



## TNI-EMCDDA EXPERT SEMINAR ON THRESHOLD QUANTITIES

Lisbon – 20 January 2011



The Expert Seminar on Threshold Quantities, an initiative of the Transnational Institute (TNI), hosted by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), and funded by the European Commission and the Open Society Institute, took place in Lisbon, Portugal, on 20<sup>th</sup> January 2011. Thanks are due to Thanasis Apostolou for chairing and to Martin Jelsma and Ernestien Jensema (TNI) for their preparation and organisation of the meeting, as well as to Brendan Hughes acting as the EMCDDA liaison for organising the event and to Genevieve Harris acting as its rapporteur.

This expert seminar formed part of the TNI drug policy dialogue series which runs across Latin America, Europe and South East Asia and is a forum for discussion of high-level drug policy-issues and dilemmas. These dialogues are timed to feed into moments of opportunity for domestic and international policy and law reform and hope to disseminate best-practice from one jurisdiction to another. The expert seminar series has evolved to support these dialogues with technical detail so as to stimulate the debates further and ensure that policy outcomes are practical and constructive. The first in the series was on the classification of controlled substances<sup>1</sup> and three more are currently scheduled: one on proportionality in sentencing for drug offences (scheduled to take place in May in London); the second on mild plant based substances such as khat, coca, ephedra and kratom; and, the third on the future of the UN drug control conventions.

The seminar was held under Chatham House rule to ensure confidentiality and to allow participants a free exchange of ideas. A total of 25 people attended and comprised a mixture of the judiciary, current and past domestic and international policy makers, and also representatives of non-governmental organisations and academic institutions.

The agenda focused on the following two themes:

- The state of the debate in the EU; and,
- Law reform proposals and the threshold dilemma.

In preparation, background papers<sup>2</sup> which clarified technical matters were sent to all participants. Each session was prefaced by introductory remarks by key participants in

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1. TNI Expert Seminar on the Classification of Controlled Substances, Amsterdam, 10 December 2009; <http://www.druglawreform.info/images/stories/documents/classification-expert-seminar.pdf>

2. Suggested reading: EMCDDA, Illicit drug use in the EU: legislative approaches, Thematic Papers, Lisbon 2005; EMCDDA, The role of the quantity in the prosecution of drug offences, European Legal Database on Drugs (ELDD) Comparative Study, April 2003; EMCDDA web page: Threshold quantities for drug offences, <http://www.emcdda.europa.eu/html.cfm/index99321EN.html>; Charlotte Walsh, On the threshold. How relevant should quantity be in determining intent to supply? International Journal of Drug Policy 19 (2008), December 2008; Grazia Zuffa, From definite quantitative thresholds to flexibility, How to determine personal use of drugs in the drug legislation; the Italian experience (1975-2006) (full paper expected to be published in 2011); Summary of responses to Home Office consultation, Letter on Section 2 of the Drugs Act 2005, Home Office, London 2006.

order to stimulate reflection and dialogue, followed by frank debate. No individuals are quoted, in keeping with the anonymity stipulated by the Chatham House rule, and this report aims to conflate the varying contributions and to précis the technical background information so that the reader can appreciate the context and highlights of the discussion. The ideas expressed were those of individuals in their capacity as experts in the field of threshold quantities, and should not be interpreted as reflecting consensus among the group, or endorsement by the organisers.

## **Introduction**

Over the past two years, working closely with policy makers in Latin America and South East Asia, TNI has witnessed a wider trend for drug law reform arising out of a felt need to make legislation more effective and more humane. Within this trend, a number of countries have considered decriminalisation or depenalisation models and many have, at least initially, considered threshold quantities as a good way to distinguish between what is possession and what is supply or trafficking and as a means to ensure that the sentences imposed are proportionate to the harmfulness of the offence.

It therefore appeared timely to reflect on the advantages and disadvantages of threshold quantities as a policy and legislative tool and it was hoped that this seminar would provide a springboard to inform current debate and to assist the elaboration of evidence-based drug law reform proposals now and in the future.

## **Session 1 – The state of the debate in the EU**

Participants were aided in their preparation for this session by the provision of exhaustive data collated by the EMCDDA, openly available as follows:

- “*The role of the quantity in the prosecution of drug offences*” European Legal Database on Drugs, EMCDDA, April 2003.  
[http://www.emcdda.europa.eu/attachements.cfm/att\\_5738\\_EN\\_Quantities.pdf](http://www.emcdda.europa.eu/attachements.cfm/att_5738_EN_Quantities.pdf)
- “*Threshold Quantities for Drug Offences*”, EMCDDA, 2011  
<http://www.emcdda.europa.eu/html.cfm/index99321EN.html>

It was evident from this data that the issue of threshold quantities is very much a live topic across the EU. Indeed, barely a year goes by without some Member State revisiting the issue and seeking advice or abandoning or amending their threshold quantity scheme.

For example, it was discussed that recent changes to threshold quantities in Europe include revisions by: Portugal in 1996; Czech Republic 1999; Austria for heroin, in 2001; Finland in 2002; Sweden for GHB, in 2002; Belgium for cannabis in 2003; Cyprus for cannabis, cocaine, and opium in 2003; Sweden for Rohypnol in 2003; Bulgaria in 2004; Slovakia and the UK in 2005; Italy in 2006; Austria in 2008; Germany in 2008 for Buprenorphine and then in 2009 for Methamphetamine; and the Czech Republic again revisited the issue in 2010.

Whilst it was clear that the majority of countries set threshold quantities for both use and supply offences, on the other hand some countries, like the UK, do not utilize

threshold quantities at all. Rather, to delimit personal use from supply and to gauge correct sentencing levels, there is a discretionary system, overseen by the judiciary and (for minor offences) also, by the police. In such a system the amount of a substance is not seen as determinative on any level, but rather as one factor amongst many others and it is recognized that there are many factors which may result in someone being in possession of a higher quantity of drugs, without being involved in supply or trafficking, and none of which should result in the individual being punished as a trafficker; in this way the presumption of innocence and proportionality in sentencing are safeguarded. Examples of where someone may be in possession of a large amount of drugs for personal use include: bulk-buying to limit contact with the criminal market; use of drugs for medical purposes that make it difficult to access the market regularly; problematic drug use that has resulted in higher tolerance levels.

Other countries set thresholds for most drugs (e.g. Italy, Lithuania, Latvia, Hungary, Austria and Finland) whereas some have thresholds for only the most commonly used (Czech Republic, Germany, Greece, Spain, Cyprus, Netherlands, Portugal, Norway) and some only for cannabis (Belgium). In general terms, however, it was nevertheless said that, the main determinant of seriousness across the EU is intention rather than quantity of drugs.

Participants noted that the EMCDDA is a centre established by the European Union whose mission is to collect factual, objective, reliable and comparable information on drugs and drug addiction and their consequences to provide an evidence-based picture of the drug phenomenon at the European level; as such, it can provide an accurate chart of the differences in the use of threshold quantities across Europe. It was underlined, however, that the body is not mandated to advise on particular courses of action and there is no model threshold quantity scheme promoted by it.

