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for Drugs and Drug Addiction



# Legal framework

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## 0 SUMMARY

The legal framework for drug and addiction policy is multi-layered and complex because this policy affects many spheres of life. The handling of drugs, drug dealing / trafficking, medical provision of drugs, drug use and drug addiction are governed by provisions set at international, European and national levels. At the national level, a range of parties are responsible for different aspects of the issue of drugs, which are subject to very different laws. In Germany, there is the additional factor, due to its federal structure, that legislative powers are split over several levels. All these provisions together form cross-sectoral legal conditions for drug and addiction policy.

In Germany, the central national legislation in the area of drug and addiction policy is the German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG), together with the ordinances issued on the basis of that Act. It determines which substances are narcotic drugs, regulates the legal trade in narcotics and contains sanctions for the unlawful handling of narcotics. In addition to the administrative regulations on the narcotics trade, the penal provisions of the BtMG are of great practical significance because narcotics offences play a large role in the day to day business of German courts.

The BtMG provides for a variety of sanctions for violations of its provisions: penalties for misdemeanors and crimes, fines for regulatory offences, rehabilitation and prevention measures, administrative acts such as confiscation. In addition, numerous other acts contain criminal provisions and sanctions for drug-related offences (German Criminal Code (Strafgesetzbuch "StGB"), German Road Traffic Act (Straßenverkehrsgesetz "StVG"), German Precursors Monitoring Act (Grundstoffüberwachungsgesetz "GÜG"), German New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz "NpSG").

Drug offences are usually classified in three categories, namely consumption-related offences, dealing / trafficking offences and other violations. The BtMG does not differentiate between "soft" and "hard" drugs. Generally, all unlawful narcotics-related acts carry the risk of custodial sentences or financial penalties without exception. There is a highly differentiated system of harsher sentences and lesser sentences. In addition, there is the possibility to completely refrain from prosecution, to halt proceedings, to refrain from punishment or to defer executing sentencing in favour of treatment. Finally, there are alternatives to criminal sanctions.

The legal framework also includes the legislation which governs the addiction support system. Addiction support forms an essential component of the drug and addiction policy in Germany. Persons with dependence disorders or harmful use have a legal right to help. As a result, a very differentiated addiction and drug support service has been established in Germany over the past decades, in particular for the purposes of prevention, treatment, harm reduction and rehabilitation. In past years, most changes to the law have been made in this area, such as the regulation on narcotics governing substitution treatment of opioid addicts

that have been enshrined in law for more than 20 years now. These provisions were extended to narcotic rules on diamorphine substitution and recently, in 2017, fundamentally reformed (Diamorphine is a pharmaceutical grade "heroin" that is approved in Germany as a medicinal product for medical use of substitution). Just as with substitution, the rules governing syringe exchange (1994) and drug consumption rooms (2000) were introduced for the purpose of harm reduction. The most recent legal changes concern the new psychoactive substances "NPS" (2016) and the authorisation of cannabis as a medicine (2017).

The number of newly appearing drugs is constantly increasing. Even though there has been, in the German New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG), a new instrument for dealing with new psychoactive substances (NPS), there will probably continue to be a certain race between the suppliers of continuously newly developed substances and the regulation of these products under narcotics law.

Drug criminality has steadily increased in recent years. One reason for this is the fact that trafficking over the internet makes drugs more readily available.

The figures for substitution patients have been constant on a comparative high level for years. It is hoped that the reform of substitution law will continue to improve this situation.

In political discourse, the question of legalising drugs for intoxication, in particular of cannabis, is again being intensively and publicly discussed.

## 1 NATIONAL PROFILE

### 1.1 Legal framework

#### Structure of legal frameworks in Germany

In the following, the term "legal frameworks" will be understood as meaning all legislation that governs narcotic drugs and NPS plus the problem of drugs and addiction in Germany. As the drug and addiction problem affects many areas of life, the pool of legislation is very large, multi-faceted and diverse.

The legal frameworks of drug and addiction policy in Germany are determined by international, national and European law.

At international level, the three UN Drug Control Conventions that were ratified by Germany (and almost all countries within the UN), contain numerous obligations and provisions which have a binding effect on the national legislation of the member states. In Germany they have, in addition to their direct international law bond, the rank of simple federal law. This includes, in particular, the obligation to ensure certain narcotic drugs and psychotropic substances are available in sufficient quantities for medical and scientific purposes, to use these substances exclusively for medical or scientific purposes and to control how they are handled. Accordingly national regulations, as long as they provide a legalization of narcotics and psychotropic substances to non-scientific and non-medical use, aren't covered by the three drug control conventions of the United Nations. At national level, the legal frameworks in Germany are in turn established at different levels because, in accordance with the German constitution (Grundgesetz), legislative and administrative competences are split between the federal, *federal states* and municipal level (Germany is a federation of states):

- The Federal Government, as the uppermost level, issues laws in the areas that are assigned to it by the Constitution. These are, for example, dealing / trafficking in narcotic drugs and medicines, social welfare legislation, criminal law, criminal proceedings, among other things. These laws apply uniformly across the whole country.
- The federal states have legislative competence in all other areas, e.g. in health law, police law, imprisonment among other things, which means that the legal frameworks are determined by the *federal states* which can lead to a situation whereby these areas are regulated completely differently in the 16 *federal states*.
- Moreover, the *federal states* are responsible for the administrative enforcement and implementation both of federal laws and their own laws. This can also result in differences in administrative practice between the *federal states*.
- Finally, the municipalities - the cities, districts and local authorities - play an important role in regulating local affairs and enforcing laws, for example in the area of addiction support.

There is also binding legislation at European level for specific areas, which also contributes to the legal frameworks in Germany. In this sense, the control of so-called drug precursors,

for example, is definitively regulated for all Member States by binding EC regulations, such that the German Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG) today only has a supplementary function. Other EU regulations also affect the legal frameworks in Germany, such as the Framework Decision of 25 October 2004 on minimum penalties in the area of illicit drug trafficking<sup>1</sup> or the Regulation on information exchange on new psychoactive substances and an early warning system and risk assessment procedure for new psychoactive substances of 15 November 2017<sup>2</sup>.

### 1.1.1 Characteristics of drug legislation and national guidelines for implementation

Drug and addiction policy has to regulate the approach to legal and illegal addictive substances and therefore touches many areas of life. Its legal frameworks thus comprise many pieces of legislation which originate from very different legal areas. This includes not only criminal legislation, but also legislation in the areas of health law, social law, commercial law, traffic law as well as other legal norms. In the following, the BtMG will be presented in section 1.1.1, section 1.1.2 will then set out the system under narcotics criminal law while section 1.1.3 will outline the new innovative law on the new psychoactive substances (NPS). The legal frameworks which are regulated in other legal areas will be covered under section 1.1.4.

#### Narcotics law

The central piece of national legislation in the area of drug and addiction policy is the **German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG)**<sup>3</sup>, together with the ordinances issued on the basis of the Act. This Act transposes the three UN Drug Control Conventions<sup>4</sup> into national law. The BtMG regulates the legal trade in narcotic drugs and contains in this respect primarily regulatory and administrative law. It also contains the central (penal-) sanctions for unlawful acts in connection with narcotics.

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<sup>1</sup> Council framework decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8 of 11 November 2004, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32004F0757&from=DE> [Accessed: 10 Sep. 2018].

<sup>2</sup> Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances, OJ L 305/1 of 21 November 2017, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32017R2101&from=EN> [Accessed: 10 Sep. 2018].

<sup>3</sup> Act on the trade in narcotic drugs (German Narcotic Drugs Act, Betäubungsmittelgesetz - BtMG) of 28 July 1981, which came into force on 1 January 1982, current version 1 March 1994, Federal Law Gazette I pp. 681, 1187: [http://www.gesetze-im-internet.de/btmg\\_1981/](http://www.gesetze-im-internet.de/btmg_1981/) [Accessed: 5 Sep. 2018].

<sup>4</sup> Single Convention on Narcotic Drugs of 1954 as amended by the 1972 Protocol [https://www.unodc.org/pdf/convention\\_1954\\_en.pdf](https://www.unodc.org/pdf/convention_1954_en.pdf); Convention on Psychotropic Substances of 1971 [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) [Accessed: 10 Sep. 2018].

First, it enumeratively specifies the substances that are considered narcotic drugs within the meaning of German law and are thus subject to narcotics control. It contains no general definition of "narcotic drugs", rather it divides specific psychoactive substances into three categories and lists them accordingly in three annexes, namely:

- narcotics not eligible for trade and non-prescribable: Annex I, e.g. heroin, LSD, cannabis, psilocybin, MDMA (ecstasy);
- narcotics eligible for trade but non-prescribable: Annex II, e.g. meprobamate, methamphetamine;
- narcotics eligible for trade and prescribable: Annex III, e.g. morphine, methadone, amphetamine, codeine, dihydrocodeine, cocaine, cannabis (only for medical purposes under state control of the UN 1961 Convention on Narcotic Drugs).

The BtMG makes no distinction based on the "dangerousness" of the substances nor does it differentiate between "hard" and "soft" drugs.

The BtMG regulates the manufacture, cultivation, bringing onto the market, trade, import and export of narcotic drugs. These activities require authorisation, which is granted by the German Federal Institute for Drugs and Medical Devices (Bundesinstitut für Arzneimittel und Medizinprodukte, BfArM) (Sec. 3 BtMG). For substances listed in Annex I, authorisation can only be granted in exceptional cases for scientific or other purposes in the public interest. Substances in Annexes II and III are subject to specific rules governing their use, such as provisions governing the prescription of substances listed in Annex III (Sec. 13 BtMG). In this context, the foundation for substitution treatment is also established. The details on prescribing narcotics are regulated in the **Ordinance on the Prescription of Narcotic Drugs** (BtM-Verschreibungsverordnung, BtMVV)<sup>5</sup> (c.f. on this point section 1.1.4 below).

The BtMG also regulates minimum requirements for setting up and operating drug consumption rooms (Sec. 10a BtMG) (c.f. on this point section 1.1.4 below). The details regarding these facilities must, however, be specified by the individual *federal states* by way of ordinances. To date, only six *federal states* have issued ordinances on the operation of drug consumption rooms.<sup>6</sup>

Legal Domestic and foreign trade in narcotics (import and export) is specified in more detail in the **Ordinance concerning the Domestic Trade in Narcotics**<sup>7</sup> (BtM-

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<sup>5</sup> BtMVV: [http://www.gesetze-im-internet.de/btmvv\\_1998/BJNR008000998.html](http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html) [Accessed: 5 Sep. 2018].

<sup>6</sup> North Rhine-Westphalia, Hamburg, Berlin, Lower Saxony, Hesse and Saarland. In total, there are currently 25 drug consumption rooms in Germany.

<sup>7</sup> BtM-BinnenhandelsVO: <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [Accessed: 5 Sep. 2018].



Binnenhandelsverordnung, BtM-BinnenhandelsVO) and the **Ordinance concerning the Foreign Trade in Narcotics**<sup>8</sup> (BtM-Außenhandelsverordnung, BtM-AußenhandelsVO).

