

Zeman, Petr – Štefunková, Michaela – Trávníčková, Ivana:

Drogová kriminalita a trestní zákoník

Drug Offences and the Penal Code

ISBN 978-80-7338-151-6

Summary

Criminal activity related with drug manufacture, distribution and consumption covers a range of illegal behaviour, from petty offences bordering on misdemeanours up to the large-scale activities of international organised crime. This monograph presents the results of three-years of research by the Institute of Criminology and Social Prevention (ICSP) focusing on detection and prosecution of drug offences in the Czech Republic and the influence that the re-codification of substantive penal law in effect since 2010 had on this field.

Drug offences for the purposes of this monograph mean criminal activity involving illicit traffic in narcotic drugs and psychotropic substances (NDPS), or precursors thereof. The Penal Code of 2009 addresses such offences in the provisions of Sections 283 - 287, while in the preceding Penal Act 1961 they appeared in Sections 187 – 188a.

The subject of research was the reaction of the State (the Czech Republic) in the area of repression of drug offences from a perspective of comparison of the situation before the adoption of the Penal Act and after. With this focus, research was conducted into legislation concerning drug offences and related criminal law institutes, their practical application in detection and prosecution of such types of crime as well as the level, development and forms of drug offences in the context of the drug scene in the Czech Republic (CR).

The purpose of the research was to analyse developments in legal regulation of drug offences and related criminal law institutes, to collect the necessary data on their practical application of the criminal authorities, to define the situation, development in and forms of this type of criminal activity and use this to evaluate the impacts of the adoption of the Penal Code for detection and prosecution of drug offences.

Qualitative and quantitative procedures, *standard methods and techniques* of criminological research were used to address the research task. The resources comprised namely an analysis of Czech legal regulations including available case law, analysis of statistical data from the Ministry of Justice of the CR, statistics from the Police Presidium of the Police of the CR and from the National Drug Headquarters of the Czech Police, analysis

of scientific literature, analysis of relevant official documents, expert questionnaire surveys among judges, public prosecutors, police officers, customs authority officers, semi-standardised interviews with selected employees of the law enforcement authorities and analysis of criminal case files.

The theoretical part of the monograph firstly outlines the situation on the drug scene and the context in which the new legislation originated and is applied. The subsequent chapter gives an overview of legislation governing drug offences and their prosecution in the CR. Attention is given not only to provisions of international law, analysis of the new domestic legal regulation, but also to related legislative changes that might affect detection and prosecution of drug offences. A whole chapter is also devoted to legislation relating to drug offences abroad.

The level of drug use in the CR is described as stable over the long term. The most frequently used illegal drug is cannabis in various forms. The prevalence of the use of other illegal drugs is significantly lower. After a more or less universal rise in illegal drug use in the second half of the nineties and in the first years of the new century, this trend has halted. However, the long-term rise in the estimated number of problematic drug users, especially those injecting methamphetamine, is worrying.

The main characteristics and trends in the development of drug offences in the CR over the past years may be summarised under the following items:

- continuing methamphetamine manufacture in home laboratories
- growth in large-scale, industrial methamphetamine production by organised criminal groups controlled from foreign countries
- growth in cross-border drug tourism
- availability of medicines containing pseudoephedrine
- growth in industrial cannabis cultivation using indoor technologies
- substitutional pharmaceuticals diverted to the black market
- cases of “false ecstasy” on the dance scene
- advent of new synthetic drugs
- boom in illegal drug dealing on the internet
- growth in trade in pre-precursors and auxiliary substances
- intensive involvement of Vietnamese criminal groups in drug dealing.

Over the past years, *control of drug offences has become a priority for both the leadership of the Police of the CR and the Ministry of the Interior*. The basic statistic

indicators of registered drug offences have risen significantly since 2010. Due to the high latency of primary drug offences, the data on recorded cases of this type of criminal activity is only of very limited illustrative value as to its real dimensions and structure.