Participants discussed that although the international framework allows for distinctions to be made between users and traffickers<sup>3</sup> and does not prohibit the use of threshold mechanisms – no particular model is promoted at the UN<sup>4</sup> or EU level. In fact, the European Commission had specifically considered and rejected the idea of uniform EU thresholds in 2001 because of the different purposes for which they are used across the various jurisdictions and the fear that, as a result, a uniform threshold would be unworkable<sup>5</sup>. Whether this decision was correct, however, or whether further efforts needed to be made to find a workable model that could address the arbitrary and disproportionate outcomes that result from different schemes being in place, became the main issue of the day with advocates on both sides.

The discussion focused in on what could be learnt by analyzing the differences amongst the European schemes. What immediately became clear, however, was ex-

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3. See Article 36-§1(b) of the amended 1961 Single Convention, Article 22-§1(b) of the 1971 Convention, and Articles 3-§2 and 3-§4(b) of the 1988 UN Convention.

4. The UN Model laws do not provide specific threshold quantities but they do highlight that it is an option for States to differentiate between maximum penalties on the basis of the quantity of the substance involved, ‘distinguishing between a commercial, a trafficable, and a less than trafficable quantity’, or to use quantity to ‘informally provide guidance for post-conviction address on penalty’. See UNDCP Model Drug Abuse Bill 2000 Commentary, para 105.

5. Walsh C.2008 ‘*On the threshold: How relevant should quantity be in determining intent to supply*’ International Journal of Drug Policy 19 (2008) 479 – 485 at 483.

actly how many variations there are and how hard it is, in fact, to compare between one jurisdiction and another. The main differences identified were as follows, in:

- Provenance and Practicalities;
- Purpose;
- Nature; and,
- Quantities and Calculations.

### **1) Provenance & Practicalities**

Wide differences were seen in which bodies set and which bodies are tasked to enforce threshold quantity schemes across Europe.

Threshold quantities have been established at different legal levels e.g. by: parliamentary law in Cyprus; governmental decree in the Czech Republic; ministerial decree in Belgium, Italy, Lithuania, Hungary, Austria, and Portugal; national police or prosecutorial guidelines in the Netherlands, Finland, and Norway; regional guidelines in Germany; court decisions in Germany and Sweden; and, by expert scientific body in Spain.

Commenting on the different legal systems in place across Europe and beyond - from constitutional to common law, civil or penal code – and the different roles that the judiciary can play even to the point of being investigators, little surprise was expressed at the varying provenance of the schemes. For the same reasons, however, some doubted the likelihood of any model being found that could function across such different settings.

Participants noted the changing nature of the evidence year on year local factors such as drug-prevalence, patterns of use and public opinion, even the relative harms of substances - that does or, it was said, should lie behind where threshold quantities are set. From this it was suggested that setting threshold schemes at parliamentary level would not provide enough flexibility because of the length of time it takes to push through amendments in primary legislation. In the same vein arguments, such as those made in the UK 2005 consultation, were rehearsed that without prescribed levels the police have greater flexibility to respond to local issues and can prioritise activity on those dealing in drugs that cause the most harm.

On the other hand, there were concerns about the democratic deficit of secondary legislation and other less formal mechanisms. It was also said that the more informal a scheme is, the less likely it is that those who set it will have sufficient evidence before them or the requisite training to ensure its rationality. This concern was at its height when considering schemes that involved the exercise of police or judicial discretion. Indeed, the need for training of such professionals, if they are to have such power, was underlined. Their willingness to assume such power, however, was also questioned simply because of the burdensomeness of calculating the true seriousness of drug offences if thresholds are not to be used. The analogy was made with drunk driving where there is a simple limit – if you are over the limit you're punished, if you're not, you're ok – this is simple to police and to enforce and the public seem to have accepted it too.

The Czech example was mooted as a cautionary tale, having last year abandoned prosecutor directives in favor of hard law. The reason given for the change was that government decrees, being uniform and binding across districts, provide more certainty for citizens as distinct from internal instruction for police and state attorneys. However, since implementation, complaints have been raised about the rigidity of the scheme. Participants also voiced the general concern that such frameworks are not responsive where unintended negative consequences arise.

As a possible solution, it was suggested that a sunset clause in primary legislation calling for review by experts at regular intervals would address the concerns of both factions.

## **2) Purpose**

What a threshold is meant to determine varies. For example, it can be: the offence, i.e. possession or supply (for which see Belgium, Greece, Cyprus and Portugal); whether an aggravated supply offence should be charged (Ireland); whether a matter should be prosecuted at all or not; whether an offence should be dealt with by way of summary procedure only (Finland); whether the matter should be dealt with by the criminal courts or diverted into administrative sanctions or health treatment (Portugal); or the level of sentence that should be imposed.

As regards underlying purpose, it was conceded by participants that the true aim of most governments in using thresholds was unclear and often-times had to be deduced from surrounding circumstances. Certainly, many schemes appeared to arise in the context of finding a way to absolve drug users from criminal sanctions (e.g. Portugal) or to render sentencing more proportionate and effective (for which, see the discussion in the recent UK consultation on sentencing for drugs offences)<sup>6</sup> both of which instances work to improve public confidence in the criminal justice system by reducing arbitrary outcomes. There were concerns, however, that differentiating between users and dealers, whilst good for users, results in more and more stringent penalties for traffickers which may not themselves be proportionate and which fail to recognize that supply (or ‘the back door’) is the necessary corollary of use. There were concerns too about the lack of distinction across many schemes between user-dealers or social suppliers as compared with serious traffickers. It was felt, however, that although such issues necessarily needed to be addressed by policy makers when considering the rights and wrongs of reform proposals, they were outside the province of this seminar the purpose of which was to gauge the utility of threshold quantities as a tool.

To the extent that utility depends on the purpose for which threshold quantities were being used, however, the discussion continued. It was mooted that there could be other rationales behind threshold quantity schemes which aren’t discussed openly, for example, cost-cutting or the need to reduce prison over-crowding. Similarly, a desire by politicians to improve public approval ratings was thought to lie behind some initiatives, for example, the changes in Italy which accompanied the shift to a centre right government.

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6. Consultation paper on sentencing for drug offences, Sentencing Advisory Panel, 22 April 2009; [http://www.banksr.com/drug\\_trafficking\\_guidelines/Drug\\_Offences\\_Consultation\\_paper\\_2009.pdf](http://www.banksr.com/drug_trafficking_guidelines/Drug_Offences_Consultation_paper_2009.pdf)

Some participants were concerned, however, that behind many schemes was very little thought at all, and many were the result of Member States unthinkingly trying to normalize their legal systems.

