

# Pilot Trials: The Swiss Approach to Cannabis Legalisation

JEANNE MORAND

This paper outlines the regulation of cannabis in Switzerland and the problems associated with it. Recent legal and policy developments are discussed. In particular, the ongoing pilot trials and their legal framework are presented. Future perspectives for cannabis legislation with the establishment of a regulated cannabis market with strict regulation are then proposed.

## Table of Contents

I. Introduction .....	219
II. Historical Development of Cannabis Use and Regulation .....	222
III. Political Climate Surrounding the Reform of the Cannabis Regulation .....	225
IV. Current Legalisation .....	227
1. The Narcotics Act .....	228
2. Problems with the Current Legislation .....	229
V. Pilot Trials .....	230
1. Objectives .....	230
2. Applicability of the Narcotics Act .....	231
3. Requirements .....	232
4. Current Projects .....	233
4.1 Pharmacies .....	234
4.2 Cannabis Social Clubs .....	234
4.3 Retail Shops .....	235
4.4 Other Projects .....	235
5. Critical Analysis .....	235
Bibliography .....	236
Legislative Materials .....	241

## I. Introduction

Switzerland is renowned for its direct democracy, in which citizens directly influence political affairs by submitting initiatives and referendums, and by voting every three months. Over the past thirty years, Swiss citizens have

voted on drug policies three times.<sup>1</sup> The most recent of these popular votes took place in 2008, during which the Swiss electorate overwhelmingly rejected an initiative on cannabis legalisation.<sup>2</sup> Cannabis regulation remains to this day a sensitive and important political issue, as a third of Swiss adults have used cannabis at least once in their life and 10% of young people consume it at least once a month.<sup>3</sup> Moreover, research shows that a significant increase in consumption can be expected in Switzerland in the coming decades, reaching a lifetime prevalence of 42% in 2045.<sup>4</sup>

Numerous countries around the world—including some of Switzerland's neighbours—have or are taking steps towards cannabis legalisation.<sup>5</sup> In Switzerland, several politicians have expressed their support for a regulated market of cannabis, making it a recurring topic in Parliament.<sup>6</sup>

Cannabis is regulated by the Narcotics Act (NarcA) and its ordinances.<sup>7</sup> Despite some minor amendments in recent years, the law fails to address modern consumption behaviours, lacks clarity and leaves scope for interpretation, resulting in important disparities in enforcement.<sup>8</sup>

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1 'Initiative populaire fédérale "Jeunesse sans drogue"' (Web page, 22 September 2022); 'Initiative populaire fédérale "pour une politique raisonnable en matière de drogue"' (Web page, 22 September 2022).

2 'Votation populaire du 30.11.2008' (Web page, 13 September 2022).

3 Federal Statistical Office, 'Consommation de cannabis, 2002, 2007, 2012, 2017' (November 2019); 'Cannabis Consumption (Age: 15–64)' (Web page, 5 May 2021).

4 Marc Vogel et al., 'Cannabis Use in Switzerland 2015–2045: A Population Survey Based Model' (2019) 69 *International Journal of Drug Policy* 55, 7.

5 United Nations Office on Drugs and Crime, *In Focus: Cannabis Legalization – World Drug Report 2020* (2020) 5; United Nations Office on Drugs and Crime, *World Drug Report 2021 – Drug Market Trends: Cannabis, Opioids* (2021) 31–41; *Mehr Fortschritt wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit* (Koalitionsvertrag 2021–2025) [Coalition Agreement] (Germany) (2021) 87; Alessandra Arachi, 'Cannabis, primo sì alla legge: a casa sarà possibile coltivare fino a 4 piante', *Corriere della Sera* (online), 8 September 2021.

6 National Council, *Parliamentary initiative 20.473* (Heinz Siegenthaler) 25 September 2020; *Motion. 18.3150* (Heinz Siegenthaler) 13 March 2018; *Postulate 18.4009* (Beat Flach) 28 September 2018.

7 *Federal Act on Narcotics and Psychotropic Substances* (Narcotics Act, NarcA) 3 October 1951, SR 812.121, Art. 2(a).

8 Federal Council, *Avenir de la politique suisse en matière de drogue: Rapport du Conseil fédéral en réponse au postulat 17.4076*, Rechsteiner Paul, 12 décembre 2017 (2021) 36 ('*Avenir de la politique suisse en matière de drogue*'); Art. 19b(1) NarcA ; Ordonnance sur les amendes d'ordre (OAO) [Fixed Penalties Ordinance] 16 January 2019, SR 314.11, Annex 2;

Moreover, the current prohibitive regulatory approach is costly and has proven ineffective in reducing cannabis consumption.<sup>9</sup> A thorough reform of the Swiss cannabis policy is thus needed.

