

“BABEȘ-BOLYAI” UNIVERSITY OF CLUJ-NAPOCA

FACULTY OF LAW

DOCTORAL SCHOOL OF LAW

DOCTORAL THESIS

**Particularities of the national drug
trafficking offence with perspectives from
comparative law**

Doctor of science

SUMMARY

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Cluj-Napoca

2026

SUMMARY

1. Current Context and Significance of the Research Topic

By means of the present thesis we seek to contribute to a deeper understanding of the issues raised by one of the gravest contemporary criminal phenomena, drug trafficking, and to provide theoretical and practical support to the efforts to prevent and combat this phenomenon. Drug offences are of particular gravity, since they injure one of the most important social values protected by criminal law, public health, and the harm caused to this value may ricochet and injure other social values indispensable to the well-being of society, such as the life and health of the consumer. Their gravity is further heightened by the fact that drug-related crime, by reason of its manner of organisation and operation, constitutes one of the most dangerous forms of organised crime.

Citizens, as the addressees of legal norms, are under a duty to adopt conduct that conforms to the rules governing operations with substances placed under national control. Accordingly, the strict regulation of operations with narcotic or psychotropic substances, through the punishment of serious breaches in the most intrusive form, that of criminal law, is required in the interest of protecting public health and ensuring the healthy development of society.

Romania joined forces with the major States of the world in the fight against this phenomenon as early as its accession to the International Opium Convention, signed at Geneva on 18 May 1928. One might be tempted to believe that, almost a century later, the unlawful circulation of drugs would be under control; the statistics in the field, however, show precisely the opposite. As in the case of other offences – cybercrime being a case in point – drug traffickers have evolved together with the society to which the end consumer also belongs, constantly adapting the “products” on offer to the tastes of their clients and to the social class from which those clients come, as well as their *modus operandi*, so that the latter either outstrips or strongly rivals the investigative techniques employed by the judicial bodies.

During the communist regime, against the background of the strict control exercised by the State, Romania did not face the scourge of drug trafficking on an extensive scale and was known only as a transit country, even though, at the international level, the phenomenon was developing at a dizzying pace. With the fall of the regime, and against the background of the transit of drugs from the East towards the West, a genuine distribution market developed

on the national territory, and Romanian society was compelled to confront a prolific market for the production, manufacture, extraction, preparation and transformation of drugs, against which the State continues to struggle to this day.

The reality of the twenty-first century demonstrates that the problem of drug trafficking and consumption is a worrying and topical one at both the international and the national level. According to the European Drug Report 2021, not even the COVID-19 pandemic discouraged traffickers; it merely led them to change their methods of operation and their means of delivery and transport: drugs were transported predominantly in intermodal containers or concealed in the goods with which traders stocked up, and to a lesser extent by human couriers, while street sales of doses gave way to orders placed through the encrypted messaging services of social media platforms or through darknet sites, with delivery to the home or to a post-office box opened under a false identity. It was rightly considered in that report that traditional, physical drug operations will be replaced by the digitalisation of the drug market, with the consequence – we would add – of the diversion of the lawful infrastructure of electronic, postal and courier services towards drug trafficking.

Nor can we disregard the conclusions of the 2024 National Report on the Drug Situation, according to which the number of persons investigated for offences relating to drugs and precursors increased in 2023: of a total of 11,135 persons investigated, 2,898 were committed for trial, an increase of 13.47% compared with 2022. It was also noted with concern that the number of minors committed for trial rose from 67 in 2022 to 100 in 2023. At the same time, the upward trend in the number of persons convicted of such offences persists, this indicator having reached its highest value in the last ten years, even though, in relation to the preceding year alone, the number is slightly lower: 1,063 persons convicted in 2023, of whom 5 were minors, compared with 1,084 in 2022, of whom, likewise, 5 were minors.

The topicality and relevance of the subject are justified by the fact that the phenomenon has penetrated almost every sphere of society – health, education, politics, the prison administration, the economy – and the harmful consequences of drug trafficking and consumption take no account of legislative shortcomings, of social class or of the age of the trafficker or the consumer. Consumption no longer takes place only in obscure places, shielded from the reach of the judicial bodies, but is widespread even in educational institutions and on the street. Under the illusion of the occasional or recreational consumption of soft drugs which, according to the collective consciousness, supposedly do not cause dependence, young people are among those most inclined to try drugs; what they do not know

is that, once a moderate tolerance has developed, they will turn to harder drugs and, from masters of their own weakness, will become slaves of a dependence from which, without specialised help, there is no escape. Moreover, driven by the pressing need to secure the next dose and by the lack of financial resources, new consumers end up drawn into the trafficking chain, becoming in their turn sellers and suppliers of drugs.

Aware of the alarming growth of the phenomenon, of its devastating consequences for public health and of the costs involved in the recovery of former consumers, the State is condemned to wage a continuous struggle against this scourge. In this socio-legal context, the thesis justifies its contemporary relevance and pertinence by the topicality of the legislative and legal issues analysed. The thesis is monographic in character and, in addition to presenting the harmful consequences of the phenomenon for society, submits for debate the principal regulatory and investigative issues identified in relation to the offence of drug trafficking, criminalised by Article 2 of Law No. 143/2000 on preventing and combating illicit drug trafficking and consumption, which constitutes the central object of the research.

2. Objectives, Structure and Methodology of the Research

The thesis is structured in four chapters. **Chapter One** is divided into two titles: the first sets out the historical evolution of the most relevant international, European and national regulations in the field, while the second analyses the social value protected by the offence of drug trafficking and the possibility of identifying a material object of that offence. **Chapter Two** is devoted to the analysis of the offence that represents the quintessence of the thesis, domestic drug trafficking as criminalised by Article 2 of Law No. 143/2000, the 18 material elements individually enumerated by the legislature being classified and examined in three distinct categories: acts of production, acts of trafficking proper and auxiliary acts of trafficking. **Chapter Three** analyses the subjective side (*mens rea*) of the offence and, in a second part, the issue of the discernment of the trafficker who pleads its impairment as a result of drug consumption. **Chapter Four** is devoted exclusively to setting out the conclusions and the *de lege ferenda* proposals advanced throughout the thesis.

The research is both theoretical in character, in that the incriminating provisions are analysed *in extenso* and critically, with emphasis on the problems of interpretation of the constituent content of the offence, and practical in character, since every new hypothesis advanced is argued and, where appropriate, illustrated by reference to judgments of national,

European or international courts. We have sought both to present the problematic hypotheses identified in judicial practice and to set out new debatable questions that may arise in domestic case law as a result of legislative shortcomings. At the key points that have given rise to doctrinal controversy, the thesis presents the guidelines laid down by the High Court of Cassation and Justice through appeals in the interest of the law, preliminary rulings on questions of law and decisions in individual cases, as well as by the Constitutional Court in the course of its *a priori* or *a posteriori* review of constitutionality. The study has been enriched by the interpretations offered by the European Court of Human Rights and by the decisions of the Court of Justice of the European Union, including its answers to requests for preliminary rulings, in those hypotheses liable to give rise to divergent interpretations.

The thesis has also been developed systematically in that, within each section, it presents, with supporting argument, the manner in which the controversial issues have been resolved in comparative law. We consider that supplementing the analyses carried out on the basis of domestic doctrine, case law and legislation with opinions and judicial decisions from foreign jurisdictions broadens the perspective of the Romanian legislature and of domestic doctrine and facilitates the appropriate amendment of the legislation. To this end, the thesis examines aspects of Swiss, German, Spanish and Italian doctrine, as well as judgments of the German Federal Court of Justice, the Spanish Supreme Court, the Italian Court of Cassation and the ordinary courts within their respective jurisdictions.

The research is, moreover, strongly interdisciplinary in character. Since it examines the methods of obtaining drugs by natural means – cultivation –, by semi-synthetic and synthetic means – production, manufacture, transformation and extraction –, as well as the methods of manipulating the effects induced by these substances – preparation and experimentation –, the corresponding sections are interwoven with technical notions drawn from agronomy, chemistry, biology, forensic medicine, psychiatry and toxicology. These sections set out, with reasons, toxicological and forensic medical expert reports from the foreign specialist literature, since only such reports demonstrate with certainty the consequences of the manufacture, adulteration or preparation of drugs for human health and life; only on the basis of their analysis could legal constructions be built on sensitive subjects such as the applicability of the aggravating circumstance of mixing drugs with other substances which increased their danger to the life and integrity of persons.

The aim of the thesis is to constitute a useful instrument for both academics and practitioners, by setting out as many problems of theory and practice in the field of drug

trafficking as possible and by advancing reasoned solutions, culminating in the corresponding *de lege ferenda* proposals. The conclusions of the research and the proposals for legislative reform are summarised below, following the structure of the thesis.

