The act against doping in sport in practice – An evaluation

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References

1. All paragraphs without further specification refer to the act against doping in sport (AntiDopG).
2. The occasional use of the generic masculine is due to the readability of the study and includes persons of all genders.

A. Fundamentals of the study*

I. Background and objectives of the evaluation

The "Act to Combat Doping in Sport" (AntiDopG) of 10 December 2015 is intended to protect the integrity of sport, the fairness and equal opportunities in competition and the health of athletes by making users of doping substances and doping methods as well as perpetrators of various forms of preparation liable to prosecution (cf. section 1 AntiDopG[1]). The AntiDopG is expected to provide a "negative counter-incentive" to compensate for the "doping affinity" that goes hand in hand with the growing commercialisation of sport.[2] In addition to this deterrent effect, the punitive prohibitions of the AntiDopG are also said to have a general preventive effect: They are supposed to contribute to anchoring the prohibition of doping, especially self-doping, in social ethics more strongly and more deeply than before. This is intended to support the efforts of sports associations which – unlike the State – lack important means to enforce the doping ban.[3]

In the opinion of the legislature, the rules that were in force until December 2015 had proved to be inadequate, as the doping-specific criminal regulations that existed at that time had gaps, particularly with regard to preparatory acts, the possession of small quantities of doping substances for self-administration and – especially – with regard to the so-called self-doping[4]. The AntiDopG therefore not only adopted the existing regulations of the Medicinal Products Act (AMG) and thus made them more visible - which could be useful for general prevention. The law has also been supplemented by further prohibitions or certain modalities of existing offences, in particular by the prohibition of self-doping in competitions of organised sport, by new offences including preparatory acts and the extension of aggravated offences, which are linked to more extensive powers of

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* An English version of the Anti-Doping Act can be found on the website of the Federal Ministry of Justice: http://www.gesetze-im-internet.de/englisch_antidopg/index.html.

1 In the following, all paragraphs not specified in detail are those of the AntiDopG.

2 See also *Rössner*, in: Lehner/Nolte/Putzke, AntiDopG, 2017, Vor § 1 Rn. 30.

3 Already *Steiner*, NJW 1991, 2729, 2733.

4 BT-Drs.18/4898, p. 2.

investigation. The AntiDopG has thus expanded the scope of prohibited conduct and the possibilities for enforcing the law through criminal proceedings. Furthermore, it has also changed the existing functional-institutional arrangement: This applies in particular to the exchange of information between the National Anti-Doping Agency (NADA) and the public prosecutor's offices. In addition, informal effects may occur: It is likely that associations (and clubs) have adapted their preventive measures, since athletes, trainers and other persons active in organised sport are faced with new risks related to criminal law. As a result, the law should have gained an additional preventive effect.

Almost five years after the AntiDopG came into force, the question arises as to how the new options are used in practice and whether the AntiDopG has come closer to achieving its stated goals.

In the legal literature this question is not appraised in a consistent manner. While some are decidedly "pessimistic" in view of the comparatively small number of completed criminal proceedings,[5] others refer to a positive preventive effect, which cannot be measured by the number of proceedings.[6] Some athletes are concerned that the breadth of the criminal offences could lead to invasive investigations that eventually lead nowhere.[7] Investigators respond that the AntiDopG makes it possible to conduct targeted investigations; the initially small number of criminal proceedings, they argue, is not unusual but is due to the novelty of the law and the nature of the proceedings.[8]

Our study serves as a basis for the evaluation of the effectiveness of the new AntiDopG, as required by its Article 8. It is intended to provide scientific support for the determination and evaluation of the effects of the new law on the criminal prosecution of doping violations and to identify possible weaknesses that become apparent in the application of the law in order to enable improvement measures. The study is therefore focused on the question of whether and how the legal changes brought about by the AntiDopG have affected legal practice. In addition to an investigation of criminal prosecution practice, the study will cover the perception of the legal

5 So *Jahn*, in: Hoven/Kubiciel, Korruption im Sport, 2018, pp. 117, 123 et. seq.; sceptically already *Kreuzer*, ZRP 2013, 181, 182 et seq.

6 So *Rössner*, quoted from *Armenat*, in: Hoven/Kubiciel (footnote 5) pp. 135 et seq., 139 et seq.

7 *Kassner*, in: Hoven/Kubiciel (footnote 5), pp. 135 et seq.

8 Supporting documents in *Armenat´s* discussion report, in: Hoven/Kubiciel (footnote 5), pp. 139, 144.

changes by representatives of external organisations such as the NADA or the athletes associations.

The central guiding questions of the evaluation were:

I. Phenomenon
   - Which forms of doping are relevant in the practice of prosecution (type of sport, perpetrator, type of doping, etc.)?

II. Prosecution of self-doping
   - How is self-doping investigated and prosecuted in practice?
     - How is an initial suspicion generated?
     - What investigation measures are conducted?
     - What criminal acts are investigated and lead to prosecution and conviction?
     - How long do the proceedings take?
     - How do suspects react when interrogated?
     - How are preliminary investigations concluded – and on what grounds?
     - What evidentiary problems arise in preliminary investigations and in court?
       - How are the subjective prerequisites for the offence proven, such as the intention to procure an advantage in section 3 (1), (2) or the knowledge that there is no indication in section 3 (2), (4)?
       - How can be proven that a doping substance or a doping method was used "without medical indication"?
       - Which additional procedural options are considered useful? (e.g.: leniency for providing information on other offenders)
     - What legal questions arise in the application of the AntiDopG?
       - How is it determined whether the competition is a competition of organised sport?
       - How is the circle of addressees described in section 4 (7) understood?
       - How is "significant revenue" in section 4 (7) no. 2 determined?
     - Are there cases of active remorse in accordance with section 4 (8)?
     - What sanctions were imposed?

III. Criminal prosecution of section 2 in conjunction with section 4
   - How does the prosecution of section 2 work in practice?
     - How is an initial suspicion generated?
     - What investigation measures are conducted?

- o What changes occurred in practice due to the introduction of section 2?
  - ▪ Does the extension of the offence by additional criminal acts play a role?
  - ▪ Does it matter that the act now also covers the illicit use of doping methods?
  - ▪ How important and how practicable are the offences by negligence in section 4 (6)?
  - ▪ What impact has the restriction of criminal liability for possession in accordance with section 2 (3) on cases of "significant quantities"?
  - ▪ Has the introduction of penalty enhancing offences (instead of particularly serious cases) brought about any change in practice?
  - ▪ Has anything changed in practice thus the acts are now possible predicate offences for money laundering?
- o How are the proceedings concluded?

IV. General questions and assessments
- – How are the range of sentences and limitation periods assessed?
- – How is the establishment of specialised public prosecutor´s offices and specialised courts evaluated?
- – What significance has the cooperation with the NADA in accordance with section 8?
- – How do practitioners assess the changes in criminal law and criminal proceedings in the AntiDopG as a whole?

II. Methodological implementation

The study exclusively examines detected cases. Since the aim of the study is not to investigate the actual spread of doping, but solely to record the effects of the AntiDopG on the criminal prosecution of doping violations, unreported cases do not play a decisive role for the present investigation.

The following methods were used:
- – Qualitative and quantitative evaluation of all case files on self-doping.
- – Expert interviews on practical experience with the amended AntiDopG.

1. Evaluation of case files

a) Sample

In accordance with the guidelines given by the Federal Ministry of Justice and Consumer Protection (BMJV), the evaluation of files is limited to proceedings on self-doping in accordance with section 3. The aim was to collect all relevant files of preliminary investigations since the introduction of the criminal liability of self-doping. The files of ongoing proceedings were excluded, as a first step the BMJV asked the States´ Ministries of Justice for information on relevant proceedings in the public prosecutor's offices in their State. Afterwards the Ministries of Justice as well as the reported public prosecutor's offices were contacted again. An application for inspection of the files in accordance with section 476 of the German Code of Criminal Procedure (StPO) was made. All public prosecutors' offices made the files held by them available. Not all files made available to the experts concerned the object of investigation; instead, case files that were conducted exclusively for violations of section 2 were transferred as well.

In total 526 files were made available. Of these, 103 proceedings actually concerned self-doping. Two different types of proceedings were covered: proceedings conducted expressly in accordance with sections 3, 4 and proceedings in which the facts of those sections were not explicitly mentioned, but recognisably examined. Only these proceedings were included in the evaluation. The files are distributed among the various public prosecutors' offices as follows.

Federal state	Made available	Relevant
Baden-Württemberg	35	35
Bavaria	27	7
Berlin	9	0
Brandenburg	19	3
Bremen	5	1
Hamburg	1	1
Hesse	12	8
Mecklenburg-Western Pomerania	21	4
Lower Saxony	39	7
North Rhine-Westphalia	248	29

Federal state	Made available	Relevant
Rhineland-Palatinate	7	1
Saarland	1	1
Saxony	71	0
Saxony-Anhalt	5	2
Schleswig-Holstein	12	1
Thuringia	14	3
Total	**526**	**103**

The low number of cases also corresponds to the assessment of the public prosecutor´s offices:

> "*The application of section 3 has almost not been relevant for us, at least in my field of activity. As far as I know I never had to deal with an accused person in accordance with section 3.*" *(public prosecutor´s office (StA) 5)*

b) Quantitative and qualitative coding

Some of the files were inspected at the premises of the public prosecutor's offices, while others were sent to the universities of Augsburg or Leipzig. For the coding of the files a qualitative coding sheet was developed in Excel. This was done in coordination with the ministries involved. The coding sheet contained 32 categories on phenomena, investigation and court proceedings as well as the legal and evidence questions raised. The categories were determined by the previously developed research questions, for which detailed sub-questions were formulated. To ensure aspects relevant to the evaluation would not be excluded due to presumptions an open category named "other particularities" was included.

For the quantitative evaluation a codebook was created. The codebook contains numerical recorded data – such as the frequency of the sports concerned or the form of the conclusion of the proceedings.

To ensure the greatest possible conformity, the experts coded the first case files jointly. In the following comparison of the results of the analysis deviations should be detected. In this way, differences in the coding could be disclosed at an early stage and divergences could be eliminated. Only af-

ter the codings had conformity of more than 90 percent, the files were transferred independently into the analysis sheet.[9]

c) Evaluation

The findings of the qualitative file analysis were transferred to an overall Excel spreadsheet. Afterwards the table could be evaluated vertically and horizontally. Whereas the vertical evaluation enabled a cross-procedural analysis of certain features and categories, the horizontal evaluation showed concrete proceedings in completeness.

The quantitative data was analyzed using the statistical program IBM SPSS Statistics 26. In accordance with the provisions of the codebook the results of the qualitative data collection were coded in a separate Excel spreadsheet as a first step. The dataset was then imported into SPSS and verified for its completeness. The coding of the information was mostly done in a nominal scaling. Multiple answers were possible in individual cases (e.g. in case of questions about the coercive measures applied). For the determination of time intervals (e.g. the duration of the investigation proceeding) a metric scaling was chosen.

After data preparation, the complete data set (n=103) was condensed by means of descriptive statistics. It was aimed to obtain measuring values as well as tables and graphs for the research questions mentioned above.[10] The present results are based on a complete survey of all preliminary investigations conducted in Germany due to initial suspicion of self-doping. Therefore - provided that all relevant case files have been sent - a prognosis using inductive statistics is not necessary.

The data which were scaled nominally were examined for their absolute and relative frequency distribution. To determine the relative frequency, the measured numbers were divided by the entire data set (n=103) as well as by the number of all relevant proceedings (n=variable). The measurement numbers were also visualised by pie charts or bar charts, to ensure better illustration. For the data which were scaled metrically the mean as

9 According to *Rössler/Geise*, the minimum standard for content categories of complex constructs is 80 percent agreement; see *Rössler/Geise*, in: Möhring/Schlütz (ed.), Handbuch standardisierte Erhebungsverfahren in der Kommunikationswissenschaft, 2013, p. 269.

10 Cf. on the methodological approach *Kosfeld/Eckey/Türck* (ed.), Deskriptive Statistik, 6th ed., 2016, pp. 37 et seq.

well as minimum and maximum values were calculated. Due to the small fluctuations, it was not necessary to determine the median.

2. Interviews with experts

On the one hand, the expert interviews were conducted for the purpose of evaluating section 2, which was not subject of the file investigation. On the other hand, the interviews complemented the file evaluation on self-doping with important aspects: Experience has shown that criminal files are incomplete in their information content and do not include decisive strategies and backgrounds, such as agreements, factual obstacles and defence strategies sufficiently.

a) Sample

Interviews were conducted with the following experts[11]:
- 1 representative of the NADA
- 1 representative of the Customs Investigation Office in Frankfurt am Main
- 1 representative of the Main Customs Office in Frankfurt am Main
- 1 representative of the Customs Criminological Office
- 1 representative of the Federal Criminal Police Office (BKA)
- 1 representative of the New Representation of Athletes (Neue Athletenvertretung)
- 1 representative of the representation of Athletes of the German Olympic Sports Federation (DOSB)
- 1 representative of the DOSB
- 2 public prosecutors at Frankfurt am Main
- 2 public prosecutors at specialised offices in Zweibrücken
- 2 public prosecutors at specialised offices in Freiburg
- 1 public prosecutor at a specialised office in Munich[12]

11 In order to prevent conclusions being drawn about the person of the respondent the generic masculine is used for the experts; persons of each sex are covered.

12 A second interview was planned, but did not take place due to scheduling difficulties, partly caused by the Corona pandemic.

– 1 judge at the Local Court Zweibrücken[13]
– 1 judge at the District Court Munich

The concrete selection of individual interviewees was for the most part done by the authorities or associations. The risk of a strategic selection by the selecting intermediary[14] appeared to be low. The experts were mainly appointed based on the areas of responsibility within the respective institution. Indeed, the suspicion of a strategic selection occurred in no case. According to the experts' impression, the intermediaries named those experts who had the most experience in the fight against doping in their area of responsibility.

b) Design of the interview guidelines

To obtain answers to all relevant research questions, the interviews were structured by interview guidelines that the experts developed in consultation with the ministries involved. For each group to be interviewed, separate guidelines were developed. However, to ensure comparability of the results, these guidelines essentially contained the same questions, but were tailored to the concrete field of experience of the interviewee.

In the expert interviews controlling and structuring in a greater extent was harmless. It was less focused on the subjective opinion of the respondents about the importance of aspects and more on subject-specific questions.[15] The use of a guideline ensured the comparability of the interviews in the later analysis.[16] To do justice to the qualitative principle of openness despite the comparatively high level of structuring,[17] the guideline contained demands to narrate, which were thematically focused initially but

13 According to the District Court Zweibrücken and the Local Court Zweibrücken only one judge at the Local Court Zweibrücken had significant experiences with the AntiDopG so far. That is why no further interviews were conducted at these courts.

14 *Kruse*, Einführung in die Qualitative Interviewforschung, 2011, p. 93.

15 *Kruse*, Einführung in die Qualitative Interviewforschung, 2011, p. 70. On the development of guidelines for expert interviews: *Bogner/Littig/Menz*, Interviews mit Experten, 2014, p. 27 et seq.

16 *Helfferich*, in: Baur/Blasius (ed.), Handbuch Methoden der empirischen Sozialforschung, 4th ed. 2014, pp. 559, 566.

17 *Hoffmann-Riem*, Kölner Zeitschrift für Soziologie und Sozialpsychologie 1980, 325; *Kruse*, in: Gredig/Schnurr (ed.), Forschen in der Sozialen Arbeit, 2011, p. 158.

narratively open. These narratives could possibly be supplemented by more detailed questions.[18]

Example of an open question:
"*What investigative and coercive measures do you use to solve doping cases and with what success?*"

Example of a possible demand:
"*Has the admissibility of the telecommunications surveillance (TKÜ) improved your investigative possibilities?*"

The transformation of the general research questions into concrete and comprehensible interview questions[19] was carried out using the "SPSS" method developed by *Helfferich.*[20] The guideline for the interviews with the experts contained various modular content areas on the phenomenon and prosecution of doping.[21]

c) Conducting and evaluating the interviews

The interviews, which were recorded with the consent of the interviewees, were conducted mostly by telephone and scarcely in personal presence. The recordings of the interviews, which lasted on an average about 30-40 minutes, were then transcribed for evaluation. The evaluation of the interviews was carried out solely qualitatively. The same principles that were applied in the analysis of the files were used. While the guidelines were transmitted into categories the answers were transferred to a common Excel spreadsheet.

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18 In this way the principle "as open as possible, as structuring as necessary" formulated by *Helfferich* was implemented in the design of the guidelines; *Helfferich*, in: Baur/Blasius, Handbuch Methoden der empirischen Sozialforschung, 4th ed. 2014, pp. 559, 560.

19 *Kaiser*, Qualitative Experteninterviews, 2014, p. 52.

20 *Helfferich*, Qualität qualitativer Daten, 2005.

21 As an example, the guidelines for the interviews with the public prosecutor´s offices are attached as an annex.

B. Results of the evaluation

I. The prohibition of self-doping (section 3)

1. Manifestations of self-doping

The relevant proceedings have the phenomenological characteristics outlined below.

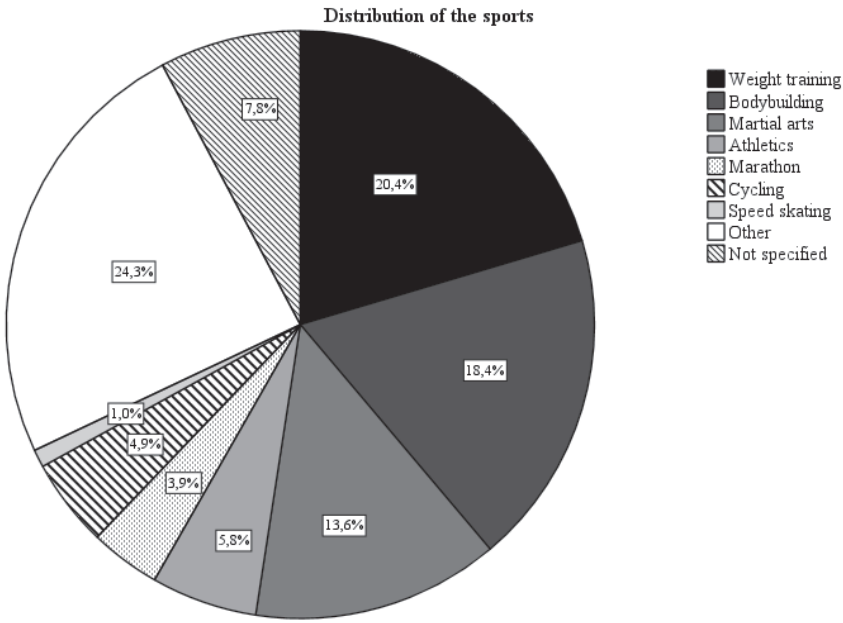
a) Sports concerned

The investigated proceedings were related in particular to the area of weight training (20.4%[22]) and bodybuilding (18.4%).[23] The remaining cases concerned sports such as martial arts (13.6%), cycling (4.9%) and athletics (5.8%).

22 Percentages are rounded to one decimal place.

23 Weight training includes powerlifting, bench press and weightlifting, whereas bodybuilding focuses on the presentation of the body and not on the performance of strength.

Fig. 1: Distribution of the sports in the sample investigated



Other sports covered by the NADA under risk group A[24], such as speed skating, canoeing, swimming, triathlon or rowing, are not included in the sample or are only included in one individual proceeding.

b) Information on the accused

The majority of the accused were male (86.1%). Most of them were born in the nineties (37.9%) and eighties (28.2%). Among the accused were two teenagers and 14 adolescents. Only one proceeding was conducted for participation in self-doping; in the remaining 102 proceedings the accusation was committing the crime as a perpetrator.

24 https://www.nada.de/fileadmin/user_upload/nada/DKS/160729_UEbersicht_Risikogruppen.pdf (accessed on: 26 May 2020).

c) Doping substances and methods

The subject of the investigations was in 96.1% of the proceedings exclusively prohibited doping substances, in 2.9% of the proceedings doping methods and in 1% both. The comparatively low significance of doping methods was also confirmed in the interviews.