### Criminal provisions of the BtMG

In addition to the administrative provisions concerning trade in narcotics, which take up a large proportion of the BtMG, the penal provisions of the BtMG are of great practical significance. As narcotics offences play an important role in the day to day operation of German courts and in criminal statistics, the BtMG is one of the most important laws in the area of so-called secondary criminal law.

The BtMG provides for a variety of sanctions for violations of its provisions: penalties for misdemeanors and crimes, fines for regulatory offences, rehabilitation and prevention measures, administrative acts such as confiscation.

Sec. 29, Sec. 29a and Sec. 30a BtMG specify the most important acts under threat of punishment in connection with narcotic drugs. Generally, every type of act in connection with narcotic drugs is prohibited and subject to punishment, whilst the statutory penalties vary greatly in terms of severity. These provisions primarily serve to combat narcotics crime and are aimed at criminal acts of both dealers and drug users. The system of criminal sanctions under the BtMG is presented in more detail in section 1.1.2.

### German Criminal Code (StGB) and German Code of Criminal Procedure (StPO)

The general provisions of criminal law and criminal procedure also apply in relation to drug offences. In addition, the StGB<sup>9</sup> contains several provisions which specifically cover drug use and its consequences, such as drunk driving (driving a vehicle under the influence of intoxicating substances (Sec. 316 StGB)), committing offences while intoxicated (Sec. 323a StGB), jeopardising a detoxification treatment (Sec. 323b StGB), referral to a detoxification facility (Sec. 64 StGB), driving ban (Sec. 69 (2) StGB).

#### **1.1.2 The system of narcotics penalties**

The central criminal provisions in narcotics law are found in Sec. 29, Sec. 29a, Sec. 30, Sec. 30a BtMG. The basic offences are contained in Sec. 29 (1) BtMG, while Sec. 29 (3), 29a, 30 and 30a BtMG contain carefully graduated increases in severity of penalties. In addition, there are provisions which allow mitigation of penalties or even refraining from prosecution or punishment.

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<sup>8</sup> BtM-AußenhandelsVO: <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [Accessed: 5 Sep. 2018].

<sup>9</sup> StGB: <https://www.gesetze-im-internet.de/stgb/StGB.pdf> [Accessed: 5 Sep. 2018].

## Classification of drug offences

In the police crime statistics, drug offences are divided into three categories<sup>10</sup>: The term "**consumption-related offences**" defines general violations of the BtMG, which includes possession, acquisition and supply of narcotics and similar offences under Sec. 29 BtMG. The term "**dealing / trafficking offences**" encompasses offences of unlawful trade in and smuggling of narcotics as per Sec. 29 BtMG as well as offences involving the unlawful import of narcotics as per Sec. 30 (1) No. 4 BtMG. The other offences are set out in the criminal statistics as "**other violations**"<sup>11</sup>. Under criminal law, it is possible, to differentiate, according to the severity of the offence, between "minor offences" (basic offences as per Sec. 29 (1) BtMG) and "crimes" (qualified offences as per Sec. 29a, 30, 30a BtMG) and "regulatory offences" (Sec. 32 BtMG).

### Basic offence

Sec. 29 (1) BtMG lists all unlawful narcotics related acts without exception and stipulates custodial sentences of up to five years, or financial penalties. That applies to the cultivation, manufacture, trading, import, export and transit, sale, supply, bringing onto the market, obtaining, prescribing, administering and providing for immediate use, as well as to not for profit sales and to mere possession of narcotic drugs. The use of narcotic drugs is in itself not a punishable offence, however the possession associated with use is. This basic rule applies to all narcotic drugs. The BtMG does not distinguish between "hard" and "soft" drugs.

### Increases in penalties

If an act in the scope of Sec. 29 (1) BtMG is committed for commercial purposes or endangers the health of multiple people, this is a particularly serious case punishable by a custodial sentence of not less than one year (Sec. 29 (3) BtMG).

A further increase in the threat of punishment is contained in Sec. 29a BtMG: according to that provision, the severity of the penalty increases to a minimum of one year if a narcotic drug has been given to an adolescent or if the acts listed above under Sec. 29 BtMG have as their object a *non-small quantity* of a narcotic drug.

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<sup>10</sup> The police crime statistics (Polizeiliche Kriminalstatistik, 2017), Federal Criminal Police Office (Bundeskriminalamt, BKA), [https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2017/pks2017\\_node.html](https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2017/pks2017_node.html) [Accessed: 7 Sep. 2018].

<sup>11</sup> "Other violations" are: Unlawful cultivation of narcotics (Sec. 29 (1) No. 1 BtMG), the cultivation of, manufacture of and dealing/trafficking in narcotics as a member of a gang (Sec. 30 (1) No. 1, Sec. 30a BtMG), making available financial means or similar assets (Sec. 29 (1) No. 13 BtMG), promotion of narcotics (Sec. 29 (1) No. 8 BtMG), supplying, administering or providing narcotics to minors (Sec. 29 a (1) No. 1, and possibly Sec. 30 (1) No. 2 BtMG), negligently causing the death of another by supplying, administering or providing narcotics for immediate use (Sec. 30 (1) No. 3 BtMG), prescription and administering by doctors in breach of Sec. 13 BtMG (Sec. 29 (1) No. 6 BtMG) and unlawful dealing/trafficking in or manufacturing, supplying, possessing narcotics in non-small quantities (Sec. 29 a (1) No. 2 BtMG).

Anyone doing so for commercial purposes will receive a penalty of imprisonment of not less than two years (Sec. 30 (1) point 2 BtMG). A minimum two-year sentence is likewise given for acts committed in a gang, recklessly causing the death of a person and for importing narcotic drugs in *non-small amounts* (Sec. 30 (1) and (3) BtMG).

A minimum of five years imprisonment should be expected by anyone cultivating, manufacturing, importing and exporting and dealing / trafficking in *non-small amounts* of drugs while at the same time operating in a gang, inciting an under 18-year-old to deal in drugs or carrying a weapon while committing the act (Sec. 30a BtMG).

Over numerous decisions, the courts have set out threshold values for the "*non-small amounts*" within the meaning of the aforementioned provisions for different narcotic drugs. According to BGH case law<sup>12</sup> these threshold values are established on the basis of a multiple of the average consumption unit of a user not accustomed to its use. Reports from users of the substance as to their experience of its effects can be used as the basis for determining the consumption unit.

### **Reductions in sentences**

A reduction is possible in the majority of less severe cases (Sec. 29a (2); Sec. 30 (2); Sec. 30a (3)). In addition, the court can reduce the punishment or even waive it altogether if the offender cooperates in the exposure of other crimes (Sec. 31 BtMG).

### **Refraining from prosecution - Sec. 31a BtMG**

There is special significance for Sec. 31a BtMG, which provides for the possibility that the public prosecutor's office (without requiring consent from the court) can completely **refrain from prosecution** if the act concerned is a misdemeanour under Sec. 29 (1), (2) or (4) BtMG (i.e. not for serious or qualified offences). For this, four requirements must be met:

- a) the offender must have cultivated, manufactured, imported, exported, carried in transit, bought or otherwise obtained or possessed the narcotic drugs solely for personal use,
- b) it must be a small amount of narcotic drugs,
- c) the offender's guilt would be deemed to be minor and
- d) there is no public interest in prosecution.

This provision was introduced in 1992, to relieve the judicial system and law enforcement authorities in the case of minor offences involving personal use. This possibility of refraining from prosecution is not limited to specific drugs, it applies to all drugs. However, in practice it is mainly applied in relation to cannabis offences.

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<sup>12</sup> BGH decision of 7 February 2018, StV 2018, p. 504 and BGH, judgment of 14 January 2015, BGHSt 60, 134, 136 et seq. para. 35 with further refs.

Since criminal prosecution is a matter for *federal states*, most of them have issued<sup>13</sup> judiciary administrative provisions on "refraining from prosecution" according to Sec. 31a BtMG, which are binding on the public prosecutor's office of the respective *federal state*. In their so-called "cannabis decision" of 9 March 1994<sup>14</sup>, the German Federal Constitutional Court encouraged *federal states* to ensure "an essentially uniform practice for prosecutors refraining from prosecution". Originally, both the administrative provisions in the *federal states* and the practice of the public prosecutors had considerable differences. For example, the definition of small amount of cannabis varied between 3 and 30 grams. A large-scale analysis of criminal prosecution practice in 2006 concluded that these differences were no longer in line with the call from the BVerfG for "an essentially uniform practice for refraining from prosecution" (Schäfer und Paoli, 2006). Following that, the *federal state* Justice Ministers greatly harmonised their guidelines at least in respect of the aspect of the "small amount". Nevertheless, differences between the different *federal state* provisions still exist, some of them considerable. An additional factor is that the state prosecutor offices involved have a certain degree of latitude in the application of the law - for example in the interpretation of the term "minor guilt" or "public interest in a criminal prosecution" - which in turn can lead to quite different decisions concerning refraining from prosecution.

### Small amount

As the BtMG does not define the meaning of "small amount" more closely, each *federal state* has set a threshold for the "small amount" for cannabis. Only a few *federal states* have done so for other narcotics.

In the case of cannabis, the majority of *federal states* take 6 grams as the threshold for a "small amount"<sup>15</sup>, some *federal states* go up to 10 grams<sup>16</sup>, Berlin even goes up to 10-15 grams. However, the significance of the threshold is not the same everywhere: In some *federal states* cases involving quantities up to that limit "should" be dropped<sup>17</sup>, in other *federal states*, they "can" be dropped. In some *federal states*, cases "can" be dropped above that level, in most, however, they may not be.

In the case of other narcotics, most *federal state* administrative provisions do not stipulate any thresholds regarding refraining from prosecution. It is either the case that other narcotic drugs are not mentioned at all or that the possibility of refraining from prosecution is generally excluded or only allowed in exceptional cases. Only three *federal states* set thresholds for other narcotics in addition to cannabis: Hamburg (heroin: 1 gram;

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<sup>13</sup> Only Bremen and Mecklenburg-Western Pomerania have passed specific guidelines on Sec. 31a BtMG.

<sup>14</sup> BVerfGE 90. 145 et seqq.

<sup>15</sup> Baden-Württemberg, Bavaria, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg-Western Pomerania, Lower Saxony, Saxony, Saxony-Anhalt, Schleswig-Holstein.

<sup>16</sup> Rhineland-Palatinate, North Rhine-Westphalia, Saarland, Thuringia.

<sup>17</sup> Baden-Württemberg, Bavaria, Berlin (up to 10g "should", up to 15g "can"), Rhineland-Palatinate, Brandenburg, Bremen, Hamburg, Hesse, Saarland (up to 6g "should", up to 10g "can"), Schleswig-Holstein, Thuringia.

cocaine: 1 gram)<sup>18</sup>, North Rhine-Westphalia (heroin: 0.5 grams; cocaine: 0.5 grams; amphetamine: 0.5 grams)<sup>19</sup>, and Schleswig-Holstein (cocaine and amphetamine no more than 3 grams; heroin no more than 1 gram (gross weight in each case)<sup>20</sup>.

All of these threshold values are only guidance and can be deviated from on a case by case basis.

#### Minor guilt; public interest

Multiple types of case are subsumed within these imprecise legal terms, such as repeat offence, endangering of others and the level of danger of the respective drugs.