3. Evolution of the Regulation and the Legal Object of the Offence of Drug Trafficking

3.1. Historical Evolution of the Criminalisation

Providing a linear overview of the evolution of the criminalisation of drug trafficking in Romania required opening the thesis with a presentation of the international and European legal instruments of reference, which constituted the source of Romanian legislation in the field. As early as the Palaeolithic period, plants containing narcotic and psychotropic substances were widely used in fields such as medicine, religion and even inter-tribal politics. As the effects of these plants became notorious, their active substances came to be reproduced chemically in laboratories, forming the basis for the development of numerous products in the pharmaceutical, chemical, agricultural and industrial sectors; at the same time, however, these plants and substances were diverted from their legitimate purposes towards personal intoxication. Against the background of the massive expansion of their use for illicit purposes and the serious harm caused to supra-individual social values, the legislatures of the world's States were compelled to intervene, both in order to provide mutual international support in combating a phenomenon that had acquired an inter-State dimension and in order to protect the health of their own populations, adopting the instruments necessary to regulate the conditions under which operations with these products may lawfully be carried out and to criminalise unlawful operations.

After the presentation of the international and European instruments, the analysis narrows to the national legislation in force, namely Law No. 143/2000, proceeding to a succinct examination of the Law as a whole, highlighting its most important regulatory directions, and to a reasoned exposition, in succession, of the forms of criminalisation that the offence of drug trafficking has known over time in national legislation.

3.2. Public Health – A Collective and Impersonal Social Value

A comprehensive understanding of the problems identified in relation to the material elements of the offence requires, *a priori*, the correct identification of the social value protected by this criminalisation. In view of the high importance of public health, injured by

the unlawful carrying out of operations with drugs, the State, in its capacity as supreme guarantor of its protection, chose to punish such operations in the most severe form possible, through criminal sanctions, assuming this mission on the basis of the theory of the social contract and of the fact that the well-being of the entire community depends on this value. By reason of the impersonal and collective character of the social value, no private individual could appropriate it or claim a right of disposal over it.

By reference to the dominant interest contemplated by the legislature, the object of legal protection is the social value of *public health*, understood as an “abstract entity which projects its protection over the set of positive and negative conditions that guarantee and promote health”. This value belongs to the category of collective and impersonal, supra-individual rights guaranteed at the level of society, and not to the category of personal rights that may be attached to persons considered in their individuality. The inclusion of drug trafficking in the catalogue of offences protecting public health shows that this offence does not protect individual health and integrity, which are already the object of protection of other incriminations; the purpose of the criminalisation was the prevention of a general risk generated for the entire community, abstracting from the harm caused to the integrity and life of individual persons. This is all the more readily understood in that the typicity of the offence – that is, the conformity of the act with the statutory definition – is satisfied even in the absence of the identification of any person who has been harmed. As eloquently argued in Spanish doctrine, the passive subject is not a specific person, “but a social group whose health and well-being constitute the object of criminal protection”.

In the light of its constituent content, the structure of its legal object and the nature of the social value injured, the offence of drug trafficking protects the mono-offensive and collective social value of public health. No other, secondary social value protected by this offence can be identified, since none is individualised in the constituent content, nor could recourse be had to the interpretation of particular terms of that content in order to identify one. Consequently, the passive subject cannot be a natural person, since the legal object protects not an individual right but a universal one; the injured person may give valid consent only in the case of offences with an individual legal object, and not in the case of those protecting supra-individual social values.

3.3. The Right to Self-Harm through Consumption and Its Limits

Although the right to self-harm is recognised to every person and guaranteed by Article 26(2) of the Romanian Constitution, as an expression of “bodily freedom and of the person’s right to dispose of his or her own body”, where the harm occurs through drug consumption the exercise of this right is restricted. Although the criminalisation contained in Article 4 of Law No. 143/2000 has been criticised as unconstitutional, it is readily understandable why the legislature has withdrawn from the consumer the right to self-injury through consumption: the exercise of the right to personal autonomy, as an aspect of the right to private life, in this situation exceeds the sphere of the injury to an individual right and is capable of harming the collective right to public health, whose protection falls upon the State. The right to dispose of one’s own body is guaranteed as long as no harm is caused to the rights of others, to public health or to public order and morals; in the case of drug consumption, however, the injury to a single social value may lead to the spread of the scourge of drug intoxication throughout society.

In such cases it is also considered that the person is incapable of properly disposing of his or her personal attributes, which is why his or her consent is assumed by the legislature, which may decide in the person’s best interest even better than the person himself or herself. Since drugs bring about physical and psychological changes, going so far as to take over the person’s freedom of action and capacity to control his or her own self-harm, it is the duty of the legislature to protect individual health, which the addict is no longer able to protect, and since the consequences of the injury to individual health radiate onto collective health, its protection is justified to the detriment of the right to self-determination. The considerations underlying this limitation are also found in Article 60 of the Civil Code, in Article 8(2) of the European Convention on Human Rights, and in the case law of those States which have criminalised the acts preceding drug consumption for the purpose of protecting supra-individual social values.

3.4. An Abstract Endangerment Offence. Concurrence with Offences against Health and Bodily Integrity

The regulation of the offence of domestic drug trafficking was conceived as an *obstacle norm* – a barrier provision – which punishes the very creation of a *state of abstract danger* for public health, with a view to preventing the spread of the danger and its materialisation in an injury to the health or life of the consumer. The consummation of the

offence is not conditional upon harm to the health of any person *in concreto*; the punitive barrier precedes any possible individual injury, the creation of a state of potential danger to public health being sufficient. What is punished is the state of danger, and not any particular result, for which reason the opinions according to which this offence would also protect the physical and mental integrity of the consumer, as an individual passive subject, cannot be accepted.

We therefore take the view that, where the immediate consequence of the state of danger has materialised in harm to the consumer's body, the offence of drug trafficking may, depending on the circumstances, be found in *concurrence* with an offence against health and bodily integrity. Where the drug reaches the consumer and the latter administers it, additional consequences of a physical and mental nature may occur which exceed the typicality of the norm; such a consequence is not the object of protection of Article 2, but of the incriminations contained in Chapter II of Title I of the Criminal Code, and the consumer may be regarded as the *passive subject* only of one of those offences. The health of the potential consumer, not individualised within the great mass of the community, remains within the sphere of protection of Article 2 only for as long as a state of risk persists; if the risk has materialised and the consumer, now individualised, requires medical care of a physical or psychiatric nature, those consequences fall within the sphere of protection of the result offences provided for in Articles 193 (battery and other acts of violence) and 194 (bodily harm) of the Criminal Code. Failure to take account of this more serious result would leave those social values without legal protection whenever their injury occurs through an act of drug trafficking.

In such a hypothesis of plurality, the act of trafficking is committed with direct or indirect intent, whereas the act of injuring the consumer's health is committed with indirect intent, since the perpetrator foresees that, following the ingestion of the drug, the purchaser's health will probably be injured, does not pursue that injury, but accepts the possibility of its occurrence. Thus, *de lege lata*, we propose that the offence provided for in Article 2 be found in concurrence with an intentional offence against health and bodily integrity, such as those provided for in Article 193 or Article 194 of the Criminal Code, since only in this way can both social values injured by the trafficker's actions be protected.

Having regard, however, to the fact that the application of the sanctioning regime of concurrence might represent a relatively disproportionate measure, given that the victim himself or herself turns to the trafficker in order to obtain the drug and, driven by dependence, proceeds to self-injury by self-administering the drug, *de lege ferenda* we propose the

criminalisation of an aggravated form of the offence, as a legal unity of offence in the variant of legal complexity, by means of two new paragraphs. Thus, the commission of drug trafficking in any of the modalities enumerated in the first paragraph (risk drugs), where the drugs have come into the consumer's possession, resulting in one of the consequences provided for in Article 193 of the Criminal Code, should be punished with penalty limits higher than those provided for the basic form, and where one of the consequences provided for in Article 194 has occurred, those limits should be increased again. Correspondingly, the commission of the offence in any of the modalities enumerated in the second paragraph (high-risk drugs), with the same consequences, should be punished with limits higher than those provided for the aggravated form of trafficking in high-risk drugs, increased again in the case of the consequences provided for in Article 194. Having regard to the legal objects injured, the purpose pursued through trafficking (as a rule, obtaining the monetary value of the dose), the manner of commission of both offences (trafficking is committed through the trafficker's action, whereas the injury occurs through the consumer's self-harm, albeit through the intermediary of the trafficker) and the consequences produced, the creation of this *legal complexity*, by uniting the two offences in an aggravated form with a directly proportionate sanction, is justified.

3.5. Inoperability of the Consent of the Victim-Consumer

Since the study converged towards aggravating the trafficker's liability, by also holding him or her liable for an offence which, as a rule, is subject to the principle of the availability of the criminal action, we examined whether the perpetrator could avail himself or herself of the *justification of the victim's consent*. The trafficker could not invoke this justification in order to have his or her liability for the harm caused to the consumer's health and integrity removed, since at least three of its five cumulative conditions are not met, the situation falling within one of the exceptions in which the victim has been deprived of the right to dispose of the social value. Although Law No. 143/2000 does not stipulate *expressis verbis* the inoperability of the consumer's consent, its lack of legal effect has been clarified through the pleas of unconstitutionality raised in relation to Article 4; the purchaser-consumer could not grant the trafficker consent to his or her own injury, since he or she does not possess that right in the case of drug offences. Moreover, having regard to the social value principally protected by Article 4, in the case of that offence too the State is the principal passive subject and the consumer the secondary passive subject, so that the consumer's consent produces no legal effect even though he or she is the holder of the social value injured, its ineffectiveness

being determined by the state of danger which consumption creates for public health, public order and morals.