> *Questioner: "The law also covers doping methods, not just doping substances. Has this ever been relevant for your work?"*
>
> *Public prosecutor´s office 5: "No. In fact, not at all. Although I currently have two proceedings where doctors might be involved, these doctors possibly administered doping substances without a real medical indication rather than actually using doping methods."*

The doping substances most used were anabolic steroids (45.6%[25]). Diuretics became relevant in only 2.9% of the cases. Stimulants, including DMAA, which is known as a sports drug, as well as THC, cocaine, ritalin or amphetamine, had significance in 25.2% of the cases. In 14.6 % of the proceedings, substances were used, which were not intended to have an immediate performance-enhancing effect, but to "mask" the illicit use of e.g. anabolic steroids.

Doping substances and methods in absolute terms:

Anabolic steroids	47
- thereof testosterone/ testosterone derivatives	23
Stimulants	26
- thereof DMAA	8
Masking	15
Diuretics	3
Method	4

25 In some cases, different agents were combined (e.g. anabolic steroids and stimulants); therefore, multiple answers are possible.

2. Substantive legal issues

a) Criminal acts

aa) Legislative context

Section 4 contains a differentiated system of criminal acts. These acts differ in regard to the injustices committed. Section 4 (1) nos. 1 to 3 sanctions violations of the prohibitions contained in section 2. The criminal acts covered by section 4 (1) nos. 4, 5 and section 4 (2) refer to the self-doping prohibited by section 3. Violations of section 3 constitute different criminal offences. The administration or application of doping substances or doping methods to yourself or the consent to this administration or application in violation with section 3 (1) sentence 1 causes criminal liability in accordance with section 4 (1) no. 4. The participation in a competition of organised sport in violation with section 3 (2) causes criminal liability in accordance with section 4 (1) no. 5. The purchase or possession of a doping substance in violation with section 3 (4) causes criminal liability in accordance with section 4 (2).

Particularly controversial was the criminal liability of self-doping introduced by section 4 (1) no. 4. According to the legislator section 4 (1) no. 4 is "one of the primary cornerstones of the conception of the fight against doping aimed by the Act against doping".[26] The prohibition of participation in a sporting competition under the influence of doping was introduced in the legislative procedure. Closing gaps in criminal liability, for example in cases in which the perpetrator dopes himself abroad in order to participate in a competition at home, was the intention.[27] If the doping substances are purchased or possessed for the purpose of self-doping, the possession of small quantities is also criminally liable. According to the explanatory memorandum to the Act, this would be justified , also taking into account the last resort function of criminal law, because already the purchase or possession of doping substances causes a considerable threat to the legally protected goods. This would be the only way to "effectively take action against doping and thus protect the integrity of organised sport."[28]

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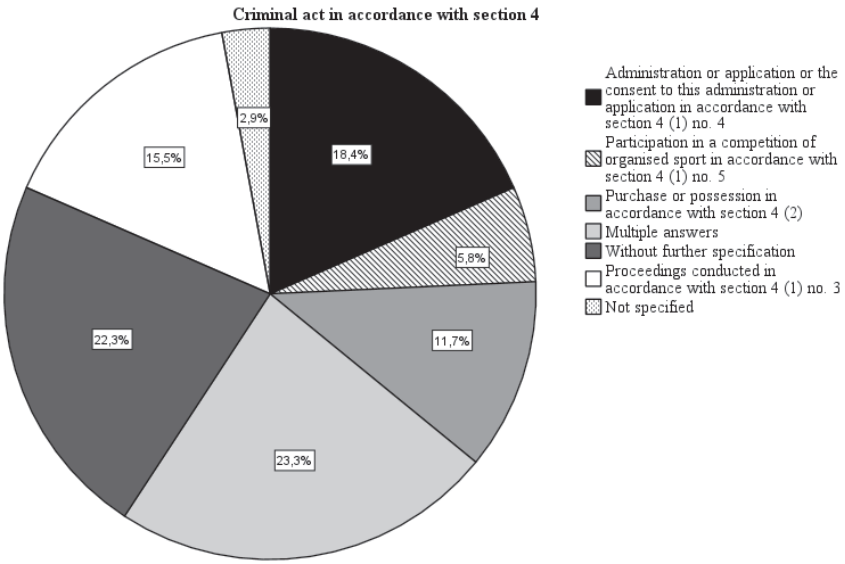
26 BT-Drs. 18/4898, p. 29.
27 Approving MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 36.
28 BT-Drs. 18/4898, p. 29.

bb) Quantitative evaluation

The evaluation of the files showed the following distribution of the preliminary investigations among the criminal acts related to self-doping.

Fig. 2: Distribution of the proceedings by criminal acts in accordance with section 4



The criminal offence "participation in a competition of organised sport" (section 4 (1) no. 5) is clearly underrepresented. In a significant proportion of proceedings, information on the criminal act was missing or not specified.

cc) Doping methods

It was striking in the evaluation that the doping methods covered by the act have not played a role in the investigations yet (see 1. c) above): The application of doping methods was the exclusive subject matter in only three proceedings (2.9 %); in one proceeding the subject matter was both

doping substances and doping methods (1.0 %). Nevertheless, it is generally considered useful to cover doping methods by the act.

> "*I think it is generally useful.*" *(Athletes association (A) 1)*

dd) The precision and comprehensibility of the formulation of the offence

Striking differences also occurred in the answers to the question of whether the offences of self-doping were sufficiently precise and comprehensibly formulated. While the *public prosecutor 4*, for example, answered the question with "*yes*" without further ado, a representative of one association implied difficulties in understanding of the athletes or communication with the athletes:

> "*Of course, this requires supreme legal expertise. (...) I think all these different offences are relatively complicated. However, I think what is allowed and what is not allowed can be explained to athletes very well.*" *(DOSB (D))*

In another interview the concerns emerged even stronger:

> "*In principle, it can be worked with, although the references within the legal norm are sometimes quite difficult as well. We also notice this when we write to public prosecutor's offices that are not specialised. In these cases, it is sometimes– even for an experienced public prosecutor – difficult to read the legal norm and the corresponding references correctly. Therefore, some clarity could surely contribute to legal certainty.*" *(NADA (N))*

One of the judges interviewed expressed the criticism particularly clear:

> "*It may be that they are sufficiently precisely formulated. For the application in practice they are very bad. I believe that criminal offences have to be immediately understandable when they are perused for the first time - at least for someone who has been doing criminal law for many years. After all, they have to be understandable to the addressee as well.*" *(Judge (R) 1)*

The analysis of the files confirms the concerns partially. As the statistics (above a) show, the public prosecutor´s offices did not provide any or no specific information on the criminal act in a conspicuously high number of cases. These proceedings were initiated, and in some cases continued, with a simple reference to "section 4 AntiDopG", "section 4 (1) AntiDopG" or even "violation of AntiDopG". It was not recognizably referred

to a specific criminal offence contained in section 4 or at least distinguished between a violation of the prohibitions of section 2 and a case of self-doping in accordance with section 3. In view of the fact that the different criminal offences of section 4 differ regarding the injustice committed and that different legal prerequisites and a different range of sentences apply, such a procedure is problematic. Accordingly, the investigations often did not proceed accurately and were quickly stopped. Multiple answers regarding the criminal acts are not unproblematic as well: In a not insignificant number of files formulations reminding of text modules such as "self-doping; application or the consent to the application of doping substances; participation in competition", sometimes combined with "purchase or possession in violation of section 3 (4)," were used. Such formulations only conceal the fact that the concrete reference point of the investigations is actually unclear.

That the system of the criminal facts with its diverse protective purposes and conditions of application is not always understood to the necessary extent is also suggested by another finding. In some cases, public prosecutor's offices justified the initial suspicion of a possession offence in accordance with section 4 (2) simply by the fact that a doping substance was ordered. Neither was the sport practised identifiable nor findings of participation in competitions or income available. On the ground that the offence was committed only once and that the guilt was minor the proceedings were then stopped – usually without further legal explanations. In one proceeding the accused was informed:

> "*Since the possible fault seems to me relatively small and I assume that this is solely a one-time violation of a criminal law, I refrain from further prosecution for once. However, I strongly reprimand the behaviour shown. In case of recurrence, you cannot expect the termination of the proceedings again.*" *(Excerpt from file)*

Such a justification for the termination of the proceedings enables the accused neither to comprehend the reason for the criminal proceedings nor the contours of the criminal conduct, so that goals pursued by special prevention are missed. Above all, the justification for the termination of the proceedings provides grounds for doubting whether the public prosecutor has dealt with the legal requirements in the necessary differentiation.

Finally, the public prosecutor's offices applied section 4 (1) no. 3 in 17 cases, even though the content of the investigations was self-doping.

ee) Criminalisation of the purchase and possession of doping substances, irrespective of quantity

If it serves the purpose of self-doping (section 3 (4)) the purchase or possession of even a small quantity of doping substances is liable to prosecution in accordance with section 4 (2). During the legislative process, the concern that a quantity-independent criminalisation of the purchase and possession of doping substances could lead to preliminary investigations caused by mistakes of the athlete or his medical or sporting environment in the procurement of medicines or to preliminary investigations caused by the deliberate placing of doping substances near the athlete by a competitor in order to harm him has occasionally been expressed.[29] These concerns were not confirmed during the evaluation. An athlete's representative said:

> "*So far I am not aware of any of the cases described and therefore I want to say at this point that the concerns have not been confirmed.*" *(A 2)*

However, it is unclear whether the criminalisation of small quantities is also necessary in practice. A public prosecutor of a specialised public prosecutor's office said:

> "*In my practice I am not aware of any case where that was relevant.*" *(StA 4)*

Another investigator considers that the criminalisation of the purchase and possession of even small quantities of doping substances is at least in the case of top athletes not relevant, as these doping substances are typically not procured by the athletes themselves, but are administered by others (e.g. sports doctors) in their practice or at another location:

> "*Usually they do not own it themselves, but are actually given it for consumption or are actually provided with it under medical supervision.*" *(StA 3)*

Nevertheless, public prosecutors were mostly in favour with the modification of the law:

> "*I think that the criminalisation of small quantities in case of a competitive athlete has proven itself in practice. On the one hand, it was aimed by the*

29 See, for example, Opinion on the Act against doping in sport by the Athletes' Commission of the DOSB, 2015, p. 2. See also *Peukert*, npoR 2015, 95, 99.

legislator as well as by the purpose of the AntiDopG and has also proven itself regarding my feelings and perceptions. It simplifies the criminal prosecution of the competitive athlete, because the initial suspicion can be affirmed faster, in order to take all measures in the criminal proceedings. If one has cases in this area, this formulation is sufficient to justify an initial suspicion. On the other hand, in the field of weight training, there is no initial suspicion of a competitive athlete, since the possession of doping substances exceeds a small quantity." (StA 3)

"*I consider it to be useful that the athlete must not possess any doping substances at all." (StA 1)*

On the contrary, one public prosecutor raised concerns:

"*We apply section 153 or section 153a StPO, which provide the possibility to refrain from imposing criminal penalties in case of insignificant guilt. I think there's too much criminalisation, which shouldn't necessarily be the case. Maybe the not small quantities should be adjusted again." (StA 2)*

ff) Summary

To sum up, doubts concerning the way the legislative formed the Act are noticeable. They are confirmed quantitatively as well as by two problematic patterns that arose in the conduct of the investigations. Therefore, consideration should be given to simplifying the structure of the offence, in particular by a clearer distinction between those alternatives of the offence that refer to violations of section 2 and those that refer to self-doping. The application of the restriction related to the offender by subsection 7 for those alternatives of the offence that refer to self-doping makes a clear distinction even more necessary. Adding the difficulties caused by the restriction of the group of perpetrators under section 4 (7) (see 2., b., bb below), a more precise definition of the criminal offences should be considered (see C II 1 a below).

b) Further conditions of criminal liability

aa) Medical indication

(1) Legislative context

Doping means the use of doping substances and methods for an intervention in the body that is not medically indicated.[30] Since many doping substances are (authorized) drugs at the same time, the AntiDopG must distinguish between inadmissible and prohibited applications of such drugs. In accordance with section 3 (1), self-doping is therefore only prohibited and in accordance with section 4 (1) no. 4 liable to prosecution if an athlete uses or allows the use of doping substances or methods "without medical indication". If a doping substance or method is used for therapeutic purposes, the behaviour is socially acceptable, even if the athletic performance increases as a side effect.[31] This shows the duality of the protective directions of the AntiDopG, which not only protects the integrity of sport but also the health of the athletes (cf. section 1). However, where the use of drugs is medically indicated, there is no room for prohibition or even punishment. In the legal literature, the distinction between medically indicated and non-indicated use is considered "difficult".[32]

(2) Findings of the study

For such difficulties the evaluation has revealed isolated indications. However, the investigations focused more often on other elements and the pro-

30 See BT-Drs. 18/4898, p. 22; Weber BtMG/ *ibid.* 5th ed. 2017, AntiDopG § 3 Rn. 18.

31 Cf. BT-Drs. 18/4898, p. 27 - Under sports law the granting of a Therapeutic Use Exemption (TEU) for the use of prohibited substances or methods in accordance with the World Anti Doping Code (WADC) is required for such cases; for details see the International Standard for Therapeutic Use Exemptions. The taking of non-prohibited drugs or substances has to be reported on the doping control form during doping control.

32 Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 3 Rn. 10, on the grounds that after illnesses or accidents prescribed medications always (and possibly up until competitions) had a performance-enhancing effect; this fails to recognise that the prohibition is not based on performance enhancement but on the medical indication. What is medically indicated is decided by the state of medical science; in addition, special permits (TEU) can be obtained (see footnote above).

ceedings were closed for other reasons (minor guilt, foreign facts). Only in one interview the medical indication was mentioned as a problematic point in the investigations:

> "*Most of the time it is certainly a lack of medical indication, because in popular sport it is, of course, often claimed that the preparations are not used for muscle building or to increase performance, but for medical reasons.*" *(StA 7)*

However, the same public prosecutor limited his statements on the prohibition of self-doping later: spor

> "*Since there are so few cases, I cannot make a valid statement.*" *(StA 7)*

Indications that the (missing) medical indication was taken into account were only found in 25 procedural files, and even then those indications were mostly brief. In 13 cases, the accused defended themselves with reference to a medical indication, either by presenting a prescription or by making a general reference to an illness without presenting a medical prescription. Only in one case, in which also the accused´s association had submitted various medical reports on the player and his illnesses, further investigations into the medical indication were made; the proceedings were ultimately closed for other reasons.

In the majority of the proceedings, the public prosecutor's offices did not examine this element in more detail. In four cases, for example, the lack of indication was obvious because the public prosecutor's office was investigating the use of cocaine. Cocaine in Germany is neither an authorised drug nor - according to the investigators - a component of authorised drugs. In two cases the accused admitted (from the outset or at the request of the investigators) that there was no medical indication. NADA's assessments of the lack of indication are found significantly more frequently in the files, such as the statement that in Germany "at present no drugs with chlorodehydromethyl testosterone as an active substance in human domain" are approved or that accidental ingestion by drugs is "almost completely excluded". Equally widespread are references by NADA to the absence or existence of a "Therapeutic Use Exemption" or a special permission.[33]

33 In case of certain clinical symptoms, NADA or the international sports governing bodies can grant a Therapeutic Use Exemption (TEU) for the use of prohibited substances or methods under the World Anti-Doping Code (WADC).

bb) Intention of gaining an advantage in a competition of organised sport

The perpetrator has to participate in a "competition of organised sport" (section 3 (2)) or has to have the intention of gaining an advantage in such a competition caused by self-doping (section 3 (1)). In accordance with the legal definition in section 3 (3), a competition of organised sport is any sporting event

1. organised by, on behalf of or with the approval of a national or international sports organisation, and
2. which requires compliance with rules adopted by a national or international sports organisation which are binding upon its member organisations.

(1) Interpretation of the characteristic "competition of organised sport"

The element aims to exclude private tournaments from the scope of the prohibition, as self-doping in the leisure sector does not affect the integrity of organised sport to an extent that would justify criminal liability.[34] According to the explanatory memorandum to the Act, the competitions covered are primarily sporting competitions of top-class sport and competitive sport, such as the Olympic and Paralympic Games or Youth Games, World Games, national or international championships, games or competitions of a national or international league, national or international cup competitions or international friendly games. Major running events (e.g. marathons) and regional leagues, sports festivals and sports events organised by private organisers are also covered, if and insofar they have been recognised by the responsible (national or international) sports organisations in advance.[35] The competition has to be organised by a national or international sports organisation, i.e. a legal entity or an association of persons whose main task is to promote sporting activities.[36] The sports organisation has to have a "certain degree of organisation"; in addition, solely local clubs are not covered.

Therefore, section 3 does, for example, not cover "sole company races, recreational football tournaments, solely private sporting activities (e.g.

34 BT-Drs. 18/4898, p. 27; Erbs/Kohlhaas/*Wußler*, 232 EL August 2020, AntiDopG § 3 Rn. 9.
35 BT Drs. 18/4898, p. 28.
36 Erbs/Kohlhaas/*Wußler*, 232 EL October 2020, AntiDopG § 3 Rn. 10.

jogging in the park) or competitions which are held exclusively as part of school sports (e.g. games between different schools)". It is discussed in the legal literature whether competitive bodybuilding is subject to the definition of organised competition.[37]

In 21 cases, the files contained information on organised competition; in the remaining 82 cases, this element was not addressed. In nine cases, the assumption of an organised competition was based on a notification from the NADA, which carried out doping controls within the framework of competitions.

In one case, the public prosecutor's office asked the NADA whether a pre-season encounter already falls under the definition of a competition of organised sport in accordance with section 3 (3). The NADA considered the encounter as a competition by stating that although the matches were "basically part of the preparation before the actual season", they "did not have the character of friendly matches in which the focus is exclusively on the 'private sporting activities of the participants' or the fun of solely recreational activities. The aim of the pre-season matches is rather to prepare for the season in a targeted and immediate manner under 'almost competitive conditions'". The public prosecutor's office accepted the assessment of the NADA.

In four proceedings, matches were assumed to be competitions since the players concerned were Bundesliga (German football league) players.

In six cases, the public prosecutor's office carried out internet research itself and checked, for example, via the accused's Facebook page whether they took part in competitions. On this basis, it was expressly declared in one case, albeit without legal examination, that the participation in bodybuilding competitions is covered by the criminal offence. In all other proceedings against bodybuilders, the question of whether competitions in this area fall within the scope of section 3 was not discussed.

It was also mentioned in the interviews, that the interpretation of the concept of competition turns out to be a problem in the application of section 3.

> "*There are certainly opportunities for disputes in organised sports events in, let's say, niche areas. I'm thinking of a bigger fight night, for example, which*

37 MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 39. Against the applicability of section 3 to bodybuilding is argued that bodybuilding is not a sport but the exhibition of bodies; *Brill*, SpuRt 2015, 153, 154; in addition *Samson-Baudisch*, Der Missbrauch von anabol-androgenen Steroiden im freizeitorientierten Bodybuilding, 2014, p. 18. Differently BGH NStZ 2010, 170.

is organised somewhere. Or you think of a city marathon, in a smaller city, where you have to look closely indeed." (StA 1)

"This definition is of course difficult. What is a sports organisation? Does a competition of bodybuilders, Mr. and Mrs. Universe for example, fall under the scope of the criminal offence? It's rather difficult. To the best of my knowledge, there is no sports organisation in the bodybuilding field." (StA 5)

The different approaches of the public prosecutor´s offices appeared particularly in the area of bodybuilding. Whereas mostly no decision was made regarding the competitive character (and the proceedings were closed for other reasons, see below 3., c.), some public prosecutor's offices did not conduct proceedings in the area of bodybuilding because of self-doping at all, but only because of section 2.

