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for Drugs and Drug Addiction



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### **Workbook Legal Framework**

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## 0 Summary (T0)

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

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

The primary legal process in Germany regarding so-called "legal highs" and new psychoactive substances (NPS) currently consists of adding substances to Schedules I and II of the BtMG in the scope of the Amending Regulation on Narcotic Drugs (BtMÄndV). Alongside the active inclusion of individual substances, there is the option, as practised, for example, in Great Britain, of subjecting entire categories of substances to the narcotics legislation. In light of the mandatory provisions of the German Constitution (principle of specificity), rules from other states cannot be adopted as they stand. Furthermore, new psychoactive substances are constantly created which cannot be attributed to a particular

substance group and thus still need to be individually recorded (Information from the German Federal Government, Bundesrat Printed Paper 525/13<sup>1</sup>).

There is presently a lively debate amongst specialists in the field surrounding how best to deal with new psychoactive substances. There is broad agreement that the expansion of Schedules I and II of the German Narcotic Drugs Act is a necessary but inadequate step to protect users against the possible health risks and consequences of use and to prevent the commercial trade.

A comprehensive debate amongst experts and also in wider society deals with the question of the extent to which a new approach is required on how to deal with cannabis from a political and criminal law perspective. Numerous scientific conferences, political hearings and expert discussions have dealt with this topic in detail.

## **1 National Profile (T1)**

### **1.1 Legal framework (T1.1)**

#### **1.1.1 Relevant legislation and national framework for implementation (T1.1.1)**

The German Narcotic Drugs Act (BtMG) as the basic legal instrument regulating the state response to drug related offences in Germany, provides for a variety of sanctions according to the severity and type of the act ranging from fines to custodial sentences.

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

Other legal provisions concerning drug related offences include the German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV), the Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG) and the German Medicinal Products Act (Arzneimittelgesetz, AMG).

#### **The German Narcotic Drugs Act (BtMG)**

The German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG) as well as the legal regulations enacted on the basis of the BtMG, such as the German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittelverschreibungs-Veordnung, BtMVV), contain the essential rules on how to deal with psychoactive substances. It takes into account the three UN-conventions on narcotic drugs.

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<sup>1</sup> <http://www.bundesrat.de/bv.html?id=0525-13> (last accessed: 29 Oct. 2015).

Substances that are deemed to be narcotic drugs in terms of the German Narcotic Drugs Act are listed in three schedules encompassing all substances mentioned in the international conventions on narcotic drugs:

- Schedule I: narcotics not eligible for trade and non-prescribable narcotics (e.g. MDMA, heroin, psilocybin)
- Schedule II: narcotics eligible for trade but not prescribable (e.g. meprobamate, methamphetamine)
- Schedule III: narcotics eligible for trade and for prescription (e.g. amphetamine, codeine, dihydrocodeine, cocaine, methadone, morphine and opium).

Pursuant to Schedule III the prescription of narcotics as part of a medical therapy is subject to the special regulations within the German Regulation on the Prescription of Narcotic Drugs and requires, for example, the use of special prescription forms.

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

### **German Codes of Social Law (SGB)**

The German Code of Social Law (SGB) defines the framework for the financing of drug dependence therapy. The costs of drug dependence therapy (rehabilitation) are mainly borne by the pension insurance funds (SGB VI). Physical withdrawal (detoxification) and substitution therapy are paid for by the statutory health insurance providers (SGB V). Other funding organs are the local or supra-local social welfare providers (SGB XII) and municipalities as agencies for youth welfare (SGB VIII).

With the fusion of unemployment benefit and social benefit in 2005 (“Hartz IV”), the German social law codes (in particular SGB II and SGB III) have become even more important for people with drug problems. With the central goal of the reform being to better help people find work, efforts should also be undertaken to address more intensively the removal of obstacles to entering employment. In this context, drug dependence represents a particularly problematic obstacle and should therefore be part of the support provided. According to the German Code of Social Law, Volume 2 (SGB II), the employment agencies or working groups formed between municipalities and employment agencies, as well as the so-called “opting municipalities”, are responsible for granting support.

