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Legal Framework

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0 Summary (T0)

The BtMG regulates, as the central legislative instrument, how the state deals with drug offences in Germany. Other legal provisions concerning drug related offences include the German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV), the Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG) and the German Medicinal Products Act (Arzneimittelgesetz, AMG). The German Code of Social Law (SGB) defines the framework conditions for the financing of drug dependence treatment. The pension insurance providers (SGB, Volume 6), the statutory public health insurance providers (SGB, Volume 5), as well as the local or supra-local social welfare providers (SGB, Volume 12) and municipalities as supporting organs of youth welfare, are the main funding agencies for the treatment of drug dependence (rehabilitation).

The BtMG provides for a variety of sanctions according to the severity and type of offence ranging from administrative fines to custodial sentences. In Germany, the mere consumption of narcotic drugs is not subject to sanctions. However, the purchase and possession that normally precede the act of consumption are punishable, since they are associated with the danger of the further spread of drugs. The BtMG does not differentiate between different types of drugs meaning that consumption-related offences involving all types of drugs may, under the narcotics provisions of criminal law, be dropped without the need to consult the court. However, in practice this option is mainly utilised in connection with cannabis cases (EMCDDA 2015). There are various possibilities under narcotic drugs law to refrain from prosecution, such as for the possession of small amounts of drugs for personal use. Almost all *Laender* have introduced comparable threshold values for “small amounts” (as upper/lower limit) of cannabis. The limits set by the individual *Laender* are guideline values from which public prosecutors and judges may deviate in individual cases. It is important to note that even though these regulations exist there is no legal right to insist that the relevant cases of possession of small amounts of drugs are not prosecuted. In considering how to proceed with drug offenders at the different levels of the justice system, it should be noted that the police has no power to exercise discretion and thus all cases of suspected offenders must be reported to the public prosecutor.

On 4 May 2016 the German Federal Cabinet adopted¹ the draft bill² of the German Federal Ministry of Health to combat the spread of new psychoactive substances (NpSG), so called legal highs. The draft bill provides for a far-reaching ban on purchasing, possessing and dealing NPS and the imposition of criminal penalties for supplying NPS to others. This decision represents the first time a ban has applied to an entire category of substances. As such, for two categories of substances it will no longer be possible to circumvent bans through small chemical changes and thus bring dangerous substances onto the market.

1 <http://www.drogenbeauftragte.de/drogen-und-sucht/illegale-drogen/heroin-und-andere-drogen/neue-psychoaktive-substanzen.html> [accessed: 20 August 2016].

2 http://www.gesetze-im-internet.de/btmg_1981/ [accessed: 20 August 2016].

Depending on how the market evolves, 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.

A comprehensive debate amongst experts and also in wider society deals with the question of the extent to which a new approach is required on how to deal with cannabis from a political and criminal law perspective. The German Cabinet has passed a legislative proposal on medicinal cannabis on the 4th of May 2016³. Scientific conferences, political hearings and expert discussions have dealt with this topic in detail (also see on this point the Drug Policy workbook with references to parliamentary initiatives and technical papers). More information on the current political and expert debate concerning cannabis can be found in 3.4.

1 National profile (T1)

1.1 Legal framework (T1.1)

1.1.1 Characteristics of drug legislation and national guidelines for implementation (T1.1.1)

The BtMG regulates, as the central legislative instrument, how the state deals with drug offences in Germany. It provides for a variety of sanctions according to the severity and type of offence ranging from administrative fines to custodial sentences.

Any state interference in fundamental rights must, under constitutional law, have a specific basis in the legislation. This constitutes a fundamental principle of the German Constitution, according to which all restrictive measures pertaining to drug use or other narcotics offences have to be provided for by federal law (EMCDDA 2002). The BtMG forms the legislative basis for narcotics offences.

Other legal provisions concerning drug related offences include the BtMVV, the GÜG and the AMG.

German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG)

The BtMG, as well as the legal regulations enacted on the basis of the BtMG, such as the BtMVV, contain the essential rules on how to deal with psychoactive substances. It takes into account the three UN-conventions on narcotic drugs. Substances that are deemed to be narcotic drugs within the meaning of the BtMG are listed in three annexes encompassing all substances mentioned in the international conventions on narcotic drugs:

- Annex I: narcotics not eligible for trade and non-prescribable narcotics (e.g. MDMA, heroin, psilocybin)
- Annex II: narcotics eligible for trade but not prescribable (e.g. meprobamate, methamphetamine)

3 http://www.bundesgesundheitsministerium.de/fileadmin/dateien/Downloads/Gesetze_und_Verordnungen/GuV/C/GE_Cannabis_280616.pdf [accessed: 26. Aug. 2016].

- Annex III: narcotics eligible for trade and for prescription (e.g. amphetamine, codeine, dihydrocodeine, cocaine, methadone, morphine and opium).

Pursuant to Annex III, the prescription of narcotics as part of a medical therapy is subject to the special regulations within the BtMVV and requires, for example, the use of special prescription forms. The (legal) domestic trade with narcotics falls under the Narcotics-Domestic Trade Regulation (Betäubungsmittel-Binnenhandelsverordnung (BtMbinHV))⁴, import and export fall under the Narcotics-Foreign Trade Regulation (Betäubungsmittel-Außenhandelsverordnung (BtMAHV))⁵.

The BtMG makes no legal differentiation as to the level of danger posed by individual drugs (the Act does not differentiate, for example, between cannabis and other drugs). Thus, the legislature leaves it to the courts to determine a hierarchy of drugs based on an empirically graded scale of "danger to public health" (EMCDDA 2002). The BtMG is primarily a regulatory and administrative law as its aim is to regulate the trade in narcotic drugs - import, export and prescription modalities. Regulatory law breaches of the BtMG can be punished with administrative fines of up to €25,000. On the other hand, possession of and dealing (especially trafficking) in narcotic drugs listed in the BtMG are classified as criminal offences according to Sections 29-30a of the BtMG. The interpretation and methodological application of the rules of the BtMG adhere to the system of the German Criminal Code (Strafgesetzbuch, StGB; EMCDDA 2002).