Large differences exist between the *federal state* regulations in relation to the treatment of repeat offenders: in most cases, prosecution may only be refrained from in the case of first time offenders or opportunistic offenders but not in the case of repeat offenders. At the same time, however, users suffering from dependence have sometimes been privileged<sup>21</sup>.

Some *federal states* have special provisions for adolescents: the rule is usually that in the case of adolescents and young adults to whom criminal law relating to young offenders applies, measures under the German Youth Courts Act (Jugendgerichtsgesetz, JGG)<sup>22</sup> take precedence over Sec. 31a BtMG. According to Sec. 45 JGG, the state prosecutor can refrain from prosecution, without the consent of the judge, if the offender's guilt can be seen as minor and there is no public interest in the prosecution. At the same time, the state prosecutor requests the issuing of a warning or conditions by the youth court judge. Giving the JGG precedence is intended to take account of the principle of "education" in juvenile criminal law, with a view to the personality and development of young people.

Overall, it can be concluded that differences in the enforcement of crimes under Sec. 31a BtMG by the different state prosecutors continue to exist, that these differences are due less to the varying thresholds for "small quantities" and more to their stipulation as minimum or maximum limits as well as to variations in the interpretation of the element "minor guilt" and "public interest" (Schäfer and Paoli, 2006). There is no legal right to any case being dropped

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<sup>18</sup> General order (allgemeine Verfügung) of the Department of the Interior (Behörde für Inneres) and the Department of Justice (Justizbehörde) on the application of Sec. 31a (1) BtMG: Justizbehörde AV No. 52/2010 of 22 November 2010: <https://www.hamburg.de/contentblob/3838546/c9a3da385339247fa71b83acce544334/data/hmbjvbl-2011-01.pdf> [Accessed: 5 Sep. 2018].

<sup>19</sup> Guidelines on the application of Sec. 31a (1) BtMG, Common Circular Order (gemeinsamer Runderlass) of the Ministry of Justice (4630 - III. 7 "IMA") and of the Ministry for Internal and Municipal Affairs (42 - 62.15.01) of 19 May 2011 - JMBl. NRW p. 106: <http://www.jvv.nrw.de/anzeigeText.jsp?daten=969> [Accessed: 5 Sep. 2018].

<sup>20</sup> Guidelines on the implementation of Sec. 31 a BtMG - Gl.No. 4500.9" in General Order (Allgemeine Verfügung) of the Ministry for Justice, Employment and Europe (Ministeriums für Justiz, Arbeit und Europa) of 25 July 2006 – II 302/4061 – 75 c SH - Official Journal SH 2006, 679: <http://www.gesetze-rechtsprechung.sh.juris.de/jportal/?quelle=jlink&query=vvsh-4500.9-0001&psml=bsshoprod.psml&max=true> [Accessed: 5 Sep. 2018].

<sup>21</sup> Lower Saxony, Saxony-Anhalt, Hamburg, Saarland, North Rhine-Westphalia.

<sup>22</sup> JGG: <https://www.gesetze-im-internet.de/jgg/BJNR007510953.html> [Accessed: 6 Sep. 2018].

even below the threshold value because the state prosecutor can exercise discretion in respect of Sec. 31a BtMG.

### **Ceasing prosecution, refraining from punishment**

If court proceedings have already been initiated, there are a number of possibilities for abandoning prosecution or refraining from punishment.

In the case of simple drug offences (Sec. 29 (1), (2) and (4) BtMG), the court can refrain from issuing a punishment if the perpetrator has used the narcotic drug only for personal use (i.e. cultivated, imported, exported, carried in transit, purchased or otherwise obtained or possessed in small quantities, Sec. 29 (5) BtMG). In addition, the court can, under certain conditions, reduce the punishment or even waive it altogether if the offender cooperates with the judicial authorities. (Sec. 31 BtMG).

In youth court proceedings, the judge can halt proceedings if the requirements under Sec. 153 StPO<sup>23</sup> as well as some additional requirements are met (Sec. 47 JGG).

### **Suspension of prosecution - "treatment not punishment" Sec. 35 BtMG**

The enforcement authorities can (with the consent of the court) suspend enforcement where someone has committed a crime due to a narcotics dependence and has been sentenced to no more than two years and if they are in treatment for their dependence or agree to submit to such a treatment.

The suspension of enforcement can be revoked if the treatment is not commenced or is not continued. If the suspension is revoked, the prison sentence can be enforced.

### **Alternatives to criminal sanctions**

In some *federal states*, prevention projects, such as the programme "Early Intervention in First-Offence Drug Consumers – FreD"<sup>24</sup> are used as a way of avoiding court proceedings. They represent a possibility for intervention without immediately initiating criminal proceedings. The programme is aimed at 14 to 18-year-olds but also at young adults up to 25 years old who have come to the attention of law enforcement for the first time due to their use of illicit drugs (vgl. Bartsch et al., 2018). The German nationwide pilot project FreD has been taken up at European level and further developed through the European cooperation project "FreD goes net". Today, the FreD idea has spread to many parts of Europe<sup>25</sup>.

### **Principle of mandatory prosecution / discretionary principle**

In Germany, the principle of mandatory prosecution generally applies (Sec. 152 (2), Sec. 160 (1), Sec. 163 StPO) and not the discretionary principle. The police is obliged to file a criminal

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<sup>23</sup> § 153 StPO: [https://www.gesetze-im-internet.de/stpo/\\_153.html](https://www.gesetze-im-internet.de/stpo/_153.html) [Accessed: 6 Sep. 2018].

<sup>24</sup> [http://www.lwl.org/ks-download/downloads/fred/FreD\\_Broschuere\\_de.pdf](http://www.lwl.org/ks-download/downloads/fred/FreD_Broschuere_de.pdf) [Accessed: 6 Sep. 2018].

<sup>25</sup> At the end of 2010, there were FreD projects in 15 European countries.

complaint against any suspect and to refer them to the respective public prosecutor, even in misdemeanors involving small amounts of drugs. This means that the discretionary power of the police when dealing with suspected offenders is very limited. In the case of possession of only a small amount for personal use (user offence), the so-called simplified criminal complaint is applied in some *federal states*: this means that police action is limited, in general, to weighing the substance, seizing it, conducting a drug test and interviewing the suspect. The state prosecutor has a certain degree of discretion in the scope of Sec. 31a BtMG (discretionary principle) because they can refrain from prosecution under certain conditions.

## **Sentencing**

When handing down sentencing, factors which have to be taken into account include the severity of the offence, the circumstances surrounding it, the personality of the offender and many others. There is extensive case law of the highest court regarding questions of sentences.

Even though the BtMG generally does not differentiate between different types of narcotic, the type of intoxicant and how dangerous it is do have an independent significance in the scope of sentencing for a narcotics offence. For sentencing, there is a key graduation of so-called "hard" drugs like heroin, fentanyl, cocaine and crack to "medium" drugs like amphetamine to so-called "soft" drugs like cannabis<sup>26</sup>.

### **1.1.3 Control of new psychoactive substances (NPS)**

#### **German New Psychoactive Substances Act (NpSG)**

On 16 November 2016, the NpSG<sup>27</sup> came into force. That Act intended to combat the prevalence of new psychoactive substances (NPS) and thus restrict its availability as a substance for use and intoxication. The idea to thereby protect the health of the population and of the individual, in particular adolescents and young adults, against the often incalculable and serious risks associated with the consumption of NPS.

The NpSG differentiates between prohibitions under administrative law and prohibitions under criminal law<sup>28</sup>: The Act contains a far-reaching administrative law ban on involvement with NPS (including purchase and possession), which creates the basis on which NPS may be seized and where applicable destroyed on the basis of the police laws, independent of any criminal proceedings. Moreover, it provides for the imposition of criminal penalties for acts which aim at the passing on of NPS, in particular trading in NPS, bringing them onto the market, administering NPS as well as manufacturing and introduction of NPS in the scope of application of the Act (imprisonment up to three years or fine). The penalty can be increased

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<sup>26</sup> BGH decision of 15 June 2016, NSTZ 2016, 614-615.

<sup>27</sup> <https://www.gesetze-im-internet.de/NpSg/NpSG.pdf> [Accessed: 6 Sep. 2018].

<sup>28</sup> Klaus Weber, (2017) Kommentar, Einleitung zum NpSG, marg. no. 27.



if the acts are committed for commercial purposes or in a gang, if the NPS are given to under 18s or if there is a danger to health (imprisonment of between one and ten years). Approved uses for commercial, industrial or scientific purposes are exempt from the ban (Sec. 3 (2)). The NpSG also does not apply to medicines and narcotic drugs (Sec. 1 (2)).

The criminal provisions in the Act are aimed in particular at manufacturers, dealers / traffickers and "persons bringing NPS onto the market" but not at consumers. The NpSG enables law enforcement authorities, where appropriate conditions exist, to implement measures to monitor telecommunications and confiscate profits as well as to justify holding suspects on remand due to a risk of repeat offence.

The NpSG follows a new innovative approach in that it does not list the substances individually (as is the case in the Annexes of the BtMG), rather it bans entire substance groups. Until now, emerging substances had to be scheduled individually in the Annexes of the BtMG in order for them to be controlled or banned. Due to the high number of emerging NPS and the relatively long period of time required by the banning procedures, it had become almost impossible to incorporate these substances into the BtMG in a timely manner, even if the new substances often exhibited only minor changes in chemical structure to the substances already scheduled under the BtMG. Thus, the appearance of a supposed "legality" could be exploited, because the lack of a ban gave the impression, especially to young users, that the substance is harmless. At the same time, the criminal provisions in the BtMG were being circumvented.

Prior to the introduction of the Act, action was taken against dealing / trafficking in NPS through the criminal provisions of the German Medicinal Products Act (Arzneimittelgesetz, AMG). According to the judgment of the Court of Justice of the European Union (CJEU) of 10 July 2014<sup>29</sup>, however, NPS do not fall under the definition of medicines and the AMG. Consequently, there were regulatory gaps and gaps in criminal liability which were now closed by the NpSG.

Through the new Act, in the case of two categories of substances it will no longer be possible to circumvent bans by making small chemical modifications and thus bring dangerous substances onto the market. The two categories of NPS subject to the ban, are listed in the Annex to the NpSG:

- 2-phenethylamine derived compounds (i.e. substances related to amphetamine, including cathinone),
- cannabimimetic agents / synthetic cannabinoids (i.e. substances which imitate the effects of cannabis).

In the broadly defined group of 2-phenethylamine, around 2,000 substances are described which have a pharmacological effect and in the case of which, according to current

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<sup>29</sup> CJEU, Judgment of 10 July 2014. Joined cases C-358/13 and C-181/14, <http://curia.europa.eu/juris/document/document.jsf?docid=154827&doclang=DE> [Accessed: 6 Sep. 2018].



knowledge, an abuse for intoxication purposes can be assumed<sup>30</sup>. Depending on how the market develops, it may be appropriate in future to subject further categories of substances to the provisions of the NpSG or to extend or limit categories of substances.

Substances which do not have just a slight psychoactive effect, which have proved especially harmful to health and which are abused to a not insignificant extent should continue to be scheduled under the Annexes of the BtMG.