Following an amendment to the NarcA in 2021, pilot trials of regulated cannabis sales are currently being organised throughout Switzerland.<sup>10</sup> These will help to determine whether and how a regulated cannabis market could be established.<sup>11</sup> Furthermore, the Parliament approved a parliamentary initiative aimed at legalising cannabis.<sup>12</sup> A revision of the cannabis legislation will therefore take place in the coming years, with the pilot trials providing an important decision-making basis. Research on legal and political developments of cannabis regulation is lacking. In particular, the benefits of an experimental approach with pilot trials have not been much thematised. This paper attempts to bridge this gap. It is particularly significant as it addresses a sensitive topic in criminal and health policy in the early stages of a lengthy legislative process. Furthermore, Switzerland is an interesting case in drug regulation as it has been a pioneer in alternative drug policies with its four-pillar drug policy.<sup>13</sup> Moreover, it is the first country in the world to carry out pilot trials of regulated cannabis sales on a nationwide level. It may therefore be of interest to other jurisdictions to understand how these pilot trials are designed and conducted to better assess how to reform their own cannabis regulation. This experimental and evidence-based approach to cannabis legalisation can be of help to move beyond the classic “legalise or criminalise” debate. This paper will examine the prospect of cannabis legalisation in Switzerland, exploring in particular how pilot trials

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Michael Herzig, Frank Zobel and Sandro Cattacin, *Politique en matière de cannabis. Les questions que personne ne pose* (2019) 69–72; Stéphanie Stucki, Pierra Esseiva and Frank Zobel, *Mise en oeuvre de la loi sur les stupéfiants (LStup): expériences des cantons et perspectives pour l'avenir* (2019) 48–51.

- 9 Swiss Federal Commission for Drug Issues, *La loi sur les stupéfiants (LStup) a dix ans : réflexions pour l'avenir* (2019) 17.
- 10 Art. 8a NarcA.
- 11 Message concernant la modification de la loi sur les stupe'fiants (essais pilotes impliquant du cannabis) du 27 February 2019 2497, 2521.
- 12 National Council, *Parliamentary initiative 20.473* (Heinz Siegenthaler) 25 September 2020 ('*Initiative Siegenthaler*').
- 13 The four-pillars policy— with prevention, therapy, harm reduction and repression— forms the cornerstone of the Swiss drug policy. It was developed against the background of the heroin epidemic of the 1990 s and was enshrined in law in 2008; Federal Council, *Avenir de la politique suisse en matière de drogue* (n 8) 11.

contribute to the discussion on legalisation. The focus is placed exclusively on cannabis for recreational use.<sup>14</sup> Based on legal and political analyses, it will be demonstrated that cannabis legalisation with strict regulation is likely to occur within the next decade. The paper will begin by presenting the history of cannabis regulation in Switzerland in chapter II. The political climate surrounding the reform of the cannabis regulation will be shortly summarised in chapter III. The mechanisms of the current legislation, the objectives and the problems related to it will be discussed in chapter VI. The pilot trials that are currently taking place and the requirements associated with them will be described in chapter V, along with a critical perspective.

## II. Historical Development of Cannabis Use and Regulation

The first Swiss Narcotics Act was introduced in 1924.<sup>15</sup> The Act prohibited the illegal trade of opium, morphine, heroin, coca leaves, cocaine, and their derivatives. Mostly unknown at that time, cannabis was not included in the controlled substance list.<sup>16</sup> It was added in 1951, to comply with international obligations arising from the Second International Opium Convention.<sup>17</sup> Trade, purchase and possession of cannabis became criminal offences, while consumption remained unprohibited.<sup>18</sup> Cannabis use remained negligible until the mid-1960s, where it started to be consumed for its psychoactive effects within hippie and youth movements.<sup>19</sup> Within a

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14 As cannabis for medical purposes was legalised in August 2022, it falls outside the scope of this paper.

15 Thomas Morgenthaler, 'Politik der Aussonderung: Rückblick auf die schweizerische "Drogenpolitik"' in Thomas Kessler (ed), *Cannabis Helvetica: Hanf in der Schweiz – Hoffnung für die Drogenpolitik* (1985) 145, 150.

16 *Loi fédérale sur les stupéfiants* (du 2 octobre 1924), FF 1924 III 521.

17 Message du Conseil fédéral à l'Assemblée fédérale relatif à la révision de la loi sur les stupéfiants (Du 9 avril 1951), FF 1951 I 841, 866; Frank Zobel, 'Swiss Drug Policy' in Renaud Colson and Henri Bergeron (eds), *European Drug Policies: The Ways of Reform* (2017) 206, 207.

18 Yann Boggio et al., *Apprendre à gérer: la politique suisse en matière de drogue* (1997) 29.

19 Harald Klingemann, 'Drug Treatment in Switzerland: Harm Reduction, Decentralization and Community Response' (1996) 91(5) *Addiction* 723, 724.

few years, cannabis began to be consumed outside these movements and became widespread, reaching 600'000 users in Switzerland in the mid-1970 s.<sup>20</sup> The NarcA was amended in 1975. A revised drug policy, based on three pillars—prevention, treatment, and repression—was introduced and cannabis consumption became a criminal offence.<sup>21</sup> The amendment marked a shift towards restrictive and criminalising drug policies.