"We don't even examine section 3 in these cases. Section 3 presupposes that one must gain an advantage in a competition of organised sport (...). That was already clarified before I started working here. The NADA has already said that. That doesn't matter to us. (...) We handle these proceedings under the framework of section 2. The question whether someone has participated in competitions or not can be considered as an aggravating factor in the proceeding. Section 2 leaves enough room for that." (StA 5)

(2) Intention of gaining an advantage

The accused is tested positive for cocaine during a general competition control on the occasion of a Bundesliga encounter. The athlete is a member of a general test pool of the NADA (ATP). The accused already confessed during the first interrogation by the police. He stated that he started using cocaine for private reasons but never used it to improve his performance in competition. He would be in therapy for some time because of his cocaine addiction. The public prosecutor's office considers the guilt to be minor and closes the proceeding in accordance with section 153 StPO.

A doping substance has to be taken with the intention of gaining an advantage in a competition of organised sport (section 3 (1) and (2)). While in most cases the intention of gaining an advantage is already indicated by the nature of the drug, especially when taking stimulants other motives -which are partially understandable - can also come into consideration. In

several proceedings, the accused denied having taken the substances to obtain a sporting advantage.

In the proceeding outlined at the beginning, the public prosecutor's office did not further verify the information provided by the accused, but closed the proceeding in accordance with section 153 StPO due to minor guilt. Public prosecutors also reported in the interviews that an intention of gaining an advantage is denied by the accused. However, corresponding statements were predominantly evaluated as self-serving declarations.

> "*What can be a problem is whether these substances have been used for doping purposes in sport. The statement that the intake of the substance would not have been for doping purposes in sport, but to increase potency or to relieve pain, is not rare. That is something that is arguable. From our point of view, these statements are usually self-serving declarations, attempts to get out of criminal liability. But these aspects are disputed.*" *(StA 4)*

However, taking a substance or applying a method only becomes "doping" when it is actually used to improve performance. The intention of gaining an advantage as an element can therefore serve as a corrective in order to limit the offence to actual doping relevant violations. In one trial, an athlete was accused of having given himself an infusion of at least 100 millilitres of liquid for "liquid compensation after weight making" for a wrestling competition. A summary penalty order was issued against the accused, but he was acquitted in the main trial, because it could not be proven that he has had an intention of gaining an advantage. The court concluded that "the accused would not have gained any advantage for the competition [...] if he had been administered liquid by infusion [...] two days before the competition and at least one day before the weighing. Thus, it remains questionable, after the taking of the evidence, where the advantage [...] of an infusion of more than 100 ml is for the accused. This advantage is a legal prerequisite.

(3) Interim result

The study shows that the element of organised competition has not yet taken counters in practice. The existence of an organised competition is almost without exception not subject to substantive examination. However, examining the relationship to a sporting competition would be necessary, especially in the field of bodybuilding.

Especially when using illegal drugs, it can be questionable if the athlete has an intention of gaining an advantage. Substances such as cocaine have a psychologically and physically performance-enhancing effect and can therefore be used immediately before a competition to improve performance. At the same time, cocaine is a widespread "party drug" whose private use is not implausible. If the accused denies it a clear proof of the intention of gaining an advantage is hardly possible.

c) Restrictions of criminal liability in section 4 (7)

Section 4 (7) restricts the group of possible perpetrators for reasons of proportionality. This restriction is also based on the assumption that manipulation through doping only leads to a "loss of confidence in the sports system and relevant damage" if the perpetrators are "outstanding sportsmen and women" who "practice their sport performance-oriented and competition-oriented at a high level or who gain considerable income from their sporting activities".[38]

Therefore, only persons who are either top athletes in organised sport (section 4 (7) no. 1) or who directly or indirectly gain substantial income from their sporting activities (section 4 (7) no. 2) can be liable to prosecution.[39]

aa) Athletes included in a Registered Testing Pool

A person who is as a member of a Registered Testing Pool subject to Out-of-Competition Testing within the doping control system is considered as top athlete. 11.7% of the accused were members of a Registered Testing Pool of the NADA, 74.8% were not included in such a Testing Pool and in 13.6% of the proceedings no information was provided. In all relevant cases, it was already stated in the NADA notification whether an athlete belonged to a Registered Testing Pool: "[The accused] falls within the scope of application of the sanction regulations of section 4 (7) no. 1 AntiDopG.

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38 BT-Drs. 18/4898, p. 31.

39 Some argue that the concept of top athletes includes both test pool athletes and athletes with significant revenue, see for example Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG § 4 Rn. 5. Ultimately, the conceptual classification is not important.

He or she is a member of the NADA Testing Pool within the doping control system and is subject to Out-of-Competition Testing.

One of the public prosecutors interviewed criticised that the investigating authorities were not able to check independently whether the accused was a member of a Registered Testing Pool."

> "*If being member of a Registered Testing Pool is a prerequisite for being a perpetrator, law enforcement authorities should be able to check exactly: Who is in this Testing Pool? There has to be the possibility of access for law enforcement authorities (...). If the criminal prosecutor cannot independently check whether a certain person is a member of a Registered Testing Pool, he ultimately cannot pursue his or her criminal liability.*"

bb) Significant revenue

(1) Teleological appropriateness of the restriction of criminal liability

Not only athletes who are subject to Out-of-Competition and In-Competition Testing can be exposed to a special incentive for the usage of prohibited doping substances or doping methods. Rather, such an incentive also exists when significant revenues are gained through the sport. In the view of the legislator, the penal provisions of self-doping (section 4 (1) no. 4, 5) as well as the purchase and possession of doping substances for the purpose of gaining an advantage in competition (section 4 (2) in conjunction with section 3 (4)) should therefore also cover athletes who directly or indirectly generate significant revenue from their sporting activities. The legislator also justifies the restriction of criminal liability by stating that these athletes are also role models and claim the trust that "they have achieved their sporting successes by pure means".[40] The explanatory memorandum to the Act cites organised motor sports, professional boxing and the 3rd men's football league as examples. In these sporting activities, the athletes are typically in the public eye with their sporting achievements and could therefore undermine the integrity of organised sport as well.

40 On this and on the following BT-Drs. 18/4898, p. 31 et seq.

This restriction of criminal liability is described in the legal literature as arbitrary and difficult to reconcile with the purpose of the law,[41] but is accepted in practice as the result of an exercise of discretion by the legislator:

> "*Sometimes this is difficult to determine, but I think it is intended to be tailored to this circle. It is a political question who you want to include. This may be difficult to determine; this is a practical question that also arises elsewhere.*" *(StA 4)*

(2) Difficulties of application

Voices in the legal literature criticise the concept of "significant revenues" for its insufficient certainty as well.[42] In fact, the wording of the law causes not inconsiderable problems in its application. When asked what the greatest legal difficulties in providing evidence in self-doping cases are, a public prosecutor replied:

> "*In the area of top-class sport it is certainly section 4 (7), if we do not have an athlete who is included in a Registered Testing Pool. (...) To provide the proof of revenue of a certain significance is often difficult. That one has to say, perhaps the limit is reached and it is not possible to affirm the significant revenue is certainly difficult (...).*" *(StA 1)*

In the case files evaluated, only a few accused practiced a sport at a level that is typically of interest to a wider public (one professional boxer and one kick boxer who had previously won international titles, as well as one Bundesliga wrestler and one Bundesliga weightlifter). More often, investigations were directed against less successful athletes (kick boxers, triathletes, bodybuilders). In the case of an arm wrestler, a witness testified:

> "*I cannot imagine [that the accused gains significant revenue] either, since money does not play an important role in our sporting activity.*" *(extract from file)*

Proceedings involving investigations against athletes with significant revenue are quantitatively underrepresented. Even though in nearly half of the relevant procedural files (48.5%) it was suspected that the athletes gen-

41 See for the whole issue MüKo-StGB/*Freund*, 3rd edition 2018, AntiDopG §§ 1-4 Rn. 112 et seq.

42 *Eising*, Die Strafbarkeit des Eigendopings, 2018, p. 210, who demands clarification by the legislator.

erated such revenue, this revenue was in only 12.6% of the cases actually ascertainable;[43] and that although public prosecutor´s offices base their work on a low-threshold understanding of "significant revenue".

(3) Definition and determinability of the formulation

The explanatory memorandum to the Act mentions as a prerequisite "the repeated attainment of economic advantages"; these have to be "significant benefits" that go far beyond the mere reimbursement of costs.[44] The legal literature favours a case-by-case consideration[45] or a sport-specific application, according to which an athlete who practices a cost-intensive sport should also be able to gain greater revenue.[46] Such a case-by-case interpretation could not be determined in the evaluation. Rather, it is apparent from several procedural documents that the investigating authorities asked whether revenue was generated in an amount subject to social insurance contributions ("450 Euro"). In the interviews, two public prosecutors also confirmed that this amount serves as an indication for them. Another public prosecutor combines revenue and presumed expenses and then operates with an amount "in the range of 900-1000 € (...) per month" (*StA 3*).

However, there is also uncertainty about the adequacy of comparatively low revenue limits:

> "*I had a problem the other day with the question of what constitutes significant revenue. The [accused] played American football, earned 1,000 € a month, but of course he also received board and lodging. So I asked myself: Does an American football player who plays in the 1st Bundesliga (German National League) and only earns 1,000 € per month has a significant revenue, yes or no? As far as I have seen, there was also no existing case-law on*

43 Nevertheless, the vast majority of these proceedings ended with terminations, since there were no sufficient grounds for suspicion in other respects, the guilt was minor or the accused had left the country and a request for legal assistance was unlikely to succeed due to the lack of criminal liability in the country of residence.

44 BT-Drs. 18/4898, p. 31 et seq.

45 Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG § 4 Rn. 8.

46 Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 4 Rn. 33, who draws the line from average salary payments of (men's) football players in the 3rd league and the regional leagues for annual net income of 18,000 Euro or three times payments of 1,500 Euro.

this. Therefore, it would be interesting if the legislator could specify that in greater detail." *(StA 1)*

Other respondents also expressed the wish that the legislator or the Supreme Court decisions provide conceptual clarity.

"*That perhaps would be an idea for the AntiDopG, to think about whether the range should somehow be predefined. That would be desirable. Or perhaps the design can be left to the dispensation of justice (...).*" *(StA 3)*

"*Yes, I think that overall it [the AntiDopG] is successful. The cases in top-class sport are still limited, if I understood that correctly, but I do believe that it is successful overall. (...) What is important for us (...) is the specification of the revenue.*" *(A 2)*

The courts of first instance do not seem to have had any experience with this element so far:

"*No, we have not applied that yet. I do not know. The term is chosen poorly because it may introduce a new category in criminal law regarding revenue. At least I do not know of any criminal offence immediately in which that criterion appears as well.*" *(R 1)*

A representative of sports within an association (*D*) still considers the wording to be "too vague". It is therefore not surprising that the low-threshold above which public prosecutor´s offices presume significant revenue does not appear to be present in the awareness of athletes as yet.

"*To be honest, as I understood it, this can onlyaffect athletes in the national squad, including the winning sports, i.e. national teams, national squad-plus league operations: football, basketball, handball. I find it difficult to quantify this. (...) I find a number difficult. I think, one should rather say: on a professional, international level in the national squad or national leagues. The Bundesliga is, I think, always the limit as to whether someone is a professional player or not and can therefore live on his salary. Perhaps this is where I would quantify that it is a living.*" *(A 1)*

Another athlete representative pleaded for a significantly higher threshold:

"*One criterion for the promotion of sports aid is, for example, 45,000 € per year. This is (...) taken as a criterion for whether someone should receive support or not. I think that would be helpful as a first orientation.*" *(A 2)*

(4) Investigations

Search warrants and confiscation orders are usually based on the assumption that the accused would obtain significant revenues. This assumption is made without further substantiation. For example, in proceedings conducted against a bodybuilder the public prosecutor´s office solely stated:

> "*She finished fourth in the women's physique category. She therefore earns not inconsiderable revenue from her sporting activities.*" *(Excerpt from file)*

The investigation file, however, does not contain any further details on the amount of revenue. Occasionally, internet research on the accused, such as research regarding possible employment and possible sponsors, was conducted in advance. Criminalistic experience also seems to play an important role. For example, in proceedings against strength athletes, investigations for a violation of section 3 are often not even conducted, because many public prosecutors assume that strength athletes are neither top athletes nor generate significant revenue.

> "*That are experiences that one acquires over the years, i.e., power lifters and bench pressers, stone lifters or arm-wrestlers and whatever they are called: if one carries out investigations in that area […it becomes clear] that all of them live in orderly and stable conditions, but not in conditions that offer points of attack that significant revenue is gained (...).*" *(StA 3)*

Also, the file evaluation showed that the investigations against power athletes are focused quickly on violations of section 2.

> "*A power lifter who is reported by the NADA, can usually be convicted, but not in accordance with section 3 but in accordance with section 2, because he usually possesses significant quantities of doping substances.*" *(StA 3)*

In the further course of the investigations, mostly simple investigation measures are carried out. These include the evaluation of confiscated account statements or employment or sponsorship contracts as well as the questioning of the accused and witnesses. More elaborate financial investigations through involving banks are rare. They were conducted when the case gave particular cause: In one case, this seemed to be the (additional) reference to violations of the German Narcotics Act (BtMG); in other cases, it seemed to be the investigators' criminalistic sense that the accused had made significant revenue and that the other elements were also fulfilled.

In an exemplary case in which the public prosecutor's office conducted a broad investigation and also carried out financial investigations at an early stage, the NADA had initially reported a positive doping sample in the margins of the German championships in kickboxing. The preliminary investigations were initially conducted on the grounds of section 4 (1) nos. 3, 2 (3), since the accused was not an athlete included in a Registered Testing Pool and it was at least not obvious that significant revenue was gained. On this basis a search and - rather unusual - also a blood sample (section 81a StPO) were ordered. Although the blood sample was not necessary for the proof of criminal liability for possession, it was legally permissible and would above all have facilitated the proof of self-doping, in the event that the accused gained significant revenue and thus would fall within the scope of section 4 (1) nos. 4, 5. In order to examine this, the public prosecutor's office determined what revenue the accused had earned by requesting banks. Since the accused´s revenue could ultimately not be determined, the order of punishment was finally issued in accordance with section 4 (1) nos. 3, 2 (3). However, such an effort has only been made in a small number of proceedings.

(5) Summary

In summary, this element causes practical problems, despite or rather because of a rather low threshold. In many cases, it does not seem to be clear to the athletes that even revenue in an amount that is subject to social security obligation (450 €) can give rise to a pursuant initial suspicion. Practical difficulties were also expressly pointed out or at least hinted by criminal prosecutors; several respondents expressly wished for clarification by the legislative or the Supreme Court. It is particularly clear that the low threshold widely used by the public prosecutors' offices leads to investigations due to violations of the self-doping ban even against athletes, who gain only little revenue and are not in the public eye. The lesser injustice of such acts and the resulting disproportion to further investigations is considered by the public prosecutor's offices (as in other cases of minor delinquency) by closing the proceedings.

Especially investigations against athletes with revenue on the borderline of significance can be elaborate for public prosecutor´s offices: Smaller sums are not only per se less conspicuous than larger amounts. These payments are also not always visible as incoming payments to an account. Above all, the importance of smaller expenses for the practice of sport in-

creases the lower limit for gross income set. In other words: The lower the net value that causes the assumption of "significant revenue", the greater the importance of the expenses and the investigations concerning them.

cc) General assessment of section 4 (7)

(1) Classification

In the legal literature, the question as to whether section 4 (7) is an element or a solely objective condition of criminal liability is controversial.[47] The systematic position of the provision in section 4 and not in section 3 argues for the assumption of a solely objective condition of criminal liability. It indicates that by limiting the circle of addressees the legislature intended to carry out an objective restriction of criminal liability.[48]

However, one of the investigated proceedings was closed by the public prosecutor's office in accordance with section 170 (2) StPO on the grounds that it was "not possible to determine with certainty" whether the accused had "taken the doping substances at a time when he was already aware of his inclusion in the Registered Testing Pool and thus of his norm addressee status".

Considering the systematic position of the group of perpetrators, it was criticised that such an essential prerequisite of criminal liability should not be included as late as in the seventh subsection of the penal provision.

> "*There are of course many laws that are even more complex and complicated in structure. Nevertheless, from a legal point of view, from the point of view of the user and, above all, the addressee, a clearer accentuation, highlighting or the placing at the beginning of the respective circle of addressees and the respective circle of criminal law would be desirable.*" *(N)*

47 See Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG § 4 Rn. 11; MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 113.

48 This is also the terminology used in the explanatory memorandum to the Act, BT-Drs. 18/4898, p. 31. Critical with reference to the obligation to inform about the affiliation of an athlete to the Registered Testing Pool Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG § 4 Rn. 11.

(2) Reason for low case numbers and rare indictments

The restriction of the circle of addressees in section 4 (7) was considered to be the main reason for the low number of cases in the field of self-doping.

> "*The regulation of section 4 (7) certainly is one reason why we have only very few proceedings in the area of top-class sport. One must be aware that the number of athletes who either fall into the Registered Testing Pool or actually receive significant revenue from their sporting activities is not very large.*" *(StA 1)*

This impression was confirmed by the file investigation; accused were often not athletes included in a Registered Testing Pool and the purchase of significant revenue could also not be proven. A reduction of the obstacles formulated in section 4 (7) could cause more proceedings being brought to charge.

> "*It often becomes difficult to provide proof as soon as you don't have an athlete included in a Registered Testing Pool. If you wanted to have more cases in this respect, a readjustment would certainly be useful.*" *(StA 1)*

(3) Unequal treatment of athletes

The restriction in section 4 (7) was justified by stating that the integrity of organised sport is threatened solely by the behaviour "of competitive athletes perceived by the public; purely recreational athletes should therefore not be covered by the criminal provision, even if they participate in competitions of organised sport (e.g. major running events).[49]

In the legal literature, section 4 (7) has been criticized as an "arbitrary" restriction of the offence, which has "no objective connection with the wrongfulness of the doping offences committed".[50] The NADA expert expressed similar criticism in the interview.

