

Sentencing of Drug Offenders: Legislators' Policy and the Practice of the Courts in South Eastern Europe

Edited by:

Thanasis Apostolou

Director, Diogenis Association

General Report



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General Report

Preface

As part of the activities of the project “Drug law reform in South East Europe” Diogenis presents in this publication the findings of the research “Sentencing of Drug Offenders: The Legislator’s Policy and the Practice of the Courts in South Eastern Europe”.

The research deals with an important issue which –in our opinion- needs to be addressed with evidence based data of the everyday practice. The unilateral choice of punishment and imprisonment as an effective response to the drug problem has been proven to be one of the major weaknesses of the current drug control system. Criminal law responses have been considered as the most effective means to tackle it. This fact has nourished the prevailing public opinion that the more severe penalties, the better. The interaction between severe repressive measures of the legislature and a large part of the public perception that tougher penalties are needed to eliminate drug use and dependence is particularly evident in South East Europe.

However, during the last twenty five years drug laws have been amended in nearly all the countries of South East Europe. Although the focus on the importance to provide public health-oriented assistance has increased steadily and the overall approach to drug use and addiction has improved, several drug law provisions remain problematic and need to be adapted to the current scientific insights and the changing social conditions.

The country reports of this research are a contribution to the search of legal provisions that are more consistent and will lead to greater efficiency. They contain valuable information about the current state of drug laws per country, summarize the problems concerning legislation and practice on sentencing of drug law offenders and suggest alternatives.

The current discussion about the shift in drug policy and drug legislation from repressive measures and actions to public health, social inclusion and respect for human rights is supported by the findings in this research. The identification of sanctioning practices on the state (macro) level and the analysis of the practice in drug offence cases on a county (micro) level, confirm facts that are generally shared. Most drug offenders are prosecuted for and convicted of possession of drugs for personal use. Statistics also show that a significantly

A small number of drug traffickers are convicted as compared with all the other groups of offenders.

A significant finding of the research is that judges are interpreting legislation in different ways. There is a small number of judges who impose sanctions which are harsher than those required by the legislator. Some of them see drug possession per definition as drug trafficking. The vast majority of the judges, however, is more lenient than the legislator, because they take into consideration all aspects of the situation of the offender (family, social and economic situation, previous convictions etc.) It is more and more common practice that the courts pronounce very often a suspended sentence by absence of prior conviction or other extenuating circumstances and see drug offenders primarily as persons in need of treatment. In this context we may say that the judiciary must be consulted and be taken seriously by the responsible politicians and the governments before proposing new legislation on drugs.

In several countries –and also in international level– an intense discussion is taking place about punishing or not drug possession for personal use and minor drug offences. Decriminalization of drug possession for personal use is introduced in some countries with success and positive results. At the United Nations meetings, several high rank officials express the opinion that the international drug control conventions do not impose on Member States obligations to criminalise drug use and possession for personal consumption. The recent UN General Assembly Special Session (UNGASS) calls Member States to “encourage the development, adoption and implementation, with due regard to national, constitutional, legal and administrative systems, of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature” and “Promote proportionate national sentencing policies, practices and guidelines for drug-related offences whereby the severity of penalties is proportionate to the gravity of offences and whereby both mitigating and aggravating factors are taken into account”. We hope that member states in the region of South East Europe will consider these calls as an encouragement to continue reforming their drug legislation in this direction.

This research is an example of co-operation between civil society organisations and the scientific community. Diogenes owes thanks to the researchers who have been willing to do this work with very scarce resources and great enthusiasm. Thanks also to the European Commission and the Open Society Foundations for their financial support.

*Thanasis Apostolou, Director of
Diogenis, Drug Policy Dialogue*

General Report

1. Introduction

In the last couple of years, the issue of how to address drug problems has been part of an intensive public, scientific and political debate in the region of South Eastern Europe (SEE). The adequacy of enacted legislative solutions, the effectiveness of the applied measures, and actions organised by governments have come under intense scrutiny. Non-governmental organisations (NGOs) have become more and more involved in the public debate over drug policy, openly requesting officials to amend the existing laws and to reorganise activities related to illicit drugs in order to respond more adequately to drug issues and devise more humane, cost-effective and evidence-based policies.¹ Furthermore, several countries have been asked to harmonize their laws with the aim of meeting the requirements of the European Union in the process of accession.² Although national strategies on drugs and action plans have been adopted in the countries of South Eastern Europe, there have been no effective mechanisms to monitor implementation and to evaluate whether the current and newlyproposed legislative solutions are in accordance with the standards proclaimed in these documents. Another significant shortcoming of the reforms has been the lack of a comprehensive approach based on an in-depth analysis and comparative evaluation of legislative solutions which have worked elsewhere in practice and could be implemented in a particular country. Although there are reports that in several European countries public action is more powerful when based on treatment rather than on criminal punishment, and on harm reduction rather than on

¹ . See the activities of the South East European Drug Policy Network at: http://www.diogenis.info/index.php?menu_id=c59092ce-820c-11e0-822c-1c0ce76237ea&language=en For information on NGO's initial involvement and networking in the European region see: Vara, C., A.: NGOs' Networking Observed from Within, published in: Estievenart, G. (ed.): *Policies and Strategies to Combat Drugs in Europe: The Treaty on European Union: Framework for a New European Strategy to Combat Drugs?*, European University Institute, Martinus Nijhoff Publishers, Dordrecht, 1995, pp. 307-310.

² . For more information on policy development at the European level, see: MacGregor, S. and Whiting, M.: *The Development of European Drug Policy and the Place of Harm Reduction within This, Harm Reduction: Evidence, Impacts and Challenges*, EMCDDA, Lisbon, 2010, pp. 59-77.

punitive prohibition, in most SEE countries legislative reform merely involved the introduction of amendments to criminal law.³ Being aware of the urgent need to develop more comprehensive policies in a comparative context, the Diogenis Association took the initiative to set up a project on drug law reform in the SEE region. The project provided a good example of non-governmental involvement in shaping drug policy and influencing drug legislation, as well as of co-operation between NGOs in the field of drugs and experts affiliated with research institutions and universities in SEE. The outcome of the project was a comprehensive review of drug policy and its enforcement in practice in 10 countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Greece, Montenegro, Romania, Serbia and Slovenia).⁴

The research showed that there is a distinct gap between the published strategies and their implementation in practice. It was confirmed that national strategies were adopted in all, and action plans in most, of the SEE countries; however, the majority of countries have not evaluated these basic documents. Although from the same region and influenced by the German legal tradition, the countries included in the research have developed different legislative solutions with respect to drugs. Significant differences exist with regard to criminal law, in particular. There is a vast variation of drug-related criminal offences and sanctions imposed. The participating countries have also applied different conditions for imposing suspended sentences to drug offenders and mandatory or voluntary treatment.

Notwithstanding the legislative differences, all SEE countries share common problems related to prisons. Over the last ten years, the phenomenon of prison overcrowding has continued to impair their penitentiary systems. Due to the large increase in prison populations, attempts to improve living conditions in

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³ . Dobovšek, B., Antonopoulou, A., Slak, B. and Apostolou, T.: Trends and developments in drug legislation in SEE http://www.diogenis.info/ckfinder/userfiles/files/Briefing_paper_nr_3_Trends_and_developments_in_Drug%20legislation_SEE_English_final.pdf.

⁴ . Apostolou, T. (ed.): *Drug Policy and Drug Legislation in South East Europe*, Nomiki Bibliothiki Group, Athens, 2013. <http://www.diogenis.info/ckfinder/userfiles/files/DRUG-POLICY-AND-DRUG-LEGISLATION-IN-SOUTH-EAST-EUROPE-web.pdf>

prisons and to establish adequate treatment for prisoners have been seriously impaired. It was noted that a significant majority of prisoners were convicted of drug offences and that they needed substance abuse treatment and harm reduction practices while imprisoned. The lack of alternatives to imprisonment for drug dependent prisoners and of harm reduction policies within prisons results in a high probability of subsequent criminal and drug use behaviour.⁵ Moreover, the fact that incarceration has been the dominant response to drugaddicted offenders and that drug use has increased in prisons is likely to have serious implications for the social (re)integration of drug dependent inmates once released from prison.

The research has shown significant shortcomings of the drug policy, which strongly relied on punishment and incarceration. Penal responses were seen as the only good solutions for drug issues. The prevailing public view in most of the SEE countries is that the harder the punishment, the better. Punitive regulations in force support, and are supported by, public demand for strict penalties.⁶ In certain SEE countries, whenever drug-related offences were amended, the legislative intervention was strictly punitive, imposing new types of criminal offences and/or increasing penalties. The political context of punishment and incarceration for drug offenders has also influenced court practice. There were examples of court judgments from which it appeared that drug possession for personal use was considered to be drug trafficking, and offenders were sentenced accordingly.⁷ On the other hand, it was noted that in certain SEE countries courts are reluctant to impose harsher penalties even though the sentencing framework for a certain drug offence has been

⁵. Stöver, H. and Kastelic, A.: Drug Treatment and Harm Reduction in Prisons, published in: Enggist, S., Møller, L., Galea, G. and Udesenp, C. (eds.): *Prisons and Health*, World Health Organisation, Copenhagen, 2014, p. 113.

⁶. Due to the fact that public opinion is strongly formulated and informed by the media, the public at large adopts the position of the official policy-makers. Hawdon, J. and Kleiman, M.: *Encyclopedia of Drug Policy: "The War on Drugs" Past, Present, and Future*, Sage, Los Angeles, 2011, p. 281; Cullen, F., T., Fisher, B., S. and Applegate, B., K.: Public Opinion about Punishment and Corrections, Crime and Justice, vol. 27, 2000, p. 4. Because of a tendency towards excessive harshness, scholars argue that voters should not make sentencing policy through direct democracy. O'Hear, M., M.: When Voters Choose the Sentence: The Drug Policy Initiatives in Arizona, California, Ohio, and Michigan, Federal Sentencing Reporter, vol. 14, No 6, 2002, p. 337.

⁷. Balica, E. and Păroșanu, A.: Country Report Romania, published in: Apostolou, T. (ed.), *op. cit.*, p. 254.

increased by legislative amendment. In these cases, even if the legislature considers that certain criminal acts are more dangerous for society and increases penalties accordingly, the courts do not necessarily follow the legislature's shift in thinking, because they take into consideration mitigating circumstances and deliver milder sanctions.⁸

With these conclusions in mind, the Diogenis Association decided to launch a new project about legislators' and courts' policies in drug crime punishment. The project entitled "Sentencing of Drug Offenders: Legislators' Policy and the Practice of the Courts" was constructed as a mutual endeavour of NGO representatives and researchers and scientists from several countries in SEE to strengthen the voice of civil society in the process of drug law reform. The main aims of the project were to research existing criminal regulations on drugs and their previous amendments, and to analyse case law with respect to drug offences in order to find out whether it is possible to resolve drug issues by mostly relying on repression.⁹

In relation to the project aims, the first project objective was to identify and analyse the development of punitive legislative policy in the SEE region in the last ten years. The project also aimed at identifying sanctioning practices on the state (macro) level in the same period, in order to give practical indications as to whether courts follow shifts in punitive legislative policy. Thirdly, the project intended to analyse court practice in drug offence cases in order to single out sentencing practices on a county court (micro) level. Cases from one county court were scrutinised to find out what kind of drug offences were committed in practice, who the perpetrators were and how these and other objective and subjective circumstances were evaluated by the courts when selecting the sanction for the convicted person in each particular case. The project results are used to evaluate the success of current drug policies

⁸. Horvatić, Ž.: *Problem odnosa u zakonu propisane i sudskim presudama primijenjene kaznenopravne represije prema počiniteljima kaznenih djela* / The Problem of the Relation of Legally Prescribed Criminal Repression Towards Criminal Offenders and that which is Applied through Court Judgments, Croatian Annual of Criminal Law and Practice, vol. 11, No 2, 2004, pp. 412-413.

⁹. The project research proposal was discussed during the Informal Dialogue on Drug Policy, Kalambaka Greece, June 21-22, 2013
http://www.diogenis.info/index.php?menu_id=3e1ea6bc-153d-102f-a5c7-001d92b1a429&language=en pp. 8-10

2. NATIONAL LEGISLATIVE POLICY ON DRUGS

based mostly on repressive criminal law in SEE countries, to support legislative reform initiatives based on scientific evidence, and to enhance and promote the participation of civil society in shaping drug policy in SEE countries. The countries involved in this project are: Bosnia and Herzegovina, Bulgaria, Greece, Croatia, Montenegro, the Former Yugoslav Republic of Macedonia, Romania, Serbia and Slovenia.

