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for Drugs and Drug Addiction



# Legal Framework

## GERMANY

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## 0 SUMMARY (T0)

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

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

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

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

The legal framework also includes the legislation which governs the addiction support system. Addiction support forms an essential component of the drug and addiction policy in Germany. Persons with dependence disorders or harmful use have a legal right to support. As a result, a very differentiated range of addiction and drug support services has been built in Germany over the decades, in particular for prevention, treatment, harm reduction and rehabilitation. In past years, most changes to the law have been made in this area, such as the provisions under narcotic drugs laws governing substitution treatment for opioid addicts (substitution) that have been enshrined in law for over 25 years now. The substitution treatment of opioid addicts has been a service provided by SHI accredited medical professionals since 1 October 1991. In

2009, the legislature decided to introduce diamorphine-based substitution treatment as an additional option to treat the most severely addicted opioid patients. Diamorphine (synthetic heroin), was classified for this purpose as a prescription narcotic by a corresponding amendment to the German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV).<sup>1</sup> These provisions have been supplemented by the provisions under narcotics laws regarding diamorphine-based substitution treatment and were most recently fundamentally reformed in 2017 (diamorphine is a pharmaceutical-grade “heroin” that is approved in Germany as a medicinal product for use for the purpose of medical substitution therapy). Just as with substitution, the rules governing syringe exchange (1994) and drug consumption rooms (2000) were introduced for the purpose of harm reduction. The most recent legislative changes concern new psychoactive substances, “NPS” (2020), and the temporary easing of the BtMG regulations due to COVID-19. (2020, cf. 3.1).

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

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

## 1 NATIONAL PROFILE (T1)

### 1.1 Legal framework (T1.1)

#### Structure of the legal framework in Germany

In the following, the term "legal framework" means all legislation that governs narcotic drugs, NPS and their precursors as well as the problem of drugs and addiction in Germany. As the drug and addiction problem affects many areas of life, the pool of these laws is very large, multi-faceted and diverse.

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

At international level, the three UN Drug Control Conventions that have been ratified by Germany (and almost all countries within the UN), contain numerous obligations and provisions which have a binding effect on the national legislation of the Member States. In Germany, in addition to their being directly binding under international law, they have the status of simple federal law. This includes, in particular, the obligation to ensure certain narcotic drugs and psychotropic substances are available in sufficient quantities for medical and scientific purposes, to use these substances exclusively for medical or scientific purposes and to control how they are handled. According to this, national regulations - to the extent they provide for a legalisation of narcotic drugs and psychotropic substances for non-scientific and non-medical

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<sup>1</sup> : Federal Joint Committee, <https://www.g-ba.de/presse/pressemitteilungen/762/> [accessed: 21 Aug. 2020].

purposes, thus for intoxication purposes - are not compatible with the three UN Drug Control Conventions.

At national level, the legal framework in Germany is in turn established at different levels because in accordance with the German Constitution (Grundgesetz), legislative and administrative competences are split between the federal, *Land* and municipal levels (Germany is a federation of states):

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

There is also binding legislation at European level for specific areas, which also plays a part in determining the legal framework in Germany. In this sense, the control of so-called drug precursors, for example, is definitively regulated for all Member States by binding EC regulations, such that the GÜG today only has a supplementary function. Other EU rules also impact the legal framework in Germany, such as the Framework Decision of 25 October 2004 on minimum penalties in the area of illicit drug trafficking<sup>2</sup> or the Regulation on information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances of 15 November 2017<sup>3</sup>.

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<sup>2</sup> Council framework decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8 of 11 November 2004, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32004F0757&from=DE> [accessed: 10 Sep. 2020].

<sup>3</sup> Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances, OJ L 305/1 of 21 November 2017, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32017R2101&from=EN> [accessed: 7 Aug. 2020].

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

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

#### Narcotics law

The central piece of national legislation in the area of drug and addiction policy is the **BtMG**<sup>4</sup>, together with the ordinances issued on the basis of that Act. That Act implements the three UN Drug Control Conventions<sup>5</sup> into national law. The BtMG regulates the legal trade in narcotic drugs and contains in this respect primarily regulatory and administrative law. It also contains the central (criminal) sanctions for unlawful acts in connection with narcotics.

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

- narcotics not eligible for trade and non-prescribable narcotics: Schedule I, e.g. heroin, LSD, cannabis, psilocybin, MDMA (ecstasy);
- narcotics eligible for trade but non-prescribable: Schedule II, e.g. meprobamate, methamphetamine;
- narcotics eligible for trade and prescribable: Schedule III, e.g. morphine, methadone, amphetamine, codeine, dihydrocodeine, cocaine, cannabis (to the extent cultivation takes place for medicinal purposes under state control in accordance with the UN Single Convention on Narcotic Drugs, 1961).

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

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<sup>4</sup> Act on the trade in narcotic drugs (BtMG) of 28 July 1981, which came into force on 1 January 1982, current version 1 Mar. 1994, German Federal Law Gazette I p. 681, 1187: [http://www.gesetze-im-internet.de/btmg\\_1981/](http://www.gesetze-im-internet.de/btmg_1981/) [accessed: 7 Aug. 2020].

<sup>5</sup> Single Convention on Narcotic Drugs of 1954 as amended by the 1972 Protocol [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf); Convention on Psychotropic Substances of 1971 [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) [accessed: 7 Aug. 2020].

It regulates the manufacture, cultivation, bringing onto the market, trade, import and export of narcotic drugs. These activities require authorisation, which is granted by the German Federal Institute for Drugs and Medical Devices (Bundesinstitut für Arzneimittel und Medizinprodukte, BfArM) (Sec. 3 BtMG). For substances listed in Schedule I, authorisation can only be granted in exceptional cases for scientific purposes or other purposes in the public interest. Substances in Schedules II and III are subject to special rules governing their use, such as provisions governing the prescription of substances listed in Schedule III (Sec. 13 BtMG). The basis under narcotics law for substitution treatment is also established in this context. The details on prescribing narcotics are regulated in the **German Regulation on the Prescription of Narcotic Drugs** (Betäubungsmittel-Verschreibungsverordnung, BtMVV)<sup>6</sup> (see on this point section 1.1.4 below).

The BtMG also regulates the minimum requirements for setting up and operating drug consumption rooms (Sec. 10a BtMG). The details concerning these facilities must be specified by the individual *Laender* by way of legal ordinances. To date, seven *Laender* have issued legal ordinances on the operation of drug consumption rooms.<sup>7</sup>

The rules on legal domestic and foreign trade in narcotics (import and export) are specified in greater detail in the **German Ordinance concerning the Domestic Trade in Narcotics** (BtM-Binnenhandelsverordnung, BtM-BinnenhandelsVO)<sup>8</sup> and the **German Ordinance concerning the Foreign Trade in Narcotics** (BtM-Außenhandelsverordnung, BtM-AußenhandelsVO)<sup>9</sup>.

### Criminal provisions of the BtMG

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

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

Sec. 29, Sec. 29a and Sec. 30a BtMG set out the most important acts under threat of punishment in connection with narcotic drugs. Generally, every type of act in connection with narcotic drugs is prohibited and subject to punishment, whilst the statutory penalties vary

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<sup>6</sup> BtMVV: [http://www.gesetze-im-internet.de/btmvv\\_1998/BJNR008000998.html](http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html) [accessed: 7 Aug. 2020].

<sup>7</sup> North Rhine-Westphalia, Hamburg, Berlin, Lower Saxony, Hesse, Saarland, Baden-Württemberg. In total, there are currently 27 drug consumption rooms in Germany.

<sup>8</sup> BtM-BinnenhandelsVO: <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 7 Aug. 2020].

<sup>9</sup> BtM-AußenhandelsVO: <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 7 Aug. 2020].

greatly in terms of severity. These provisions primarily serve to combat narcotics crime and are aimed at criminal acts by both dealers and drug users. The system of criminal sanctions under the BtMG is presented in greater detail in section 1.1.2.

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

The general provisions of criminal law and criminal procedure also apply in relation to drug offences. In addition, the StGB<sup>10</sup> contains several provisions which specifically cover drug use and its consequences, such as drunk driving (being in charge of a vehicle under the influence of intoxicating substances (Sec. 316 StGB)), committing offences while intoxicated (Sec. 323a StGB), jeopardising a detoxification treatment (Sec. 323b StGB), referral to a detoxification facility (Sec. 64 StGB), driving ban (Sec. 69 (2) StGB).

### **1.1.2 The system of narcotics penalties (T1.1.2)**

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

#### **Classification of drug offences**

In the police crime statistics, drug offences are divided into three categories<sup>11</sup>: The term "**consumption-related offences**" defines general violations of the BtMG, which includes possession, acquisition and supply of narcotics and similar offences under Sec. 29 BtMG. The term "**dealing/trafficking offences**" encompasses offences of unlawful trade in and smuggling of narcotics as per Sec. 29 BtMG as well as offences involving the unlawful import of narcotics as per Sec. 30 (1) No. 4 BtMG. The remaining offences are described in the criminal statistics as "**other violations**"<sup>12</sup>. Under criminal law it is possible to differentiate, according to the severity of the offence, between "minor offences" (the basic offences as per Sec. 29 (1) BtMG) and "crimes" (qualified offences as per Sec. 29a, 30, 30a BtMG) and "regulatory offences" (Sec. 32 BtMG).

<sup>10</sup> StGB: <https://www.gesetze-im-internet.de/stgb/StGB.pdf> [accessed: 7 Aug. 2020].

<sup>11</sup> The police crime statistics (Polizeiliche Kriminalstatistik, 2019), German Federal Criminal Police Office (Bundeskriminalamt, BKA), [https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2019.pdf?\\_\\_blob=publicationFile&v=10](https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2019.pdf?__blob=publicationFile&v=10) [accessed: 7 Aug. 2020].