3.6. Death of the Consumer and the Theory of Objective Imputation of the Result

Practical reality shows that the consequences of making drugs available for consumption sometimes go so far as to injure the supreme social value, *the right to life*. Although this hypothesis is covered by Article 11 of Law No. 143/2000, the analysis of the case law revealed a reluctance to find this offence, owing to the difficulty of proving the causal link between the trafficker's act and the consumer's death. We therefore considered it necessary to promote an easier solution, by reference to the *theory of objective imputation of the result*, which offers a more objective means of establishing the causal link. If it can be proved that the trafficker sold the drugs to the consumer (the exclusionary ground of permitted risk being inapplicable), thereby creating the risk of endangering life (the grounds of non-existent or diminished risk being equally inapplicable), and that death is the direct consequence of the administration of the drugs made available by the trafficker, a result protected by this norm (without the exclusionary grounds of deviated risk, risk attributable to the victim's own fault, equal risk or unprotected risk being engaged), the more serious consequence of the victim's death can readily be imputed to the perpetrator through the application of this theory.

3.7. The Definition of Drugs, the Material Object and the Notion of Trafficking

Since the alternative material elements concern the unlawful carrying out of operations with *drugs*, it was also indispensable to research the terminological aspects of this notion and the capacity of drugs to constitute the material object of the offence. In order for the new *definition of the term "drug"*, as amended by Law No. 45/2023, to be fully harmonised with that of Framework Decision 2004/757/JHA, and in order to identify clearly which new psychoactive substances (NPS) are regarded as drugs, we consider that the definition of NPS in domestic law should be supplemented by the clarification that the new psychoactive substances included in the definition of drugs are those stipulated in the Annex to the Framework Decision, a clarification which unequivocally reflects the intention of the European legislature in adopting Directive (EU) 2017/2103 and better circumscribes the range of NPS classified as drugs.

The study converged towards the conclusion that *drugs cannot constitute the material object of the offence*, since they do not embody the protected social value, cannot be the object of harm caused by the offence and do not belong to any particular passive subject – findings which reconfirm the abstract endangerment nature of the offence, whose general passive subject can only be the State. The classification of drugs as an *essential requirement in connection with which the material element is committed* allows the material elements to be committed in relation both to existing drugs and to drugs yet to be produced, and allows a typical act to be found only where the unlawful operations are carried out with these substances; otherwise, the act is not typical from the objective standpoint.

A priori to the examination of the material elements, we also considered it appropriate to clarify the meaning of the notion of *trafficking* in the marginal heading of the offence, since some material elements are eminently patrimonial in character while others are purely disinterested, and their grouping under the same notion lends it a controversial character. The terminological study converged towards the finding that, in domestic law, the notion of drug trafficking encompasses any operation carried out unlawfully with the substances listed in Tables I–III of Law No. 143/2000, irrespective of the existence of a patrimonial or non-patrimonial purpose, carried out with a view to putting those substances into circulation. This clarification facilitates the demonstration of the differing nature of the material elements and of the tripartite classification given to them in the thesis.

4. The Material Elements of the Offence of Drug Trafficking

Although domestic case law draws no distinction as to the nature of the material elements (*actus reus*) of drug trafficking, classifying them all as acts of trafficking, following the model of Spanish case law, which we consider highly eloquent, the 18 material elements individually enumerated by the legislature have been classified and analysed in three distinct categories, according to the character which the nature of the activity imprints upon the material element: acts of production, acts of trafficking proper and auxiliary acts of trafficking. The analysis led to the identification of a number of inaccuracies and legislative shortcomings in the incriminating text, in respect of which, *de lege ferenda*, we consider legislative intervention necessary, with a view to applying the legal provisions with greater legal accuracy.

4.1. Acts of Production

This category comprises the acts by which drugs, whether natural or synthetic, are obtained: cultivation, production, manufacture, transformation, extraction, preparation and experimentation. Since domestic doctrine has departed from the original definitions given to the notions of cultivation, production and manufacture by the 1961 Single Convention on Narcotic Drugs, their primary meaning has been explained in the light of the Convention.

Cultivation

For the sake of legal accuracy, we propose that the material element of *cultivation* be renamed *cultivation of plants containing narcotic or psychotropic substances*, the designation under which Law No. 339/2005, which governs the legal framework for operations with drugs, provides for the procedure for the cultivation of such plants. The analysis of the original terminology showed that the notion of cultivation covers the set of agricultural activities extending from the sowing of the soil to the moment of harvesting the plant. From that moment, in accordance with the Official Commentary on the 1961 Convention, harvesting activities fall, depending on the nature of the plant, under either production or manufacture: under Article 1(t) of the Convention, *production* means the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained, whereas the separation of drugs from other plants falls, pending an amendment of the Convention, under the notion of *manufacture*.

We take the view that, since Romania has acceded to the 1961 Convention, domestic case law ought to have adhered to this definition and applied it faithfully, all the more so as it was adopted *verbatim* by the domestic legislature upon accession by Decree No. 626/1973, the Convention having been published in the Official Bulletin No. 213 of 31 December 1973, and is also used to explain the notion of production in Article 2(l) of Law No. 339/2005. Consequently, pending any amendment of the definition, we are bound to confine the applicability of the notion of production to the acts of gathering the opium poppy, the coca leaf, the cannabis plant and cannabis resin, and for the harvesting of other types of plants, such as cacti, mushrooms or salvia, we propose the use of the notion of manufacture, while emphasising the distinction from the activity under which that notion is widely known, the chemical production of drugs.

In Romania, the cultivation of *Cannabis sativa* L., subspecies *sativa*, is permitted subject to obtaining authorisation from the Ministry of Agriculture and Rural Development,

using certified seeds of the varieties listed in the official catalogues, obtained from authorised suppliers, and not exceeding a tetrahydrocannabinol content of 0.3%. The analysis, however, identified the development of a genuine industry of illegal cannabis cultivation, through the takeover of the entire mechanised process and of the cultivation, propagation and harvesting techniques of the lawful industry, with traffickers constantly searching for new technologies in order to *artificially increase the THC content*; recent research shows that these crops are now far more potent than in the past, which increases their danger to health.

By reason of its nature as an abstract endangerment offence, cultivation is not susceptible of a completed (perfect) attempt, but only of an incomplete (imperfect) attempt. Since the socially dangerous consequence consists in a state of danger and not in a result, consummation is not conditional even upon the germination of the seeds: the state of danger arose upon the execution of the basic act, at the moment of sowing the soil, so that, from that moment, the act constitutes a consummated offence.

Knowledge of the *properties of cannabinoids* may reveal important information in criminal proceedings. The detection of THC automatically classifies the plant as belonging to the genus *Cannabis*, while the detection of cannabichromene (CBC) shows that the plant is old or degraded, the THC/CBC ratio making it possible to determine the age of the sample; corroborated with other factual circumstances, this information can be used to assess whether the possession of a large quantity of plant material, which degrades over time, is for the purpose of own consumption or of trafficking. The distinction between THC and cannabidiol (CBD) explains why the use of the latter, which has no psychoactive effect, is permitted in civil transactions, whereas operations with CBD products containing THC, even in small percentages, are liable to be classified as unlawful operations with controlled substances. Finally, THC and the cannabis plant, although similar, have appreciably different chemical properties, by virtue of which the law has assigned them different legal regimes, a point which facilitates the correct classification of operations with these distinct products.

The use of the information derived from the analysis of *biological samples*, as set out in technical-scientific findings reports or toxicological expert reports, may constitute evidence of enhanced relevance and probative force, enabling the judicial bodies to obtain data on the type of drug, the quantity, and the date and frequency of consumption. The study converged towards the conclusion that the traditional samples, blood and urine, may be supplemented by saliva, nails and hair, which contribute to building as accurate a profile of the perpetrator as possible – a normal or chronic consumer, with the types of drugs consumed and the period of

consumption – or even to proving that he or she is not a consumer, or not a consumer of the type of drug with which he or she was found, thereby contributing to the correct classification of the act in those borderline situations where it is necessary to distinguish between possession for consumption and possession for trafficking.

Psychedelic Mushrooms and Cannabis Seeds

Mushrooms do not belong to the kingdom *Plantae*, but represent a distinct group of living organisms belonging to the kingdom *Fungi*, a category not stipulated *expressis verbis* in the definition of drugs, even though various genera, species and substances synthesised by fungi are placed under control by enumeration in the Tables of the Law. For reasons of scientific rigour, we propose amending the *definition of drugs to include the kingdom Fungi* in the enumeration of plants and substances placed under control.