## Other Laws

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

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

### 1.1.2 Implementation and application of the legal framework (T1.1.2)

In Germany, the mere consumption of narcotic drugs is not subject to sanctions. However, the purchase and possession that normally precede the act of consumption are punishable, since they are associated with the danger of the further spread of drugs. There are various possibilities within the German Narcotic Drugs Act to refrain from prosecution, such as for the possession of small amounts of drugs for personal use. Important criteria for such a decision are the amount and type of drugs, endangering others, personal history, previous convictions and public interest in prosecution. When a sentence is handed down, the main principle governing addicted users who have committed a crime is the so-called “treatment not punishment”: this allows the courts to refrain from enforcing any final sentence under the condition that the narcotics dependent criminal undergoes treatment (Sec. 35 BtMG). It is also possible to defer the enforcement of imprisonment by up to 2 years to provide addicts with a chance to undergo therapy (Sec. 56 StGB).

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

Table 1 gives a simplified illustration of the relevant violations in dealing with illicit drugs, as well as options for action at police, public prosecutor and court levels.

Table 1 Overview of the procedural options for various offences

Types of offence	Procedural method		
	... at police level	... at public prosecutor level	... at court level
<b>Personal possession</b>	<ul style="list-style-type: none"> <li>• Simplified criminal complaint / Initiation of preliminary investigation</li> <li>• Complaint / Initiation of preliminary investigation (common practice)</li> </ul>	<ul style="list-style-type: none"> <li>• Case dismissal with/without consent of the court</li> <li>• Case dismissal with conditions/instructions with/without consent of the court</li> <li>• Refraining from criminal prosecution (section 31a German Narcotic Drugs Act)</li> <li>• Refraining from prosecution under juvenile law (diversion provisions: adolescents and young adults)</li> <li>• Refraining from initiation of public prosecution with consent of the court (Sec. 37 BtMG)</li> <li>• Application for a summary punishment order at court</li> <li>• Initiation of Public Prosecution</li> </ul>	<ul style="list-style-type: none"> <li>• Case dismissal with consent of the public prosecutor</li> <li>• Case dismissal with conditions/instructions with consent of the prosecutor</li> <li>• Refraining from prosecution with consent of the public prosecutor (Sec. 31a German Narcotic Drugs Act)</li> <li>• Acquittal</li> <li>• Summary punishment order</li> <li>• Imposition of fines or custodial sentences</li> <li>• Release on probation</li> <li>• Referral to detoxification facility / for therapy</li> </ul>
<b>Cultivation, production and/or commercial trafficking</b>	<ul style="list-style-type: none"> <li>• Complaint / Initiation of preliminary investigation</li> <li>• (Preliminary) arrest</li> </ul>	<ul style="list-style-type: none"> <li>• Case dismissal with/without consent of the court</li> <li>• Case dismissal with conditions/instructions with/without consent of the court</li> <li>• Refraining from initiation of public prosecution with consent of the court (Sec. 37 BtMG)</li> <li>• Application for arrest warrant</li> <li>• Application for a summary punishment order</li> <li>• Initiation of Public Prosecution</li> </ul>	<ul style="list-style-type: none"> <li>• Case dismissal with consent of the public prosecutor</li> <li>• Case dismissal with conditions/instructions with consent of the prosecutor</li> <li>• Issue of arrest warrant</li> <li>• Acquittal</li> <li>• Summary punishment order</li> <li>• Imposition of fines or custodial sentences</li> <li>• Imposition of custodial (and pecuniary) sentences</li> <li>• Release on probation</li> <li>• Referral to detoxification facility / for therapy</li> </ul>
<b>Driving whilst under the influence of drugs</b>	<ul style="list-style-type: none"> <li>• <u>In the case of regulatory offence:</u></li> <li>• Caution</li> <li>• Initiation of administrative fine proceedings</li> <li>• Fine of up to 1,500 Euro</li> <li>• Driving ban (1-3 months)</li> <li>• <u>In the case of criminal offence:</u></li> <li>• Initiation of judicial proceedings</li> </ul>	<ul style="list-style-type: none"> <li>• <u>In the case of criminal offence:</u></li> <li>• Case dismissal with/without consent of the court</li> <li>• Request for summary punishment order</li> <li>• Initiation of Public Prosecution</li> </ul>	<ul style="list-style-type: none"> <li>• Case dismissal with consent of the public prosecutor</li> <li>• Acquittal</li> <li>• Summary punishment order</li> <li>• Imposition of fines or custodial sentences</li> <li>• Release on probation</li> <li>• Referral to detoxification facility / for therapy</li> <li>• Imposition of driving ban</li> <li>• (Provisional) driving ban (6 months to 5 years or lifetime)</li> </ul>