> "*In our exchanges with the public prosecutors' offices we have seen that we are now putting the athletes included in a Registered Testing Pool and the ones who clearly generate an income from the sporting activity in a situation that puts them in a negative privileged position compared to all other athle-*

49 BT-Drs. 18/4898, p. 32.
50 MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 112.

tes who may be taking part in the same event or competition. This should be brought back into focus, if necessary." *(N)*

Indeed, section 4 (7) has the consequence that athletes who participate in the same competition are treated differently by the AntiDopG. The distinction between competitive and recreational athletes described in the explanatory memorandum to the Act may make sense in certain competitions, such as an urban marathon, which is also open to popular sport. However, the restriction in section 4 (7) extends well beyond these cases. For example, in a German championship, usually only competitive athletes participate; athletes included in a Registered Testing Pool, however, are only those who have already made the leap into the corresponding squad (depending on the sport: A squad (including athletes competing at an international level) or B squad (including athletes who are likely to compete at an international level in the near future). Although the athletes compete directly with each other, only those who already belong to the squad should be punished – whereas, those who try to be accepted into the squad through their participation should not be punished.[51]

The unequal treatment of participants in the same sporting competition is difficult to reconcile with the aims of integrity and fairness of organised sport, especially in the case of events in which recreational athletes usually do not participate. Much evidence suggests that the offence should not be restricted by personal characteristics, but rather by clearly limiting the competitions covered (see C II 1).

d) Active repentance

aa) Legislative context

Pursuant to section 4 (8), anyone who voluntarily relinquishes the actual power of disposition of the doping substance before using it or allowing it to be used will not be punished for the purchase or possession of doping substances pursuant to section 3 (4). The provision was not contained in

51 See also *Freund*, who describes the situation as follows: "Of two athletes who have doped themselves in advance and therefore participate in the same competition in violation of sports law, only the one who has perhaps only just moved up into the circle of 'top athletes' is punished, while his equally doped competitor goes unpunished if he is only very close to being accepted into this 'illustrious' circle". See MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 112.

the government draft, but was introduced into the law by a recommendation of the Sports Committee.[52] As a personal reason for suspension of sentence, the provision is intended to enable impunity if the athlete distances him- or herself from self-doping and voluntarily ensures that he or she can no longer harm the integrity of sport by using the doping substance. Prerequisite for impunity is that the athlete relinquishes the power of disposition of the doping substance before using it.[53]This requires that the athlete performs an action that is visible to the outside world and results in the athlete no longer being able to dispose of the doping substance (disposal, handover to the authorities, etc.).[54] In addition to this consideration regarding the protective purpose, there are also special preventive reasons for the waiving of punishment in such cases: In cases in which the athlete apparently refrains from self-doping intentions by giving up the possession, it is not necessary that the penalty impinges on the athlete. Consequently, the reason for suspension of sentence further presupposes that the surrender of actual power of disposition is voluntary. The athlete must give up the power of disposition of the doping substances for self-imposed motives and voluntarily ensure that he or she can no longer harm the integrity of the sport with the doping substance.[55]

The creation of a reason for suspension of sentence in case of active repentance was welcomed by the legal literature.[56]

bb) Results of the study

In the files evaluated, the provision did not play a role. In particular, no case was ascertainable in which criminal proceedings were (partially) discontinued because in the course of the investigation it had turned out that an athlete had relinquished the power of disposition of doping substances which he or she allegedly had purchased or possessed before the investigations began. However, whether and to what extent the provision has individual significance for athletes who dispose of doping substances and re-

52 Cf. on this and the following BT-Drs. 18/6677, p. 4, 12 f.
53 Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 4 Rn. 94.
54 Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 4 Rn. 94.
55 Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 4 Rn. 95.
56 MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG §§ 1-4 Rn. 75; furthermore Lehner/Nolte/Putzke/*Putzke*, Anti-Doping-Gesetz, § 4 Rn. 97.

frain from doping intentions with a view to the criminal privilege cannot be determined.

From the low practical significance of the provision on active repentance, however, it cannot be deduced, that the reason for suspension of sentence does not have justification relating to criminal policy. On the contrary, it is conceivable that indications (e.g. statements from the environment, documents) at first suggest the initial suspicion of the purchase or possession of doping substances, but as a result of the investigations it turns out that the athlete has voluntarily relinquished the power of disposition in the meantime. The continuation of the investigations or even a punishment is not necessary in such cases because of the considerations regarding the protective purpose and special preventive reasons mentioned under aa) above. Apart from that, this reason for suspension of sentence can also be seen as a certain corrective to the comprehensive, not quantitatively limited criminal liability for the purchase and possession in accordance with section 4 (2).

3. Findings on procedural issues

a) Knowledge obtainment

aa) Ways of obtaining knowledge

The law enforcement authorities learned about possible cases of self-doping in particular through reports or informational notifications from the NADA (65.0%). The NADA based its reports primarily on the result of a positive doping sample (56 proceedings) or on anonymous information through its BKMS reporting system (Business Keeper Monitoring System) (9 proceedings).[57] Following a report by the NADA, the public prosecutor's offices usually initiated preliminary investigations within a few days. The importance of the NADA for obtaining knowledge of crimes in the area of self-doping was also confirmed in the interviews.

> "*Since in the field of top-class sport the NADA is practically the only source of possible reports, the information is relevant. We receive 20 to 30 reports by the NADA per year. Otherwise there are no initiations for any investiga-*

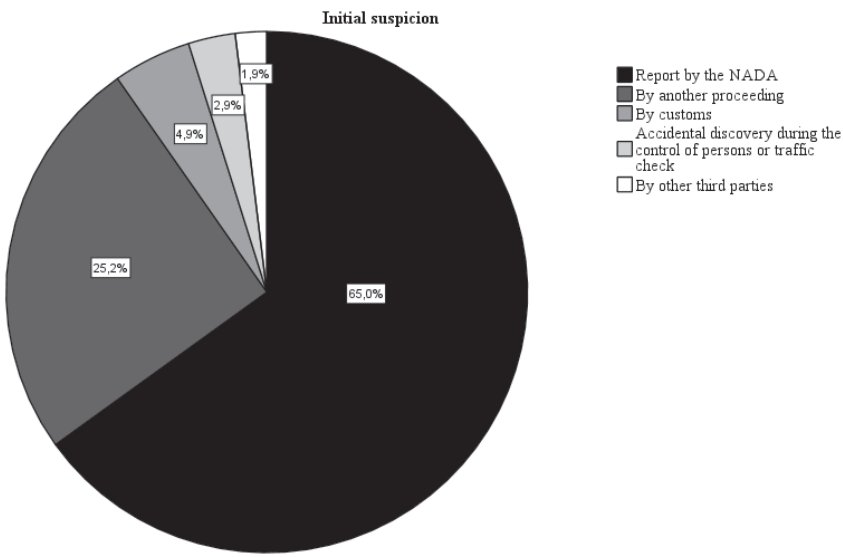
57 Two further proceedings were initiated by the NADA itself due to media reporting or public statements by the athlete.

tions in this area. That is why the cooperation with the NADA is very important." (StA 3)

In 25.2% of the cases, the initial suspicion of the public prosecutor´s offices arose from other proceedings, in particular from investigations against dealers of doping substances in accordance with section 2.[58] In those cases the law enforcement authorities initiated proceedings against the customers of the substances, whose data were taken from the dealers' order lists. The practice among the public prosecutor's offices was inconsistent: While some investigated solely on the basis of section 2 (purchase),[59] other public prosecutor's offices conducted the proceedings – even without any indications of participation in sports competitions or the capacity as a perpetrator in accordance with section 4 (7) – on the grounds of self-doping. However, all of those proceedings were closed without conditions.

Five of the proceedings were reported to the public prosecutor's offices by customs, two proceedings by third party complainants. There were no indications from sports associations in the sample investigated.

Fig. 3: Origin of the initial suspicion



58 Chance finds during house searches or telecommunications surveillance also played a role.

59 These proceedings were then not included in the local evaluation.

bb) Leniency

In connection with acquiring knowledge about cases of self-doping, the interviewees regularly made the introduction of a leniency subject of discussion. A leniency for athletes, who are accused of self-doping, does not yet exist. Section 46b I 1 of the German Criminal Code (StGB) in conjunction with section 100a (2) no. 3 StPO refers solely to the qualifying offence of committing the crime commercially or as a member of a gang in section 4 (4) no. 2 lit. b and thus excludes the doped athlete from the privilege of a leniency.[60]

In view of the limited possibilities of obtaining knowledge, some of the public prosecutors interviewed argued in favour of extending the leniency to the area covered by section 3. The prospect of mitigation of punishment or exemption from punishment could help to uncover structures and convict other doping athletes.

> "*At the top of the wish list would be, of course, to include a leniency in the AntiDopG because, as I said before, especially in top-class sport we don't get any cases. I already explained earlier how cases come up in mass sports and in weight training. Since practically all of these possibilities do not exist in top-class sport we do not get any cases in that area. Reports come either from the NADA or from the scene. [...] One would have to give the athletes an incentive to make a statement to the prosecution authorities. Especially since the dealer or the doctor would have the possibility to get a mitigation of the range of sentences through the general leniency. The athlete simply does not have that possibility. In my opinion, it is a very important signal to the scene to say cooperation is worth it.*" *(StA 3)*

On the introduction of a leniency for doping athletes, see in detail below (4.b.aa.).

b) Investigation measures

In 54.4% of the proceedings, no investigations carried out by the prosecution authorities were documented in the files that went beyond the hearing of the accused. The investigation measures carried out often involved searches of flats, motor vehicles and business premises (38.8%); urine,

60 On this in detail and critically: *Cherkeh*, SpuRt 2019, pp. 167, 168; *Hauptmann/Klarmann*, SpuRt 2019, p. 197.

blood or hair analyses were less frequent (6.8%) and an observation and a financial investigation were each only carried out in one case. Below the threshold of State intervention measures, online searches were often carried out to obtain an impression of the sporting activities and potential income of the accused.

> "*Often search measures are carried out, in both popular and top-class sport. The accused athlete's home and partly also the premises of his or her sports association are searched.*" *(StA 1)*

> "*The first measure is, of course, a search of the house. We actually always find something there with great success, if there's an initial suspicion.*" *(StA 2)*

Considerable differences between the public prosecutor's offices appear again in their willingness to carry out investigative measures.

In some cases, investigation measures were ordered at a very early stage of the proceedings. The legal prerequisites for the criminal liability of self-doping - such as participation in a competition of organised sport or the capacity as a perpetrator pursuant to section 4 (7) - were not examined. Extensive - and for the accused invasive - searches of flats were often carried out; however, the proceedings were then closed with a view to the lack of the legal requirements of section 3, even when substances were found. In such cases a reverse procedure would be appropriate, both for reasons of effectiveness and with a view to the protection of the accused.

However, the reverse picture also emerged. Despite existing indications that doping substances were being taken proceedings were closed without carrying out investigations by stating that the legal requirements would not be met. An actual examination of the prerequisites of the offence, however, was not carried out.

The NADA reported a dart player who tested positive for amphetamines at the German Darts Masters. It was not an athlete included in a Registered Testing Pool. The public prosecutor's office waived further investigations. The proceedings were closed in accordance with section 170 (2) StPO on the grounds that there was no indication of significant revenue. However, possible income of the athlete was not examined by the public prosecutor's office.

In other proceedings, the questioning of accused persons was waived "because, based on experiences from other preliminary investigations, it was to be expected that the accused persons will make use of their right to si-

lence. The proceedings are therefore to be closed pursuant to section 170 (2) StPO". (Excerpt from file)

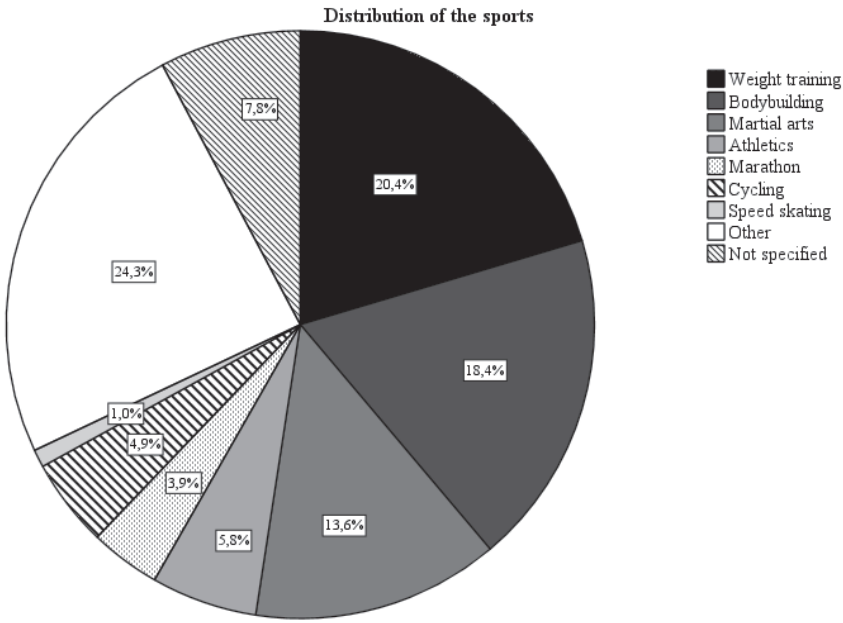
c) Completion of proceedings

Six of the investigated proceedings were ultimately not penalised as self-doping but as violations of section 2 or closed subject to conditions in accordance with section 153a StPO.[61] In three cases a summary penalty order (of 30, 40 or 120 daily rates) was issued for the accusation of self-doping.[62] The remaining proceedings regarding self-doping were closed; only four of these proceedings were closed with the imposition of a fine in accordance with section 153a StPO. No convictions for self-doping were found in the examined sample.

61 Since in these proceedings, the accusation of self-doping was raised, they were included in the sample (see p. 4). The outcomes were two convictions, two summary penalty orders and two terminations subject to conditions in accordance with 153a StPO for violation of section 2.

62 In one of the two summary penalty orders section 4 (1) no. 4 and 5 are named, but the explanatory memorandum solely refers to section 2 (3).

Fig. 4: Completion of criminal proceedings



Also, the interviews confirmed that cases of self-doping have hardly ever reached the courts so far.

R 2: "*I would say there wasn't a single case [of self-doping].*"

Interviewer: "*So this is not an offence that occupies you in practice, where we could now talk about the interpretation of the individual elements?*"

R 2: "*No, not at all.*"

aa) No convictions for self-doping

The evaluation of the procedural files provided by the public prosecutor's offices shows a remarkable conspicuousness: The proceedings that were conducted for a violation of the self-doping ban were almost without exception closed in accordance with section 170 (2), section 153 StPO.

The findings of the file evaluation coincide with the results of the interviews to the extent that the interlocutors confirm that so far there have

been no convictions for violations of the self-doping ban after a main hearing. Indications of such convictions, which can be drawn from the provisional data for 2017 and 2018 provided by the Federal Statistical Office, cannot be confirmed by the public prosecutors interviewed. Instead, one public prosecutor told a specialised public prosecutor's office about two judgements allegedly delivered in his area of responsibility:

> "*I believe there was an error in the statistical recording.*" *(StA 3)*

A public prosecutor from another specialised public prosecutor´s office stated on request about a judgment that might have been delivered in his area of responsibility:

> "*I currently do not recall any proceedings by the specialised public prosecutor's office that have led to a conviction for self-doping after the main trial was held.*" *(StA 1)*

One judge replied to the question whether he had encountered legal problems relating to the application of the offences related to self-doping:

> "*No, because I never used them.*" *(R 1)*

bb) Terminations in accordance with section 170 (2) StPO or section 153 StPO

Whether proceedings were closed in accordance with section 170 (2) StPO or in accordance with section 153 StPO depended less on the reasons for termination than on the practice of the respective public prosecutor's offices.[63] In particular, proceedings were often closed in accordance with section 153 StPO even if the results of the investigation showed that the legal prerequisites were not met or could not be proven. In the explanatory memorandum to the writ of nolle prosequi doubts whether the legal prerequisites were met were not addressed, but the lack of previous convictions and the special preventive effect of the preliminary investigations were pointed out.

63 Some public prosecutor's offices did not close proceedings in accordance with section 170 (2) StPO in principle, while others chose either section 153 or section 170 (2) StPO without any identifiable differentiation criterion; still others did not close proceedings in accordance with section 153 StPO if an element was demonstrably not fulfilled.

> "The accused has not yet made a criminal appearance. It can be expected that the accused has been sufficiently impressed and warned by the preliminary investigations carried out so far."[64]

The analysis revealed various reasons for the termination of proceedings relating to self-doping, such as:

- The substance found was not a prohibited doping substance.
- The accused is domiciled abroad and a letters rogatory was not considered promising.
- There has already been "a considerable sanction on the part of the sports association"[65], which makes criminal proceedings no longer appear necessary.[66]
- The proceedings lasted longer than one year and were closed "taking into account the further lapse of time that had occurred in the meantime".

In almost all proceedings it was difficult to prove all prerequisites for criminal liability.

In particular, the characteristic of "significant revenue" posed problems of proof. The public prosecutor's offices often did not carry out investigations in this respect, but decided to close the proceedings ("It cannot be assumed with a sufficient degree of certainty that the accused was generating revenue.").

Another reason for the termination of proceedings was the presentation of a medical certificate. A review of the medical certificate by the public prosecutor's offices was not apparent from the files; in some cases it was expressly pointed out that obtaining a "costly expert opinion" was "not proportionate to the importance of the matter". The proceedings were closed.

The experts would like to draw particular attention to two problems in the effective prosecution of self-doping: Termination because of the absence of intent regarding the use of doping substances (cc) and termination without apparent reasons (dd).

64 The explanatory memorandums to the writs of nolle prosequis in accordance with section 153 StPO read almost exactly the same at this point.

65 All following quotations are extracts from the files examined.

66 In these cases, the proceedings were closed in accordance with section 153 StPO.

cc) Termination because of the absence of proof of intent regarding the use of doping substances

> "The accused denies having committed the offence he or she is charged with. There are no direct witnesses. There is no evidence that would allow for a conviction without concerns. After carrying out the extensive investigations, it cannot be established with the probability required for an indictment that the accused has taken the substance knowingly and willingly."

Despite the existence of a positive doping sample, public prosecutor´s offices closed twelve proceedings on the grounds that it could not be proven that the accused took the doping substance knowingly.

(a) Terminations even took place if the accused's explanation for the substance in his or her blood or in his or her urine can only be described as far-fetched. For example, a racing cyclist explained his positive doping test in the accused's hearing as follows:

> "*In summary, these were tablets against hypertension and dehydration tablets for my mother who suffers from cancer. My mother wanted to put these tablets into a doser or dispenser. In this process a few tablets fell to the floor. I took one of the tablets from the dispenser and munched the others from the floor. (...) My mother explained only later to me what kind of tablets these are and what active substance they contain. That was Friday before the race.*"

The public prosecutor's office considered this testimony as sufficient for a termination in accordance with section 170 (2) StPO:

> "*The accused denied the charge brought against him and pleaded that he does not take 'such shit' and could not explain the proof of the substances amphetamine, heptaminol and hydrochlorothiazide in his blood. There is no other objective evidence available to convict the accused. In view of this factual situation and this evidence, bringing a public action has no chance of success. Because of the principle in criminal proceedings that in case of remaining doubts it always has to be decided in favour of the accused, it is not to be expected that the accused would be convicted.*"

(b) It has been repeatedly argued by accused that the proof of prohibited substances is due to contaminated food or drinking water. In the following, one proceeding is outlined as an example.

The accused was an athlete included in a Registered Testing Pool. He was a track cyclist. When the NADA carried out an unannounced training control, tamoxifen was detected in the athlete´s urine.[67] The NADA brought the matter to court. The accused denied having taken tamoxifen and gave an affidavit that he had never knowingly taken doping substances. He stated that the substance could at best have entered his body through contaminated drinking water and provided newspaper articles reporting that French drinking water was contaminated by tamoxifen. In addition, he provided evidence that he had been in a Belgian training camp shortly before the training control. The trainer had still kept the (partly opened) water bottles that the athletes used in the training camp. The water from these bottles was tested - an amount of tamoxifen that would have explained the positive doping test could not be detected.
The public prosecutor's office made the following summary statement:
"The conjecture of the accused that he unknowingly ingested the active substance tamoxifen via food supplements or contaminated water is in view of the chemical analysis carried out far-fetched. Concerning this matter, it also had to be considered that none of the other athletes in Team X tested positive for tamoxifen after their training camp in Belgium. Moreover, the NADA is not aware of any cases in which a doping case with the substance tamoxifen was caused by contaminated (drinking) water."
Nevertheless, the public prosecutor's office closed the proceedings in accordance with section 170 (2) StPO.
"Apart from the positive doping result, the criminal proceedings carried out did not provide any further evidence which would allow the conclusion that the accused knowingly applied or knowingly had applied the doping substance to him - or herself. The accused's testimony that he never knowingly or intentionally took the substance tamoxifen for a prohibited performance increase can therefore not be refuted with the certainty required for prosecution. In this respect, it had to be considered that in professional cycling it is not excluded that someone from the accused's environment administered the substance to the accused without his knowledge in order to promote his performance or to harm him. Therefore, the mens rea cannot be proven."

67 Tamoxifen is used for doping to counteract the side effects of anabolic steroids (e.g. breast growth in men). Since anabolic steroids are usually broken down more quickly than tamoxifen, however, often only this substance is detectable.

