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Legal framework

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0 Summary (T0)

The German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG) regulates, as the central legislative instrument, sanctions for unlawful acts in connection with psychoactive substances. Further criminal and regulatory offence provisions can be found in the German New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG), in the German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV), the German Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG) and the German Medicinal Products Act (Arzneimittelgesetz, AMG). The German Code of Social Law (Sozialgesetzbuch, SGB) defines the framework conditions for the financing of drug dependence treatment. The pension insurance providers (SGB, Volume 6 - SGB VI), the statutory health insurance providers (SGB, V), as well as the local or supra-local social welfare providers (SGB, XII) and municipalities as supporting organs of youth welfare (SGB, XIII), are the main funding agencies for the treatment of drug dependence (rehabilitation).

The BtMG provides for a variety of sanctions which, depending on the severity and type of offence, range 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 drugs being supplied to others. 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 exercised 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 "minor amounts" of drugs for personal use. Almost all *Laender* have introduced threshold values for "minor amounts" in relation to cannabis. The limits set by the individual *Laender* are guideline values from which public prosecutors and judges may deviate on a case by case basis. 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 smaller 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.

In November 2016, the New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG) came into force. The Act prohibits the purchasing of, possession of as well as trafficking/dealing in specific groups of new psychoactive substances (NPS) and it imposes criminal penalties for supplying NPS to others. The NpSG serves the objective of combatting the distribution of NPS and thus limiting its availability. Through the new Act, for two categories of substances (2-Phenethylamine derived compounds, i.e. substances related to amphetamine, including cathinone and synthetic cannabinoids) it will no longer be possible to circumvent bans by making small chemical modifications and thus bring the substances

onto the market. 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.

In March 2017, the "Cannabis as Medicine" Act came into force. It regulates the use of cannabis-based pharmaceuticals in individual cases as a therapeutic alternative for patients with serious diseases. The costs of treatment can be reimbursed by the health insurance providers on request; this also applies for cannabis in the form of dried flowers. The production of cannabis for medicinal purposes will in future be monitored by the state in Germany, to which end a state "cannabis agency" has been set up. Accompanying data will be collected in order to gather further information on the effects of cannabis. The Act is described in detail under section 3.1.

The provisions on opioid substitution were revised/brought up to date in 2017. Clinical decisions (e.g. requirements for the initiation of treatment, handling of concomitant use etc.), which was previously regulated in the BtMVV, now fall within the authority of the German Medical Association. In addition, the take-home rules and the colleague consultation rule have been broadened, as has the range of institution which are allowed to dispense substitution drugs (e.g. hospices, public health authorities etc.), in order to strengthen services available locally. The rules are reported on in detail in section 3.1.

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)

In Germany, the BtMG regulates, as the central legislative instrument, how the state deals with unlawful acts in connection with psychoactive substances. It provides for a variety of sanctions which, depending on the severity and type of offence, range from administrative fines to custodial sentences.

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

Further criminal and regulatory offence provisions can be found in the NpSG, in the BtMVV, in the GÜG and in 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. The Act 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)
- Annex III: narcotics eligible for trade and for prescription (e.g. amphetamine, codeine, dihydrocodeine, cocaine, methadone, morphine and opium).

Pursuant to Annex III, prescribing narcotics as part of medical treatment is subject to the special regulations within the BtMVV and requires, for example, the use of special prescription forms specially designed for narcotics. The (legal) domestic trade in narcotic drugs is regulated in Germany by the Ordinance concerning the Domestic Trade in Narcotics (Betäubungsmittel-Binnenhandelsverordnung, BtMBinHV)¹; import or export of narcotics is regulated by the Ordinance concerning the Foreign Trade in Narcotics (Betäubungsmittel-Außenhandelsverordnung, BtMAHV)².

1 <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 11 Sept. 2017].

2 <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 11 Sept. 2017].