A two-year research project funded by the BMG intends to assess the effects of the NpSG on users, the addiction support system and law enforcement authorities and the justice system as well as the market on a qualitative and quantitative basis (period from June 2017 to end of May 2019). In the scope of that project, primarily structured narrative interviews are being carried out with NPS users, representatives of the addiction support system and law enforcement authorities or the justice system as well as surveys in correctional institutions and by forensic medicine institutes and poison control centres. The aim of the project is to achieve the objectives of the Act and to make recommendations for indicators which will enable a long-term evaluation of the effectiveness of the Act. Additionally, findings from chemical toxicological analyses of cases of poisoning (patterns of use, possible interactions) can be used for the development of prevention measures.

#### **1.1.4 Drug related norms in other areas of the law**

As drug policy affects many areas of life, norms in other areas of law also form part of its legal framework. The following areas will be presented below:

- (a) Monitoring of trade in precursors
- (b) Drugs in road traffic
- (c) Framework conditions of addiction support
- (d) Provisions on harm reduction

##### **(a) Precursor monitoring**

Closely related to the BtMG is the German Precursors Monitoring Act (GÜG). The objective of precursor monitoring is to monitor the legal trade in certain chemical products (precursors), in order to prevent their being illegitimately diverted and used for the purpose of illegally manufacturing narcotics. Precursors are chemicals which are sold, sometimes in large quantities, in legal trade but which are also needed for the illegal manufacture of narcotics. The original GÜG from 7 October 1994 regulated this area exhaustively and in great detail. In 2005, the European Union issued two regulations in which the monitoring of precursors was harmonised, i.e. regulated directly and equally bindingly in all EU Member States. Since then, the German GÜG merely supplements and provides additional precision

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<sup>30</sup> Explanatory memorandum: BT Printed Paper 231/16 of 6 May 2016, p. 22, [https://www.bundesrat.de/SharedDocs/drucksachen/2016/0201-0300/231-16.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2016/0201-0300/231-16.pdf?__blob=publicationFile&v=1) [Accessed: 6 Sep. 2018].

in the area of administrative control and monitoring, namely in respect of the regulations on national competence, of modifications of national administrative proceedings and of the design of certain monitoring measures (Körner et al., 2016). In addition, it contains criminal provisions and provisions regarding fines, the regulation of which the EU left to the national legislatures.

The two EU regulations - the regulation on internal trade<sup>31</sup> and the regulation on external trade<sup>32</sup> - are based in turn on international law, namely the UN narcotic drugs convention of 1988<sup>33</sup>, which contains binding provisions on, among other things, which substances are subject to control as well as the numerous modalities of the control of the international trade in precursors. The narcotic drugs convention of 1988 defines 26 substances<sup>34</sup> which have to be controlled. The EU regulations divide these into 4 categories which are subject to control measures of varying strictness.

In addition to this statutory control system, there is a voluntary monitoring system based on cooperation between the chemicals and pharmaceuticals industries and the law enforcement authorities, with the goal of preventing abuse of the products. In this system, laboratory chemicals are also monitored which are not covered by the UN narcotic drugs convention and the EU regulations.

The GÜG contains a series of provisions on criminal sanctions and fines which are aimed to combat the diversion of precursors for the illegal manufacture of narcotics (Sec. 19, Sec. 20 GÜG) and which are based strongly on the criminal provisions of the BtMG.

## **(b) Drugs in road traffic**

Drugs in road traffic are a subject matter of the StGB and the StVG.

### German Criminal Code (StGB)

Anyone who is in charge of a vehicle despite not being able safely to drive that vehicle as a result of consuming alcoholic drinks or other intoxicating substances is considered to have committed a crime under Sec. 316 StGB (driving while drunk). This is punished with imprisonment of up to one year or a fine. Unfitness to drive exists if there are indications which prove the incapability of driving an automobile. This incapability can follow from the

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<sup>31</sup> Regulation (EC) No. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, OJ L 47/1 of 18 February 2004, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32004R0273&from=DE> [Accessed: 6. Sep. 2018].

<sup>32</sup> Regulation (EC) No. 111/2005 of the Council of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, OJ L 22 of 26 January 2005, p.1, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005R0111:20050215:DE:PDF> [Accessed: 6 Sep. 2018].

<sup>33</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf) [Accessed: 6 Sep. 2018].

<sup>34</sup> Version October 2017, [http://www.incb.org/documents/PRECURSORS/TABLES/revise\\_1988\\_Conv\\_Schedules\\_18Oct2017\\_corr.pdf](http://www.incb.org/documents/PRECURSORS/TABLES/revise_1988_Conv_Schedules_18Oct2017_corr.pdf) [Accessed: 6 Sep. 2018].

presence of physical or mental defects or be based on the the influence of drugs. If the driver has, in addition, endangered other persons or property of significant value (impairing the safety of road traffic), the sentence may be increased to up to 5 years (Sec. 315c StGB).

### German Road Traffic Act (Straßenverkehrsgesetz, StVG)

A regulatory offence within the meaning of Sec. 24a (2) StVG<sup>35</sup> is deemed to be whenever someone consumes an "intoxicant" and then drives a vehicle in traffic while under its effects. The "intoxicating agents and substances" are listed in the Annex to Sec. 24a StVG. As a regulatory offence, driving a vehicle under the influence of drugs can be punished with a fine of up to € 3,000 (Sec. 24a (4) StVG). In addition to the fine, a driving ban is also usually imposed (Sec. 25 (1) second sentence StVG)<sup>36</sup>. The details on this are regulated in the German Driving Licence Ordinance (Fahrerlaubnis-Verordnung, FeV)<sup>37</sup>.

Whilst the StVG set a blood alcohol threshold for fitness to drive of 0.5 mg/ml, there is no statutory limit for other intoxicants. Therefore, for a long time any amount of narcotics detected in the blood, no matter how small, was punished as a violation of Sec. 24a StGB.

The German Federal Constitutional Court declared, in a decision of 21 December 2004, the so-called "zero value limit" to be anti-constitutional and set a limit of 1 nanogram tetrahydrocannabinol (THC) per millilitre of blood (ng/ml). Since then, research has produced new findings as to the concentration of THC above which an impairment in ability can actually be expected. The Commission on Legal Limits (Grenzwertkommission), which advises the German Federal Ministry of Transport (Bundesverkehrsministerium) issued a new recommendation in 2015, according to which an impairment of the fitness to drive can only be assumed from a level of 3ng/ml and above.

However, case law did not follow this recommendation. Whilst it was disputed between the appeal courts as to whether an act constituting a regulatory offence within the meaning of Sec. 24a (2) and (3) StVG had occurred from an analytical threshold of 1.0 ng/ml THC concentration, the BGH has now decided that a regulatory offence could be considered even from a level of 1.0 ng/ml<sup>38</sup>. One must assume that tests could show THC concentrations above that level even several days after the last use. In a study from the USA, several participants exceeded the threshold of 1 nanogram THC per millilitre of blood up to 12 days after the last joint.

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<sup>35</sup> StVG in the version of 5 March 2003 (German Federal Law Gazette I p. 310, 919), last amended by act of 17 August 2017 (German Federal Law Gazette I p. 3202) <https://www.gesetze-im-internet.de/stvg/StVG.pdf> [Accessed: 6 Sep. 2018].

<sup>36</sup> Körner/Patzak Kommentar zum BtMG, before §§ 29 et seqq., marg. no. 416.

<sup>37</sup> Ordinance on the licensing of persons to drive in traffic of 13 December 2010 (German Federal Law Gazette I p. 1980), last amended by Ordinance of 3 May 2018 (German Federal Law Gazette I p. 566) [https://www.gesetze-im-internet.de/fev\\_2010/FeV.pdf](https://www.gesetze-im-internet.de/fev_2010/FeV.pdf) [Accessed: 6 Sep. 2018].

<sup>38</sup> BGH, Decision of 14 February 2017 – 4 StR 422/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2017&Sort=3&nr=77913&pos=3&anz=51> [Accessed: 6 Sep. 2018].

Limits have also been set in case law<sup>39</sup> for other narcotics (amphetamine: 25 ng/ml; benzoylecgonine: 75 ng/ml; morphine 10 ng/ml).

An act is deemed not to be a regulatory offence if the substance comes from the proper use of a prescribed medicine for a specific illness (Sec. 24a (2) third sentence StVG). Since the prescription of cannabis as a medicine was approved in the Cannabis Act of March 2017<sup>40</sup> this exception has applied generally also for cannabis patients. This exemption for medicines has previously applied only to the medicinally used substances morphine and amphetamine. Now, it also applies for medicinal drugs containing THC.

Irrespective of whether a regulatory offence has been committed or not, the question of fitness to drive still arises in the case of cannabis medicines.

Under Sec. 2 (2) first sentence No. 3 StVG, applicants for a driving licence must be capable of driving vehicles and meet the physical and mental requirements. Regularly taking cannabis will generally rule out a fitness to drive. In case law, it has been clarified that regular consumption of cannabis in this sense means taking cannabis daily or almost daily for a period of at least half a year<sup>41</sup>.

The Standing Working Group on Evaluation Criteria (Ständige Arbeitsgruppe Beurteilungskriterien, StAB) of the German Society for Traffic Psychology (Deutsche Gesellschaft für Verkehrspsychologie, DGVP) and the German Society for Traffic Medicine (Deutsche Gesellschaft für Verkehrsmedizin, DGVM) created recommendations for action in relation to the evaluation of fitness to drive (version: August 2018)<sup>42</sup>. These recommendations attempt to resolve the conflict between the legitimate treatment option on the one side and the possibility of negatively impacting traffic safety on the other. Just like the German Driving Licence Ordinance (Annex 4 to Sec. 11, Sec. 13 and Sec. 14 FeV), the recommendations assume an unfitness to drive in the case of persons who regularly consume cannabis - even if prescribed by a doctor - and assume that fitness to drive can only be assumed in exceptional cases if no impairment of driving skills is present in a specific case and if there is a high probability that consumption and driving are kept separate. In some cases, a doctor's report or a medical-psychological report can be requested. The recommendations for action provide a large number of criteria for the evaluation of an

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<sup>39</sup> Case law references at Körner/Patzak BtMG 8th Ed. 2016, before §§29 et seqq., marg. no. 399-404.

<sup>40</sup> Act Amending Narcotics and Other Provisions (Gesetz zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften) of 6 March 2017, German Federal Law Gazette I 2017, p. 403; [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27265308%27%5D&skin=pdf&tlevel=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27265308%27%5D&skin=pdf&tlevel=-2&nohist=1) [Accessed: 12 Sep. 2018] and Lagodny, Münchner Kommentar zum StGB, Nebenstrafrecht I, BtMG before §§ 29 et seqq. marg. no. 38-40.

<sup>41</sup> c.f. BVerwG, Judgment of 26 February 2009 - 3 C 1.08 - BVerwGE 133, 186.

<sup>42</sup> DGVP-DGVM: Handlungsempfehlung der Ständigen Arbeitsgruppe Beurteilungskriterien (StAB), Updated version, August 2018 [https://www.dgvp-verkehrspsychologie.de/wp-content/uploads/2018/08/Handlungsempfehlung-Cannabismedikation\\_v2\\_Stand-15.08.2018.pdf](https://www.dgvp-verkehrspsychologie.de/wp-content/uploads/2018/08/Handlungsempfehlung-Cannabismedikation_v2_Stand-15.08.2018.pdf) [Accessed: 10 Sep. 2018].

individual case, whereby there remains uncertainty as to how they are to be interpreted and applied<sup>43</sup>.