The adoption of the Penal Code No. 40/2009 Coll. may be considered one of the greatest changes to Czech criminal law since 1989. As for *legal regulation of drug offences*, however, no fundamental changes were announced as regards the categories of behaviour prosecuted as this type of criminality. Current Czech legislation governing penalties for illicit handling with NDPSs is greatly influenced by the obligations of the Czech Republic arising from internationally binding documents. The international system for control and regulation of NDPS handling is based on three multi-partite accord documents known as the UN drug control treaties: the 1961 Single Convention on Narcotic Drugs, amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances of 1971, and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Of the legal acts of the European Union, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking has direct significance for the prosecution of illicit handling with NDPS in EU member states.. Other European Union regulations of key significance for prosecution of illicit drug trafficking in the CR are legal acts concerning the control of precursors and so-called new psychotropic substances. For this reason, the new Penal Code is based to a considerable extent on the preceding law, although it brings with it certain changes. Conceptual differences can be found in the following aspects:

- for the crime of possession for personal use of NDPSs and poisons (Section 284 of the Penal Code) *sentences have been stipulated for unlawful possession of a drug for personal use of a quantity that is greater than small that differ for cannabis on the one hand and for other NDPSs on the other*. This facilitated the differentiation of NDPSs demanded by the government according to the degree of the medical and social risk involved, i.e. according to negative medical and social impacts resulting from abuse of such drugs.
- *a new criminal offence* has been introduced *involving unlawful cultivation of plants containing NDPSs for personal use of a quantity greater than small*, where the severity of sentencing differs between cultivation of cannabis and cultivation of other plants containing NDPSs (Section 285 of the Penal Code). According to legislators, the purpose of this privileged offence was to differentiate between supply for personal

use and “commercial” cultivation and to eliminate ambiguity in the legal qualification of acts involving cultivation of plants containing NDPSs.

- ***The empowerment afforded to the government by Section 289 of the Penal Code to stipulate by government decree what constitutes a quantity greater than small of NDPSs and products containing them and of poisons*** was intended to achieve unification of practice (performed by government decree no. 467/2009 Coll.). The government was also meant to stipulate by the decree ***which plants or mushrooms are considered to be plants and mushrooms containing NDPSs and what constitutes a quantity greater than small in this case*** (implemented by government decree no. 455/2009 Coll.). Nevertheless, with effect of 23 August 2013, the part of the empowerment and the part of the government decree no. 467/2009 Coll. concerning stipulation of values for a quantity of NDPSs that is greater than small was abolished by Constitutional Court Ruling ref. Pl. ÚS 13/12. This was due to inconsistency with Art. 39 of the Charter of Fundamental Rights Freedoms in combination with Art. 78 of the Constitution, specifically breach of the principle of *nullum crimen sine lege*. Guide values specifying a “quantity greater than small” for selected NDPSs are currently contained in the appendix of the standpoint issued by the Criminal Division of the Supreme Court, No. Tpjn 301/2013. With respect to this matter, the Criminal Division added that in order to deem that this element of the crime has been proven, the fact of whether this concerns a first-time user or a user of such substances who is at an advanced stage of dependence, or other facts affecting the degree to which the situation is health or life threatening for the user should be taken into account.

The adoption of the new Penal Code has also meant a range of ***further legislative changes*** not addressed directly at the drug offences, nevertheless it may have a significant influence on the detection and prosecution of drug offences. Such changes include for instance the introduction of bipartition of criminal offences, a move to purely formal concept of crime or changes in application of penalties and protective measures. In the subsequent part of the chapter, attention turns to other institutes that might be relevant in this respect, such as the institution of cooperating defendant, the Act on Criminal Liability of Legal Entities, the Act on International Judicial Cooperation in Criminal Matters or amendments to the administrative misdemeanour law.