<sup>12</sup> "Other violations" are: Unlawful cultivation of narcotics (Sec. 29 (1) No. 1 BtMG), the cultivation of, manufacture of and dealing/trafficking in narcotics as a member of a gang (Sec. 30 (1) No. 1, Sec. 30a BtMG), making available financial means or similar assets (Sec. 29 (1) No. 13 BtMG), promotion of narcotics (Sec. 29 (1) No. 8 BtMG), supplying, administering or providing narcotics to minors (Sec. 29a (1) No. 1, and possibly Sec. 30 (1) No. 2 BtMG), negligently causing the death of another by supplying, administering or providing narcotics for direct use (Sec. 30 (1) No. 3 BtMG), prescription and administering by doctors in breach of Sec. 13 BtMG (Sec. 29 (1) No. 6 BtMG) and unlawful dealing/trafficking in or manufacturing, supplying, possessing narcotics in non-small quantities (Sec. 29a (1) No. 2 BtMG).



## Basic offences

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

## Increases in penalties

If an act in the scope of Sec. 29 (1) BtMG is committed for commercial purposes or endangers the health of multiple people, this is a particularly serious case punishable by a custodial sentence of at least one year (Sec. 29 (3) BtMG).

An additional increase of custodial sentence is implied by Sec. 29a BtMG: The custodial sentence increases to at least a year, in case the narcotic drug is handed to an adolescent or if the offences mentioned above were committed with a *not small amount* of the narcotic drug according to Sec. 29 BtMG.

In Sec. 30 (1) BtMG, the legislature has classified certain types of narcotics offences, such as gang offences, as particularly dangerous and abhorrent attacks on public health and stipulated a minimum sentence of not less than two years.<sup>13</sup> A minimum of five years imprisonment should be expected by anyone cultivating, manufacturing, importing and exporting and dealing/trafficking in "*non-small quantities*" of drugs while at the same time operating in a gang, inciting an under 18-year-old to deal in drugs or carrying a weapon while committing the act (Sec. 30a BtMG).

Over numerous decisions, the courts have set out threshold values for the "*non-small quantities*" within the meaning of the aforementioned provisions for different narcotic drugs. According to the case law of the German Federal Court of Justice (Bundesgerichtshof, BGH)<sup>14</sup> these threshold values are established on the basis of a multiple of the average consumption unit of a user not accustomed to its use. Reports from users of the substance as to their experience of its effects can be used as the basis for determining the consumption unit.

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<sup>13</sup> Körner, H. H., Patzak, J. & Volkmer, M. (2019). Betäubungsmittelgesetz: BtMG. Arzneimittelgesetz, Grundstoffüberwachungsgesetz, Betäubungsmittelverschreibungsverordnung, Neue-psychoaktive-Stoffe-Gesetz, Anti-Doping-Gesetz, 9. Auflage., C.H.Beck, München. § 30 marg. no. 1.

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

## Reductions in penalties

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

## Refraining from prosecution - Sec. 31a BtMG

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

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

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

Since criminal prosecution is a matter for the *Laender*, most of them<sup>15</sup> have issued judicial administrative provisions on "refraining from prosecution" according to Sec. 31a BtMG, which are binding on the public prosecutor's office of the respective *Land*. In its so-called "cannabis decision" of 9 March 1994<sup>16</sup>, the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) called upon the *Laender* to ensure "an essentially uniform practice for prosecutors regarding refraining from prosecution". Originally, considerable differences existed, both in the administrative provisions across the *Laender* and in the practice of the public prosecutors. For example, the definition of a small quantity of cannabis varied between 3 and 30 grams. A large-scale analysis of criminal prosecution practice in 2006 concluded that these differences were no longer in line with the call from the BVerfG for "an essentially uniform practice regarding refraining from prosecution" (Schäfer und Paoli, 2006). Following that, the *Laender* Justice Ministers harmonised their guidelines to a great extent at least in respect of the aspect of the "small quantity". Nevertheless, differences between the different *Land* provisions still exist, some of them considerable. An additional factor is that the state prosecutor offices involved have a certain degree of latitude in the application of the law - for example in the interpretation of the term "minor guilt" or "public

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<sup>15</sup> Only Mecklenburg-Western Pomerania has not passed specific guidelines in relation to Sec. 31a BtMG.

<sup>16</sup> BVerfGE 90. 145 et seqq.

interest in a criminal prosecution" - which in turn can lead to quite different decisions concerning refraining from prosecution.

### Small quantity

As the BtMG does not define the meaning of "small quantity" more closely, each *Land* has set a threshold for the "small quantity" in the case of cannabis. In contrast, only a few *Laender* have done so for other narcotics.

In the case of cannabis, the majority of *Laender* take 6 grams<sup>17</sup> as the threshold for a "small quantity", some *Laender* go up to 10 grams<sup>18</sup>, Berlin and Bermen even go up to 10-15 grams. However, the significance of the threshold is not the same everywhere: In some *Laender*, cases involving quantities up to that limit "should" be dropped<sup>19</sup>, in other *Laender*, they "can" be dropped. In some *Laender*, cases "can" be dropped above that level, in most, however, they may not be.

In the case of other narcotics, most *Land* provisions concerning the administration of justice do not stipulate any thresholds regarding refraining from prosecution<sup>20</sup>. It is either the case that other narcotic drugs are not mentioned at all or that the possibility of refraining from prosecution is generally excluded or only allowed in exceptional cases. Four *Laender* set quantity thresholds for other narcotic drugs in addition to those for cannabis: Bremen (heroin: 1 gram; cocaine: 1 gram; amphetamine: 1.6 grams, ecstasy: up to 3 tablets), Hamburg (heroin: 1 gram; cocaine: 1 gram, ecstasy: considerably below 10 tablets)<sup>21</sup>, North Rhine-Westphalia (heroin: 0.5 grams; cocaine: 0.5 grams; amphetamine: 0.5 grams)<sup>22</sup>, and Schleswig-Holstein (heroin: 1 gram; cocaine: 3 grams; amphetamine: 3 grams)<sup>23</sup>.

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<sup>17</sup> Baden-Württemberg, Bavaria, Brandenburg, Hamburg, Hesse, Mecklenburg-Western Pomerania, Lower Saxony, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, Körner/Patzak/Volkmer/Patzak, 9th edition 2019, BtMG § 31a marg. no. 43.

<sup>18</sup> Rhineland-Palatinate, North Rhine-Westphalia, Thuringia, Körner/Patzak/Volkmer/Patzak, 9th edition 2019, BtMG § 31a marg. no. 43.

<sup>19</sup> Baden-Württemberg, Bavaria, Berlin (up to 10g "should", up to 15g "can"), Rhineland-Palatinate, Brandenburg, Bremen, Hamburg, Hesse, Saarland (up to 6g "should", up to 10g "can"), Schleswig-Holstein, Thuringia.

<sup>20</sup> Körner/Patzak/Volkmer/Patzak, 9th edition 2019, BtMG § 31a marg. no. 44, 45.

<sup>21</sup> General order (allgemeine Verfügung) of the Department of the Interior (Behörde für Inneres) and the Department of Justice (Justizbehörde) on the application of Sec. 31a (1) BtMG: Justizbehörde AV No. 52/2010 of 22 November 2010:

<https://www.hamburg.de/contentblob/3838546/c9a3da385339247fa71b83acce544334/data/hmbjvbl-2011-01.pdf> [accessed: 6 Sep. 2020].

<sup>22</sup> Guidelines on the application of Sec. 31a (1) BtMG, Common Circular Order (gemeinsamer Runderlass) of the German Ministry of Justice (4630 - III. 7 "IMA") and of the Ministry for Internal and Municipal Affairs (42 - 62.15.01) of 19 May 2011 - Justice Ministry Gazette. NRW p. 106:

<http://www.jvv.nrw.de/anzeigeText.jsp?daten=969> [accessed: 6 Sep. 2020].

<sup>23</sup> Guidelines on the implementation of Sec. 31a BtMG - Gl.No. 4500.9 in General Order (Allgemeine Verfügung) of the Ministry for Justice, Employment and Europe (Ministeriums für Justiz, Arbeit und Europa) of 25 July 2006 – II 302/4061 – 75 c SH - Official Journal SH 2006, 679: <http://www.gesetze->

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

#### Minor guilt; public interest

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

Large differences exist between the regulations of the various *Laender* in relation to the treatment of repeat offenders: in most cases, prosecution may only be refrained from in the case of first time offenders or opportunistic offenders but not in the case of repeat offenders. At the same time, however, users suffering from dependence have sometimes been afforded exemptions<sup>24</sup>.

Some *Laender* have special provisions for young people: the rule is usually that in the case of adolescents and young adults to whom criminal law relating to young offenders applies, measures under the German Youth Courts Act (Jugendgerichtsgesetz, JGG)<sup>25</sup> take precedence over Sec. 31a BtMG. According to Sec. 45 JGG, the state prosecutor can refrain from prosecution, without the consent of the judge, if the offender's guilt can be seen as minor and there is no public interest in the prosecution. At the same time, the state prosecutor suggests the issuing of a warning or conditions by the youth court judge. Giving the JGG precedence is intended to take account of the principle of "education" in juvenile criminal law, with a view to the personality and development of young people.

Overall, it should be noted that differences in the enforcement of crimes under Sec. 31a BtMG by the different state prosecutors continue to exist, that these differences are due less to the varying thresholds for "small quantities" and more to their stipulation as minimum or maximum limits as well as to variations in the interpretation of the elements "minor guilt" and "public interest" (Schäfer und Paoli, 2006). There is no legal right to any case being dropped, even where an amount is below the threshold, because the state prosecutor can exercise discretion in respect of Sec. 31a BtMG.