The Office of the Attorney General comments on the termination of the proceedings as follows:

> "*The accurate report of the public prosecutor's office makes it clear that despite the extension of the criminal liability in the area of doping to so-called self-doping, it will remain difficult in individual cases to prove a crime in a way that would satisfy the Code of Criminal Procedure. In cases in which direct proof of the crime, for example, by perpetuation of evidence during searches or by testimonies from the accused's close environment, is not possible, failure of punishment despite positive blood samples will probably continue to happen frequently in the future.*"

(c) The public prosecutor's offices impose extraordinarily high requirements on the assumption of sufficient suspicion of a crime with regard to the mens rea. In the proceedings examined, the impression was created that the accused´s testimonies were protection assertions. This applies not only to explanations apparently far-fetched - such as in case (a) - but also to blanket indications to contamination of consumed food, which are not confirmed by any investigations or practical experiences (on the contrary: in case (b) the claim that the doping substance would have been ingested through contaminated drinking water can be considered as refuted).

The practice observed would amount to the fact that proceedings for self-doping can in fact not be brought to trial[68] as soon as the accused denies the act, even if a positive doping sample is present. This applies in particular if one follows the public prosecutor´s office´s argumentation in case (b), according to which the abstract possibility of manipulation by third parties should be sufficient to deny that the athlete knowingly took the doping substances by applying the principle in dubio pro reo.

That such a handling of the reference to contaminated food is by no means mandatory is shown by the conviction of the boxing athlete *Felix Sturm* by the Regional Court of Cologne for self-doping (for the self-doping in coincidence with the bodily injury caused thereby an imprisonment of six months was imposed). The 8th Criminal Division of the Regional Court of Cologne had initially rejected the opening of the proceedings on

68 Finding doping substances in the home of an athlete included in a Registered Testing Pool days or weeks after a test has been carried out does not seem very promising. The same applies to witnesses, especially since in these cases, taking the reasoning of the public prosecutor's office as a basis, the possibility of a will to incriminate could not be excluded.

the grounds that[69] "based on the files and the expert opinions obtained, even at the end of a main hearing, the realistic possibility of an unintentional intake of the active substance remains. Therefore, a conviction for violations of the AntiDopG is not to be expected."[70] However, the Higher Regional Court of Cologne annulled the decision and admitted the charges against *Sturm* to be brought before a different criminal division. The 12th Criminal Division of the Regional Court dealt in detail with the question whether the doping substance stanozolol[71] could have been ingested by the athlete unknowingly. On the basis of two expert opinions, the chamber ruled out both the external influence hypothesis - it was argued that members of the opposing team had brought contaminated water bottles into the changing room after the fight - and the intake through contaminated food and food supplements.[72] The importance of stanozolol as one of the "most popular competition steroids", which is "typically used in boxing",[73] as well as the personal and professional circumstances of the athlete suggested the deliberate use of the doping substance. The press officer of the Regional Court rightly pointed out that in this case - as in other proceedings –the evidence had to and could be provided by circumstantial evidence:

> "*In such cases, we have a normal circumstantial evidence. And in this case, the court considered the accused´s testimony, also based on the expert opinions, as a self-serving declaration.*"

The proceedings conducted in Cologne were complex - already due to the appointment of two experts and the comprehensive evaluation of their expert opinions. It therefore remains to be seen whether the verdict will in future cause public prosecutors' offices and courts - even in proceedings in-

69 Decision of the 8th Grand Criminal Division of the Regional Court of Cologne of 10 January 2019 - 108 KLs 17/18.

70 Quoted in accordance with the decision of the Higher Regional Court of Cologne of 04 April 2019 - 2 Ws 122/19. On this topic *Lorenz/Bade*, JR 2020, 324.

71 Stanozolol is an exogenous anabolic steroid which, when taken over a certain period of time, for example during preparation for a competition, supports the build-up of muscle mass with the aim of increasing maximum and explosive strength.

72 The expert opinions could prove that the substances had not been taken shortly after the competition; it was also proven that neither meat nor the food supplements used by the accused could have been contaminated with stanozolol.

73 Order of the Higher Regional Court of Cologne of 04 April 2019 - 2 Ws 122/19Rn. 28. See *Kubiciel*, SpuRt 2020, 206 seq.

volving less prominent accused - to a more intense taking and consideration of evidence.

dd) Termination without apparent reasons

In many proceedings, terminations took place as soon as first difficulties in obtaining evidence arose. In some cases, however, it became clear that the investigating authorities had no will to prosecute. As an example, two proceedings will be outlined.

The accused - a marathon runner - is reported to the NADA via the anonymous whistleblower system. An evaluation of his Facebook profile by the public prosecutor's office shows that he repeatedly makes public statements about doping substances and also about their (personal) use. According to the anonymous informant, he had bragged to club members "at all times, whether appropriate or inappropriate," about consuming doping substances. The public prosecutor's office initially decides not to open proceedings, because the information provided by an anonymous informant cannot be verified. The NADA criticizes the action of the public prosecutor's office and points out that the informant is willing to testify by name. Thereupon, the proceedings are initiated. However, they are closed shortly thereafter in accordance with section 170 (2) StPO. The public prosecutor's office justifies the termination on the grounds that it would be "one person´s word against another´s". The NADA again contacts the public prosecutor's office and criticizes that the existing evidence would not have been sufficiently evaluated. Thereupon, the proceedings are reopened. Two months later, the proceedings are closed again in accordance with section 170 (2) StPO; this time by pointing out that the athlete took part in competitions abroad and therefore German criminal law would not be applicable.

In the file there is no legal examination of the applicability of the AntiDopG. The result would not be justifiable anyway; the point of reference for the criminal act under section 3 (1) is the application of the substance and not the participation in a competition. For acts under section 3 (2), the public prosecutor's office should have examined the requirements of section 7 StGB.

One supplier was investigated for the dispatch of doping substances. Customs receive a list of customers and can intercept a package addressed to the accused. The package contains a large number of illegal substances. Customs forwards the find to the public prosecutor's office. In addition, the public prosecutor's office is informed that the receiver is a triathlete who takes part in national and international competitions and, as his homepage shows, is supported by various sponsors. The proceedings are closed by the public prosecutor's office after 4 weeks in accordance with section 170 (2) StPO without investigation measures being initiated. Reasons for the termination cannot be found in the file.

The delivery of the doping substance to the receiver as well as the references to his participation in sporting competitions and his revenue generated thereby should at least have given rise to investigations.

It is also noteworthy that both public prosecutor's offices (in case a and case b) have closed all proceedings conducted by them for self-doping in accordance with section 170 (2) StPO.

d) Summary penalty orders and sentencing

Regarding self-doping, the relevant procedural files made available to the experts contained only three summary penalty orders and one acquittal following an appeal against a summary penalty order. In the latter case, a Bundesliga wrestler, who was accused of an offence under section 4 (1) no. 4 in conjunction with (7) no. 1 was acquitted.

On the one hand, it is striking that two of the summary penalty orders were issued against accused who made a confession regarding the subject of the investigations. On the other hand, it is remarkable that two of the sentences imposed in the summary penalty orders are at the lowest edge of the range of sentences: In the case of a baseball player, a fine of 40 daily rates was imposed for an offence under section 4 (1) no. 5 in conjunction with (7) no. 2. In proceedings against a cyclist, a fine of 30 daily rates was imposed for an offence under section 4 (1) no. 3, no. 5, (7) no. 1. In proceedings against a professional boxer who tested positive at a competition abroad, a summary penalty order was issued for a total of 120 daily rates: 80 daily rates for a "violation of section 3 (1) sentence 1" and 60 daily rates

for a "violation of section 3 (4)".[74] The accused initially raised an objection (without detailed justification) against the summary penalty order; however, this objection was withdrawn on the day of the main hearing without a plea on the merits.

It was not possible to evaluate the case file of the professional boxer Felix Sturm, who was convicted by the Regional Court of Cologne at the end of April, as the proceedings had not yet been concluded at the time of the evaluation. Of the total prison sentence of three years, six months were imposed for the offences under section 4 (1) nos. 4 and 5, which were committed in coincidence, as well as for the related bodily injury. The written grounds for the verdict were not yet available at the time this report was written.

4. Evaluation

a) General evaluation of the criminal law regulation of self-doping

aa) Overview

The concerns against the introduction of the AntiDopG in general and the criminal liability of self-doping in particular that had been expressed during the legislative procedure have been partially dispelled. It is noticeable that the attitude of the athletes' representatives is more positive than it was during the legislative procedure. It is also apparent that the majority of the public prosecutors interviewed have no concerns about the criminalisation, while the judges interviewed assess the offences more critically; however, the judges have not yet been able to gain any experience with charges of criminal violations of the self-doping ban.

bb) Appropriateness of the criminalisation of self-doping

During the legislative procedure, it has often been criticised that fairness and equal opportunities in sport are values of sporting ethics,[75] but no le-

74 Why the summary penalty order did not set the sum of 80 daily rates and 60 daily rates (140), but 120 daily rates, was not apparent from the files.

75 DOSB, Opinion on the draft bill for a law to combat doping in sport, p. 4.

gitimate objects of protection of criminal offences.[76] These concerns are still hinted at by one athlete's representative:

> "*I think this is a little difficult. On the one hand the integrity of sport is a valuable commodity for me, but on the other hand it was only introduced by the AntiDopG. I don't know if this is the right place to punish self-doping so much again, because for me as an athlete it is a much higher penalty that you are practically banned from your sport for two years and, in addition, have to pay back all income from the Sports Aid. This is a deep cut in life, which you do not want to take on under any circumstances. (...) That's why I would view it as a little critical to punish self-doping in a national law. It is already punished very severely elsewhere. That is probably not the way to prevent self-doping.*" *(A 1)*

Nevertheless, when asked whether it would be useful to prosecute the illicit use of doping methods and substances, she replied as follows:

> "*I think that it makes sense in general, (...) also from health aspects, especially from the aspect of how our meritocracy develops. There is a high risk if young athletes notice the illicit use of doping methods and substances in their club. In the leisure sector doping also takes place often. (...) That's why I generally think it's not bad that this is being prosecuted. However, you always have to clarify the framework conditions in such a way that it is proportionate.*" *(A 1)*

Another athlete representative is also ultimately convinced that the criminalisation would be useful:

> "*I find it a little bit hard to answer, because personally I was always very ambivalent about whether this is the right way to go. I was worried that this criminalisation takes place, also because I see many situations where young people get into a system, dependencies arise, pressure situations arise. I do not mean to say that they are therefore not guilty when they take doping substances, but there is sometimes a system which strongly favours this and which also puts them in a very difficult situation when they do not take the doping substances, because this partly happens in a group. That's why I was partially skeptical whether these athletes should actually be penalised. They already have to endure a hard punishment, because they actually lose their career. That's what causes my conflict. Basically, though, I believe that hard*

76 Opinion of the German Association of Judges on the draft bill for a law to combat doping in sport, no. 7/15.

measures are necessary. We see that with the means we currently have for prosecution within the Anti-Doping Control System it is very difficult to stop someone from taking doping substances if he or she is willing to take them." *(A 2)*

The majority of the public prosecutors interviewed also did not express any doubts about the usefulness of the criminalisation and the prosecution of self-doping.

"*I consider the offence as very important.*" *(StA 1)*

"*In terms of the idea of sport, I consider it as quite counterproductive that people who work with doping substances have more training progress and more success. That's why I think that the principle of criminal liability for such matters makes sense, yes.*" *(StA 5)*

One public prosecutor, however, expressed concerns:

"*I think that everyone must decide on his or her own responsibility whether or not to take doping substances. Recently I had a case, where someone who was subject of an arrest warrant was supposed to be extradited from Georgia (the Georgians don't know the AntiDopG and also have no similar law and everybody is always surprised that this is punishable in Germany). We probably go on a special path. I think that the self-responsibility among athletes should be enough to decide whether to take doping substances or not. Possession of doping substances for personal use - yes, I don't know if that necessarily has to be liable to prosecution.*" *(StA 2)*

However, according to the public prosecutor´s own statement, he has so far only dealt with one case of self-doping. The same applies to the two judges, who also expressed critical views.

"*I never had anything to do with section 3. I have actually not yet developed an informed opinion on section 3 because I have never had to apply it myself. My opinion on it is rather superficial. I consider section 3 to be largely superfluous. (...) From the point of view of criminal prosecution it seems to me completely uninteresting that top athletes apply or have applied doping methods to themselves. I do not know why this should not be allowed. (...) I have my doubts because it is primarily a matter of self-endangerment. The only reason for me to pay attention to this phenomenon is the fact that there are also underage athletes who must be protected by all means.*" *(R 1)*

Someone else pointed out:

> "*Why should I stop an athlete from doing that? I mean, although this is a stupid example, I'm not stopping anyone from eating 10 kilograms of beef or pork every day, and somehow harming him or herself thereby. Let's put it this way: I could live with it better if the real sense, the real purpose would be to protect the sport. Doping, some would say, that is also sport. But if I leave aside the fact that this is a way of at least helping to limit the certainly existing doping problem, I am still waiting for the first case. That is a bit strange, because if you look closely that is almost impossible.*" *(R 2)*

cc) Fear of deliberate false accusations

During the legislative procedure, athlete representatives have expressed concerns that athletes could be mistakenly suspected on purpose, for example by competitors, or that a small amount of doping substances could be foisted on athletes. So far, however, athlete representatives are not aware of any such case:

> "*No, I don't have an illustrative example of that, and I wouldn't dare stating that it unsettled the athletes.*" *(A 2)*

> "*I am not aware of any case.*" *(A 1)*

When asked about a possible insecurity of the athletes, a representative of athletes answered:

> "*No, I do not have an example of that. (…). But that still doesn't mean it's OK. It's just in the perception - I think - not so bad.*" *(A 1)*

dd) Concern about the importance of sports jurisdiction

Finally, the empirical study did not reveal any indications that the criminalisation of self-doping and the State prosecution has led to a weakening or devaluation of sports law proceedings. Commenting on this, a representative of an association said:

> "*It is true that we had indeed always brought this up in the legislative procedure and that it was precisely this weakening that was the greatest concern. Whether this was actually justified, we cannot yet answer clearly. We do not yet see an actual case in Germany that would be such a prominent case inde-*

pendent of popular sport, and is sentenced with penalties and sanctions provided by the AntiDopG. Therefore, we cannot even compare and consequently also not assess if there actually is a discrepancy between the sports law and the criminal law sanction system." (D)

The athletes' representatives even stressed that the fear of consequences under the sports law would be greater than the fear of prosecution.[77]

ee) General evaluation

When asked whether the self-doping ban of the AntiDopG would be successful, the majority of the athletes and public prosecutors interviewed responded with a basically positive tendency. Exemplary:

"*I think, as a whole, it is successful. I just think that we really have to get away from saying that the AntiDopG solves the problems.*" *(A 1)*

"*Yes, I think, as a whole, it is successful. The cases in top-class sport are still within limits, if I understood it correctly, but I do think that it is successful as a whole." (A 2)*

"*It definitely succeeded to criminally or legally legitimise a really very difficult and very, very controversial area. This is good, this is the right way. Of course, it is also important to look at this law regularly and to improve necessary nuances.*" *(N)*

"*Successful and no change requests.*" *(StA 4)*

However, these positive statements are limited by some with a view to the small number of cases:

"*Well, I think the AntiDopG is successful. You can't say that it backfired. It has brought about a multitude of positive phenomena. (...) These are all points which support the anti-doping prosecution, although the whole basic trend and situation that you don't get cases in competitive sports did not actually improve because of the AntiDopG. (...) We simply have no cases. The AntiDopG could offer an incentive or provide the possibility to get cases by starting where the information could come from. In my view, it can only come from the scene, and that is why the absence of a sports-specific leniency is*

77 See quotations from A 1 on p. 37 and 68.

a considerable shortcoming; I believe that the AntiDopG has a considerable need for improvement." (StA 3)

"I think it's somehow really difficult for us to evaluate this because we think that there are too few relevant cases to assess whether it works or not. If you - I mean, overall that's not desirable, - but if you had ten or twenty actual cases of application to test it on - that sounds a bit weird - but if you could actually completely apply the law, and by that I don't mean just any bodybuilders from any fitness studio, but really these top athletes that we're talking about of course we do not want that, but only then, I think, we could say, "It really proved itself or not." (D)

b) Practical proposals for the reform of the criminal law provisions on self-doping

Despite the basically positive assessment of the self-doping ban by the majority of the respondents, the experts made suggestions for the improvement of the criminal punishment of violations against the AntiDopG at various places. In relation to the substantive law, the focus was on the revision of section 4 (7), which was considered too vague, especially with a view to the "significant revenue" (see 2.c. bb. above). However, most frequently the experts pointed out the introduction of a leniency and better protection for whistleblowers.

aa) Introduction of a specific leniency

As already stated, (see 3.a. bb. above), the leniency in section 46b StGB does not apply to self-doping athletes. An independent leniency as in section 31 BtMG does not yet exist in the AntiDopG. Therefore, athletes accused in criminal proceedings have no legal incentive to disclose their own knowledge about structures, backers or other perpetrators.

In their statements, the NADA, the DOSB, the German Lawyer Association (DAV) and athletes associations have called for the introduction of a leniency for athletes.[78] It is pointed out that the prospect of a reduced sen-

78 Athletes Germany Association (Athleten Deutschland e.V.), opinion at the hearing of the sports committee on August 23, 2019, p. 4; DAV, opinion no. 38/2019, p. 4; DOSB, public hearing of the sports committee on October 23, 2019, p. 2; NADA, public hearing of the Sports Committee of the German Bundestag, Need

tence or impunity could motivate athletes - who often remain silent out of shame, fear or misconstrued loyalty - to provide further information about their milieu to the investigating authorities. An international comparison has also shown that cooperation with convicted athletes is an important prerequisite for the detection of doping structures.

> "*The responsible investigators of the Anti-Doping Agencies are facing great problems due to this lack of will to cooperate. They are often neither able to identify all members of the doping network nor to gather sufficient legally effective evidence against suspects. (...) In the past, such mechanisms have proved to be very helpful. Leniencies, for example, helped the American authorities to uncover the widespread abuse of doping substances within the former cycling team US Postal.*"[79]

Also the legal literature demands the introduction of a leniency for all offences provided for in section 4. It is argued with the parallel to the narcotics law, whose special leniency in section 31 BtMG would be comparable in its ratio and would have proven itself in practice.[80] The criminal leniency should be accompanied by the commitment to lift sports law bans respectively to close the disciplinary proceedings for doping by the competent anti-doping organisation.[81]

In the expert interviews, two positions on the leniency could be distinguished. Some of the experts doubted the need for a special leniency.

> "*[Whether a leniency would be useful,] I cannot answer, because we very, very seldom deal with competitive sports and I am, to be honest, not aware of any application of a leniency in our investigations.*" *(Zoll 3)*

Interviewer:	"*What role does the leniency applicable to section 2 play?*"
R 1:	"*So far, it did not play a role for us.*"
Interviewer:	"*Would an extension of the leniency to self-doping make sense?*"
R 1:	"*Since the leniency has not played a role so far: no.*"

> "*As far as I can see, [the leniency] has as yet not played any role for us, I mean in my work. I can therefore not assess that.*" *(StA 5)*

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for Amendments and Supplements to the Act against doping in sport (Anti-DopG), p. 2 f.

79 Opinion Athleten Deutschland e.V., p. 4.

80 *Hauptmann/Klarmann*, SpuRt 2019, 197.

81 *Cherkeh*, SpuRt 2019, 167.

Interviewer:	"*What role does the leniency applicable to section 2 play?*"
StA 7:	"*It does not play a role for me.*"
Interviewer:	"*Would an extension of the leniency to self-doping make sense?*"
StA 7:	"*No, because the leniency does not play a role for me.*"

However, the respondents did not criticise the basic idea of a leniency, but did not see any practical reason for a reform in view of their own occupation. Considering that the number of proceedings is currently still low this finding should not be overestimated: Since the public prosecutor´s offices - and all the more the courts - have only very rarely been confronted with relevant cases of self-doping, it is obvious that so far there has been hardly any need for a leniency.

Nevertheless, in the interviews, in addition to the representatives of the NADA and athlete federations, also public prosecutors spoke in favour of a special leniency in the AntiDopG.