The specific nature of the cultivation regime of mushrooms allows their growth to begin from living organisms which do not contain the controlled active substances, such as psilocybin and psilocin, but which will develop into the mushroom in the course of growth. Having noticed this, traffickers have developed a new method of cultivation – ordering grow kits from abroad, thereby circumventing international drug trafficking – which is faster than the traditional method and facilitates the commission of offences, given the absence of any criminalisation of operations with these living organisms. We therefore propose that each Table listing the genera or species of controlled mushrooms be *supplemented* with the *mycelia, spores and cell cultures* capable of producing the substances or mushrooms listed in the Tables. The amendment would not impede lawful trade, since it applies strictly to organisms capable of yielding one of the controlled substances or mushrooms, and the intervention is indispensable, since the legislative omission facilitates both international and domestic trafficking in the form of mushroom cultivation. *Mutatis mutandis*, we consider it necessary to *supplement Table III with cannabis seeds*, all the more so as cannabis is the principal drug consumed in Romania.

Atypical Hypotheses of Complicity in Cultivation

The analysis of cultivation made it possible to identify a number of *atypical hypotheses of complicity*, of practical interest by reason of the novel manner of their commission. Although the purchase of cannabis seeds is a lawful act, where this act of assistance is knowingly and foreseeably provided for illicit cultivation, the contribution acquires criminal relevance and is sufficient to constitute an act of criminal participation, even

in the absence of any subsequent participation through further acts of assistance in tending the plantation.

The act of an electrician who installs clandestine connections to the electricity grid, in order to steal the energy needed to operate the devices used in the agricultural process, simultaneously constitutes an act of complicity in unlawful cultivation. Although his actions directly injure the social values of the security of the energy system and the property of the energy supplier, the same actions indirectly provide real, effective and indispensable support to the cultivation activity, the causal link being verifiable through the theory of objective imputation of the result. The hypothesis constitutes a specific case of ideal concurrence: by one and the same act, the electrician foresaw and pursued the commission both of the offences of illegal connection to the grid and theft of electricity and of the offence of facilitating cannabis cultivation.

Since Article 9 of Law No. 143/2000 separately regulates the activity of *financing* drug trafficking, autonomously criminalising acts of complicity consisting in making funds available, we consider that, where the acts of facilitating cultivation take the form of an act of financing – paying rent or utilities, remitting the money needed to purchase agricultural products and devices – the act does not constitute complicity in trafficking in the form of cultivation, but the autonomous offence provided for in Article 9.

The last hypothesis analysed made it possible to identify *accomplices specialised in facilitating cultivation*: legal persons specialised in supplying agricultural products intended for unlawful cultivation, whose facilitating activity may begin even before the perpetrator has formed the criminal resolution. Their activity falls within an autonomous, anterior complicity, situated at the stage of preparatory acts and lawful in character – operations with these products not being criminalised – which acquires criminal relevance only when the grower forms the criminal resolution and resorts to the supplier's services. Pending any autonomous criminalisation of such specialised acts of complicity, they remain outside the scope of criminal law and acquire criminal significance only subsequently to and dependently upon the perpetrator's action, their legal classification, from both the objective and the subjective standpoint, being subordinate to that of the perpetrator, without any independent classification being possible.

Manufacture and Convergence with Operations Involving Precursors

As regards *manufacture*, we emphasise the need to abandon the ordinary Romanian-language meaning of the term, which equates it with production, an interpretation contrary to the official definitions in the 1961 and 1971 Conventions, faithfully adopted by Law No. 339/2005, and liable to narrow its scope of application. We propose that manufacture be understood as *the set of activities, other than production, which make it possible to obtain synthetic and semi-synthetic narcotic and psychotropic substances, including through processes of purification and transformation thereof, irrespective of the means used and the quantity obtained.*

Since manufacture cannot be carried out without the use of precursors, considerable space was devoted to the points of convergence between this offence and that of unlawfully carrying out operations with precursors. At the time of its adoption, Law No. 143/2000 constituted the general framework for criminalising unlawful operations both with narcotic and psychotropic substances and with precursors, but legislative evolution led to the formation of a special framework, Law No. 142/2018, into which the rules on precursors were transferred. Remnants of that regulation nevertheless remain in Law No. 143/2000 and are no longer justified. Consequently, *we propose the removal of Table IV from Law No. 143/2000*, since the enumeration of those substances in the annex to a law which does not govern their status is redundant and liable to cause confusion, the new legal framework being supplemented by Regulations (EC) No 273/2004 and No 111/2005, which contain such lists, constantly updated; likewise, *we propose the removal of the definitions of precursors in Article 1(a) and (e) of Law No. 143/2000*, which serve no purpose since that Law no longer regulates any operation with precursors, while the new Law contains up-to-date definitions referring directly to the two European regulations.

A correct understanding of the *definition of precursors* is especially important where they are contained in medicinal products procured specifically for their extraction and use in the manufacture of drugs. Unlawful operations with such medicinal products, for the purpose of extracting precursors, within the Union territory and in trade with third countries, are excluded from the typicity of the offence provided for in Article 20 of Law No. 142/2018; depending, however, on the method of acquisition, the quantity and the stage of extraction, the act may be classified as an attempt to manufacture drugs, either under Article 12(1), where the medicinal products have begun to be used through the extraction of precursors, or under Article 12(2), where they have not yet begun to be used, a situation assimilated to *procuring*

the means and taking measures with a view to committing the offence. By contrast, following the amendment made by Regulation (EU) No 1259/2013, the same acts committed in relation to medicinal products containing ephedrine and pseudoephedrine, in trade with third countries, continue to fall within the typicity of Article 20 of Law No. 142/2018.

The explanations from a technical perspective highlighted the chemical absorption of the precursor into the mass of the drug, to the point of losing its individuality in the manufacturing process, and supported the thesis of the applicability of the *legal unity of offence, in the form of natural complexity, through the absorption of the offence of unlawfully carrying out operations with precursors into that of manufacturing drugs*, an applicability which must be reflected in the sanctioning regime. In the contrary hypothesis, where the precursors and the drugs can be identified in their individuality, the rules on plurality of offences, in the form of concurrence, will apply. The analysis of the convergence hypotheses clarified the scope of the acts of execution specific to each offence and gave relevance to the acts of execution or facilitation of manufacture committed by the supplier of precursors.

Transformation and Extraction

The original interpretation of *transformation* is confined to the conversion of one drug into another, new drug, distinct from the original one, which acquires material existence as a result of that operation, the process including all operations modifying the chemical composition, the colour and even the state of aggregation. We emphasise the need to understand the notion in all the stages that the process may involve, so as to avoid the erroneous use of the terminology in cases involving merely a change in the state of aggregation (*exempli gratia*, the liquefaction of solid cocaine for the purpose of concealment in various objects so that it may be transported undetected). The particular features of its concrete mechanism of commission make transformation a *simple offence, in the form of natural collective unity*, a nature which facilitates the classification of operations transforming a risk drug into a high-risk drug, and vice versa, either as a simple offence of trafficking, encompassing both the basic and the aggravated form, or as a concurrence of offences. Where, in order to circumvent the criminalisation, the drug is transformed into a substance not under control, and the effects of the “new drug” seriously endanger public health, the legislature is bound to intervene by placing it in the category of controlled substances; pending such legislative intervention, however, the absence of any control measure requires a

finding that the act is not typical, as dictated by the principles of the legality of criminalisation and of penalties.

Extraction must be interpreted in accordance with the meaning given by the 1961 Convention, namely the extraction of a psychoactive or narcotic substance from a plant or from a raw material containing it, an understanding which prevents the use of the notion for procedures that do not constitute extraction but isolation, such as the isolation of the drug from an object in which it has been concealed for clandestine transport. Having regard to the biochemical specificity of the operation, where the act is detected at the stage of preparatory acts, those acts must be examined by reference to the materials, instruments and means specifically required for the process of extracting a particular substance from a particular plant or compound, since only in this way can their correct classification be established and their proper distinction from other offences, such as the possession of precursors, be drawn.

Preparation and the Aggravating Circumstance of Mixing Drugs

As regards *preparation*, the research into domestic doctrine revealed a departure from the original meaning conferred by the 1961 and 1971 Conventions. We propose that preparation be understood as the activity in which a controlled substance is mixed either with one or more other controlled substances, or with other non-controlled substances, irrespective of their state of aggregation, for the purpose of obtaining a preparation. This understanding makes it possible to distinguish preparation from manufacture: in manufacture, several substances are combined in order to obtain a controlled active substance (for example, cocaine), whereas in preparation the active substance already obtained is used in combination with other substances (for example, combining cocaine with heroin to obtain the *speedball* mixture); the domestic definitions would equate the two operations and would render their express enumeration in the incriminating text redundant.