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

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

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

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rechtsprechung.sh.juris.de/jportal/?quelle=jlink&query=vvsh-4500.9-0001&psml=bssshoprod.psml&max=true [accessed: 6 Sep. 2020].

<sup>24</sup> Lower Saxony, Saxony-Anhalt, Hamburg, Saarland, North Rhine-Westphalia.

<sup>25</sup> JGG: <https://www.gesetze-im-internet.de/jgg/BJNR007510953.html> [accessed: 7 Aug. 2020].

conditions, reduce the punishment or even waive it altogether if the offender cooperates with the judicial authorities (Sec 31 BtMG).

In youth court proceedings, the judge can halt proceedings if the requirements under Sec. 153 StPO<sup>26</sup> as well as some additional requirements are met (Sec. 47 JGG).

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

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

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

### **Alternatives to criminal sanctions**

In some *Laender*, prevention projects, such as the programme "Early Intervention in First-Offence Drug Consumers – FreD"<sup>27</sup> are used as a way of avoiding court proceedings. They represent a possibility for intervention without immediately initiating criminal proceedings. The programme is aimed at 14 to 18-year-olds but also at young adults up to 25 years old who have come to the attention of law enforcement for the first time due to their use of illicit drugs (vgl. Bartsch et al., 2018). The German nationwide pilot project FreD has been taken up at European level and further developed through the European cooperation project "FreD goes net". Today, the FreD idea has spread to many parts of Europe<sup>28</sup>.

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

In Germany, the principle of mandatory prosecution generally applies (Sec. 152 (2), Sec. 160 (1), Sec. 163 StPO) and not the discretionary principle. The police are therefore obliged to file a criminal complaint against any suspect and refer them to the respective public prosecutor, even in misdemeanors involving small quantities of drugs. This means that the latitude afforded to the police when dealing with suspected offenders is very tightly limited. In the case of possession of only a small quantity for personal use (user offence), the so-called simplified criminal complaint is applied in some *Laender*: this means that police action is limited, in general, to weighing the substance, seizing it, conducting a drug test and interviewing the suspect. The state prosecutor has a certain degree of discretion in the scope of Sec. 31a BtMG (discretionary principle) because they can refrain from prosecution under certain conditions.

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<sup>26</sup> Sec. 153 StPO: [https://www.gesetze-im-internet.de/stpo/\\_153.html](https://www.gesetze-im-internet.de/stpo/_153.html) [accessed: 7 Aug. 2020].

<sup>27</sup> [http://www.iwl.org/ks-download/downloads/fred/FreD\\_Broschuere\\_de.pdf](http://www.iwl.org/ks-download/downloads/fred/FreD_Broschuere_de.pdf) [accessed: 7 Aug. 2020].

<sup>28</sup> At the end of 2010, there were FreD projects in 15 European countries.

## Sentencing

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

Even though the BtMG generally does not differentiate between different types of narcotic, the type of intoxicant and how dangerous it is do have an independent significance in the scope of sentencing for a narcotics offence. For sentencing, there is a relevant graduation of so-called "hard" drugs like heroin, fentanyl, cocaine and crack, to "medium" drugs like amphetamine down to so-called "soft" drugs like cannabis<sup>29</sup>.

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

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

The NpSG<sup>30</sup> came into force on 26 November 2016. That Act was intended to combat the distribution of new psychoactive substances (NPS) and thus restrict their availability as substances for use and intoxication. The idea is thereby to protect the health of the population and of the individual, in particular adolescents and young adults, against the often incalculable and serious risks associated with the consumption of NPS.

The NpSG differentiates between prohibitions under administrative law and prohibitions under criminal law<sup>31</sup>: The Act contains a far-reaching administrative law ban on handling NPS (including purchase and possession), which creates the basis on which NPS may be seized and, where applicable, destroyed on the basis of the police laws, independent of any criminal proceedings. Moreover, it provides for the imposition of criminal penalties for acts which aim at the passing on of NPS, in particular trading in NPS, bringing them onto the market, administering NPS as well as the manufacture and introduction of NPS in the scope of the Act (imprisonment of up to three years or a fine). The penalty can be increased if the acts are committed for commercial purposes or in a gang, if the NPS are given to under 18s or if there is a danger to health (imprisonment of between one and ten years). Approved uses for commercial, industrial or scientific purposes are exempt from the ban (Sec. 3 (2)). The NpSG also does not apply to medicinal products and narcotic drugs (Sec. 1 (2)).

The criminal provisions in the Act are aimed in particular at manufacturers, dealers/traffickers and "persons bringing NPS onto the market" but not at consumers.

The NpSG follows a new innovative approach in that it does not list the substances individually (as is the case in the Schedules of the BtMG), rather it bans entire substance groups.

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<sup>29</sup> BGH decision of 15 June 2016, NStZ 2016,614-615.

<sup>30</sup> <https://www.gesetze-im-internet.de/npsg/> [accessed: 7 Aug. 2020].

<sup>31</sup> Klaus Weber, (2017) Kommentar, Einleitung zum NpSG, marg. no. 27.

Previously, emerging substances had to be added individually to the schedules of the BtMG in order for them to be controlled or banned. Due to the high number of emerging NPS and the relatively long period of time required by the banning procedures, it had become almost impossible to incorporate these substances into the BtMG in a timely manner, even if the new substances often represented only minor changes in chemical structure to the substances already scheduled under the BtMG. Thus, the appearance of a supposed "legality" could be exploited because the lack of a ban gave the false impression, especially to young users, that the substance was harmless. At the same time, the criminal provisions in the BtMG were being circumvented.

Consequently, there were gaps in regulation and in criminal liability which were then closed by the NpSG.

When the law came into force, the following two substance groups were initially included in the Schedule to the NpSG:

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

In the broadly defined group of 2-phenethylamine, around 2,000 substances are described which have a pharmacological effect and in the case of which, according to current knowledge, an abuse for intoxication purposes can be assumed<sup>32</sup>.

Due to the extent of abusive use of certain psychoactive substances and their effects, the schedule to the NpSG was expanded in 2019 by the following three substance groups:

- benzodiazepines,
- N-(2-aminocyclohexyl)amide derived compounds,
- tryptamine derived compounds.

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

A two-year research project funded by the German Federal Ministry of Health (Bundesministerium für Gesundheit, BMG) intended to assess the effects of the NpSG on users, the addiction support system and law enforcement authorities and the justice system as well as the market on a qualitative and quantitative basis (period from June 2017 to end of May 2019). In the scope of that project, primarily structured narrative interviews were carried out

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<sup>32</sup> Explanatory memorandum: Bundesrat Printed Paper 231/16 of 6 May 2016, p. 22, [https://www.bundesrat.de/SharedDocs/drucksachen/2016/0201-0300/231-16.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2016/0201-0300/231-16.pdf?__blob=publicationFile&v=1) [accessed: 7 Sep. 2020].

with NPS users, representatives of the addiction support system and law enforcement authorities or the justice system, as well as surveys in correctional institutions and by forensic medicine institutes and poison control centres. The aim of the project is to achieve the objectives of the Act and to make recommendations for indicators which will enable a long-term evaluation of the effectiveness of the Act. Additionally, findings from chemical toxicological analyses of cases of poisoning (patterns of use, possible interactions) can be used for the development of prevention measures. The study “evaluation of consequences due to the law to fight the spread of new psychoactive substances – EVA NpSG” provides evaluation of the impact of the NpSG on user, the market and different relevant agents, like addiction aid or law enforcement authorities. Additionally, the authors recommend indicators that may enable continuous monitoring of the impact of the law in the future.<sup>33</sup>

### **Further development of the NpSG and the Annexes to the MnSP and BtMG**

Depending on how the market develops, it may be appropriate to subject further categories of substances to the provisions of the NpSG and to extend or limit categories of substances. Likewise, particularly dangerous individual substances will continue to be subject to the BtMG. Therefore, the schedules of the NpSG and BtMG are regularly adapted in line with the current state of scientific knowledge by way of legal regulations, in order to counteract abusive use (see Sec. 7 NpSG and Sec. 1 (2) BtMG).

In addition to the aforementioned expansion of the substance groups in the schedule to the NpSG, eight further NPS were therefore added to Schedule II of the BtMG in 2019 (which contains narcotics eligible for trade but non-prescribable), of which two were synthetic cannabinoids and six were synthetic opioids.

In July 2020, two regulations came into force which led to the following changes to the schedules to the NpSG and BtMG:

- In the schedule to the NpSG, the side chain of compounds defined under 2.1.4 derived from indole, pyrazole and 4-quinolone, has been expanded by rewording paragraph (b) and adding (c) to cover more synthetic cannabinoids.
- The synthetic cannabinoid 5F-MDMB-PICA was added to Schedule II of the BtMG.
- In Schedule III, the existing exemption for solid dosage forms relating to the drug clobazam was expanded to include certain liquid forms. Schedule III of the BtMG contains narcotics eligible for trade. If an exemption situation exists, therefore, the narcotic in question is not one included in Schedule III of the BtMG.

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<sup>33</sup> The results of the project were published in a short version on <https://www.bundesgesundheitsministerium.de/service/publikationen/drogen-und-sucht/details.html?bmg%5Bpubid%5D=3478> [Last accessed: 27.10.2020].



Moreover, three further NPS were added to Schedule II of the BtMG in the Nineteenth Regulation on the Amendment of Schedules of the BtMG (19. Verordnung zur Änderung von Anlagen des BtMG) of 17 December 2019. This regulation serves as the national implementation of the decisions of the 62nd session of the Commission on Narcotic Drugs (CND) on 19 March 2019, which amended Schedule II of the United Nations Convention on Psychotropic Substances of 1971, and Schedule I of the United Nations Single Convention on Narcotic Drugs of 1961 by adding further NPS. Changes of the NpSG during 2020 can be found on 3.2.