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" (c.f. on this point EMCDDA 2002). The BtMG is primarily a regulatory and administrative law as its aim is to regulate the trade in narcotic drugs - for example the purchase, sale, 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, for example possession of and dealing (especially trafficking) in narcotic drugs listed in the BtMG are classified as criminal offences according to Sec. 29-30a of the BtMG. The interpretation and methodological application of the provisions 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

The German New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG) came into force on 16 November 2016³. The act prohibits, among other things, the purchase of, possession of and dealing in NPS, so-called "legal highs", and provides for the imposition of criminal penalties for supplying NPS to others. The NpSG serves the objective of combatting the distribution of NPS and thus limiting its availability. To this end, the act provides for a prohibition, subject to criminal penalties, for handling NPS with the intention of supplying 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 in the act are aimed in particular at the producers and dealers of NPS as well as those who bring them onto the market. Additionally, this new act 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 is a new, stand alone law with a new approach: in future, the considerable dangers to health arising from NPS will be combated through the banning of entire categories of substances. Prior to the introduction of the Act, the primary legislative approach in Germany when dealing with NPS was to add individual substances (one by one) to the Annexes of the BtMG, thereby banning them and subjecting them to criminal sanctions. The substances brought under the Act often exhibited only minor changes in chemical structure to substances already covered by the BtMG. Since the new substance was close in structure and effect to the substance already covered, the possibility of abuse was used under the premise of apparent "legality" and the penal provisions of the BtMG were circumvented. At the same time, the lack of a ban could give the impression, especially to young drug users, that the substance is harmless. Due to the high number of emerging NPS and the relatively

3 <https://www.gesetze-im-internet.de/npsg/> [accessed: 11 Sept. 2017]; <http://www.drogenbeauftragte.de/presse/pressekontakt-und-mitteilungen/2016/2016/neue-psychoaktive-stoffe-gesetz-npsg-tritt-in-kraft.html> [accessed: 11 Sept. 2017].

long period of time required by the banning procedures, it had become difficult to incorporate these substances into the BtMG in a timely manner.

Through the new Act, for 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 an annex:

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

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.

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 intention with the Act is to close loopholes in respect of regulation and criminal liability in the German Medicinal Products Act resulting from a judgment of the Court of Justice of the European Union (CJEU) of July 2014. The CJEU had decided that acts involving 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 pharmaceutical law.

In order to assess the effects of the NpSG, the Federal Ministry of Health (Bundesministerium für Gesundheit, BMG) has funded a two-year research project, running from June 2017 to the end of May 2019, in the scope of which the effects of the NpSG on users, the addiction support system and law enforcement authorities/the justice system as well as the market will be qualitatively and quantitatively evaluated. Lead partners are the IFT Munich and the Police University in Münster, other project partners are Wittlich prison, Chemnitz University of Technology, the Centre for Interdisciplinary Addiction Research of Hamburg University, the Ludwig Maximilian University Clinic, Munich and Freiburg University. In order to realise the project goals, structured narrative interviews will be 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. These surveys will be supplemented by an analysis of quantitative secondary data, which in some cases enables monitoring during the time period before and after the implementation of the NpSG. New quantitative and qualitative information in connection with use behaviour will be collected in youth medical and psychiatric acute care centres. The surveys will be complemented with an analysis of individual legal problems.

The aim of the project is to evaluate the achievement of the (implicit) goals of the Act. The declared aim is also to recommend, at the end of the project term, 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. Data from forensic medicine also serves to improve the quality of drug death statistics.

German social law codes

The various volumes of the SGB define the framework conditions for the funding of drug addiction treatment. The main funding agencies for the costs of drug addiction rehabilitation therapy are the pension insurance providers (SGB, VI). Physical withdrawal (detoxification) and substitution therapy are funded by the statutory health insurance providers (SGB, V). Other funding agencies are the local or supra-local social welfare providers (SGB, XII) and municipalities as agencies for youth welfare (SGB, VIII).

