

**THE NEW CRIMINAL CODE AND CRIMES CONNECTED WITH UNAUTHORISED HANDLING OF
NARCOTIC AND PSYCHOTROPIC SUBSTANCES FROM 2010
AND ASSOCIATED AMENDMENTS IN THE ACT ON MISDEMEANOURS**

- Summary of relevant information -

On 1 January 2010, Act No. 40/2009 Coll., the Criminal Code, as amended by Act No. 306/2009 Coll., which was promulgated in Part 11 of the Collection of Acts on 9 February 2009, comes into effect. Chapter VII (Crimes against public order) Division 1 (Crimes of general endangerment) of the Criminal Code sets forth under the provisions of sections 283–288 thereof a list of crimes directly connected with unauthorised handling of drugs (hereinafter “narcotic and psychotropic substances” – “NPSs”). The precise wording of the headings of the said provisions in the new Criminal Code is as follows:

- section 283 – Unauthorised production and other handling of narcotic and psychotropic substances and poisons
- section 284 – Possession of narcotic and psychotropic substances and poisons
- section 285 – Unauthorised cultivation of plants containing narcotic or psychotropic substances
- section 286 – Production and possession of articles for the unauthorised production of narcotic and psychotropic substances and poisons
- section 287 – Spreading of drug addiction
- section 288 – Production and other handling of substances with hormonal effect

The provisions of sections 283-288 of the Criminal Code were hitherto contained in sections 187-188a of Act No. 140/1961 Coll., the Criminal Code, as amended, with the exception of sections 285 and 288, which are entirely new.

As regards the overall conception of the new Criminal Code, it can be said that from 1 January 2010 the assessment of criminal liability will significantly differ from the situation to date. Under the Criminal Code as applicable until 2009, a crime consisted of an act endangering society the features of which are given in the Criminal Code, whereas an act whose degree of endangerment of society is negligible does not constitute a crime, even when it otherwise displays the features of a crime (section 3(1),(2) of the Criminal Code). This material (or formally material) conception of a crime is superseded by a formal conception in the new Criminal Code. Under the new Criminal Code, a crime consists of any illegal act which the Criminal Code designates as a crime, and which displays the features stated therein, regardless of the given act's endangerment of society (degree of damage etc.) (section 13(1) of the Criminal Code).

In this light, therefore, the crime of e.g. possession of NPSs and poisons in the meaning of section 284 of the Criminal Code will consist of every act of a criminally liable offender which possesses without authorisation and for personal use any substance from the defined group (under Act No. 167/1998 Coll., on Addictive Substances, as amended) in at least the quantity stipulated by a government decree. However, a material corrective set forth in section 12(2) may open a crack in the absolute criminal liability ensuing from this formal conception of a crime; in the area of drug crime one can envisage the application of section 12(2) (subject to other conditions being met) in cases of, for example, cultivation and subsequent processing of cannabis exclusively for the purposes of alternative medicine.

The provisions of section 283 – Unauthorised production and other handling of narcotic and psychotropic substances and poisons - to a considerable extent take over the existing merits of cases set forth in section 187 of the Criminal Code. They thus regulate various types of unauthorised handling of NPSs (e.g. production, sale, holding NPSs in possession for another etc.). A marked increase in strictness occurs in particular in relation to offenders that have repeatedly committed a crime (have been convicted or punished for the same crime in the three years preceding). Such an offender will face punishment by imprisonment for a term of between 2 and 10 years (under the prior legislation the offender faced imprisonment for between 1 and 5 years).

A significant amendment is brought by the provisions of section 284 – Possession of narcotic and psychotropic substances and poisons - which give concrete form to a requirement stemming from practice to make a distinction amongst the possession of various particular types of illegal NPSs with regard to the health and social risks associated therewith. Relatively lower sentences are therefore

faced by users of an NPS in possession of a quantity greater than small of a cannabis-based drug for their own use. In this case, offenders face punishment under subsection 284(1) of the Criminal Code by imprisonment for a term of up to 1 year, prohibition of business activity, or forfeiture of an item of property or other asset. Offenders that possess for their own use and in a quantity greater than small some NPS other than cannabis-based drugs will face imprisonment under subsection 284(2) for up to 2 years, prohibition of business activity, or forfeiture of an item of property or other asset. The provisions of subsections 284(3) and (4) of the Criminal Code relate to possession of an NPS on a significant and substantial scale respectively, regardless of the type thereof.