It was felt that there was little point discussing abstract threshold quantities unless they can be measured against their stated aims and the dearth of such data was therefore met with concern. In particular it was said that it would be very helpful in assessing utility to have figures as to detention rates both before and after the schemes are enacted. From the figures available, however, some participants felt little cause to be optimistic; outside the EU the particular example of Peru was given where thresholds for personal use were enacted in 2000 but detention rates have in fact gone up. On the contrary, the positive example of the Schiphol Action Plan in the Netherlands provided hope. The number of drug couriers in that jurisdiction had at one point been such, it was said, that the judicial system was collapsing with hugely over-crowded prisons. A system was brought in (on a time-limited basis) that worked according to the amount of drugs that individuals could carry internally and where such individuals were detected, they were dealt with by way of deportation and travel black-list alongside forfeiture and destruction of the drugs. This pragmatic scheme saw a great easing on penal resources and was highly commended.

### **3) Nature**

There were differences in whether threshold quantities are binding, presumptive, or merely indicative of their various ends. For example, Slovakia utilizes binding thresholds to distinguish between use and trafficking, whereas the majority of EU countries deploy presumptive thresholds.

This issue was passed over quickly and it seemed almost to go without saying that whilst indicative threshold quantities may afford benefits, binding thresholds carry too many negative unintended consequences. Likewise, the concerns about presumptive schemes on a reverse burden of proof basis (that had been raised by UK stakeholders when that state had consulted on and abandoned the idea of threshold quantities) resonated. Specifically, some felt that presumptive schemes equal an unnecessary complication of law, are human-rights ambiguous, and wrongly de-prioritise other highly relevant factors than quantity.

### **4) Quantities and Calculations**

There were found to be differences between where and how the threshold quantity is set across Member States as well as in general terms from one substance to another; differences could even be found within countries operating on a federal system.

Participants discussed how some Member States did not define the threshold numerically, but rather chose to talk about ‘small quantities’. However, such schemes still need to be rooted in an understanding of what a small quantity is, and indeed, participants saw that, for example, in the Czech Republic, exact threshold amounts are given to support such determinations, e.g. no more than 5 cannabis plants. Also, the Czech Republic has set down the lowest permitted quantity of the active psychotropic element and general mass is cross referenced against this figure.

Some Member States refer to the number of ‘doses’, for example: in Estonia the personal use limit is set at 10 doses; in Slovakia it is between 3 and 10 doses; in Norway 1 – 2 doses; and in Slovenia 1 dose. As to the workability of such schemes (where they are no more than legislative shorthand for an exact numerical figure found elsewhere) the example of Bulgaria was given which had had a law that if a drug user had one ‘dose’ only, he could be diverted away from the criminal justice system, but this was found to be overly complicated and was abandoned.

Some Member States set their thresholds on the idea of a day’s drug use. For example, Portugal has a threshold of the amount required for 10 days drug use as the limit set for personal use. Of course, there is also an actual weight per drug for the average day’s use in order for such a threshold to be calculated and this brings its own attendant problems and disadvantages.

Participants also considered the use by some Member States of street value to set a threshold quantity (Ireland) and that some countries (e.g. Slovakia) take a combination approach to the calculation i.e. where doses are cross-referenced against street value. It was generally agreed, however, that street-value is very difficult to calculate and therefore not a very workable criterion. However, where street value is to be deployed, it was said that the Irish scheme, where the value is set so high (at around €13,000) as to leave no room for doubt, represents the most workable of such schemes.

In terms of numerical threshold quantities, these varied between the whole mass of the substance found to just the mass of the active principal. For example, in Italy the cannabis threshold quantity is set by way of THC level, while the cocaine quantity is set for whole mass.

Prima facie, purity seemed a fairer criterion than simple mass which also takes into account benign or licit adulterants. The most extreme illustration was that of cannabis resin which often reduces in mass by the time a case comes to trial due to water evaporation. On the other hand, a number of difficulties were identified with a purity calculation, as follows:

a) Impracticality. Participants conjured up the striking visual image of an Italian Carabinieri pulling out a mass spectrometer to determine THC content of some teenager’s spliff on a back-street of Rome, or more likely using other more informal methods to determine the THC level.

b) Resources and Capacity. Those in attendance who had worked with the Afghan administration told of the domestic desire to have (an imperfect) but workable trafficking threshold that would suit their local reality, for example in the region of 100kilos pure mass whereas the Americans had promoted a purity system at the milligram level which simply could not be satisfied in the field. Indeed, the costliness of purity analysis was considered a real drawback and it was said that such tests should perhaps be reserved only for large amounts of drugs or where an aspect of the case is in dispute that it could inform, for example, how high up the supply chain a dealer might be.

c) Uncertainty. It was said that few users or dealers are aware of or have control over the purity of the substance in their possession, and as such it has no relevance to their culpability and should have no bearing on their sentence.

It was suggested that many states choose to take the full mass rather than use quantity as a determinant not because of these difficulties, however, but because it is better for the politicians, police, prosecutors and judges to say to a journalist that 1 tonne of a substance, rather than 15kilos, has been seized, prosecuted or punished by them. This culture of pushing for ‘results’ by such officials, is something, members of the expert group felt needs to be addressed.

A comparative study of the threshold quantities for personal use in the form of gram relations within and across countries was presented to those in attendance<sup>7</sup> and is reproduced below:

Gram relations within a country: Cannabis resin to cannabis herb

Belgium	3g resin	:	3g herb	x 1
Cyprus	30g resin	:	30g herb	x 1
Czech Republic	5g resin	:	15g herb	x 3
Portugal	5g resin	:	25g herb	x 5
Greece	2.5g resin	:	20g herb	x 8
Spain	25g resin	:	200g herb	x 8
Lithuania	0.25g resin	:	5g herb	x 20

Gram relations within a country: cannabis resin to cocaine

Lithuania	0.25g resin	:	0.2g cocaine	x 1.25
Greece	2.5g resin	:	1.5g cocaine	x 1.67
Portugal	5g resin	:	2g cocaine	x 2.5
Cyprus	30g resin	:	10g cocaine	x 3
Spain	25g resin	:	7.5g cocaine	x 3.3
Czech Republic	5g resin	:	1g cocaine	x 5
Netherlands	5g resin	:	0.5g cocaine	x 10

Gram relations within a country: heroin to cocaine

Czech Republic	1.5g heroin	:	1g cocaine	x 0.67
Greece	1.5g heroin	:	1.5g cocaine	x 1
Cyprus	10g heroin	:	10g cocaine	x 1
Netherlands	0.5g heroin	:	0.5g cocaine	x 1
Norway	0.5g heroin	:	0.5g cocaine	x 1
Portugal	1g heroin	:	2g cocaine	x 2
Spain	3g heroin	:	7.5g cocaine	x 2.5
Italy	2.5g heroin	:	7.5g cocaine	x 3
Hungary	0.6g heroin	:	2g cocaine	x 3.3
Austria	3g heroin	:	15g cocaine	x 5
Lithuania	0.02g heroin	:	0.2g cocaine	x 10

How these figures were set, however, is not a calculation for which the workings out are generally in the public domain nor, did some jurisdictions retain their workings out even in the private domain.

