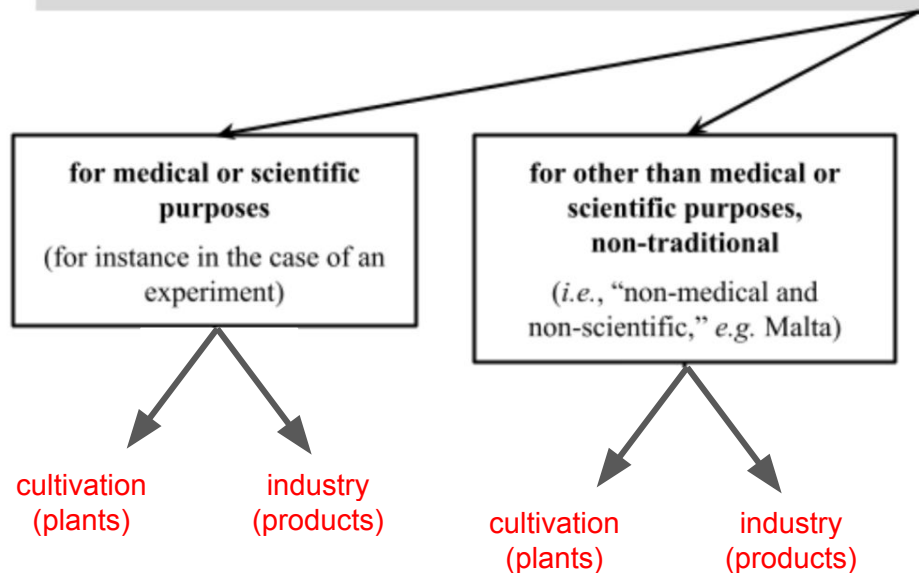


*Recreational cannabis =
Cannabis prescribed & used
within a scientific experimental framework*
SCIENTIFIC PURPOSES RÉGIME





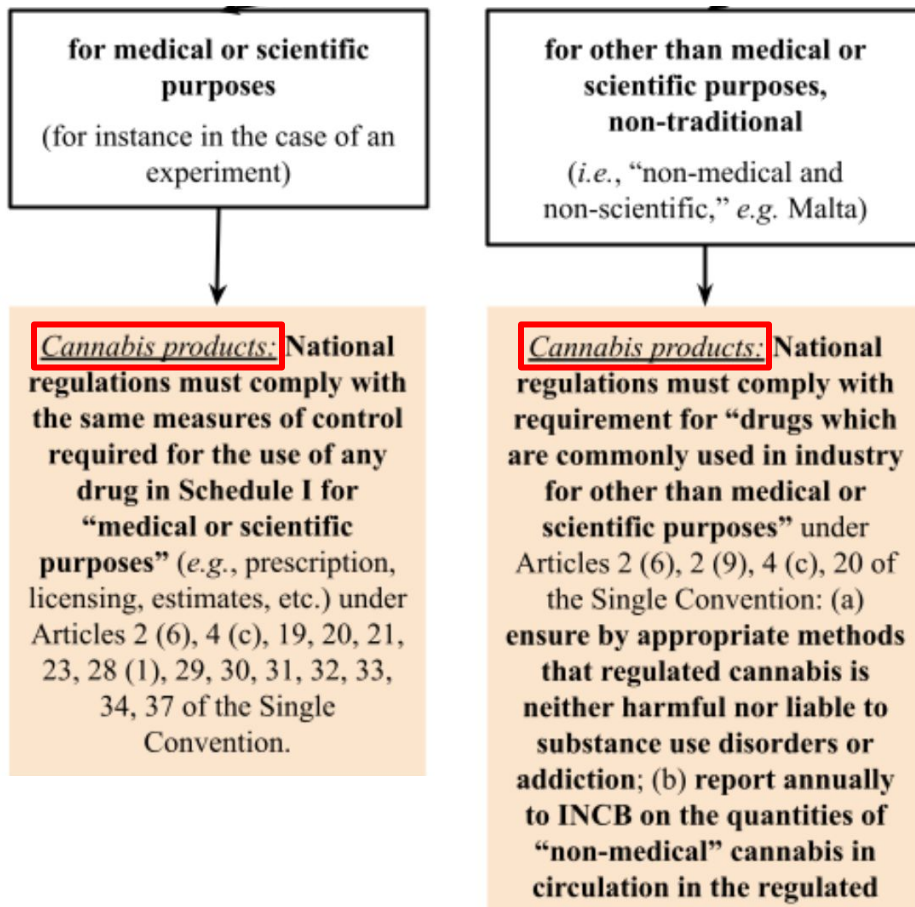
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Industry obligations

transformation, transport, import/export, sale, retail of **products**

Industry obligations (transformation, transport, import/export, sale, retail of products)