The next chapter outlines the ***approaches chosen by the European Union states with respect to prosecution of unlawful handling with illicit drugs***.. Attention is paid to the matter of defining controlled substances, solutions for penalising drug use, differentiating possession

of drugs (especially cannabis) for personal use from supply, defining the legally relevant quantities and the question of control of precursors. The concluding part considers current tendencies in the area of drug control, in particular about the diversion from primarily repressive drug policy. Nevertheless this overview has to be considered as descriptive and indicative only. Deeper analysis of the legislation and a more detailed comparison of the drug situation in each country exceed the focus and the extent of this publication.

Due to our historical connections, *Slovak legislation concerning drug offences* is analysed in more detail. Despite the fact that both legislations stem from the same basis, they differ considerably from each other and their similarities are merely imagined. Slovak legislation is significantly more repressive. Despite the declared intention of recodification, it remains severe in particular towards drug users.

From a point of *basic statistical indicators*, the development in the area of drug offences in the sense of the numbers of drug offences registered by the police since 1990 may be divided into four imaginary stages. The first covered the nineteen nineties for which sustained and noticeable rise in the level of drug offences was characteristic. This rise peaked in 1999 and a noticeable overall reduction followed. From a point of view of recorded drug offences, the period between 2005 and 2010 can be described as a time of stagnation with a gradual rise from 2007. A sharp increase has been apparent since 2010. As for developments in numbers of people undergone preliminary procedure and those convicted for drug offences, a gradual upward trend can be seen for both indicators during the years surveyed.

Certainly the most frequent drug crime is unauthorised manufacture and other handling of NDPSs and poisons according to *Section 187 of the former Penal Act, now Section 283 of the Penal Code*, which accounts for more than three-quarters of all recorded drug offences. Development in the incidence of other drug offences in recorded drug criminality and the number of people convicted thereof diverged in the reference period. Possession of illicit drugs for personal use (a crime under *Section 187a of the Penal Act, now Section 284 of the Penal Code*) has gradually increased its incidence among reported drug offences to approximately 15% over the past years. The proportion of cases of cultivation of plants containing NDPSs for personal use (*Section 285 of the Penal Code*) has fluctuated since its existence as a separate drug offence between 3.5% and 5% of drug criminality recorded by the police and between 2% and 5% of convicted persons. Manufacture and possession of equipment and other objects intended for the manufacture of drugs (*Section 188 of the Penal Act, Section 286 of the Penal Code*) accounted for the greatest incidence of recorded drug crime in 2004 at 9%. Since then, the level has been falling constantly (with the

exception of 2006) and in 2014 accounted for 3%. Evidently due to different record-keeping methodologies, the highest proportion of persons convicted for manufacture and possession of equipment and other objects intended for the manufacture of drugs was recorded at the beginning of the reference period, when in 1994 it reached 15% and then 12% in 1995. Afterwards, this incidence gradually decreased, despite a growth in absolute numbers. In 2014 persons convicted for this crime accounted only for 3%. The share of police recorded incidence of the crime of inciting or promoting the use of addictive substances other than alcohol (*Section 188a of the Penal Act, Section 287 of the Penal Code*) had reached almost 20% at the turn of the century. Since the year 2000 it fell sharply to around 1% where it has remained since 2009, with the exception of 2013 where increased police activity in connection with “grow shops” made its mark. The share of persons convicted of this crime between 1996 and 2000 was on average at 7%, then gradually falling and remaining at around 1% since 2006.

Detailed statistical data of the Police Presidium of the CR and of the National Drug Headquarters of the Czech Police relating to the issue of drug offences shows that clarification of drug offences is very high in the long-term, fluctuating between 80% and 90% since 2007. No significant differences are apparent in numbers of identified perpetrators of drug offences as against the total population of identified perpetrators. In the long term, the majority of perpetrators of drug offences are prosecuted for illicit handling with methamphetamine, although over the last three years this figure has fallen slightly. Contrarily, the share of perpetrators prosecuted in connection with cannabis is rising. Perpetrators of offences committed in connection with methamphetamine and cannabis currently account for more than 90% of all perpetrators of drug offences. In the reference period there was a noticeable drop in the share of perpetrators of drug offences connected with heroin. Since 2005, the number of foreigners amongst arrested perpetrators of drug offences has more than doubled and since 2010 has been over 10%. Those arrested were dominated by citizens of Vietnam, the proportion of whom rose sharply in 2008 and since then has not fallen below 50%.