German New Psychoactive Substances Act - Neue-psychoaktive-Stoffe-Gesetz, NpSG

On 4 May 2016 the German Federal Cabinet adopted⁶ the draft bill⁷ of the German Federal Ministry of Health to combat the spread of new psychoactive substances (NpSG), so called legal highs. On 2 June 2016 the draft bill was debated in the first reading in the German Bundestag and on 6 July 2016 a hearing of experts was held on the bill in the Committee on Health of the German Bundestag. The draft bill provides for a far-reaching ban on purchasing, possessing and dealing NPS and the imposition of criminal penalties for supplying NPS to others. This decision represents the first time a ban has applied to an entire category of substances.

The primary legislative process in Germany regarding so-called "legal highs" and NPS has up to now consisted of adding NPS one by one to the Annexes of the BtMG, thereby banning them and subjecting them to criminal sanctions. However, the substances to be included often represent only minor changes in chemical structure to substances which are already covered by the BtMG. Since the new substance is close in structure and effect to the substance which is already covered, there is the possibility of misuse under the conditions of

4 <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 07. October 2016].

5 <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 07. October 2016].

6 <http://www.drogenbeauftragte.de/drogen-und-sucht/illegale-drogen/heroin-und-andere-drogen/neue-psychoaktive-substanzen.html> [accessed: 20 August 2016].

7 http://www.gesetze-im-internet.de/btmg_1981/ [accessed: 20 August 2016].

an apparent "legality" and the penal provisions of the BtMG are thus circumvented. At the same time, the lack of a ban may give the impression, especially to young drug users, that the substance is harmless. Due to the high number of emerging NPS and the relatively long period of time required by the current banning procedures, it has become difficult to incorporate legal highs into the BtMG in a timely manner.

The NpSG is a new, stand alone law with a new approach; in future, the considerable dangers to health, in particular for adolescents and young adults, will be combated through the NPS in that entire categories of substances will be banned. In this way, for two categories of substances, it will no longer be possible, through small chemical changes, to circumvent bans and bring dangerous substances onto the market. The two categories of NPS subject to the ban, are listed in an annex:

1. 2-phenethylamine derived compounds (i.e. with amphetamine related substances, including cathinone)
2. cannabimimetic agents / synthetic cannabinoids (i.e. substances which imitate the effects of cannabis)

Depending on how the market evolves, 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.

The NpSG is intended to serve the objective of combating the proliferation of NPS and thus limiting their availability. To this end, the draft provides for a prohibition, subject to criminal penalties, for handling NPS with the intention of passing it to others. In this way the population, in particular adolescents and young adults, will be protected against the often incalculable health risks connected to the consumption of NPS. The prohibition and penalty provisions of the draft bill are aimed in particular at the manufacturers and dealers of NPS as well as those who bring them onto the market. The ban covers the trading, bringing onto the market, manufacture, import, export and transit, the purchase, possession and administration of NPS.

Approved uses for commercial, industrial or scientific purposes are exempt from the ban (Section 3 (2)). The NpSG also does not apply to medicines and narcotic drugs (Section 1 (2)). The intention with the Act is to close loopholes in respect of regulation and criminal liability in the German Medicinal Products Act resulting from a judgement of the Court of Justice of the European Union (CJEU) of July 2014. The CJEU had decided that the approach to NPS which were not yet subject to the BtMG may no longer be - as had been the practice in Germany to that point - pursued and punished according to pharmaceuticals law.

German Codes of Social Law (SGB)

The German Code of Social Law (SGB) defines the framework conditions for the financing of drug addiction treatment. The costs of drug addiction therapy (rehabilitation) are mainly borne by the pension insurance providers (SGB VI). Physical withdrawal (detoxification) and

substitution therapy are paid for by the statutory health insurance providers (SGB V). Other funding bodies are the local or supra-local social welfare providers (SGB XII) and municipalities as the bodies responsible for youth welfare (SGB VIII).

With the merging of benefit payments for recipients of unemployment benefits and social welfare in 2005 ("Hartz IV"), the German social law codes (in particular SGB II and SGB III) have become even more important for people with drug problems. With the central goal of the reform being to better help people find work efforts should also be undertaken to address more intensively the removal of obstacles to entering employment. In this context, drug addiction represents a particularly problematic obstacle and as such is an element of the support needed. According to the German Code of Social Law, Volume 2 (SGB II), the employment agencies, the working groups formed between municipalities and employment agencies, as well as the municipalities availing themselves of the option to act on their own (under the German Option Act, Optionsgesetz), are responsible for providing support.

Other Laws

Other important laws defining the possible legal consequences of the consumption of psychoactive substances, for example with regard to participation in road traffic, are the following:

- German Road Traffic Regulation (Straßenverkehrsordnung, StVO) which specifies, for example, how traffic checks should be conducted,
- German Road Traffic Act (Straßenverkehrsgesetz, StVG) which sets blood alcohol limits and also defines driving motor vehicles under the influence of other intoxicating substances as a regulatory offence,
- German Criminal Code (Strafgesetzbuch, StGB), which also addresses the consequences of the consumption of alcohol and other intoxicating substances in road traffic and the placing of offenders with substance dependence in secure psychiatric facilities (Maßregelvollzug)
- German Driving Licence Regulation (Fahrerlaubnisverordnung, FeV), which deals with the requirements for driving, doubts about fitness for driving and the revocation of driving licences, for example due to an existing dependence on narcotic drugs.