Section 31a of the German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG) provides for the possibility to refrain from prosecution of narcotics use offences under certain

circumstances, namely when the offender has cultivated, produced, imported, exported, bought or received and otherwise possessed narcotic substances in small amounts exclusively for personal use and when his guilt is deemed as minor, as well as there being no public interest in prosecution. This provides the public prosecutor with an instrument to halt proceedings for consumption-related offences without court approval. All Federal Laender have introduced more detail as to the application of section 31a BtMG through recommendations or general guidelines. A few years ago there were still considerable differences between the Laender but in recent years these have become smaller. Some divergence in the regulations of the Laender does however persist (c.f. Körner at al. 2012; Schäfer & Paoli 2006).

### **Threshold values for “small amounts” of cannabis and other substances**

Almost all Laender have introduced comparable threshold values for “small amounts” (upper/lower limit) of cannabis. The limits set by the individual Laender are guideline values from which public prosecutors and judges may deviate in individual cases. It is important to note that even though these regulations exist there is no legal right in the relevant cases of possession of small quantities of drugs, that these will not be prosecuted. If no criminal prosecution is pursued, this does not automatically mean that the crime has no consequences. Public prosecutors have the option to halt proceedings with the imposition of certain conditions (e.g. community service, fines or counselling in a social institution).

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

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

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

### **Personal possession or use**

Personal possession of illicit drugs is punishable irrespective of the type and amount of the drug. Due to the applied legality principle (Sec. 152, (2), Sec. 160 (1), Sec. 163 German Code of Criminal Procedure, [Strafprozessordnung, StPO]), the police is obliged to file a criminal complaint against any suspect and to refer it to the respective prosecutor, even in cases of small quantities of drugs. This means that the discretionary power of the police when dealing with suspected offenders is limited. Possession of only a small amount for personal use is considered a consumption-related offence and the police approach is limited in some Laender in general to the weight and seizure of the substance, the performance of a drug test and interviewing the suspect (so-called simplified complaint). There are considerable differences in the handling of consumption-related offences (possession of small quantities for personal use - especially of cannabis) across the various Laender (EMCDDA 2002; Schäfer & Paoli 2006). In recent years there seems to be a greater harmonisation by the Laender regarding the definitions of threshold values up to which the prosecutor may refrain from further prosecution. 14 Laender have already introduced a threshold of 6g (upper/lower limit).

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

In order to combat open drug scenes, the police and the responsible administrative authorities based on federal police legislation can ban individuals from certain areas as well as impose restraining orders on the participants attracted to such scenes.

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

The BtMG does not differentiate between different types of drugs meaning that under narcotics law proceedings related to usage offences can be dropped without consulting the courts for all types of drugs. However, in practice this option is mainly utilised in connection with cannabis cases (EMCDDA 2015).

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

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

It is possible to halt prosecution of crimes committed by adolescents and young adults, who fall under criminal law relating to young offenders or to discontinue proceedings in respect of the Youth Courts Law (JGG, Sec. 45 and Sec. 47). This is often the case where small quantities of cannabis up to 6 grams are involved.

In general, acquittals are very rare, especially in the cases of illegal possession of drugs. For consumption-related offences, though, a dismissal of the proceedings can be considered also at the court stage (§§ 31a (2) BtMG). Refraining from prosecution with or without conditions is provided for in Sec. 153 (2) and Sec. 153a (2) German Code of Criminal Procedure in cases of minor guilt and lack of public interest to prosecute. According to Sec. 29 (5) BtMG, the court also has the power to refrain from imposing punishment if the quantity is not significant and for personal use.