The 2018 German Conference on Traffic Law (Verkehrsgerichtstag) addressed this problem<sup>44</sup>. This details of this issue are the subject of much debate<sup>45</sup>.

### **(c) Framework conditions of addiction support**

Addiction support forms an essential component of the drug and addiction policy in Germany. Persons with dependence disorders or harmful use have a legal right to support in Germany. The social funding agencies have created, together with the service providers and self-help groups, a very varied range of addiction and drug support services over the past decades. The legal frameworks of this system are predominantly governed by legislation in social and health law. The addiction support system is funded by numerous parties and is characterised by different competences at many levels both in the governmental and societal realm. The legal framework conditions of this system are accordingly complex and hard to understand.

The most important elements of the addiction support system are<sup>46</sup>:

- the prevention of drug use and early intervention
- addiction and drug counselling
- psychosocial case, assistance and education
- low-threshold support, measures for harm reduction
- Addiction treatment, in particular
  - Detoxification and withdrawal
  - Pharmacotherapy
  - Substitution treatment
  - Outpatient / inpatient medical rehabilitation
  - Aftercare
- Occupational and social rehabilitation, employment support.

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<sup>43</sup> Pogarell u.a., Medizinisches Cannabis - eine praxisbezogene Hilfestellung. Bay. Akademie für Suchtfragen, version: 21 June 2018, [https://www.bas-muenchen.de/fileadmin/documents/pdf/Publikationen/Papiere/Med\\_Can\\_Hilfestellung\\_2106\\_2018.pdf](https://www.bas-muenchen.de/fileadmin/documents/pdf/Publikationen/Papiere/Med_Can_Hilfestellung_2106_2018.pdf) [Accessed: 10 Sep. 2018].

<sup>44</sup> Craw, Cannabis und Fahreignung aus verkehrsmedizinischer Sicht, Neue Zeitschrift für Verkehrsrecht - NZV 2018, p. 18.

<sup>45</sup> In detail on this point, Kalus: Rechtsprechungsübersicht Verkehrsverwaltungsrecht, Deutsches Auto-Recht - DAR 2017, p. 61.

<sup>46</sup> Deutsche Hauptstelle für Suchtfragen (DHS) (2014): Suchthilfe und Versorgungssituation in Deutschland, <http://www.dhs.de/dhs-stellungnahmen/versorgungsstrukturen.html> [Accessed: 17 Sep. 2018].

For these interventions, which in Germany are generally carried out by independent bodies and social institutions and are only carried out by the state in exceptional cases (subsidiarity principle), a large number of different legal provisions apply. The addiction support system is characterised by international agreements, national laws and ordinances but also by specialist norms, guidelines and standards.

At an international level, the United Nations narcotic drugs conventions<sup>47</sup> obligate the state to "take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved"<sup>48</sup>. As far as the reintegration of drug addicted persons is concerned, the United Nations Convention on the Rights of Persons with Disabilities of 2006<sup>49</sup> enshrines the right of disabled persons (whereby "disability" means any form of physical, mental, intellectual or sensory impairment) to full participation in all activities in society.

At a national level, the social state principle of the German Constitution obliges the legislature to allow services of social insurance (health, social care, pension, unemployment insurance) as well as of care and welfare also to be received by persons affected by drugs.

## Prevention

At the forefront of drug and addiction policy in Germany is the prevention of the use of addictive substances. On 25 July 2015, the German Act to Strengthen Health Promotion and Preventive healthcare (Prevention Act, Präventionsgesetz - PräVG)<sup>50</sup> came into force. Its aim was to improve the basis for cooperation between statutory social insurance providers, the *federal states* and municipalities in the areas of prevention and health promotion for all age groups and in many areas of life. It also covers the prevention of use of addictive substances<sup>51</sup>. Addiction prevention targets three factors: increasing the age of first use, reducing harmful use and preventing the development of dependence. Preventive measures against substance use are, depending on the target group, classified into universal, selective and indicated approaches. Prevention programmes are carried out by many independent and

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<sup>47</sup> Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf); Convention on Psychotropic Substances of 1971 [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) [Accessed: 10 Sep. 2018].

<sup>48</sup> Art. 38 of the Single Convention of 1961 and Art. 20 of the Convention on Psychotropic Substances of 1971.

<sup>49</sup> United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006: <http://www.un.org/Depts/german/uebereinkommen/ar61106-dbgbl.pdf> [Accessed: 12 Sep. 2018].

<sup>50</sup> German Act to Strengthen Health Promotion and Preventive healthcare (Gesetz zur Stärkung der Gesundheitsförderung und der Prävention, Präventionsgesetz – PräVG): [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F\\*%5B%40node\\_id%3D%27266406%27%5D&skin=pdf&tlevel=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F*%5B%40node_id%3D%27266406%27%5D&skin=pdf&tlevel=-2&nohist=1) [Accessed: 12 Sep. 2018].

<sup>51</sup> Federal framework recommendations of the Prevention Conference 19 February 2016, pp. 14, 27: [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/P/Praevension/160219\\_Bundesrahmenempfehlungen.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/P/Praevension/160219_Bundesrahmenempfehlungen.pdf) [Accessed: 6 Sep. 2018].



state institutions at many different levels. The nationwide delivery of universal addiction prevention is, in particular, the responsibility of the Federal Centre for Health Education (Bundeszentrale für gesundheitliche Aufklärung, BZgA). Research and pilot projects of the German Federal Ministry of Health (Bundesministerien für Gesundheit, BMG) enable the development, testing and evaluation of new approaches for selective and indicated measures<sup>52</sup>.

## Treatment

The framework conditions for the funding of the prevention and treatment of addiction and drug dependence are determined by the German Codes of Social Law (Sozialgesetzbuch, SGB). "Addiction" is defined as a "chronic psychosocial illness and disability with psychiatric relevance and requiring treatment". Detoxification treatment and substitution therapy are funded by the statutory health insurance providers according to SGB, Volume 5 (SGB V)<sup>53</sup>. The funding agencies for the costs of drug addiction rehabilitation treatment are, according to SGB, Volume 6, the pension insurance providers (SGB VI)<sup>54</sup>.

In Germany, all persons are mandatorily insured by the statutory health insurance system, unless they have other protection in the event of illness<sup>55</sup>. As such, all people - including persons affected by drugs - generally have access to the health system<sup>56</sup>. However, this access is today impeded by the large number of different service providers and due to administrative hurdles - for example in the case of the transition of rehabilitation patients released from prison into health insurance protection (vgl. Schneider et al., 2018b).

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<sup>52</sup> BMG - Prävention des Suchtmittelkonsums (Prevention of use of addictive substances):  
<https://www.bundesgesundheitsministerium.de/ministerium/ressortforschung/krankheitsvermeidung-und-bekaempfung/drogen-und-sucht/praevention-des-suchtmittelkonsums.html> [Accessed: 6 Sep. 2018].

<sup>53</sup> 5th Volume, German Code of Social Law - Statutory health insurance (5. Buch Sozialgesetzbuch – Gesetzliche Krankenversicherung) of 20 December 1988, German Federal Law Gazette I pp. 2477, 2482), last amended by the Act of 17 August 2017 (German Federal Law Gazette I p. 3214):  
[https://www.gesetze-im-internet.de/sgb\\_5/SGB\\_5.pdf](https://www.gesetze-im-internet.de/sgb_5/SGB_5.pdf) [Accessed: 6 Sep. 2018].

<sup>54</sup> 6th Volume, German Code of Social Law - Statutory pension insurance (6. Buch Sozialgesetzbuch – Gesetzliche Rentenversicherung) in the version of 19 February 2002, German Federal Law Gazette I pp. 754, 1404, 3384), last amended by the Act of 17 July 2017 (German Federal Law Gazette I p. 2575):  
[https://dejure.org/BGBI/2002/BGBI\\_I\\_S\\_754](https://dejure.org/BGBI/2002/BGBI_I_S_754) [Accessed: 6 Sep. 2018].

<sup>55</sup> German Act to Strengthen Competition in Statutory Health Insurance (GKV-Wettbewerbsstärkungsgesetz (GKV-WSG)) of 26 March 2007 c.f. Sec. 5 (1) No. 13 SGB V  
[https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&start=//%255B@attr\\_id=%2527bgbl107s0378.pdf%2527%255D#\\_bgbl\\_%2F%2F%25B%40attr\\_id%3D%27bgbl107s0378.pdf%27%25D\\_1536313995620](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%255B@attr_id=%2527bgbl107s0378.pdf%2527%255D#_bgbl_%2F%2F%25B%40attr_id%3D%27bgbl107s0378.pdf%27%25D_1536313995620) [Accessed: 6 Sep. 2018].

<sup>56</sup> According to the German Federal Statistical Office, in Germany in 2015 only around 0.1 % of the population did not have health insurance protection (around 80,000 people),  
[https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/zdw/2016/PD16\\_40\\_p002pdf.pdf?\\_blo b=publicationFile](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/zdw/2016/PD16_40_p002pdf.pdf?_blo b=publicationFile) [Accessed: 12 Sep. 2018].

## Substitution

Substitution based treatment in Germany is based on three pillars: there are statutory provisions in the BtMG and the BtMVV as well as guidelines of the German Medical Association (Bundesärztekammer, "BÄK"), which describe the current status of medical science and set standards accordingly, as well as social law provisions of statutory health insurance providers regarding the assumption of costs.

Substitution treatment was legally approved in the 1990s by the BtMG (Sec. 13 (1) first sentence BtMG). In 1998<sup>57</sup> and 2001<sup>58</sup>, very detailed provisions regarding substitution were incorporated into the German Ordinance on the Prescription of Narcotic Drugs (Sec. 5 BtMVV). These provisions stipulate, among other things, the objectives of substitution, the approved substances and the indication or grounds for exclusion respectively. They require the proof of a specific qualification of the participating doctor. They also stipulate that medical substitution treatment must be accompanied by psychotherapeutic and social care. Finally, a substitution register was set up at the BfArM. All substitution treatments must be reported, in anonymised form, to that register. As a rule, substitution drugs are taken orally with supervision. Under certain circumstances, the doctor can allow the patient to take the substitution drug home with them (so-called take-home prescription).

These statutory provisions were supplemented in 2001 by the "Guidelines of the German Medical Association on the delivery of substitution-assisted treatment of opioid addicts", which set out the generally recognised status of the findings of medical science for substitution treatment (Sec. 5 (12) BtMVV). Parallel to this, the Federal Committee of Doctors and Health Insurance Providers (Bundesausschuss der Ärzte und Krankenkassen) also issued guidelines for the assumption of costs in substitution treatment by the statutory health insurance providers<sup>59</sup>, which opens up access to treatment - under specific conditions - for all insured persons. The Committee's guidelines are currently being revised.