With the merging of payments 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 introduction of "Hartz IV", with the central goal of being to better help people find work, also involved the intensive removal of barriers to entering employment. In this context, drug addiction represents a particularly problematic obstacle and as such is an element of the support needed. 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.

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 sets out 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 drugs being supplied to others. There are various possibilities under narcotic drugs law to refrain from prosecution, such as for the possession of minor 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" ("Therapie statt Strafe"): 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 for 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 illicit drugs, as well as options for action at police, public prosecutor and court levels.

Table 1 Overview of the procedural options for various offences

Type of offence	Procedure		
	... 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 (Sec. 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 public prosecutor • Case dismissal with consent of the public prosecutor (Sec. 31a (2) BtMG) • Refraining from imposing punishment (Sec. 29 (5) 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 public prosecutor • Issue of arrest warrant • Acquittal • Summary punishment order • Imposition of fine or custodial sentence • Imposition of custodial (and pecuniary) sentence • Suspension of sentence on probation • Referral to detoxification facility/treatment

Table 1 (continued)

Type of offence	Procedure		
	... 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 • 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)

Sec. 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 minor 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 requiring the consent of the court. All Federal *Laender* have introduced more detail as to the application of Sec. 31a BtMG through recommendations or general guidelines. The differences which still existed between the *Laender* a few years ago have over recent years become smaller. Some divergence in the regulations of the *Laender* does persist, however (c.f. on this point also Körner at al. 2012; Schäfer & Paoli 2006). Within the framework conditions defined by the BtMG, the severity of some of the punishments requested or imposed by the individual local public prosecutors or courts or between *Laender* differs considerably. How narrowly or broadly the scope for action afforded to public prosecutors and the courts in the BtMG can be interpreted or applied in individual cases is within the discretion of the respective judicial authorities. Options on dismissal of proceedings, for example, for different substances and "minor amounts", possession for "personal use" or repeat offences are illustrated in detail in the following sections.

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

Almost all *Laender* have introduced threshold values for "minor amounts" in relation to cannabis. The limits set by the individual *Laender* are guideline values from which public prosecutors and judges may deviate on a case by case basis. 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 smaller 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).

In a landmark decision on 3 December 2008 (case no. 2 STR 86/08), 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 new scientific knowledge at that time regarding the high addiction potential of methamphetamine and the health consequences of abusive use, the opinion of the Senate was that a substantial reduction in the threshold value should be made. Contrary to a Regional Court judgment, the BGH fixed the threshold value not to five grams of methamphetamine hydrochloride, however, but to methamphetamine base (for a detailed explanation, see also Patzak 2009). With its judgment of 17 November 2011, the BGH stipulated the "non-minor 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 in the event of conviction the offender would be facing imprisonment of no less than one or two years.

As far back as April 2007, the BGH defined the "non-minor amount" of buprenorphine in a landmark judgement. With that, the BGH added another judgment to the series of landmark rulings on the term "non-minor amount" in which it dealt for the first time with a substance used in substitution therapy that has also appeared on the illegal market, causing some concern (Winkler 2007). The "non-minor amount" in the wording of the BtMG does not refer - unlike the term "minor 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 and consumption-related offences

Personal possession of illicit drugs is punishable irrespective of the type and quantity of the drug. Due to the principle of mandatory prosecution (Sec. 152 (2), Sec. 160 (1), Sec. 163 German Code of Criminal Procedure, (Strafprozessordnung, StPO)), the police is obligated to file a criminal complaint against any suspect and to refer them to the respective public prosecutor, even in cases of minor amounts of drugs. This means that the discretionary power of the police when dealing with suspected offenders is very limited. Possession of only a minor amount for personal use is considered a consumption-related offence and the police approach is limited in some *Laender* in general to weighing the substance, seizing it, conducting a drug test and interviewing the suspect (so-called simplified criminal complaint). There are considerable differences, however, in the handling of consumption-related

offences across the various *Laender* (EMCDDA 2002; Schäfer & Paoli 2006). In recent years there has been a greater harmonisation amongst the *Laender* regarding the definition of threshold values up to which the prosecutor may refrain from further prosecution.