A repeat offence or illegal possession of a larger quantity than what is defined as a small amount (see above) is generally sanctioned according to Sec. 29 BtMG with imprisonment of up to five years or a fine.

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

In some Laender, local prevention projects, such as the widespread programme "Early Intervention in First-Offence Drug Users – FreD" are used as a way of avoiding court proceedings.<sup>2</sup> They also represent a possibility to intervene without initiating criminal proceedings immediately. The programme addresses 14 to 18 year-olds but also young adults up to 25 years old who have come to the attention of the police for the first time due to their use of illicit drugs. The FreD project, which was born out of a voluntary support service for drug users who had come to the attention of the police for the first time, was continued in many Laender after the conclusion of the pilot phase. Today, after 15 years, there are approximately 120 project locations nationwide. The project has met with a high level of acceptance amongst decision makers and practitioners but also amongst the target group. The service aimed especially at younger users, which consists of an "intake conversation" and a course, is designed to help prevent a possible dependence and a slide into criminality.

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<sup>2</sup> <http://www.lwl.org/FreD> (last accessed: 29 Oct. 2015).

### **Production, dealing or trafficking**

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

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

The legal framework for punishments in these particularly serious cases, such as in cases involving minors, consists of between 1 and 15 years imprisonment. However, in the cases of convicted addicts who are willing to undergo treatment for their addiction, the enforcement of the sentence could be deferred provided the remaining sentence is less than 2 years (the principle of “treatment not punishment”) (EMCDDA 2015). In many cases, cash and/or profits are also confiscated.

### **Driving whilst under the influence of drugs**

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

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

Unlike alcohol, as yet no judicially recognised minimum threshold quantity for illicit drugs has been defined. This means that, in principle, even the slightest dosage can be punished with a fine (Böllinger & Quensel 2002). However, according to a Supreme Court decision, a THC-content of below 1.0 ng/ml in the blood does not constitute an acute impairment of the fitness to drive (case no. BvR 2652/03 of 21 Dec. 2004; also: Judgement of the Federal Administrative Court (Bundesverwaltungsgerichts, BVerwG) of 23 Oct. 2014; file ref. 3 C 3.13). Moreover, according to a decision of the German Federal Constitutional Court

(Bundesverfassungsgericht, 8 July 2002), the driving licence authorities are allowed to withdraw the offender/suspect's driving licence only if there are concrete reasons to suspect that the respective individual is not reliably willing or able to separate cannabis consumption from active participation in road traffic (Schedule 4, to Sec. 11, Sec. 13 and Sec. 14 FeV35 – No. 9.2.2).

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

German legislation provides for a dual sanction approach to punishment regarding driving under the influence of psychoactive substances. If the case is considered a regulatory offence, the available sanctions range from a caution, to initiation of fine proceedings of an amount up to 1,500 Euro, to a driving ban. When the case is classified as a criminal offence, it is referred to the public prosecutor.

Anyone who is in charge of a vehicle despite not being able safely to drive that vehicle as a result of the intake of alcoholic drinks or other intoxicating substances, will, if a court case ensues, be punished with imprisonment of up to one year (Sec. 316 StGB). If the driver has in addition endangered other persons or valuable property, the sentence may be increased by up to 5 years (Section 315c StGB). Unfitness to drive exists, if evidence is available which proves the unsuitability to drive an automobile. This unfitness can be proved by the presence of physical or mental defects or by establishing that a person is driving a vehicle under the influence of drugs. The criminal court can also order a temporary driving ban or revoke the driving licence with a blocking period. After a minimum time has elapsed a new driving licence can be granted after passing an exhaustive medical-psychological test, the costs of which to be borne by the traffic offender (Böllinger & Quensel 2002).