## Heroin substitution

In Germany, the main substance used is methadone, with buprenorphine used in around one fifth of cases and dihydrocodeine / codeine only rarely used. Heroin (diamorphine - chemical name: diacetylmorphine) has also been approved as a substitution drug since 2009. Following a pilot project spanning several years which established that dispensing heroin to the most severely addicted patients had proven beneficial compared to methadone treatment, dispensing diamorphine was adopted into regular healthcare by the Act on Diamorphine-assisted Substitution Therapy (Gesetz zur diamorphingestützten

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<sup>57</sup> 10th Amending Ordinance on Narcotic Drugs (10th BtMÄndV) of 20 January 1998, German Federal Law Gazette I p. 74 <https://dejure.org/BGBl/1998/BGBl. I S. 74> [Accessed: 6 Sep. 2018].

<sup>58</sup> 15th Amending Ordinance on Narcotic Drugs (15th BtMÄndV) of 19 June 2001, German Federal Law Gazette I p. 1180 <https://dejure.org/BGBl/2001/BGBl. I S. 1180> [Accessed: 10 Sep. 2018].

<sup>59</sup> Federal Joint Committee: Guidelines on substitution supported treatment of opiate addicts of 28 October 2002 <https://www.kvhb.de/sites/default/files/rili-substitution.pdf> [Accessed: 10 Sep. 2018].



Substitutionsbehandlung) of 15 July 2009, in order to reach more severely addicted with an additional treatment option (Sec. 5a BtMVV). The German Medical Association (Bundesärztekammer, BÄK) and the Federal Joint Committee (Gemeinsamer Bundesausschuss) have incorporated diamorphine substitution into their respective guidelines.

### Reform of substitution law

In light of the practical experiences of the last 20 years, the legal basis for substitution treatment was revised in 2017. Through the 3rd Ordinance Amending the BtMVV<sup>60</sup>, the regulation of cases which directly affect medical therapeutic assessments were removed from the federal law provisions of the BtMVV and transferred to the guideline competence of the BÄK. The BÄK now regulates the following on the basis of generally accepted state of knowledge of medical science:

- The objectives of substitution
- The general requirements for the initiation and continuation of substitution therapy
- The creation of a therapy concept, in particular
  - the choice of substitution drug
  - the requirements for the prescription of a substitution drug for independent use ("take home").
  - the necessity of including psychosocial care
  - the assessment and control of the course of the therapy.

These new narcotic provisions have been applicable since the publication of the BÄK guidelines by the Federal Ministry of Health in the Federal Gazette of 2 October 2017<sup>61</sup>.

The previous provisions of the BtMVV were changed in the following points:

- The principle that substitution drugs should only be given out for immediate use remains in place. However, the previous rule on take home prescription has been expanded: in justified individual cases, substitution drugs may now be prescribed in the quantity required for up to 30 days (instead of previously up to seven days), even if the person is not leaving the country. Previously it was only possible to receive substitution drugs for 30 days for trips abroad.

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<sup>60</sup> 3rd Ordinance Amending the BtMVV of 22 May 2017 (3. Verordnung zur Änderung der BtMVV), Federal Law Gazette I, p. 1275 [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=/\\*\[@attr\\_id=%27bgbl117s1275.pdf%27\]#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl117s1275.pdf%27%5D\\_1536320821196](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=/*[@attr_id=%27bgbl117s1275.pdf%27]#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s1275.pdf%27%5D_1536320821196) [Accessed: 6 Sep. 2018].

<sup>61</sup> Guidelines of the BÄK on the delivery of substitution-assisted treatment of opioid addicts (2017): [https://www.bundesaeztekammer.de/fileadmin/user\\_upload/downloads/pdf-Ordner/RL/Substitution.pdf](https://www.bundesaeztekammer.de/fileadmin/user_upload/downloads/pdf-Ordner/RL/Substitution.pdf) [Accessed: 6 Sep. 2018].

- The catalogue of facilities that are permitted to dispense substitution drugs to affected persons has been expanded to rehabilitation services, public health authorities, nursing homes and hospices. This is intended to improve the local care for those affected.
- In order to improve the service further, the colleague consultation rule has been extended. Previously, a doctor without a qualification in addictive therapy could only care for a maximum of three substitution patients, provided a doctor with the addiction medicine qualification was available to act as consultant. According to the new regulation, the treatment of up to ten patients is now possible.

The rules on safety and control of the narcotics trade, which are essential in the scope of a substitution treatment, continue to be regulated under the BtMVV. The guidelines of the Federal Joint Committee are currently being revised according to the new rules.

### Medical use of cannabis

In March 2017 the "Cannabis as Medicine" Act came into force<sup>62</sup>, which created the prescribability of cannabis based pharmaceuticals and the eligibility for costs to be assumed by the statutory health insurance system. Cannabis (parts of plants and cannabis extracts of pharmaceutical quality) were transferred from Annex I BtMG to Annex III BtMG ("prescribable narcotic drugs"). Therefore it is no longer only cannabis-containing finished medicinal products Sativex® and Canemes® or prescription drugs such as solutions containing dronabinol which are prescribable on a narcotic drug prescription, but also dried cannabis flowers<sup>63</sup>. Seriously ill patients who have no alternative treatment thus now have an additional option. This can be the case for example in the treatment of pain for specific chronic illnesses such as multiple sclerosis or in the case of serious loss of appetite and nausea with cancer. The new regulation is also a step towards the improvement of palliative care.

The costs of treatment are able to be reimbursed by the statutory health insurers on application. The requirements for the statutory claims for reimbursement are defined in the new Sec. 31 (6) SGB V<sup>64</sup>. Until now, the eligibility for reimbursement has been generally limited to authorised finished medicinal products in their respective approved area of application. With the amendment, under certain circumstances the costs of cannabis in the

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<sup>62</sup> Act Amending Narcotics and Other Provisions (Gesetz zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften) of 6 March 2017, German Federal Law Gazette I 2017, p. 403. [https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D#\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D\\_1536573907398](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D_1536573907398) [Accessed: 10 Sep. 2018].

<sup>63</sup> Federal Chamber of Pharmacists (Bundesapothekerkammer, BAK): Prescription of medicinal products containing cannabis flowers, extract and cannabinoids - information for prescribing doctors. 2017. [http://www.kbv.de/media/sp/Cannabisbl\\_ten\\_und\\_Cannabinoide\\_Information\\_BAK.pdf](http://www.kbv.de/media/sp/Cannabisbl_ten_und_Cannabinoide_Information_BAK.pdf) [Accessed: 4 Dec. 2018].

<sup>64</sup> § 31 SGB V: <https://www.sozialgesetzbuch.sgb.de/sgbv/31.html> [Accessed: 6 Sep. 2018].

form of dried flowers or extracts of standardised quality are now also eligible for reimbursement for people with severe disorders<sup>65</sup>.

For the supply of cannabis-based pharmaceuticals of a controlled quality, the cultivation of cannabis for medicinal purposes is possible in Germany. When doing so, the internationally binding provisions of the 1961 Single Convention on Narcotic Drugs must be observed. These include, among other things, the use of a "cannabis agency". This task was transferred to the BfArM. The BfArM made a Europe-wide public announcement on the licensing procedure for the provision of medicinal cannabis. Until state-controlled cultivation in Germany has been implemented by the Cannabis Agency (Cannabisagentur), the supply of medicinal cannabis will be met by imports<sup>66</sup>.

In order to obtain further information on the effects of long-term medicinal cannabis use, accompanying data collection will be conducted. To this end, doctors will transmit specific data (diagnosis, therapy, dose and side effects), in anonymised form, to the BfArM. The information collected will serve as the basis for the more detailed rules on the provision of services by the statutory health insurance providers. The anonymising of data guarantees that no conclusions can be drawn regarding individual patients.

### Provisions on harm reduction

Harm reduction is understood to mean measures that do not primarily target the reduction of drug use but the minimising of negative health and social consequences of drug abuse<sup>67</sup>.

The BtMG enabled needle exchange as early as 1994, in that it clarified that the provision of sterile single use syringes to drug addicts is not punishable (Sec. 29 (1) second sentence BtMG).

In 2000<sup>68</sup> the provisions governing minimum requirements for setting up and operating drug consumption rooms were adopted into the BtMG (Sec. 10a BtMG). The primary intention was to create legal clarity regarding the permissibility of these facilities and take into account the requirements of the UN drug conventions and the concerns of the International Narcotics Control Board (INCB). On the basis of Sec. 10a BtMG, six federal states have issued

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<sup>65</sup> Ulrich Knispel, Cannabis on health insurance certificate, health law (Cannabis auf Krankenschein, Gesundheitsrecht, (GesR)) 2018, p. 273.

<sup>66</sup> Mainly from Canada and the Netherlands, c.f. Grotenhermen, F. and Göttsche, M. (2018) Cannabissorten in Deutschland und ihre Inhaltsstoffe: [https://www.cannabis-med.org/nis/data/file/cannabissorten\\_inhaltsstoffe.pdf](https://www.cannabis-med.org/nis/data/file/cannabissorten_inhaltsstoffe.pdf) [Accessed: 3 Dec. 2018].

<sup>67</sup> Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem, <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf> [Accessed: 6 Sep. 2018].

<sup>68</sup> Third Act Amending the BtMG of 28 March 2000, Federal Law Gazette I, p. 302; [https://www.bgbl.de/xaver/bgbl/start.xav?start=/\\*%5B@attr\\_id=%27bgbl100s0302.pdf%27%5D#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl100s0302.pdf%27%5D\\_1536321129623](https://www.bgbl.de/xaver/bgbl/start.xav?start=/*%5B@attr_id=%27bgbl100s0302.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl100s0302.pdf%27%5D_1536321129623) [Accessed: 6 Sep. 2018].

ordinances on the operation of drug consumption rooms, in which the provisions of the BtMG are specified<sup>69</sup>.

### Reintegration and rehabilitation

With the introduction of the ninth German Code of Social Law (SGB IX)<sup>70</sup> in 2001, the participation of disabled people also became an increased focus of goal setting in addiction support. Addicts can derive an entitlement to services from SGB XII because they are regarded as "people with mental impairments" as per Sec. 3 (Ordinance on reintegration)<sup>71</sup>.

For reintegration support, the social welfare providers have cross-provider responsibility for coordination and structure. Other funding agencies are the municipalities as providers of youth welfare (SGB VIII).

With the merging of benefits for recipients of unemployment benefits and social welfare in 2005 (so-called "Hartz IV" plan), the German social law codes (in particular SGB II and SGB III) have become even more important for people with drug problems. The central goal of the act is to better help people find work. This also includes a more intensive addressing of barriers to entering employment. In this context, drug addiction represents a particularly problematic obstacle and as such is an element of the support. The employment agencies, working groups formed between municipalities and employment agencies as well as municipalities availing themselves of the option to act on their own (under the German Option Act, Optionsgesetz), are responsible for providing support under SGB II.

The Eighth Volume of the German Code of Social Law (SGB VIII)<sup>72</sup> regulates the duty of protection where there is risk to child welfare (Sec. 8a). This also includes protection against the unlawful use of addictive substances and psychotropic substances<sup>73</sup>.

One can conclude that there are appropriate services in the German addiction support system for every need for assistance by affected people, even very specific needs. It is problematic however, that the competences and financing options are regulated in an extremely complex way and a seamless availment of a meaningful combination of

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<sup>69</sup> North Rhine-Westphalia, Hamburg, Berlin, Lower Saxony, Hesse and Saarland. The texts of the ordinances are printed by Körner/Patzak, Kommentar zum BtMG; Annex C 7.