Statistical data clearly shows a steady rise in the number of detected cannabis grow sites, while there is a slight downward trend in the number of methamphetamine laboratories discovered. Over the past two years, more grow sites have been discovered than laboratories. The largest proportion of detected cannabis grow sites are home sites with a capacity of up to 50 plants (approx. 40%). However, the proportion of large-scale cannabis grow sites with a capacity of between 500 and 1,000 plants (approx. 15%) and 1,000 plants and more (approx.

10%) is not inconsiderable. While smaller grow sites with a capacity of up to 500 plants tend to be operated by Czechs, large-scale cannabis grow sites with a capacity of 500 plants and more are the domain of the Vietnamese. Prices of drugs on the street level in the CR have been fairly stable over the past ten years. A gentle fall can be seen in prices of heroin and a gentle rise in the price of marihuana. However, none of these changes can be seen to coincide with to the period immediately after the new Penal Code coming into effect. The wide price range for methamphetamine is also interesting, pointing to a wide range of drug quality available on the street level.

For *more detailed analysis of statistics from the Ministry of Justice* the chosen source of data were special statistical summaries gleaned from the judiciary's CSLAV statistics and records system. The system enables summaries to be compiled on the basis of the criteria entered, going back to 2008. A gradual rise in the index of those convicted for drug offences is evident for all regions. Relatively low indexes are found for the South Moravian and North Moravian Regions. The Capital City of Prague has gradually reached first place. The index for the Central Bohemian Region made a sudden jump in 2010. The high index in the West Bohemian, South Bohemian and North Bohemian Regions may be due to cross-border activities in connection with growing demand for methamphetamine in Germany and Austria. Statistical data shows that preliminary proceedings for drug offences are becoming gradually faster. In particular, the number of cases processed within two weeks has risen. This is probably due to the widening of the option of using shortened preliminary proceedings since 2012. In 2014, 40% of preliminary proceedings took less than 2 months. Completed criminal proceedings right up to legally binding verdicts have also accelerated in drug-related cases. The proportion of drug-related criminal cases completed with binding verdicts in 2014 had risen as against 2008 by more than 20%.

The number of foreign nationals, mostly Vietnamese, involved in the crime of unauthorised manufacture and other handling of NDPs and poisons (Section 187 of the Penal Act and Section 283 of the Penal Code), has risen in absolute and relative figures. As against 2008, the number of Vietnamese convicted is almost nine times as high. The second most numerous group is composed of citizens of the Slovak Republic. Since 2009, the third most populous group are citizens of the Federative Republic of Nigeria. After a slight fall in 2010, a rise is evident of the past years in the number of persons prosecuted and convicted for the offence defined by Section 187a of the Penal Act and Section 284 of the Penal Code. This is dominated by perpetrators of possession of cannabis for personal use under the first paragraph, who represent over 60%. Possession of cannabis is also most often dealt with in

shortened preliminary proceedings, accounting for as many as 47% of cases in 2014. The number of persons convicted for the offence of illicit cultivation of plants containing NDPSs (Section 285 of the Penal Code) is rising gradually, while so far these have always been cases of illicit cultivation of cannabis plants. The offence of manufacture and possession of equipment and other objects intended for the manufacture of NDPSs and poisons (Section 188 of the Penal Act and Section 286 of the Penal Code) is the only drug offence showing a downward trend in the reference indicators, with a minor fluctuation in 2013. The least frequent drug offence of promoting drug use (Section 188a of the Penal Act and Section 287 of the Penal Code) shows a gradual increase, after a fall in the reference indicators in 2010. In 2014, the rise in the number of prosecuted persons is striking, and can evidently attributed to the police “grow shop” raid that took place at the end of 2013. The statistics do not demonstrate that re-codification has had any fundamental effect on the composition of penalties imposed. The most frequently imposed penalty is a suspended prison sentence. Alternative sanctions are only rarely applied. Despite the growing number of persons convicted, the numbers of imposed compulsory treatment are falling.