#### **1.1.4 Drug related norms in other areas of the law (T1.1.4)**

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

- (a) Monitoring of trade in precursors
- (b) Drugs in road traffic
- (c) Framework conditions for addiction support

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

Another law related to the BtMG is the German Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG). The objective of precursor monitoring is to monitor the legal trade in certain chemical products (precursors), in order to prevent their being illegitimately diverted and used for the purpose of illegally manufacturing narcotics. Precursors are chemicals which are sold, sometimes in large quantities, in legal trade but which are also needed for the illegal manufacture of narcotic drugs. The original GÜG from 7 October 1994 regulated this area exhaustively and in great detail. In 2005, the European Union issued two regulations in which the monitoring of precursors was harmonised, i.e. regulated directly and equally bindingly for all EU Member States. Since then, the German GÜG merely supplements and provides additional precision in the area of administrative control and monitoring, namely in respect of the regulations on national competence, modifications of national administrative procedures and the design of certain monitoring measures<sup>34</sup>. In addition, it contains criminal provisions and provisions regarding fines, the regulation of which the EU left to the national legislatures.

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<sup>34</sup> The GÜG, Regulation 111/2005 (laying down rules for the monitoring of trade between the Community and third countries in drug precursors); 1277/2005 was repealed; [https://www.gesetze-im-internet.de/g\\_g\\_2008/BJNR030610008.html](https://www.gesetze-im-internet.de/g_g_2008/BJNR030610008.html) [accessed: 21 Aug. 2020].

The two EU regulations - the regulation on internal trade<sup>35</sup> and the regulation on external trade<sup>36</sup> - are based in turn on international law, namely the UN narcotic drugs convention of 1988<sup>37</sup>, which contains binding provisions on, among other things, which substances are subject to control as well as the numerous modalities of the control of the international trade in precursors. The narcotic drugs convention of 1988 defines 29 substances<sup>38</sup> which have to be controlled. The EU regulations divide these into four categories, which are subject to control measures of varying degrees of strictness.

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

The GÜG contains a series of provisions on criminal sanctions and fines which are aimed at preventing precursors being diverted for the illegal manufacture of narcotic drugs (Sec. 19, Sec. 20 GÜG) and which are closely based on the criminal provisions of the BtMG.

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

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

#### German Criminal Code (StGB)

Anyone who is in charge of a vehicle despite not being able to drive that vehicle safely, as a result of consuming alcoholic drinks or other intoxicating substances is considered to have committed a crime under Sec. 316 StGB (driving while drunk). The punishment is imprisonment of up to one year or a fine. Unfitness to drive exists if there are indications which prove an incapability of driving an automobile. This incapability could be deduced from the presence of physical or cognitive deficiencies or be based on the influence of drugs. If the driver has, in addition, endangered other persons or property of significant value (impairing the safety of road traffic), the sentence may be increased to up to 5 years (Sec. 315c StGB).

#### German Road Traffic Act (StVG)

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<sup>35</sup> Regulation (EC) No. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, OJ L 047 of 18 February 2004, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32004R0273&from=DE> [accessed: 7 Aug. 2020].

<sup>36</sup> Council Regulation (EC) No. 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, OJ L 22 of 26 January 2005, p.1, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005R0111:20050215:DE:PDF> [accessed: 7 Aug. 2020].

<sup>37</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf) [accessed: 7 Aug. 2020].

<sup>38</sup> Version October 2017, [https://www.bgbl.de/xaver/bgbl/start.xav?start=//%5B@attr\\_id=%27bgbl293s1136.pdf%27%5D#\\_\\_bgbl\\_\\_%2F%2F%5B%40attr\\_id%3D%27bgbl293s1136.pdf%27%5D\\_\\_1572443196069](https://www.bgbl.de/xaver/bgbl/start.xav?start=//%5B@attr_id=%27bgbl293s1136.pdf%27%5D#__bgbl__%2F%2F%5B%40attr_id%3D%27bgbl293s1136.pdf%27%5D__1572443196069) [accessed: 7 Aug. 2020].

A regulatory offence within the meaning of Sec. 24a (2) StVG<sup>39</sup> is deemed to be whenever someone consumes an "intoxicant" and then drives a vehicle in traffic while under its effects. The "intoxicating agents and substances" are listed in the Schedule to Sec. 24a StVG. As a regulatory offence, driving a vehicle under the influence of drugs can be punished with a fine of up to €3,000 (Sec. 24a (4) StVG). In addition to the fine, a driving ban is also usually imposed (Sec. 25 (1) second sentence StVG)<sup>40</sup>. The details on this are regulated in the German Driving Licence Ordinance (Fahrerlaubnis-Verordnung, FeV)<sup>41</sup>.

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

The German Federal Constitutional Court declared, in a decision on 21 December 2004<sup>42</sup>, the so-called "zero value limit" to be anti-constitutional and set a limit of 1 nanogram tetrahydrocannabinol (THC) per millilitre of blood (ng/ml). Since then, however, research has produced new findings as to the concentration of THC above which an impairment in ability can actually be expected. The Commission on Legal Limits (Grenzwertkommission), which advises the German Federal Ministry of Transport (Bundesverkehrsministerium) issued a new recommendation in 2015, according to which an impairment of the fitness to drive can only be assumed from a level of 3ng/ml and above<sup>43</sup>. However, case law has not followed this recommendation. Whilst the appeal courts could not agree as to whether an act constituting a regulatory offence within the meaning of Sec. 24a (2) and (3) StVG can be deemed to have occurred from an analytical threshold of 1.0 ng/ml THC concentration, the BGH has now decided that a regulatory offence could be considered even from a level of 1.0 ng/ml<sup>44</sup>. One must assume that tests could detect THC concentrations above that level even several days after the last use. In a study from the USA, several participants exceeded the threshold of 1 ng/ml up to 12 days after the last joint.

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<sup>39</sup> StVG in the version of 5 March 2003 (German Federal Law Gazette I p. 310, 919), last amended by the Act of 17 August 2017 (German Federal Law Gazette I p. 3202) <https://www.gesetze-im-internet.de/stvg/StVG.pdf> [accessed: 7 Aug. 2020].

<sup>40</sup> Körner/Patzak Kommentar zum BtMG, 9th edition, 2019, zu §§ 29 et seqq. BtMG marg. no. 423 (see III. Rechtsfolgen)

<sup>41</sup> Ordinance on the licensing of persons to drive in traffic of 13 December 2010 (German Federal Law Gazette I p. 1980), last amended by Ordinance of 3 May 2018 (German Federal Law Gazette I p. 566) [https://www.gesetze-im-internet.de/fev\\_2010/FeV.pdf](https://www.gesetze-im-internet.de/fev_2010/FeV.pdf) [accessed: 7 Aug. 2020].

<sup>42</sup> BVerfG, decision of 21 Dec. 2004 – 1 BvR 2652/03, [http://www.bverfg.de/e/rk20041221\\_1bvr265203.html](http://www.bverfg.de/e/rk20041221_1bvr265203.html) [accessed: 11 Aug. 2020]

<sup>43</sup> On fitness to drive while under the influence of cannabis. Threshold values and testing methods in Germany and the Netherlands, <https://www.bundestag.de/resource/blob/637902/597d53f5cf611ccbe0a0d1bd3197a624/WD-7-040-19-pdf-data.pdf> [accessed: 13 Aug. 2020].

<sup>44</sup> BGH, Decision of 14 Feb. 2017 – 4 StR 422/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2017&Sort=3&nr=77913&pos=3&anz=51> [accessed: 7 Aug. 2020].

Limits have also been set in case law for other narcotics<sup>45</sup> (amphetamine: 25 ng/ml; benzoylecgonine: 75 ng/ml; morphine: 10 ng/ml).

An act is deemed not to be a regulatory offence if the substance comes from the proper use of a prescribed medicine for a specific illness (Sec. 24a (2) third sentence StVG). Since the legal basis for the prescription of cannabis as a medicine came into force in March 2017<sup>46</sup> this exception has applied generally also for cannabis patients.

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

Under Sec. 2 (2) first sentence No. 3 StVG, applicants for a driving licence must be capable of, and meet the physical and mental requirements for, driving vehicles. The regular consumption of cannabis will generally rule out a fitness to drive. In case law, it has been clarified that regular consumption of cannabis in this sense means taking cannabis daily or almost daily for a period of at least half a year<sup>47</sup>.

The Standing Working Group on Evaluation Criteria (Ständige Arbeitsgruppe Beurteilungskriterien, StAB) of the German Society for Traffic Psychology (Deutsche Gesellschaft für Verkehrspsychologie, DGVP) and the German Society for Traffic Medicine (Deutsche Gesellschaft für Verkehrsmedizin, DGVM) created recommendations for action in relation to the evaluation of fitness to drive (version: August 2018)<sup>48</sup>. These recommendations attempt to resolve the conflict between the legitimate treatment option on the one side and the possibility of negatively impacting traffic safety on the other. As with the German Driving Licence Ordinance (Schedule 4 to Sec. 11, Sec. 13 and Sec. 14 FeV), the recommendations assume an unfitness to drive in the case of persons who regularly consume cannabis - even if prescribed by a doctor - and assume that fitness to drive can only be assumed in exceptional cases if no impairment of driving skills is present in a specific case and if there is a high probability that consumption and driving are kept separate. In some cases, a doctor's report or a medical-psychological report can be requested. The recommendations for action provide a

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<sup>45</sup> Case law references at Körner/Patzak BtMG 9th edition, 2019, before §§ 29 et seqq., 409-415 see d, aa, bb, cc, dd, ee.