Industry obligations (transformation, transport, import/export, sale, retail of products)

Scientific purposes

TREATY OBLIGATIONS
FOR THE INDUSTRY:

Article 2(1),
Article 19,
Article 20,
Article 21,
Article 29,
Article 30,
Article 31,
Article 32,
Article 33,
Article 34,
Article 37,
etc.

for medical or scientific
purposes
(for instance in the case of an
experiment)

Cannabis products: National
regulations must comply with
the same measures of control
required for the use of any
drug in Schedule I for
“medical or scientific
purposes” (e.g., prescription,
licensing, estimates, etc.) under
Articles 2 (6), 4 (c), 19, 20, 21,
23, 28 (1), 29, 30, 31, 32, 33,
34, 37 of the Single
Convention.

for other than medical or
scientific purposes,
non-traditional
(i.e., “non-medical and
non-scientific,” e.g. Malta)

Cannabis products: National
regulations must comply with
requirement for “drugs which
are commonly used in industry
for other than medical or
scientific purposes” under
Articles 2 (6), 2 (9), 4 (c), 20 of
the Single Convention: (a)
ensure by appropriate methods
that regulated cannabis is
neither harmful nor liable to
substance use disorders or
addiction; (b) report annually
to INCB on the quantities of
“non-medical” cannabis in
circulation in the regulated

Non-medical purposes

TREATY OBLIGATIONS
FOR THE INDUSTRY:

Article 2(9),
Article 20(1)b.

Industry obligations (transformation, transport, import/export, sale, retail of products)

Scientific purposes

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- medical prescriptions upon dispensation,
- medicalisation (including for people with no use disorder),
- general requirements of a pharmaceutical supply chain,
- comprehensive estimates and statistical returns on all activities,
- in addition to the inappropriate measures for cultivation outlined

etc.

for other than medical or
scientific purposes,
non-traditional
(i.e., “non-medical and
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Article 20(1)b.

Industry obligations (transformation, transport, import/export, sale, retail of products)

Scientific purposes

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Article 2(1),
Article 19,
Article 20,
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Article 34,
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Non-medical purposes

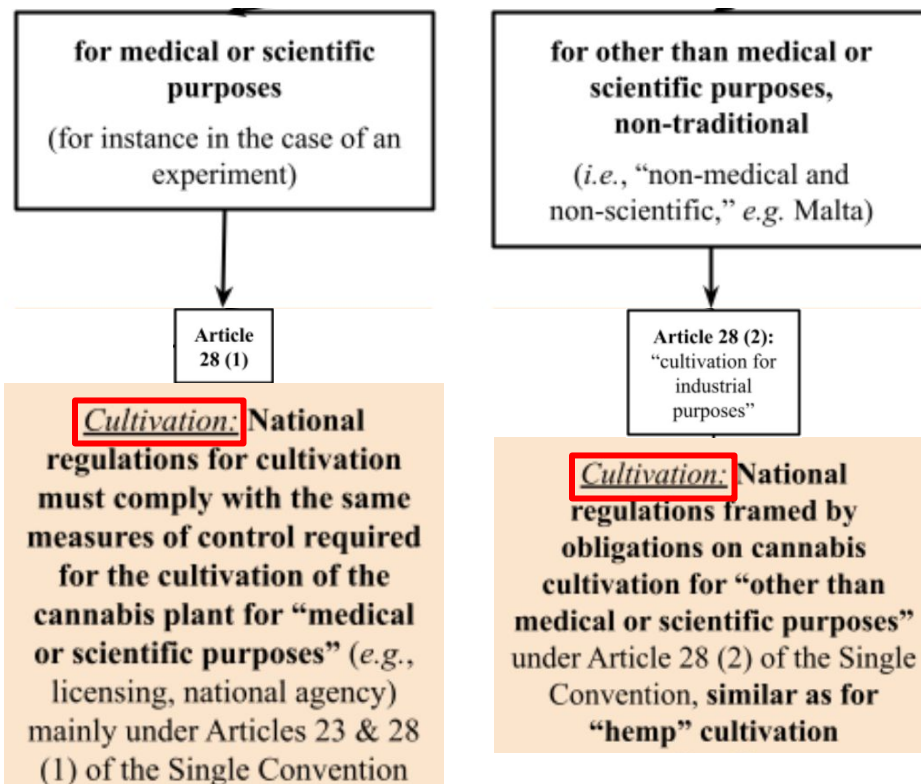
TREATY OBLIGATIONS
FOR THE INDUSTRY:

Article 2(9),
Article 20(1)b.