2. National legislative policy on drugs

2.1. Legislative drug policy framework

The legislative policy framework and its basic nomotechnical divisions of legislative drafting have not changed over the last decade. In the SEE region, it is commonly accepted that the legislative drug policy is defined in special laws (*lex specialis*) prescribing the conditions for drug manufacturing, possession and trafficking, drug abuse control measures, measures to reduce and prevent drug addiction and to help drug-addicted persons, as well as in criminal codes that shape state repression for the most severe criminal conducts.¹⁰ For example, in **Croatia** the Drug Abuse Prevention Act regulates issues concerning drugs, while the Law on Control of Narcotic Substances and Precursors is in force in **Bulgaria**, and the Law on Control of Narcotic Drugs and Psychotropic Substances in the **Former Yugoslav Republic of Macedonia**. Similar laws are in force in **Montenegro** (the Law on Control of Production and Distribution of Substances Which Can be Used in the Production of Narcotic Drugs and Psychotropic Substances, and the Law on the Prevention of Drug Abuse) and **Serbia** (the Law on Psychoactive Controlled Substances and the Law on Substances the Most Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances). In **Greece**, the fundamental legislation aimed at suppressing misuse of drugs and

¹⁰ . The above-mentioned dual system of norms, as well as the introduction of *lex specialis* as a legislative means to regulate drug (ab)use, was constructed in accordance with the international drug conventions and their proposals to establish criminal legislative measures under the domestic law. Hamaide, J.: Repression of Illicit Drugs in Western Europe: Aspects of legal Practice, published in: Estievenart, G. (ed.), *op. cit.*, p. 147.

adequately treating drug offenders is Law No 4139/2013, entitled “Law on Addictive Substances and Other Provisions”.

In **Romania**, the legislative policy on drugs is based on several special laws:

Law No 143/2000 on Preventing and Combating Illicit Drug Trafficking and Consumption, Law No 339/2005 on the Judicial Regime of Plants, Substances and Products with Narcotic or Psychoactive Effect, and Law No 194/2011 on Counteracting Operations with Products Suspected to Have Psychoactive Effects, other than those Stipulated by the Legislation in Force. Drug offences related to drug precursors are regulated by Government Emergency Ordinance No 121/2006 on the Legal Status of Drug Precursors, which was subsequently approved by Law No 186/2007. While defining the national legislative policy on drugs, the **Slovenian** legislature applied a similar approach enacting three different special laws (the Production of and Trade in Illicit Drugs Act, the Act Regulating the Prevention of Use of Illicit Drugs and Treatment of Drug Users, and the Act on Precursors for Illicit Drugs). Due to its fragmented national legislation, the drug legislative policy is highly complex in **Bosnia and Herzegovina**; however, it does not differ from the standard nomotechnical systems applied in other countries. The Law on the Prevention and Suppression of Drug Abuse in Bosnia and Herzegovina, as well as the Public Order and Peace Laws (for the Republic of Sprska, Brčko District and 10 laws at the canton level) consist of normative rules that govern special drugrelated issues, while four different criminal codes define drug-related offences and impose sanctions on drug offenders depending on the territorial jurisdiction (the Criminal Code of Bosnia and Herzegovina, the Criminal Code of the Federation of Bosnia and Herzegovina, the Criminal Code of the Republic of Srpska and the Criminal Code of Brčko District).

2.2. Strong reliance on criminal justice policy

The state suppression of drug abuse relies heavily on criminal justice policy. The policy has been shaped by the Criminal Code provisions concerning drugs as part of a comprehensive approach towards prevention of and fight against drug crime. Declaring certain conducts involving drugs as criminal offences and imposing sanctions on drug offenders is the backbone of the legislative drug policy, and a clear sign that criminal legislation is mostly used

in the harm prevention context.¹¹ The approach taken has been justified as a response to state obligations assumed by becoming a party to various interna-

¹¹. A theoretical analysis of issues on harm, prevention and the criminal law has been given in: Waiton, S.: *The Politics of Antisocial Behaviour: Amoral Panics*, Routledge, New York, 2008, pp. 8-10. See also: Ashworth, A. and Zedner, L.: Prevention and Criminalization: Justifications and Limits, *New Criminal Law Review: An International and Interdisciplinary Journal*, vol. 15, No 4, 2012, pp. 542-571.

tional conventions on drugs.¹² All participating countries signed and ratified the UN international conventions on drugs (the 1961 UN Single Convention on Narcotic Drugs as well as its 1972 Geneva Protocol, the 1971 UN Convention on Psychotropic Substances and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).¹³ The States Parties have been applying for years this strategy of preventing drug use through drug criminalisation and punitive sentencing policies.¹⁴ Consequently, the criminal legal regulations have had a central role in constructing the legislative policy on drugs in the SEE region.

3. Criminal legislative policy on drug offences

3.1. Crime classification systems

To attempt to suppress the most non-conforming, threatening and dangerous behaviours involving drugs by penalising them has never been an issue in the SEE region. However, differences do exist in criminal justice system classifications of drug-related offences, depending on severity criteria and imposed sanctions. For example, in **Greece** criminal offences are classified as felonies, misdemeanours or transgressions, and this triad of crimes scheme has been directly applied in the current legal framework of state-level regulation of conduct involving drugs.¹⁵ Under the 2013 Law on Addictive

¹² . Boiteux, L., Peluzio Chernicharo, L. and Souza Alves, C.: Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws, published in: Caiuby Labate, B. and Cavnar, C. (eds.): *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use*, Springer, Heidelberg, New York, 2014, p. 4.

¹³ . Ruyver, B. (ed.): *Multidisciplinary Drug Policies and the UN Drug Treaties*, Institute for International Research on Criminal Policy, Antwerpen, 2002, p. 153.

¹⁴ . Imprisonment has been used as a deterrence measure to avoid drug use; however, such tactics did not reduce the number of civilian drug addicts or increase public safety. Haney, C.: Psychology and the Limits to Prison Pain Confronting the Coming Crisis in Eighth Amendment Law, Psychology, Public Policy, And Law, vol. 3, 1997, pp. 510-511. For the negative consequences of the “war on drugs” policies see Martin, J., A.: Drugs, Crime, and Urban Trial Court Management: The Unintended Consequences of the War on Drugs, Yale Law and Policy Review, vol. 8, No 1, 1990, pp. 117-145.

¹⁵ . Anagnostopoulos, G., I. and Magliveras. K.: Criminal Law in Greece, International Encyclopaedia of Laws (IEL) / Criminal Law Series, Kluwer Law International, The Hague, 2000.

Substances and Other Provisions, drug offences are constructed as felonies and misdemeanours with respect to bipolar drug use-drug supply criteria.¹⁶ More precisely, a certain type of criminal act is classified as a felony or misdemeanour depending on whether the offender is a user or a supplier. A distinction between levels of risk for public health and the lives of individuals caused by certain prohibited acts involving drugs has been the legal rationale for the application of the criteria. The dangerousness of drug offences is one of the substantive distinctions applied in the classification of drug crimes and misdemeanours in **Bosnia and Herzegovina, Croatia, Montenegro and Slovenia**.

Unlike the above countries, the criminal justice system in **Bulgaria and Romania** is constructed upon a single crime classification system. According to the general criminal law principle, all prohibited acts are considered to be criminal offences.¹⁷ No matter what the expressed principle, the classification is eroded by the introduction of administrative violations in both countries.

3.2. The practice of the *ne bis in idem* principle

This analysis has found that certain administrative violations under the **Bulgarian** Law on Control of Narcotic Substances and Precursors can also be qualified as criminal offences. Regardless of the normative overlap, the distinction between prohibited acts provided for by law is clear and precise and, therefore, court practice ensures that legal actions are not instituted twice against the offender for the same conduct.¹⁸

Although there are certain significant similarities between the determination of criminal conducts related to unauthorised production, sale and possession

¹⁶ . Antonopoulou, A.: Country Report Greece, published in: Apostolou, T. (ed.), *op. cit.*, p. 181.

¹⁷ . Bojadjieva, J.: Country Report Bulgaria, published in: McDonald, W. (ed.): *World Factbook of Criminal Justice System*, 2002, <<http://www.bjs.gov/content/pub/html/wfcj.cfm>>; Brînză, W., G.: The New Penal Code. European Union Requirement or Necessity for Romania?, AGORA International Journal of Judicial Sciences, No 3, 2013, pp. 14-18.

¹⁸ . For a brief overview of criminal offences and administrative violations related to drugs in Bulgaria see: Shentov, O., Stoyanov, A. and Yordanova, M.: *Penitentiary Policy and System in the Republic of Bulgaria*, Centre for the Study of Democracy, Sofia, 2011, pp. 62-66.

of narcotic drugs as misdemeanours and crimes in different legal instruments in **Bosnia and Herzegovina**, the prohibition on prosecution twice for the same conduct is upheld. It is up to the public prosecutor to decide whether to prosecute the offender in the criminal court or to forward the case to the misdemeanour court, after careful evaluation of all circumstances of the individual case. Despite the fact that definitions of criminal conducts are not harmonised, this research has found that drug offenders are charged and prosecuted only once and that in most cases priority is given to the instigation of criminal proceedings. The same conclusion has been reached with respect to prosecutorial practice in **Montenegro**.¹⁹

The experience of **Bulgarian, Bosnian and Montenegrin** national judicial bodies with respect to drug-related offences has not been mutually shared in the SEE region. In the **Former Yugoslav Republic of Macedonia**, for example, the use of narcotic drugs and psychotropic substances in public places constitutes a misdemeanour under the Law on Offences against Public Order and Peace, punishable by a fine of € 200 to 500. Moreover, the possession of drugs with intent to sell them is a criminal offence punishable by imprisonment from 6 months to 3 years or from 3 to 10 years depending on the amount of drugs in possession. Despite the fact that possession of drugs for personal use is not a criminal offence, the analysis of court practice has demonstrated that a certain number of offenders were found guilty in misdemeanour proceedings and subsequently in criminal proceedings before a criminal court. The case law is highly problematic. On the one hand, the intent to sell drugs has been presumed by courts, artificially converting lesser criminal acts into serious crimes. On the other hand, this practice is contrary to the *ne bis in idem* principle enshrined in Article 7 of the FYR Macedonian Code of Criminal Procedure and Article 4 of Protocol No 7 to the European Convention of Human Rights and Fundamental Freedoms.²⁰

¹⁹ . There is no common and equivalent standard of the *ne bis in idem* principle between European states. Vervaele, J., A., E.: *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, Utrecht Law Review, vol. 9, No 4, 2013, p. 212.

²⁰ . For the Court's interpretation of the right not to be tried twice see *Sergey Zolotukhin v. Russia*, ECHR final judgment on 10 February 2009, Application No 14939/03, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91222>>; *Glantz vs. Finland*, ECHR final judgment on 20 May 2014, Application No 37394/11, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144114>>

The principle of *ne bis in idem* has long been incorporated in the **Croatian** legal system. A general notion among criminal legal experts is that the principle is not infringed if the previously imposed sentence upon the offender for a misdemeanour is included in the pronounced sentence for the crime.²¹ According to the 2001 Drug Abuse Prevention Act, possessing drugs for personal use is a misdemeanour punishable by a fine; before the 2012 Criminal Code amendments, it was a crime punishable by imprisonment not exceeding one year. When deciding the measure of punishment to be pronounced against a drug possessor already prosecuted and tried before a misdemeanour court, the Croatian criminal courts would convert the previously pronounced fine into imprisonment before deducting it from a final prison sentence pronounced for the crime of drug possession. This practice proved to be highly problematic. The European Court of Human Rights strongly emphasised that the deduction of sentences did not alter the fact that the offender was tried twice for the same offence.²² Due to double legal classifications of the same offence, Croatian criminal practice was burdened with duplication of criminal proceedings, violating the offender's right not to be tried or punished twice. Faced with sharp and determined criticism as well as possible future applications before the European Court of Human Rights, the Croatian legislature took a decisive step towards a more lenient sentencing policy on drugs. The possession of drugs for personal consumption was decriminalised through the 2012 Criminal Code amendments.²³

3.3. Unauthorised manufacture of and trade in drugs and associated sanctions

In the SEE region drug abuse prosecutions are constructed according to the gravity and degree of danger to the health of people as a consistent value. In most countries participating in the research, criminal offences consist of two

²¹ . Zlatarić, B.: *Krivično pravo opći dio* / Criminal Law General part, Informator, Zagreb, 1977, p. 9: Novoselec, P.: *Opći dio kaznenog prava* / General Part of the Criminal Law, Manualia Universitatis Studiorum Zagradiensis, Zagreb, 2007, p. 64.

²² . *Maresti vs. Croatia*, ECHR final judgment on 25 September 2009, Application No 55759/07, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>>; *Tomasović v. Croatia*, ECHR final judgment on 18 January 2011, Application No 53785/09, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107047>>

²³ . Grozdanić, V., Škorić, M. and Martinović, I.: *Kazneno pravo opći dio* / Criminal Law General Part, Faculty of Law, University of Rijeka, Rijeka, 2013, p. 16.

sets of prohibited acts: unauthorised manufacture of and trade in drugs, and enabling the use of drugs. The prohibited acts and prescribed sanctions for these drug-related offences are presented here in two separate tables.

