

QUANTITY THRESHOLDS FOR DRUG POSSESSION AND SUPPLY OFFENCES - A BRIEFING FROM TRANSFORM & MUCD.



Quantity thresholds are widely used in drug policy and law around the world to help determine how an individual caught in possession of illegal drugs should be dealt with. There is however, significant variety in policy and practice, not only in the level at which thresholds are set for different drugs in different jurisdictions, but also the purpose of such thresholds, how they are administered, and the sanctions deployed once any threshold-guided determination has been reached.

While there is broad agreement that it is important to have a fair, consistent, and practical mechanism for determining whether someone caught in possession of drugs has them for personal use or intent to supply (and the nature of such supply), there is considerable controversy over how to achieve this in practice. Having a single threshold quantity, below which an individual is designated as a user, and above which they are designated a supplier is an appealingly simple concept; It is easy to understand for both public and law enforcement, and seemingly easy to enforce for police and courts. Experience, however, has proven that this is a complex issue for which simplistic solutions can create injustices and unintended consequences.

The most obvious challenge is where should any threshold be set? Any fixed or legally binding threshold - even if based on sound scientific evidence and reasoning - creates a potential for incorrect designations. Fixed binding thresholds are intrinsically arbitrary; some people in possession for personal use will, on occasion, be over the threshold (if they are, for example, buying in larger quantities to; save money; reduce contact with the illegal market; because they are a medical user or problematic user with higher tolerance; or because they live in a remote area). Similarly, suppliers will occasionally be below the threshold. When thresholds are set too low many users may be wrongly labelled as suppliers and receive disproportionate sentences. If set too high, illegal dealers can operate with relative impunity.

In this context, it is important to note that implicit in legally binding thresholds is a presumption of guilt for supply offences if someone is found in possession of above the threshold. This challenges the fundamental legal principle of the presumption of innocence (until proven guilty), and reverses the burden of proof onto the defendant.

Whilst seeming to be a simple enforcement framework, enforcing thresholds in reality can present a series of practical problems:

- How is quantity defined when pill and powder form drugs are routinely cut with adulterants or bulking agents? Would 1 gram of 80% pure cocaine be viewed the same as 4 grams of 20% pure cocaine? What if a sample of heroin is cut with fentanyl or other drug? How can front line enforcers make an accurate assessment of drug contents and purity to inform their actions?
- How can different forms of cannabis be differentiated (fresh herbal, dried herbal, resin and other concentrates, edibles etc.) when the ratio of active drug content to weight will vary so greatly between cannabis products? And again, what are practical and resource implications of front line enforcers making such a designation?
- If someone is a small scale street dealer (whose involvement in the illegal market may often be driven by lack of opportunity and economic necessity), or someone is supplying for a group of friends on a social, non-profit basis - how can they be distinguished from the larger scale traffickers and more senior organised crime actors to ensure fair and proportionate sanctions?
- How is drug cultivation - whether for personal use or wider supply - addressed? How can threshold weights be applied to growing or unprocessed plants?
- What should any threshold be used for? Determining what offence has been committed, determining whether there should be a prosecution at all; determining which agency should process the offence; determining the sentence for a given offence?

In practice there are no simple answers to these questions. The UN drug treaties obligate member state parties to criminalize trafficking, but not possession for personal use - providing the space within international law for decriminalisation approaches to people who use drugs that have been widely adopted around the world.¹ Whilst the UN framework provides for distinctions to be made between people who use and supply or

traffick drugs² no specific model is promoted, or detailed guidance provided by the UNODC.³ The nearest thing to guidance that has so far been made available is a 'Model Drug Abuse Bill'⁴, produced by the UN Drug Control Programme (the forerunner of the UNODC) almost 20 years ago in 2000 (it is currently undergoing review - although the publication date is unspecified).

The UNDCP model bill does not propose specific threshold quantities. It does, however, highlight that it is an option for States to differentiate between maximum penalties on the basis of the quantity of the drug involved, 'distinguishing between a commercial, a trafficable, and a less than trafficable quantity', but also that it is an option to use quantity to 'informally provide guidance for post-conviction address on penalty'.