It was generally agreed that best practice would involve policy makers consulting with all interested parties in order to set thresholds on a scientific basis. Reference to

7. B.Hughes EMCDDA 2010. Further detailed and up to date figures are available from the EMCDDA at <http://www.emcdda.europa.eu/html.cfm/index99321EN.html>; see also the EMCDDA Annual Report 2010, chapter 1 on National Legislation.

Spain was made, in which the thresholds are apparently set further to serious study by the Institute of Toxicology, but it was lamented that the documents on which their estimates are based have not been made public. It was also positively noted where categorizations had been determined on the basis of deemed similarity between the harmfulness of substances. For example, in Sweden in 2002 it was decided that GHB was analogous to ecstasy and the threshold quantities set accordingly. Also, in Germany the High Court, on receiving evidence about the dangerousness of methamphetamine, ruled to lower the threshold in relation to that substance in 2009. It was said that such 'equality' was a positive thing and should be prioritized in states' calculations. That is, when considering different substances, if the severity of the crime is comparable the thresholds set, (where they are different numerically), should lead to the same sentence.

Nevertheless, participants reflected how little equivalence there is in general terms amongst and within Member States and doubted, as a consequence, the evidence-base that lay behind the various calculations. In Austria, for example participants heard that thresholds are set after consulting with only a single professor. Questions were also raised as to how the Czechs can allow more heroin by weight than cocaine whereas other countries, for example, Austria, allow five times as much cocaine for personal use than heroin? Likewise, participants found it surprising that in Lithuania, the threshold for personal possession of cannabis resin is almost as much as it is for cocaine. Attempting an answer, the example of Spain was given where more cocaine is allowed for personal use than ecstasy because the calculation takes into account prevalence rates in the country. However so many more examples were available of States' rejecting scientific advice in the field of drug policy (Netherlands as regards magic mushrooms and the UK as regards ecstasy and cannabis) that there appeared to be little confidence in the room as to how these thresholds had been being set, so far, by governments.

It was clear from the discussion that as much (or arguably as little) as the quantities set may depend on science; they equally depend on local factors, but whether such factors alone could account for the huge variations discussed, continued to be debated. It was agreed that how thresholds are set at the levels they are, across the different Member States, would be a valuable subject of further research.

Participants reflected also as to how attitudes towards a particular drug and evidence as regards its effects develop over time and so threshold quantities do not remain static within states for long. For example: in Austria in 2001, the threshold quantity of heroin for personal use was dropped from 5g to 2g; in 2005 Slovakia changed the threshold amount for personal use upwards from 1 personal dose to 3 doses or 10 in cases of heavier use; likewise, in Germany in 2008, the threshold quantity of methamphetamine for trafficking was dropped from 30g to 5g. In addition, it was noted that prevalence and patterns of use also change over time and this is often factored into threshold quantities.

Finally, it was noted how so few Member States set thresholds for production, usually categorized as trafficking and sentenced accordingly, whereas in fact, for example, individuals might be cultivating cannabis for personal use. Production thresholds were seen to be a forgotten issue even beyond Europe and particular reference was made to coca in other jurisdictions also as well as the fact that across Latin America, cannabis growers have actively been seeking clarification on this issue. Colombia, it must be

said, was given an honorable mention for having a threshold quantity for cultivation. Without denigrating the issue of principle, however, some participants raised concerns about the practicality of threshold quantities for cultivation and production as the potential yield of a crop is very hard to estimate. An illustrative example was taken from Belgium where 3g cannabis and 1 cannabis plant is the threshold amount, albeit one cannabis plant can produce up to 500g cannabis.

## **Portugal Case Study**

Participants considered in depth the example of host-country Portugal.

The Portuguese scheme was borne out of the work of the Institute for Drugs and Drug Addiction. This Institute comprised a group of recognized experts in drugs law which considered the decisions made by the courts in drug cases as well as wider themes such as trafficking, drug couriers, average daily dose-amounts and threshold quantities, etc. Each year the Institute published a book with the result of this work and made it available, free of charge, to all courts and all legal practitioners. Soon, the influence of the publication began to be felt in the jurisprudence of the courts which were concerned to reduce the variations in the outcomes of similar cases before different courts that had been highlighted and to address the anxiety that the incumbent penal system had led to the highest prevalence of problematic drug use in Europe, a concern also reflected in population surveys.

In 1999, the Council of Ministers approved a national strategy for combating drugs which decriminalized drug consumption as well as possession and purchase of drugs for personal use. It became only an administrative offence to consume, acquire, or possess for one's own consumption controlled substances, plants and preparations not exceeding the amount needed for the average individual consumption during a period of 10 days. The welfare state was expanded and a new institutional structure created in order to support the changes. The new regime was founded on the following principles: because of its social effects drug consumption is not merely a private choice, and the drug addict is a sick person in need of health care.

The law which enacted this strategy in 2001 did not, however, identify threshold quantities to determine 10 days use and this, it was said, caused some confusion.<sup>8</sup> One of the attempts to quell this confusion was a ruling by the Supreme Court that the acquisition or possession of narcotics for personal consumption in excess of the amount needed for 10 days was to be mandatorily criminalised. Participants heard that this ruling was not well received, however, to the point, indeed, that it is considered illegal and unconstitutional and many courts, even, do not enforce it.<sup>9</sup>

The confusion continued, however, as two sets of indicative quantities were devised, one by way of Ordinance, and another by the Courts of Appeal which were critical of the Ordinance and sought to uphold the limits that they had always worked to. These limits are 2g cocaine, 1g heroine and 5g hashish and were devised by reference to weight, purity, harmfulness, the limits of the Ordinance, and street-value.

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8. A chronology of the statutory reforms is as follows: a new drug law in 1993; quantities set in 1996; decriminalisation followed in 2001.

9. Instead the courts will only look at the weight of the active ingredient the substance and not at the total weight of the substance carried.

Where the amount of drugs falls below the threshold amount and there is no indication of intent to trade or traffic a person is diverted to the Drug Addiction Dissuasion Commission which is not within the criminal justice system, but falls instead under the province of the Ministry of Health. The aim of the Commissions is to educate about the harmfulness of drug use and dissuade people from it and to this end, it can refer for treatment where required, as well as other social services such as the employment agency. The Commission can also impose civil fines and other low-level sanctions where a person does not comply. Dissuasion interventions are meant to provide an opportunity for an early, specific and integrated interface with drug users and to be aimed and targeted to the drug users' characteristics and individual needs.

Where the amount exceeds what is average for 10 days use, the matter always goes before a criminal court and if trafficking is disputed it remains open to the judge to decide that even for larger amounts, a person arrested with drugs had them only for personal use and so redirect the person to the Commission. In certain cases, it may happen that the Judge decides that the exceeding amount is for personal use (based on the person's declarations and the non existence of criminal evidence) and therefore refer the person to the Commission. In other cases, the Judge may decide that the exceeding quantity clearly defines a crime of use, as the person has an amount greater than what the law provides for personal use, and apply a penalty, in accordance with Article 40 of the Decree Law 15/93. In such circumstances, the Court usually imposes the same sanctions as applied by the Commission i.e.: fees; community service; regular presentations etc.