Table 1
Unauthorised manufacture of and trade in drugs and associated sanctions in Bosnia and Herzegovina, Croatia, FYR Macedonia, Montenegro, Serbia and Slovenia

	Bosnia and Herzegovina	Croatia	FYR Macedonia	Montenegro	Serbia	Slovenia
	Art. 238 of the CC of the B&H Federation	Art. 190 of the CC	Art. 215 of the CC	Art. 300 of the CC	Art. 246 of the CC	Art. 186 of the CC
Prohibited conduct	Prescribed term of imprisonment					
Unauthorised manufacturing and processing of drugs without intent to sell		6 months to 5 years			6 months to 5 years	
Distribution of drugs	1-10 years	1-12 years	3-10 years	2-10 years	3-12 years	1-10 years
Aggravated distribution of drugs		3-15 years		2 or 3-12 years of imprisonment depending on circumstances		3-15 years
Mitigated distribution of drugs			6 months to 3 years			

Offending within a group	3-20 years	3-20 years	at least 5 years	3-15 years	5-15 years or at least 10 years depending on circumstances	5-15 years
Criminal responsibility for more severe consequences		5-20 years				
Unauthorised manufacturing of equipment, materials or substances used to produce drugs and analogues thereof	6 months to 5 years	6 months to 5 years	1-5 years	6 months to 5 years		6 months to 5 years

It is evident from Table 1 that drug offences such as the unauthorised manufacture of and trade in drugs consist of almost identical criminal acts and carry very similar prescribed sanctions in six SEE countries. A basic form of prohibited drug-related conduct concerns *distribution of drugs* (unauthorised manufacturing, processing, transporting, procuring, possessing and marketing of drugs that are intended for unauthorised sale or placing on the market in some other way), with the exception of **Croatia** and **Serbia**. According to the Croatian Criminal Code (Art. 190(1)), manufacturing and processing substances which are declared by law to be drugs is a basic drug offence punishable by imprisonment for a term of six months to five years. The court experience has shown that the great majority of drug manufacturers are drugaddicted offenders who cultivate plants from which a drug can be obtained or in some other way produce drugs for their own consumption.²⁴

²⁴ . Cvjetko, B.: *Kazneno zakonodavstvo i kaznenopravna reakcija na kazneno djelo zlouporabe opojnih droga u Republici Hrvatskoj* / Criminal Legislation and Criminal Legal Reaction to the Criminal Offence of Abuse of Narcotic Drugs in the Republic

Bearing this in mind, the legislator has imposed lesser sanctions for drug producers who at the time of committing the offence did not act with intent to sell. Likewise, offenders who cultivate poppy plants, cannabis or other plants to produce drugs in Serbia may be punished with six months' to five years' imprisonment. The cited provision is the only example in which a criminal offence is constructed with respect to *the degree to which a psychoactive drug is harmful to a user* in the countries on Table 1. It has to be emphasised that drug harmfulness is a normative standard to define the severity of sanctions for drug offences applied in **Bulgaria** and **Romania**. For this reason, the legislator's criminal policy in these countries will be analysed separately.²⁵

The *amount of drugs involved* is a determining factor for drug offence qualification only according to the **FYR Macedonian** Criminal Code. In 2009, a new paragraph was introduced in Article 215 to differentiate between the punishment of small drug dealers and drug offenders who engage in distribution of larger amounts of drugs. In accordance with this provision, drug offenders who distribute a smaller amount of narcotic drugs, psychotropic substances or precursors shall be punished with imprisonment of six months to three years. Although this provision could have been an important step towards a more lenient sentencing policy on drugs, a repressive tone has been maintained due to the fact that the penalty threshold for the basic offence of distribution of drugs was increased from one to three years of imprisonment.

Criminal legislative policy in these six SEE countries is stricter if drug production or drug distribution is committed within a group. Organisers of a network of resellers or middle-men for the production or distribution of drugs shall be sentenced to imprisonment of three to fifteen years in **Montenegro**. The penalty threshold is slightly higher in the **FYR Macedonia**, **Serbia** and **Slovenia**, while the upper limit is increased in **Croatia** and **Bosnia and Herzegovina**. A distinction between drug distribution within a group vs.

of Croatia, Croatian Annual of Criminal Law and Practice, vol. 10, No 2, 2003, pp. 915-916; New Approaches of Policy on Drugs & Interventions, Report on the Informal Dialogue on Drug Policy, Kalambaka Greece, June 21-22, 2013, http://www.diozenis.info/index.php?menu_id=3e1ea6bc-153d-102f-a5c7-001d92b1a429&language=en

²⁵ . The legislative solutions are in accordance with Global Commission on Drug Policy recommendation that governments should experiment with legislative models and differentiate among drugs. O'Connor, M., P. and Rumann, C., M., *op. cit.*, p. 125.

within a criminal organisation is only made by the **Serbian** Criminal Code. Drug offenders who are members of a criminal organisation shall be punished with imprisonment of at least ten years.²⁶

A special aggravated offence depending on *the personal characteristics of a drug buyer, drug distributor, crime location and other aggravated circumstances* exists in only three SEE countries of Table 1. In **Croatia** and **Serbia**, the court may impose a prison sentence of three to fifteen years if the basic offence is aggravated (e.g. committed against a minor or a person with severe mental difficulties), or in an educational institution or in its immediate proximity, or in a penal institution or if the offender is a public official who offends in relation to his/her functions or public authority. Offenders prosecuted for the same crime in **Montenegro** may expect a slightly lower prison sentence. The aggravated distribution of drugs, constructed in the manner described above, has been introduced in the relevant Criminal Code provisions to harmonise the prescribed legislative frameworks with the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

If severe consequences arise from the commission of a basic offence (e.g. severe impairment of health of a great number of persons or death of a person to whom a drug was distributed), the **Croatian** courts may pronounce a sentence of imprisonment for a term of at least five years. The Croatian example of regulating the drug distributors' criminal responsibility for more severe consequences is an exception in the SEE region. On the other hand, Criminal Code provisions prohibiting the unauthorised manufacturing of equipment, materials or substances used to produce drugs and analogues thereof are harmonised to a significant extent.²⁷

²⁶ . Art. 246(3) and (4) of the Criminal Code of the Republic of Serbia, Official Gazette No 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013.

²⁷ . The criminal offences are in accordance with Articles 2 and 4 of the 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, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:335:0 008:0011:en:PDF>>

3.4. Enabling the use of drugs and associated sanctions in Bosnia and Herzegovina, Croatia, FYR Macedonia, Montenegro, Serbia and Slovenia

The data presented in Table 2 show that criminal legislative policy on drug offenders who encourage others to use narcotic drugs or create conditions for such use does not significantly differ in the six surveyed countries of Table 2. Punitive responses to this particular drug offence, as far as the elements of criminal offences and sanctions are concerned, are to a large extent consistent.

Variations exist in punitive policies with respect to criminal sanctions for causing the death of a person to whom illicit drugs were given. According to the **Croatian** and **Serbian** criminal law, such conduct constitutes a separate, aggravated offence punishable by imprisonment for between three and fifteen years. Except from providing for slightly increased penalties for drug offences under Article 187 of the Criminal Code, the **Slovenian** legislature has excluded unlawfulness in the case where the offence is committed during a treatment programme or a programme for controlled drug use. Furthermore, this analytical discussion has found that drug possession has not been criminalised in all six SEE countries of Table 2. For example, having drugs in one's possession is considered to be a crime according to the Federal Criminal Code of **Bosnia and Herzegovina**, as well as the **Serbian** Criminal Code. In contrast, the **Croatian** and **Montenegrin** policies take a more lenient approach to drug misuse, keeping drug possession in the sphere of the forbidden but not criminalised. In 2010, drug possession was decriminalised in Brčko District of **Bosnia and Herzegovina**, as well.

Table 2
Enabling drug use and associated sanctions in
Bosnia and Herzegovina, Croatia, FYR Macedonia,
Montenegro, Serbia and Slovenia

Bosnia and Herzegovina	Croatia	FYR Macedonia	Montenegro	Serbia	Slovenia
Art. 239 of the CC of the B&H Federation	Art. 191 of the CC	Art. 216 of the CC	Art. 301 of the CC	Art. 247 of the CC	Art. 187 of the CC

Prohibited conduct	Prescribed term of imprisonment					
Encouragement of others to use narcotic drugs and creation of conditions for such use	3 months to 5 years	6 months to 5 years	3 months to 5 years	6 months to 5 years	6 months to 5 years	6 months to 8 years
Aggravated encouragement of others to use narcotic drugs and creation of conditions for such use	1-10 years	1-10 years	1-10 years	2-10 years	2-10 years	1-12 years
Criminal responsibility for death of a person subjected to the criminal conduct		3-15 years			3-15 years	

3.5. Unauthorised manufacture of and trade in drugs and associated sanctions in Bulgaria and Romania

In contrast to the punitive legislative policy adopted in the six countries on Tables 1 and 2, in **Bulgaria** and **Romania** the categorisation of drug-related criminal offences depends on the type of the controlled substances involved. The Romanian legislature has divided offences according to high-risk drugs and lower-risk drugs. In 2006, a new category of drug offences related to precursors was introduced under the Government Emergency Ordinance No 121/2006. In Bulgaria the classification is almost identical, consisting of three basic categories: high-risk narcotic drugs or analogues thereof, lower-risk narcotic drugs or analogues thereof, and precursors and facilities or materials for the production of narcotic drugs or analogues thereof.

Table 3 presents the legislative sentencing policy on unauthorised manufacture of and trade in drugs in Bulgaria and Romania. There are some similar approaches, but the differences in punitive policies are more

significant than those noted in the discussion about Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Slovenia and Serbia. Policy coherence in these six countries is partially due to their having had a shared common legal tradition for years, while members of the Yugoslav Federation. Dissimilarities in punitive legislative policy are more prominent when offences related to enabling the use of drugs are compared.

Table 3
Unauthorised manufacture of and trade in drugs and associated sanctions in Bulgaria and Romania

Art. 242, 354a-354c of the CC		Bulgaria	Romania
		Law No 143/2000; GEO No 121/2006	
Prohibited conduct	Types of drugs	Punishment	
Unauthorised possession	R substance		
	H-R substance		
	Precursors and similar risk substances		6 months to 5 years or a fine
Unauthorised manufacturing and processing of drugs without intent to put them into circulation	R substance		3 months to 2 years or a fine
	H-R substance		6 months to 3 years
	Precursors and similar risk substances		
Distribution of drugs	R substance	1 to 6 years and a fine	2 to 7 years and deprivation of certain rights
	H-R substance	2 to 8 years and a fine	5 to 12 years and deprivation of certain rights

	Precursors and similar risk substances	3 to 12 years and a fine	3 months to 3 years or a fine; 6 months to 5 years or a fine
Smuggling of drugs in or out of the country	R substance	3 to 15 years and a fine	3 to 10 years and deprivation of certain rights
	H-R substance	10 to 15 years and a fine	7 to 15 years and deprivation of certain rights
	Precursors and similar risk substances	2 to 10 years and a fine	6 months to 5 years or a fine
Aggravated smuggling of drugs in or out of the country		15 to 20 years and a fine	
Aggravated distribution of drugs in respect of:	large quantity of prohibited substances	3 to 12 years and a fine	
	particularly large quantity of prohibited substances	5 to 15 years and a fine	
	personal characteristics of the offender, offending within an organised criminal group and other circumstances	5 to 15 years and a fine	

3.6. Enabling drug use and associated sanctions in Bulgaria and Romania

In accordance with national legislation, a physician who unlawfully prescribes prohibited substances to a person may be sentenced to no more than 5 years in prison in **Bulgaria** and for a term of one to five years in **Romania** (provided that the object of the offence is a high-risk substance, which is not the case in **Bulgaria**). In both countries the possession of drugs for personal use is prohibited. The **Bulgarian** Criminal Code prescribes

different sanctions for this type of offence depending on risk factors associated with the drugs in possession (one to six years and a fine for possession of high-risk drugs, imprisonment of up to one year and a fine for possession of risk drugs or only a fine not exceeding BGN 1,000 in minor drug possession cases). It is interesting to note that in Romania the prohibition is of declarative nature due to the fact that Law No 143/2000 does not impose a sanction for possessing drugs for personal consumption.