In order to understand the *modus operandi* of preparation, the thesis examines the additives used to adulterate drugs for the purpose of increasing mass or enhancing or reducing effects, the reasons why certain drugs are adulterated only with certain specific additives, and concrete cases in which adulteration increased the risk to life and health, explanations which underpin the analysis of the special aggravating circumstance of mixing drugs with other substances which increased their danger to the life and integrity of persons. The aggravating circumstance is applicable where it is proved that the drug was adulterated either with other drugs or with substances that are not drugs, in a manner liable to increase the degree of danger

presented by the drug in its ordinary form. Its application is not conditional upon the actual materialisation of increased harm to health, it being sufficient to prove an *increase in the state of danger as a result of adulteration*, with the logical consequence of an increase in the potential harm: the aggravating circumstance does not require the actual causation of an injury (*in concreto*), but only the creation of the possibility of the risk of such an injury (*in abstracto*). At the same time, its application is conditional upon proof that the perpetrator knew of the adulteration or suspected it, and nevertheless accepted to carry out the operation in those conditions.

Experimentation and the Administration of Drugs to Another Person

With regard to *experimentation*, we emphasise the need to distinguish between experimenting with drugs on oneself, which remains within the sphere of domestic drug trafficking, and experimenting with drugs on another person, which falls within the offence of administering drugs to another person. Confusion may still arise between the two offences, since the administration of drugs to another person criminalises only the hypothesis of high-risk drugs, so that the administration of risk drugs remains under the aegis of drug trafficking. This difference gives rise to inequities in the sanctioning regime: in the case of the administration of a *high-risk* drug, the perpetrator benefits from a more lenient regime, whereas in the case of the administration of a *risk* drug, of lesser danger, a harsher regime applies, the act falling within the variant of carrying out any other operation with drugs under the objective side of trafficking; this leads to contradictory situations in which an act of lesser gravity is punished more severely than one of greater gravity. A further inequity: the perpetrator who administers a high-risk drug, which he or she may also have possessed beforehand, benefits from a penalty three times lower than if he or she had been found merely in possession of that drug, an act classified as trafficking.

Consequently, *de lege ferenda*, the criminalisation in Article 7 should be amended by *bringing the administration of risk drugs within its scope* and by *adapting the sanctioning regime* to the degree of danger to health posed by the substance administered. The urgency of this amendment is all the greater given the cases in which perpetrators resort to administering drugs in order to facilitate the commission of other offences – hypotheses of convergence with trafficking in human beings, with offences against health and integrity, and with rape and robbery, examined in the thesis – in which, in a similar factual situation, the legal

classification and the sanctioning treatment differ solely because of the different nature of the substance.

4.2. Acts of Trafficking Proper

This category examines *offering, sale, offering for sale, purchase* and *procurement*, which fall within the specifically commercial side of drug trafficking.

Offering

The analysis of *offering* began with an examination of the characteristics which an offer of drugs must display in order to be typical. Since the trafficker may make various offers, oral or written, which, depending on the channel of transmission, may or may not reach the addressee, and which are sometimes automatically rejected by the addressee out of lack of interest, we analysed in which of these cases the act satisfies the elements of typicity. We concluded that offering is consummated at the moment when a verbal, unilateral, serious, intentional and explicit offer is made by the trafficker to a determined person, even in the absence of the drugs being shown or handed over, and without the offer having to be accepted. Such an act is capable of giving rise to a state of abstract danger to public health and belongs to the category of acts criminalised in anticipation of an actual injury to the social value. Having identified strong elements of similarity between the offering of drugs, the incitement to drug consumption and the instigation to drug trafficking, we also analysed these three institutions, an analysis which highlighted the imperative of a clear distinction between them, since they represent different offences, with different regulatory and sanctioning regimes.

Sale and Purchase. Migration of the Market to the Online Environment

The analysis of the case law on the *sale and purchase of drugs* in small quantities revealed a paradigm shift in the trading market: against the background of the ever-increasing availability of internet services, social media platforms, online shops and the encryption tools made available to users, participants in trafficking have moved a significant part of the market from the street to the online environment. The worrying aspect is that drugs sold via the internet become accessible to an ever-greater number of persons, including persons who have never consumed drugs before. The phenomenon must be counteracted by legislative measures, which is why we examined the possibility of holding the administrators of these services criminally liable for facilitating drug trafficking.

Liability of Providers of Electronic Services: Regulation (EU) 2022/2065 and Law No. 50/2024

The starting point was Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (the Digital Services Act). The analysis showed that the Regulation does not provide for any form of criminal liability of service providers or of persons acting under their authority for breach of the obligations laid down, but only for administrative liability. Nevertheless, in those areas in which the Regulation leaves supervisory and control powers to the national authorities, it allows the national legislature to provide for other forms of liability as well, a particular application of this general rule being evident in the case of Article 9(6) and Article 10(6); in those areas of competence, the national authorities may therefore also provide for forms of *criminal liability*.

In order to understand the impact of the Regulation on domestic legislation, a comparative analysis was carried out of the manner in which its application has been ensured by the Romanian legislature, through Law No. 50/2024 establishing measures for the application of Regulation (EU) 2022/2065, and by the French legislature, through Law No. 2004-575 of 21 June 2004 on confidence in the digital economy. The examination of Article 32 of Law No. 50/2024 showed that the national legislature has proclaimed a regime of protection of users superior to that of the Regulation, providing for administrative (contraventional) liability for breach of the obligations transposed from the Regulation only in so far as the act does not, under the criminal law, satisfy the constituent elements of an offence; the 54 forms of conduct listed will be sanctioned as contraventions only if they cannot be classified as criminal. Nevertheless, unlike the French legislature, the domestic legislature has not concerned itself with providing *expressis verbis* for *special offences* attributable to service providers for breach of the obligations under the Regulation.

The French Model

The French legislature has ensured a higher standard of protection, the effects of ensuring the applicability of the Regulation being felt both in the Law on confidence in the digital economy and in the French Criminal Code. Article 6(IV)(A) of Law No. 2004-575, as amended by Article 48 of Law No. 2024-449 of 21 May 2024, established the duty of hosting service providers to contribute to preventing the dissemination of illegal content satisfying the constituent elements of the offence of drug trafficking, in the variant provided for in Article

222-39 of the French Criminal Code, the providers being obliged promptly to inform the authorities of drug trafficking reported to them – a report which may be made under Article 16 of the Regulation – and committed by the users of their own services, breach of this obligation being punishable. Breach of the duty under Article 18 of the Regulation, to inform the competent authorities promptly where the provider comes into possession of information giving rise to a suspicion that an offence has been committed, is likewise criminally sanctioned by Article 6(IV)(C), such conduct being capable of characterisation as a facile acceptance of the commission of the offence. Finally, under Article 6-2-1 of the same Law, a hosting service provider is punishable for failing to remove, within 24 hours of receiving a removal order issued under Article 9 of the Regulation, illegal content consisting in the transfer or offering of narcotic drugs, the act being all the more serious in that the provider, expressly notified by the judicial authorities, chooses to remain passive.

The criminalisation of these breaches does not constitute a sanction of the provider for participation in drug trafficking, but for the breach of obligations of substantial importance laid down by the Regulation, and represents an effective method of holding providers accountable in cooperating to combat crime in the virtual environment. We therefore consider it necessary, *de lege ferenda*, for the domestic legislature to intervene, following the French model, by *providing in Law No. 50/2024 for forms of criminal liability for breach of these obligations*. In view of the importance of compliance with them for achieving the aim of the Regulation, of the fact that providers place on the market a service under their own management, and of the fact that they are specifically notified of the commission of a criminal act through their own service, the establishment of criminal liability is the only means capable of guaranteeing the protection of social values against the socially dangerous consequence that such a breach may generate.

The impact of the Regulation has also been felt in the French Criminal Code: under Article 323-3-2, the operator of an online platform service referred to in Article 6(I)(4) of Law No. 2004-575 who restricts access to that service to persons using connection-anonymisation techniques, or who fails to comply with the obligations laid down in Article 6(IV) of that Law or in Articles 15, 16 and 18 of the Regulation, and thereby knowingly permits the transfer of products, content or services whose transfer, offer, acquisition or possession is manifestly illegal, is punishable. Drawing inspiration from the analogous criminalisation in Section 127 of the German Criminal Code, the French legislature has thus criminalised the conduct of platform administrators who knowingly allow goods whose

possession is prohibited by law, such as drugs, to be offered for sale through their services, overcoming the impediment of the impossibility of punishing the complicity of platforms in offences committed through them. The offence may be characterised both as a criminalisation of passive complicity in offences committed through the provider's own service and as an offence by which complicity is autonomously sanctioned through the provision of the platform or of the secure "channel" for transactions.