Agricultural obligations

cultivation and harvest of **plants**, prior to its transformation into products

Agricultural obligations (cultivation and harvest, prior to transformation)



Agricultural obligations (cultivation and harvest, prior to transformation)

Scientific purposes

*TREATY OBLIGATIONS
FOR AGRICULTURE:*

Article 28(1),
Article 23

for medical or scientific
purposes
(for instance in the case of an
experiment)

Article
28 (1)

Cultivation: National
regulations for cultivation
must comply with the same
measures of control required
for the cultivation of the
cannabis plant for “medical
or scientific purposes” (e.g.,
licensing, national agency)
mainly under Articles 23 & 28
(1) of the Single Convention

for other than medical or
scientific purposes,
non-traditional
(i.e., “non-medical and
non-scientific,” e.g. Malta)

Article 28 (2):
“cultivation for
industrial
purposes”

Cultivation: National
regulations framed by
obligations on cannabis
cultivation for “other than
medical or scientific purposes”
under Article 28 (2) of the Single
Convention, similar as for
“hemp” cultivation

Non-medical purposes

*TREATY OBLIGATIONS
FOR AGRICULTURE:*

Article 28(2).

Agricultural obligations (cultivation and harvest, prior to transformation)

Scientific purposes

TREATY OBLIGATIONS
FOR AGRICULTURE:

Article 28(1),
Article 23

for medical or scientific purposes
(for instance in the case of an experiment)

Article
28 (1)

Cultivation: National regulations for cultivation must comply with the same measures of control required for the cultivation of the cannabis plant for “medical or scientific purposes” (e.g., licensing, national agency) mainly under Articles 23 & 28 (1) of the Single Convention

for other than medical or scientific purposes,
non-traditional
(i.e., “non-medical and non-scientific,” e.g. Malta)

Article 28 (2):
“cultivation for industrial purposes”

Cultivation: National regulations framed by obligations on cannabis cultivation for “other than medical or scientific purposes” under Article 28 (2) of the Single Convention, similar as for “hemp” cultivation

Non-medical purposes

TREATY OBLIGATIONS
FOR AGRICULTURE:

Article 28(2).

in a nutshell

for medical or scientific
purposes
(for instance in the case of an
experiment)



**Scientific
purposes**

TREATY OBLIGATIONS:

**Same as for
medical use**
(full extent of
drug control)

for other than medical or
scientific purposes,
non-traditional
(*i.e.*, “non-medical and
non-scientific,” *e.g.* Malta)