1.1.2 Variation of penalties (T1.1.2)

In Germany, the mere consumption of narcotic drugs is not subject to sanctions. However, the purchase and possession that normally precede the act of consumption are punishable, since they are associated with the danger of the further spread of drugs. There are various possibilities under narcotic drugs law to refrain from prosecution, such as for the possession of small amounts of drugs for personal use. Important criteria in any decision not to prosecute are the quantity and type of drugs, endangerment of others, personal history, previous convictions and the public interest in bringing a prosecution. When a sentence is handed down, the guiding principle governing addicted users who have committed a crime is

"treatment not punishment": this allows the courts to refrain from enforcing any final sentence under the condition that the narcotics dependent criminal undergoes treatment (Sec. 35 BtMG). It is also possible to defer the enforcement of imprisonment up to 2 years to give addicts the opportunity to undergo therapy (Sec. 56 StGB).

In considering how to deal with drug offenders at the different levels of the justice system, it should be noted that the police has no power to exercise discretion and thus all cases of suspected offenders must be reported to the public prosecutor. Investigations carried out by the police are thus under the public prosecutor's supervision. The public prosecutor is also principally responsible for the proceedings.

Table 1 gives a simplified illustration of the relevant offences related to drugs, as well as options for action at police, public prosecutor and court levels.

Table 1 Overview of the procedural options for various offences

Types of offence	Procedural method		
	... at police level	... at public prosecutor level	... at court level
Personal possession	<ul style="list-style-type: none"> • Simplified criminal complaint / Initiation of preliminary investigation • Complaint / Initiation of preliminary investigation (common practice) 	<ul style="list-style-type: none"> • Case dismissal with/without consent of the court • Case dismissal with conditions/instructions with/without consent of the court • Refraining from criminal prosecution (section 31a BtMG) • Refraining from prosecution under juvenile law (diversion provisions: adolescents and young adults) • Refraining from initiation of public prosecution with consent of the court (Sec. 37 BtMG) • Application for a summary punishment order at court • Initiation of public prosecution 	<ul style="list-style-type: none"> • Case dismissal with consent of the public prosecutor • Case dismissal with conditions/instructions with consent of the prosecutor • Refraining from prosecution with consent of the public prosecutor (Sec. 31a BtMG) • Acquittal • Summary punishment order • Imposition of fine or custodial sentence • Suspension of sentence on probation • Referral to detoxification facility / treatment
Cultivation, production and/or commercial dealing/trafficking	<ul style="list-style-type: none"> • Complaint / Initiation of preliminary investigation • (Preliminary) arrest 	<ul style="list-style-type: none"> • Case dismissal with/without consent of the court • Case dismissal with conditions/instructions with/without consent of the court • Refraining from initiation of public prosecution with consent of the court (Sec. 37 BtMG) • Application for arrest warrant • Application for a summary punishment order • Initiation of public prosecution 	<ul style="list-style-type: none"> • Case dismissal with consent of the public prosecutor • Case dismissal with conditions/instructions with consent of the prosecutor • Issue of arrest warrant • Acquittal • Summary punishment order • Imposition of fine or custodial sentence • Imposition of custodial (and pecuniary) sentences • Suspension of sentence on probation • Referral to detoxification facility / treatment

Table 1 (continued)

Types of offence	Procedural method		
	... at police level	... at public prosecutor level	... at court level
Driving whilst under the influence of drugs	<ul style="list-style-type: none"> • <u>In the case of regulatory offence:</u> • Caution • Initiation of administrative fine proceedings • Fine of up to 1,500 euros • Driving ban (1-3 months) • <u>In the case of criminal offence:</u> • Initiation of preliminary investigation 	<ul style="list-style-type: none"> • <u>In the case of criminal offence:</u> • Case dismissal with/without consent of the court • Request for summary punishment order • Initiation of public prosecution 	<ul style="list-style-type: none"> • Case dismissal with consent of the public prosecutor • Acquittal • Summary punishment order • Imposition of fine or custodial sentence • Suspension of sentence on probation • Referral to detoxification facility / treatment • Imposition of driving ban • (Provisional) driving ban (6 months to 5 years or lifetime)

Section 31a of the BtMG provides for the possibility to refrain from prosecution of narcotics use offences under certain circumstances, namely when the offender has grown, produced, imported, exported, carried in transit, bought or otherwise obtained or possessed narcotic substances in small amounts exclusively for personal use and when the offender's guilt is deemed to be minor as well as there being no public interest in prosecution. This provides the public prosecutor with an instrument to halt proceedings for consumption-related offences in the area of narcotics crime without court approval. All Federal *Laender* have introduced more detail as to the application of Section 31a BtMG through recommendations or general guidelines. A few years ago there were still considerable differences between the *Laender* but in recent years these have become smaller. Some divergence in the regulations of the *Laender* does however persist (c.f. on this point also Körner at al. 2012; Schäfer & Paoli 2006). Within framework conditions defined by the BtMG, the severity of some of the punishments requested or imposed by the individual district attorneys or courts or between *Laender* differ considerably. How narrowly or broadly the scope for action afforded to state attorneys and the courts in the BtMG can be interpreted or applied in individual cases is within the discretion of the respective judicial authorities. For the options on dismissal of proceedings, for example, for different substances and "small amounts", possession or consumption for "personal use" or repeat offences see in detail the following sections.

Threshold values for "small amounts" of cannabis and other substances

Almost all *Laender* have introduced comparable threshold values for "small amounts" (as upper/lower limits) of cannabis. The limits set by the individual *Laender* are guideline values from which public prosecutors and judges may deviate in individual cases. It is important to note that even though these regulations exist there is no legal right to insist that the relevant cases of possession of small amounts of drugs are not prosecuted. If no criminal prosecution is pursued, this does not automatically mean that the crime has no consequences. Public

prosecutors have the option to halt proceedings with the imposition of certain conditions (e.g. community service, fines or counselling in a social institution).