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 threshold, 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 police laws of the *Laender*, issue dispersal orders or impose residence restrictions on individuals in that scene.

According to the principle of mandatory prosecution which governs the German law of criminal proceedings, all cases of violation of applicable laws are, where grounds for initial suspicion exists, forwarded to the public prosecutor, who initiates preliminary proceedings. Nonetheless, under specific conditions, the prosecutor has a dutiful discretion to drop the case. As already outlined above, for offences of use related to unlawful acts in connection with minor amounts for own use, Sec. 31a of the BtMG allows the public prosecutor to refrain from continuing the prosecution, provided there is no public interest in 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 consequences without the need for approval from the court. However, in practice this option is mainly exercised 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 the 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 judgment) may be initiated. However, the possession of larger quantities of illicit substances 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 or to discontinue proceedings in respect of crimes committed by adolescents and young adults, who could fall under criminal law relating to young offenders. This is usually the case where only minor 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 proceedings can also be considered at the court level (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 culpability on the part of the perpetrator and a 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 the case concerns a minor amount for personal use.

Repeat offences or illegal possession of a larger quantity than that defined as a "minor amount" is generally punished, according to Sec. 29 BtMG, with imprisonment of up to five years or a fine.

Cases of personal possession of larger quantities of illicit drugs which exceed the limit for active substance content defined under case 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 is aimed at 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, specifically aimed at younger users, which consists of an "intake conversation" and a range of courses, follows the objective of preventing a possible dependence and counteract any slide into criminality.

Production, dealing and trafficking

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

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

The legal scope for sentencing in these particularly serious cases, such as also 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 is confiscated and/or the seizure of profits is ordered.

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 is 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 public prosecutor to cease proceedings is very limited as traffic offences always entail a public interest in prosecution. Furthermore, a dismissal of the case would prevent the possibility of imposing 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 drive⁴. Moreover, according to a decision of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) of 8 July 2002, the driving licence authorities are only permitted to revoke a 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 do so⁵.

The threshold level for THC concentration in the blood allowed 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 been working 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

⁴ Case no. BvR 2652/03 of 21 Dec. 2004; also: Judgment of the German Federal Administrative Court (Bundesverwaltungsgerichts, BVerwG) of 23 October 2014; case no. 3 C 3.13.

⁵ Annex 4, to Sec. 11, Sec. 13 and Sec. 14 FeV – No. 9.2.2.

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 only be granted after an extensive medical-psychological test has been passed, the costs of which are borne by the convicted party themselves (Böllinger & Quensel 2002).

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

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

Detailed information on the NpSG and its evaluation has already been laid out in the section on "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 both on a nationwide and a *Land* level. Although a large volume of data is collected at different levels within the justice system, the various statistics are not interlinked. The main obstacles in sequential 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, prepared by the DBDD in 2008 in the scope of the annual REITOX Report for the EMCDDA and available for download at www.dbdd.de.

To the extent that 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 sentencing practice in connection with NPS. The combination of the federal structure of Germany, the lack of differentiation by how dangerous individual drugs are in the BtMG, the sometimes unclear legal situation regarding 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. Important findings and recommendations in this area are expected in 2019 from the NpSG evaluation described in 1.1.1 above.

1.2.3 Discussion (T1.2.3)

Even though from 2016 onwards, there has been, in the NpSG (see T1.1.1), a new instrument for dealing with NPS, it will probably continue to be a race between the providers of continuously newly devised substances and their regulation of these products 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 as meaning 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 products of a higher quality at a lower price, instead of wanting to place their products on the market primarily on the basis of their (alleged) legality. If these assumptions are confirmed, in the next few years, one can expect, in addition to further developed NPS, high quality "old" drugs.