The British Model

To complement the European instruments, we also presented the British model, the United Kingdom's Online Safety Act being a reference instrument for holding platform operators liable, since it regulates their obligations in a firm and demanding manner. Schedule 7 to the Act lists the *priority offences*, whose illegal content is regarded as the most serious and the most widespread online, and among them *expressis verbis* trafficking in drugs and psychoactive substances, as regulated by the Misuse of Drugs Act 1971, from which the aggravated character attributed by the English legislature to trafficking committed through digital services may be inferred. The examination of this offence in conjunction with the obligations laid down by the Act led to the finding that service providers are required to create digital algorithms capable of detecting the risk that their services will be used for the illegal sale or offering for sale of drugs, for the supply of products intended for the administration or preparation of drugs, or for incitement to any other offence under the Misuse of Drugs Act. This Act is one of the first instruments to provide for the *criminal liability* of the employees or senior managers of electronic services for non-compliance with the requirements imposed in connection with the conduct of their business, as well as, directly, for *participation* in offences committed through their own service.

Criminal Liability of Platforms de lege lata and the de lege ferenda Proposal

Since the Regulation leaves the regulation of the criminal liability of providers to the national authorities, we take the view that, where the conduct of providers can be brought within the provisions of the general or special criminal law, it is liable to be sanctioned under domestic provisions, the analysis of the manner of compliance with the *obligations imposed* having a significant bearing on the manner in which criminal liability may be attributed. We consider that a platform may be held criminally liable for complicity in domestic or international drug trafficking, depending on the distribution market of its services, if the commission of those offences is facilitated through the services provided. *De lege lata*, the

analysis may be carried out from the perspective of the criminal liability of the legal person for its own act, under Article 135 et seq. of the Criminal Code, separately from the liability of the administrator for his or her own act. In both cases, liability must be analysed *factually*, on the basis of the nature and degree of compliance with the special and general obligations imposed by the Regulation or by Law No. 50/2024, in each individual case; for example, a very large platform could be held criminally liable for complicity in drug trafficking if it were established that its manifest failure to comply with its *due diligence obligations* – both the special obligations imposed on this category of providers and the general ones – resulted in the facilitation of the commission of the offence.

Having identified a legislative gap as regards the autonomous criminalisation of complicity by assistance on the part of providers of electronic services, *de lege ferenda* we consider it appropriate to introduce into the Criminal Code an offence autonomously criminalising *complicity in the commission of offences through an online platform*, as the German and French legislatures have done. For this *ex novo* criminalisation we propose the marginal heading *failure to adopt or to comply with online safety measures by providers of electronic services* and the following constituent content: *the act of a provider of electronic services of failing to comply with the obligations laid down in Articles 9, 10, 15, 16 and 18 of Regulation (EU) 2022/2065, if the act was such as to facilitate the transfer of products, content or services whose transfer, offering, sale or possession is prohibited by law, shall be punishable.*

Such a criminalisation is warranted by the current realities of virtual crime, since it will make providers even more acutely aware of the sanctions to which they are liable for non-compliance with Law No. 50/2024 and the Regulation. It may be characterised as a form of autonomous complicity by assistance and will allow a general complicity to be found in respect of any offence committed through the platform, without the typicity of the autonomous offence being conditional upon the commission of any particular offence. The express reference to the five provisions of the Regulation is based on the fact that they are the ones that guarantee the detection of illegal content uploaded to the platform, diligent compliance with them enabling the early identification of the commencement of an offence and the adoption of the legal measures needed to prevent its continuation. The finding of this autonomous form of complicity will not be incompatible with the finding of complicity as a form of secondary participation in another offence committed through the platform, and we

accordingly support the possibility of finding the new offence in concurrence with complicity in drug trafficking.

4.3. Auxiliary Acts of Trafficking

Auxiliary acts of trafficking are so called because they do not directly secure a patrimonial or non-patrimonial benefit, their role being merely to contribute to obtaining it, the benefit proper being obtained through the acts of trafficking proper, by which the right of ownership is transferred. This category comprises *possession*, together with the material elements by which drugs are moved from one location to another: *transport*, *dispatch* and *delivery under any title*.

Possession

Possession may be *direct* and *immediate* – actual, effective, material – where the owner has the drugs under his or her *de facto* control and enjoys uninterrupted contact with them, but also *indirect* and *mediated*, exercised at a distance, without physical contact. What matters, in any form of possession, is that the drug is under the control of the agent's will; typicity is not conditional upon physical possession, provided that there is functional control by virtue of which the drug can be disposed of. A restrictive interpretation, limited to *de facto* possession, would allow major traffickers who manage orders (*ad exemplum*, negotiating sales, arranging deliveries, coordinating distribution and transport) through encrypted means of communication, at a distance, without ever being in actual possession of the drugs, to evade criminal liability, as would those who, although negotiating the transaction face to face with the buyer, do not carry the drugs on their person, in order to avoid self-incrimination, but direct the buyer to a depot to collect them personally; such situations would remain beyond the reach of the criminal law, defeating the legislature's purpose.

Drugs may also be possessed jointly by several persons, who become co-perpetrators of the possession of the same quantity, each enjoying a right of disposal over the whole, a matter of importance both for the legal classification and for the individualisation of the penalty. Even if some of the co-perpetrators possess risk drugs and others high-risk drugs, or some possess a smaller quantity and others a larger one, or some possess directly and others indirectly, by reason of the power of disposal of all of them over the entire mass of drugs, the whole quantity, of both risk and high-risk drugs, will be taken into account in the legal classification of each. That quantity lends the act greater gravity, may attract the general

aggravating circumstance of commission of the act by three or more persons together, provided for in Article 77(a) of the Criminal Code, and, ultimately, a higher penalty.

The identification of adhesions and residues of narcotic drugs on various accessories does not satisfy the elements of typicity, in so far as they are no longer fit for consumption, since it could not be proved that the perpetrator previously possessed a quantity at least fit for personal consumption. By contrast, the possession of psychoactive plants and parts thereof is typical even if no psychoactive substance is detected in the plant material; otherwise, the separate enumeration of the substance and of the plant would be superfluous. The possession of drugs on different dates or in different locations does not, as a matter of law, entail a concurrence of offences: depending on the circumstances of commission, the period of possession and the criminal resolution formed upon taking possession, a single offence of possession may be found, extending over the entire period and covering all the locations.

The analysis of the act of *temporarily receiving drugs into one's custody*, solely in order to prevent the owner from being found with them on his or her person, converged towards its classification as complicity in drug trafficking, and not as concealment (*tăinuire*): by reason of its nature as a continuing offence, the principal offence from which the drug derives has not yet been exhausted. The hypothesis illustrates once more the possibility of exercising possession in a mediated manner, through another person. Although, *de facto*, the action might be classified as possession under the letter of the law, it must be analysed in the light of all the circumstances in which the assistance was given and of the intention with which it was carried out, in the spirit of the law: the person does not exercise possession in his or her own interest, as the perpetrator does, but merely a material, impersonal custody, in the perpetrator's interest and solely in order to help him or her, for a short period, without intending to become involved in operations to put the drug into circulation. The act can therefore constitute neither an act of execution specific to the *verbum regens*, nor possession with a view to subsequent operations concerning the circulation of drugs, but falls within the form of complicity provided for in Article 48(2) of the Criminal Code, concomitant concealment: the person promises, during the commission of the principal offence, to conceal (in the form of temporary receipt with an obligation to return) the goods derived from the offence.

Distinguishing Possession for Consumption from Possession for Trafficking. The Quantity Criterion

A further controversial issue is that of the criteria for distinguishing between the possession of drugs for own consumption and possession for the purpose of trafficking, there being in domestic legislation and case law no unanimously recognised set of reference criteria to which the judicial bodies may refer where the facts are ambiguous. Following a study of Spanish, Italian and German case law and doctrine, and starting from the Spanish model, a *tripartite scheme* was constructed comprising the criteria relevant to a judicious classification of the act, founded on three categories of circumstances – relating to the drug, to the person of the possessor and to the manner in which possession was exercised – each containing a series of criteria to be verified against the facts.

The analysis of foreign doctrine also revealed that the judicial bodies, in cooperation with the authorities responsible for public health and with the legislative bodies, have compiled annex tables setting out the quantities of drugs characteristic of individual intoxication at a normal, moderate or chronic level and the number of doses required for personal consumption over a short period, the need to adopt such tables having long been raised in domestic doctrine as well. *De lege ferenda*, we propose that, following the Spanish, German and Italian models, through inter-institutional cooperation between the Ministry of Health, the Ministry of Justice, the Public Ministry and the Ministry of Internal Affairs, *a table of the minimum and maximum dose values characteristic of personal consumption be established for each substance placed under national control*.

The *quantity criterion* is indispensable in determining the dangerousness of the perpetrator and the gravity of the act, and must have directly objectifiable consequences in the penalty limits. The act of a petty trafficker, whose activity consists in retail sales, is of lesser gravity than that of an ordinary or professional trafficker, who operates with larger quantities and for profit; at present, however, unjustly and inequitably, the sanctioning regime is set within the same limits for both. Consequently, *de lege ferenda*, starting from the number of doses characteristic of average personal consumption over a reasonable period, it is indispensable that, through the cooperation of the competent authorities, *small, standard and large quantities* be established, around which the reform of the offence should revolve.