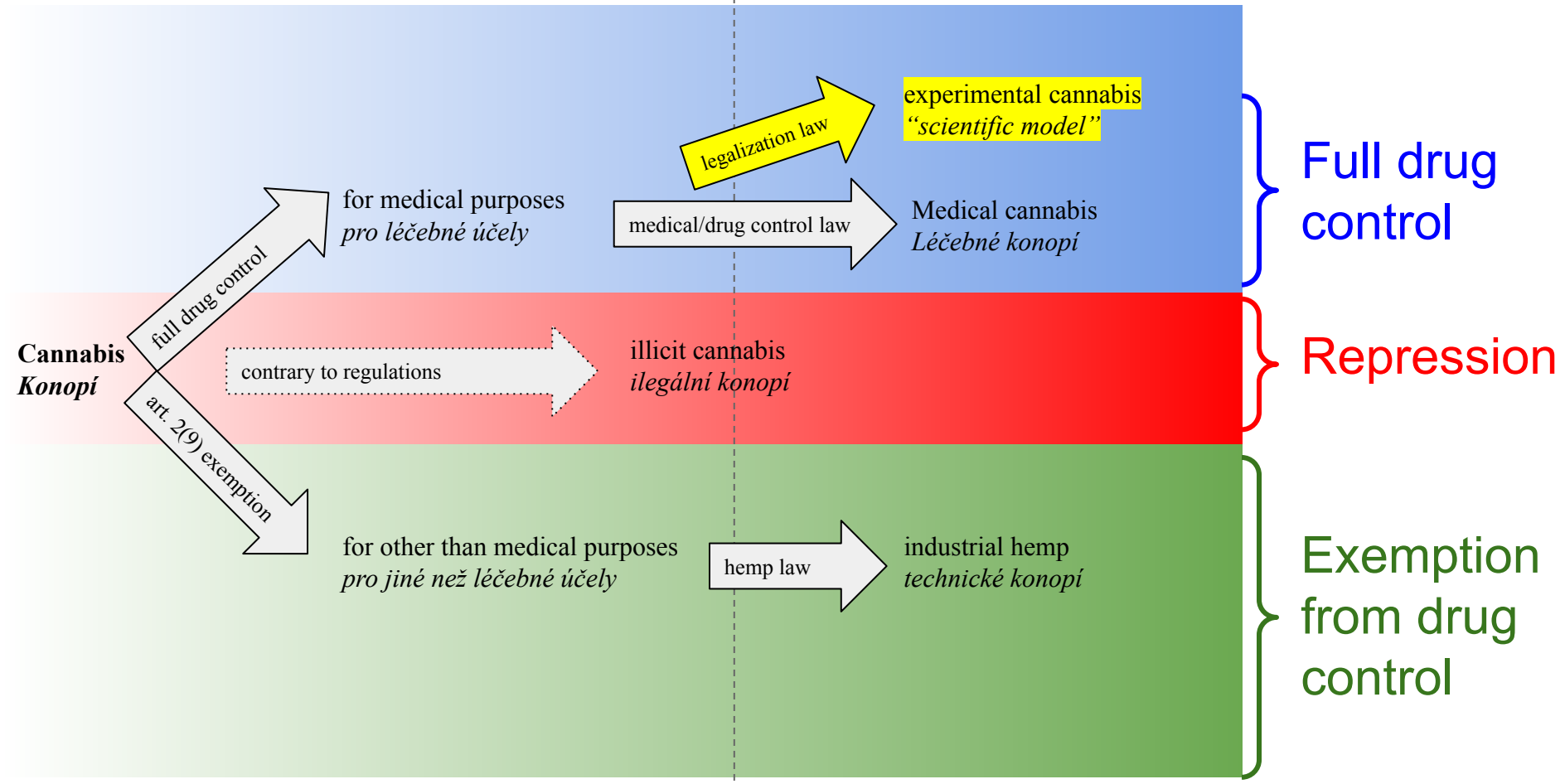
**Non-medical
purposes**

TREATY OBLIGATIONS:

**Same as for
“industrial
hemp”**
(non-psychoactive)

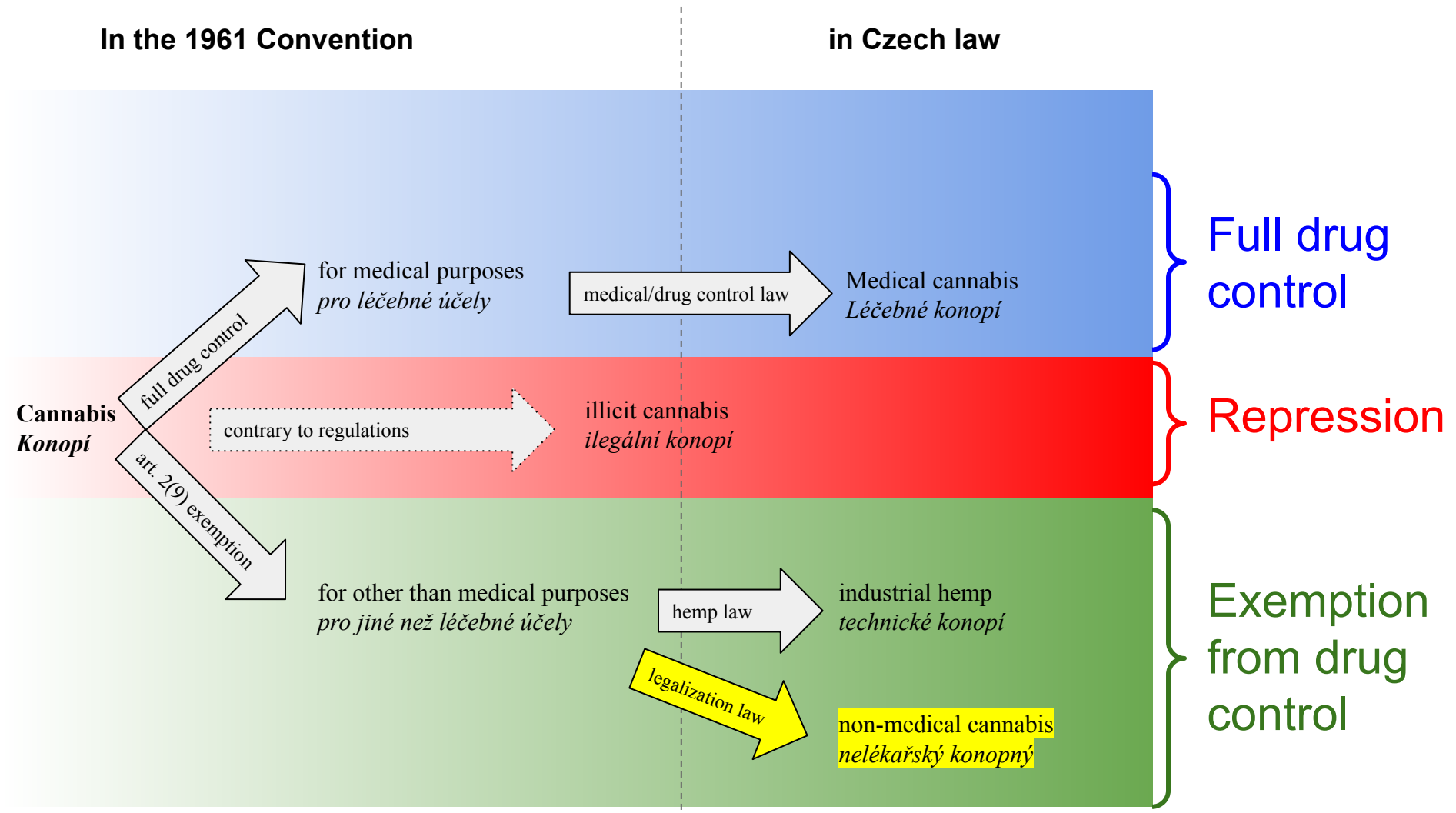
In the 1961 Convention

in Czech law



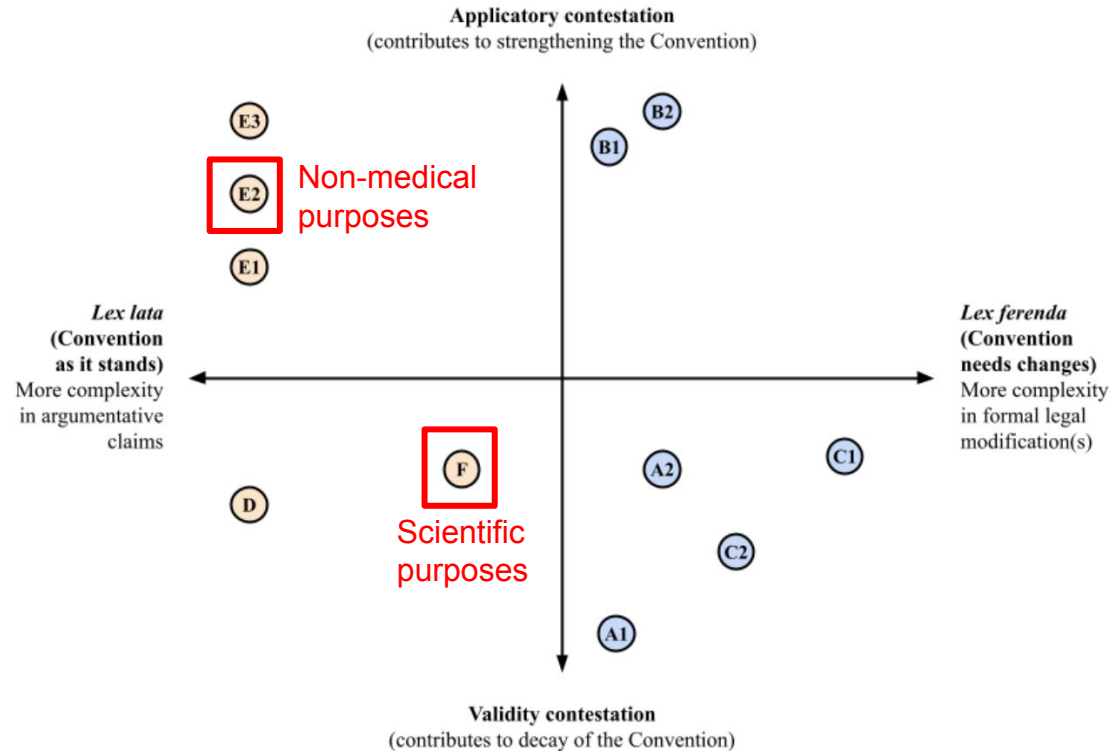
In the 1961 Convention

in Czech law



TREATY COMPLIANCE OPTIONS FOR CANNABIS REGULATIONS IN THE EU

policy brief



Precedents

Precedents

for medical or scientific
purposes
(for instance in the case of an
experiment)



**Scientific
purposes**

nobody

for other than medical or
scientific purposes,
non-traditional
(i.e., “non-medical and
non-scientific,” e.g. Malta)



**Non-medical
purposes**



No precedent for the “scientific purposes” option because there is no legal ground supporting it. This option would not hold before international or European courts.



Martin Jelsma • 1st

Director Drugs & Democracy programme at TNI - Amsterdam Senior Re...

1mo •

...

Germany: Flirting with Plan B?

This last scenario, now presented in Der Tagesspiegel as a possible Plan B, could be branded as the 'Japan route'. Japan tried to use a similar 'scientific purpose' exemption in the Whaling Convention to justify the very practice that the Convention aimed to prohibit. And for that reason, the ICJ ruled that Japan was in breach of the treaty, even though they acknowledged that Japan's whaling programme “involves activities that can broadly be characterized as scientific research”. For a critical analysis of this scenario see the [ICLR article by Rick Lines and Damon Barrett](#). It is also important to point out that the Dutch government deliberately decided not to use the 'scientific purpose' argument to justify the experiment, accepting the reality that it was not a faithful treaty interpretation that could stand up to legal scrutiny.

[linkedin.com/posts/martin-jelsma-77244213_germany-flirting-with-plan-b-activity-7006009628345966592-c3A1](https://www.linkedin.com/posts/martin-jelsma-77244213_germany-flirting-with-plan-b-activity-7006009628345966592-c3A1)



INTERNATIONAL COMMUNITY
LAW REVIEW 20 (2018) 436–455

INTERNATIONAL COMMUNITY
LAW REVIEW
brill.com/iclr

Lines, R.; Barrett, D.