2 Trends (T2)

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

Reliable and scientifically founded information on the changes in punishment practice or the definition of key elements of offences has not been available since 2000. The information in this area 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 already been discussed above, such as the similar recommendations in many *Laender* regarding how to handle cannabis products for personal use, the rules surrounding "minor amounts" and the use of options for refraining from prosecution. Other topics are rather losing importance in terms of quantity (for example offences in connection with heroin) or are still relatively new

and have already been discussed (NpSG). 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 conditions.

Essential reforms of the BtMG include

- legal recognition of substitution based treatment for persons dependent on narcotics (Sec. 13(1) first sentence), thereafter, several further amendments such as the introduction of diamorphine-assisted substitution treatment for the most severely addicted persons (c.f. REITOX Reports 2008, 2009) and the current new regulation which transfers regulations on cases which directly affect medical therapeutic assessments, to the guideline competence of the German Medical Association (see 3.1)
- expansion of the penal framework for simple drug offences (c.f. Sec. 29(1))
- the clarification that dispensing sterile disposable syringes to persons dependent on narcotics is not a punishable offence (Sec. 29(1) second sentence)
- the legal clarification of the permissibility of drug consumption rooms with a catalogue of minimum standards to ensure compatibility with international addictive substances law (Sec. 10a)
- 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 who have been given a custodial sentence to enter or re-enter drug treatment, according to the additional requirements of Sec. 35 to 38
- the introduction of new elements of offences and higher minimum penalties into the BtMG for cases of serious drug dealing/trafficking through the German Act to Combat Crime (Verbrechensbekämpfungsgesetz, VerbrBekG) and the German Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG)
- a series of amending regulations (Betäubungsmittelrechts-Änderungsverordnung, BtMÄndV) in order to bring additional substances, in particular with respect to NPS, under the control of the BtMG (on this problem, see section 1.1.1, NpSG)
- the introduction of the Act "Cannabis as Medicine", Sec. 19, Sec. 24a, Annexes I-III BtMG (see section 3.1)

3 New developments (T3)

3.1 Changed laws (T3.1)

Table 2 Overview of changed laws in the last year

Original version of the document	New version / amended version of the document	Summary of change	Comments
BtMG ¹ , (subordinate: BtMAHV, BtMVV, SGB V, GÜG)	BtMG ¹ , (subordinate: BtMAHV, BtMVV, SGB V, GÜG)	"Cannabis as Medicine" Act introduced	See below
BtMVV	Third Amending Regulation of BtMVV; BtMVV	Modification of the regulation of opioid substitution therapy	See below
BtMG Annexes I and II ³	18th Regulation Amending the Annexes to the German Federal Narcotic Drugs Act (Verordnung zur Änderung von Anlagen des Betäubungsmittelgeset zes, BtMGAnlÄndV; BtMG Annexes I and II ³	Two new substances are included in Annex I, 13 new substances in Annex II	

¹Comparison of old and new versions of the BtMG: <https://www.buzer.de/gesetz/631/v204005-2017-03-10.htm> (accessed: 11 Sept. 2017). Further information on Cannabis as Medicine: <http://www.bundesgesundheitsministerium.de/ministerium/meldungen/2017/januar/cannabis-als-medizin.html> (accessed: 11 Sept. 2017).

²Comparison of old and new version of the BtmVV: <https://www.buzer.de/gesetz/3710/v205673-2017-05-30.htm> (accessed: 11 Sept. 2017).

³Comparison of old and new version of the BtMG Annexes I and II: <https://www.buzer.de/gesetz/631/v206439-2017-06-21.htm> (accessed: 11 Sept. 2017).

"Cannabis as Medicine" Act

In March 2017 the "Cannabis as Medicine" Act came into force, to change narcotics legislation and other regulations. The act set out the prescribability of further cannabis-based pharmaceuticals (dried cannabis buds and cannabis extracts in pharmaceutical quality) is established and the eligibility for reimbursement within the statutory health insurance system. 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 can, under the amendment to SGB V, be reimbursed by the statutory health insurers on request. 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 form of dried flowers are now also eligible for reimbursement for critically ill people.