> "*A special leniency would certainly be desirable. If the accused could be instructed to that effect, it would, by all means, be a signal for him. He could be motivated to provide further information." (StA 1)*[82]

> "*In my opinion, the AntiDopG is a good law. You can really work with the AntiDopG, but this is a real loophole. You can really improve on that. (...) I think this is a very central point. If you want to do something about it, if you want to optimise the prosecution of doping, then you have to establish this leniency." (StA 3)*

bb) Improved protection of whistleblowers

The opinions of the NADA and the athletes associations call furthermore for an improved protection of "whistleblowers".[83] This concerns persons

82 However, the expert adds that this is a general assessment which is not based on experience: "As far as the existing possibilities are concerned, we have, however, so far very rarely found that an accused person provides more information simply because he has been given the appropriate instruction, but nevertheless we would consider it as a useful signal for the accused person."

83 Athleten Deutschland e.V., Statement at the hearing of the Sports Committee on August 23, 2019, p. 4; NADA, Public Hearing of the Sports Committee of the German Bundestag, Need for Amendments and Supplements to the Act against doping in sport (AntiDopG), p. 3.

who wish to reveal information about doping violations without themselves being confronted with a criminal charge. The NADA points out that "all revelations of the biggest current doping scandals [...] are based on the statements of whistleblowers".[84] The representatives of these bodies emphasised the importance of a better protection of whistleblowers also in the interviews.

Whistleblowers risk serious professional, financial and private consequences by exposing doping violations, as there is still the risk of being considered as a "runner-down" in the sporting environment.[85]

> "*It is important for us, however, that also people who see something are protected sufficiently. Also, the Russian scandal has shown that there are countries where athletes are exposed to very, very great dangers. Even in Germany, partially criminal structures are behind it. The people who say something must in any case know that they are protected. Many people don't say anything out of fear. I think this is a big point that needs to be improved.*" *(A 1)*

In the interviews, in particular the athletes' representatives pointed out that existing whistleblower systems - such as those of the NADA or the World Anti-Doping Agency (WADA) - are hardly known so far.

> "*The problem is that it's far too unknown. Most athletes don't even know that it exists. (...) We had a small internal survey among the athletes' representatives, these are people who are already more interested in sports politics and read many more e-mails and obtain information on websites, and of these 35 people only two people - or three people including me - knew about the whistleblower system. You therefore can imagine what it looks like among athletes.*" *(A 1)*

In the opinion of the respondents, a good whistleblower system should be completely anonymous and at the same time - e.g. by means of a "mailbox function" - allow follow-up questions to the whistleblower. However, the experts did not make any concrete proposals to the legislator. The establishment of effective whistleblower systems was primarily seen as a task of the federations and anti-doping agencies:

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84 NADA, Public Hearing of the Sports Committee of the German Bundestag, Need for Amendments and Supplements to the Act against doping in sport (AntiDopG), p. 2.

85 *Hauptmann/Klarmann*, SpuRt 2019, 191.

> "*Whether the Act against doping in sport is the right place [for provisions regarding the protection of whistleblowers], I don't know. We ourselves launched the initiative to say that whistleblowers in sport must be protected in principle. This is rather a task coming from the sport. (...) I kind of miss a concrete approach on how a legislator can take the lead. Nevertheless, I would of course like to see some initiative, if that is possible.*" *(N)*

II. The prohibition norms of section 2

Section 2 is one of two central prohibition norms of the AntiDopG. Section 2 (1) contains offences which address the "delivery side"[86] of doping and which prohibit, in particular, the manufacturing, trafficking and placing on the market of doping substances. Section 2 (2) covers the illegal administration or application of doping substances and methods to another person, while section 2 (3) prohibits the purchase and possession of doping substances in significant quantities for the purpose of doping humans and their transport to or through the territory governed by the AntiDopG. Section 4 (1) nos. 1 to 3 makes violations of these prohibition norms liable to prosecution.

According to all interviewed persons who work at customs, the public prosecutor´s offices and the courts, these provisions are at the centre of their practical work with the AntiDopG. The following statement of a public prosecutor is representative:

> "*The violations of section 2, i.e. the possession of doping substances in significant quantities, are the focus of our work, of our preliminary investigations. Without this provision we would have little contact with the AntiDopGt itself (...).*" *(StA 6)*

This statement is confirmed by another public prosecutor, who at the same time shows which group of persons makes up the majority of the accused:

> "*90% of the cases are of course that at Frankfurt airport customs finds many parcels containing testosterone ampoules or similar, which were purchased by a recreational athlete via an Internet portal (...) and which are usually shipped to Frankfurt from Thailand, China or the USA and are then intercepted by customs. Of these 90 %, I would say: 80 % are recreational athletes who go to the gym, who build up their muscles.*" *(StA 2)*

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86 Accurate Weber BtMG/*ibid.*, 5th ed. 2017, AntiDopG § 2 Rn. 2.

1. Phenomenon

a) Findings on perpetrators and criminal acts

The statements made by the interviewed investigators of customs, the public prosecutor's offices and judges on the accused were uniform. According to them, the proceedings concern almost without exception "*the fitness scene in general, so let's say mass sports, typical gym visitors, i.e. weight training and bodybuilding.*" *(Customs (Zoll) 3)*. The "*area of muscle building, bodybuilding*" would "*really (be) the biggest part of our proceedings.*" *(StA 1)*

This information can be split up in two respects. On the one hand, the preliminary investigations are not only directed against strength athletes who "*really do that competitively, but also (against) people who simply want to get their bodies in shape. That's the bulk of cases we have.*" *(StA 5)*

> "*The predominant portion of the proceedings that we deal within the specialised public prosecutor's office are proceedings involving bodybuilders or weight training. Some of the bodybuilders practice the sport competitively, but the majority of the bodybuilders are simply people who go to the gym and do the sport there. That's the largest part in terms of numbers.*" *(StA 4)*

> "*The main recipient is clearly the bodybuilder sport. Starting with people who do it actively, i.e. who compete, but also a large proportion of recreational athletes in the gyms, who expect increase in strength to match the current lifestyle. And that's over 90% of our group of recipients.*" *(Zoll 1)*

On the other hand, the interviews show that self-users make up the majority of the accused, i.e. persons who purchase, possess or carry to the territory governed by this act doping substances for their own use. Whereas those who exclusively or primarily deliver doping substances to third parties, manufacture them or traffic in them are clearly underrepresented. Thus, the prosecutors focus "*clearly on self-users*" *(StA 7)*; the accused are predominantly "*only consumers*" (R 1).

It happens less often that preliminary investigations are directed against manufacturers or dealers. One interviewee told about a special case of manufacturing of doping substances and commercial trafficking:

> "*A concrete case, which is actually somewhat larger, is a married couple who ordered substances from China over a period that is not even that long. Raw materials from China. And then - without much previous knowledge of chemical processes - created mixtures, mainly testosterone products, and then sold them on eBay to a significant extent.*" *(StA 5)*

More frequent, however, are cases in which an accused has acquired or possesses doping substances for his or her own use and at the same time traffics in them (to a small extent). A judge commented on that:

> "*It was either the bodybuilding studio operator, who also took the stuff himself and passed it on to his customers, or the bodybuilder himself. I think there were one or two who ordered it in bulk and then resold it, so that they ended up committing a serious criminal offence. But basically, it is the typical self-harmers.*" *(R 2)*

> "*Trafficking, that happens from time to time, like the narcotics addicts when they buy something and give away parts of it to get the money for the next batch.*" *(R 2)*

Nevertheless, structural parallels to other forms of organised crime are emphasised by customs investigators and also individual public prosecutors, in particular a "*collaborative, very conspiratorial approach*". *(Zoll 3).* There are "*also frequently points of contact with the rocker scene.*" *(Zoll 3)* Especially the high profit margins are mentioned as a reason why the organised trafficking in doping substances is interesting for offenders:

> "*Yes, clearly. The profit margin in trafficking in doping substances is higher than in trafficking in narcotics. Until a few years ago, the threat of punishment was also much lower, so it could be assumed that trafficking in doping substances was safer. One was able to generate more profit than with drug trafficking, and the punishment was also not at all comparable to the punishment of trafficking in narcotics.*" *(Zoll 1)*

If there are corresponding indications of organised offender groups, the investigators try to uncover these networks:

> "*Of course, we're trying to get the backers. We're trying to investigate in particular at this point. From a certain amount of import volume or also from the products, one can estimate whether the recipient is a consumer or someone who processes it. Our endeavour is to get the backers, especially those who make a profit out of it, i.e. who process the doping substances and then ultimately traffic in them.*" *(Zoll 1)*

> "*We have also already stopped large freight shipments at Frankfurt Airport, which should then be, so to speak, obtained by an operator network. These do exist, but in a small number of cases. It happens, one could say, every year and a half that we make investigations of structures into such large cases.*" *(StA 7)*

b) Findings on doping substances

The questionings on the doping substances subject of the proceedings revealed three essential findings. On the one hand, classical medicinal products for muscle building dominate:

> "*Ultimately, we start with the classic, the testosterone, nandrolone, but also the stuff you need to cushion the side effects from tamoxifen to clomiphene. Everything you can think of. Our main group of perpetrators operates in recreational sports, i.e. weight training, bodybuilding - and everything that causes muscle growth is ultimately imported, partly as a finished product, partly as a raw material, as an active substance, which is then further processed into these corresponding doping substances.*" *(Zoll 1)*

On the other hand, according to the investigators, trends can also be observed as a result of which new doping substances quickly become very popular:

> "*There are lots of new fancy substances. (...) For quite some time now lots of the new SARMs [selective androgen receptor modulators], for example.*" *(Zoll 3)*

Thirdly, investigations increasingly concern lifestyle drugs, which can in principle be used for the purpose of doping in sport, but often serve other purposes:

> "*Recently this DHEA. And epiandrosterone (...) also is very common. Whereby it is then used less for muscle building, but to regain control of the normal aging and sexual desire at a certain age.*" *(StA 2)*

According to a customs investigator, proceedings involving such lifestyle drugs cause considerable expense. The concrete determination whether they are actually intended to serve doping purposes would be labour-intensive and sometimes hardly determinable.

> "*We are very much frequented by it. (...) However, although it is listed and we then (…) have to conduct the preliminary investigation, (…) we have no knowledge that this medicinal product was even intended to be used for such purposes. (...) That ties up a lot of personnel.*" *(Zoll 2)*[87]

87 More on the difficulties in determining the intended use below 2.a.ee.

c) Summary

At the centre of the prosecution of offences under the AntiDopG are violations of section 2. Within this group of violations, the investigations are mostly directed against self-users of doping substances who do bodybuilding and fitness as a popular sport outside of competitions. Accordingly, the vast majority of the doping substances subject of the proceedings are medicinal products used for muscle building. In addition, there are an increasing number of new "fancy" medicinal products or lifestyle products which are often not used for doping purposes.

2. Findings on substantive aspects of section 2

a) The offences and their prerequisites

aa) Legislative context

Pursuant to section 2 (1), it is prohibited to
– manufacture,
– traffic in,
– sell, dispense or otherwise place on the market without trafficking, or
– prescribe.

A doping substance which is or contains a substance listed in Annex I of the International Convention against Doping in Sport of 19 October 2005 in the version promulgated by the Federal Ministry of the Interior in part II of the Federal Law Gazette for the purpose of doping human beings in sport.

Section 2 (2) prohibits to administer to another person such a doping substance for the purpose of doping in sport. Finally, section 2 (3) prohibits to purchase, possess or carry to or through the territory governed by the AntiDopG significant quantities of such a doping substance which is or contains a substance listed in the annex to this act, for the purpose of doping in sport.

Section 4 (1) nos. 1 to 3 makes actions contrary to these prohibitions punishable, whereas section 4 (6) also makes negligent conduct punishable.

According to the legislator, these provisions "serve primarily the protection of health".[88] This would be because the use of doping substances and doping methods for the purpose of doping in sport would not be based on a medical indication and therefore would lead to an intervention in the body which is not medically indicated and which entails considerable risks for the health of the athletes concerned. Numerous deaths in the past and serious long-term consequences of systematic doping would prove the harmfulness of doping. Underage athletes would also obtain and use doping substances despite the special health risks that the use of these substances holds particularly for young people.[89] Not only the athletes would be affected but also the general public, which bears the costs of treatment. In addition, the explanatory memorandum to the Act refers to the illegal trafficking in doping substances, which would have reached alarming dimensions and would use organised distribution channels and dealer structures comparable to those in the organised drug trafficking.

Section 2 adopts the prohibition norms previously contained in the AMG and places them - in a modified form - in the context of doping in sport. The spin-off of the prohibition norms from the AMG and their integration into the AntiDopG is assessed positively:

> "*[Our work] has become easier in the sense that the application of law has become easier and we no longer have to rummage through the Medicines Law.*" *(Zoll 3)*

The greater clarity of the norm is also emphasised:

> "*The (prohibition norms) are very brief and very clearly understandable (...).*" *(Zoll 1)*

One advantage of the new provision is seen in the fact that the applicability of the prohibition norms is now no longer linked to the properties of a medicinal product, but to the broader term of "doping substance". An investigator commented on the previous legal situation under the AMG:

88 BT-Drs. 18/4898, 23; Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG § 2 Rn. 1.

89 BT-Drs. 18/4898, p. 53; *Eising*, Die Strafbarkeit des Eigendopings, 2018, p. 86; *Heger*, medstra 2017, 205, 212; cf. in this respect also the parallel provision of section 29a (1) no. 1 BtMG on the illicit distribution of narcotics to minors: Körner/Patzak/Volkmer/*Patzak* BtMG, 9th ed. 2019, § 29a Rn. 5.

> "*In order to achieve criminal liability, we had to 'deal' with the fact that the doping substances are often counterfeit medicinal products. In order to achieve a conviction, we had to use auxiliary bridges at that time.*" *(Zoll 1)*

The act does not define the term of "doping substance". However, the explanatory memorandum to the Act states that both medicinal products and other active substances should be covered.[90] The decisive factor for the applicability of section 2 (2) and (3) is that doping substances contain substances listed in Annex I of the International Convention against Doping in Sport of 19 October 2005, in the version promulgated by the Federal Ministry of the Interior in part II of the Federal Law Gazette. Therefore, in contrast to section 6 a (2) sentence 1 of the old version of the AMG, not all amendments to Annex I of the Convention are included in the prohibition. Rather, such amendments at the international level become domestically effective for the AntiDopG only through a decision of the national regulator.[91]

In a decision of 14 February 2019, the Federal Court of Justice (BGH)[92] considered this to be a sufficient "degree of national design sovereignty" and for this reason rejected constitutional objections to the reference to Annex I of the International Convention against Doping.[93] Practitioners assess this approach as positive because "*with the help of the list of substances and the list of banned substances*" it would be easy to determine the range of criminal liability (Zoll 1).

Critics complain, however, that - in contrast to the BtMG, for example - no statutory instrument would be required to determine the incriminated medicinal products and active substances, but a mere announcement of the adoption of the application of amendments to Annex 1d of the Doping Convention: A statutory instrument would have - also with regard to the requirement of the principle of legality - a different status than an announcement and, in addition, different procedural requirements.[94] Therefore, it is demanded that a new power to issue statutory instruments for

90 BT-Drs. 18/4898 p. 23; critical Weber BtMG/*ibid.*, AntiDopG § 2 Rn. 6.
91 BT-Drs. 18/4898, p. 24.
92 BGH of 14 February 2019, 4 StR 283/18, StV 2020, 315, 317. See also *Finken*, PharmR 2016, 445, 446: "The provision therefore does not meet with any constitutional concerns."
93 BGH of 14 February 2019, 4 StR 283/19, StV 2020, 315, 317.
94 Weber BtMG/*ibid.*, AntiDopG, 5th ed.17, § 2 Rn. 14 f. Furthermore Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 4 AntiDopG Rn. 1, 11.

the specification of incriminated substances is created in the AntiDopG in order to determine the objects of the AntiDopG from now on more precisely by way of a statutory instrument - instead of an announcement:

> "*Also in the fight against doping in sport, it would at least be a gain in the rule of law if such a power to issue statutory instruments would be created or, as long as this has not been done, instead of an announcement the power to issue statutory instruments under section 6 (2) would be used.*"[95]

The legislator, on the other hand, points out that precisely in the fight against doping special flexibility would be needed in order to be able to react quickly and appropriately to new developments - even "during the year" and within a few months. In the past, it would have shown that "there is a high risk of lagging behind the rapid development of new doping substances and doping methods, which impairs the effective fight against doping.[96]

bb) Manufacturing, trafficking, placing on the market, prescribing (section 2 (1))

According to section 6a AMG (old version), the placing on the market, prescribing or administering of medicinal products to others for the purpose of doping human beings in sport was prohibited. These prohibitions have been incorporated into section 2 (1) in an altered form and new modi operandi have been added.[97] According to the legislator, the provisions of the AMG had proved to be too narrow; the manufacturing, trafficking, selling and dispensing of doping substances should also be punishable bearing in mind the health risks caused.[98]

The ban on manufacturing is intended to combat the development of illegal markets.[99] Due to its great practical importance, the legislator decided to include the selfish, turnover-oriented act of trafficking.[100] By incorporating the offence of selling, those cases in which the perpetrator dis-

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95 Weber BtMG/*ibid*., 5th ed. 2017, AntiDopG § 2 Rn. 15.
96 BT-Drs. 18/4898, p. 25.
97 Weber BtMG/*ibid.,* 5th ed.2017, AntiDopG, § 2 Rn. 6.
98 BT-Drs. 18/4898, p. 23; Lehner/Nolte/Putzke/*Striegel*, AntiDopG, § 2 Rn. 12.
99 BT-Drs. 18/4898, p. 23; Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, AntiDopG, § 4 Rn. 5.
100 The term is derived from the BtMG, BT-Drs. 18/4898, p. 24; Weber BtMG/*ibid.*, 5th ed. 2017, AntiDopG, § 2 Rn. 35.

penses doping substances against payment but unselfishly will be covered.[101] In order to address regulatory loopholes for acts of disposal that cannot be specifically proven, the catch-all element of other placing on the market has been included in the prohibitions.[102]

The interviewees appreciated the new version for two reasons. First of all, it would remove previously existing ambiguities in interpretation or close legal loopholes. The inclusion of trafficking is seen as particularly positive, because some cases are not yet covered by the act of placing on the market:

> "*Including the act of trafficking was a good decision. The act of placing on the market has always required some kind of stockpiling so that any incidents beforehand, such as a mere order or an intercepted package, have always lacked a legal basis.*" *(StA 3)*

The new legal situation would bring about a simplification[103] as it would also cover "*verbal trading up until a serious binding agreement has been reached*" *(StA 3)* and thus all cases "*from packing a parcel that is not even sent away in the end through to an intercepted parcel*" *(StA 3)*.

It is also appreciated that the wording of the law is based on established formulations of the BtMG:

> "*The new legal situation is to be welcomed because of its similarities with the BtMG.*"

On the one hand, this would be important for defence attorneys and other legal practitioners when they have "*to deal with violations of the AntiDopG for the first time*" and are "*more familiar*" with the BtMG. On the other hand, referring to well-known terms "*that have already been shaped by the case-law on the BtMG*" would be advantageous. *(StA 1)*

The benefits to the prosecution authorities are summarized as follows:

> "*Most importantly, section 2 is clearly defined. In the end, it is very similar to the BtMG.*" *(StA 5)*

101 BT-Drs. 18/4898, p. 24; MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 50.

102 BT-Drs. 18/4898, p. 24; Weber BtMG/*ibid.*, 5th ed. 2017, AntiDopG, § 2 Rn. 55.

103 "*In my opinion, this was a huge relief.*" *(StA 3)*

cc) Administration or application of doping substances and methods (section 2 (2))

The prohibition of administering doping substances (no. 1) corresponds with the previously applicable prohibition under section 6a (1) AMG. The new provision has been extended to include the prohibition of administering doping methods to another person (no. 2). The doping methods – as well as the doping substances –are listed in Annex I of the International Convention against Doping in Sport in the version promulgated by the Federal Ministry of the Interior.