On 3 December 2008, the German Federal Court of Justice (Bundesgerichtshof, BGH), in a landmark decision, lowered the "non-small" amount for methamphetamine from 30 grams methamphetamine base to 5 grams. In view of the scientific findings gathered on the toxicity of methamphetamine over the last ten years, the BGH Senate considered it necessary to lower the threshold value compared to its level in the case law up to then. Contrary to a Regional Court judgement, the BGH fixed the threshold value not to five grams of methamphetamine hydrochloride but to methamphetamine base (for a detailed explanation, see also Patzak 2009). With its judgement of 17 November 2011, the BGH stipulated the "non-small amount" of racemic methamphetamine to be 10g of the effect-inducing base. Upwards of this amount, the offender is no longer merely committing a misdemeanour as per Sec. 29 (1) BtMG, which provides for possible sanctions of monetary fines or imprisonment of up to five years, rather they would be facing imprisonment of no less than one or two years.

As far back as April 2007 the BGH defined the "non-small amount" of buprenorphine in a landmark judgement. With that, the BGH added another decision to the series of landmark rulings on the term "non-small amount" in which it dealt for the first time with a substance used in substitution therapy that has also appeared on the illicit market causing some concern (Winkler 2007). The "non-small amount" in the wording of the BtMG does not refer - unlike the term "small amount" - to the weight of the seized substance, but to the active ingredient contained in the substance.

Only a few *Laender* have explicitly defined regulations for refraining from prosecution in cases related to other narcotic drugs. Insofar as such regulations exist, they provide for the possibility of halting prosecution in the case of possession of heroin (1g), cocaine (depending on the *Land*: 0.5 – 3g), amphetamines (0.5 – 3g) and ecstasy (between 3 and less than 20 tablets) (Patzak & Bohnen 2011).

Personal possession or use

Personal possession of illicit drugs is punishable irrespective of the type and quantity of the drug. Due to the applied legality principle (Sec. 152, (2), Sec. 160 (1), Sec. 163 German Code of Criminal Procedure, [Strafprozessordnung, StPO]), the police is obliged to file a criminal complaint against any suspect and to refer it to the respective prosecutor, even in cases of small amounts of drugs. This means that the discretionary power of the police when dealing with suspected offenders is limited. Possession of only a small amount for personal use is considered a consumption-related offence and the police approach is limited in some *Laender* in general to weighing and seizing the substance, conducting a drug test and interviewing the suspect (so-called simplified criminal complaint). There are considerable differences in the handling of consumption-related offences (possession of small amounts for personal use - especially of cannabis) across the various *Laender* (EMCDDA 2002; Schäfer & Paoli 2006). In recent years there seems to be a greater harmonisation by the *Laender*

regarding the definitions of threshold values up to which the prosecutor may refrain from further prosecution. 14 *Laender* have already introduced a threshold of 6g (upper/lower limit).

Another aspect in which approaches differ between *Laender* is that a discontinuation of proceedings is obligatory in some federal states where a case involves a quantity below the given maximum, whereas in others it is subject to a case-by-case approach, also taking into account repeat offences.

In order to combat open drug scenes the police and the responsible administrative authorities may, on the basis of *Land* police legislation, issue dispersal orders or impose residence restrictions on individuals in that scene.

According to the principle of legality which governs German criminal proceedings law, all cases of violation of applicable laws are, on the basis of a justified initial suspicion, forwarded to the public prosecutor, who initiates preliminary proceedings. Nonetheless, under specific conditions, the prosecutor has the dutiful discretion to drop the case (discretionary principle). As already outlined above, if there is no public interest in prosecution and for offences of use related to unlawful acts in connection with small amounts for own use, Sec. 31a of the BtMG allows the public prosecutor to refrain from continuing the prosecution (EMCDDA 2002).

The BtMG does not differentiate between different types of drugs meaning that consumption-related offences involving all types of drugs may, under the narcotics provisions of criminal law, be dropped without the need to consult the court. However, in practice this option is mainly utilised in connection with cannabis cases (EMCDDA 2015).

Sec. 153 and Sec. 154 of the StPO provide for the possibility of the case being closed with or without conditions or instructions, when the act is considered minor and there is no public interest in prosecution. In certain cases the dismissal may be provisional - dependent on compliance with conditions and instructions.

If the prosecutor deems a personal court hearing of the accused to be unnecessary, summary proceedings (simplified court proceedings without main hearing and judgement) may be initiated. However, the possession of larger quantities usually results in referral to trial.

Under the German Juvenile Offenders Act (Jugendgerichtsgesetz, JGG, Sec. 45 and Sec. 47), it is possible to halt prosecution of crimes committed by adolescents and young adults, who could fall under criminal law relating to young offenders, or to discontinue proceedings. This is usually the case where only small amounts of cannabis of up to 6 grams are involved.

In general, acquittals are very rare, especially in the cases of illegal possession of drugs. For consumption-related offences, however, a dismissal of the proceedings can also be considered at the court stage (Sec. 31a (2) BtMG). Refraining from prosecution with or without conditions is provided for in Sec. 153 (2) and Sec. 153a (2) StPO in cases of minor level of the perpetrator's offences and lack of public interest in a prosecution. According to Sec. 29 (5) BtMG, the court also has the power to refrain from imposing punishment if it concerns a small amount for personal use.

Repeat offences or illegal possession of a larger quantity than that defined as a small amount (see above) is generally punished according to Sec. 29 BtMG with imprisonment of up to five years or a fine.