For the supply of quality controlled cannabis-based pharmaceuticals, the cultivation of cannabis for medicinal purposes in Germany is possible in observance of the internationally binding provisions of the 1961 UN Single Convention on Narcotic Drugs. The responsibilities according to these international provisions have been transferred to the BfArM (state "cannabis agency"). In April 2017, 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, the supply of medicinal cannabis will be covered by imports.

In order to obtain further information on the effects of long-term medicinal cannabis use, non-interventional data collection will be carried out. To this end, doctors will transmit specific data, in anonymised form, to the BfArM (diagnosis, therapy, dose and side effects). The collected information will also serve as the basis for the regulation on the details regarding the provision of services, which is to be carried out by the Federal Joint Committee in the guidelines according to Sec. 92 (1) second sentence, number 6 SGB V. The anonymising of data guarantees that no conclusions can be drawn regarding individual patients.

Third Amending Regulation of BtMVV: New regulation of opioid substitution

Regulations in cases which directly affect medical therapeutic assessments were transferred, with the new regulation, from the scope of direct federal regulation in the BtMVV into the guideline competence of the German Medical Association (Bundesärztekammer, BÄK). The BÄK sets out the generally accepted state of medical scientific knowledge in a guideline for substitution treatment, in particular for:

- The aims of substitution according to Sec. 5 (2) BtMVV
- 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 prescribing of substitution drugs for independent use by patients who have a firm handling of their addictive behaviour.
 - The decision as to the necessity of including psychosocial care
 - The assessment and control of the course of the therapy

The provisions to be amended and introduced with the Third Amending Regulation of BtMVV have been applicable since the publication of the German Medical Association guidelines in the Federal Gazette of 2 October 2017.

The principle that substitution drugs should only be given out for immediate use, i.e. only taken in the presence of specialist personnel, remains in place. The previous rule on take home prescription is, however, extended. In justified individual cases, substitution doctors can now prescribe a substance in the quantity required for up to 30 days (instead of generally up to seven days), also in immigration cases, in order to help patients transition to an independent life.

In order to improve the local services for those affected, the types of institution which are allowed to dispense substitution drugs to them has been broadened. These will in future include rehabilitation services, public health authorities, nursing homes and hospices. In order to improve the service further, the colleague consultation rule has been extended. Previously, a doctor without specialist addictive therapy training could only care for a maximum of three substitution patients, provided a doctor with the addiction medicine qualification was available to consult. 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 substitution therapy, are continued in the BtMVV (Press offices of the Federal Ministry of Health (Bundesministerium für Gesundheit, BMG) and the Federal Commissioner for Drugs 2017).

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. Current data and trends with respect to convictions for narcotics violations are reported in the Drug Market and Crime workbook.

3.3 Evaluation (T3.3)

No current information is available on the evaluation of laws. The results of the NpSG evaluation - as already outlined in section 1.1.1 - is expected in 2019. The accompanying data collection which is taking place in the context of the "Cannabis as Medicine" act is described above.

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 schemes which are intended primarily to lead to usable results in prevention and care (see also the Drug Policy workbook).

The discussion, described last year, concerning the implementation of cannabis as medicine has for now been stilled, since the implementation of the Act. There remain isolated discussions concerning the difficulties in implementing the Act, for example that it remains difficult for patients to find doctors who are prepared to offer cannabis-based treatments.

Furthermore, cases have been reported in which there have been disputes between insured patients and health insurance providers over who bears the costs.

A lively political debate over a possible decriminalisation of cannabis continues. Representatives of different political parties, some of which are involved in governments at a national and state level, have commented to this effect; at a municipal level, projects to assess the possible effects of corresponding changes are regularly announced. To date however, no projects have been implemented due to the legal situation.