During the following two decades, cannabis consumption grew steadily.<sup>22</sup> However, due to the problems related to the open drug scenes that had developed in several Swiss cities, cannabis was side-lined by the authorities.<sup>23</sup> Moreover, due to the extensive media coverage of the open drug scenes and the ravages caused by hard drugs, the use of cannabis received increased tolerance at both the public and the political level.<sup>24</sup> In the early 1990 s, local authorities across Switzerland turned to a “pragmatic approach” to drug policies and introduced harm reduction as a complement to prevention, therapy, and repression.<sup>25</sup> At the turn of the century, drugs were a much-discussed and controversial topic among the Swiss population.<sup>26</sup> Two popular initiatives were brought forward between 1993 and 1994. One called for more restrictive drug policies by prohibiting harm reduction measures;<sup>27</sup> while the second one aimed at decriminalising the cultivation, purchase, possession, and consumption of all drugs.<sup>28</sup> Both were rejected by over 70% of voters.<sup>29</sup> The initiatives and the debates surrounding these initiatives highlighted the need for legislative reform in

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20 Andreas Giger-Gschwend, ‘Hanf in unserer Gesellschaft: von der Rebellion zur Integration’ in Thomas Kessler (ed), *Cannabis Helvetica: Hanf in der Schweiz – Hoffnung für die Drogenpolitik* (1985) 129, 139.

21 Peter Albrecht, ‘Strafen gegen den Drogenmissbrauch’ in Thomas Kessler (ed), *Cannabis Helvetica: Hanf in der Schweiz – Hoffnung für die Drogenpolitik* (1985) 93, 95; Loi sur les stupéfiants: Modification du 20 mars 1975, FF 1975 I 1220, 1224.

22 Commission fédérale pour les questions liées aux drogues, *Rapport sur le Cannabis de la Commission fédérale pour les questions liées aux drogues* (1999) 14.

23 Simon Anderfuhren-Biget et al., ‘Swiss Cannabis Policies’ in Tom Decorte, Simon Lenton and Chris Wilkins (eds), *Legalizing Cannabis: Experiences, Lessons and Scenarios* (2020) 323.

24 Boggio et al. (n 18) 88.

25 Each canton then had its own decentralised drug policy; Zobel (n 17) 209–210.

26 Ibid 210.

27 *Initiative populaire fédérale ‘Jeunesse sans drogue’* (n 1).

28 *Initiative populaire fédérale ‘pour une politique raisonnable en matière de drogue’* (n 1).

29 The initiative “Jeunesse sans Drogue” was rejected by 70.7% of voters, DroLeg by 74%.

the Swiss drug policy.<sup>30</sup> The Federal Council then proposed a partial revision of the NarcA. The aim was to bring the law into line with modern drug policy practices by anchoring the four-pillar policy in the legislation and to decriminalise cannabis consumption. The latter aspect led the Parliament to reject the reform.<sup>31</sup> The revision was then modified to drop the question of cannabis and was accepted by popular vote in 2008. During the same vote, Swiss citizens rejected a popular initiative aiming at decriminalising cannabis consumption as well as cultivation, possession, and acquisition for personal use.<sup>32</sup> The issue of cannabis thus remained at the status quo. Combatting cannabis consumption required considerable efforts from the police and the courts, which were considered disproportionate to the seriousness of the offence. Moreover, law enforcement practices varied considerably among cantons.<sup>33</sup> The Parliament thus decided to amend the NarcA in 2011, decriminalising cannabis consumption: administrative fines replaced criminal proceedings for consumption of small quantities.<sup>34</sup> Despite the rejection of the cannabis initiative in 2008, neither cannabis consumption nor the problems associated with it—criminality, black market, risks related to the quality of the products—decreased.<sup>35</sup> Some of Switzerland's main cities started working on new regulatory approaches: bottom-up solutions were explored and projects to study the feasibility of controlled sales of cannabis were launched.<sup>36</sup> By 2017, almost all Swiss cities had launched their own cannabis trials or joined interurban working groups on cannabis regulation.<sup>37</sup> Those projects required specific scientific research authorisations from the Federal Office of Public Health (FOPH),

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30 Anderfuhren-Biget et al. (n 23) 325.

31 The 2004 revision was narrowly rejected. The Council of States accepted it, whereas the National Council dismissed it, with 89 votes in favour and 96 against; National Council, *Parliamentary debate* 01.024, 14 June 2004.

32 The initiative was rejected by 63 % of voters. *Votation populaire du 30.11.2008* (n 2).

33 Frank Zobel, Jennifer Hasselgård-Rowe and Barbara Broers, *Rapport de synthèse sur la cannabis de la Commission fédérale pour les questions liées aux addictions* (2019) 8.

34 Loi sur les stupéfiants: Modification du 28 septembre 2012, RO 2013 1451; Andreas Eicker, 'Entkriminalisierung durch Auflösung des Strafrechts, zur Revision des Schweizer Ordnungsbussengesetzes' (2018) 30(3) *Neue Kriminalpolitik* 268, 269.

35 Federal Council, *Avenir de la politique suisse en matière de drogue* (n 8) 14–16.

36 Anderfuhren-Biget et al. (n 23) 327.

37 Federal Office of Public Health, *Modification de la loi sur les stupéfiants et ordonnance sur les essais pilotes au sens de la loi sur les stupéfiants (essais pilotes impliquant du cannabis), Rapport sur les résultats de la procédure de consultation* (2018) 4 ('Federal Office of Public Health, *Modification*').

which were denied. As a result, parliamentarians filed motions to create a legal basis for pilot trials involving the dispensing of cannabis for non-medicinal purposes.<sup>38</sup> The Federal Council then drafted a new article for scientific pilot trials with cannabis, which was accepted by Parliament in 2020. Article 8a NarcA entered into force in May 2021. The pilot trials will serve as the basis for future legislation.<sup>39</sup> Chapter V of this paper will further describe these pilot trials and their implementation.