Cases of personal possession of larger illicit drug quantities of a drug with an active substance content exceeding the content defined by the law are considered serious offences (crimes) punishable with a custodial sentence of no less than one year (Sec. 29a (1) No. 2 BtMG). Narcotics and any narcotics paraphernalia are seized according to Sec. 33 BtMG.

In some *Laender*, local prevention projects, such as the widespread programme "Early Intervention with Drug Users Coming to the Attention of Law Enforcement for the First Time – FreD" (Frühintervention bei erstaußälligen Drogenkonsumenten), are used as a way of avoiding court proceedings. They represent an additional possibility for intervention without immediately initiating criminal proceedings. The programme addresses 14 to 18 year olds but also 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. The FreD project, which was born out of a voluntary support service for drug users who had come to the attention of law enforcement for the first time, was continued in many *Laender* after the conclusion of the pilot phase. Today, 15 years on, there are around 120 project locations nationwide. The project has met with a high level of acceptance amongst decision makers and practitioners but also amongst the target group. The service, aimed especially at younger users, which consists of an "intake conversation" and a course, is designed to help prevent a possible dependence and counteract any slide into criminality.

Production, dealing and trafficking

Dealing, cultivating and manufacturing narcotics are considered serious criminal offences. Therefore, prior to the case being referred to the public prosecutor, there is usually a preliminary arrest. As well as the seizure of the drugs any production facility and property assets are also seized in order to confiscate unlawfully earned profits. In addition, an arrest warrant is often applied for and an action usually brought. On the question of imprisonment the selection of the court (of first instance) and the subsequent request for prosecution is based on, in addition to the type and quantity of the seized narcotic, the level of professionalism in committing the criminal act and the involvement of organised groups or gangs. Under certain conditions, such as cultivation and manufacture of small amounts for personal use, prosecutors can refrain from further prosecution and cease criminal proceedings (see above).

Production of, cultivation of or dealing/trafficking in large quantities (so called non-small quantities) of narcotic drugs as well as commercial trafficking or dealing through criminal organisations are usually punished by the courts with a custodial sentence which cannot be commuted to probation (Sec. 29a and Sec. 30 BtMG).

The legal scope for sentencing in these particularly serious cases, such as in cases involving minors, is between 1 and 15 years imprisonment. However, in the case of convicted addicts who are willing to undergo treatment for their drug addiction, the enforcement of the

sentence could be deferred provided the remaining sentence to be enforced is less than 2 years (in line with the principle of "treatment not punishment" already mentioned above) (EMCDDA 2015). In many cases, cash and/or profits are also confiscated.

Driving whilst under the influence of drugs

When the police suspect someone of driving under the influence of drugs a blood test is usually ordered. In this case, the police are additionally required to forward all information related to the fitness to drive and drug use to the responsible driving licence authority (Berr et al. 2007).

For criminal offences the public prosecutor normally institutes court action or requests a summary punishment order be issued. The discretion of the prosecutor to dismiss proceedings is limited as driving offences always entail a public interest in prosecution. Furthermore a dismissal of the case would prevent the ability to impose a driving ban as part of the sentencing.

Unlike for alcohol, as yet no judicially recognised minimum threshold quantity for illicit drugs has been defined. This means that, in principle, even the slightest quantity can be punished with a fine (Böllinger & Quensel 2002). However, according to a decision of the highest court, a THC content of below 1.0 ng/ml in the blood does not constitute an acute impairment of the fitness to drive (case no. BvR 2652/03 of 21 Dec. 2004; also: Judgement of the Federal Administrative Court (Bundesverwaltungsgerichts, BVerwG) of 23 October 2014; case no. 3 C 3.13). Moreover, according to a decision of the German Federal Constitutional Court (Bundesverfassungsgericht, 8 July 2002), the driving licence authorities are only allowed to revoke the offender/suspect's driving licence if there are concrete grounds to suspect that the individual concerned is not reliably able to separate cannabis consumption from active participation in road traffic or is not willing to (Annex 4, to Sec. 11, Sec. 13 and Sec. 14 FeV – No. 9.2.2).

The threshold level for THC concentration in the blood for participation in road traffic has been the subject of several studies that provide potential approaches to and recommendations for the development of specific limits for cannabis (Berghaus & Krüger 1998; Böllinger & Quensel 2002; Grotenhermen et al. 2005). To the same end experts have worked on a matrix for measuring the level of intoxication caused by THC similar to how this is achieved for blood alcohol concentration.

German legislation provides for a dual sanctioning approach regarding participation in road traffic under the influence of psychoactive substances. If a violation is considered a regulatory offence the available sanctions range from a caution through the initiation of administrative action and a fine of up to 1,500 euros to a driving ban. When the case is classified as a criminal offence, however, it is referred to the public prosecutor.

Anyone who is in charge of a vehicle despite not being able safely to drive that vehicle as a result of the intake of alcoholic drinks or other intoxicating substances, will, if a court case ensues, be punished with imprisonment of up to one year or a fine (Sec. 316 StGB). If the driver has in addition endangered other persons or property of significant value the sentence

may be increased to up to 5 years (Sec. 315c StGB). Unfitness to drive exists if evidence is available which proves the incapability of driving an automobile. This incapability can be proved by the presence of physical or mental defects or by establishing that a person is driving a vehicle in road traffic under the influence of drugs. The criminal court can also order a temporary driving ban or revoke the driving licence with a blocking period. After the blocking period has expired a new driving licence can be granted after an exhaustive medical-psychological test has been passed, the costs of which are to be borne by the traffic offender themselves (Böllinger & Quensel 2002).

Moreover, as a regulatory offence (see above), driving under the influence of drugs could be punished with a fine which takes into account the severity of the crime and the financial situation of the traffic offender (Sec. 24a (2) StVG). Another option for regulatory offences is for the offender to receive driving ban of up to three months.