Evidence is produced to the Judge in the preliminary stage of the investigation prior to trial. The quantity is considered to be indicative, as are the limits prescribed by the Ordinance but these do not bind the judge who retains discretion to consider the circumstances of the offence and offender as a whole. More important than the quantity found, therefore, is to define its purpose: is it for trafficking or for personal use? The criminal investigation may add precious information to help the Judge's decision, such as the presentation of the drug (in individual doses or not) or if the person has objects relating to supply (money, scales). Where a person is found to be a trafficker, rather than a drug user, distinctions go on to be made between small-scale supply, mid-level trade, and larger trade by the courts which deploy a matrix that takes into account what qualifying aggravating factors subsist. The result of the distinction is seen in the severity of the sentence handed down which, depending on which substance is involved can range from 4-12yrs or 5-15yrs.

Low-level user-dealers, in particular, are usually dealt with by way of fine, unless there is prior recidivism in which case they can expect between 4 and 6 months in prison. Minor traffickers can expect 3-4yrs, but this is sometimes suspended. Drug couriers receive on average 5years in prison and also risk deportation. The heavier sentences are reserved for those who commit other crimes in conjunction with their trafficking, and although the maximum penalty is 25yrs, the courts rarely see sentences imposed in excess of 20yrs.

The question was raised as to whether in fact more users are being arrested<sup>10</sup> and brought to court because the penalty is lower than it was under the previous system

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10. In fact users are never arrested unless they have more than the quantity defined for 10 days use, in which case they might be apprehended as traffickers not users, and even in that case they are not "ar-

where even the police were concerned about the severity of disposals and so often chose not to enforce the law; but this question went unanswered.<sup>11</sup>

Certainly it was said that the passage into law and practice of these reforms had not been easy, bearing in mind the international and national critique which followed but which has since been overcome;<sup>12</sup> however it was said that the changes were and remain welcomed at home. Concerns were also raised about whether resources were being effectively used when 65% of those before the Commission were there only for cannabis use. However, the point was made that it was more cost-effective and proportionate for such people to go before the Commission than before the criminal courts and bearing in mind that this regime kept the country within the UN framework of prohibition, it was arguably a good half-way house.

Trends noted<sup>13</sup> since the implementation of the regime have been: small increases in illicit drug use amongst adults; reduced illicit drug use among adolescents at least since 2003; reduced burden of drug offenders on the criminal justice system; reduction in the prevalence of injecting drug use; reduction in opiate deaths and infections diseases; reduced stigmatization of drug users; increases in the amounts of drugs seized by the authorities;<sup>14</sup> reductions in the retail prices of drugs; increased efficiency of police and customs forces; and that drug addiction is no longer a political issue, falling from 1<sup>st</sup> to 13<sup>th</sup> place on the Eurobarometer survey.

The Portuguese example was commended for the breadth of the package and reforms. The fact that the Ministry of Health oversees the Commissions and not the Ministry of Justice was considered vital to their effectiveness. The fact that the threshold quantities were not binding and both Courts and Commissions could redirect matters that had been wrongly sent to them, having analyzed all the facts, was said to be necessary to achieve proportionate and appropriate outcomes. The fact that care had gone into the setting of the thresholds at a high enough level to provide a safeguard against needing to re-divert cases regularly was also remarked on positively. Participants consequently highlighted this lesson for other jurisdictions; the need to consider the whole package.

## Discussion

The merits of a threshold quantity system in any form, were hotly debated. Against threshold systems, participants pointed to the flexibility of the drug market. The example of how drug-dealers in the western suburbs of Paris have begun to operate was given. Participants heard how such dealers rarely, now, have more than one

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rested” they are “ identified and presented to a judge”. Only in the case of a criminal conviction a criminal record is built.

11. Some say this question remained unanswered because the figures remained more or less similar, the police was and still is mainly focusing on the dealers. Users are sometimes viewed by the police as a means to get to the dealers.

12. The fact that the Portuguese drug policy is in compliance with the international treaties and the success of the Portuguese approach have silenced the critique.

13. Participants reflected the conclusions of the recent study ‘What can we learn from the Portuguese Decriminalisation of illicit drug use?’ Hughes C & Stevens A *Brit. J. Criminol.* (2010) 50, 99 -1022

14 Although the number of seizures decreased which eventually might indicate that the police forces are working higher at the drug trafficking “chain”.

gram on their person but keep their larger stock in the house of a ‘nursemaid’ (a lady of previous good character on whom suspicion is unlikely to fall) and who acts as a care-taker for the drugs. A binding threshold quantity, however, would allow such a dealer with low level amounts of drugs on his person, to go unpunished.

On the contrary, some participants were concerned about the inflexibility of threshold quantity schemes, even those which are non-binding. Participants reflected that though the death penalty is not a practical concern within EU countries but felt that a threshold quantity that meant the difference between the death penalty and imprisonment illustrates exactly the inhumanity and arbitrariness of such schemes. The question was posed, how could it be right, in any context, that a person with 11g of a substance should die, whereas 1g less would have meant only imprisonment?

The comment was made that the need for threshold quantities depends very much on the robustness and integrity of the institutions and professionals that oversee the decisions to which they relate. As much as different legal systems and judicial functions need to be taken into account, the level of corruption in a particular jurisdiction was also considered highly relevant. However, it was argued that in a functioning judicial system, discretion affords the most humane result and that ideally, there should be some form of judicial discretion that takes into account a range of other factors relating to the offence and the offender to determine the sentence (for example, the quantity of drugs involved, the nature of supply, previous criminal history, treatment needs).

The example was given of the UK where, whether the correct charge has been laid, (E.g. possession or supply) is dealt with by a jury if disputed, and where the correct sentence is determined by a judge in their discretion (albeit quantity is considered a highly relevant criterion). It was felt by some that this provided the best opportunity of reaching the correct decision. For example to determine possession or supply, the court takes into account all the circumstances including quantity, for example whether there is: dealing paraphernalia (e.g. digital scales, client lists, numerous pay as you go telephones, large amounts of cash on the defendant’s person); evidence of drug-use or dependency by the defendant including any medical need or religious usage; previous convictions; the defendant’s evidence including the credibility of any desire to minimize contact with criminals and therefore need to buy in bulk; as well as any surveillance footage. Likewise, to determine the appropriate sentence the issue is the seriousness of the offence and this depends on the defendant’s culpability and the direct and indirect harm caused, or risked, by the offence – this is of course impacted by the amount of drugs in issue, but not determined by this alone. In both types of decision (offence and charge) the defendant’s intention is considered paramount.