Table 4
Enabling the use of drugs and associated sanctions
in Bulgaria and Romania

Art. 242, 354a-354c of the CC		Bulgaria	Romania
		Law No 143/2000; GEO No 121/2006	
Prohibited conduct	Types of drugs	Punishment	
Unauthorised possession	R substance		
	H-R substance		
	Precursors and similar risk substances		6 months to 5 years or a fine
Unauthorised manufacturing and processing of drugs without intent to put them into circulation	R substance		3 months to 2 years or a fine
	H-R substance		6 months to 3 years
	Precursors and similar risk substances		
Distribution of drugs	R substance	1 to 6 years and a fine	2 to 7 years and deprivation of certain rights

	H-R substance	2 to 8 years and a fine	5 to 12 years and deprivation of certain rights
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3.7. The Greek criminal legislative policy on drugs

The Greek criminal legislative policy on drugs is unique compared to that of the other countries included in this research, as it is based on a division originating from the principle that drug offences committed for personal use and those committed for commercial use demand different punitive responses.

²⁸ Law No 4139/2013 stipulates different felonies and misdemeanours for drug-addicted and non-addicted offenders, and the prescribed punishments vary accordingly. For example, Greek criminal courts may impose imprisonment of at least 8 years upon drug offenders who distribute drugs for commercial purposes. Drug distribution for personal use is considered to be a lesser offence punishable with imprisonment of up to 3 years. Besides drug addiction, qualitative elements are taken into consideration, such as the small quantity of drugs sufficient for satisfying the offender's personal daily needs. If drug distribution reflects any of the aggravated, offence-specific elements, the penalty stipulated by the law is more severe. For instance, the penalty threshold of imprisonment is 10 years and the fine prescribed ranges from € 50,000 to 500,000 if drug distribution is a *delicta preparata* (the offender is a public official whose duties include the safekeeping of drugs or drug law enforcement, a doctor or a pharmacist) or if drug distribution was committed in order to facilitate or conceal some other felony. Other relevant aggravating circumstances prescribed by the law concern the *locus delicti* (such as military camps or other premises used by the armed forces, penal institutions, educational institutions, and sports premises), organised crime elements, the offender's prior convictions and the manner of committing the drug offence. Lifelong incarceration may be imposed upon offenders who are responsible for more severe consequences (bodily injury, serious bodily injury or death of the person subjected to the criminal conduct) or if the offence is committed against a minor. The most severe penalty is also prescribed for drug

²⁸ . A short historical overview of the Greek criminal legislative policy on drugs is presented in: Mavris, M., Spinellis, C., D. and Zagoura, P.: Greece: Regulating Drug Trafficking Nuisance and Use, published in: Dorn, N. (ed.): *Regulating European Drug Problems, Administrative Measures and Civil Law in the Control of Drug Trafficking, Nuisance and Use*, Kluwer Law International, The Hague, 1999, pp. 172-177.

distribution by way of an occupation or in cases where the expected pecuniary gain exceeds € 75,000 or the drug offender has used weapons in order to escape.

More lenient sanctions are applied for encouraging others to use drugs (imprisonment of at least 6 months and a fine from € 500 to 50,000; in case of aggravated circumstances imprisonment up to 10 years). The lowest sanction is set for possession and procurement of drugs in quantities only sufficient to satisfy the offender's personal needs, and for cultivation of cannabis plants in numbers and on areas justified for personal use (imprisonment not exceeding 5 months). The law is, however, silent on what would constitute a quantity of drugs acceptable for personal use. It is up to the judge's personal discretion to determine this quantity, taking into consideration the substance, the quantity, the purity and the needs of the offender. A special legal mechanism of exemption from punishment is available if the offence was an exceptional "one-time event" and unlikely to be repeated in future. Drug-related offences concerning falsified medical prescriptions are punishable with imprisonment not exceeding 2 years and driving under the influence of drugs with at least 5 months' imprisonment and a fine.

Notwithstanding the fact that Law No 4139/2013 sets out more lenient sanctions compared to those under the previous laws in force, the severity of the currently prescribed penalties is extremely high. Bearing in mind that only in Greece may a drug offender be sentenced to lifetime imprisonment, it would not be an overstatement to say that the Greek punitive legislative policy on drugs is among the most severe ones in the SEE region.²⁹ A certain balance is introduced with provisions governing the punishment of drug-addicted offenders and suspension of the execution of punishment for drug offenders undergoing treatment.³⁰

²⁹. Harsh sentencing has been one of the most consistent characteristics of the Greek criminal legislation on drugs. Lambropoulou, E.: Crime, Criminal Justice and Criminology in Greece, *European Journal of Criminology*, vol. 2, No 2, 2005, pp. 238-239.

³⁰. The legislative policy reflects research conclusions that both drug use and criminal activity are reduced if drug offenders attend a treatment programme. Meyer, W., G. and Ritter, A., W.: Drug Courts, *Work, Federal Sentencing Reporter*, vol. 14, No 3-4, 2001-2002, p. 179.

Sentencing policy has been relaxed to a certain extent in **Romania**, as well. The 2014 criminal law reforms have halved the sentence for certain drug offences. It should be emphasised that a more lenient sentencing approach has been applied as a general rule for a variety of prohibited conducts *not* involving drugs. The reform of legislated sentencing options has brought about more coherence in respect of the principle of proportionality. Regardless of the sentencing amendments, legislative policy is still perceived to be considerably harsh, as is the case with all the other SEE countries included in the research.³¹ For example, a drug distributor who is a member of a group faces the same penalty as a defendant charged with robbery or rape in **Montenegro**. In the **Serbian** sentencing policy, the specific minimum prescribed for drug distribution is higher than the one prescribed for serious bodily injury and manslaughter. Drug offences under the **Croatian** Criminal Code are classified as some of the most serious offences. For instance, a basic drug offence is equivalent to threatening to commit terrorist acts, transportation of slaves, infanticide, negligent homicide, female genital mutilation or serious bodily injury. According to the legislature's punitive policy, drug offending within a group and drug distribution causing more severe consequences are among the top 2% of the most heinous crimes treated by the Croatian Criminal Code. The seriousness of drug offences and the sentence which may be given to offenders show that penalties for drug offences are severe in **Bulgaria**, as well. This sentencing phenomenon is partially caused by legislature's frequent interventions intended to broaden the field of criminalisation and increase penalties for drug offences.

4. Characteristics of amending policies

The research shows that amendments to policies in the SEE countries share certain characteristics. There has been a high incidence of amendments to the drug offences (except in the **FYR Macedonia**).³² For instance, in **Bulgaria**

³¹ . Drug offences have generally been considered to be a type of heinous crime. Reamer, F., G.: *Heinous Crime: Cases, Causes, and Consequences*, Columbia University Press, New York, 2005.

³² . Frequent amendments of drug offences have been a common characteristic of legislative punishing policy in the USA and UK. Bonneau, A., B.: *Offensive Drug Offences: Applying Procedural Justice Theory to Drug Sentencing in the United States and United Kingdom*, Boston University Law Review, vol. 93, pp. 1485-1521;

laws prohibiting drug-related activities were introduced in the Criminal Code in 1975. Since then, the provisions have been amended eight times. Legislative alterations of drug crimes are even more frequent in **Croatia**. Since World War II, almost all Criminal Code amendments have been related to drug offences. A continuing trend of reforms has been a decisive characteristic of the **Greek** drug legislation. In a twenty-year period, Law No 1729/1987 was amended almost yearly by the Hellenic Parliament. After the enactment of Law No 3459/2006, Parliament's amending activity slowed down. It was a prevailing opinion that the legislature had succeeded in systematically regulating drug-related issues, consequently the need to introduce amendments was substantially reduced.

Stemen, D.: Policies of Imprisonment: Sentencing and Corrections Policy Innovation in the United States, 1970-2002, doctoral thesis, New York University, 2007, p. 54.

In the following seven years, the 2006 law was amended on three different occasions. The **Romanian** drug legislation was substantially amended by several legislative acts.

Most of the newly introduced legal initiatives in the SEE region are related to sanctions, with the exceptions of **Greece** and **Montenegro** where legislative interventions in drug offences are substantial and concern both the description of prohibited acts and the sanctions. Although frequent and usually sanctions-related, the legislative amendments have limited impact; therefore, the responses to drug offences remain decidedly punitive. Even where the legislature decides to decriminalise a certain drug-related conduct, the penalties for the remaining drug offences are increased. For example, in **Croatia** drug possession for personal consumption was left as a misdemeanour in the 2012 Criminal Code amendments. While discussions were centred on the question of whether the legislature's decision was justified, valid and appropriate, the critics failed to notice that the same amendments also raised the penalties for certain forms of manufacture of and trade in drugs. Furthermore, in **Romania** the latest legislative amendments which have been in effect since February 1, 2014 have significantly lowered the sentences for drug crimes: the range between the specific minimum and maximum prescribed for some drug-related offences was halved. However, the fact remains that the lowering of sentences has been part of a broader criminal legislative policy involving milder punishment strategies for crime in general and that, despite the amendments, the prescribed sentences, when compared with punitive legislative frameworks in the remaining eight countries, are among the most punitive in the SEE region. Regardless of the steps taken towards loosening the official government sentencing policy, drug offenders, if found guilty, can expect a significant term of incarceration to be delivered by courts, as noted in state criminal justice statistics.

5. Crime rates of drug-related offences on state (macro) level

One evaluation method commonly used by researchers to measure the impact of punitive legislative policy on drugs is a phenomenological analysis of drug crimes over a certain period. It has been presumed that an effective legislative sentencing policy would reduce the number of drug offences or at least keep it stable within tolerable parameters which would not impact on the penal system. It has also been presumed that any statistical changes in drug crime

rates could be caused by, among other phenomenological factors, criminal law amendments.³³ Thus, any statistical changes in crime rates should be evaluated in relation to shifts in legislative sentencing policy.

Official state statistics in the SEE region show that drug offenders accounted for a considerable proportion of all persons convicted of a crime in state criminal courts. According to the Hellenic Statistical Authority, in the period 2001-2010, the percentage of drug-related felonies over the total number of felonies committed in **Greece** varied from 19.6% (2010) to 31.8% (2002). In **Croatia**, approximately 8.5% of all offenders were convicted of drug offences in 2012 compared to 16.5% in 2004. This picture differs significantly for the **FYR Macedonia, Montenegro and Slovenia**, where drug offenders account for only about 2.0-6.6% of all convicts. The lowest drug crime rates are found in the **FYR Macedonia** in 2004 (2.02%) and in the following year in **Montenegro** (3.1%) and **Slovenia** (3.2%). The Ministry of Interior statistical reports for **Montenegro** demonstrate that the peak was reached in 2007 (5.9%), while the highest prevalence of drug crime in the **FYR Macedonia** was recorded in 2011 (4.5%) and one year later in **Slovenia** (6.6%). Due to the notable statistical inconsistency, the data for **Bosnia and Herzegovina** has to be considered with a certain amount of caution. The official state statistics for this country do not reflect the actual crime prevalence for the reason that not all country courts submit the regular annual reports to the central statistical base. Therefore, the information that drug offenders account for about 0.4%-4.4% of all convicts in the period 2007-2012 is only a rough indicator of drug crime prevalence, bearing in mind that criminal offences in general are underreported.

The statistical analysis shows that most drug offenders are prosecuted for and convicted of possession of drugs for personal use. In **Croatia** 71.2% of all adult drug offenders possess drugs with no intention of selling them or putting them into circulation (2002-2012). Almost identical data can be found in **Greek** criminal justice statistics: between 63.4% (2007) and 71.9% (2010) of all adult drug offenders engage in drug offences only by possessing and cultivating drugs for personal consumption. The analysis of various drug offences in **Bulgaria** also shows that more drug abusers are convicted of drug

³³ . Moxon, D.: The Role of Sentencing Policy, published in: Goldblatt, P. and Lewis, C. (eds.): *Reducing Offending: an Assessment of Research Evidence on Ways of Dealing with Offending Behaviour*, Home Office Research and Statistics Directorate, London, 1998, pp. 85-100.

possession (40%) than of drug distribution (35.2%). An indication of a greater proportion of drug possession over all drug crimes comes from **Romanian** police investigations, which involve suspects for drug possession in 51.9% of the cases.³⁴ On the other hand, a significantly smaller number of drug traffickers are convicted as compared with all the other groups of offenders (1.6% in **Bulgaria** and **Croatia** and 3.8% in **Greece**).

Bearing in mind that drug possession crime rates are the highest drug crime rates in general, it seems reasonable to conclude that such cases significantly overburden the criminal justice system in the SEE region. This research has found that various internal measures have been applied in order to reduce the number of possession cases getting to the trial phase. For example, in **Croatia** the public prosecutor's office has used the principle of opportunity not to instigate criminal proceedings against drug possessors, while criminal courts have rendered acquittals on the basis that the offender's possessing drugs was an insignificant offence. In certain cases the court acquitted the defendants of the charge because their manufacturing and processing drugs in order to satisfy their own addiction were similarly judged as insignificant. The lack of social danger as a basis for the diversion of drug cases from prosecution has been used by **Romanian** public prosecutors in a significant number of drug cases. The peak of diversion under Article 18 of the Criminal Code was reached in 2009 when 50.2% of the cases were assessed as posing no danger for the society.