Moreover, driving under the influence of drugs could be classified as a regulatory offence and thus can be punished with a fine taking into account the seriousness of the crime and the financial situation of the traffic offender (Sec. 24a (2) of the Road Traffic Act [Strassenverkehrsgesetz, StVG]). Another option for regulatory offences is for the offender to receive a three month driving ban.

### **1.1.3 Controlling so called "new psychoactive substances" (NPS) (T1.1.3)**

In the past, when dealing with so-called "new psychoactive substances" (NPS) the German Medicinal Products Act (AMG) was often utilised. In the scope of a decision of the Court of Justice of the European Union (CJEU) in July 2014, it was clarified, however, that the German Medicinal Products Act could not be used in itself to prohibit dealing in so-called "legal highs". The primary statutory approach in Germany regarding so-called "legal highs" and new psychoactive substances (NPS) therefore currently consists of adding substances

to Schedules I and II of the BtMG in the scope of the Amending Regulation on Narcotic Drugs (BtMÄndV).

Accordingly, the 28th Amending Regulation on Narcotic Drugs (Bundesrat Printed Paper 490/14 of 15 December 2014) added 32 NPS, which were primarily synthetic cannabinoids and cathinone, to the German Narcotic Drugs Act. In May 2015, a further nine substances were added in the scope of an amendment regulation to the BtMG (Bundesrat Printed Paper 135/15 of 22 May 2015).

Alongside the active inclusion of individual substances, there is the option, as practised, for example, in Great Britain, of subjecting entire categories of substances to the narcotics legislation.

In this context, some substance classes such as cathinone are more homogenous in their chemical structure and thus relatively simple to record in their variants whilst other substances, for example cannabinoids, are an extremely heterogeneous class. The possibility of using substance groups is currently being analysed by the German Federal Ministry of Health. However, such a process poses high scientific and constitutional law challenges.

In particular, the specificity requirement for criminal laws as per Art. 103 (2) German Constitution (Grundgesetz, GG) and the principle of the rule of law as per Art. 20 (3) GG. Threatened punishments must be necessary and reasonable, even in the case of a regulation of substance groups which would cover numerous different substances and thus also substances which do not have or do not with sufficient probability have psychoactive and harmful effects.

In light of the mandatory provisions of the German Constitution, rules from other states cannot be adopted as they stand. Furthermore, new psychoactive substances are constantly created which cannot be attributed to a particular substance group and thus still need to be individually recorded (Information from the German Federal Government, Bundesrat Printed Paper 525/13<sup>3</sup>).

## **1.2 Implementation of legislative framework**

### **1.2.1 Data for law enforcement practice in the context of illicit drugs (T1.2.1)**

The main data sources regarding drug criminality and the respective responses in Germany are the Police Crime Statistics (Polizeiliche Kriminalstatistik, PKS), the data network Drugs Data File (Falldatei Rauschgift, FDR) as well as the Criminal Prosecution Statistics of the judiciary. All aforementioned data sources are available on a nationwide as well as a Land level. Although a variety of data is collected at different levels within the justice system, the various statistics are not interlinked. The main obstacles in sequencing and comparative analysis are the different methods of data recording and classification, but also in the differentiation in the level of the detail collected (Paoli 2008). By way of illustration, the police

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<sup>3</sup> <http://www.bundesrat.de/bv.html?id=0525-13> (last accessed: 29 Oct. 2015).

statistics contain information also on the substance type, whereas the prosecution statistics do not.

An overview of the most important statistics can be found in a selected issue chapter of the REITOX Report 2008, prepared by the DBDD in the scope of the annual report for the EMCDDA available for download at [www.dbdd.de](http://www.dbdd.de).

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

### **1.2.2 Data for law enforcement practice in the context of NPS (T1.2.2)**

The German Federal Government Drug and Addiction Report as well as the well-known statistics from, for example, the Federal Criminal Police Office or the German Federal Statistical Office do not offer any evidence on which to assess the law enforcement practice in connection with NPS here. The combination of the federal structure of Germany, the fact that the German Narcotic Drugs Act does not include any statutory differentiation by how dangerous individual drugs are, the in part unclear legal situation regarding newly emerging NPS and the lack of any possibility to identify with certainty such data in the relevant statistics, means that no summarising assessment of law enforcement practice can currently be made.