In order to discover the opinions of employees of law enforcement authorities involved in detection and prosecution of perpetrators of drug offences concerning the changes brought by the new Penal Code for this field, as well as other observations, experiences and proposals concerning the subject of research, *an expert questionnaire survey* was conducted *among judges, public prosecutors, police officers and employees of the Customs Drugs Unit*. The field phase of the survey was conducted in March and April 2014. A total of 146 completed questionnaires were collected.

Most of the respondents are convinced of a rise in drug offences after the year 2010. The high latency is closely linked to drug offences. The primary cause of latency according to all groups of experts is the peculiarity for this type of crime in that a special relationship exists between user and perpetrator, and the user protects his source of drugs. The majority of respondents in all professional groups do not see any significant effect of the new Code on levels of latency. All groups of respondents also mainly share the opinion that after 2010, the involvement of Vietnamese in drug trade has increased. Respondents from the ranks of the police force and customs service agree on the fact that an increase in the numbers of perpetrators from the Vietnamese community can also be expected in the future. As for changes in drug consumption, specialists in both groups expect a rise in abuse of methamphetamine, marihuana and of new synthetic drugs. They also agreed on the fact that heroin consumption has fallen. Experts from both groups most often identified tolerance of

drugs in society or the social aspects of drugs in general as the main reason for the increasing availability of drugs in this country. Another serious factor contributing to greater availability of drugs in the CR is seen by the respondents to be shortcomings in legislation and their enforcement.

If the respondents were to evaluate current conditions for prosecution of drug offences in the CR in comparison with the period up to 2010, a marked difference existed between the professional groups. More police officers perceive a difference between the current situation and that of before 2010, although they are not united in their opinion of its nature – the proportion of those that think that conditions for prosecuting drug offences has improved and of those that think they have deteriorated are similar. According to the majority of respondents among public prosecutors, either conditions have remained unchanged, or they have deteriorated. Judges constituted the professional group that interpreted the development of conditions for prosecution of drug offences most favourably – although most judges from the sample group did not notice any changes, a whole third considers conditions to have improved. The respondents' comments, however, indicate that experience with the new legislation and its application on the part of the law enforcement authorities, and the resulting evaluation of development, vary considerably from one member of the same professional group to the next.

Overall the new legal provisions for drug offences stood up fairly well in the respondents' answers in comparison with the previous legislation. More than half of police officers, more than a third of public prosecutors and almost a half of the judges identified them as better. Contrarily, roughly one tenth of police officers and judges involved consider them to be worse. Only among public prosecutors was there a significant proportion who shared this opinion, even though this group was in the minority. Even so, it cannot be taken lightly that a tenth of respondents from this professional group consider the new legislation to be considerably worse than the preceding legislation. All seven participating customs officers identified the new legislation to be better. Respondents of all professional groups that consider the new legislation to be better than the preceding legislation appreciate that it is more detailed. Contrarily, respondents according to whom the legislation for drug offences has deteriorated point mainly at the fact that the new legislation has introduced more grey areas into application practice.

The main individual changes that the Penal Code has brought to the legislation for drug offences to be evaluated most negatively were changes consisting of the introduction of more levels of “scope” as a qualifying aspect of drug offences and in the empowerment in the

government decree to change the qualification of “a quantity greater than small” of NDPSs. On the other hand, respondents most positively evaluated the impacts of the changes brought by making prosecution of certain forms of drug offences harsher (repeated manufacture and distribution of NDPSs, promoting drug use to children below the age of 15). In evaluation of the separate changes of drug offences, the police officers tended to be more critical than public prosecutors and judges. In their opinions on a suitable method of stipulating the values for a “greater than small” quantity of NDPSs, the respondents agreed on the fact that they would prefer the existence of a document with concretely stipulated values for a greater than small quantity of NDPSs to the option of this aspect being left to application at individual discretion. The option of a chart of defining quantities of drugs would be contained in a unifying standpoint of the Criminal Division of the Supreme Court won the highest support with all groups of respondents.