<sup>46</sup> Act Amending Narcotics and Other Provisions (Gesetz zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften) of 6 March 2017, German Federal Law Gazette I 2017, p. 403; [https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D#\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D\\_\\_1572442083854](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D__1572442083854) [accessed: 7 Aug. 2020] and Lagodny, Münchner Kommentar zum StGB, Nebenstrafrecht I, BtMG before §§ 29 et seqq. marg. nos. 38-40.

<sup>47</sup> see BVerwG, judgment of 26 February 2009 - 3 C 1.08 - BVerwGE 133, 186.

<sup>48</sup> DGVP-DGVM: Handlungsempfehlung der Ständigen Arbeitsgruppe Beurteilungskriterien (StAB), revised version August 2018 [https://www.dgvp-verkehrspsychologie.de/wp-content/uploads/2018/08/Handlungsempfehlung-\\_Cannabismedikation\\_v2\\_Stand-15.08.2018.pdf](https://www.dgvp-verkehrspsychologie.de/wp-content/uploads/2018/08/Handlungsempfehlung-_Cannabismedikation_v2_Stand-15.08.2018.pdf) [accessed: 7 Aug. 2020].

large number of criteria for the evaluation of an individual case, whereby uncertainty remains as to how they are to be interpreted and applied<sup>49</sup>.

The 2018 German Conference on Traffic Law (Verkehrsgerichtstag) addressed this problem<sup>50</sup>.

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

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

The most important elements of the addiction support system are<sup>51</sup>:

- the prevention of drug use and early intervention,
- addiction and drug counselling,
- psychosocial care and help with education,
- low-threshold support and measures for harm reduction,
- addiction treatment, in particular
  - detoxification and withdrawal
  - pharmacotherapy
  - substitution treatment
  - outpatient/inpatient medical rehabilitation
  - aftercare
- occupational and social rehabilitation as well as employment support.

For these interventions, which in Germany are generally carried out by independent bodies and social institutions and are only carried out by government in exceptional cases (subsidiarity principle), a large number of different legal provisions apply. The addiction support system is

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<sup>49</sup> Pogarell u.a., Medizinisches Cannabis - eine praxisbezogene Hilfestellung. Bay. Akademie für Suchtfragen, version: 21 June 2018, [https://www.bas-muenchen.de/fileadmin/documents/pdf/Publikationen/Papiere/Med\\_Can\\_Hilfestellung\\_2106\\_2018.pdf](https://www.bas-muenchen.de/fileadmin/documents/pdf/Publikationen/Papiere/Med_Can_Hilfestellung_2106_2018.pdf) [accessed: 7 Aug. 2020].

<sup>50</sup> Craw, Cannabis und Fahreignung aus verkehrsmedizinischer Sicht, Neue Zeitschrift für Verkehrsrecht - NZV 2018, p. 18.

<sup>51</sup> Deutsche Hauptstelle für Suchtfragen (DHS) (2014): Suchthilfe und Versorgungssituation in Deutschland, <http://www.dhs.de/dhs-stellungnahmen/versorgungsstrukturen.html> [accessed: 7 Aug. 2020].

characterised by international agreements, national laws and ordinances but also by specialist norms, guidelines and standards.

At an international level, the United Nations narcotic drugs conventions<sup>52</sup> oblige the state to "take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved"<sup>53</sup>. As far as the reintegration of drug addicted persons is concerned, the 2006 United Nations Convention on the Rights of Persons with Disabilities<sup>54</sup> enshrines the right of disabled persons (whereby "disability" means any form of physical, mental, intellectual or sensory impairment) to full participation in all activities in society.

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

## Prevention

At the forefront of drug and addiction policy in Germany is the prevention of the use of addictive substances. On 25 July 2015, the German Act to Strengthen Health Promotion and Prevention (Prevention Act, Präventionsgesetz - PräVG)<sup>55</sup> came into force. Its aim was to improve the basis for cooperation between social insurance providers, the *Laender* and municipalities in the areas of prevention and health promotion for all age groups and in many areas of life. It also covers the prevention of use of addictive substances<sup>56</sup>. Addiction prevention targets three factors: increasing the age of first use, reducing harmful use and preventing the development of dependence. Preventive measures against substance use are, depending on the target group, classified into universal, selective and indicated approaches. Prevention programmes are carried out by many independent and state institutions at many different levels. The nationwide delivery of universal addiction prevention is, in particular, the responsibility of the Federal Centre for Health Education (Bundeszentrale für gesundheitliche Aufklärung, BZgA).

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<sup>52</sup> Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf); Convention on Psychotropic Substances of 1971 [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) [accessed: 7 Aug. 2020].

<sup>53</sup> Art. 38 of the Single Convention of 1961 and Art. 20 of the Convention on Psychotropic Substances of 1971.

<sup>54</sup> United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006: <http://www.un.org/Depts/german/uebereinkommen/ar61106-dbgbl.pdf> [accessed: 7 Aug. 2020].

<sup>55</sup> German Act to Strengthen Health Promotion and Prevention (Gesetz zur Stärkung der Gesundheitsförderung und der Prävention, Präventionsgesetz – PräVG): [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&start=//%255B@attr\\_id=%27bgbl115s1368.pdf%27%255D#\\_\\_bgbl\\_\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl115s1368.pdf%27%5D\\_\\_1572442905414](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%255B@attr_id=%27bgbl115s1368.pdf%27%255D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl115s1368.pdf%27%5D__1572442905414) [accessed: 7 Aug. 2020].

<sup>56</sup> Federal framework recommendations from the Prevention Conference 19 February 2016, pp. 14, 27: [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/P/Praevention/160219\\_Bundesrahmenempfehlungen\\_.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/P/Praevention/160219_Bundesrahmenempfehlungen_.pdf) [accessed: 7 Aug. 2020].

Research projects and pilot projects by the BMG enable the development, testing and evaluation of new approaches for selective and indicated measures<sup>57</sup>.

## Treatment

The legal framework for the funding of the prevention and treatment of addiction and drug dependence is determined by the German Codes of Social Law (Sozialgesetzbücher, SGB). "Addiction" is defined as a "chronic psychosocial illness and disability with psychiatric relevance and requiring treatment". Costs of detoxification treatment and substitution therapy are borne by the statutory health insurance providers according to the SGB, Volume 5 (SGB V)<sup>58</sup>. The funding agencies for the costs of withdrawal treatment are, according to the SGB, Volume 6, the pension insurance providers (SGB VI)<sup>59</sup>.

In accordance with the statutory benefits catalogue, statutory health insurance also covers access to treatment for addiction disorders<sup>60</sup>. However, this access is today impeded by the large number of different service providers and administrative hurdles - for example in the case of the transition of rehabilitation patients released from prison into health insurance protection (see Schneider et al., 2018)(vgl. Schneider et al., 2018)

## Substitution

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

Substitution treatment was legally approved in the 1990s by the BtMG. In 1998<sup>61</sup> and 2001<sup>62</sup>, very detailed provisions regarding substitution were incorporated into the BtMVV. These provisions stipulate, among other things, the objectives of substitution, the approved

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<sup>57</sup> BMG - Prävention des Suchtmittelkonsums (Prevention of use of addictive substances): <https://www.bundesgesundheitsministerium.de/ministerium/ressortforschung/krankheitsvermeidung-und-bekaempfung/drogen-und-sucht/praevention-des-suchtmittelkonsums.html> [accessed: 7 Aug. 2020].

<sup>58</sup> 5th Volume, German Code of Social Law - Statutory health insurance (SGB V) of 20 December 1988 (German Federal Law Gazette. I pp. 2477, 2482), last amended by the Act of 17 August 2017 (German Federal Law Gazette I p. 3214): [https://www.gesetze-im-internet.de/sgb\\_5/SGB\\_5.pdf](https://www.gesetze-im-internet.de/sgb_5/SGB_5.pdf) [accessed: 7 Aug. 2020].

<sup>59</sup> 6th Volume, German Code of Social Law - Statutory pension insurance (6. Buch Sozialgesetzbuch – Gesetzliche Rentenversicherung) - in the version of 19 February 2002, (German Federal Law Gazette I pp. 754, 1404, 3384), last amended by the Act of 17 July 2017 (German Federal Law Gazette I p. 2575): [https://dejure.org/BGBI/2002/BGBI.\\_I\\_S.\\_754](https://dejure.org/BGBI/2002/BGBI._I_S._754) [accessed: 7 Aug. 2020].

<sup>60</sup> Guidelines on the examination and treatment methods of SHI accredited medical professionals in the version of 18 June 2020, BAnz AT 21.07.2020 B1, <https://www.g-ba.de/richtlinien/7/> [accessed: 11 Aug. 2020]

<sup>61</sup> 10th Amending Regulation on Narcotic Drugs (10th BtMÄndV) of 20 January 1998, Federal Law Gazette I p. 74 [https://dejure.org/BGBI/1998/BGBI.\\_I\\_S.\\_74](https://dejure.org/BGBI/1998/BGBI._I_S._74) [accessed: 7 Aug. 2020].

<sup>62</sup> 15th Amending Regulation on Narcotic Drugs (15th BtMÄndV) of 19 June 2001, German Federal Law Gazette I p. 1180. [https://dejure.org/BGBI/2001/BGBI.\\_I\\_S.\\_1180](https://dejure.org/BGBI/2001/BGBI._I_S._1180) [accessed: 7 Aug. 2020].

substances and the indication or grounds for exclusion respectively. They require the proof of a specific qualification of the participating doctor. They also stipulate that medical substitution treatment must be accompanied by psychotherapeutic and social care. Finally, a substitution register was set up at the BfArM. All substitution treatments must be reported, in anonymised form, to that register (Sec. 5b BtMVV). As a rule, substitution drugs are taken orally with supervision. Under certain circumstances, the doctor can allow the patient to take the substitution drug home with them (so-called take-home prescription).