4 Additional information (T4)

4.1 Additional sources of information (T4.1)

No additional sources of information are available on this.

4.2 Further aspects (T4.2)

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

5 Sources and methodology (T5)

5.1 Sources (T5.1)

Relevant laws

- German Medicinal Products Act (Arzneimittelgesetz, AMG)⁶
- German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Änderungsverordnung, BtMÄndV)⁷
- The German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG)⁸
- The "Third Amending Regulation of the German Regulation on the Prescription of Narcotic Drugs (Dritte Verordnung zur Änderung der Betäubungsmittel-Verschreibungsverordnung)⁹
- Ordinance concerning the Domestic Trade in Narcotics (Betäubungsmittel-Binnenhandelsverordnung, BtMBinHV)¹⁰
- Ordinance concerning the Foreign Trade in Narcotics (Betäubungsmittel-Außenhandelsverordnung, BtMAHV)¹¹.

6 http://www.gesetze-im-internet.de/amg_1976/ [accessed: 12 Sept. 2017].

7 http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/_node.html [accessed: 12 Sept. 2017].

8 http://www.gesetze-im-internet.de/btmg_1981/ [accessed: 12 Sept. 2017].

9 http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html [accessed: 12 Sept. 2017].

10 <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 12 Sept. 2017].

11 <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 12 Sept. 2017].

- Driving Licence Regulation (Fahrerlaubnisverordnung, FeV)¹²
- Act on diamorphine-assisted substitution therapy¹³
- German Constitution (Grundgesetz, GG)¹⁴
- Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG)¹⁵
- Youth Courts Law (Jugendgerichtsgesetz, JGG)¹⁶
- 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)¹⁷
- New Psychoactive Substances Act (Neue-psychoaktive-Stoffe-Gesetz, NpSG) - The law to combat the spread of new psychoactive substances¹⁸
- German Code of Social Law: SGB V¹⁹ (statutory health insurers), SGB VI²⁰ (pension insurance providers), SGB VIII²¹ (youth welfare), SGB XII²² (social welfare providers)
- Criminal Code (Strafgesetzbuch, StGB)²³
- Road Traffic Act (Straßenverkehrsgesetz, StVG)²⁴
- Road Traffic Regulation (Straßenverkehrsordnung, StVO)²⁵
- Act to Combat Crime (Verbrechensbekämpfungsgesetz, VerbrBekG)²⁶

12 http://www.gesetze-im-internet.de/fev_2010/ [accessed: 12 Sept. 2017].

13 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl109s1801.pdf [accessed: 12 Sept. 2017].

14 <http://www.gesetze-im-internet.de/gg/> [accessed: 12 Sept. 2017].

15 http://www.gesetze-im-internet.de/g_g_2008/ [accessed: 12 Sept. 2017].

16 <http://www.gesetze-im-internet.de/jgg/> [accessed: 12 Sept. 2017].

17 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl192s1302.pdf [accessed: 12 Sept. 2017].

18 <https://www.gesetze-im-internet.de/npsg/> [accessed: 12 Sept. 2017].

19 http://www.gesetze-im-internet.de/sgb_5/ [accessed: 12 Sept. 2017].

20 http://www.gesetze-im-internet.de/sgb_6/ [accessed: 12 Sept. 2017].

21 http://www.gesetze-im-internet.de/sgb_8/ [accessed: 12 Sept. 2017].

22 http://www.gesetze-im-internet.de/sgb_12/ [accessed: 12 Sept. 2017].

23 <http://www.gesetze-im-internet.de/stgb/> [accessed: 12 Sept. 2017].

24 <http://www.gesetze-im-internet.de/stvg/> [accessed: 12 Sept. 2017].

25 http://www.gesetze-im-internet.de/stvo_2013/ [accessed: 12 Sept. 2017].

26 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl194s3186.pdf [accessed: 12 Sept. 2017].

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5.3 Methodology (T5.2)

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

6 Tables

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