1.1.3 Control of new psychoactive substances (NPS) (T1.1.3)

Detailed information on the NpSG has already been laid out in the section, "Characteristics of drug legislation and national guidelines for implementation (T1.1.1)" above.

1.1.4 Other relevant topics (T1.1.4)

No separate information will be reported on this.

1.2 Implementation of the law (T1.2)

1.2.1 Data on actual sentencing practice related to drug legislation (T1.2.1)

The main data sources for recording drug criminality 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. All aforementioned data sources are available on a nationwide as well as a *Land* level. Although a variety of data is collected at different levels within the justice system the various statistics are not interlinked. The main obstacles in sequencing and comparative analysis are the different methods of data recording and classification, but also in the type of differentiation used at the detailed level (Paoli 2008). By way of illustration, the police statistics contain information regarding the type of substance, whereas the criminal prosecution statistics do not.

An overview of the most important statistics can be found in a Selected Issue chapter of the REITOX Report 2008, prepared by the DBDD in the scope of the annual report for the EMCDDA and available for download at www.dbdd.de.

Insofar as the respective data on criminal prosecution is available for the whole of Germany, this is contained in the Drug Market and Crime workbook.

1.2.2 Data on actual sentencing practice related to NPS (T1.2.2)

The German Federal Government Drug and Addiction Report as well as the well-known statistical reports from, for example, the Federal Criminal Police Office or the German Federal Statistical Office do not offer any evidence on which to assess the law enforcement practice in connection with NPS here. The combination of the federal structure of Germany, the fact that the BtMG does not include any statutory differentiation by how dangerous individual drugs are, the sometimes unclear legal situation regarding newly emerging NPS and the lack of any possibility to identify such data in the relevant statistics with certainty make it currently impossible to produce a summarising assessment of sentencing practice.

1.2.3 Discussion (T1.2.3)

Even though from 2016 onwards, the NpSG (see T1.1.1) has provided a new instrument in dealing with NPS, it will probably continue to be a race between the providers of continuously newly devised substances and their regulation under narcotics law, while there are virtually no changes in respect of the legal status of the "old" drugs. There are indications that can be interpreted to mean 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 the increasing criminalisation of dealing with NPS with professional suppliers and dealers thus falling back on classic "market strategies" (high quality, low price), instead of wanting to place their products on the market primarily on the basis of differing legal framework conditions. If these assumptions are confirmed, in the next few years as well as further developed NPS, high quality "old" drugs can be expected to be seen.

2 Trends (T2)

2.1 Changes in penalties and definitions of core offences (T2.1)

Reliable and scientifically grounded information on the changes in punishment practice or the definition of core offences has not been available since 2000. The relevant information is anecdotal in nature and cannot be understood, in the opinion of legal experts, as representative in general. Individual elements that go in a similar direction have been discussed above, such as the comparable recommendations in almost all *Laender* regarding how to treat cannabis products for personal use, the rules surrounding "small amounts" and the use of options for refraining from prosecution. Other topics play an increasingly less important role in terms of quantity (for example offences in connection with heroin) or are still relatively new and have already been discussed (NPS). One can assume that, for example, in dealing with stimulant offences (in particular methamphetamine) other "traditions" are developing in particularly affected regions, also at a prosecution level - without systematic findings already being available.

2.2 Changes in implementation (T2.2)

Since its introduction in 1971, the BtMG has been modified and amended several times in order better to suit the changing framework conditions.

Essential reforms of the BtMG

- legal recognition of substitution based treatment for persons dependent on narcotics (Sec. 13 (1) first sentence);
- expansion of the penal framework for simple drug offences (c.f. Sec. 29 (1));
- clarification that dispensing sterile disposable needles to persons dependent on narcotics is not a punishable offence (Sec. 29 (1) second sentence);
- making it simpler to refrain from prosecution in the case of so-called own-use offences through the sole decision making authority of the state prosecutor without consent of the court (decriminalisation as per Sec. 31a);
- making it simpler for offenders with a narcotics dependency, and who have been given a custodial sentence, to enter or re-enter drug treatment, according to the additional requirements of Sec. 35 to 38 BtMG;
- the introduction of new elements of offences and higher minimum penalties into the BtMG for cases of serious drug trafficking through the German Act to Combat Crime (Verbrechensbekämpfungsgesetz, VerbrBekG) and the Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG).

From 2000 onwards, the contentious permission for drug consumption rooms was decided positively through a new provision in the BtMG (c.f. Sec. 10a). In that provision, a catalogue of minimum standards was defined which, in particular, ensures compatibility with international addictive substances law. Generally, the BtMG leaves the decision on whether they want to permit drug consumption rooms to the *Laender*. To this end, a legal ordinance based on the BtMG from the *Land* government is required which regulates the approval process and licensing conditions in greater detail.

With the "Act on Diamorphine-assisted Substitution Therapy" (Gesetz zur diamorphingestützten Substitutionsbehandlung, BtMGuaÄndG), which came into effect on 21 July 2009, the legal preconditions were created for a transfer of diamorphine-assisted therapy from the German national pilot project into regular care by amending the BtMG, the AMG and the BtMVV. The Act stipulates primarily that diamorphine (pharmaceutically produced heroin, provided it is approved as a finished medicinal product for substitution purposes under German pharmaceuticals law) is eligible for prescription and sale - under strict conditions - for the substitution treatment of the most heavily dependent opioid users (c.f. REITOX Reports 2007 and 2008).