Drug offenders who were prosecuted and pronounced guilty in a significant majority of cases had a suspended sentence imposed in **Croatia**, **Greece** and **Romania**. In **Croatia** this group of drug offenders represents 48.6% of all offenders sentenced for drug-related crimes in the period 2002-2012. The predominance of suspended sentences is also noted in **Greece**. About 52.7% of all prison sentences (except for drug trafficking) are suspended for a certain period of time. Likewise, the suspended sentence remains the most common

³⁴ . Research has shown that different statistical outcomes for drug possession may be explained by state policies to address drug use. In countries where priority is given to the reduction of harms associated with illicit drug use, the statistical rates of drug possession offences may be low or moderate no matter the fact that drug possession is a serious criminal offence. On the other hand, policies that are aimed at reducing drug use itself are likely to generate high statistical rates of drug possession offences. McKeganey, N.: *Controversies in Drugs Policy and Practice*, Palgrave Macmillan, New York, 2011, p. 82.

sentence for drug offences in **Slovenia** (57.4%). According to the **Romanian** official statistics, suspended sentences and suspended sentences with supervision are imposed upon drug offenders in between 15.5% (2005) and 50.6% (2012) of cases. Such figures represent a significant increase of alternative sanctions in drug sentencing policy during these seven years.³⁵ In contrast, in **Bulgaria** the most common alternative to imprisonment is a fine. In the period 2004-2012, criminal courts in Bulgaria ordered 1,394 fines and imposed only 223 suspended sentences for drug offences: 12.9% of Bulgarian drug offenders incurred a fine and only 2% received a suspended sentence.

The number of drug law violation cases in which courts pronounce a prison sentence is considerably higher in **Bulgaria**. It has been reported that 81.5% of offenders adjudicated and sentenced for drug crime are sent to prison. The numbers are also high in the **FYR Macedonia**, where prison sentences are imposed upon 69% of this particular category of offenders. According to the **Slovenian** sentencing practice, imprisonment is the second most common sanction for drug law violations (42.3%). In **Croatia**, courts impose imprisonment upon drug offenders in 23% of cases. This also holds true for **Greece**, where less than a quarter of convicted non-addicted drug offenders (excluding drug traffickers) received a prison sentence. In **Bosnia and Herzegovina** about 10% of all prisoners serve time for drug offending. While imprisonment rates are more or less stable over the years in most of the countries included in the research, an important decrease has been noted in **Romania**. Imprisonment for drug offences gradually decreased from 84.4% (2005) to 48% (2012) of cases, in favour of alternative sentences.³⁶

This analysis of punitive policy in the SEE region indicates that reliance on prison punishments by state criminal justice systems may overburden the

³⁵ . Statistical data are in accordance with previous research showing that drug offenders who were given a prison sentence were more likely to re-offend and took less time to re-offend when compared with drug offenders given suspended sentences. Spohn, C. and Holleran, D.: *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, Criminology, vol. 40, No 2, 2002, pp. 329-358.

³⁶ . The above statistics confirm the increased interest in alternative sanctions in the criminal justice system, which has been noted in other countries too. Tonry, M. and Hatlestad, K. (eds.): *Sentencing Reform in Overcrowded Times: A Comparative Perspective*, Oxford University Press, Oxford, 1997, pp. 264-276.

prison system.³⁷ This is further corroborated by data on the length of prison sentences.³⁸ In **Romania**, sentences for drug offenders range between 1 and 5 years. Similar sentencing patterns for drug offences are found in **Croatia** and **Bulgaria**, where most drug offenders received prison terms between 1 and 3 years.³⁹ The effects of high proportions of prison sentences and length of incarceration are directly visible in the number of drug offenders in prison populations. In **Croatia**, some 20% of the inmate population are drug offenders. The **Croatian** prison system has experienced a growing incarceration rate and drug offenders have probably contributed to the growing number of prisoners nationwide. The numbers are less alarming in the **FYR Macedonia**, where between 5.8% (2007) and 9.6% (2011) of all offenders sentenced to prison served time for drug crimes. According to the **Bulgarian** official prison statistics, drug offenders represent between 3.7% (2008) and 7.9% (2006) of incarcerated offenders. The proportion is significantly lower in **Romania**, but the increase of drug offenders within the prison population from 2% to 3.7% in the period under examination sends out a warning that numbers would be even higher if criminal courts did not shift their sentencing policy towards delivering more alternative sentences.

The analysis shows a strong correlation between drug offenders' representation within the inmate population and the type of drug-related offences committed by incarcerated offenders in some SEE countries. The low participation of drug offenders in the prison population in **Romania** can be explained by the fact that the large majority of these drug offenders were sentenced for drug trafficking (93.4% to 94.5% in 2005-2008) and for trafficking in high-risk drugs and international trafficking (93.0% to 95.3% in 2009-2012). On the other hand, the majority of incarcerated offenders in **Bulgaria** are sentenced for drug possession (40%) and drug distribution (35.2%). Drug traffickers

in penal policies and philosophies. Van Zyl Smit, D. and Dünkel, F.: *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions*, Kluwer Law International, Dordrecht, 2001, p. 811.

38. An identical causal relationship between prison population growth and sentencing trends for drug offenders was found in: Simon, E.: *The Impact of Drug-Law*

³⁷ . Research has shown that the incarceration of drug offenders causes serious problems for prison regimes and that changes in prison population are closely related to changes

Sentencing on the Federal Prison Population, Federal Sentencing Reporter, vol. 6, No 1, 1993, pp. 29-32.

39. Slightly higher numbers were obtained in a 2009 EMCDDA study for Bulgaria. The average prison sentence pronounced by Bulgarian courts was 43 months' imprisonment. EMCDDA: *Drug Offences: Sentencing and Other Outcomes*, Publications Office of the European Union, Luxembourg, 2009, p. 15.

make up only 1.8% of those in prison. According to prison statistics, the proportion of drug distributors among incarcerated drug offenders ranges between 69.4% (2010) and 77.2% (2004) in **Croatia**.³⁸ Drug possessors are the second most incarcerated drug offenders (14.6% to 14.4% in 2004-2012), while the proportion of drug traffickers who acted within an organised group is the lowest (4.2% to 6.9% in 2004-2012).

Due to methodological obstacles and incomplete data for the legislative and statistical analysis, only tentative conclusions can be drawn with respect to the relationship between the legislators' and the criminal courts' sentencing policies for drug offenders at the state level in the SEE region.

A correlation is clearly visible in countries where drug possession for personal use has been decriminalised. For example, the 2000 Criminal Code amendments in **Bulgaria**, decriminalising the possession of one dose of drugs, immediately affected drug-related crime rates (which declined) and the structure of prison population. The single dose possession offence was reintroduced into the Criminal Code in 2004 and the number of drug offences over all crimes nationwide increased again. Due to strong statistical shifts, state repression of drug possession for personal consumption was again loosened in 2006, leading to a notable reduction in drug crime rates over the two subsequent years. Recently, drug-related crime rates have similarly fallen in Brčko District (**Bosnia and Herzegovina**) due to the fact that since 2010 drug possession for personal consumption is no longer a crime. An important phenomenon with respect to drug possession has been observed in **Croatia**, where drug possession was decriminalised in early 2013. However, long before the 2011 Criminal Code amendments officially entered in force, the criminal courts and the public prosecutor's office were implementing the

³⁸ . The above-mentioned research findings correspond to the statistical prevalence of drug distributors found in: Grozdanić, V., Karlavaris Bremer, U. and Rittossa, D.: Long-Term Imprisonment in Croatia, published in: Drenkhahn, K., Dudeck, M., Dünkel, F. (eds.): *Long-Term Imprisonment and Human Rights* (Routledge Frontiers of Criminal Justice), Routledge, Oxford, New York, accepted for publication.

available legislative measures to reduce drug possession crime. From 2006 to 2012, drug possession offences decreased by 33.7%, leading to an overall drop of drug crime over total crime by 7.6%. It was not only that courts did not follow the legislators' punitive drug policy and accommodated sanctions to the increased sentencing framework for drug offences in the last ten years; there is a strong

probability that court practice influenced the legislators' decision to implement a less punitive approach to drug offenders' sentencing and to decriminalise drug possession.

6. Crime rates of drug-related offences on county court (micro) level

To overcome the methodological insufficiencies noted during the analysis at the state level, which result in significant limitations of the study, research on court sentencing policies was conducted at different county courts in the SEE region. The study at the court (micro) level was intended to draw a more precise phenomenological picture of drug-related cases and to detect whether the legislative sentencing framework is adequately applied in practice. The study was also organised as a control mechanism of the conclusions reached by the analysis at state level.

Table 5
Elements of the research sample of the study at court (micro) level

Country	Court	Research period	Country	Court	Research period
Bulgaria	(1) Sofia Regional Court (2) Sofia District Court	July 2010 - July 2013	Romania	Court of Appeal Bucharest and High Court of Cassation and Justice Bucharest	January 2010 - September 2013
Croatia	County Court in Rijeka	2008 (1 judgment) 2009 (3 judgments) 2010-2012 (46 judgments)	Serbia	Higher Court in Belgrade	2010-2012
Greece	Court of Appeal of Thessaloniki	2010-2012	Slovenia	Ljubljana County Court	2010-2012

6. CRIME RATES OF DRUG-RELATED OFFENCES ON COUNTY COURT (MICRO) LEVEL



Montenegro	High Court in Podgorica	2010-2013			
Country	Court			Research period	
Bosnia and Herzegovina	Municipal Court in Orašje, Municipal Court in Zavidovići, Municipal Court in Sokolac, Municipal Court in Široki Brijeg, Municipal Court in Ljubuški, Municipal Court in Mostar, Municipal Court in Zenica, Municipal Court in Sanski Most, Municipal Court in Tuzla, Municipal Court in Čapljina, Municipal Court in Cazin, Municipal Court in Banja Luka, Municipal Court in Gradačac, Municipal Court in Zvornik, Municipal Court in Kalesija, Municipal Court in Trebinje, Municipal Court in Brčko Distrikt, Municipal Court in Konjic, Municipal Court in Orašje, Municipal Court in Živinice, Municipal Court in Sarajevo, Municipal Court in Doboј, Municipal Court in Bosanska Krupa, Municipal Court in Žepce, Municipal Court in Bugojno, Cantonal Court in Mostar and Court of Bosnia and Herzegovina			2010-2012	
FYR Macedonia	First Instance Court in Strumica			October 2009 - December 2013	

The research sample consisted of at least 50 final court judgments collected from a “second instance” court in each country included in the research. Due to unexpected court administrative obstacles, the **Bulgarian** research sample comprises 18 judgments delivered by the Sofia Regional Court and 32 judgments by the Sofia District Court. The research on court practice with

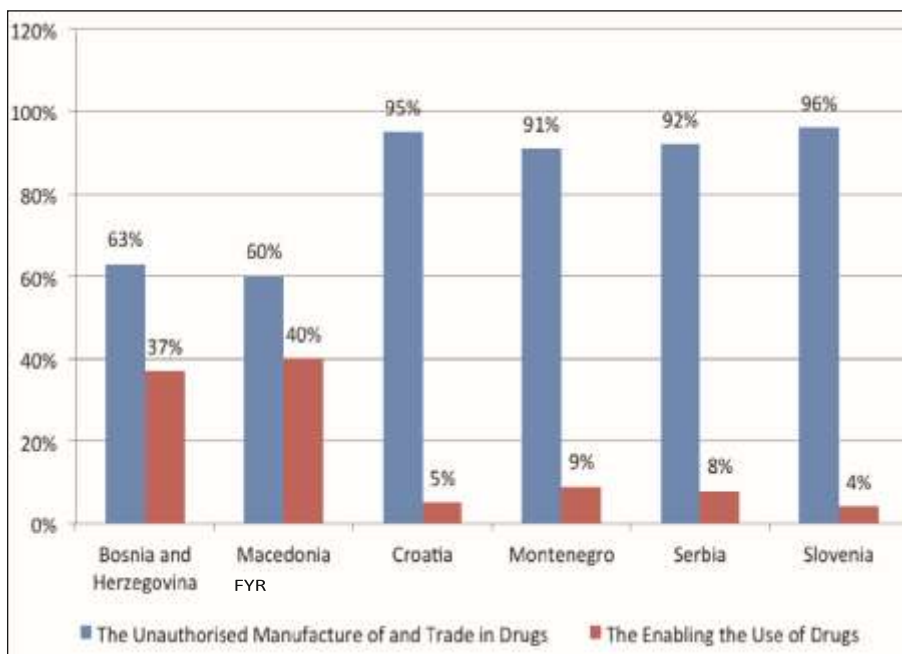
respect to drug offences in **Bosnia and Herzegovina** was conducted on a sample consisting entirely of municipal court judgments. This was necessary in order to overcome obstacles imposed by the complex constitutional system of this country and achieve a better representation of drug-related cases. An exception was also made in the case of the **FYR Macedonia** where the research sample consisted of 50 final court judgments delivered by the First Instance Court in Strumica. This was the only court that recognised the importance of assessment of court and legislative punitive policies against drug offenders and agreed to participate in the research. These inconsistencies could have an effect on research coherence, nonetheless the analysis that follows, albeit with limitations, can provide policymakers with useful comparative insights into court sentencing and contribute to the future development of national and regional drug policies. The research period covers different time periods in each country, as it was necessary to collect a specific number of final court decisions that could not be subject to appeal.