These statutory provisions were supplemented in 2001 by the "Guidelines of the BÄK on the delivery of substitution-based treatment of opioid addicts", which set out the generally recognised status of the findings of medical science for substitution treatment (Sec. 5 (12) BtMVV). Parallel to this, the Federal Committee of Doctors and Health Insurance Providers (Bundesausschuss (G-BA) der Ärzte und Krankenkassen) also issued guidelines for the assumption of costs in substitution treatment by the statutory health insurance providers<sup>63</sup>, which opens up access to treatment - under specific conditions - for all insured persons.

The "Third Amending Regulation of the German Regulation on the Prescription of Narcotic Drugs (Dritte Verordnung zur Änderung der Betäubungsmittel-Verschreibungsverordnung) (Substitution therapy for opioid addicts)

The Third Amending Regulation of the German Regulation on the Prescription of Narcotic Drugs (Dritte Verordnung zur Änderung der Betäubungsmittel-Verschreibungsverordnung) was announced on 29 May 2017. It regulates fundamental improvements in the substitution therapy of patients dependent on opioid abuse. On 6 September 2018, the Federal Joint Committee (Gemeinsamen Bundesausschuss, G-BA) passed a resolution to implement the new regulations of the BtMVV, taking into account the aforementioned BÄK Directive<sup>64</sup>. The G-BA resolution was changed once more on 22 November 2018 (reinstatement of the sampling regulation for quality assurance) and came into force on 7 December 2018. As a result, the changes in the SHI delivery of treatment for opioid addicts from the Third BtMVV became effective.

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<sup>63</sup> Federal Joint Committee: Guidelines on substitution-based treatment of opiate addicts of 28 October 2002 <https://www.kvvh.de/sites/default/files/rili-substitution.pdf> [accessed: 7 Aug. 2020].

<sup>64</sup> <https://www.g-ba.de/beschluesse/3472/>, Amendment to Schedule 1 No. 2 of G-BA Directive on the methods in contractual medical care (MVV Directive) for the substitution treatment of opioid addicts) [accessed: 7 Aug. 2020].



## 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 Federal Situation Report (Bundeslagebild) as well as the criminal prosecution statistics of the judicial authorities. However, there are different methods in the recording and classification of data in each case, and even in the type of differentiation used at the detail level. For example, the police statistics contain information regarding the type of substance, whereas the criminal prosecution statistics do not. This makes sequencing and comparative analyses more difficult.

The PKS<sup>65</sup>, in which all crimes known to the police by way of their own investigations or criminal complaints are recorded and registered, shows that in 2019 a total of 359,747 drug offences were recorded. 284,603 of those were general violations of the BtMG, 51,845 dealing/trafficking and smuggling offences under Sec. 29 BtMG, 1,530 cases of importing “non-small quantities” under Sec. 30 BtMG and 21,378 other violations of the BtMG.

Further prosecution data can be found in the Drug Market and Crime workbook (Schneider et al., 2020).

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

In 2017, for the first time the PKS included crimes under Sec. 4 NpSG in the total figure for narcotics offences. In 2019, 611 cases of NPS dealing/trafficking offences were recorded, which is an increase of +108.5%.

Within these offences, there is no way of differentiating between dealing/trafficking and manufacturing. Other than that, the statistics from the Federal Criminal Police Office (Bundeskriminalamt, BKA) or German Federal Statistical Office (Destatis) do not (yet) provide enough information points on which to assess the sentencing practice in connection with NPS.

### 1.2.3 Discussion (T1.2.3)

A commonly stated reason for the increase in drug crime is the fact that buying and selling via the internet makes drugs more readily available<sup>66</sup>. There are selling platforms, especially on the darknet, on which drugs of all types are offered for sale and often then sent by post to the purchaser. In 2019, a total of 3,263 narcotics offences were recorded in the PKS, with the internet being the instrument used, representing almost no change from the previous year

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<sup>65</sup> Report by the German Federal Ministry of the Interior, Building and Community on the PKS 2019 [https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/pks2019\\_node.html](https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/pks2019_node.html) [accessed: 7 Aug. 2020].

<sup>66</sup> Die Polizei - Das Präventionsportal: Zahlen zu Drogendelikten, <https://www.polizei-dein-partner.de/themen/sucht/drogen/detailansicht-drogen/artikel/zahlen-zu-drogendelikten.html> [accessed: 7 Aug. 2020].

(2018: 3,239). It is, however, assumed that there is a large number of unreported cases. The general increase in cultivation areas for heroin, cocaine and marijuana is also further proof of availability. The situation is similar for synthetic drugs. Previously, these were manufactured in small laboratories, whereas today manufacture takes place increasingly in professional facilities with extensive production capacity.

In 2019, a total of 284,927 suspected criminals were recorded for a narcotics offence. A particularly critical aspect is that the number of adolescents suspected of a drug offence increased by almost 4,000 to 34,495 people (2018: 30,640 criminal suspects). 14 to under-18 year-olds were most frequently accused of cannabis consumption, possession, manufacture, or dealing (29,661 suspected criminals). Recognising and recording hard drug users is difficult and incomplete, because it can be assumed that a criminal suspect's drug addiction is often not recognised. The proportion of offences committed by users of hard drugs should therefore likely be registered at a higher level than that statistically recorded - especially for theft and robbery offences. The development of registered narcotics offences strongly depends on how often customs and the police perform checks.

## 2 TRENDS (T2)

The most important changes to the legal framework since 2000 will be presented in the following. Not only criminal provisions but also legal provisions on the treatment of drug addicts and on harm reduction will be looked at.

### 2.1 Changes in criminal provisions (T2.1)

A fundamental change to the criminal provisions of the BtMG most recently took place in the 1990s, when new criminal offences were introduced into the BtMG, as well as an extension of the range of sentencing and high minimum penalties for cases of serious drug trafficking, through the Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG) of 1992<sup>67</sup> and the Act to Combat Crime (Verbrechensbekämpfungsgesetz) of 1994<sup>68</sup>. In 1992, Sec. 31a BtMG was created, which

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<sup>67</sup> Art. 2 of the German Act Combatting Illegal Narcotics Drugs Trafficking and Other Forms of Organised Crime (OrgKG) of 15 July 1992, German Federal Law Gazette I, p. 1302: [https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F\\*%5B%40attr\\_id%3D%27bgbl192s1302.pdf%27%5D#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl192s1302.pdf%27%5D\\_\\_1572446077295](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl192s1302.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl192s1302.pdf%27%5D__1572446077295) [accessed: 7 Aug. 2020].

<sup>68</sup> Art. 9 of the German Act to Combat Crime of 28 October 1994, Federal Law Gazette I, p. 3186, [https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F\\*%5B%40attr\\_id%3D%27bgbl194s3186.pdf%27%5D#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl194s3186.pdf%27%5D\\_\\_1572446164717](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl194s3186.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl194s3186.pdf%27%5D__1572446164717) [accessed: 7 Aug. 2020].

provided for the possibility of refraining from prosecution<sup>69</sup>. Since then, the central criminal provisions of the BtMG have remained largely unchanged<sup>70</sup>.

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

## 2.2 Legislation on treating drug addiction (still T2.1)

While the BtMG of 1981<sup>71</sup> originally primarily regulated the legal trade in narcotic drugs and sanctions for violations of these provisions, other elements were increasingly added as time went on, which had as their object the treatment of drug addicts, the medical use of narcotic drugs and harm reduction. At the political level, the 1992 "National plan to combat narcotics" ("Nationale Rauschgiftbekämpfungsplan") was superseded in 2003 by the "Action Plan for Drugs and Addiction" ("Aktionsplan Drogen und Sucht"), which was based on a balanced approach and which, in addition to the areas of "prevention", "counselling/treatment" and "repression/reduction of supply", recognised for the first time "survival support/harm reduction" as the fourth pillar of drug policy. The expired action plan was superseded in 2012 by the "National Strategy on Drug and Addiction Policy"<sup>72</sup> but this did not introduce any new legal trends.

The German Narcotic Drugs Act introduced the regulation on needle exchange as far back as 1994 (Sec. 29 (1) second sentence BtMG), the goal of which was harm reduction (see section 1.1.4 above). The regulation of drug consumption rooms followed in 2001, in Sec. 10a BtMG (see section 1.1.4 above), with the same legislative objective.

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

The NpSG, introduced in 2016, and its extensions, as well as the "Cannabis as Medicine" Act, introduced in 2017, are also important legislative amendments of recent years (see section 3.2).

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<sup>69</sup> On these changes in detail: Harald H. Körner, Die Strafrechtspraxis im Labyrinth neuer Betäubungsmittelrechtsbestimmungen, NJW 1993, pp. 233-239.

<sup>70</sup> Overview of all amendments to the BtMG in Lagodny, Münchner Kommentar zum StGB, Nebenstrafrecht I, BtMG before §§ 1 et seqq. BtMG, marg. no. 50.

<sup>71</sup> BtMG of 28 July 1981, Federal Law Gazette I pp. 681, 1187, which came into force on 1 January 1982 [https://www.gesetze-im-internet.de/btmg\\_1981/BJNR106810981.html](https://www.gesetze-im-internet.de/btmg_1981/BJNR106810981.html) [accessed: 7 Aug. 2020].

<sup>72</sup> The Federal Government Commissioner on Narcotic Drugs: [https://www.drogenbeauftragte.de/fileadmin/dateien-dba/Drogenbeauftragte/2\\_Themen/1\\_Drogenpolitik/Nationale\\_Strategie\\_Druckfassung-Dt.pdf](https://www.drogenbeauftragte.de/fileadmin/dateien-dba/Drogenbeauftragte/2_Themen/1_Drogenpolitik/Nationale_Strategie_Druckfassung-Dt.pdf) [accessed: 7 Aug. 2020].