### **1.2.3 Discussion (T1.2.3)**

It is currently very complex to bring new psychoactive substances (NPS) within the German Narcotic Drugs Act whilst there remains practically no change to the legal status of the "old" drug. As such, there is a race between constantly emerging new variations of a substance and their regulation under narcotics law. In order to reduce the availability of high risk NPS for users on an EU level, the EU Commission presented, in September 2013, legislative proposals for a quicker, effective and more proportionate approach. These will be discussed in the EU Parliament and in the Council. The German Federal Government is contributing to the process of finding as effective a regulation as possible which is capable of reacting more effectively to the cross-border phenomenon of NPS across the EU.

The German Federal Ministry of Health (BMG), in consultation with the other relevant federal ministries and taking into account the current state of scientific knowledge, is currently developing methods for solving the problem of how NPS can be combated through legal measures more effectively in future. The objective in this respect is to prevent, better than so far possible, the distribution, availability and thus the harmful use of NPS, the ingredients of which are not declared and which are associated with incalculable risks to health.

## 2 Trends (T2)

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

### 2.2 Changes in implementation (T2.2)

Since its introduction in 1971, the German Narcotic Drugs Act has been modified and amended several times in order better to suit the changing framework conditions. Essential amendments to the German Narcotic Drugs Act include

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

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

With the “Act on Diamorphine-assisted Substitution Therapy” (Gesetz zur diamorphingestützten Substitutionsbehandlung), which came into effect on 21 July 2009, the legal preconditions were created for a transfer of the diamorphine-assisted therapy from the German national pilot project into regular care by amending the Narcotic Drugs Act (BtMG), the Medicinal Products Act (AMG) and the Regulation on the Prescription of Narcotic Drugs (BtMVV). The Act stipulates primarily that diamorphine (pharmaceutically produced heroin, provided it is approved as a finished medicinal product for substitution purposes under pharmaceuticals law) is eligible for prescription and sale - under strict conditions - for the

substitution treatment of the most heavily dependent opioid addicts (c.f. REITOX Reports 2007 and 2008).

With a series of amending regulations (Amending Regulation on Narcotic Drugs, BtMÄndV), numerous substances have in recent years been brought under the control of the German Narcotic Drugs Act (BtMG) which accompany the growing availability, attractiveness and role of so-called NPS. This does not represent a change in strategy on how to deal with these new substances, rather the criminalisation is extended to how to deal with new substances. This approach seems only to be suited to achieving the limitation of availability and reduction of use, as intended by the legislator, when in combination with other measures.

### **3 New developments (T3)**

#### **3.1 Amended regulations and laws (T3.1)**

##### **28th Amending Regulation on Narcotic Drugs (28th BtMÄndV)**

*Documents:* All relevant documents (basic printed paper, committee recommendations and decision paper) are available on the homepage of the German Bundesrat (upper house)<sup>4</sup>.

*Content/comments:* With the 28th Amending Regulation on Narcotic Drugs (BtMÄndV), as of 13 December 2014, the schedules of the German Narcotic Drugs Act were adjusted to suit the current state of scientific knowledge. 32 new psychoactive substances were included in Schedules I and II of the German Narcotic Drugs Act (BtMG). They were synthetic cannabinoids and synthetic derivatives of cathinone and amphetamine. For lisdexamfetamine dimesylate, used for the treatment of ADHD, a maximum prescribed quantity of 2,100 mg was defined.

In cases where the patient has been given written instructions for use, the narcotics prescriptions will in future no longer need to have "as per written instruction" stated expressis verbis on them. The reference to written instructions for use will suffice, without any specific rule as to how that reference must be worded on the narcotics prescription.

Pharmacies, which perform the delivery of the prescriptions for the emergency services as well as the half-yearly checks of the narcotics stocks, no longer have to be registered with the responsible Land authority.

In addition, the regulations on the substitution register are modified to take into account the changed requirements for practical application as well as data protection. This affects in particular the registration procedure for the doctors' association (Ärztekammer) in respect of doctor's addiction treatment qualification.