### III. Political Climate Surrounding the Reform of the Cannabis Regulation

After the rejection of the initiative in 2008, three different parliamentary procedure requests for cannabis legalisation were submitted by politicians motivated by different reasons: reducing law enforcement costs, putting alcohol and cannabis on an equal footing, and generating additional tax revenue.<sup>40</sup> In response to these motions, the Federal Council issued an opinion in May 2018: “The current prohibition of cannabis in the NarcA, which aims at protecting the population, acts insufficiently. Despite the ban, consumption is not decreasing, the black market is growing, there is no quality control, and consumer safety is not guaranteed. Furthermore, law enforcement, which mobilises enormous resources, is not very effective. From a health policy perspective, it is therefore imperative to examine new approaches to deal with the cannabis problem.”<sup>41</sup> Despite this, all legalisation requests have been rejected by Parliament. However, a postulate, filed by Paul Rechsteiner, a socialist member of the Council of

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38 National Council, *Motions 17.411* (Regine Sauter), *17.412* (Angelo Barrile), *17.4413* (Regula Rytz), *17.4414* (Kathrin Bertschy) 19 September 2018 and *17.4210* (Roberto Zanetti) 14 December 2017.

39 Art. 8a NarcA; *Ordonnance sur les essais pilotes au sens de la loi sur les stupéfiants (OEPStup)* [Ordinance on Pilot Trials under the Narcotics Act] 31 March 2021, SR 812.121.5, Art. 5 (2).

40 National Council, *Parliamentary initiative 09.488* (Katharina Prelicz-Huber) 24 September 2009, *Motion 18.3150* (Heinz Siegenthaler) 13 March 2018 and *Postulate 18.4009* (Beat Flach) 28 September 2018.

41 Federal Council, *Statement of the Federal Council of 23 May 2018 in response to the motion 18.3150* (Heinz Siegenthaler).

States, was adopted.<sup>42</sup> It commissioned the Federal Council to conduct a review of the actual drug policy and to plan the future of Swiss drug policy for the next decade, considering current national and international developments. The report was delivered accordingly in April 2021. It recognises that consumption practices of recreational substances have changed considerably and evaluates the current cannabis policy as inadequate and therefore, needing adjustment to reflect the current situation.<sup>43</sup> A gradual revision of the national drug policy is suggested, with the four-pillar model as the backbone of a comprehensive policy. Measures focusing on people rather than substances are proposed.<sup>44</sup> In short, the Federal Council advocates that future drug policy should focus solely on people with problematic drug use and on the protection of young people.<sup>45</sup> In parallel, the Federal for Drug Issues issued two reports drawing similar conclusions: the NarcA needed to be revised, as it fails to address the realities of drug consumption.<sup>46</sup> Prohibition led to the criminalisation of large sections of the population and to collateral damages in terms of health and safety. The decriminalisation of drug use with strict regulation of sales and production, focusing on the protection of young people is recommended.<sup>47</sup>

Based on these reports, a parliamentary initiative was submitted in September 2020 by Heinz Siegenthaler.<sup>48</sup> The initiative aims at lifting the prohibition of cannabis and reforming the regulation of its cultivation, production, trade, and consumption. It was accepted by the Social Security and Health Committees (SSHC) of both parliamentary chambers in October 2021. An ad hoc sub-committee of the SSHC of the National Council is therefore currently carrying out legislative work and drafting new regulations for a regulated cannabis market based on research, on the results of the ongoing pilot trials and on successful regulatory models from

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42 Council of States, *Postulate 17.4076* (Paul Rechsteiner) 12 December 2017.

43 Federal Council, *Avenir de la politique suisse en matière de drogue* (n 8) 9.

44 *Ibid* 29, 51.

45 *Ibid* 69.

46 Swiss Federal Commission for Drug Issues (n 9) 9.

47 Zobel, Hasselgård-Rowe and Broers (n 33) 27; Swiss Federal Commission for Drug Issues (n 9) 31.

48 National Council, *Initiative Siegenthaler* (n 12).



other countries. The sub-committee has until October 2023 to prepare a draft law, which will then be submitted to the Parliament for approval.<sup>49</sup>

On another front, Thomas Minder, an independent member of the Council of States, submitted a postulate requesting a report on ways to better exploit the cannabis plant economically to regulate it in a modern and comprehensive manner. The aim of this report is to revive the political debate on cannabis legalisation, improve legal certainty and ensure uniform implementation of the regulations around the production, trade and consumption of hemp and cannabis products throughout Switzerland. The postulate was adopted, and the Federal Council is currently working on the report.<sup>50</sup>

The regulation of cannabis, in particular the decriminalisation of consumption and the protection of youth, is a hot topic in Swiss politics. Both Parliament and the Federal Council are currently working on this issue. However, given its controversial nature, many voices have been raised against projects to create regulated markets. Conservative politicians have already announced opposing any plans to decriminalise cannabis and that referendums against such legislation will be held.<sup>51</sup> It is therefore to be expected that Swiss citizens will vote on the issue of cannabis legalisation within the next decade.