## 2.3 Changes in implementation (T2.2)

There have been no readily apparent long-term changes in criminal law practice over the last two decades. The development of the application of Sec. 31a BtMG in practice (refraining from prosecution in cases of personal use of small amounts) has already been reported on above (see section 1.1.2).

Of note is the trend in traffic accidents involving people under the influence of drugs or intoxicants (excluding alcohol). While the number of road traffic accidents overall has significantly fallen since 2000 (2000: 382,949 accidents with 7,503 deaths; 2018: 308,553 accidents with 3,270 deaths; 2019: 300,143 accidents with 3,046 deaths), the number of accidents involving persons under the influence of drugs has more than doubled (1999: 880 accidents; 2019: 2,386 accidents)<sup>73</sup>.

The "Cannabis as Medicine" Act of 2017 has affected case law practice in two ways:

- (a) Prior to that, an exemption was required under Sec. 3 BtMG in order to obtain or cultivate cannabis for therapeutic purposes, which was issued by the BfArM. Under the case law of the German Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) prior to the law change<sup>74</sup> there was a "public interest" in supplying individual severely ill patients with cannabis, if this enabled symptoms to be cured or alleviated and the person affected had no equally effective therapy alternative available and affordable to them. As the acquisition and use of cannabis as a medicine must now follow the rules of the new act, there is no longer scope to issue an exemption under Sec. 3 BtMG, hence such actions are now rejected by the administrative courts.
- (b) The question of cannabis patients' fitness to drive increasingly occupies the courts. Above all, the question as to whether and to what extent patients who are being treated with cannabis can rely on the exemption in Sec. 24a (2) third sentence StVG, which stipulates that taking a prescribed medicine as intended cannot be a regulatory offence within the meaning of subsection 1 of that section. The problem was also discussed at the 2018 German Conference on Traffic Law (Graw, 2018). This led to a call for the German Driving Licence Ordinance to be revised. In addition, the view was taken that a user of cannabis should who comes to the attention of authorities for the first time when in charge of a vehicle should not immediately be regarded as unfit to drive a vehicle. Instead, there may be questions as to their fitness to drive which the driver can allay by means of a medical-psychological examination (MPU). Furthermore, it was considered that a lack of "separation ability" should not be assumed from as low as 1ng/ml THC in blood serum: this should only be the case as of a THC value of 3ng/ml. A medical indication, above all the prescription of cannabis flowers, can also raise legitimate doubts as to the fitness to drive under the influence of cannabis. Thus, fitness

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<sup>73</sup> Statistisches Bundesamt, Time series, 2019 No. 6.

<sup>74</sup> BVerwG, judgment of 19 May 2005 - 3 C 17.04.

to drive must also be assessed in that case, whereby the assessment can only be carried out by a qualified doctor. The doctor must inform the patient of and assist them in all aspects of the impairment of their fitness to drive and of their driving safety<sup>75</sup>. In April 2019 the federal constitutional court made the decision that a single violation against the separation law will not result in suspension of the driving licence but a ruling of MPU<sup>76</sup>.

- (c) The GSAV, which came into force on 16 August 2019, contributes to the de-bureaucratisation of the prescription of cannabis for medicinal use under Sec. 31(6) SGB V. In the case of an adjustment of the dosage or a change in the type of flower following authorisation, no renewed application to the health insurance provider is necessary. If a service under Sec. 31(1) first sentence SGB V is prescribed by an SHI doctor in the scope of discharge management or directly following treatment in an inpatient hospital facility, a decision on the application for approval must be issued within three days of submission.

The implementation of the rules on substitution treatment led to a situation whereby in the early years after reporting became obligatory, the number of registered substitution patients continuously increased (from 46,000 patients in 2002 to 77,400 patients in 2010). The number has remained at a comparably high level since 2011 and was at 79,700 patients on 1 July 2019<sup>77</sup>(Tönsmeise et al., 2020).

### 3 NEW DEVELOPMENTS (T3)

#### 3.1 Amended provisions and laws as a result of COVID-19

On 22 April 2020, the German SARS-CoV-2-Ordinance on the Supply of Medicinal Products (SARS-CoV-2-Arzneimittelversorgungsordnung) came into force. The ordinance intends to guarantee the supply of necessary medicinal drugs, narcotics and substitution medication during the SARS-CoV-2 epidemic. The ordinance expires when the German federal parliament repeals the declaration of the national epidemic state, but latest on 31 March 2021. This includes, among other things, amendments to and derogations from the BtMG and the BtMVV,

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<sup>75</sup> GDV – the German insurers. What the working groups at the 56 Traffic Conference called for. Cannabis use and fitness to drive. <https://www.gdv.de/resource/blob/30308/9c445568c01d731815416e63fe986af6/56--verkehrsgerichtstag-2018---empfehlungen-arbeitskreis-v---download-data.pdf> [accessed: 7 Aug. 2020].

<sup>76</sup> BVerwG, Judgement on 11 April 2019 – 3 C 25-17

<sup>77</sup> BfArM, Report on the substitution register (Bericht zum Substitutionsregister), January 2020 [https://www.bfarm.de/SharedDocs/Downloads/DE/Bundesopiumstelle/SubstitReg/Subst\\_Bericht2020.pdf?\\_\\_blob=publicationFile&v=2](https://www.bfarm.de/SharedDocs/Downloads/DE/Bundesopiumstelle/SubstitReg/Subst_Bericht2020.pdf?__blob=publicationFile&v=2) [accessed: 7 Aug. 2020].

in Sec. 5 and Sec. 6. The provisions of the ordinance seek to protect the population by reducing the risk of infection while also ensuring treatment and preventing relapses.<sup>78</sup>

- (a) Due to the expected high demand for narcotics, especially in the case of ventilation capacities in intensive care and in order to counteract bottlenecks in supply, Sec. 5 of the ordinance enables the relaxation of Sec. 3 BtMG, thus facilitating the trade in narcotics between pharmacies under Schedule III.
- (b) Sec. 6 contains exceptions to the BtMVV which seek to secure vital treatments and protect against relapses and economic compulsive crime while still reducing the risk of infection with SARS-CoV-2 through reduced contacts. The paragraph allows consultants to treat more than the stipulated ten patients per doctor with substitution medication. Among other things, the upper limit of the amount prescribed has been increased to enable a supply for a period of up to seven days. The maximum number of prescriptions for substitution medication has also been increased, to four per week. Under the new ordinance, prescriptions may now also be dispensed without personal consultation and by replacement staff.

### 3.2 Changed laws in 2020 (T3.1)

In July 2020, important changes to the schedules to the NpSG and BtMG came into force, general information on the NpSG can be found at 1.1.3. Updating the schedules in line with the current state of knowledge enables more effective legal action to be taken against the distribution and availability of new psychoactive substances (NPS). In addition, the legal adjustment in line with the current state of knowledge enables access to important medicinal drugs. To this end, the schedules to the NpSG and the BtMG have been adjusted in line with the current state of knowledge. In July 2020 two regulations came into force that resulted in the following changes in the NpSG and the BtMG:

- In the Schedule of the NpSG letter b has been updated and letter c has been extended in line with the current state of knowledge by expanding the side chain of compounds derived from indole, pyrazole and 4-quinolone defined under number 2.1.4 of the Schedule to the NpSG<sup>79</sup>.
- The synthetic cannabinoid 5F-MDMB-PICA was added to Schedule II of the BtMG

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<sup>78</sup> BMG, SARS-CoV-2-Arzneimittelversorgungsverordnung, April 2020: <https://www.bundesgesundheitsministerium.de/service/gesetze-und-verordnungen/guv-19-lp/sars-cov-2-arzneimittelversorgungs-vo.html> [accessed: 7 Aug. 2020].

<sup>79</sup> Bundesrat Printed Paper 270/20 of 20 May 2020, [https://www.bundesrat.de/SharedDocs/drucksachen/2020/0201-0300/272-20.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2020/0201-0300/272-20.pdf?__blob=publicationFile&v=1) [accessed: 8 Aug. 2020].

- Schedule III of the BtMG has been extended regarding the pharmaceutical form of the drug Clobazam, adding a liquid form in addition to the solid form. Schedule III of the BtMG includes negotiable and prescribable narcotic drugs. In exceptional cases, it is not considered a narcotic drug according to Schedule III of the BtMG.

### 3.3 Evaluation (T3.3)

The report of the evaluation of the NpSG was published mid-October. (cf. above 1.1.3) The accompanying data collection which is taking place in the context of the German "Cannabis as Medicine" Act is described above (see section 1.1.4 above). An evaluation of the reform to narcotics law regarding substitution is currently being implemented.

### 3.4 Political discussions (T3.4)

#### Debate on the legalisation of cannabis

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

On 5 December 2017, the FDP parliamentary party tabled a "minor request" on the "controlled supply of cannabis"<sup>80</sup>, which the German Federal Government responded to on 21 December 2017<sup>81</sup>. In its response, the German Federal Government rejected the legalisation of the use of cannabis for enjoyment purposes on the grounds of the protection of the health of the population.

At the beginning of 2018, a motion by the FDP ("Cannabis pilot projects"), a motion by Die Linken ("Allow possession of cannabis for personal use") and a draft bill from Bündnis 90/Die Grünen ("Cannabis Control Act", "Cannabiskontrollgesetz") were presented to the Bundestag for debate.

In its motion<sup>82</sup>, the FDP advocated enabling pilot projects for free cannabis use. It called on the German Federal Government to create the basis for approving pilot projects for the controlled supply of cannabis as a stimulant. It suggests that previous applicants should be actively supported. This motion was rejected by the Bundestag<sup>83</sup>.