The analysis has shown that in most SEE countries drug offenders are mostly prosecuted for and found guilty of unauthorised manufacture of and trade in drugs.³⁹ The data on the statistical prevalence of various drug offences are almost identical for **Bosnia and Herzegovina** and the **FYR Macedonia**. Considerable similarities in the distribution of drug offences are also noted in **Croatia, Montenegro, Serbia and Slovenia**, where offenders are pronounced guilty of enabling others to use drugs in a significantly smaller number of cases. There are similarities in the bipolar division of drug offences as expected, bearing in mind that the research sample for the first two countries comprises municipal court decisions only. The research in the four remaining countries was conducted at a county court that contests as a second instance court the first instance decisions only in case of appeal. Based on the data presented in Graph 1, the appeal as a filtering mechanism of drug-related cases, among other factors, has caused a different phenomenological distribution at the higher instance courts.

Graph 1

³⁹ . Drug dealing and trading are usually part of the offenders' highly criminal lifestyle and this is reflected in official crime statistics. Staton-Tindall, M. and Havens, J., R.: Substance Use Prevalence in Criminal Justice Settings, published in: Leukefeld, C., Gullotta, T., P. and Gregich, J. (eds.): *Handbook of Evidence-Based Substance Abuse Treatment in Criminal Justice Settings*, Springer, New York, 2011, p. 92.

Statistical prevalence of various drug law offences committed by adult offenders according to court practice surveyed in Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Croatia, Montenegro, Serbia and Slovenia

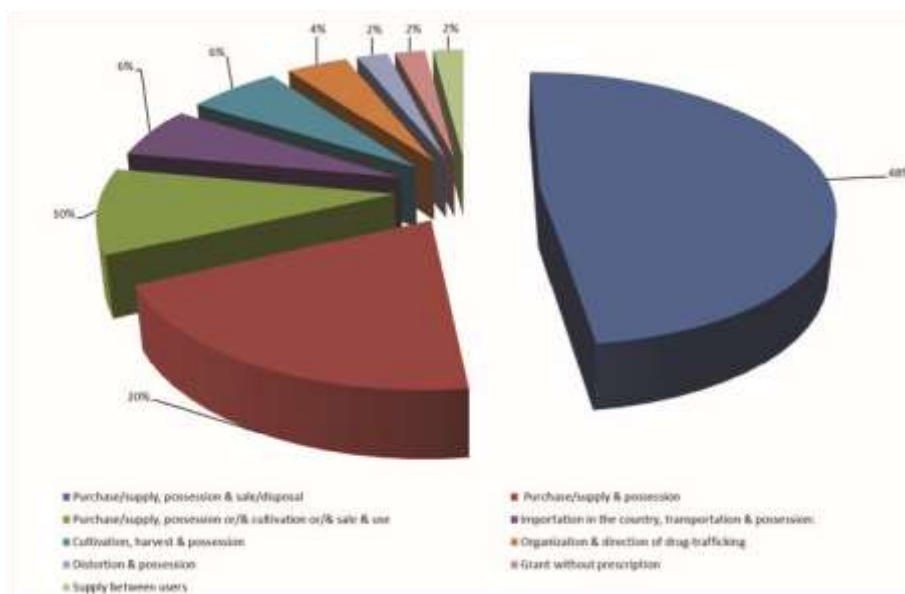


A similar situation has been detected in the prevalence of drug offences in **Romania** and **Bulgaria**. According to the **Romanian** report, drug distribution is the most frequently committed offence (74%). The offenders distributed high-risk substances in 24 and risk substances in 13 cases. In 16% of the cases the court in Bucharest imposed a sentence upon offenders who possessed high-risk drugs without intent to put them into circulation. Considerably less frequent was the offence of international drug trafficking. In all five cases the offenders were smuggling high-risk drugs. Drug cases concerning the encouragement of others and the creation of conditions to use drugs are entirely missing from the sample. **Bulgarian** researchers noted the same phenomenon. The sample collected at the Regional and the District Court in Sofia does not contain convictions for encouraging others to use drugs. **Bulgarian** offenders were mostly convicted of possession of drugs without intent to put them in circulation. In 50% of cases, the offenders possessed

drugs for personal use. Distribution of drugs is the second most commonly committed offence: 42% of offenders manufacture, process or possess narcotic drugs for distribution. In only one case was a drug offender sentenced by the court when it was proven that he cultivated a plant from which a drug could be obtained (2%). The prevalence of drug offences in **Bulgaria** slightly differs from the **Romanian** results due to unavoidable differences in the research samples. Another noted limitation is the missing data on the type of drugs taken into possession or distributed by the offenders in the **Bulgarian** research. The object of the criminal offences in question is a decisive element upon which a sanction prescribed by the law depends.

The analysis of crime rates for drug-related offences on the country (micro) level is presented separately for **Greece** for methodological reasons. While for certain countries the research sample had to be broadened with additional judgments delivered before 2010 or by lower courts in order to obtain the threshold of 50 final court decisions, the sample obtained at the Court of Appeal of Thessaloniki was narrowed down since the Court delivered 1,740 judgments in the last three years, of which 49.3% were related to drug offences. Therefore, the number of 50 court cases corresponds to 5.8% of the Court's three-year case load. A selection of judgments included in the sample was made in an effort to depict the overall case distribution in a certain year with respect to the type of drug offence committed and the sanction imposed. An additional reason for a separate analysis of Greek court data lies in certain special characteristics of the Greek criminal justice system, which are not commonly shared with other SEE countries. One of these can be seen in the composition of drug offences included in the sample. Except in cases of continuing criminal offences, a single penalty may be imposed by courts for different acts on condition that the same quantity of drugs is involved.

Graph 2
Statistical prevalence of various drug law offences
committed by adult offenders according to court
practice surveyed in Greece.



In almost all countries participating in the research the analysis has shown that the sentence pronounced most commonly is imprisonment up to 3 years. About three quarters of the convicted drug offenders had to serve this short-term prison sentence in **Montenegro**. The Municipal Courts in **Bosnia and Herzegovina** imposed this sanction upon drug offenders in 70% of cases. The analysis of court penalty policy in **Croatia** shows that a three-year prison sentence was pronounced in 58% of cases. The statistical frequency is lower in **Greece** (48%). Based on the research results, the sentencing policy for drug offenders is more lenient in the **FYR Macedonia**, where the most punitive sentence imposed by the court is two and a half years' imprisonment.⁴⁰ On the other hand, the pronounced sanctions are more severe in **Serbia**, where 75% of the offenders were sentenced to between 3 and 6 years' imprisonment. Significant punitive reactions to drug offending have also been noted in **Greece**, where 42% of those convicted of drug-related crimes were confined in a penitentiary for at least 5 years, excluding those who were sent to a penal institution to serve a life sentence (6%). The Greek data are highly

⁴⁰ . Similar results can be found in criminal justice statistics for other countries. For example, the main prison sentence imposed upon drug offences in the USA was 48 months' imprisonment. However, the research has demonstrated that many offenders only serve in state prisons 20 months of their main sentence. Clear, T., Reisig, M. and Cole, G.: *American Corrections*, Cengage Learning, Wadsworth, 2013, p. 75.

exceptional, in that in all the other participating countries there were no cases with convictions of the maximum term imprisonment prescribed for a drug offence.⁴¹

It was also noted that the courts in the region have different practices with respect to suspended sentences as a means to reduce drug crime. The analysis on the micro level in **Montenegro** shows that suspended sentences are extremely rare. The High Court in Podgorica suspended the sentence imposed upon one drug offender (1.3%). The infrequent imposition of a suspended sentence is also confirmed in the **Croatian** sample (7.3%), while the incidence is slightly higher in **Greece** (22%). In contrast, court practice analysis in **Bosnia and Herzegovina** demonstrates that over one third of drug offenders received a suspended prison sentence (34.4%). The proportion of suspended sentences in the **FYR Macedonia**, and in the **Romanian** and **Serbian** samples, is significantly higher (43.1% of all analysed cases in the FYR Macedonia, 50% in Romania and 60.8% in Serbia).

The average amount of punishment calculated by the courts does not differ between non-suspended and suspended sentences for the same criminal offence. In most cases courts impose equal or highly similar terms of imprisonment to be served as in “ordinary” prison sentences, no matter the fact that they will be suspended for a certain period of time. An exception to this practice is furnished by drug possession cases from the Croatian sample. At the time of trial, the prescribed sentence for drug possession for personal use was imprisonment up to one year. The County Court in Rijeka suspended the prison sentence of 3 and 5 months in four different cases. The level of punishment, when compared with the one measured by the court in non-suspended sanctions, is notably higher.⁴² Moreover, the measurement of state repression for possession cases is excessive in the analysed court cases if compared with drug possession punitive policies on state (macro) level, according to which a significant number of drug possessors were convicted but no criminal sanction was imposed upon them or their case never reached

⁴¹ . The 2009 EMCDDA study on drug offenders’ sentencing confirms the conclusion that maximum sentences are rarely pronounced by the courts in Europe. EMCDDA, *op. cit.*, p. 16.

⁴² . A significantly higher level of punishment in suspended sentences was also noted in Horvatić, Ž., *op. cit.*, p. 425.

trial since public prosecutors had dismissed crime reports under the principle of opportunity.

When deciding about the type and level of punishment, criminal court judges take into consideration a variety of criminological factors related to the offender and the committed criminal offence. This research has shown that in all countries participating in the research an absence of prior conviction is the key circumstance that has to be fulfilled in order for courts to pronounce a suspended sentence.

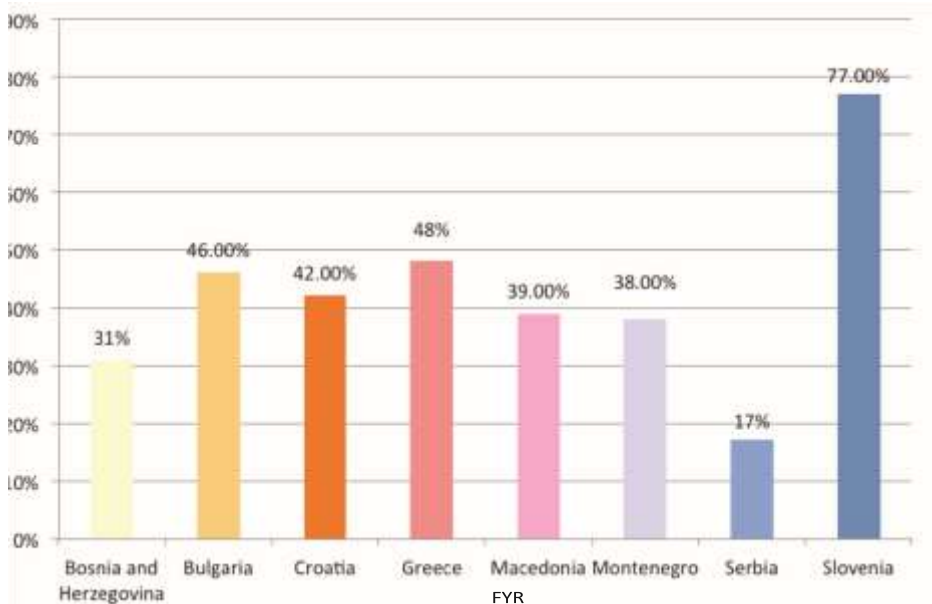
The analysis of punitive court policy almost unanimously points to the conclusion that courts in the SEE region predominantly deliver sentences around the legislative minimum or within one third of the range between the special minimum and maximum prescribed for a specific drug-related offence. In **Romania**, in almost all final judgments the court mitigated the punishment or the punishment equalled the prescribed legislative minimum or was slightly above that. The same sentencing trend is noted in **Croatia** where sentences are settled under or around the special legislative minimum.