<sup>70</sup> German Code of Social Law, Volume 9 (9. Buch Sozialgesetzbuch) of 23 December 2016 (Federal Law Gazette I p. 3234), last amended by the Act of 17 July 2017 (German Federal Law Gazette I p. 2541): [https://www.gesetze-im-internet.de/sqb\\_9\\_2018/BJNR323410016.html](https://www.gesetze-im-internet.de/sqb_9_2018/BJNR323410016.html) [Accessed: 6 Sep. 2018].

<sup>71</sup> Ordinance under Sec. 60 of German Code of Social Law, Volume 12 (BSHG § 47 V): [https://www.gesetze-im-internet.de/bshg\\_47v/BJNR003390964.html](https://www.gesetze-im-internet.de/bshg_47v/BJNR003390964.html) [Accessed: 10 Sep. 2018].

<sup>72</sup> 8th Volume, German Code of Social Law - Child and Youth Welfare (8. Buch Sozialgesetzbuch – Gesetzliche Krankenversicherung) as published on 11 September 2012 (German Federal Law Gazette I, p. 2022), last amended by Act of 30 October 2017 (German Federal Law Gazette. I p. 3618) [https://www.gesetze-im-internet.de/sqb\\_8/SGB\\_8.pdf](https://www.gesetze-im-internet.de/sqb_8/SGB_8.pdf) [Accessed: 6 Sep. 2018].

<sup>73</sup> Deutsche Hauptstelle für Suchtfragen (DHS), Suchthilfe und Versorgungssituation in Deutschland (2014), p. 20, [http://www.dhs.de/fileadmin/user\\_upload/pdf/dhs\\_stellungnahmen/2014-08-27\\_DHS-Systemanalyse\\_Finale\\_01.pdf](http://www.dhs.de/fileadmin/user_upload/pdf/dhs_stellungnahmen/2014-08-27_DHS-Systemanalyse_Finale_01.pdf) [Accessed: 12 Sep. 2018].

interventions is therefore not always possible<sup>74</sup>. In addition, addiction support services are not uniformly distributed across the board, so the supply of services differs from region to region and there are some shortages.

## 1.2 Implementation of legislative framework

### 1.2.1 Data on actual sentencing practice related to drug legislation

The most important data sources for recording drug crime and the state handling of drug offences in Germany are the Police Crime Statistics (Polizeiliche Kriminalstatistik, PKS), the nationwide Drugs Data File (Falldatei Rauschgift, FDR) as well as the criminal prosecution statistics of the judicial authorities. However, there are different methods in the recording and classification of data in each case, but also in the type of differentiation used at the detailed level. By way of illustration, the police statistics contain information regarding the type of substance whereas the criminal prosecution statistics do not. This makes sequencing and comparative analyses more difficult.

The PKS<sup>75</sup>, in which all crimes known to the police, from their own investigations or criminal complaints, are recorded and registered, shows that in 2017 the number of drug offences has significantly increased, namely by 9.2 %, while the number of crimes overall has decreased by 9.6 %. Thus, the steady increase in drug offences over recent years continues. In 2017, the PKS documented a total of 5.76 million crimes, of which 330,580 were drug offences. Among those were 204,000 cannabis offences (increase of 12 %), 19,644 cocaine and crack offences (+18.7 %), 11,972 heroin offences (+2.6 %). The increase applies both to consumption-related offences (255,344; +10.1 %) and dealing / trafficking offences (54,605; +5.5 %) and other violations (20,136; +6.4 %)<sup>76</sup>.

In contrast, the total number of offences of direct economic compulsive crime, which were predominantly committed by narcotic and medicinal drug addicts to acquire drugs and substitutes, fell in 2017 (to 1,732 crimes = decrease of 5.6 percent).

More details are provided in the 2017 Federal Situation Report (Bundeslagebild) from the German Federal Criminal Police Office (Bundeskriminalamt, BKA)<sup>77</sup>.

Further prosecution data can be found in the Drug Market and Crime workbook (vgl. Schneider et al., 2018a).

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<sup>74</sup> Andreas Koch (2015). Addiction support and the supply situation in Germany; a DHS analysis ("Suchthilfe und Versorgungssituation in Deutschland; eine Analyse der Deutschen Hauptstelle für Suchtfragen (DHS)", <https://www.konturen.de/fachbeitraege/suchthilfe-und-versorgungssituation-in-deutschland/> [Accessed: 6 Sep. 2018].

<sup>75</sup> Report by the German Federal Ministry of the Interior, Building and Community on the PKS 2017, p. 18 <https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/PolizeilicheKriminalstatistik/2017/pks2017ImkBericht.html> [Accessed: 6 Sep. 2018].

<sup>76</sup> On this classification, c.f. section 1.1.2 above.

<sup>77</sup> Bundeskriminalamt, Drug Related Crime, Bundeslagebild 2017, p. 5 [https://www.bka.de/DE/UnsereAufgaben/Deliktsbereich/Rauschgiftkriminalitaet/rauschgiftkriminalitaet\\_node.html](https://www.bka.de/DE/UnsereAufgaben/Deliktsbereich/Rauschgiftkriminalitaet/rauschgiftkriminalitaet_node.html) [Accessed: 6 Sep. 2018].

### 1.2.2 Data on actual sentencing practice related to NPS

In 2017, the PKS included crimes under Sec. 4 NpSG in the total figure for narcotics offences, namely 495, for the first time. In this figure, one cannot differentiate between dealing / trafficking and manufacturing. Otherwise, the statistics from the Federal Criminal Police Office or German Federal Statistical Office do not (yet) offer enough information points on which to assess the sentencing practice in connection with NPS here. Important findings and recommendations in this area are expected sometime in 2019 from the NpSG evaluation described in section 1.1.3 above.

### 1.2.3 Discussion

One reason for the increase in drug crime is the fact that trading via the internet makes drugs more readily available<sup>78</sup>. There are selling platforms, especially on the darknet, on which drugs of all types are offered for sale and can often be sent to the purchaser via mail order. In 2017, 2,541 narcotics cases were registered with the internet being the instrument used (increase of 24 %). It is however assumed that there is a large number of unknown cases. The increase in cultivation areas for heroin, cocaine and marijuana is also further proof of availability. The same applies for synthetic drugs. Previously, these were manufactured in small laboratories, whereas today manufacture takes place increasingly in professional production facilities with extensive capacity.

A particularly critical aspect is that the number of adolescents suspected of a drug offence has increased by almost 4,000, to 34,132 people (2016: 30,661 criminal suspects). The most frequent accusation made against 14 to under-18 year-olds was cannabis possession, manufacture, or dealing (25,346 suspected criminals). Recognising and recording of users of hard drugs is difficult and incomplete, because one can assume that a suspect's drug addiction is frequently not recognised. The proportion of offences committed by users of hard drugs should therefore likely be registered at a higher level than that statistically recorded - especially for theft and robbery offences. The development of registered narcotics offences heavily depends on the control behaviour of customs and the police.

## 2 TRENDS

In the following, the most important changes to the legal framework since 2000 will be presented. In the course of this, not only criminal provisions, but also legal provisions on the handling of drug addicts and on harm reduction will be taken into account.

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<sup>78</sup> The police - the prevention portal: numbers of drug offences, <https://www.polizei-dein-partner.de/themen/sucht/drogen/detailansicht-drogen/artikel/zahlen-zu-drogendelikten.html> [Accessed: 10 Sep. 2018].



## 2.1 Changes in criminal provisions

A fundamental change in the provisions of the BtMG most recently took place in the 1990s, when new criminal offences were introduced into the BtMG, as well as the extension of the range of sentences and high minimum penalties for cases of serious drug trafficking, through the Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG) of 1992<sup>79</sup> and the Act to Combat Crime (Verbrechensbekämpfungsgesetz) of 1994<sup>80</sup>. In 1992, Sec. 31a BtMG was created, which provided for the possibility of refraining from prosecution<sup>81</sup>. Since then, the criminal provisions of the BtMG have remained broadly unchanged<sup>82</sup>.

The new Act on NPS introduced new criminal provisions (see section 1.1.3 above), however these were not primarily aimed against users, rather they only penalised illegal supply.

## 2.2 Legislation on treating drug addiction

While the BtMG of 1981<sup>83</sup> originally primarily regulated the legal trade in narcotic drugs and sanctions for violations of these provisions, other elements were increasingly added as time went on, which had as their object the treatment of drug addicts, the medical use of narcotic drugs and harm reduction. At the political level, the 1992 "national plan to combat narcotics" ("Nationale Rauschgiftbekämpfungsplan") was superseded in 2003 by the "Action Plan for Drugs and Addiction" (Aktionsplan Drogen und Sucht), which was based on a balanced approach and which, in addition to the areas of "prevention", "counselling / treatment" and "repression / service reduction", recognised for the first time "survival support / harm reduction" as the fourth pillar of drug policy. The already expired action plan was superseded in 2012 by the "National Strategy on Drug and Addiction Policy"<sup>84</sup> but this did not introduce any new legal trends.

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<sup>79</sup> Art. 2 of the Act Combatting Illegal Narcotics Drugs Trafficking and Other Forms of Organised Crime (Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität, OrgKG) of 15 July 1992, German Federal Law Gazette I p. 1302, [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27284447%27%5D&skin=pdf&tlevel=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27284447%27%5D&skin=pdf&tlevel=-2&nohist=1) [Accessed: 6 Sep. 2018].

<sup>80</sup> Art. 9 of the Act to Combat Crime (Verbrechensbekämpfungsgesetz) of 28 October 1994, Federal Law Gazette I, p. 3186, [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27282552%27%5D&skin=pdf&tlevel=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27282552%27%5D&skin=pdf&tlevel=-2&nohist=1) [Accessed: 6 Sep. 2018].

<sup>81</sup> On these amendments in detail, Harald H. Körner, Die Strafrechtspraxis im Labyrinth neuer Betäubungsmittelrechtsbestimmungen, NJW 1993, pp. 233-239.

<sup>82</sup> Overview of all amendments to the BtMG in Lagodny, Münchner Kommentar zum StGB, Nebenstrafrecht I, BtMG before §§ 1 et seqq. BtMG, marg. no. 50 [Accessed: 10 Sep. 2018].

<sup>83</sup> BtMG of 28 July 1981, Federal Law Gazette I pp. 681, 1187, which came into force on 1 January 1982 [https://www.gesetze-im-internet.de/btmg\\_1981/BJNR106810981.html](https://www.gesetze-im-internet.de/btmg_1981/BJNR106810981.html) [Accessed: 6 Sep. 2018].

<sup>84</sup> The Federal Government Commissioner on Narcotic Drugs: [https://www.drogenbeauftragte.de/fileadmin/dateien-dba/Drogenbeauftragte/2\\_Themen/1\\_Drogenpolitik/Nationale\\_Strategie\\_Druckfassung-Dt.pdf](https://www.drogenbeauftragte.de/fileadmin/dateien-dba/Drogenbeauftragte/2_Themen/1_Drogenpolitik/Nationale_Strategie_Druckfassung-Dt.pdf) [Accessed: 10 Sep. 2018].