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<sup>80</sup> BT-Printed Paper 19/181 of 5 Dec. 2017, <http://dip21.bundestag.de/dip21/btd/19/001/1900181.pdf> [accessed: 7 Aug. 2020].

<sup>81</sup> BT-Printed Paper 19/310 of 21 December 2017, <http://dip21.bundestag.de/dip21/btd/19/003/1900310.pdf> [accessed: 7 Aug. 2020].

<sup>82</sup> BT-Printed Paper 19/515 of 24 Jan. 2018, <http://dip21.bundestag.de/dip21/btd/19/005/1900515.pdf> [accessed: 6 Sep. 2020].

<sup>83</sup> BT-Printed Paper 19/13099 of 10 Sep. 2019, <http://dip21.bundestag.de/dip21/btd/19/130/1913099.pdf> [accessed: 7 Aug. 2020].

In its motion<sup>84</sup>, the FDP advocated enabling pilot projects for free cannabis use. It called on the German Federal Government to create the basis for approving pilot projects for the controlled supply of cannabis as a stimulant. It suggests that previous applicants should be actively supported. This motion was also rejected by the German Federal Government<sup>85</sup>.

The draft bill from Die Grünen<sup>86</sup> proposes exempting cannabis from the criminal provisions of the BtMG and instead creating a strictly controlled legal market for cannabis. Under the draft bill, the entire supply chain for cannabis from cultivation, to wholesale, to import/export and retail would be regulated. Sale to minors would have to be banned and this ban effectively monitored. The Bundestag decision on this motion is still pending.

All of the motions were debated in the plenary of the German Bundestag on 22 February 2018. On 27 June 2018, a public hearing on these motions was held in the Committee for Health in the German Bundestag. In that hearing, it was evident that the legalisation and controlled supply of cannabis for intoxication purposes is still a very controversial topic among experts and is rejected by many with regards to the potential for harm to health<sup>87</sup>.

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<sup>84</sup> BT-Printed Paper 19/515 of 24 January 2018, <http://dip21.bundestag.de/dip21/btd/19/005/1900515.pdf> [accessed: 7 Aug. 2020].

<sup>85</sup> BT-Printed Paper 19/13099 of 10 Sep. 2019, <http://dip21.bundestag.de/dip21/btd/19/130/1913099.pdf> [accessed: 7 Aug. 2020].

<sup>86</sup> BT-Printed Paper 19/819 of 20 February 2018, <http://dip21.bundestag.de/dip21/btd/19/008/1900819.pdf> [accessed: 7 Aug. 2020].

<sup>87</sup> Report on the public hearing, see Deutsche Bundestag, Documents <https://www.bundestag.de/dokumente/textarchiv/2018/kw26-pa-gesundheit-cannabis/558286> [accessed: 7 Aug. 2020].



## 4 SOURCES AND METHODOLOGY (T5)

### 4.1 Sources (T5.1)

#### 4.1.1 Relevant legislation

##### International Conventions

- Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol. Available: [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) [accessed: 7 Aug. 2020].
- Convention on Psychotropic Substances of 1971. Available: [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf) [accessed: 7 Aug. 2020].
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Available: [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf) [accessed: 7 Aug. 2020].
- Convention of the United Nations on the rights of persons with disabilities of 13 December 2006. Available: <http://www.un.org/Depts/german/uebereinkommen/ar61106-dbgbl.pdf> [accessed: 12.08.2020].

##### European regulations

###### Drug precursors:

- Regulation (EC) No. 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, OJ L 22/1 of 26 January 2005. Available: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:022:0001:0010:DE:PDF> [accessed: 7 Aug. 2020].
- Regulation (EC) Nr. 273/2004 of 11 February 2004 amending drug precursors, ABI. L 47/1. Available: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/customs/customs\\_controls/drugs\\_precursors/drug\\_precursors/consolidated\\_version\\_273\\_de.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_controls/drugs_precursors/drug_precursors/consolidated_version_273_de.pdf) [accessed: 7 Aug. 2020].
- Regulation (EU) No 1258/2013 of the European Parliament and of the Council of 20 November 2013 amending Regulation (EC) No 273/2004 on drug precursors, OJ L 330/21. Available: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:L:2013:330:FULL&from=DE> [accessed: 7 Aug. 2020].
- Regulation (EU) No 1259/2013 of the European Parliament and of the Council of 20 November 2013 amending Council Regulation (EC) No 111/2005 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, OJ L 330/30. Available: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:L:2013:330:FULL&from=DE> [accessed: 7 Aug. 2020].

### Criminal law:

- Framework decision 2004/757/JI of the Council of 25 October 2004 amending minimum regulations on elements of offence of criminal acts and penalties on acts of illegal drug trafficking, ABl. L 335/8 of 11 November 2004. Available: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32004F0757&from=DE> [accessed: 07.08.2020].

### New Psychoactive Substances:

- Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHAOJ. Available: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32017L2103&from=EN> [accessed: 7 Aug. 2020].
- Regulation (EU) 2017/2101 of the European parliament and of the Council of 15 November 2017 amending Council Regulation (EC) No 1920/2006 laying down rules for the information exchange about psychoactive substances and the early warning system and the risk assessment process for new psychoactive substances, ABl. L 305/1 of 21 November 2017. Available: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32017R2101&from=EN> [accessed: 07.08.2020].

## National legislation

### Narcotics law:

- Act on the trade in narcotic drugs (German Narcotic Drugs Act, Betäubungsmittelgesetz - BtMG) of 28 Aug. 1981, last amended 1 March 1994 (German Federal Law Gazette I p. 681, 1187). Available: [http://www.gesetze-im-internet.de/btmg\\_1981/](http://www.gesetze-im-internet.de/btmg_1981/) [accessed: 7 Aug. 2020].
- Regulation on the Prescription of Narcotic Drugs (BtMVV) of 20 January 1998 (German Federal Law Gazette I p. 74, 80), last amended by the Regulation of 2 July 2018 (German Federal Law Gazette I p. 1078). Available: [http://www.gesetze-im-internet.de/btmvv\\_1998/BJNR008000998.html](http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html) [accessed: 7 Aug. 2020].
- Ordinance concerning the Domestic Trade in Narcotics (BtMBinHV) of 16 December 1981 (German Federal Law Gazette I p. 1425), last amended by the Regulation of 17 August 2011 (German Federal Law Gazette I p. 1754). Available: <https://www.gesetze-im-internet.de/btmbinhv/BJNR014250981.html> [accessed: 7 Aug. 2020].
- Ordinance concerning the Foreign Trade in Narcotics (BtMAHV) of 16 December 1981 (German Federal Law Gazette I p. 1420), last amended by the Act of 6 March 2017 (German Federal Law Gazette I p. 403). Available: <https://www.gesetze-im-internet.de/btmahv/BJNR014200981.html> [accessed: 7 Aug. 2020].
- Act Amending Narcotics and Other Provisions (Gesetz zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften) of 6 March 2017, German Federal Law Gazette I 2017, p. 403. Available:

[https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D#\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl117s0403.pdf%27%5D\\_1536573907398](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D_1536573907398) [accessed: 7 Aug. 2020].

- Act Monitoring the Trade in Precursors that can be Misused for the Unlawful Manufacture of Narcotic Drugs (GÜG) of 11 March 2008 (German Federal Law Gazette I p. 306), last amended by the Act of 13 April 2017 (German Federal Law Gazette I p. 872). Available: [http://www.gesetze-im-internet.de/g\\_g\\_2008/G%3C%9CG.pdf](http://www.gesetze-im-internet.de/g_g_2008/G%3C%9CG.pdf) [accessed: 7 Aug. 2020].
- Act on New Psychoactive Substances (Neue-psychoaktive-Stoffe-Gesetz (NpSG)) of 21 November 2016 (German Federal Law Gazette I p. 2615), last amended 13 April 2017 (German Federal Law Gazette I p. 872). Available: [https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr\\_id%3D%27bgbl116s2615.pdf%27%5D#\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl116s2615.pdf%27%5D\\_1572526995119](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl116s2615.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl116s2615.pdf%27%5D_1572526995119) [accessed: 7 Aug. 2020].
- Act Monitoring the Trade in Precursors that can be Misused for the Unlawful Manufacture of Narcotic Drugs (GÜG) of 11 March 2008 (German Federal Law Gazette I p. 306), last amended by the Act of 13 April 2017 (German Federal Law Gazette I p. 872). Available: [http://www.gesetze-im-internet.de/g\\_g\\_2008/G%3C%9CG.pdf](http://www.gesetze-im-internet.de/g_g_2008/G%3C%9CG.pdf) [accessed: 7 Aug. 2020].

#### Social law/health law:

- Act enforcing health promotion and prevention (Präventionsgesetz PräVG) of 17 July 2015 (German Federal Law Gazette I p. 1368). Available: [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&start=/\\*%255B@attr\\_id=%27bgbl115s1368.pdf%27%255D#\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl115s1368.pdf%27%5D\\_1572527272405](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=/*%255B@attr_id=%27bgbl115s1368.pdf%27%255D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl115s1368.pdf%27%5D_1572527272405) [accessed: 07 .2020].
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- 8th Volume, German Code of Social Law - Child and Youth Welfare (SGB VIII) as published on 11 September 2012 (German Federal Law Gazette I, p. 2022), last amended by Act of 30 October 2017 (German Federal Law Gazette. I p. 3618). Available: [https://www.gesetze-im-internet.de/sgb\\_8/SGB\\_8.pdf](https://www.gesetze-im-internet.de/sgb_8/SGB_8.pdf) [accessed: 7 Aug. 2020].
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