In order to address legal loopholes, the legislator explicitly included doping methods.[104] This is appreciated by a public prosecutor who is referring to a case example as follows:

> "*It was a good decision to include doping methods and thus close any legal loopholes. (...) In a previous trial, we discovered that unlawful methods were applied and thanks to the new provision, we were able to issue an order of summary punishment. Otherwise, we would have been compelled to close the proceeding.*" *(StA 1)*

Another public prosecutor agrees with this and refers to legal uncertainties in the previous legal situation under the AMG by citing a specific preliminary investigation:

> "*The inclusion of doping methods was really important. Under the AMG the precise distinction between methods and medicinal products was always a matter of dispute, especially in terms of blood doping like in 'Operation Aderlass'.*" *(StA 3)*

Only one judge, who has not yet gained any experience in this matter, expressed criticism:

> "*I have my doubts as to whether this is really necessary because we never had to negotiate the use of certain doping methods.*" *(R 1)*

104 BT-Drs. 18/4898, p. 25; Körner/Patzak/Volkmer/*Volkmer,* BtMG, 9th ed. 2019, AntiDopG, Vor § 1 Rn. 21; Weber BtMG/*ibid.*, 5th ed. 2017, AntiDopG, § 1 Rn. 2.

dd) Acquisition, possession and transfer pursuant to section 2 (3)

(1) General meaning

The prohibition of possessing and purchasing significant quantities of certain health-endangering doping substances for the purpose of doping in sport contained in the previously applicable section 6a (2a) sentence 1 AMG has been incorporated into section 2 (3). Additionally, the prohibition of carrying to or through the territory governed by this act, thus to or through the territory of the Federal Republic of Germany, has been included. Thereby, the prohibition of carrying medicinal products to the purview of this Act (section 73 AMG) is supplemented by the act of carrying doping substances through the purview of this Act.

(2) Acquisition and possession of significant quantities

In practice, the acts of acquisition and possession of doping substances seem to be of particular importance. This is indicated by the statements quoted above under 1 a), according to which the accused are "*definitely self-users*" (StA 7) in most cases. When asked about a typical example of his investigations, a customs investigator states the following:

> "*The focus is on section 4 (1) no. 3 in conjunction with section 2 (3). We operate in accordance with it.*" *(Zoll 2)*

The legislator imposed a ban on the acquisition and possession of significant quantities of doping substances, since experience has shown that such quantities usually result in trafficking with doping substances.[105] The prohibitions contain the legally protected right to public health as the population should be protected from the distribution of doping substances for the purpose of doping. To this end, acts that typically only serve to prepare for transfer should already be prohibited[106]. Thereby, any evidentiary problems that arise in cases where trafficking, selling or dispensing cannot be specifically proven will be solved at the same time.

105 BT-Drs. 18/4898, p. 25; MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 58; Körner/Patzak/Volkmer/*Volkmer*, BtMG, 9th ed. 2019, AntiDopG, Vor § 1 Rn. 21.

106 BT-Drs. 18/4898, p. 25 f.; BGH StV 2018, 302.

The element "significant quantities" is of fundamental importance to this legitimation model.[107] If the threshold for significant quantities is exceeded, the law will - according to its ratio legis - irrefutably presume the criminal intent to transfer; below this threshold personal use cannot be ruled out and thus, a criminal intent to transfer cannot be presumed.[108] In general, this approach is approved by the prevailing view in literature.[109] Occasionally, however, constitutional concerns regarding the principle of legal certainty (Article 103 (2) of the Basic Law) are raised because section 6 (1) authorises the Federal Ministry of Health to determine the significant quantity by statutory instruments without it being clear what their determinations should be based on.[110] The BGH, however, considers the provision to be constitutional. Since the legislator himself precisely determined the criminal act and the sentencing range, the determination of a significant quantity would merely be a specification of the elements that justify the punishment.[111] During the interviews, no concerns about the jurisdiction of the regulator were raised either.

However, the evaluation has shown that the application of law clearly distances itself from the above-mentioned basis for legitimacy, namely the prohibition of purchase and possession in order to prevent trafficking in doping substances and not as an end in itself. This is due to two reasons. *Firstly*, according to the BGH, section 2 (3) shall also cover possessions for the purpose of self-doping: Even if the accused was in possession of doping substances for the mere purpose of self-doping and was at most willing to pass it on unprofitably, he should still be held criminally liable in accordance with section 4 (1) no. 3.[112] This means that the provision can also be applied to self-doping competitive athletes who do not meet the personal requirements for the application of section 4 (7) and who only possess doping substances for their own purposes. *Secondly*, many respondents pointed out that the threshold for a significant quantity is extremely low. There-

107 On this and on the following Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, AntiDopG, § 4 Rn. 17.
108 Weber BtMG/*ibid.*, AntiDopG, § 2 Rn. 21.
109 Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, AntiDopG, § 4 Rn. 17.
110 Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, AntiDopG, § 4 Rn. 1; Körner/Patzak/Volkmer/*Volkmer*, BtMG, 9th ed.2019, AntiDopG, § 4 Rn. 50 f.
111 BGHStV 2020, 315, 317.
112 BGHStV 2018, 302.

fore, a public prosecutor expressed fundamental doubts about the legitimacy of the norm:

> "*The legislator was probably struggling due to the fact that doping is generally a self-destructive matter. (...) But anyhow he presumed that the possession of a significant quantity always involves the risk that these doping substances may be placed on the market. (...) This just means that the legislator was uncertain whether the mere possession of doping substances should be punishable. So he decided that it should at least be punishable if there was a risk of trafficking or dispensing. That seems to be ambivalent, I guess. Also, considering my sense of justice, I'm not sure whether this should really be criminalised bearing in mind that a small quantity is really not that much (...).*" *(StA 5)*

Other interviewees confirmed that the threshold for a significant quantity would quickly be exceeded and that no great practical importance would be attached to this restriction of criminal liability:

> "*In fact, the significant quantities are reached very quickly.*" *(StA 7)*

> "*In martial arts, the significant quantities are quite often exceeded. (...) A 10 ml ampoule, i.e. a perforable ampoule (...), will often be enough to give rise to criminal liability.*" *(StA 3)*

> "*It's relatively rare that someone is in possession of such a small quantity that he will go unpunished. (...) Usually, people have a larger quantity because otherwise it doesn't really make sense to use it for doping.*" *(StA 4)*

> "*Well, the significant quantity isn't much of a problem. In the AntiDopG, the threshold is set so low that almost any possession constitutes a criminal offence. One must rather say that sometimes it is too low so that even the smallest amounts are punishable (...).*" *(Zoll 1)*

Only one public prosecutor stated that it can be difficult sometimes to calculate whether there is a significant quantity of a doping substance:

> "*Recalculating all of this is quite a lot of work for the prosecution.*" *(StA 1)*

If, for example, only one ampoule is found, there will certainly be sufficient initial suspicion under section 2. But whether an infringement of section 2 has actually occurred would depend on how much active substance is still left in the ampoule. That would have to be precisely calculated:

> "*Just because you have found an ampoule you cannot simply assume a violation of the AntiDopG. Instead, you have to calculate exactly how much is*

still left in the ampoule. Often, you have to obtain an expert opinion for this." *(StA 1)*

Ultimately, however, this opinion also confirms that the thresholds for significant quantities are set so low that the detection of an ampoule (that is not even completely filled) already provides grounds for an investigation. This means that, above all, self-users who only administer the doping substances themselves and who – contrary to what is assumed in the explanatory memorandum to the Act – do not intend to trade with, sell or dispense doping substances will be prosecuted. The proceedings are often directed against bodybuilders who do not participate in competitions and thus do not use doping substances in order to gain an advantage in sports competition, but for other (e.g.: aesthetic) reasons.

(3) Carrying to or through the territory governed by this act

The new ban on carrying doping substances to the territory governed by this act already allows for the seizure of doping substances on entry at the border of the Federal Republic of Germany[113] and enables the prosecution to punish it as a criminal offence. Carrying doping substances through the territory governed by this act is also punishable.

Two public prosecutors expressed a positive opinion on these modi operandi. The "*offences of carrying to or through the territory governed by this act*" have been "*advantageous for us*" (StA 1) or rather "*absolutely crucial*" (StA 7). The reason for this is that the previously required "import" was only given when the goods were released into free circulation after customs clearance. However, if this was not given due to the fact that the goods were not delivered to Germany, but have only been handled there and are being further transported, there was no punishable import. Thereby, legal loopholes occurred:

"*Actually, 'carrying to or through the territory governed by this act' is a customs term. It is necessary, though, because the previous AMG has only referred to 'import'. And 'import' requires the entry of medicinal products into free circulation, which will usually not be the case if it has already been detected by the customs authorities beforehand. Since there was no criminal liability for attempted import under the previously applicable AMG, the ac-*

113 On this and on the following BT-Drs. 18/4898, p. 25; Lehner/Nolte/Putzke/*Striegel*, AntiDopG, § 2 Rn. 83 f.

cused often remained unpunished. By incorporating the act of carrying doping substances to the territory governed by this act, this legal loophole has been closed." *(StA 7)*

The interviewed customs officers referred to its practical significance as follows:

"*For example, if goods are sent from China to Poland and customs controls are carried out at Frankfurt airport, the goods are carried to Germany. And this can already incur criminal liability. So, it had a huge impact on our work.*" *(Zoll 1)*

"*It's a clarification and it has certainly helped a lot.*" *(Zoll 3)*

According to the two of the interviewed customs officers, the provision is considered to be of significant practical relevance:

"*Since then, the number of preliminary investigations into cases of transit has increased.*" *(Zoll 3)*

"*We have a great number of criminal proceedings for transit. Usually, large quantities of doping substances that were seized when being carried to Germany are involved. Some of the criminal proceedings are then continued in other European countries (...).*" *(Zoll 1)*

Another customs investigator, however, pointed out that it is particularly difficult here to distinguish permissible forms of carrying to or through the territory governed by this act from criminal acts because the required element "for the purpose of doping in sport" would not be inherent in the doping substances themselves, but could only be determined through further investigations. The purpose of doping would "*sometimes be a bit difficult to identify*". Occasionally, it would also concern "*larger consignments of medicinal products*" (Zoll 2). In such cases transnational investigations may become necessary:

"*If doping substances are carried through Germany in order to reach the receiver in a third country, the investigator will have to initiate criminal investigations to find out about the intended purpose.*" *(Zoll 2)*

While the ban on carrying to or through the territory governed by this act is considered to be of significant practical importance for the customs authorities, it has played virtually no role in criminal justice so far. One interviewed judge had no experience with charges of illegal transit, which indicates a high rate of termination of proceedings:

> "*Well, we've never had any cases of transit. But we've had many cases of manufacturing and trafficking.*" *(R 1)*

Currently, the ban on carrying to or through the territory governed by this act seems to primarily serve the purpose of checking suspicious deliveries as well as seizing doping substances.

ee) For the purpose of doping human beings in sport

The standards of section 2 and the related criminal offences listed in section 4 (1) link the prohibitions or rather the criminal liability for handling or application of doping substances or methods to the "purpose of doping human beings in sport".[114] The term "sport" shall include all sporting activities; competitive sport as well as popular sport.[115] Thereby, the improving performance in bodybuilding by means of unnatural increases in weight and strength is also included.[116]

While the classification of activities under the broad term of sport does not cause any practical difficulties,[117] a proof of the purpose of doping can be difficult. This concerns cases of carrying medicinal products through the territory governed by this act (see above dd. (3)) as well as those lifestyle drugs already mentioned above (under 1.a.). In this regard, the survey indicates that the investigation's main focus lies on the question whether the medicinal product should serve as a doping substance "for the purpose of doping human beings in sport" or whether it is used for other – permissible – reasons.

> "*At the moment, we see a medicinal product called DHEA (dehydroepiandrosterone) a lot. (...) It's one of those lifestyle drugs that has already been approved in the US and is sometimes prescribed by German doctors, too. (...) It can be used to help with cancer, stress, anti-aging or menopausal disorders. (…) Due to this medicinal product, we've got so much work to do. But it might not even be that effective in this respect because the people usually have no clue that it is*

114 Section 2 (2) refers to the purpose of doping in sport "to another person".

115 Körner/Patzak/Volkmer/*Volkmer*, BtMG, 9th ed. 2019, AntiDopG, § 4 Rn. 24; Erbs/Kohlhaas/*Wußler*, 228 EL January 2020, AntiDopG, § 2 Rn. 6.

116 BGH NStZ 2010, 170.

117 The question whether so-called e-sports can also be seen as sport is currently disputed in legal literature, see *Kubiciel*, ZRP 2019, 200, 203.

a medicinal product. Nevertheless, preliminary investigations are initiated." (Zoll 2)

If someone is found to be carrying such medicinal products on entry, the investigations seem to be carried out by inspection and queries. An investigator vividly described that his colleagues are then wondering:

> "*Could the person in front of us be an athlete? (...) What is he or she saying? If the person in front of us is a seventy-year-old pensioner on his travels carrying DHEA with him, I would ask him: what for? If he says that he just came from the US, suffers from a medical condition and that this is why he is taking the pills, I wouldn't have an initial suspicion. I would probably tell him to keep it because you are allowed to import a three months' supply of medication for your own use.*"[118]

Such an initial assessment cannot always be made through a mere inspection. Sometimes, the investigations become more complex and investigative resources must be pooled, especially due to the fact that quite a few of the accused happen to exchange defence strategies on the internet in order to convince investigators that the medicinal product is not used for the purpose of doping in sport:

> "*When talking with the accused, I can't help but wonder what nonsense he or she has been reading on the internet in order to convince me of their innocence.*" *(Zoll 2)*

ff) Criminal liability for negligence in accordance with section 4 (6)

Based on the previous section 95 (4) of the AMG, section 4 (6) covers the negligent conduct of the offences under subsection 1 nos. 1 to 3. The criminalisation is justified by the legislator with regard to the "health endangering" nature of these offences by comparing section 4 (1) nos. 1 to 3 to such different crimes like negligent arson (section 306 d StGB), driving under influence of drinks or drugs (Section 316 StGB) and negligent bodily harm (Section 229 StGB). Therefore, a criminal liability for negligence seemed to be "appropriate". Especially in those cases where the offender did not consider the respective substance to be a doping substance within the

118 The interviewee was not mentioned here in order to avoid any conclusions about his or her identity.

meaning of this Act, the criminal liability for negligence should become relevant.[119]

Quantitatively speaking, however, the significance of section 4 (6) appears to be extremely low.

> "*We once had a conviction for negligent conduct. (...) One case, that's about it.*" *(R 1)*

> "*I haven't really dealt with offences by negligence that much so far.*" *(StA 5 and also StA 1)*

The reason given for this is that negligent purchase or possession of doping substances for the purpose of doping human beings is barely conceivable.

> "*That's due to the fact that it's hard to imagine how someone would negligently obtain such substances. I mean, when you order these products, you will most certainly do so for a particular reason.*" *(StA 5)*

In addition, the interviewees reported that in those cases where a negligent conduct is even worth considering, the criminal proceedings are usually terminated though because the offender's guilt is considered to be minor. Therefore, section 4 (6) would play "*no major role in practice, since sections 153 et seq. StPO are usually applied in such cases*". *(StA 3)*

Nevertheless, the criminal liability for negligence is welcomed for various reasons. One prosecutor gives a symbolic-communicative reason:

> "*In practice, offences by negligence have not played a major role so far, I guess. (...) Nevertheless, I consider them to be an important sign. It is thereby made clear that negligent conduct is also punishable.*" *(StA 1)*

Two other public prosecutors consider offences by negligence to be much needed catch-all elements for cases where the criminal intent cannot be proven:

> "*Section 4 (6) certainly is an important catch-all provision.*" *(StA 2)*

> "*They are important because there always has to be a criminal liability for negligence in case the perpetrator does not act with oblique intent (...).*" *(StA 3)*

Another prosecutor argues that a catch-all element would not be necessary in practice, since "*at least oblique intent can usually be assumed*". *(StA 2)*

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119 BT-Drs. 18/4898, p. 25; Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, AntiDopG, § 4 Rn. 34.

b) Penalty enhancing offences

According to section 4 (1), infringements of the prohibitions under section 2 are punishable with up to three years' imprisonment or a fine. Based on this, section 4 (4) creates penalty enhancing offences where the penalties range from one to ten years of imprisonment. They are serious criminal offences within the meaning of section 12 (1) StGB. The aggravating factors shall cover particularly reprehensible and socially harmful conduct.[120] In terms of content, they correspond to the examples of especially serious cases contained in the previously applicable section 95 (3) no. 1 and section 2 AMG, but are complemented by selling doping substances to a person under the age of 18, prescribing doping substances or applying doping methods to such a person. According to the explanatory memorandum to the Act, the reason given for this modification into a penalty enhancing offence is that "there are nearly no cases where an aggravation seems inappropriate even though all the elements are present.[121]

In practice, the aggravation is welcomed, not only because of the practical consequences, but also because of their symbolic meaning:

> "*As the AntiDopG has also included serious criminal offences, doping is no longer treated as a trivial offence. So, it has helped to bring the AntiDopG closer together with the BtMG. And this really does affect our practice (...).*" *(StA 5)*

> "*I particularly appreciate that acting commercially referred to in section 4 (4) has been classified as a serious criminal offence. It just shows that the legislator intends to punish doping offences more harshly. And this seems reasonable to me.*" *(StA 1)*

Also with regard to the limitation period, the provision is considered necessary:

> "*Due to the fact, that section 4 (4) is now a serious criminal offence, the limitation periods have been extended to ten years. Under the previously applicable section 95 AMG, however, there was a limitation period of only five years for especially serious cases.*" *(StA 3)*

120 BT-Drs. 18/4898, p. 31; Weber BtMG/*ibid.*, 5th ed. 2017, AntiDopG, § 4 Rn. 282; Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, AntiDopG, § 4 Rn. 35.

121 BT-Drs. 18/4898, p. 30.

Furthermore, it is referred to the possibility of telecommunications surveillance as a much needed special investigation measure:

> "*Anyone who acts commercially or as a member of a gang has already been held criminally liable under the AMG. But now, there's the possibility of telecommunications surveillance for cases pursuant to section 4 (4) no. 2 lit. b as referred to in section 100 a. This is a huge advantage from our perspective. Other than that, nothing has really changed.*" *(Zoll 1)*

Furthermore, the modification of the previous examples of especially serious cases into serious criminal offences has led to the consequence that the criminal offences under section 4 (4) are referred to as unlawful acts within the meaning of section 261 (1) sentence 2 StGB and can thereby act as prior offences of money laundering. However, this aspect seems to have had little impact so far; the interviewed practitioners did not report any cases. This could also be due to the fact that the majority of criminal proceedings are conducted against self-users, where following offences such as money laundering are practically ruled out. One investigator suggested yet another reason for this finding:

> "*It is a big problem. In terms of money laundering the estimation of profits still causes problems because we need to prove at which price the products were purchased and what price they have been sold for.*" *(Zoll 1)*

In addition, there are investigative difficulties, for example when social media channels are used for communication:

> "*It's very difficult to estimate the perpetrator's profit when there are no records due to the fact that he or she is only communicating on WhatsApp.*" *(Zoll 1)*

One of the public prosecutors thought about the inclusion of trafficking during which the offender carries a weapon as contained in the BtMG to section 4 (4):

> "*In contrast to the BtMG, trafficking during which the offender carries a weapon is not punishable according to the AntiDopG. (...) In the BtMG, however, it incurs a penalty of imprisonment for a term of at least five years.*" *(StA 5)*

When asked whether there was a practical need for the inclusion of such a penalty enhancing offence, he rather replied in the negative:

> "*The largest distribution channels are basically gyms and private sales on the internet. So, I have doubts as to whether there would even be a scope for it.*" *(StA 5)*

c) Summary

The modification and extension of the offences under the AMG in accordance with the BtMG has been widely appreciated. However, there were doubts about the justification of the criminal liability for purchase and possession, especially since the thresholds for significant quantities are apparently so low that they are usually exceeded. This means that mostly self-users whose criminal intent to pass on doping substances to third parties cannot necessarily be presumed are criminalised. The prohibition of carrying doping substances to or through the territory governed by this act is widely considered to be successful. However, it seems difficult to prove the purpose of doping in these particular cases. Furthermore, the inclusion of penalty enhancing offences pursuant to subsection 4 as well as the inclusion of offences by negligence are deemed appropriate, although negligent conduct rarely becomes relevant in practice.