⁴³ The strictest sentences were imposed within the first quarter of the range of prescribed punishment. In **Serbia**, the harshest sentences were five and a half years' imprisonment for aggravated distribution of drugs; even in this case, however, the sentence was slightly above the special legislative minimum considering that the range is between 5 and 15 years. Similarly, the majority of sentences in the **FYR Macedonia** were closer to the prescribed threshold. A prison sentence approaching the legislative maximum is highly exceptional, as also noted in **Bosnia and Herzegovina**. According to the analysis, mitigated punishments and punishments settled around the legislative minimum prevail in court practice, whereas the remaining sentences do not exceed the first one third of the legislative framework. An exception to this

⁴³ . The same conclusion about Croatian courts' punishment policy was reached in: Garačić, A.: *Zakonska i sudska politika kažnjavanja županijskih sudova u Republici Hrvatskoj za kaznena djela silovanja i zlouporabe droga* / Legislative and Court Punishing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, Croatian Annual of Criminal Law and Practice, vol. 11, No 2, 2004, pp. 475-516; Kurtović, A. and others: *Zakonska i sudska politika kažnjavanja općinskih sudova na području Županijskog suda u Splitu* / Prescribed Punishment and Sentencing Policy of the Municipal Courts in the Territory under the Jurisdiction of the County Court in Split, Croatian Annual of Criminal Law and Practice, vol. 11, No 2, 2004, pp. 609-652.

punitive court trend was seen in only one case, when the court pronounced a maximum sentence of 10 years' imprisonment for unauthorised production and sale of narcotic drugs. According to the research analysis, the maximum sentences of life imprisonment in **Greece** are used in 6% of all cases. However, just like in other countries in the region, **Greek** drug offenders are mostly sentenced to imprisonment below the prescribed minimum. The exact proportion of mitigated sentences within the research sample in individual countries is presented in the graph below.

Graph 3
Statistical prevalence of mitigated punishments according to
court practice surveyed in Bosnia and Herzegovina, Bulgaria,
Croatia, Greece, FYR Macedonia, Montenegro, Serbia,
Slovenia



In most cases, courts pronounce a less severe sentence than the one prescribed for a particular criminal offence after careful evaluation of special mitigating circumstances. The sample representing court practice in **Greece** mostly consists of sentences below the lower range of punishment due to the offender's prior obedience to the law, sincere remorse for the crime committed, exemplary conduct after perpetration of the criminal offence for a long period of time, or young age. In **Romania**, the offender's personal

characteristics, prior conviction, social dangerousness, his or her conduct before offending, the attitude during criminal proceedings and confession are all noted as mitigating circumstances that may lower the punishment below the legislative minimum. The circumstances that influenced **Slovenian** judges who mitigated the punishment were almost identical (small amount of drugs, confession, no prior conviction, young age, drug abstention and positive personality traits). Case law analysis for **Croatia** showed that judges use their discretionary powers to mitigate the punishment prescribed by the law under the following special mitigating circumstances: drug addiction *tempore criminis* and drug abstention at the time of trial, first-time offence, regular employment, mother of an underage child, severe health problems caused by diabetes and addiction and small amount of drugs as the object of crime, young age, regular student status, two years of dating a girl introduced to the offender's family, entering into marriage, parents' illness, mental illness of a spouse, confession of a crime, timely call for medical assistance, cooperation with the police, the fact that the criminal act involved cannabis as the least dangerous drug and that cannabis was sold only to one person. It was also observed that in certain cases the special mitigating circumstances may prevail over the aggravating circumstances (e.g. significant amount of heroin) and lead to a less severe sentence.

In two SEE countries (**Croatia** and **Serbia**) the court applied the standard of "effective regret" to circumvent the prescribed legislative minimum. This particular criminal legal standard allows the courts to remit the punishment and, *inter alia*, to mitigate it, if the drug offender has substantially contributed of his/her own free will to the revelation of the drug offence. Although complete exoneration of the drug offender was extremely rare in **Croatia** and completely absent in **Serbia**, the current analysis points to the conclusion that "effective regret" has been recognised and well used as a correctional sentencing methodology in drug cases. According to the court's reasoning, the favourable sentencing provision had to be applied due to the fact that the offender's self-incriminatory acts speeded up the trial by providing evidence to support the prosecutor's claims about the criminal offence or that the police did not have any evidence or indication that the drug offence was committed.

Except from relying on the standard of "effective regret" and special mitigating circumstances, **Croatian** judges reduced the punishment of young offenders below the legislative minimum by using the discretionary powers granted under Article 106(1) of the Juvenile Courts Act. In accordance with this provision, the court may mitigate the punishment if the socio-anamnestic

data of the offender's case history confirm that such court's decision is appropriate in a particular case. According to court practice, the court's assessment focused on the offender's young age, his personal satisfaction with his working time, work conditions and earnings, acquired working habits, positive orientation towards the future, stable emotional relationship and termination of contacts with persons who engage in antisocial behaviour.⁴⁴ In addition, the court lowered the punishment in 8 cases due to the fact that the public prosecutor and the defendant had signed a special agreement.

As can be seen from the above analysis, punitive court policies in the SEE region significantly differ from those foreseen by legislators. Besides the fact that courts mostly use 30% of the prescribed legislative framework or break its lower limit by imposing mitigated punishments, this discrepancy is also evidenced in trends in court sentencing after legislative amendments of sanctions prescribed for drug offences have taken effect. The case analysis clearly shows that even when the prescribed criminal penalty frameworks for drug offences are increased, the courts do not necessarily follow the newly prescribed punitive policies. The same phenomenon is observed in the case of decreasing the lower range of punishment. As was noted in case law analysis in **Croatia**, the only effect of a less restrictive punitive legislative policy is a decrease in the number of mitigated sentences. Having said that, it can be concluded that there is significant consistency in the sentencing of drug offenders. Irrespective of legislative amendments, the courts continue to pronounce sentences within the already used range of punishment. Therefore, the average sentences imposed upon drug offenders highly resemble those imposed in pre-amendment periods.

7. Individualisation of imposed sanctions

The research shows that, in most participating countries, courts do not provide a sufficient explanation of the sanctions imposed. The court's reasoning on the choice of type and range of sanction is weak and, generally speaking, conceptualised as a prediction of the offender's future behaviour without any concrete grounds or exact assessment of the circumstances affecting the

⁴⁴ . In accordance with the said article, the court is not obliged, subject to limitations provided for by the Criminal Code provisions on mitigation of punishment, to impose the minimum term of punishment for a criminal offence committed by a young adult if the court applies the general criminal law. Art. 106(1) of the Juvenile Courts Act, Official Gazette No 84/2011, 143/2012, 148/2013 (formerly Art. 110(1) of the Juvenile Courts Act, Official Gazette No 111/1997, 27/1998, 12/2001).

severity of punishment. In most cases, the court's reasoning with respect to sanctions consists of standard phrases like "a given sentence is suitable for achieving the purpose of punishment" or "while determining the type and measure of punishment, the court weighed all the circumstances that are relevant for the determination of a sentence" followed by a couple of objective and subjective circumstances of the case. Although there are examples of good explanatory practice in establishing the relationship between mitigating and aggravating circumstances and the pronounced sanction (as seen in **Bulgarian** and **Romanian** court practice), in the vast majority of cases the courts only state the circumstances, giving no additional explanation. The repeated enumeration of circumstances and a lack of in-depth analysis are especially evident in the courts' reasoning as to why it was appropriate to mitigate the sentence. The research has shown that courts in **Bosnia and Herzegovina** and **Croatia** assign the same sentencing effect to "ordinary" mitigating circumstances and to *special* mitigating circumstances, although the law prescribes that the effect of the former is to lower the sentence towards the legislative minimum and of the latter to impose a sentence below that minimum. The imposed sanction, whether mitigated or set within the legislative sentencing framework, is more a product of the court's impression of the offender and the circumstances of the case than of analytical evaluation.⁴⁵ Therefore, a widely-used method of individualising the sanctions imposed on individual drug offenders is the "synthetic" method.⁴⁶ In order to trace any possible genuine predictabilities

⁴⁵ . Grozdanić, V., Sršen, Z. and Rittossa, D.: *Kaznena politika općinskih sudova na području Županijskog suda u Rijeci* / The Penal Policy of Municipal Courts in the Area of the County Court in Rijeka, Croatian Annual of Criminal Law and Practice, vol. 11, No 2, 2004, p. 607.

⁴⁶ . The aforementioned negative features of court sentencing policy have been predominantly associated with the judicial discretion sentencing regime. In order to enhance equality and transparency in sentencing, certain countries have replaced pure judicial discretion in sentencing by the administrative sentencing system (Klein, R., S. and

that might influence the court's decision on the selection of punishment, Table 6 presents a more detailed analysis of mitigating and aggravating circumstances in **Croatia, Montenegro, Romania and Serbia**.

Table 6
List of mitigating and aggravating circumstances relevant
for the choice of type and range of punishment used by
courts in Croatia, Montenegro, Romania and Serbia

Mitigating				Aggravating			
Offender's personal characteristics		Objective characteristics of the offence		Offender's personal characteristics		Objective characteristics of the offence	
Type	Frequency of evaluation	Type	Frequency of evaluation	Type	Frequency of evaluation	Type	Frequency of evaluation
partial or full confession	91	small quantity of drugs	20	prior conviction	57	large amount of drugs	17
first-time offender	89	cannabis as the object of crime	12	offence committed during probationary period	2	social dangerousness of the criminal offence	13
regret	40	degree of threat to or violation of a legally protected good	8	high degree of guilt	2	degree of threat to or violation of a legally protected good	11

Steiker, J., M.: The Search for Equality in Criminal Sentencing, The Supreme Court Review, 2002, pp. 224). No matter the sentencing guidelines, studies of actual sentences imposed by state court judges reveal sentencing disparity that could seriously impair the principle of equality before the law (like-situated offenders who commit similar offences should receive similar punishment). Daly, K. and Tonry, M.: Sentencing Disparity and Discrimination, A Focus on Gender, published in: Spohn, C., C. (ed.): *How Do Judges Decide?, The Search for Fairness and Justice in*

Punishment, SAGE Publications, Thousand Oaks, London, New Delhi, 2009, pp. 127-147.

personal situation	40	long time period between the commission of the offence and the trial	8	motive for offending	2	drug offence with international element	3
drug addiction	38	manner of drug offence commission	6	misbehaving at trial	1	drug distribution organised professionally	2
conduct after the commission of the offence	32	situational delict	2	persistence in offending	1	drawing others into criminal activity	1
young age	32						
collaboration with the authorities	31						
behaving at trial	29						
parent of a minor	13						
family circumstances	10						
regular employment	10						

serious health problems	8						
marital status	3						
degree of guilt	6						
voluntarily handing over drugs	3						
drug abstinence	3						
regular student status	2						
single or primary family breadwinner	2						
stable emotional relationship	2						
lack of profit from offending	2						
motive for offending	1						
timely call for medical intervention	1						
healthier way of life	1						
sport activities	1						
voluntary client in substance abuse treatment	1						

success in school	1						
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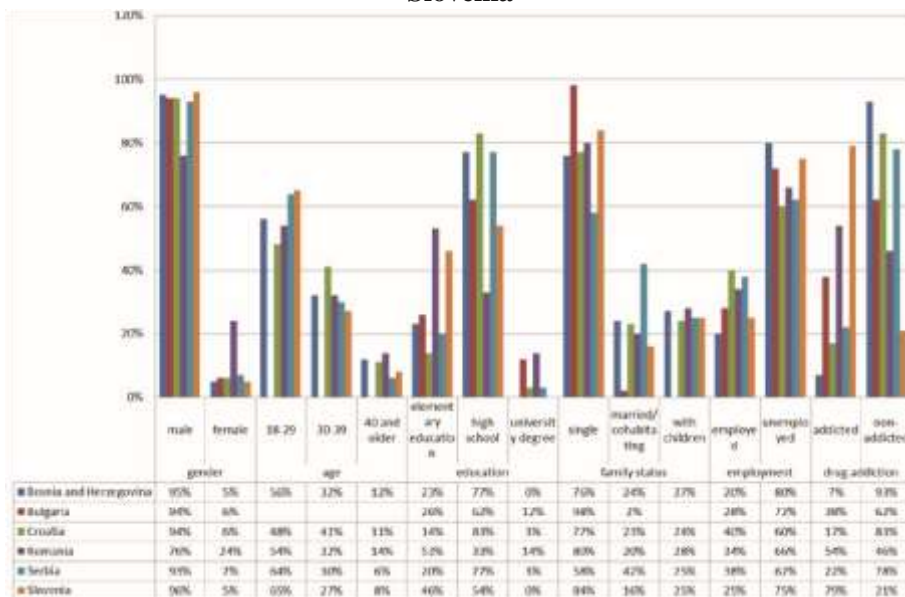
The court's decision on sentencing is influenced by a number of factors as presented in Table 6.⁴⁷ Mitigating circumstances outnumber aggravating factors, and this is in line with the courts' current punitive policy to impose sanctions around the legislative minimum or within one third of the range of prescribed punishment. The diversity of circumstances clearly shows that courts try to individualise sentences in order to achieve special and general prevention. The chosen sentence, i.e. its type and measure, has to be the one most likely to change the offender's behaviour and also deter others from committing offences of a similar nature.⁵⁰

Bearing in mind that the offender's personal characteristics are the greatest influence on the court's judgment in respect of the type and length of the sentence, one of the research aims was to analyse these characteristics in order to identify additional determining factors in court sentencing policy. A statistical portrait of drug offenders is presented in the following graph.