Beyond that, numerous substances have been brought, with a series of amending regulations (Amending Regulation on Narcotic Drugs, BtMÄndV), under the control of the BtMG as a consequence of the growing availability, attractiveness and role played by so-

called NPS. This does not represent a change in strategy on how to deal with these new substances, rather the criminalisation is extended to include how to deal with new substances. This approach only seems capable of achieving the limitation of availability and reduction of use, as intended by the legislator, when used in combination with other measures.

3 New developments (T3)

3.1 Changed laws (T3.1)

Thirtieth Amending Regulation on Narcotic Drugs (30. BtMÄndV)

Documents: All relevant documents are available in the TRIS (Technical Regulation Information System) database of the Directorate General for Growth of the European Commission⁸ (notification number: 2015/0413/D). Moreover, the amendment has been published, in its version as at 11 November 2015, in the German Federal Law Gazette (BGBl. I 2015 p. 1992).

Content/comments:

One new substance was added to Annex I and five new substances were added to Annex II of the BtMG. These comprised two benzodiazepines, two synthetic cannabinoids as well as synthetic derivatives of phencyclidine and cathinone.

The BtMVV was amended. The maximum prescribable quantities of levomethadone, methadone and morphine were adjusted to the therapeutically necessary dosages: Levomethadone: 1,800 mg; methadone: 3,600 mg and morphine: 24,000 mg.

Thirty First Amending Regulation on Narcotic Drugs (31. BtMÄndV)

Documents: All relevant documents are available in the TRIS (Technical Regulation Information System) database of the Directorate General for Growth of the European Commission⁹ (notification number: 2016/48/D). Moreover, the amendment has been published, in its version as at 31 May 2016, in the German Federal Law Gazette (BGBl. I 2016 p. 1282).

Content/comments:

One new substance was added to Annex I and five new substances were added to Annex II of the BtMG. These comprised one phenethylamine/cathinone derivative and five synthetic cannabinoids.

Note: The summaries of the aforementioned "Contents/Comments" were adopted by the homepage of the German Federal Opium Agency at the German Federal Institute for

8 <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2015&num=413> [accessed: 20 August 2016].

9 <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2015&num=413> [accessed: 20 August 2016].

Medicines and Medicinal Products (BfArM), which contains an overview of relevant changes to narcotics legislation by year¹⁰.

3.2 Implementation in the last year (T3.2)

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

3.3 Evaluation (T3.3)

No current information is available on this.

3.4 Political discussions (T3.4)

There remain very wide regional variations in the prevalence of use of methamphetamine, presenting some *Laender* with considerable challenges. The BMG supports the *Laender* in this respect, in particular by initiating pilot programs which are intended primarily to lead to usable results in prevention and care (see also the Drug Policy workbook).

The ongoing discussions regarding the consumption of cannabis as a recreational behaviour have already been discussed in detail in the Drug Policy workbook. Another discussion taking place within the BMG concerns improving the care of chronically ill patients using medicines containing cannabinoids as well as with medicinal hemp. On 7 July 2016 the draft law "Cannabis as a Medicine" was discussed for the first time in the Bundestag (Bundestagsdrucksache 18/8965¹¹).

In the view of the Federal Government Commissioner on Narcotic Drugs the use of cannabis as a medicine can be useful under controlled conditions. In her opinion when cannabis is used as a medicine for certain patients it is important that this is carried out in a quality assured form and that the health insurance providers assume the costs. The Commissioner pointed out, during the presentation of the draft law, that the demand for an improved care for patient groups with cannabis is at odds with a continued clear disapproval on the part of the German Federal Government of the use of cannabis as a recreational behaviour.

According to the draft law, cannabis medicines should be used as a therapeutic alternative for certain patients in individual cases for serious diseases, where an appreciable, positive effect on the course of the disease or where serious symptoms exist (for example for the treatment of pain for specific chronic illnesses or in the case of serious loss of appetite and nausea experienced during chemotherapy as part of cancer treatment).

Changes to the fifth volume of the SGB would be intended to extend the eligibility for reimbursement of medicines within the statutory health insurance system to include cannabis. Until now, the eligibility for reimbursement has been generally limited to authorised finished medicinal products in their respective approved area of application. In particular, the

10 http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/_node.html [accessed: 20 August 2016].

11 http://www.bundesgesundheitsministerium.de/fileadmin/dateien/Downloads/Gesetze_und_Verordnungen/GuV/C/GE_Cannabis_280616.pdf [accessed: 20 August 2016].

possibility of a reimbursement of the costs of cannabis in the form of dried flowers should be created for critically ill people. In order to gain further insights into the effects of cannabis any reimbursement will be linked to an accompanying collection of data. Doctors communicate available data to this end anyway - for example on the diagnosis, treatment, dosage and side effects - in anonymised form to the BfARM. The survey should also provide information on the long term use of cannabis for medicinal purposes.