Cannabis Reform, ‘Medical and Scientific Purposes’ and the Vienna Convention on the Law of Treaties

Treaty interpretation has long been a subject of interest for international legal scholars. However, it is only recently that advocates for drug policy reform have taken up these questions. This article examines the proposition put forward by several authors that a legally regulated market in cannabis may be permissible under the international drug control treaties if considered as a policy ‘experiment’. These authors contend that such measures conform to the general obligation of the Single Convention on Narcotic Drugs to limit uses of cannabis ‘strictly to medical and scientific purposes’. Reviewing this position using the formal methods set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, we conclude the interpretation proposed is untenable. While we share with these authors the objective of wider drug policy reform, we find the arguments supporting this position weak, and based on absent, flawed or incomplete interpretive methodology.

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

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

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

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

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

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

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

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

(iii) Intermediary recommendation

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

Two precedent for the “non-medical industry” option



- First page, recreational use defined as “cannabis for purposes other than medical or scientific purposes”

⇒ *This is treaty language only present in Article 2(9) + 28(2)*

- Law’s goal: “carry out work [...] to implement harm reduction from the use of cannabis”

⇒ *This is the reduction of abuse and harms “by any other means” present in Article 2(9).*

The Maltese law matches all requirements of article 2(9).

It matches none of the drug control requirements.