The provisions of section 285 – Unauthorised cultivation of plants containing narcotic or psychotropic substances – are a fundamental amendment in the new Criminal Code in comparison to the legislation hitherto. Cultivation for personal use now has so-called privileged (in this case more leniently punished) case merits in comparison to the provisions of section 283 of the Criminal Code affecting *inter alia* production of NPSs. The provisions of section 285 also distinguish between cultivation of cannabis and cultivation of mushrooms or other plants containing an NPS. Cultivation of a small quantity of cannabis, mushrooms or other plants for personal use will not be subject to criminal law regulation and will be subject to sanctions under the Act on Misdemeanours. Cultivation of cannabis in a quantity greater than small will be punished under the provisions of subsection 285(1) by imprisonment for up to 6 months, a fine, or forfeiture of an item of property or other asset. Cultivation of mushrooms or other plants for personal use in a quantity greater than small will be subject to imprisonment for up to 1 year, a fine, or forfeiture of an item of property or other asset. In the case of cultivation on a large or substantial scale, similarly as in the case of possession of an NPS for personal use, there is no distinction made amongst cannabis, mushrooms and other plants, and punishment is set at imprisonment for a term of up to 3 years, or a fine, in the case of cultivation on a significant scale, and imprisonment for between 6 months and 5 years for cultivation on a substantial scale. The introduction of these new case merits of cultivating plants containing NPSs should remove any ambiguities in relation to legal sanction of the act of cultivation itself as regards these plants; under section 187 of the prior Criminal Code, this could have been sanctioned as unauthorised production of an NPS. Drying and other preparation, however, remains a crime under section 283 of the Criminal Code.

Note.: The law allows the cultivation of cannabis plants designated as “technical”, which contain less than 0.3% of delta 9-THC. In cases where this plant is cultivated on a total area of land greater than 100 m² (this area limit also applies to the sum total of a greater number of smaller sown areas), the cultivator has a notification obligation towards the customs and excise authority of local jurisdiction under section 29 (Notification obligation of persons cultivating opium poppy and cannabis) of the Act on Addictive Substances (Act No. 167/1998 Coll.). The same notification obligation also applies to persons cultivating opium poppy.

In the provisions of section 286 – Production and possession of articles for the unauthorised production of narcotic and psychotropic substances and poisons - which are to supersede the existing provisions of section 188 of the Criminal Code, there is an important amendment consisting particularly of broadening the range of sentence in the case of the first subsection, from the original punishment of imprisonment for a term of 1– 5 years to imprisonment for a term of up to 5 years. This thereby decreases the lower boundary of the sentence.

Section 287 – Spreading of drug addiction - superseding the existing provisions of section 188a of the Criminal Code, specifies the circumstances for rendering higher sentences in regard to an offender that is a member of an organised group.

Section 288 introduces a new crime of unauthorised handling of substances with anabolic or hormonal effects and unauthorised usage of methods with doping effects, for which the basic sentence starts at imprisonment for up to one year and ends, in the case of qualified case merits, at the punishment of imprisonment for a term of between five and twenty years.

Section 289 – Joint provisions – establishes *inter alia* legal authorisation for the government to stipulate in a decree what quantity constitutes a quantity greater than small for NPSs for the purposes of sections 283, 284 and 285 of the Criminal Code, and which plants or mushrooms are deemed to be plants and mushrooms containing a narcotic or psychotropic substance in the meaning of section 285, and what quantity thereof is a quantity greater than small in the meaning of section 285. This provision

conferring authority was included into the Criminal Code in particular in view of the difficulties with practical application and the differing interpretations of the term “quantity greater than small” under the prior legislation at the level of the police force, state representation, and courts. On 7 December 2009 the government passed a decree relating to the cultivation of plants and mushrooms for personal use, while postponing debate and the potential passing of a decree relating to quantities greater than small for NPSs until 21 December 2009.

Possession of an NPS in a small quantity or cultivating plants or mushrooms containing a narcotic or psychotropic substance “in a small quantity” is deemed a misdemeanour under Act No. 200/1990 Coll., on Misdemeanours in the amendment effective from 1 January 2010. According to the provision of subsection 30(1)(j) of the said Act, a misdemeanour has been committed by whoever “without authorisation possesses in a small quantity for their own use a narcotic or psychotropic substance.” Possession of such a substance in a quantity greater than small is qualified as the crime described above pursuant to the provisions of section 284 of the Criminal Code. According to the provisions of section 30(1)(k) of the cited Act, a misdemeanour has been committed by whoever “without authorisation cultivates in a small quantity for their own use a plant or mushroom containing a narcotic or psychotropic substance.” Cultivation of such plants or mushrooms in a quantity greater than small shall be qualified as the crime described above pursuant to the provisions of section 285 of the Criminal Code. For both misdemeanours, offenders face a fine of up to CZK 15,000, although they may also be sanctioned by a warning and forfeiture of an item of property (i.e. even the NPS).

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