In the future the intention would be for state-controlled cultivation of cannabis for medicinal purposes to be carried out in Germany, in order to enable the supply of quality controlled cannabis medicines. The related tasks will - in accordance with the internationally binding provisions of the 1961 United Nations Single Convention on Narcotic Drugs - be given to the BfARM (state "cannabis agency"). Until the cannabis agency can implement state controlled production in Germany the supply of medicinal cannabis shall be covered by imports. Some doctors have criticised the plans of the presented draft bill "cannabis as medicine" (Bühning 2016). Generally, the German Medical Associations (Bundesärztekammer, BÄK) and the Drug Commission of the German Medical Association (Arzneimittelkommission der deutschen Ärzteschaft, AkdÄ) welcome the plans of the German Federal Ministry of Health to achieve a wider eligibility for prescription of medicines containing cannabinoids. However, they reject the prescribability of cannabis in the form of dried flowers and extracts. In the view of the BÄK and the AkdÄ, the reclassification of cannabis as a plant or parts of a plant is neither well-founded nor necessary. Their reasoning is a lack of sufficient scientific evidence for the medicinal use of medicinal cannabis flowers. It should also be taken into account, according to those bodies, that the use of medicinal hemp does not allow for an exact dosage of the medically active components of cannabis and its consumption as a joint carries the associated health hazards of smoking. The BÄK and the AkdÄ also do not see the need to set up a cannabis agency to control production and trade, since the benefits of a therapeutic use of medicinal cannabis flowers are not backed up with scientific evidence (cited according to: [aerzteblatt.de](http://www.aerzteblatt.de), 11 July 2016¹²). The German government responded that evidence for the effectiveness of the medicinal products covered by this rule was not on the level usually required for reimbursable medicinal products (with the exception of already approved products for certain areas of application). Combining benefit entitlements will an accompanying survey will help gain comprehensive information about the medicinal use of cannabis. Thus, it will help build a base for a more specific regulation for the payment of benefits which will be developed by the Federal Joint Committee according to section 92, subsection 1, second sentence number 6 SGBV after the survey has been completed. The regulation for the survey explicitly states that it will be a non-interventional accompanying measure. There will be no more diagnostic procedures other than those needed for treatment. The prescribing doctor must anonymise all data transferred to the Federal Institute

12 <http://www.aerzteblatt.de/treffer?mode=s&wo=17&typ=1&nid=69502&s=cannabis> [accessed: 18 August 2016].

for Drugs and Medical Devices which is in charge of conducting the survey, thus ensuring anonymity of the ensured patient¹³.

4 Additional information (T4)

4.1 Additional sources of information (T4.1)

No current information is available on this.

4.2 Further aspects (T4.2)

No additional information will be reported on this.

5 Notes and queries (T5)

5.1 Cannabis legislation (T5.1)

The current debate surrounding cannabis as medicine was discussed in detail in section 3.4. Examples of initiatives related to the debate on cannabis use as a recreational behaviour are included in the Drug Policy workbook.

6 Sources and methodology (T6)

6.1 Sources (T6.1)

Relevant laws

- New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG) - The law to combat the spread of new psychoactive substances¹⁴
- German Medicinal Products Act (Arzneimittelgesetz, AMG)¹⁵
- German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Änderungsverordnung, BtMÄndV)¹⁶
- The German Narcotic Drugs Act (BtMG)¹⁷
- German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV)¹⁸
- Narcotics-Domestic Trade Regulation (Betäubungsmittel-Binnenhandelsverordnung, BtMBinHV)¹⁹

13 <http://dip21.bundestag.de/dip21/btd/18/089/1808965.pdf> [accessed: 07.Oct. 2016].

14 http://www.bmg.bund.de/fileadmin/dateien/Downloads/Gesetze_und_Verordnungen/GuV/N/GE_NpSG_Kabinett.pdf [accessed: 20 August 2016].

15 http://www.gesetze-im-internet.de/amg_1976/ [accessed: 29 Oct. 2015].

16 http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/_node.html [accessed: 29 Oct. 2015].

17 http://www.gesetze-im-internet.de/btmg_1981/ [accessed: 29 Oct. 2015].

18 http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html [accessed: 29 Oct. 2015].

- Narcotics-Foreign Trade Regulation (Betäubungsmittel-Außenhandelsverordnung, BtMAHV)²⁰
- Driving Licence Regulation (Fahrerlaubnisverordnung, FeV)²¹
- Act on diamorphine-assisted substitution therapy²²
- German Constitution (Grundgesetz, GG)²³
- Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG)²⁴
- Youth Courts Law (Jugendgerichtsgesetz, JGG)²⁵
- Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG)²⁶
- German Code of Social Law: SGB V²⁷ (statutory health insurers), SGB VI²⁸ (pension insurance providers), SGB VIII²⁹ (youth welfare), SGB XII³⁰ (social welfare providers)
- Criminal Code (Strafgesetzbuch, StGB)³¹
- Road Traffic Act (Straßenverkehrsgesetz, StVG)³²
- Road Traffic Regulation (Straßenverkehrsordnung, StVO)³³
- Act to Combat Crime (Verbrechensbekämpfungsgesetz, VerbrBekG)³⁴

6.2 Methodology (T6.2)

The methodology used in the different publications is described in the respective publication (see point 7 of the Bibliography).

19 <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 07. October 2016].

20 <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 07. October 2016].

21 http://www.gesetze-im-internet.de/fev_2010/ [accessed: 29 Oct. 2015].

22 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl109s1801.pdf [accessed: 29 Oct. 2015].

23 <http://www.gesetze-im-internet.de/gg/> [accessed: 29 Oct. 2015].

24 http://www.gesetze-im-internet.de/g_g_2008/ [accessed: 29 Oct. 2015].

25 <http://www.gesetze-im-internet.de/jgg/> [accessed: 29 Oct. 2015].

26 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl192s1302.pdf [accessed: 29 Oct. 2015].

27 http://www.gesetze-im-internet.de/sgb_5/ [accessed: 29 Oct. 2015].

28 http://www.gesetze-im-internet.de/sgb_6/ [accessed: 29 Oct. 2015].

29 http://www.gesetze-im-internet.de/sgb_8/ [accessed: 29 Oct. 2015].

30 http://www.gesetze-im-internet.de/sgb_12/ [accessed: 29 Oct. 2015].

31 <http://www.gesetze-im-internet.de/stgb/> [accessed: 29 Oct. 2015].

32 <http://www.gesetze-im-internet.de/stvg/> [accessed: 29 Oct. 2015].

33 http://www.gesetze-im-internet.de/stvo_2013/ [accessed: 29 Oct. 2015].

34 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl194s3186.pdf [accessed: 29 Oct. 2015].

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8 Tables

Table 1	Overview of the procedural options for various offences	10
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