The German Narcotic Drugs Act introduced the regulation on needle exchange as far back as 1994 (Sec. 29 (1) second sentence BtMG), the goal of which was harm reduction (c.f. section 1.1.4 above). In 2000, the regulation on drug consumption rooms followed, in Sec. 10a BtMG (c.f. section 1.1.4 above), with the same legislative objective.

The provisions on substitution treatment (c.f. section 1.1.4 above), which were tested in the 1980s in pilot projects, initially without express legal foundation but were not enshrined in the BtMG until the end of the 1990s, then the introduction of diamorphine substitution in 2009 and finally, the most recent reform, in 2017, can all be regarded as harm reduction provisions.

The NpSG, introduced in 2016, and the "Cannabis as Medicine" Act introduced in 2017 are also important legislative amendments in recent years (c.f. section 3.1 above).

### 2.3 Changes in implementation

There are no readily apparent long-term changes in criminal law practice over the last two decades. The development of the application of Sec. 31a BtMG (refraining from prosecution in cases of personal use of small amounts) has already been reported on above (c.f. section 1.1.2). There were no noteworthy changes to case law over the last year either<sup>85</sup>.

Of note is the development of traffic accidents while under the influence of drugs or intoxicants (excluding alcohol). While road traffic accidents overall have significantly reduced since 2000 (2000: 382,949 accidents with 7,503 deaths; 2017: 302,656 accidents with 3,180 deaths), the number of accidents while under the influence of drugs has doubled (1999: 880 accidents; 2017: 1,991 accidents)<sup>86</sup>.

The "Cannabis as Medicine" Act of 2017 (c.f. section 1.1.4 above) has affected case law practice in two ways:

(a) To date, an exemption was required under Sec. 3 BtMG in order to obtain or cultivate cannabis for therapeutic purposes, which was issued by the BfArM. Under the case law of the German Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) prior to the law change<sup>87</sup> there was a "public interest" in the care of individual severely ill patients with cannabis, if through this the cure or alleviation of symptoms was possible and the person affected had no equally effective therapy alternative available and affordable to them. As the acquisition and use of cannabis as a medicine must now follow the rules of the new act, there is no longer scope to issue an exemption under Sec. 3 BtMG, hence such actions are now rejected by the administrative courts.

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<sup>85</sup> Detlev Schmidt, The development of narcotics law up to mid-2017 (Die Entwicklung des Betäubungsmittelstrafrechts bis Mitte 2017), NJW 2017, pp. 2876-2881.

<sup>86</sup> Statistisches Bundesamt, Time series, 2017 No. 6.

<sup>87</sup> BVerwG, Judgment of 19 May 2005 - 3 C 17.04.



(b) The question of cannabis patients' fitness to drive increasingly occupies the courts. Above all, the question of whether and to what extent patients who are being treated with cannabis can rely on the exemption in Sec. 24a (2) third sentence StVG, which stipulates that taking a prescribed medicine as intended cannot be a regulatory offence within the meaning of subsection 1 of that section. The problem was also discussed at the 2018 German Conference on Traffic Law (Graw, 2018).

The implementation of the rules on substitution treatment led to a situation whereby in the early years after reporting became obligatory the number of registered substitution patients continuously increased (from 46,000 patients in 2002 to 77,400 patients in 2010). However, the number has remained largely constant since 2011 and was 78,800 patients on 1 July 2017<sup>88</sup> (vgl. Bartsch et al., 2018).

### 3 NEW DEVELOPMENTS

#### 3.1 Changes to laws in the last year

After several important changes to the law came into force in 2016 and 2017 (NpSG of 16 November 2016; "Cannabis as Medicine" Act of 6 March 2017; reform of substitution law of 22 May 2017, c.f. sections 1.1.3 and 1.1.4 above), there have been few legislative proposals in the past year.

- a) On 13 July 2018, the Ordinance to Amend the BtMVV came into force<sup>89</sup>, with the three editorial changes to the BtMVV in relation to the provisions governing substitution.
- b) With the same Ordinance, two new NPS were added to Annex II of the BtMG, namely the synthetic cannabinoids CUMYL-PEGACLONE (SGT-151) and CUCYL-5F-P7AICA (SGT-263). In the case of other synthetic cannabinoids and several synthetic opioids, their being added to the BtMG is being prepared.
- c) The two fentanyl precursors ANPP and NPP were scheduled under EU precursor legislation with effect as of 7 July 2018 (c.f. section 1.1.4 above)<sup>90</sup>. This change to the law applies directly in all Member States of the European Union. As such, these substances are subject to precursor monitoring with the objective of more strongly

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<sup>88</sup> BfArM, Report on the substitution register (Bericht zum Substitutionsregister), January 2018 [https://www.bfarm.de/DE/Bundesopiumstelle/Substitutionsregister/Bericht/\\_node.html](https://www.bfarm.de/DE/Bundesopiumstelle/Substitutionsregister/Bericht/_node.html) [Accessed: 6 Sep. 2018].

<sup>89</sup> Ordinance Amending Narcotics and Other Provisions (Verordnung zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften) of 2 July 2018, German Federal Law Gazette I p. 1076, [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27354038%27%5D&skin=pdf&tlevel=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27354038%27%5D&skin=pdf&tlevel=-2&nohist=1) [Accessed: 6 Sep. 2018].

<sup>90</sup> Commission Delegated Regulation (EU) No 2018/729 of the European Commission of 26 February 2018 (OJ L 123/4 of 18 May 2018, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32018R0729&from=DE> [Accessed: 6 Sep. 2018].

impeding the illicit manufacture of fentanyl internationally. The criminal provisions in the GÜG must now be promptly modified, in line with the amended EU law.

### **3.2 Implementation in the last year**

There are no separate findings regarding changes in connection with the introduction and implementation of legal provisions and laws in the past year.

### **3.3 Evaluation**

No current information is available on the evaluation of laws. Results of the evaluation of the NpSG (c.f. section 1.1.3 above) are expected in 2019. The accompanying data collection which is taking place in the context of the "Cannabis as Medicine" act is described above (c.f. section 1.1.4 above).

### **3.4 Political discussions**

#### **NPS**

When the NpSG (see section 1.1.3) came into force in November 2016 it already contained around two thirds of the substances it currently does. This gives the authorities the ability to take action against the majority of these substances. At present, politicians are exploring the possibility of expanding the substance groups or including additional substance groups in order to cover even more NPS.

Even though there has been, in the form of the NpSG, a new instrument for dealing with NPS, there will probably continue to be a race between the suppliers of continuously newly developed substances and the regulation of these products under narcotics law. There are indications that "old" drugs are being made available at a clearly higher quality than previously (for example based on the level of purity) or – as in the case of MDMA – are once more appearing on the market. This is possibly as a consequence of professional suppliers and dealers falling back on classic "market strategies" of offering high quality products at a low price, instead of marketing them with a reference to their (alleged) legality. If these assumptions are confirmed, one can expect both newly developed NPS and high quality "old" drugs in the next few years.

#### **Debate on the legalisation of cannabis**

In the German Bundestag, the topic of legalising cannabis has once more been on the agenda.

On 5 December 2017, the FDP parliamentary party tabled a "minor request" on the "controlled supply of cannabis"<sup>91</sup>, which was answered by the German Federal Government

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<sup>91</sup> BT Printed Paper 19/181 of 5 December 2017, <http://dip21.bundestag.de/dip21/btd/19/001/1900181.pdf> [Accessed: 6 Sep. 2018].

on 21 December 2017<sup>92</sup>. In its answer, the German Federal Government rejected the legalisation of the use of cannabis for enjoyment purposes on the grounds of the protection of the health of the population.

At the beginning of 2018, a motion of the FDP ("Cannabis pilot projects"), a motion of the Linken ("Allow possession of cannabis for personal use") and a draft bill from Bündnis 90/Die Grünen ("Cannabis Control Act", "Cannabiskontrollgesetz") were presented for debate. All three motions believe that the existing drug policy has failed.

The FDP's motion proposes<sup>93</sup> enabling pilot projects for free cannabis use. It calls on the German Federal Government to create the basis for approving pilot projects for the controlled supply of cannabis as a luxury article. It suggests that previous applicants should be actively supported.

The draft bill from the Grünen<sup>94</sup> proposes exempting cannabis from the criminal provisions of the BtMG and instead creating a strictly controlled legal market for cannabis. Under the draft bill, the entire supply chain for cannabis from cultivation to wholesale to import and export and retail would be regulated. The sale to minors would have to be banned and this ban effectively monitored.

In its motion, "Protection of health not criminal prosecution - for a progressive approach to cannabis use"<sup>95</sup>, the Linke party calls for possession of cannabis for personal use to be allowed and for the pillars of addiction prevention, counselling and treatment to be strengthened in drug policy in comparison to the pillars of repression and stigmatisation.

These motions were debated in the plenary of the German Bundestag on 22 February 2018. On 27 June 2018, a public hearing on these motions was held in the Committee for Health. In that hearing, it was evident that the legalisation and controlled supply of cannabis is still a very controversial topic among experts<sup>96</sup>.

### **Suicide problem**

Recently, there has been a topic of some public discussion which goes far beyond narcotics law, namely the permissibility of the use of narcotics for suicide. The German Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) decided, in a judgment of 2

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<sup>92</sup> BT-Printed Paper 19/310 of 21 December 2017, <http://dip21.bundestag.de/dip21/btd/19/003/1900310.pdf> [Accessed: 6 Sep. 2018].

<sup>93</sup> BT-Printed Paper 19/515 of 24 January 2018, <http://dip21.bundestag.de/dip21/btd/19/005/1900515.pdf> [Accessed: 6 Sep. 2018].

<sup>94</sup> BT-Printed Paper 19/819 of 20 February 2018, <http://dip21.bundestag.de/dip21/btd/19/008/1900819.pdf> [Accessed: 6 Sep. 2018].

<sup>95</sup> BT-Printed Paper 19/832 of 21 February 2018, <http://dip21.bundestag.de/dip21/btd/19/008/1900832.pdf> [Accessed: 6 Sep. 2018].

<sup>96</sup> Report on the public hearing, c.f. Deutsche Bundestag, Documents <https://www.bundestag.de/dokumente/textarchiv/2018/kw26-pa-gesundheit-cannabis/558286> [Accessed: 6 Sep. 2018].

March 2017<sup>97</sup> that the purchase of a narcotic (in the specific case, sodium pentobarbital) generally cannot be permitted for the purpose of committing suicide. An exception from this principle can only be assumed if the purchaser who intends to commit suicide is in an extreme emergency due to a serious and terminal illness. This judgment triggered a lively public debate.

## 4 ADDITIONAL INFORMATION

### 4.1 Additional sources of information

No additional sources of information are available on this.

### 4.2 Further aspects

No further information on further aspects of the legal frameworks is currently available.

## 5 SOURCES AND METHODOLOGY

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<sup>97</sup> BVerwG of 2 March 2017, 3C 19/15, BVerwGE 158, 142-163 <https://www.bverwg.de/020317U3C19.15.0> [Accessed: 6 Sep. 2018].

## 5.1.1 Relevant legislation

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#### New Psychoactive Substances:

- Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32017L2103&from=EN> [Accessed: 12 Sep. 2018].
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