This system was commended for tailoring decisions to all the facts and seemed more capable of producing proportionate and humane outcomes therefore than a rigid threshold quantity scheme. On the other hand, participants noted with concern that the down-side of this discretionary system is low-level discrimination with black people in the UK more likely than white people to be included at each stage of the criminal justice system for drug offences and to be sentenced more harshly.<sup>15</sup>

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15. Stevens. A.. speaking at the Release conference 2008 on ‘Drugs, Race, and Discrimination’. See also Stevens, A. (2011) *‘Drugs Crime and Public Health; The Political Economy of Drug Policy’* Routledge-Cavendish.

The question was posed do thresholds resolve corruption or do they provide more opportunities for corruption? In particular the danger of police abuses was canvassed and examples were given of police threatening to increase the recorded amount of drugs found so as to take people over the relevant thresholds unless a bribe were paid. On the other hand, the example of Uruguay was given where cannabis users have requested the introduction of a threshold system, because the current discretionary system doesn't provide any protection against police harassment.

It was suggested that threshold quantities lost sight of what was really significant which is not how much of a substance a person has but whether it is held for personal use or supply, the culpability or otherwise of the particular offender and the harm caused by the specific offence. These, it was said, determined the threshold of seriousness which merited state involvement and enforcement and it should be remembered that the threshold quantity is merely a tool towards determining this end and not an end in itself. Rather, appropriate disposals should be decided on a case by case basis taking into account all the relevant circumstances.

Some felt, however, that the seemingly arbitrary divergences between threshold quantities across different jurisdictions cried out for a transferable and evidence-based model – that there was a compelling need to harmonise. There was disagreement here: some viewed it as arbitrary and wrong that 1g of a substance was often viewed more seriously and consequently treated differently by police and courts in a rural context as compared with 1g in an urban context; others felt that it was right to reflect in the response meted out the different regional prevalence of drug use and the harms caused by it as well as local attitudes towards that harm.

Others felt that local factors were so important that a model would not be workable, but that in order not to lose the clear benefit, in some jurisdictions, of limiting discretion, what might be of assistance is a variety of models that would work for different countries and in different settings.

There were concerns too about the willingness of Member States to adopt a standard European threshold model. It was argued that irrespective of the nominal transfer of nation-state sovereign rights to the supranational European institutions, the Westphalian principle remained paramount. That is, that the ultimate reference for policy and legislative change remains the state, not international organizations. It was said that Member States would not care about a common model, they would only be interested in whether it sticks with their situation and in order to persuade Member States of the benefits of adopting or amending threshold quantity schemes, the advantages to them of doing so would have to be tangible. It was said that few states would be willing to forego the benefits they derive from having good crime-detection statistics mostly founded on the high levels of enforcement as regards low-level drug crime – if the consequence of introducing a threshold quantity scheme were to have any effect on these. Participants heard that Russia had ignored UNODC advice on scheduling and the tabling of methadone and the example of Afghanistan was revisited – despite the considerable persuasive power of the American regime in that context, the Afghans continued to disregard purity. It was said that when a model is promoted that is un-manageable, the Westphalian principle will triumph and the country will not follow.

## Session 2 – Law Reform Proposals and the Threshold Dilemma

Participants sought to broaden the context of the debate in the afternoon session by taking a closer look at 3 case-studies beyond the EU – Mexico, Argentina, and Australia. In each of these jurisdictions, drug law reform has been high on the agenda in recent years and participants therefore hoped, with closer study, to gauge a better sense of the role that threshold quantities can play in such reforms in practice and the outcomes that can be achieved.

### Mexico Case Study

In 2009, the Mexican government passed a new law against low-level drug trafficking in order to address organized crime and, it was said, in order to be seen to be tough on drugs. This law sought to involve local government and local police in the fighting against drug trafficking and allowed one year's grace for it to be enforced by local officials; previously only the federal authorities sought out and investigated high level drug-dealing. The quantities of drugs that pass through Mexico and the size of the domestic Mexican drug-market had become such that a joint-responsibility approach between federal and local levels was seen as necessary.

Presumptive threshold quantities were established to distinguish between users and traffickers and were brought in for opium, heroin, cannabis, cocaine, LSD, ecstasy, and methamphetamine. It is not known how the threshold quantities were set however; the Government at the time made reference to '*international standards*' but there was consensus amongst the experts at the seminar that there are none such in existence. Drug users were to be diverted into health treatment, whereas traffickers were to be punished.

The results of the new law are now becoming clear. The major positive outcome has been a cultural shift of attitude wherein a distinction is now being made between drug-users and criminals.

On the negative side, however, participants had more to say. First, the threshold quantities set are very low in relation to the market. For example, for cocaine, the threshold is 0.5g but on the street, cocaine is usually offered to users in 1g deals. This puts the legitimate user at risk of prosecution. Moreover, whereas drug markets in other jurisdictions are perhaps more flexible, users in Mexico are less willing to buy in smaller amounts over repeat transactions because of the general danger of engaging with traffickers and the high levels of violence, as well as the likelihood of detection by the authorities being highest at the moment of the transaction.

At the same time, traffickers have been able to adapt their practices to ensure that they only ever have so much of a particular substance on their person that they are always within the lowest sentencing band of 6yrs for trafficking. For example, the threshold range for low-level marijuana trafficking is between 5g and 5kilos and numerous individuals have been caught just under, with only 4½ kilos on their person.

So far, only 5 Mexican states out of 32 have adapted the new law to local level. The local judiciary and police have explained their reticence to assume responsibility for

enforcement on the grounds of human and financial resources, prison over-crowding, and the corrosive nature of such crimes on the police. It was felt by many participants, however, that the real fear behind such reticence is the violence of the high-level traffickers. This would explain, it was said, why local actors have continued only to focus on the very low-level market. As a result many users have found themselves in jail because of the impractically low threshold quantities set and the need of the local officials to be seen to be doing something at the same time as their unwillingness to do anything that would actually have an impact. Examples were given of strong cases against high-level traffickers being dropped by local judges on procedural or technical grounds even where there is compelling evidence like a confession whereas low-level traffickers and users are more easily brought to justice.

Participants heard that most of the people imprisoned in Mexico therefore relate to drug offences with 50% imprisoned for drugs worth less than \$100 and 25% imprisoned for drugs worth less than \$25. Albeit that the presumptive threshold allows people to disprove their guilt on a case by case basis, in working practice, those in possession of more than the threshold quantities find themselves going to jail just for possession. It was said, however, that the system does not uphold the rights of the drug user and they have become the patsy of the regime. A particular impact has been felt by women and the poor.

There is no data as to how many people have been diverted into health care. Whilst concerns were raised about the validity of such data in any event - (it was suggested that often in national statistics there is an overlap between who is counted as a drug user / drug trafficker and also that some individuals might wrongly self-identify or self-refer to avoid punishment) – There were real concerns that the health system created to deal with drug users in Mexico is not operating well and not well-funded as the law focuses much more on criminal justice than health. Indeed, in practice, the index of success for Mexico is the number of people incarcerated rather than the number of people diverted into health treatment, or reductions in street-violence.