First, having regard to the large-scale confrontation of the authorities with *trafficking in small quantities*, the lesser gravity of that act and the inequity of applying the same

sanctioning regime, we consider that the criminalisation should be maintained but punished within lower limits: as in Spanish, Italian and German legislation, we consider it appropriate to introduce, through a new Article 2¹ in Law No. 143/2000, *a mitigated variant of drug trafficking*, covering trafficking in small quantities characteristic of the petty trafficker, the number of doses corresponding to a small quantity being determined differentially according to the nature of the drug, the profile of the Romanian consumer and the capacity of the quantity to supply a small number of consumers for a short period. Second, we propose revising Article 2 by incorporating into the objective typicity the criterion of the *standard* quantity, an intermediate category in terms of weight and number of doses, set by the competent authorities for each type of drug, with a view to supplying a larger segment of the consumer market, this being the most common offence in practice. Third, for a complete and coherent reform, we consider it appropriate to introduce, among the special aggravating circumstances in Article 13 of Law No. 143/2000, an aggravating circumstance for trafficking in *large* quantities of drugs, a proposal founded on the cases already detected in domestic case law, which demonstrate that the legislative framework lags behind factual realities.

The regulation of these quantities facilitates the distinction between the *petty* trafficker, who carries out small commercial acts to supply, as a rule, only consumers, and few of them, the *ordinary* trafficker, who engages in such operations for profit, and the *professional* trafficker, who operates only with large quantities. Reference doses will constitute a fair, transparent and equitable instrument of legal classification, since they will facilitate the work of the judicial bodies on the basis of an objective criterion and will make offenders aware of the offences for which they are liable according to the quantity unlawfully handled.

Natural Absorption of Possession for Consumption into the Offence of Trafficking

In the particular situation in which one of the material elements common to drug trafficking and to possession for own consumption is committed both for the purpose of trafficking and for the purpose of consumption, we consider that drug trafficking acquires a *complex character through the natural absorption of the offence of possession for consumption*. The necessary character of the absorption of the offence under Article 4 into that under Article 2 operates, since the commission of the common action is so intertwined that one becomes the essential element of the other and underlies the subsequent act of trafficking. Although the same activity, for example cultivation, is committed on the one hand

for own consumption and on the other with a view to putting the drugs into circulation, the two purposes are not incompatible, because the general prohibition of *any unlawful handling of drugs* in Article 2 also encompasses the particular prohibition in Article 4 against handling drugs for own consumption.

The compatibility of the absorption is also supported by the common core of social values protected by the two norms: the closeness of the connection between the actions, which interpenetrate to the point of merging, together with the circumstances of commission and the injury to the same principal legal object, allows the necessary character of the absorption to be found and the status of a complex offence by natural absorption to be conferred. The constituent elements of Article 4 can be *determined* unequivocally within Article 2, for both risk and high-risk drugs, and the difference in social danger between the two offences is readily reflected in the penalty limits. Absent recognition of this legal unity, we would be bound to apply the concurrence of offences, an institution which may result in the perpetrator being punished twice for the same action: since drug consumption is not punishable, the perpetrator would be punished twice for the same material element, once under the objective side of Article 4 and again under the objective side of Article 2.

Transport, Dispatch and Delivery. Diversion of the Postal and Courier Infrastructure

The analysis of national case law showed that a high proportion of the drugs transported on the national territory are brought in from abroad, for which reason transport was examined in the light both of the modalities characteristic of domestic trafficking and of those characteristic of international trafficking. Particular emphasis was placed on the diversion of the lawful infrastructure of the postal and courier system towards the transport of drugs, national legislation being analysed by reference to the transposition of the obligations assumed under the Universal Postal Convention, together with its successive protocols, the Constitution of the Universal Postal Union and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contains specific provisions in this respect; the German and Spanish postal legislation was also examined, in order to highlight the methods used by other States to combat trafficking by post or courier.

The analysis showed that, against the background of legislative gaps in the framework governing postal services at the domestic and international level, we are witnessing a diversion of this lawful infrastructure towards the transport of drugs, through the “recruitment” of postal and courier workers as “carriers”. In the absence of provisions on the

control of postal items binding on both postal service providers and their employees, we are bound to accept that the latter act as carriers who commit the act under an invincible error of fact as to typicity, so that, *de lege lata*, neither the employees nor the employing company can be held criminally liable for participation in drug trafficking.

In order to combat this phenomenon, we consider it necessary to *adopt forms of control of postal items*, along two lines of legislative amendment: verification of the identity of the sender and the addressee, coupled with examination of the contents of the parcel, without opening it, at the time of deposit, by means of scanning devices such as X-ray scanners, which allow the interior of the item to be examined in real time in order to detect the presence and nature of controlled substances. Such a combined control would constitute an effective instrument for halting the introduction of drugs into the postal network, would contribute to the security of the network and to preventing the risk to the health of postal workers who handle items containing drugs, and the statutory regulation of these obligations would establish responsibilities on the part of postal service providers and their employees, capable of preventing the entry of controlled substances into the network and, in the event of non-compliance, of triggering the mechanisms for verifying participation in drug trafficking.

5. The Subjective Side of the Offence and the Discernment of the Drug-Consuming Perpetrator

5.1. The Intention to Put Drugs into Circulation

The analysis of the subjective side showed that the intention to traffic is made up of a cognitive element – the *awareness*, unaffected by error, of carrying out an unlawful operation with a *substance under national control* – and a volitional element – the *will* to carry out such an operation with such a substance –, both components having to be directed towards the aim of putting the drugs into circulation, with the consequence of their dissemination in society. *Per a contrario*, where the operations with drugs are carried out not with a view to putting them into circulation but, on the contrary, to removing them from circulation, the act does not satisfy the conditions of typicity, even if an act of disposal over the drugs is committed. Likewise, where the agent seeks to injure public health by disseminating drugs, but in so doing also injures other social values – the mental or physical integrity or the property of a person –, the drug offence will be found in concurrence with the offence protecting the values injured, such as battery and other acts of violence, theft or robbery.

5.2. Impairment of Discernment as a Result of Drug Consumption

In the second part of the chapter we examined, from an interdisciplinary perspective – legal and forensic-psychiatric –, the causes, conditions and circumstances that may lead to the diminution or abolition of the trafficker's discernment, with the consequence of narrowing the limits of criminal liability. By reason of its chemical composition and pharmacological effects, drug consumption is liable to impair the *perpetrator's discernment* in its intellectual component, its volitional component or both; the World Health Organization itself has pointed out that psychotropic substances may cause dependence and may stimulate or depress the central nervous system, causing hallucinations or changes in motor and cognitive functions, behaviour, perception or mood.

A person cannot be held *criminally liable* in the absence of a finding of *mental responsibility*. Whereas mental responsibility belongs to the field of psychology and is the consequence of the person's bio-psychological capacity, criminal liability belongs to the field of law and is the consequence of the commission of a criminal act; in the process of analysing criminal liability it is therefore appropriate to verify *in concreto*, first of all, mental responsibility, that is, the integrity of the cognitive and volitional factors, against the background of drug consumption. Moreover, *responsibility* must not be confused with *discernment*: whereas responsibility is the person's ability to understand the significance of his or her actions, coupled with the capacity to control them, discernment is confined to the analysis of those capacities in relation to a specific, concrete act, which is why, in the case of a concurrence of offences, it may be established that the perpetrator had discernment in respect of some offences while in respect of others his or her discernment was abolished or diminished.

Drug consumption does not automatically abolish or diminish discernment, nor does it automatically bring about withdrawal or dependence, whether the consumption is isolated or regular. The existence and degree of impairment are influenced by a multitude of factors – state of health, genetic make-up, tolerance, metabolism, dosage –, so that even the consumption of soft drugs such as cannabis may, in some persons, cause only euphoria, disinhibition or agitation, without affecting discernment, whereas in others it may induce paranoid ideation, visual or tactile illusions and hallucinations, and, in the case of prolonged consumption, even intoxication complicated by *delirium*, capable of abolishing discernment. Responsibility is established indirectly, by verifying the applicability of a ground that removes it – the non-imputability grounds of irresponsibility or of complete involuntary

intoxication – or mitigates it – incomplete involuntary intoxication –, an applicability which must be confirmed by the evidentiary procedures in the file: first, those specific to forensic medicine – forensic psychiatry, forensic psychology and toxicology –, and second, the traditional ones, such as the statements of eyewitnesses who directly observed the perpetrator's behaviour during and immediately after the commission of the act.