Experts see the impacts of the legislative changes on the various forms of drug offences in different ways. Although, with respect to prosecution of manufacture and distribution the prevailing opinion among respondents was that the new Code is stricter, or remained at the same level, with respect to prosecution of possession of drugs for personal use, the respondents tend to be of the opinion that if any change occurred, it was a change towards less severe prosecution. Manifest differences existed between the separate professional groups. With regard to the length of imprisonments for separate drug crimes, the opinion that the penalties stipulated by the Penal Code were reasonable applied without exception with all of the professional groups. Despite certain unifying tendencies, opinion regarding different drug offences varied to a certain extent. A part of the respondents consider the sentences to be too lenient, this answer was chosen mostly by the police officers.

A significant amount of drug offences is committed by persons who use drugs themselves. One of the approaches used by criminal justice with respect to perpetrators who are drug users is to impose them protective measures – compulsory treatment of drug addiction and security detention. Most respondents consider the provision concerning compulsory treatment and security detention for perpetrators who are NDPS users to be appropriate. When evaluating the utility of the institute of security detention, there were a high number of those who were unable to give their opinion and a similar answer dominated when evaluating the changes in legislation of inpatient compulsory treatment during serving a prison sentence. However, most respondents consider the change involving widening the opportunity of imposing security detention on drug users who repeatedly commit a crime under the influence of or in connection with drug use to be positive.

The legal institutes considered by respondents to be useful include the institute of cooperating defendant and protective measure of confiscation of items or other assets . To the question of definition of NDPSs for the purposes of criminal law, the respondents preferred the so-called “analogical” approach, i.e. defining NDPSs in the law only according to their similarity in chemical composition and their pharmacological effects (traditional drugs and any substances that distinctly resemble them in their chemical composition and pharmacological effects). The most used source of information concerning the issue of drugs for all of the professional groups of respondents involved are experiences from the professional practice of these respondents. In any case, it can be said that in general personal contact with colleagues and scholarly literature are some of the most frequent sources.

Proposals “*de lege ferenda*” by respondents who attached a commentary concluded that the increase in the length of prison sentences and imposition of harsher punishments would be the most useful. Most proposals for change came from police officers who would welcome a complete tightening up of repression towards a certain form of criminalisation of drug use. Public prosecutors and judges consider the liberal attitude of society to the issue of drugs with respect to prevention and elimination of medical and social risks to be important. Another aspect that all professional groups mentioned was more detailed definition of the legally relevant scopes and quantities relating to drug crimes. In this respect, the respondents inclined towards reduction of the current values. In all professional groups the opinion prevailed that increasing the effect of prosecution of drug offences is not a question of a change to substantive, but rather to procedural law.

The new Penal Code has brought changes to legislation of drug offences and their prosecution that are evident at first glance. It can be deduced from the Explanatory Note to the Penal Code that the reason was not the need to change the focus or intensity of legal repression in the area of drug policy, but more of an attempt to make the substantive legislation more precise and more rational. It can be claimed that the new legislation has not presented any fundamental obstacles to detection and prosecution of drug offences. Also, the attitude of the law enforcement authorities to it is mainly positive. Comparison of the new and preceding legislations shows that the changes brought about by the Penal Code for the area of prosecution of drug offences cannot be defined as being clearly stricter or more lenient in approach to such criminality and its perpetrators, because a shift in both directions is apparent. This can be seen as a desirable attempt of greater differentiation of criminal penalties depending on the degree of severity of drug offences. ***From a point of view of legislation or in view of its practical impacts, the adoption of the new Penal Code has not***

meant any significant variation to the approach applied thus far. No shift in the drug policy of the Czech Republic has occurred that would merit significant change in the intensity or the focus of legal repression as one of the elements of such a policy and the legislation for drug offences and its prosecution in the Penal Code and related regulations correspond with this fact.

Translated by: Presto