## IV. Current Legalisation

In this section, the NarcA will be introduced and the specific provisions on cannabis will be presented. The problems with the current legislation will be then discussed. Pilot trials will be covered separately in chapter V.

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49 *Federal Act on the Federal Assembly (Parliament Act, ParLA)* of 13 December 2002, SR 171.10, Art. 111(a); Secretariat of the Committees for Welfare and Health, 'Pas d'objectif maximal pour la hausse des coûts de la santé' (Press release, 8 April 2022).

50 Council of States, *Postulate 21.3280* (Thomas Minder) 18 March 2021.

51 Elisa Jeanneret, 'Parlament legalisiert Cannabis – SVP findet es "bedenklich"', *Nau* (online), 23 October 2021.

## 1. The Narcotics Act

The NarcA regulates all narcotics and psychotropic substances in a uniform manner, with the four pillars policy as its cornerstone.<sup>52</sup> The objective of the law is not only the protection of individual health but also the protection of the population from the adverse effects of addiction-related disorders—so-called “collateral damages for society”.<sup>53</sup> The NarcA and its ordinances only regulate cannabis plants and preparations with a tetrahydrocannabinol (THC) content of 1% or more.<sup>54</sup> Cannabis preparations below this limit are not subject to any regulations. The cultivation, production, trade, transport, import, export, financing, acquisition, and possession of cannabis are criminal offences under Art. 19 NarcA.<sup>55</sup> Penalties are custodial sentences of up to three years or monetary penalties.<sup>56</sup> Art. 19*b* provides for exceptions: the preparation of a negligible quantity of narcotics for personal consumption does not constitute an offence, whereas 10 grams of cannabis is considered a negligible quantity. In this respect, the cultivation, acquisition, and possession of up to 10 grams of cannabis for personal consumption are considered “preparation acts” and therefore exempted from punishment.<sup>57</sup> Likewise, supplying cannabis to another adult for the purpose of consuming it together is also decriminalised. However, consumption remains a criminal offence and is punishable by an administrative fine of CHF 100, provided that the consumer is not in possession of more than 10 grams of cannabis.<sup>58</sup> Should the 10 grams limit be exceeded, ordinary criminal proceedings are initiated.<sup>59</sup>

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52 Art. 2*b* NarcA; Gustav Hug-Beeli, *Betäubungsmittelgesetz (BetmG): Kommentar zum Bundesgesetz über die Betäubungsmittel und die psychotropen Stoffe vom 3. Oktober 1951* (2016) Art. 1*a* [5–7].

53 Thomas Fingerhuth, Stephan Schlegel and Oliver Jucker, *BetmG Kommentar: Betäubungsmittelgesetz mit weiteren Erlassen* (3<sup>rd</sup> ed, 2016) Art. 1 [3].

54 Ordonnance du DFI sur les tableaux des stupéfiants, des substances psychotropes, des précurseurs et des adjuvants chimiques (Ordonnance sur les tableaux des stupéfiants, OTStup-DFI) [Federal Ordinance on the Lists of Narcotics, Psychotropic Substances, Precursors and Auxiliary Chemicals] 20 May 2011, SR 812.121.11, Annex 1.

55 The term “cannabis” in this paper always refers to illegal cannabis. The term “legal cannabis” refers only to preparations with a THC content of less than 1%.

56 Art. 19(1) NarcA.

57 BGer 6B\_630/2016, 25 January 2017, C. 2.3; Hug-Beeli (n 52) Art. 19*a* [406].

58 Art. 19*b*(1) NarcA; *Loi sur les amendes d'ordre* (LAO) [Fixed Penalties Act] 16 March 2016, SR. 314.1, Art. 1(1)(a)(10); Annex 2 OAO; *Swiss Criminal Code* of 21 December 1937, SR 311.0, Art. 366(2).

## 2. Problems with the Current Legislation

The current legislation is inconsistent and unclear: possessing a few grams of cannabis for personal consumption is decriminalised, but the consumption in itself remains a criminal offence. Therefore, a consumer who buys a few grams of cannabis remains in conformity with the law only by not consuming it. This contradiction is the result of a carelessly written law, which brings legal uncertainty and has given rise to various problems of interpretation by the police and prosecution authorities.<sup>60</sup> Moreover, enforcement practices differ significantly between cantons. The distinction between preparatory acts for consumption and actual consumption is difficult and nonsensical; possession always preceding consumption.<sup>61</sup> Furthermore, there are important variations in the initiation of criminal proceedings against consumers, as the decision to report criminal offences to the public prosecutor or to impose an administrative fine on the spot is taken by the police. Given the lack of clarity in the law, the police ultimately decide on a case-by-case basis. These inconsistent police operations lead to significant disparities in law enforcement.<sup>62</sup> Since the last rejection of the legalisation of cannabis in 2008, law enforcement practice has been more repressive and prosecutions against consumers have intensified.<sup>63</sup> Despite this, consumption has been rising, which is consistent with research showing that repressive policies have little impact on consumption.<sup>64</sup> The total cost of this repressive drug policy is difficult to measure.<sup>65</sup> A recent study estimated the costs of policing, criminal proceedings and enforcement measures related to cannabis at

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59 Hug-Beeli (n 52) Art. 19a [406].