It is clear that member states have considerable flexibility in how they apply the broadly defined UN and treaty mandate, and that this flexibility is reflected in the wide variation in policy models around the world. In 2001 the European Commission actually considered, and ultimately rejected, a proposal for uniform EU thresholds on the basis that there was not enough structural alignment in EU member state criminal justice systems to make it practical.⁵ The EU's European Monitoring Center for Drugs and Drug Addiction does however usefully provide a thorough comparative regional analysis of use of drug quantity thresholds (which, to note, are a live issue - subject to regular review and change). Its analysis identifies that in the EU:

- Quantities may be established at different legal levels; in laws, in ministerial decrees, in prosecutor guidelines or sentencing guidelines.
- Some countries draw up extensive lists of substances, others will only apply a defined quantity limit to a few substances.
- Different countries opt for different quantities for similar offences; eg criminal prosecution for possession of cannabis resin will start with 0.25g in Lithuania but with 6g in many German Laender.
- Drugs are treated quite differently within each country. For a given offence, the established weight threshold of cannabis herb may be

equal to that of resin (Belgium), or twenty times more (Lithuania). The weight threshold for cannabis may be three times (Cyprus) or ten times (Netherlands) that of heroin. The weight threshold of cocaine may be equal to that of heroin (eg Norway), or ten times heavier (eg Lithuania).

Similar variation is observed across Latin America⁶ - as this table of personal use quantity thresholds illustrates. It is notable that, for example, Uruguay's threshold for cannabis is 8 times higher than Mexico's, and Peru's threshold for cocaine is 10 times higher than Mexico.'

CASE STUDY.

The difficulties in devising a workable system to address these practical legal challenges is illustrated in the UK example.

Clause 2 of the The Drugs Act 2005 sought to amend the Misuse of Drugs Act 1971, by introducing fixed thresholds that created a presumption of intent to supply where the defendant is found to be in possession of over the threshold quantity or the given drug. The legislation was widely criticised as being rushed, lacking adequate consultation and pandering to pre-election populist 'tough on drugs' sentiments.⁷ Unusually, at the time the Act was passed the actual threshold quantities had not been established; this task left for so-called 'statutory instruments' that provide the detail of how the Act functions in practice, to be developed and commenced at a later stage.

A year after the Act was passed, a consultation with a range of expert stakeholders was belatedly convened. These deliberations were

fraught - engaging with many of the questions and challenges outlined in this briefing (indeed many of the stakeholders had objected to the idea of binding/presumptive thresholds before the act was passed). Ultimately, no adequate solutions could be found and the amendment was never commenced - being quietly struck out of the legislation entirely some years later. The UK therefore has no quantity thresholds for differentiating possession and intent to supply offences, with charging decisions instead based on a set of charging guidelines relating to factual information such as possession of money, scales, drug bags, phone messages etc.⁸

In 2012, a set of guideline thresholds for supply that are the 'indicative quantity of drug concerned' was, however, adopted to inform sentencing decisions. These guidelines were provided by the independent Sentencing Council, and based on an open expert consultation process. The guidelines identify 4 categories of seriousness for supply offences, which are linked to increasing quantities.⁹ Sentencing decisions are also influenced by an evaluation of the level of culpability (criteria are provided for 'leading', 'significant', or 'lesser' market participants). These parallel evaluations of quantity and culpability are then related to a sentencing guidelines matrix for the different categories of offence. The guidelines provide a range of sentences - i.e. maximum/minimum for each - with sentencing made within this range determined with reference to a list of aggravating or mitigating circumstances (such as - in aggravation; previous convictions, involvement of minors, or in mitigation; involvement under coercion, youth or mental disability).¹⁰ The guidelines are subject to regular review.

Thresholds established for main substances*

Substance	Colombia	Ecuador (2013)	Mexico	Peru	Uruguay
Heroin	-	0.1 g	50 mg	-	-
Cannabis	20 g Hashish: 5 g	10 g	5 g	8 g	40 g
Cocaine, base cocaine or cocaine hydrochloride	1 g	2 g / 1 g**	500 mg	5 g / 2 g**	-
MDA	-	0.15 g	40 mg	-	-
MDMA	-	0.015 g	40 mg	-	-

Source: Prepared with information from studies by country.

*Only the main substances are shown.

**Ecuador: 2g cocaine/1g hydrochloride, Peru: 5g cocaine/2g hydrochloride.

Discussion and Conclusions.