Despite all these concerns, however, it was argued that the need for threshold quantities in Mexico was real because the pressure placed on Judges and other officials in Mexico by narco-traffickers is such that discretion is easily corrupted. It was also said, however, that it was a great shame that the government had failed to consider the whole package when implementing their reforms and particularly that they had not invested in treatment options nor in shoring up their local institutions, nor considered the realities of the drug market and set their thresholds at sensible levels.

As to whether Mexico was moving in the right direction it was felt that more time was needed for the impact of the reforms to become clear. Indeed, even with all the difficulties experienced as a result of (or perhaps despite) the reforms, many delegates felt that the resultant change in the political rhetoric and public understanding as to drug users not being criminals was so valuable and so potentially transformative, it was worth being patient.

## **Argentina Case Study**

Argentina is a signatory to the UN conventions and until 2009 had a typical prohibitory regime whereby drug possession for personal use was punished with between

1 month and 2 years in prison and/or compulsory treatment and education; trafficking, even in small amounts, was met with 4 to 15yrs imprisonment. There were concerns, however, that the policy neither achieved its stated goal of reducing drug-consumption nor effectively brought organized crime to justice whereas the courts were flooded with minor cases, the prisons were overcrowded by drug users and other vulnerable groups and the laws had created barriers to accessing drug treatment.

In 2008 a Scientific Advisory Committee on drug control was set up to consider the issue with the participation of the Chief of the Cabinet. This led to a paradigm shift in drug policy with the Argentinean Minister of Justice advocating the right to access health-treatment and respect for a drug user's dignity as a basic Human Right at the 51<sup>st</sup> session of the UN Commission on Narcotic Drugs. Domestic focus also fell on the fact that Argentina's constitution enshrines its human rights obligations and that there were tensions between the drug control regime and these obligations. The tensions were resolved by the Supreme Court case of Arriola (August 25<sup>th</sup>, 2009) in which it was held that criminalization of possession of amounts for personal use of any kind of drugs in private was incompatible with these obligations and therefore unconstitutional. Particularly, the prohibitory scheme was found to be in breach of due process, unlawful, disproportionate, irrational, and to constitute cruel and degrading punishment so as to violate dignity, privacy, autonomy, and the right to health. There have also since been moves to reconsider the private / public use distinction which is considered to result in discrimination against the poor and the young, who may have no private location for use.

Argentina, with its focus on the rights of the drug user, did not opt for threshold quantities due to concerns that such systems endanger drug users by forcing them to buy in smaller quantities on more occasions and so increasing their exposure to the dangers of the market and traffickers. Moreover, the judiciary in Argentina saw no need for thresholds, considering it a simple task, on reviewing all the evidence in a case to determine whether someone is a user or a dealer. Indeed, various practitioners from other jurisdictions confirmed the ease of such determinations in practice and likewise doubted the need for thresholds where the judiciary was adequately informed and its integrity could be trusted. It was said that the difference between Argentina and Mexico, for example, was political will.

The choice not to utilize threshold quantities was said to be in contrast to many other Latin American countries and whilst participants had already discussed the Mexican example, reference was also made to the fact that Venezuela, Paraguay, and Colombia worked on such models. It was mooted, however, that bar the recent set-back in Colombia (a constitutional amendment in December 2009 reintroducing prohibition of consumption and simple possession) the general trend across the region has been one of intended depenalisation and within this trend whether or not threshold quantities are a useful tool towards this end has depended, very much, on local factors.

With no threshold system, Argentina was suggested by some participants to be very much at the mercy of the police and the judiciary. The retort was made, however, that whilst the police may continue to commit various abuses, judicial oversight was rigorous in this jurisdiction and it was necessary to believe in your officials in order to inspire them to meet your trust and so have any hope of creating the outcomes you want to see achieved.

On the other hand, participants heard that there is debate amongst the judiciary in Argentina as to the proper use of discretion when sentencing traffickers; in such decisions quantity continues to play a persuasive part when distinguishing between mules, low-level dealers and large-scale traffickers. For example, it was felt by some that the average 4 year sentence of imprisonment meted out to drug mules was disproportionate to the harms caused by such offences and the culpability of such offenders irrespective of the quantity carried.

Argentina also, consciously, did not opt for diversion away from criminal justice into administrative or civil penalties (such as are provided for in Brazil); Argentina took the view that administrative penalties can often have the same deleterious impact on an individual as penal sanctions and are no more likely to be effective. Likewise, compulsory drug treatment had been rejected as an affront to the drug user's rights.

The government's loss of majority in Congress initially appeared to jeopardize the implementation of a framework to support these changes, and there were concerns that there were not enough drug-treatment places for those who were now coming forward for assistance as a result of the changes in enforcement policy, but, happily, in December 2010 a new mental health and drug treatment law was approved. It was suggested that Argentina was moving in the right direction but with presidential elections looming (October 2011), the progress made was in a somewhat precarious position.

## **Australia Case Study**

Participants heard that Australia is a federal system and that there are different threshold quantities set down in each state and territory to distinguish between trafficked amounts, commercial amounts and large commercial amounts. The quantity thresholds can be specified in pure drug (active principal) or mixed drug (including inert substances).

Concerns have arisen, over time, however, that the differences in jurisdiction leaves open the possibility for traffickers to move around and take advantage. As a consequence, a model criminal code was set out for all territories, ostensibly based on 'commercial realities' but with no scientific underpinning as to what such realities might amount to.<sup>16</sup> At the current time, not all states have enacted this model code, and one is undertaking a human rights impact assessment first.

In such an assessment, a core issue is proportionality of response and to gauge this, studies are ongoing to determine whether the current laws make sense in terms of the commercial realities of the drug market or not<sup>17</sup>. It is felt that what thresholds are set should be able to properly distinguish users from traffickers and low-level dealers from high end traffickers, and to ensure that users do not get caught up in the system. The studies have looked at 1) how many doses can be bought under the current thresholds; 2) retail value or potential profit; 3) potential harm that could be inflicted on society. It has become evident, already, however, that the current laws do not fit

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16. Model Criminal Code Officers Committee (1998). Chapter 6 - Serious drug offences (Model Criminal Code).

17. Hughes, C. and Ritter, A. (in press). Monograph No. 22: Legal thresholds for serious drug offences: Expert advice to the ACT on determining amounts for trafficable, commercial and large commercial drug offences, DPMP Monograph Series, Sydney: NDARC.

the commercial realities. For example, in one jurisdiction the lowest category has levels which amount to 2.8 doses of MDMA, 50 doses of methamphetamine, and also 500 doses of cannabis. This has created a situation where the logical result of the law is that users of MDMA are much more likely to be charged as traffickers and large scale traffickers of cannabis and methamphetamine to escape with much lesser sentences than would be warranted under a proportionate system – whether this occurs in practice is currently under review. Likewise it has been calculated that ecstasy users can carry up to 30 tablets for personal use (equating to 8.7 grams of street MDMA), but the current threshold quantities stop at 3g.