60 Federal Commission for Drug Issues (n 9) 17–18; Hug-Beeli (n 52) Art. 19b [4]; Peter Albrecht, *Die Strafbestimmungen des Betäubungsmittelgesetzes (Art. 19–28 l BetmG)* (3rd ed, 2016) 186.

61 Federal Council, *Avenir de la politique suisse en matière de drogue* (n 8) 49; Herzig, Zobel and Cattacin (n 8) 124.

62 Herzig, Zobel and Cattacin (n 8) 69–72.

63 Ibid 123.

64 Federal Statistical Office (n 3); Marysia Ogrodnik et al., 'An Economic Analysis of Different Cannabis Decriminalization Scenarios' (2015) 27 *Psychiatria Danubina* 309, 312; Brendan Hughes, João Matias and Paul Griffiths, 'Inconsistencies in the Assumptions Linking Punitive Sanctions and Use of Cannabis and New Psychoactive Substances in Europe' (2018) 113(12) *Addiction* 2155, 2155.

65 Sheron Baumann, 'Ökonomische Analyse des Schweizer Cannabismarktes' (2008) 1 *Abhängigkeiten* 24, 43.

approximately CHF 119 million per year.<sup>66</sup> In addition to the direct costs of repression, prohibitionist policies entail social costs related to insufficient prevention, harm reduction measures and treatment.<sup>67</sup> In particular, high health and social costs occur due to the low quality of products purchased on the black market.<sup>68</sup>

## V. Pilot Trials

### 1. Objectives

According to Art. 8a NarcA, the FOPH may, on request and after consultation with the cantons and municipalities concerned, authorise scientific pilot trials with narcotics with cannabinoid-like effects. The goal is to examine new regulatory approaches and to obtain scientifically supported data on the effects of controlled access to cannabis. The effects on the physical and psychological health of consumers and consumption-related behaviours will be primarily assessed. Socio-economic aspects, such as the effects on users' work capacity and their family and social relationships, will also be examined. Moreover, the impact on criminality and on the

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66 Federal Council, *Avenir de la politique suisse en matière de drogue* (n 8) 17.

67 Baumann (n 65) 43.

68 Particularly worrying are the high levels of pesticides, spores, micro-organisms, heavy metals, and synthetic cannabinoids discovered in cannabis samples tested across Switzerland. Synthetic cannabinoids are synthetic chemicals with a similar mechanism of action to THC, sprayed on legal industrial hemp and then sold on the black market as natural cannabis. They contain higher toxicity than natural cannabis, leading to increased health risks. Its effects on consumers are unpredictable and have led to cases of fatal overdose. No specific regulations or measures have been adopted to date.; Manuela Carla Monti et al., 'Adulteration of Low-delta-9-tetrahydrocannabinol Products with Synthetic Cannabinoids: Results from Drug Checking Services' (2022) 14(6) *Drug Testing and Analysis* 1026, 1027; Markus Schläpfer, Christian Bissig and Christian Bogdal, 'Synthetische Cannabimimetika auf Industriehanblüten' (2020) 7 *Kriminalistik: Zeitschrift für die gesamte kriminalistische Wissenschaft und Praxis* 433, 435; Markus Schläpfer, 'Cannabis Typisierung – Differenzierung auf der Strasse' (2018) (4) *Kriminalistik: Zeitschrift für die gesamte kriminalistische Wissenschaft und Praxis* 258, 258, 259; Dominique Schori, *Synthetische Cannabinoide: Ergebnisse aus dem Drug-Checking der Stadt Zürich, Januar bis August 2020* (2020) 6; Werner Bernhard et al., 'Untersuchung von Cannabis auf Streckmittel, Verschnittstoffe, Pestizide, mikrobiologische und anorganische Kontaminationen', Institut für Rechtsmedizin der Universität Bern (2017) 12.

local black market, as well as the protection of youth will be observed in some trials.<sup>69</sup> Finally, the appropriateness of different distribution systems will also be evaluated.<sup>70</sup> The results will then be used as a basis for decisions on future cannabis regulation.<sup>71</sup>

## 2. Applicability of the Narcotics Act

The Ordinance on Pilot Trials explicitly derogates from the NarCA regarding provisions on the prohibition of cultivation, production, import and sale of narcotics containing an effective concentration of cannabinoids.<sup>72</sup> There is, however, no legal exemption from prosecution for possession and consumption of cannabis for pilot trials participants. This can be explained by the fact that participants can only purchase up to 10 grams of cannabis within the pilot trials; the same quantity that is considered a “negligible quantity” under Art. 19b NarCA.<sup>73</sup> Although not explicitly mentioned in the Ordinance, participants will be able to consume legally. However, this only applies to private spaces or cannabis social clubs. As cannabis consumption in such spaces is generally not subject to police control, pilot trials participants are in practice not significantly privileged before the law.<sup>74</sup> Beyond the few exceptions mentioned, the current legal situation is applicable in the context of the pilot trials. The following actions remain therefore prohibited: possession of more than the authorized quantity of the cannabis supplied in the trials; resale, sharing or giving away of the study cannabis to third parties or minors, passing on to minors, consumption in public places as well as driving a vehicle under the influence of cannabis.<sup>75</sup>

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69 *Ordinance on Pilot Trials under the Narcotics Act* (Switzerland) 31 March 2021, SR 812.121.5, Art. 2(2).