Graph 4

⁴⁷ . Previous research on predictors for imposing longer prison sentences has shown that courts also evaluate the following aggravating circumstances: unemployment for the two years preceding the crime, young age and living without a father in a family home. Robinson, P., H.: Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, Harvard Law Review, vol. 114, 2001, p. 1439.

Offenders' personal characteristics in drug abuse cases in Bosnia and Herzegovina, Bulgaria, Croatia, Romania, Serbia and Slovenia



50. Banks, C.: *Criminal Justice Ethics, Theory and Practice, The Purpose of Criminal Punishment*, Sage Publications, Los Angeles, 2013, p. 107. For a detailed theoretical analysis of the purpose of punishment in the context of obtaining justice, see: Materni, M., C.: *Criminal Punishment and the Pursuit of Justice*, *British Journal of American Legal Studies*, No 2, 2013, pp. 263-304.

The phenomenological picture of the average drug offender is almost identical in the participating SEE countries presented in Graph 4. The study shows that drug offenders are predominantly male, leading to the conclusion that drug crime is gender-related.⁴⁸ Certain disparities are noted in **Romania**, where

⁴⁸ . Criminal drug offending has mostly been a male activity. However, studies show that a significant number of female prisoners are serving time for drug offences and that numbers are growing. Coughenor, J., C.: *Separate and Unequal: Women in the Federal Criminal Justice System*, *Gender and Sentencing*, *Federal Sentencing Reporter*, vol. 8, No 3, 1995, p. 142; Hagan, J. and Dinovitzer, R.: *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, *Crime and Justice*, vol. 26, 1999, p. 141; Grozdanić, V. and Karlavariš Bremer, U.: *Kazna zatvora za ovisnice - represija i/ili prevencija? / Imprisonment for Drug-Addicted Female Offenders -*

female offenders represented 24% of the sample. Data on offender age show that the majority of drug offenders are in their twenties. The second leading age group in the region is 30 to 39 (32.4%). Crimes related to drugs are almost always committed by the most criminally active groups, due to the specific nature of the crime that involves planning, a certain amount of activity and a degree of coordination. A significant majority of drug offenders are high school graduates, except in **Romania**, and unemployed. In terms of family status, drug offenders are mostly single and without children.

The prevalence of drug-addicted offenders is low or medium, except in **Slovenia** where 79% of drug offenders had consumed drugs and experienced drug problems.⁴⁹ The research has shown that this particular criminological factor influences the court's sentencing decision to a large extent. For example, in **Bosnia and Herzegovina** and **Croatia**, drug addiction is rarely visible but, when determined, it is always considered as a mitigating circumstance. The analysis of **Slovenian** court practice points to a similar conclusion. If the defendant proved that he abstained from drug use at the time of the trial, the length of the prison sentence was negatively influenced by this factor. In contrast, drug addiction recidivists and criminal recidivists were more likely to receive longer prison sentences.⁵⁰

In countries where drug dependence is a legislative condition for more lenient sentencing of the offender (e.g. **Greece**), the research has shown that there are no significant deviations in courts' sentencing policy. The policy is less coherent when it comes to non-addicted drug offenders, due to the fact that the court's sentencing decisions are influenced, *inter alia*, by the type and quantity of drugs. There is a strong probability that drug offenders who deal in highly addictive drugs or drugs that cause the most harm to health will be sentenced to harsher punishments. It was also noted that the quantity of drugs seized by the authorities was a more decisive sentencing factor in cases

Repression and/or Prevention, Collected Papers of the Faculty of Law in Rijeka, vol. 26, No 2, 2005, pp. 689-724.

⁴⁹ . The Slovenian data confirm the theoretical conclusions about the positive relationship between drug use and increased criminal activity. Staton-Tindall, M. and Havens, J., R., *op. cit.*, p. 92.

⁵⁰ . It has, for a long time, been recognised that increased penalties should be associated with repeat offenders. A short historical overview of the legislative punishment policies

involving less harmful drugs. For example, drug offenders who distribute larger quantities of cannabis are more likely to receive longer prison sentences. However, the relation between quantity and sentencing outcomes is less readily visible if the object of crime is heroin, since sentencing factors are far more complex in cases involving high-risk drugs.

8. Conclusions, Implications and Proposals for Further Recommendations

The analysis has shown that in most SEE countries drug offenders represent a considerable proportion of all persons convicted of a crime in state criminal courts. Drug offenders are mostly prosecuted for and found guilty of unauthorised manufacture of and trade in drugs. Data on the prevalence of different drug offences are almost identical for **Bosnia and Herzegovina** and the **FYR Macedonia**. Considerable similarities in the distribution of drug offences are also noted in **Croatia, Montenegro, Serbia** and **Slovenia** where offenders are pronounced guilty of enabling others to use drugs in a significantly smaller number of cases.

Most drug offenders are prosecuted for and convicted of possession of drugs for personal use. Drug possession rates are the highest drug crime rates in general. This overburdens significantly the criminal justice system in the SEE region. In recent years, various internal measures have been applied in view of reducing the number of possession cases which get to the trial phase. Moreover, the great majority of drug manufacturers are drug-addicted offenders who cultivate

for recidivists is in line with the courts' current tendency to impose harsher sentences on offenders with prior convictions. Recidivism and Virginia's "Come-Back" Law, Selected Articles on Eminent Domain Compensation and Valuation Problems, Virginia Law Review, vol. 48, No 3, 1962, p. 597.

plants from which a drug can be obtained or in some other way produce drugs for their own consumption. As a result, there has been a drop in the number of offenders convicted of personal use. Statistics also show that a significantly small number of drug traffickers are convicted as compared with all the other groups of offenders (1.6% in **Bulgaria** and **Croatia** and 3.76% in **Greece**).

In almost all countries participating in the research the analysis has shown that drug offenders who were prosecuted and pronounced guilty are predominantly sentenced to up to 3 years' imprisonment. In a significant majority of cases, the courts also suspended their sentences. In **Croatia** this group of drug offenders represents 48.6% of offenders sentenced for drug-related crimes in the period 2002-2012. The predominance of suspended sentences is also noted in **Greece**. About 52.7% of all pronounced prison sentences (except for drug trafficking) are suspended for a certain period of time. A suspended sentence remains the most common sentence for drug offences in **Slovenia** as well (57.4%). Unlike the aforesaid sentencing policy, in **Bulgaria** the most common alternative to imprisonment is a fine.

When deciding about the type and level of punishment, criminal court judges take into consideration a variety of criminological factors related to the offender and the criminal offence committed. The research has shown that in all countries participating in the research the absence of prior conviction is the key condition that has to be fulfilled in order for courts to pronounce a suspended sentence. The average amount of punishment measured by the courts does not differ in non-suspended and suspended sentences for the same criminal offences. In most cases courts impose equal or highly similar terms of imprisonment to be served as in "ordinary" prison sentences, no matter the fact that they will be suspended for a certain period of time. The analysis of punitive court policy almost unanimously points to the conclusion that courts in the SEE region predominantly pronounce sentences around the legislative minimum or within one third of the range between the special minimum and maximum prescribed for a specific drug-related offence.

The analysis shows that punitive court policies in the SEE region differ significantly from those foreseen by legislators. Besides the fact that courts mostly use 30% of the prescribed legislative framework or break its lower limit by imposing mitigated punishments, this discrepancy is also evidenced in trends in court sentencing after legislative amendments of sanctions prescribed for drug offences have taken effect. The (micro) case analysis clearly shows that even when the prescribed criminal penalty frameworks for

drug offences are increased, the courts do not necessarily follow the newly prescribed punitive policies. The same phenomenon is observed in the case of decreasing the lower range of punishment.

The study shows that drug offenders are predominantly male, leading to the conclusion that drug crime is gender-related. Certain disparities are noted in **Romania** where female offenders represented 24% of the sample. Data on offender age show that the majority of drug offenders are in their twenties. The second leading age group in the region is 30 to 39 (32.4%). Crimes related to drugs are almost always committed by the most criminally active groups, due to the specific nature of the crime that involves planning, a certain amount of activity and a degree of coordination. A significant majority of drug offenders are high school graduates, except in **Romania**, and unemployed. In terms of family status, drug offenders are mostly single and without children.

The research analysis demonstrates that there is substantial discrepancy between legislative and court punitive policies for drug offenders in the SEE region. While legislative measures to suppress drug abuse have primarily been oriented towards health protection, intensified criminalisation of drug-related conducts and highly punitive criminal sanctions, court practice shows that drug offenders are primarily seen as persons in need of treatment whose criminal behaviour is caused by specific criminological factors.

The case law analysis in certain SEE countries suggests that courts do not necessarily follow shifts in punitive legislative policy. Even though the sentencing framework of a certain drug offence was increased, courts continued to apply similar sanctions to the ones applied in the pre-amendment period. Moreover, most sanctions correspond to or are slightly above the legislative minimum, while sanctions exceeding one third of the legislative framework are highly exceptional. The described trends in sentencing have been strongly criticised as “mild punitive policy”, but any criticism should be based on additional research in drug offenders’ recidivism and crime prevalence.

Furthermore, it has been noted that offenders who commit certain drug-related offences receive similar sanctions. Although the principle of proportionality and equality before the law demand consistency of punitive court practices, the sameness of court sentencing decisions raises certain doubts if one considers that it is highly unlikely that all drug offenders are like-situated or that identical mitigating and aggravating circumstances exist in all drug

offences. A lack of sufficient explanations regarding such circumstances in relation to sentencing outcomes is an additional limitation of court practice.

Irrespective of the above limitations, in most SEE countries court sentencing practice has triggered discussions on the adequacy of criminal legislative policy on drugs. Court practice has probably contributed to drug policy interventions to reduce state repression. The analysis of court practice and recent legislative amendments confirms that criminal law measures promoting harm minimisation rather than incarceration have been gradually introduced into the criminal justice system. A significant reduction of sentences in **Greece** and **Romania** and decriminalisation of drug possession for personal use in **Croatia** and Brčko District of **Bosnia and Herzegovina** are fair examples of the new policies.

This research demonstrates that there is a need for further re-examination of criminal legislative policies with a focus on diverting offenders who have committed less serious drug offences from prison. In keeping with this aim, conditions to impose therapeutic measures should be modified in order to enhance alternatives to punishment for offenders who undergo treatment. The treatment measures for drug offenders should be consolidated in a coordinated system. Moreover, in certain countries the new legislative proposals should broaden court discretionary powers in sentencing (e.g. in **Greece**). It has to be kept in mind that evidence suggests that the steps taken towards less punitive and more treatment-oriented practices are not sufficient and that drug policy interventions *de lege ferenda* have to be more substantial and with more far-reaching effects.

Efficient monitoring of newly imposed legislative alterations should be implemented in all SEE countries, and continuing education and training provided to judges, public prosecutors and police officers. A more thorough study of the Criminal Code's effects on drug court practice as well as analysis of trends affecting the penitentiary system are needed. Future research should also focus on programmes to prevent future criminal and drug recidivism in order to develop a consistent drug policy to address these factors.

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The Drug Law reform Project in South East Europe aims to promote policies based on respect for human rights, scientific evidence and best practices which would provide a framework for a more balanced approach and will result in a more effective policy and practice. A major aim of our activities is to encourage open debate on drug policy reform and raise public awareness regarding the current drug policies, their ineffectiveness and their adverse consequences for individuals and society.

Το Πρόγραμμα Μεταρρύθμιση της Νομοθεσίας για τα Ναρκωτικά στη Νοτιοανατολική Ευρώπη στοχεύει στην προώθηση πολιτικών που βασίζονται στο σεβασμό των ανθρωπίνων δικαιωμάτων, την επιστημονική τεκμηρίωση και τις βέλτιστες πρακτικές που θα προσφέρουν ένα πλαίσιο για μια περισσότερο ισορροπημένη προσέγγιση και θα οδηγήσουν σε αποτελεσματικότερες πολιτικές και πρακτικές. Ιδιαίτερα σημαντική επιδίωξή μας είναι να ενθαρρύνουμε την ανοιχτή συζήτηση για μεταρρύθμιση της πολιτικής των ναρκωτικών και να ευαισθητοποιήσουμε την κοινή γνώμη για τις δυσμενείς επιπτώσεις και την αναποτελεσματικότητα της ισχύουσας πολιτικής των ναρκωτικών για τα άτομα και την κοινωνία.

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