A second issue concerns the transparency of threshold systems. Jurisdictions that have a purity-based system raise particular concerns of non-transparency, because unless buyers or sellers do the conversions (e.g. 2 gram pure cocaine at 61.4% purity under 2008-09 market conditions = 3.26 grams mixed cocaine) they are very unlikely to know whether or not they exceed the thresholds (in this case the trafficable threshold). Conversions in relation to MDMA are even more problematic given the need to consider purity and the average size of a pill.

Efforts are therefore being taken to identify more appropriate threshold quantities. A mixed-based system has been proposed and calculations of threshold quantities are being undertaken which are based on doses or retail value, and also on the potential harm inflicted to the community per gram of the relevant drug. It was suggested that harm may be a more static variable than dose or street value. These calculations cross-reference two indices, the first of which measures social cost (i.e. costs from dependence and infectious diseases, criminal justice costs, road traffic offences) and the other of which is the scale produced by David Nutt and featured in the *Lancet*.<sup>18</sup> Recommendations are being put forward to the government and it is hoped that the laws will be adapted to reflect some notion of the seriousness of drug trafficking offences and result in fewer users getting caught up in the system and in more proportional sanctioning of mid and high level traffickers. However, whilst representatives of the Ministry of Health, the police and the judiciary have been receptive to these proposals, and suggest change may occur in this jurisdiction by the end of 2011, there do remain concerns about potential resistance to amending the status quo as widely as envisaged. At the very least the government would risk considerable public opprobrium if they were to increase the quantities for cocaine and MDMA (to bring them into line with the potential harm inflicted by trafficking in such substances) and, equally, if they were to reduce quantities for methamphetamine and heroin.

It was felt by some participants that the notion of developing a more rational system was good. But participants highlighted particular concerns with the proposal for a harm-based threshold system, and suggested this was the most complicated solution and the difficulties attendant on measuring harm, which had been discussed in depth at a previous Expert Seminar<sup>19</sup>, were rehearsed. Indeed, it was conceded that various relevant aspects of harm, such as the impact of organized crime, were absent from the

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18. David J Nutt, Leslie A King, Lawrence D Phillips, on behalf of the Independent Scientific Committee on Drugs, Drug harms in the UK: A multicriteria decision analysis, *The Lancet*, Volume 376, Issue 9752, Pages 1558 - 1565, 6 November 2010

[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)61462-6/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)61462-6/abstract)

19. TNI Expert Seminar on the Classification of Controlled Substances, Amsterdam, 10 December 2009; <http://www.druglawreform.info/images/stories/documents/classification-expert-seminar.pdf>

Australian calculations simply because no way had been found to measure them. It was also contended that a harm-based system would lose sight of the intended purpose of the threshold quantities which is supposedly to distinguish users and traffickers because how harm can bear on such a distinction is unclear. It was suggested that the proposed approach<sup>20</sup> was better suited to achieving proportionate sentencing than delineating roles. It was hoped, however, that if the thresholds could be set at a high enough level there would be a dual benefit to such a system wherein users would not get caught up by it, and those convicted of trafficking would benefit from sentences that were more proportionate to the harms caused by their offence.

## Conclusions

It had not been expected, over the course of one day, to determine what the correct threshold quantities should be for all the different substances across the EU and beyond, nor, definitively what factors should or should not be worked in and out of such calculations. Indeed, the importance of local context and the need for a broader package on which all were agreed, meant that this would not have been appropriate in any event. Saying this, participants felt drawn, already, to certain conclusions and were also able to highlight various dilemmas as well as gaps in data that required further study.

First, it was broadly agreed that setting some sort of distinction between users, small-traders, and bigger-traders, is important. It was said that if threshold quantities can be of assistance in such a task, the aim of which is to introduce more rationality and proportionality to drug control systems and thereby humanize those systems, they would have great value. In such circumstances, it was emphasized that producers and growers not be forgotten. It was also said that threshold quantities should be a means not an end, and care should be taken that perverse consequences do not result, for example, more users being incarcerated. It was felt that this could only be achieved by clarity in policy objectives, moderation of policy outcomes with data collection, and flexible schemes that allow revisions easily where the evidence-base or salient local-factors change or where negative unintended consequences emerge.

As to whether threshold quantities should be used to achieve such policy purposes at all, there were clearly different opinions in the room and competing advantages and disadvantages had been debated hotly, as reflected in the report of the discussion above. Certainly, though, it was amazing to many, how few schemes had been based on rigorous scientific study. Transforming this dilemma as to the merits of threshold schemes into a conclusion, it was said, is work that requires further data collection and analysis. Going forward, it was said, any hope that policy recommendations would be taken up by policy-makers would depend on the pragmatism of the recommendation and their ability to translate into cost-savings or other attractive goals to do with public health or confidence in the criminal justice system, for example. Work should begin on measuring the impact of threshold quantity schemes against their stated aims with a particular focus on detention rates before and after their implementation.

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20. It is important to note that the reforms are, at this stage, only proposed in one jurisdiction of Australia.

Second, where threshold quantities are used, they should be part of a comprehensive package that involves health-care, and that does not forget the need to resource and support the institutions and train the officials tasked with implementing the scheme. The whole package should also allow scope for the taking into account all the circumstances of an offender and an offence to ensure that proportionate outcomes are achieved. Likewise, any threshold quantity scheme should be non-binding and should be clear and practical for both citizens and the authorities. Also, where administrative sanctions are brought in, it should be ensured that these are not, in practice, more punitive than criminal justice sanctions. Moreover, any such package should be underpinned by local factors.

It was agreed that no one model is possible, not even across the EU: legal systems, police operations, corruption levels, prevalence and patterns of drug use, and their harms as well as the robustness and resources available to the institutions and officials tasked with overseeing and enforcing the schemes vary so much that this would be unworkable. The importance of local factors was therefore considered paramount but it was also felt that some guideline matrix to assist policy makers in finding the right model for them, bearing in mind local circumstance, the best available evidence, and the need to ensure more continuity across jurisdictions, should be achievable.

As to dilemmas, whether a rigid threshold quantity scheme is required at statutory level or whether such important distinctions should be left to the judges or police was felt to be something quite mutable and very much dependant on local factors. This was even though it could be said in principle that in a functioning judicial system discretion would afford the most proportionate and humane response because there were no examples available in practice of a perfectly functioning discretionary system – even the UK had the drawback of institutional discrimination. As such, a balance between discretion and threshold quantities would be needed in most jurisdictions, supported by comprehensive training for decision-making officials.

In conclusion, the fact that threshold quantities were clearly a live issue at play across so many different jurisdictions, confirmed the relevance of the Expert Seminar initiative and it was certain that it had afforded a useful mechanism for knowledge exchange. It is therefore hoped that work will continue on this increasingly important subject, especially in terms of research and analysis, and, further to this, TNI intends to deliver a policy briefing on this subject later this year.

Genevieve Harris, February 2011

With financial support from



**Drug Prevention and  
Information  
Programme of the  
European Union**



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