70 *Ibid* Art. 32(2).

71 FF 2018 2497 (n 11), 2498.

72 Art. 3 OEPStup.

73 Art. 16(1) OEPStup. The possession of up to 10 grams of cannabis is exempted from punishment (see chapter IV).

74 The main benefits of participating in the pilot trials are thus the controlled quality of the products and the convenience of purchasing it legally.

75 Art. 16–17 OEPStup; *Loi fédérale sur la circulation routière* (LCR) [Road Traffic Act] 19 December 1958, SR 741.01, Art. 15d(1)(a); ‘Weed Care – Informationen’ (Web page, undated).

### 3. Requirements

Pilot trials may be conducted by public or private organisations, in collaboration with local enforcement and prosecution authorities and subject to authorisation by the FOPH.<sup>76</sup> Each trial is geographically restricted to one or several municipalities, for a duration of five years. They may, upon request, be extended for a total duration of seven years. The maximum number of participants is 5000 per trial.<sup>77</sup> Cannabis sold within the trials must meet strict quality requirements: plants must be organically produced in Switzerland, be free from additives and contaminants and comply with European rules of agricultural practice for the cultivation of medicinal plants.<sup>78</sup> The THC level must not exceed 20% per product. Additional rules apply for products intended to be ingested, such as cannabis oils.<sup>79</sup> Products must be properly packaged and labelled, and advertising is prohibited.<sup>80</sup>

Only regular cannabis consumers are eligible to participate in the trials.<sup>81</sup> They must be domiciliated in the canton of the trial, accept the conditions of the scientific study (with requirements such as the obligation to answer questionnaires) and be able to prove that they already use drugs with cannabinoid-like effects.<sup>82</sup> Participation is excluded for minors and for people suffering from a disease for which the use of cannabis is contraindicated, such as psychosis.<sup>83</sup> Participants will be able to purchase up to 10 grams of THC per month for their personal use, at a price corresponding to the local black market price.<sup>84</sup> Consumption of the products in public spaces is forbidden.<sup>85</sup>

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76 Art. 18(a), 21–22 OEPStup.

77 Art. 5–6 OEPStup.

78 Rules of good agricultural practice for the cultivation of medicinal plants as defined by the European Medicines Agency.

79 Art. 9(1)(b) OEPStup.

80 Art. 11–12 OEPStup.

81 Participants will have to prove that they are regular consumers through normalised tests or hair samples analysis.

82 Art. 14 OEPStup.

83 People with first-degree relatives suffering from psychiatric disorders would for instance also be banned from participating in a pilot trial.; Art. 14(2) OEPStup; Jacob Ablin et al., 'Medical Use of Cannabis Products: Lessons to Be Learned from Israel and Canada' (2016) 30(1) *Der Schmerz* 3, 4.

84 Art. 16 OEPStup.

85 Art. 17(1) OEPStup.

Every year, organisers will monitor the quantities of cannabinoids acquired, delivered, and stored and prepare a research report with an evaluation of the trial.<sup>86</sup> The FOPH will continuously review the reports with a view to a possible amendment of the law. In particular, the effects on individual and public health, consumer behaviour, public safety and order as well as the appropriateness of the distribution measures, instruments and procedures will be examined.<sup>87</sup> At the end of the testing period, the Federal Council as well as the Parliament will be informed of the results.<sup>88</sup> The research reports will then be reviewed in light of legislative developments, including additional sectoral research to ensure that a sufficient scientific basis for decision-making is created for the legislator to amend the legislation.<sup>89</sup>

#### 4. Current Projects

The first trial started in September 2022 in Basel. Other trials—in Berne, Geneva, Lausanne and Zurich—organised by the cities in cooperation with universities and associations, are currently in the development phase or awaiting approval.<sup>90</sup> For now, three different distribution models are being considered: pharmacies, cannabis social clubs and retail shops.

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86 Art. 32 OEPStup.

87 Art. 34(2) OEPStup.

88 Art. 34(4) OEPStup.

89 Federal Office of Public Health, *Rapport explicatif: ordonnance sur les essais pilotes au sens de la loi sur les stupéfiants* (2021) 17.

90 Stadt Zürich, 'Züri Can – Cannabis mit Verantwortung' (Web page, undated); Koordinationsstelle Forschung am Menschen (Kofam), 'Cannabisverkauf in Berns Apotheken: Eine randomisierte kontrollierte Studie' (Web page, 29 April 2022); Cann-L, 'Le projet Cann-L' (Web page, 2022); Gesundheitsdepartement des Kantons Basel-Stadt, 'Grünes Licht für Studie zum regulierten Cannabisverkauf in Apotheken im Kanton Basel-Stadt' (Web page, 19 April 2022); Federal Office of Public Health, 'WEED CARE – Studie zum regulierten Cannabisverkauf in Basel' (Web page, 22 September 2022); Koordinationsstelle Forschung am Menschen (Kofam), 'La Cannabinothèque. Un projet pilote d'accès réglementé au cannabis à Genève (Projet Pilote Cannabinothèque, PPC)' (Web page, 21 June 2022) ('Kofam, Cannabinothèque').