##### **29th Amending Regulation on Narcotic Drugs (29th BtMÄndV)**

*Documents:* All relevant documents (basic printed paper, committee recommendations and decision paper) are available on the homepage of the German Bundesrat (upper house)<sup>5</sup>.

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<sup>4</sup> <http://www.bundesrat.de/bv.html?id=0490-14> (last accessed: 29 Oct. 2015).

*Content/comments:* With the 29th Amending Regulation on Narcotic Drugs (BtMÄndV), as of 22 May 2015, the schedules of the German Narcotic Drugs Act were adjusted to suit the current state of scientific knowledge. Nine new substances were included in Schedule II of the German Narcotic Drugs Act (BtMG). These were specifically seven synthetic cannabinoids and two other psychoactive substances.

**Note:** The summaries of the aforementioned "Contents/Comments" were taken from the homepage of the German Federal Opium Agency at the German Federal Institute for Medicines and Medicinal Products (BgArM), which contains an overview of relevant changes to narcotics legislation categorised by year<sup>6</sup>.

### **3.2 Changes in implementation of legal regulations and laws (T3.2)**

No current additional information is available on this.

### **3.3 Evaluation (T3.3)**

No current information is available on this.

### **3.4 Political discussions (T3.4)**

As in previous years, an increasingly intensive discussion is taking place concerning a fair approach to new psychoactive substances. There is broad agreement that the expansion of Schedules I and II of the German Narcotic Drugs Act is a necessary but inadequate step to protect users against the possible health risks and consequences of use and to prevent the commercial trade.

Furthermore, the huge increase in use of methamphetamine in some regions has presented some Laender with considerable challenges. The German Federal Ministry of Health (BMG) supports the Laender in this respect, in particular by initiating pilot programmes which are intended primarily to lead to usable results in prevention and care.

## **4 Additional information (T4)**

### **4.1 Additional sources of information (T4.1)**

No current information is available on this.

### **4.2 Optional: Further aspects (T4.2)**

No additional information will be reported on this.

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<sup>5</sup> <http://www.bundesrat.de/bv.html?id=0135-15> (last accessed: 29 Oct. 2015).

<sup>6</sup> [http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/\\_node.html](http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/_node.html) (last accessed: 29 Oct. 2015).

## 5 Notes and queries (T5)

### 5.1 Cannabis legislation (T5.1)

A comprehensive debate amongst experts and also in wider society deals with the question of the extent to which a new approach is required on how to deal with cannabis from a political and criminal law perspective. Numerous scientific conferences, political hearings and expert discussions have dealt with this topic in detail. In this context, a draft of a cannabis control act was presented to the German Bundestag by the Parliamentary Group of BÜNDNIS90/DIE GRÜNEN on 20 March 2015, which referred to the relevant committees for consultation<sup>7</sup>.

## 6 Sources and methodology (T6)

### 6.1 Sources (T6.1)

#### Relevant laws

- German Medicinal Products Act (Arzneimittelgesetz, AMG)<sup>8</sup>
- German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Änderungsverordnung, BtMÄndV)<sup>9</sup>
- The German Narcotic Drugs Act (Betäubungsmittelgesetz, BtMG)<sup>10</sup>
- German Regulation on the Prescription of Narcotic Drugs (Betäubungsmittel-Verschreibungsverordnung, BtMVV)<sup>11</sup>
- Driving Licence Regulation (Fahrerlaubnisverordnung, FeV)<sup>12</sup>
- Act on diamorphine-assisted substitution therapy<sup>13</sup>
- German Constitution (Grundgesetz, GG)<sup>14</sup>
- Precursors Monitoring Act (Grundstoffüberwachungsgesetz, GÜG)<sup>15</sup>
- Youth Courts Law (Jugendgerichtsgesetz, JGG)<sup>16</sup>

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<sup>7</sup> <http://dipbt.bundestag.de/doc/btd/18/042/1804204.pdf> (last accessed: 29 Oct. 2015).