Two precedent for the “non-medical industry” option

- Switzerland has had a legal “scientific purpose” system for heroin for decades. They did NOT mimic it for cannabis, but used distinct legal stance. The same law covers the two topics and allows comparison.
- Law regulates cannabis “for non-medical purposes,”
⇒ *This is treaty language only present in Article 2(9) + 28(2). Incompatible w/ “scientific purposes” by definition*
- Law based on a robust public health and harm reduction approach
⇒ *Compatible with reduction of abuse/harm by any “other means” in Article 2(9) + 28(2).*
- No prescriptions. Zero pharmaceutical rules. No licensing of cultivation, etc...
⇒ *If this is “scientific purposes”, it violates the Convention. But if this is article 2(9) + 28(2) it is compliant.*
- “Estimates” are not collected (*this is required for “scientific purposes”*). However, final quantities are compiled (*as required by article 2 (9)*)



SWITZERLAND

The Swiss law matches all requirements of article 2(9) for *pilot projects* of a “non-medical cannabis industry”.

It matches none of the requirements for “scientific use”



In national law, the regulated activities related to cannabis and cannabis resin (cultivation, production, manufacture, extraction, preparation, offering, distribution, sale, delivery, brokerage, dispatch, dispatch in transit, transport, import, export, etc.) **are defined as:**

for medical or scientific purposes

(for instance in the case of an experiment)

for other than medical or scientific purposes, non-traditional

(i.e., “non-medical and non-scientific,” e.g. Malta)

Rhetorics

(political strategy)

Legal text

(legal strategy)

**SWITZE
RLAND**

Complete legal analysis in this report

Riboulet-Zemouli (2022), *High Compliance*. Paris: FAAAT.

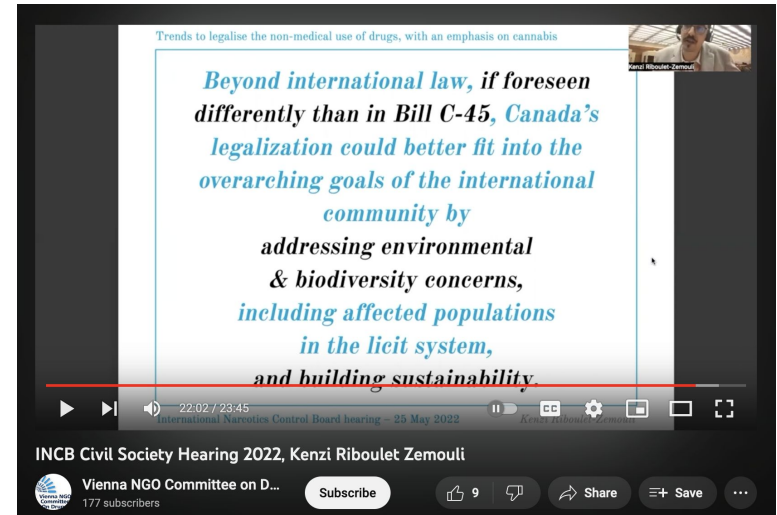
➔ ssrn.com/abstract=4057428



Hearing at the INCB last year

(video, 25 min.)

➔ youtu.be/YvtakkaEFBI



1. INTRODUCTION

1.1. Lexicon

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

1.2.1. Decriminalisation and international law

1.2.2. Decriminalisation and EU law

1.3. Legalisation: a more complex panorama

2. INTERNATIONAL AND EU LEGAL PANORAMAS

2.1. International law: drug control

2.1.1. 1971 and 1988 conventions

2.1.2. Goals of the 1961 Single Convention

2.1.3. “Purposes” in the Single Convention

2.1.4. Cannabis cultivation

2.1.5. Personal activities

2.2. International law: non drug-related

2.3. EU acquis

2.3.1. Primary legislation

2.3.2. Secondary legislation

2.3.3. Interpretation, non-legislative acts

2.3.4. Case law

2.3.5. Treaty-making competencies of the EU

4. INTERNAL MARKET

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

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

Highlight: Prohibition remains an available option.

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

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

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

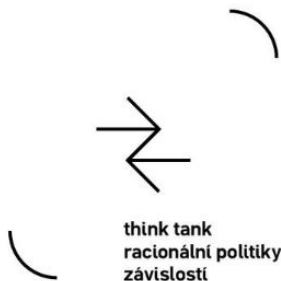
Highlight: A world of cannabis tourism

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

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

TREATY COMPLIANCE OPTIONS FOR CANNABIS REGULATIONS IN THE EU

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



2 Dec. 2022

Děkuji, že to
vezmete v potaz

Gràcies per la seva atenció

All my publications in open
access, links, and contact:

kenzi.zemou.li