## 4.1 Pharmacies

Basel, Berne and Zurich opted for pilot trials with distribution through selected pharmacies.<sup>91</sup> This distribution model is similar to the one adopted in Uruguay, where the sale of cannabis products is exclusively carried out by pharmacies.<sup>92</sup> The advantage of such a distribution model is that the infrastructure and processes for handling and controlling substances already exist.<sup>93</sup>

## 4.2 Cannabis Social Clubs

Cannabis social clubs are registered, non-profit associations that purchase cannabis, sell it to their members and run a clubhouse where members can consume together.<sup>94</sup> This distribution model will be evaluated within the pilot trial in the city of Zurich.<sup>95</sup> Each club will have between 50 and 150 members. Cannabis social clubs are a model of non-profit production and distribution of cannabis among a closed circuit of adult cannabis users. The main advantage of this model is that it provides members with a safe environment for consumption.<sup>96</sup>

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91 Regierungsrat des Kantons Basel-Stadt, Anzug Tanja Soland und Konsorten betreffend "Pilotversuch zum kontrollierten Verkauf von Cannabis", Beschluss des Regierungsrates, 10.5204.06, Basel: 2021.

92 For more information on the Urugayan model: Rosario Queirolo, 'Uruguay: The First Country to Legalize Cannabis' in Tom Decorte, Simon Lenton and Chris Wilkins (eds), *Legalizing Cannabis: Experiences, Lessons and Scenarios* (2020) 116, 122.

93 José Miguel Cruz, Maria Fernanda Boidi and Rosario Queirolo, 'The Status of Support for Cannabis Regulation in Uruguay 4 Years after Reform: Evidence from Public Opinion Surveys: Support for Cannabis Regulation' (2018) 37 *Drug and Alcohol Review* 429, 432.

94 Tom Decorte et al., 'Regulating Cannabis Social Clubs: A Comparative Analysis of Legal and Self-Regulatory Practices in Spain, Belgium and Uruguay' (2017) 43 *International Journal of Drug Policy* 44, 44.

95 Stadt Zürich (n 90).

96 Oliver Hoff, Cannabis in the Swiss Economy: Economic Effects of Current and Alternate Regulation in Switzerland (2022) 139.



### 4.3 Retail Shops

Projects organised by the cities of Geneva and Lausanne have opted for distribution through dedicated shops run by associations for addiction prevention.<sup>97</sup> Within those shops, the sale of cannabis will be accompanied by medical and social counselling. The central idea is to eliminate profit and the incentives associated with it so that the focus is on protecting consumers and public health rather than private interests.<sup>98</sup>

### 4.4 Other Projects

The association “Verein Cannabis Research” announced organising three studies in St. Gallen, Basel, and Zurich with cannabis sales in private “dispensaries” to investigate the dynamics between urban-rural areas and price sensitivity.<sup>99</sup>

## 5. Critical Analysis

A great deal of freedom regarding the design and organisation of the pilot tests is left to the organisers. Cities can thus organise pilot trials in line with their drug policy practices and in collaboration with their local structures. This setting echoes the situation in the 1990s when cities were testing approaches to deal with the problems associated with hard drug use.<sup>100</sup> This flexibility is extremely valuable as it provides a relatively open

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97 Kofam, *Cannabinothèque* (n 90).

98 Cann-L (n 90). For a comparison of distribution models: Ivana Obradovic, ‘From Prohibition to Regulation: A Comparative Analysis of the Emergence and Related Outcomes of New Legal Cannabis Policy Models (Colorado, Washington State and Uruguay)’ (2021)

91 *International Journal of Drug Policy* 102590, 3–4.

99 The president of “Verein Cannabis Research” has family ties to the owner of “Rivamo”, the company that will operate the cannabis dispensaries.

100 It is interesting to note that although the competences for drug policy are cantonal, the cities are the most involved in prevention and harm reduction programmes; Art. 3b(1), 3d, 3 g NarcA; Valérie Junod, ‘Cannabis utilisé à des fins non-médicales: Feu vert pour des essais pilotes ciblés?’ (2018) *sui generis* 414, 426.

framework within which different hypotheses about forms of regulation can be tested with different approaches and methodologies.<sup>101</sup>

However, to best examine the impact of possible forms of regulation, pilot trials should be designed to be close to reality.<sup>102</sup> The exclusion of non-consumers and people with illnesses from the participation in the trials seems thus counterproductive.<sup>103</sup> Although such exclusion is morally and politically comprehensible, a strong selection bias is created by allowing only regular, healthy consumers to participate in the trials.<sup>104</sup> The results of the study will therefore only be valid for this group of consumers, and not for the population as a whole. Whether more people start using cannabis as a result of legal access to the product can for instance not be answered.<sup>105</sup>

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101 Ibid; Hermann Fahrenkrug, *Drogues illégales en Suisse 1990–1993: la situation dans les cantons et en Suisse* (1995) 181–189.

102 Message concernant la modification de la loi sur les stupéfiants (essais pilotes impliquant du cannabis) du 27 février 2019 2497, 2512.

103 Art. 14(2)(d) OEPStup.

104 Junod (n 100) 423.

105 Federal Office of Public Health, *Rapport explicatif: ordonnance sur les essais pilotes au sens de la loi sur les stupéfiants* (2021) 10.

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## Legislative Materials

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