<sup>8</sup> [http://www.gesetze-im-internet.de/amg\\_1976/](http://www.gesetze-im-internet.de/amg_1976/) (last accessed: 29 Oct. 2015).

<sup>9</sup> [http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/\\_node.html](http://www.bfarm.de/DE/Bundesopiumstelle/Betaeubungsmittel/_node.html) (last accessed: 29 Oct. 2015).

<sup>10</sup> [http://www.gesetze-im-internet.de/btmg\\_1981/](http://www.gesetze-im-internet.de/btmg_1981/) (last accessed: 29 Oct. 2015).

<sup>11</sup> [http://www.gesetze-im-internet.de/btmvv\\_1998/BJNR008000998.html](http://www.gesetze-im-internet.de/btmvv_1998/BJNR008000998.html) (last accessed: 29 Oct. 2015).

<sup>12</sup> [http://www.gesetze-im-internet.de/fev\\_2010/](http://www.gesetze-im-internet.de/fev_2010/) (last accessed: 29 Oct. 2015).

<sup>13</sup> [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl109s1801.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl109s1801.pdf) (last accessed: 29 Oct. 2015).

<sup>14</sup> <http://www.gesetze-im-internet.de/gg/> (last accessed: 29 Oct. 2015).

<sup>15</sup> [http://www.gesetze-im-internet.de/g\\_g\\_2008/](http://www.gesetze-im-internet.de/g_g_2008/) (last accessed: 29 Oct. 2015).

<sup>16</sup> <http://www.gesetze-im-internet.de/jgg/> (last accessed: 29 Oct. 2015).

- Act to Combat Organised Crime (Gesetz zur Bekämpfung der Organisierten Kriminalität, OrgKG)<sup>17</sup>
- German Code of Social Law: SGB V<sup>18</sup> (statutory health insurers), SGB VI<sup>19</sup> (pension insurance funds), SGB VIII<sup>20</sup> (youth welfare), SGB XII<sup>21</sup> (social welfare providers)
- Criminal Code (Strafgesetzbuch, StGB)<sup>22</sup>
- Road Traffic Act (Straßenverkehrsgesetz, StVG)<sup>23</sup>
- Road Traffic Regulation (Straßenverkehrsordnung, StVO)<sup>24</sup>
- Act to Combat Crime (Verbrechensbekämpfungsgesetz, VerbrBekG)<sup>25</sup>

## 6.2 Methodology (T6.2)

The methodology of the individually listed studies is described in detail in the respective publications (see point 7 bibliography for information on sources).

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<sup>17</sup> [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl192s1302.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl192s1302.pdf) (last accessed: 29 Oct. 2015).

<sup>18</sup> [http://www.gesetze-im-internet.de/sgb\\_5/](http://www.gesetze-im-internet.de/sgb_5/) (last accessed: 29 Oct. 2015).

<sup>19</sup> [http://www.gesetze-im-internet.de/sgb\\_6/](http://www.gesetze-im-internet.de/sgb_6/) (last accessed: 29 Oct. 2015).

<sup>20</sup> [http://www.gesetze-im-internet.de/sgb\\_8/](http://www.gesetze-im-internet.de/sgb_8/) (last accessed: 29 Oct. 2015).

<sup>21</sup> [http://www.gesetze-im-internet.de/sgb\\_12/](http://www.gesetze-im-internet.de/sgb_12/) (last accessed: 29 Oct. 2015).

<sup>22</sup> <http://www.gesetze-im-internet.de/stgb/> (last accessed: 29 Oct. 2015).

<sup>23</sup> <http://www.gesetze-im-internet.de/stvg/> (last accessed: 29 Oct. 2015).

<sup>24</sup> [http://www.gesetze-im-internet.de/stvo\\_2013/](http://www.gesetze-im-internet.de/stvo_2013/) (last accessed: 29 Oct. 2015).

<sup>25</sup> [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl194s3186.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl194s3186.pdf) (last accessed: 29 Oct. 2015).

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## 8 Tables

Table 1 Overview of the procedural options for various offences .....	8
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