5.3. Withdrawal and Severe Dependence. De lege ferenda Proposals

The study found that, in addition to abolishing or diminishing discernment, drug consumption may cause mental and behavioural disorders, such as the onset of withdrawal or dependence, which may significantly impair mental and volitional faculties. For offences committed as a result of mental illness caused by consumption or of complete involuntary intoxication, the legislature has provided for the two grounds of non-imputability. The comparative forensic medical literature has, however, also documented two further consumption-induced conditions which may severely impair intellectual and cognitive capacities, withdrawal and dependence, both classified as mental and behavioural disorders due to psychoactive substance use under the ICD-10-AM classification; since their medical consequences are recognised in the medical field, the Romanian legislature too should recognise the effects of withdrawal and of severe dependence in the process of impairment of discernment. The German legislature has recognised these effects through case law, verifying their applicability by reference to pathological mental disorders, disorders of consciousness, diminished intelligence or serious mental abnormality, which may result in the act being committed without guilt, under Section 20 of the German Criminal Code, or with diminished guilt, under Section 21. The Spanish legislature, by contrast, opted for statutory recognition, including withdrawal among the grounds exempting from criminal liability – the institution analogous to the grounds of non-imputability in domestic law – and dependence among the statutory mitigating circumstances.

Since *withdrawal* is classified as a mental and behavioural disorder due to psychoactive substance use, and since the abstinence syndrome caused by cessation of drug administration produces physical and mental suffering that may reach an intensity capable of impairing discernment, we propose *de lege ferenda* that the most severe form of withdrawal be regulated within the non-imputability ground of intoxication, alongside intoxication due to alcohol or other substances, since withdrawal too is the consequence of the ingestion of substances. Whereas in the case of intoxication the condition that it be involuntary and

complete remains valid, in the case of withdrawal that condition no longer applies: even if the state was induced intentionally, the medical condition subsequently takes control of the intellectual and cognitive functions to the point of abolishing discernment; the consumer cannot intentionally induce a state of withdrawal, but enters it automatically as a result of ceasing to administer the drug, and preventing it would mean compelling the perpetrator to continue consuming, which would run counter to the rationale of criminalising drug offences. Where the forensic medical expert report establishes that withdrawal did not abolish but merely diminished discernment – the second, intermediate, progressive form of withdrawal –, the legal recognition of these findings will allow the perpetrator to benefit from the judicial mitigating circumstance provided for in Article 75(2)(b) of the Criminal Code.

The *dependence* syndrome has likewise been recognised as a mental and behavioural disorder induced by psychoactive substance use, formed through repeated consumption and involving a strong desire to consume, difficulty in controlling the pattern of consumption and persistence in consumption despite its adverse consequences. Given that the effects of *severe dependence* have been recognised in the forensic medical literature, and that a large proportion of drug offences committed by petty trafficker-consumers are committed under the influence of this condition, *de lege ferenda* we propose that it be regulated among the statutory mitigating circumstances of the Criminal Code, as a recognition of the medical condition under which the consumer acts and in compliance with the obligations assumed by the Romanian State under the United Nations Conventions to show concern for the health of consumers. The application of the circumstance will be subject to two requirements: first, only trafficker-consumers suffering from severe dependence will be able to invoke it, those who plead a mere state of dependence without proving impairment of their intellectual and cognitive capacities being excluded; second, its application will be limited to consumers who commit acts in order to obtain income to secure the dose they need, or to trafficker-consumers who carry out operations characteristic of petty trafficking for the same purpose, a limitation which excludes the unjustified invocation of the circumstance by any offender and in relation to any offence. Consumers who committed the offences in the first form of withdrawal will also be able to avail themselves of this circumstance.

To further improve the normative framework, we emphasise the need also to verify the motivation at the time of intoxication, in the light of the principle of *actio libera in causa*, so as to prevent the evasion of criminal liability by inducing a state of irresponsibility. Where the perpetrator becomes intoxicated intentionally but without foreseeing, although he or she could

and should have foreseen, the possibility of committing an offence in that state, we take the view that an offence of negligence should be found. Moreover, in order to avoid exemption from liability where the act is punishable only if committed intentionally, we propose *de lege ferenda* the enactment of an *ex novo* criminalisation, such as the offence of *intoxication* in Section 323a of the German Criminal Code: whereas under *actio libera in causa* the consequence produced is punished, the offence of intoxication criminalises the very act inducing that state, a mitigated criminalisation justified by the perpetrator's subjective position and by the motivation behind the impairment of the intellectual and cognitive factors, on the ground that, by becoming intoxicated intentionally or negligently, the perpetrator places himself or herself in a state that may represent a danger to others.

6. Final Conclusions and Synthesis of the *de lege ferenda* Proposals

The research carried out has confirmed that the offence of drug trafficking, criminalised by Article 2 of Law No. 143/2000, is an abstract endangerment offence, conceived as an obstacle norm protecting the mono-offensive, collective and impersonal social value of public health, whose general passive subject can only be the State. Major practical consequences flow from this nature: the consummation of the offence independently of any concrete injury, the impossibility of classifying drugs as its material object, the inoperability of the consumer's consent, and the need to find a concurrence of offences where the state of danger materialises in an injury to health or in the death of the consumer. The analysis of the 18 material elements revealed terminological inaccuracies, discrepancies with the original definitions of the 1961 and 1971 Conventions, legislative gaps that facilitate the new forms of trafficking – through online platforms and through the postal and courier network – and inequities in the sanctioning regime, which draws no distinction between the petty and the professional trafficker. The *de lege ferenda* proposals formulated in the thesis, summarised below, seek to remedy these shortcomings.

1. Criminalising, through two new paragraphs of Article 2 of Law No. 143/2000, an aggravated form of the offence, in the variant of legal complexity, for the situation in which risk or high-risk drugs have come into the consumer's possession, resulting in one of the consequences provided for in Article 193 or Article 194 of the Criminal Code, with progressively increased penalty limits.

2. Supplementing the definition of new psychoactive substances with the clarification that those included in the definition of drugs are the substances stipulated in the Annex to Framework Decision 2004/757/JHA.
3. Renaming cultivation as *cultivation of plants containing narcotic or psychotropic substances* and interpreting the notions of production, manufacture, transformation, extraction and preparation in accordance with the original definitions of the 1961 and 1971 Conventions.
4. Including the kingdom *Fungi* in the definition of drugs, supplementing the Tables with the mycelia, spores and cell cultures capable of producing the controlled mushrooms or substances, and supplementing Table III with cannabis seeds.
5. Removing Table IV and the definitions of precursors in Article 1(a) and (e) from Law No. 143/2000, the regulation of operations with precursors being exhaustively ensured by Law No. 142/2018 and by the European regulations.
6. Amending the offence of administering drugs to another person in Article 7, by bringing risk drugs within its scope and by adapting the sanctioning regime to the degree of danger of the substance administered.
7. Providing in Law No. 50/2024, following the French model, for forms of criminal liability for breach of the essential obligations imposed on providers of electronic services by Regulation (EU) 2022/2065.
8. Criminalising *ex novo*, in the Criminal Code, the offence of *failure to adopt or to comply with online safety measures by providers of electronic services*, as an autonomous form of complicity by assistance, following the model of Section 127 of the German Criminal Code and Article 323-3-2 of the French Criminal Code.
9. Doctrinal recognition of the tripartite scheme of criteria – relating to the drug, to the person of the possessor and to the manner in which possession is exercised – for distinguishing possession for consumption from possession for trafficking, and the establishment, through inter-institutional cooperation, of a table of the minimum and maximum doses characteristic of personal consumption for each controlled substance.
10. Reforming the offence of drug trafficking on the basis of the quantity criterion: introducing a mitigated variant, through a new Article 2¹, for trafficking in small quantities; incorporating the standard quantity into the typicity of Article 2; and

providing, in Article 13, for a special aggravating circumstance for trafficking in large quantities.

11. Recognising the natural absorption of the offence of possession for own consumption (Article 4) into the offence of drug trafficking (Article 2) where the same quantity is possessed both for consumption and for trafficking, in order to avoid double punishment.
12. Establishing forms of control of postal items – verification of the identity of the sender and the addressee, coupled with non-intrusive scanning of the contents at the time of deposit –, with responsibilities placed on postal and courier service providers and their employees.
13. Regulating the most severe form of withdrawal within the non-imputability ground of intoxication, without the requirement of involuntariness, and recognising the intermediate form of withdrawal as a basis for the judicial mitigating circumstance provided for in Article 75(2)(b) of the Criminal Code.
14. Regulating severe drug dependence as a statutory mitigating circumstance, applicable to trafficker-consumers who prove impairment of their intellectual and cognitive capacities and who commit acts in order to secure the dose they need.
15. Criminalising *ex novo* the offence of intoxication, following the model of Section 323a of the German Criminal Code, in order to punish the perpetrator who, intentionally or negligently, places himself or herself in a state of irresponsibility that may represent a danger to others.

Alongside these proposals for legislative reform, the thesis advances *de lege lata* solutions to the problems of legal classification identified in practice – the concurrence between drug trafficking and offences against bodily integrity, the application of the theory of objective imputation in the event of the consumer's death, atypical complicity in cultivation, mediated possession and possession in co-perpetration, the classification of temporary receipt into custody as an act of complicity, and the criminal liability of online platforms under the general criminal law –, in the hope that the present thesis will constitute a useful instrument for academics and practitioners alike.

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