- A review of the international evidence shows a wide variety of policy and practice. The frequent revising of national legislation also demonstrates the ongoing challenge of trying to establish a fair and practical system for distinguishing between personal use and intent to supply offences for those caught in possession.
- International experience shows thresholds can be used to at different stages of the criminal justice process; at arrest, charge or sentencing - for a range of purposes. Thresholds can be binding (leading to an automatic penalty), presumptive (where there is a presumption one way or another regarding a given offence), or discretionary (where the quantity is only one factor in guiding a determination). Some countries, have no formally designated thresholds for some or all drugs (such as the UK and Argentina), with decisions of prosecutors and judges instead based on a wider analysis of factual information presented by police.
- In devising a model, it is important to ask what are the goals of thresholds, do they achieve them, and is there a better way to achieve them? To avoid perverse outcomes, thresholds - if adopted - should be seen as a means to an end and evaluated against predetermined goals. Key aims include; avoidance of criminalisation of people who use drugs; avoidance of potential for police corruption/extortion; fairness and proportionality in sentencing; and cost, practicality and ease of understanding for enforcers and public. These goals may sometimes be in conflict; keeping a system cheap and simple to enforce for example, may lead to injustices and disproportionality. It is therefore important that any model is subject to regular review against such aims and is flexible enough to adapt where there is evidence of unintended or negative consequences.
- Binding and presumptive thresholds are intrinsically arbitrary and run contrary to important concepts of natural justice. They present a demonstrable risk of injustices, especially if they are set so low that they designate significant numbers of users as suppliers. This may be viewed as an unacceptable cost to pay for the apparent simplicity and efficiency of such a system. Binding thresholds may also allow some criminal suppliers to 'game' the system by staying just the right side of the thresholds.
- A discretionary system where the thresholds quantities provide guidance to be used alongside other information can avoid these problems, and allows flexibility to focus attention on drugs which are causing the most harm. It will also potentially be more open to abuse, discrimination, or corruption - so requires more training and scrutiny to function in a fair, effective and consistent fashion. Guidelines used to make decisions under a discretionary system should be fully transparent.
- If thresholds are used, for any purpose, they should be based on scientific evidence and independent expert consultation and review - something that has not tended to be the case internationally - with decisions seen more often as arbitrary and politicised.¹¹ There is no consensus in law or expert opinion on precisely where, if used, personal use (or other) thresholds should be set for different drugs - indeed it seems clear that they need to be shaped by local factors. However, setting personal use thresholds so low that users are often designated as suppliers is a serious but commonly identified problem; not only cruel and unjust, but fuelling over-incarceration across the world.
- Where intent to supply is identified it is important to be able to make distinctions between minor supply offences (economic necessity, social non-profit supply etc), medium scale, and larger, more serious offences. This may usefully entail a hierarchy of threshold quantities for different drugs, rather than a single user/supplier threshold, and/or transparent guidance on other aggravating and mitigating factors.
- Sentencing should be proportionate to harm caused to society - and not guided by populist political instincts to 'get tough' on all drug dealers. Notably, politicians exploring

decriminalisation of users, have often historically felt the need to simultaneously ramp up sanctions for supply offences; not on any rational basis, but rather driven by a political desire to not be seen as weak or 'soft' on drugs. Alternatives to incarceration and punishment for certain minor supply offences have also been widely endorsed by various UN agencies.

- Special consideration needs to be given to cultivation of drug crops - particularly small scale cultivation for personal use, non-profit supply, medical use, or other mitigating circumstances.
- Where systems are changed resources should be made available to retrain enforcement and judiciary as required, as well as educate the public. Resources should also be made available for adequate data collection on the systems functioning and effectiveness against agreed indicators of success.

References.

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2. See Article 36-§1(b) of the amended 1961 Single Convention, Article 22-§1(b) of the 1971 Convention, and Articles 3-§2 and 3-§4(b) of the 1988 UN Convention
3. UNODC does however define 'significant' quantities for seizures - but this is for reporting purposes, not for determining sentences or offences. https://www.unodc.org/documents/data-and-analysis/statistics/Drugs/Seizure_Cases_Guidance_Note_English.pdf
4. UNDCP Model Drug Abuse Bill 2000 Commentary, para 105. https://www.unodc.org/pdf/lap_drug-abuse-bill_commentary.pdf
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