3. Findings on procedural issues

The experts had no files available for their assessment; the evaluation of procedural issues is therefore based on the conducted expert interviews.

a) Initial suspicion

The justification of an initial suspicion of a criminal offence under section 4 (1) nos. 1 to 3 in conjunction with section 2 naturally depends on the specific criminal act. Nevertheless, there are three typical occasions for grounds of suspicion: the detection of alleged doping substances at customs control and in international postal and goods traffic; investigations against distribution structures and trafficking on the internet, namely the so-called Darknet as well as accidental discoveries, for example during investigations conducted against other offenders.

In the customs field, most findings are made at the time of import control as well as in mail sorting centres:

> "*Since we are responsible for Frankfurt Airport and various mail sorting centres, our main focus is on import control. In this context we are investigating by means of physical checks, x-rays and checks on documents whether any illegal substances listed in the AntiDopG are imported to Germany. Often, the goods are either wrongly declared or hidden.*" *(Zoll 1)*

> "*Usually, the doping substances are carried by the end consumer, either in his luggage or his car, depending on where the customs controls take place. Otherwise, any doping substances that have been ordered online on the internet or Darknet will be send by post.*" *(Zoll 3)*

Added to this are information obtained from investigations into distribution structures and online suppliers of doping substances. Here, for example, investigative approaches arise "*if a distribution structure has been eliminated, a server has been mirrored or an underground laboratory has been found. For example, the evaluation of electronic storage media can result in criminal proceedings against the respective customers.*" *(Zoll 3)*

A public prosecutor from a specialised public prosecutor's office also confirmed that "*(...) especially those lists of online orders or investigations into the Darknet*" can lead to further preliminary investigations. *(StA 1)*.

Lastly, "*there are also accidental discoveries*" *(StA 1)*, thus indications of violations of the AntiDopG given in the course of other investigations:

> "*We often initiate criminal proceedings due to the fact that we have found various doping substances in the course of a search within a completely different investigation.*" *(StA 1)*

With regard to trafficking and manufacturing, grounds for initial suspicion often arise from a consignment if the threshold for a significant quantity is exceeded:

> "*If illegal substances, medicinal products or active substances are found – whether being exported to other EU Member States or third countries –, there are grounds for suspicion of trafficking or manufacturing of doping substances in case the threshold for a significant quantity is exceeded.*" *(Zoll 3)*

b) Investigation measures

The expert interviews have shown that investigators and public prosecutors often follow a standardised investigation scheme. This applies, above all, to investigations at customs authorities, which are usually initiated on the basis of similar circumstances. Here, some of the investigation steps are already carried out "onsite" before the public prosecutor's office gets involved:

> "*Predominantly, we are dealing with seizures of international consignments by post. At first, our colleagues open up the package and assign the medicinal products found to the different areas of law, either to the AMG or the AntiDopG. Next up, it must be calculated whether the threshold for a significant quantity is exceeded. Then, the consignment is seized by the customs officer on site. Afterwards, it is passed on to us for a re-examination and conduct of written hearings in consultation with and on behalf of the public prosecutor's office Frankfurt am Main. Then, the accused shall be given the opportunity to comment on the alleged offence. After he or she has responded, the criminal proceeding is made pending before the public prosecutor's office.*" *(Zoll 2)*

In many cases where doping substances are found, the starting points are questionings or hearings in order to investigate the intended use. At the same time, internet research or database queries are carried out in order to check the suspicions or the accused's responses of the written hearing for plausibility:

> "*In such small cases, we will always conduct written hearings. In Addition, internet research or database queries can be useful.*" *(Zoll 2)*

The investigators then decide on further steps in consultation with the prosecution:

> "*We will conduct investigations by means of written hearing. Anything else that could be relevant to the investigation will be decided in consultation with the prosecution.*" *(Zoll 2)*

The search of primate premises was referred to as the most common investigation measure after hearings of the person concerned:

> "*On a regular basis, we perform searches and secure and seizure doping substances.*" *(Zoll 1)*

> "*Of course, we carry out a search of private premises at first. We always find something; and if there is an initial suspicion, the chances are even higher.*" *(StA 2)*

Other investigation measures were mentioned less frequently and seem to be taken in exceptional cases only:

> "*We sometimes order telecommunications surveillance in order to track down any customers that are contacting the perpetrator by phone. Besides, we sometimes issue a writ of seizure combined with an attachment order to confiscate the gained profits.*" *(StA 2)*

> "*Due to the fact, that section 4 (4) no. 2 (b) is a serious crime within the meaning of section 100a (2) no. 3 StPO, telecommunications surveillance can be performed. This includes checking telephone and e-mail records, observations or placing listening devices in the car or outside the house.*" *(StA 3)*

The possibility of telecommunications surveillance is seen as an improvement to the investigation measures because otherwise it would be difficult to investigate criminal acts of commercial trafficking that take place underground:

> "*In major proceedings concerning criminal acts on a commercial scale it is advantageous that we can rely on telecommunications surveillance.*" *(Zoll 1)*

> "*With regard to the act of trafficking for commercial gain our possibilities of investigation have certainly improved. And we are happy to rely on it because otherwise underground laboratories are just really hard to detect.*" *(StA 1)*

Access to content stored in messenger services was named one of the greatest difficulties when providing evidence:

> "*Due to the fact that most of the communication takes place via messenger services like WhatsApp, providing the evidence has been more difficult.*" *(Zoll 1)*

A further aspect is the communication in restricted online forums and chat rooms that are inaccessible to third parties:

> "*Furthermore, communication takes place in restricted chat rooms that we have no access to.*" *(Zoll 1)*

Lastly, encrypted or even deleted e-mails were mentioned as an obstacle to the investigations:

> "*For example, such internet programmes that ensure the immediate deletion of the e-mails after they have been sent are used by the perpetrators.*" *(Zoll 1)*

The customs investigators often mentioned that they carry out transnational investigations on a regular basis. It is notable that the cooperation with the authorities of other EU Member States seems to be standardised and apparently runs without any major difficulties:

> "*If I get an e-mail from Frankfurt Airport telling me that a consignment from China including 50 kg of testosterone being on its way to France has been seized at Frankfurt Airport, I will immediately inform our French colleagues. Then, they can either take immediate measures or tell us to proceed with delivery to France for further examination on site.*" *(Zoll 1)*

> "*Usually, our findings on the sender, receiver and the quantity of doping substances are passed on to the receiving country in order to find out about the identity of the receiver and to see if they are interested in taking over the proceedings. This is done by our department of international administrative and mutual legal assistance as provided for in the Naples II Convention.*" *(Zoll 3)*

However, it appears to be a problem that requests for mutual legal assistance addressed to non-EU States often fails due to the lack of mutual criminal liability when the active substance concerned is released over-the-counter and thus not recognised as a doping substance in the respective State or when there is no comparable ban to section 2:

> "*Outside the EU, some of the doping substances that are listed in the Anti-DopG are not even punishable because they are released over-the-counter.*" *(Zoll 1)*

c) Conclusion of the proceedings

The consultation of public prosecutors and judges did not reveal any particularities concerning the conclusion of the proceedings. As with other crimes of minor and medium gravity, many proceedings are terminated. However, unlike with self-doping, summary penalty orders are issued on a

regular basis (sometimes even predominantly) and – in serious cases – public charges are preferred.

> "*Actually, quite a lot of the proceedings are terminated in accordance with section 153 StPO.*" *(StA 5)*

> "*The proceedings are predominantly concluded by a summary penalty order and a fine. In case there are huge amounts of doping substances or previous convictions of the perpetrator, public charges may be preferred. But then, the criminal proceedings are usually either terminated in accordance with sections 153 et seq. StPO or the sentence is suspended on probation.*" *(StA 6)*

Besides relevant previous convictions, the amount of doping substances found plays a decisive role according to the public prosecutors.

> "*At first we need to determine by how much the threshold for a significant quantity was exceeded. Then, we will check the accused's criminal record.*" *(StA 5)*

Especially if the threshold for a significant quantity has only slightly been exceeded, the investigators will consider a termination of the proceeding. It also becomes clear that the threshold is currently set so low that even the possession of twice the amount of the significant quantity is not considered to be at risk of trafficking.

> "*For example, the perpetrator has ordered twice the amount of the significant quantity. However, a risk of trafficking in doping substances still seems rather far-fetched to me.*" *(StA 5)*

The incorporation of the serious cases referred to in the AMG into the penalty enhancing offences pursuant to section 4 (4) that are punishable by a minimum sentence of imprisonment of one year leads to the fact that criminal proceedings can no longer be terminated in accordance with sections 153 et seq. StPO.

> "*The main change for us is probably that fewer proceedings are terminated now that the penalty range has been increased.*" *(R 1)*

Nevertheless, the interviewed judges stated that they are only rarely concerned with proceedings pursuant to section 2 in conjunction with section 4. This also applied to the interviewed judge at the specialised court.

Interviewer: "*How many of your proceedings are doping-related?*"

R[122]*:* "*Probably about 5%, but definitely not more than that.*"

The judge, who does not work at a specialised court, reported five cases of doping during the last five and a half years that he has been in charge of doping violations.

The criminal proceedings - if a conviction is handed down –are usually concluded by fines; according to the judge, sentences of imprisonment are rarely ordered, only if there are many previous convictions. Here again, in practice there are no recognisable differences from other areas of crime.

d) Characteristics of the court proceeding

> "*Many proceedings are carried out in the same way. Usually, the defendant has lodged an objection against the summary penalty order at the court which leads to a main hearing. At the main hearing the defendants often make a confession.*
> *Larger-scale proceedings for trafficking in doping substances are carried out similarly to the ones for trafficking in narcotics. However, in cases of doping, the defendants and their defence counsels are usually not as professional and familiar with the proceedings as the parties to the proceedings under the BtMG.*" *(StA 6)*

According to the respondents, the majority of cases conducted before court is focused on bodybuilding or popular sport. Thus, accusations in accordance with section 2 rarely seem to concern competitive sport.

> "*Typically, the defendants are either bodybuilders or gym owners who pass it on to their customers. Since they are also using the doping substances themselves, it is basically an act of self-harm. But so far there haven't been any convictions of competitive athletes.*" *(R 2)*

With regard to the course of the proceedings, the respondents could not identify any particularities.

> "*There are no particularities about the court proceedings. So, it's like any other trial. There are no differences.*" *(StA 5)*

122 A number is not given here in order to avoid any conclusions on the other statements made by the judge at the specialised court.

The proceedings were usually pretty simple and were conducted in an expeditious way.

> "*Well, I'd say the proceedings tend to be rather simple and expeditious. Often, just one main hearing will be enough.*" *(StA 6)*

> "*The proceedings don't take excessively long. They are conducted just as quickly or slowly as any other one.*" *(StA 7)*

For the most part, there were no evidentiary problems during the course of the proceedings.

> "*Usually, the accused does not even apply for evidence to be taken in his defence. I mean, if you find doping substances at his or her house, it is pretty clear. So, we never even had to take any evidence.*" *(R 2)*

For this reason, negotiated agreements are also extremely rare in the main hearing.

> "*Most proceedings concern cases of petty crime such as possession of doping substances that are only punishable by a fine of a limited number of daily rates. Besides, the doping substances were found so there's clear evidence. So, these kinds of proceedings aren't really suitable for a negotiated agreement.*" *(StA 4)*

> "*No. We don't reach any negotiated agreements in these trials.*" *(StA 6)*

However, experts' opinions often have to be obtained in order to "*classify and determine the quantity of those doping substances*" *(StA 3)*. This may lead to delays - but apparently only in individual cases.

> "*If the courts insist that every single ampoule or every single medicinal product is checked for its active substance, it will obviously take its time. This may prolong the proceeding. In my opinion, that's not always necessary.*" *(StA 7)*

4. Evaluation

a) General assessment

Opinions in criminal law literature fundamentally criticize the prohibitions of section 2.[123] Due to the fact that the prohibitions do not presuppose a connection to competitive sport, any sporting activity that is merely a private matter and which does not require compliance with any rules of sports law would also be included. If, however, the use of doping substances would be considered unobjectionable under sports law, doping could not damage the integrity of sport. The prohibitions could be justified by the objective of health protection, but then the provisions would mostly protect people acting on their own responsibility from any self-damaging acts. Such paternalism within criminal law could hardly be justified.[124]

On the other hand, one could argue that the freedom to use doping substances on one's own responsibility would not yet imply a right to pass on these doping substances.[125] In this respect, threats to young athletes, for example, who cannot take decisions on self-damaging acts on their own responsibility yet, cannot be ruled out.[126] However, doubts remain as to the criminal liability considering the implementation of the prohibitions of purchase and possession. In the expert interviews, the respondents also expressed concerns about the criminalisation of purchase and possession of doping substances. A judge and a public prosecutor, along with the critics in literature, questioned whether the offender's protection against self-harming acts would generally be a matter of criminal law:

> "*I think everyone has to decide on his or her own whether or not to use doping substances.*" *(StA 2)*

123 See for the whole issue MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 21.

124 For further details see *Freund*, FS Rössner, 2015, p. 590; Lehner/Nolte/Putzke/*Rössner*, AntiDopG, Vor § 1 Rn. 25.

125 Weber BtMG/*ibid.*, AntiDopG, § 1 Rn. 6.

126 BT-Drs. 18/4898, 17; *Eising*, Die Strafbarkeit des Eigendopings, 2018, p. 86; On the former legal situation in detail: *Fiedler*, Das Doping minderjähriger Sportler, 2013, p. 26 et seq.; *Heger,* Strafrechtliche Besonderheiten im Umgang mit minderjährigen Leistungssportlern, in: Kauerhof/Nagel/Zebisch, 2010, p. 25 et seq.

> "*If the state was in charge of preventing us from harming ourselves, then he would also have to ban alcohol. I know that's a bit of an exaggeration but still, think about it.*" *(R 2)*

The legislator has tried to circumvent the problem of legitimacy of criminal liability for purchase and possession of doping substances by justifying it with the risk of passing on to others; thereby, both criminal acts therefore constitute offences that include actions prior to dispensing, selling or traffic in doping substances. However, this legitimation approach does not go with the fact that the thresholds for significant quantities are so low that the prohibitions mostly cover mere self-users (see 2.a.cc. above).

The fact that criminal prosecution mainly concerns self-users in the area of bodybuilding is openly criticised by one judge. It would only lead to improvements in criminal prosecution statistics but without changing the actual problem of sports doping:

> "*If I wanted to increase the numbers and improve the statistics, I could simply order the search of the private premises of several bodybuilders. We will always find something there.*" *(R 2)*

The easily achieved successes in investigations against self-users in the leisure area and outside of organised sport are contrary to the lack of success in the combat against doping in international competitive sport:

> "*You get the impression that the government does not take fighting doping serious enough.*" *(R 2)*

b) Legislative implementation

In contrast to the fundamental criticism of the application of section 2 to self-users in the leisure area, the formulation of the prohibitions under section 2 was otherwise assessed in a predominantly positive way. There was only one decidedly negative opinion in this matter that did not provide any further explanation for his or her critical judgement.

> "*In my opinion, the Act is insufficient.*" *(R 1)*

However, a clear majority of those questioned came to an overall positive conclusion, in particular due to the important symbolism as well as the good practical manageability of the provision. Two public prosecutors em-

phasized the particular symbolic meaning of the incorporation of the prohibitions laid down in the AMG into the AntiDopG:

> "*Having an individual AntiDopG definitely underlines the importance.*" *(StA 2)*

Another public prosecutor emphasized that it was important to *exclude* these provisions "*from this confusing and messed up AMG*". The AntiDopG has "*given them a greater meaning (...)*". *(StA 3)*

A second group of respondents appreciated the easy manageability of section 2 as well as the clear comprehensibility of its content. One judge said:

> "*You can easily implement [the provision] without having to wonder what might have been meant.*" *(R 2)*

When asked to assess section 2, a public prosecutor replied as follows:

> "*I consider section 2 to be exemplary due to its clarity. Therefore, it is easily manageable.*" *(StA 2)*

The customs investigators also came to a positive conclusion due to the comprehensibility and manageability of the provision:

> "*It is easily comprehensible and you will be able to familiarise yourself with section 2 and the relevant annex to the Act without further problems. More problematic is, however, that the legislator can no longer keep up with the list of doping substances due to the ongoing development of new substances. But with the help of our science centre we manage to work it out.*" *(Zoll 1)*

> "*The introduction of the AntiDopG has made work much easier for us. The provisions are so much clearer and provide more possibilities of investigation.*" *(Zoll 1)*

Only one customs investigator said that the AntiDopG would not have brought about any major changes compared to the AMG. His work would have "*actually remained the same.*" *(Zoll 2)*

c) Suggestions for improvement

aa) Substantive law

Suggestions for improvement in substantive law did not concern the offences under section 2, but (a) the question whether quantities may be

added up as well as (b) the formulation of the Doping Substances (Quantities) Regulation (DmMV).

> "*In most cases, the offender did not just use one doping substance but rather a mixture of various doping substances in order to counteract adverse reactions. For the determination of a significant quantity each substance will be calculated separately. But, if we have three different medicinal products of 0.9 times the significant quantity each, we will add them up to obtain a total amount of 2.7 times the significant quantity. However, it is nowhere written that the quantities may be added up. So, I would appreciate an explicit reference to this either in the AntiDopG, the DmMV or the explanatory memorandum to the Act.*" *(Zoll 3)*

The fact that the possibility of adding up quantities intensifies the effect of criminalising self-users in the fitness sector who do not even have the intent to pass on doping substances, has not been discussed by the customs investigator. In addition, one interviewee suggested a more precise formulation of the DmMV, which would "*not be entirely clear sometimes*":

> "*We sometimes come across substances where it's just really hard to know if they are even covered by the DmMV and if so which part of the DmMV they belong to. So, it would be nice to specifiy the Regulation.*" *(Zoll 3)*

In order to explain, the interviewee referred to a specific request:

> "*I am just going to read this out: 'We have compiled the following suggestions and questions regarding the amendment of the DmMV:*
> *(1) What exactly are 'other substances related to anabolic-androgenic steroids'? Do, for example, trestolone, epiandrosterone and arimistane belong? When exactly substances are structurally related? Does there have to be scientific evidence that the substance has an anabolic effect? What kind of evidence is needed (animal tests, clinical trials)? Are the so-called 'prohormones' also meant here?*
> *(2) In general, it would be extremely helpful if all the CAS Registry Numbers of the mentioned substances were given. This is the only way to reliably assign the names (for some of them there are plenty of synonyms) to the respective chemical structure. As an example: When searching for methyl nortestosterone on the internet, the following substances will come up: 11β-Methyl-19-nortestosterone (11β-MNT), Methyldienolone (17α-methyl-19-nor-δ^{9}-testosterone), Metribolone (methyltrienolone; R-1881; 17α-methyl-19-nor-$\delta^{9,11}$-testosterone), Normethandrone (methylestrenolone; normethisterone; 17α-methyl-19-nortestosterone) or Trestolone (7α-methyl-19-nortestosterone; MENT).*

(3) It would be helpful if some examples of selective androgen receptor modulators were mentioned (LGD-4033, RAD 140, enobosarm, andarine, YK-11,...).
(4) How should the substance SR9009 be evaluated?
(5) For peptides: There are a few peptides (e.g. GHRP6 and pralmorelin) with modified versions due to a different terminally attached amino acid (so far: glycine). Are these also included in the 'Growth Hormone Releasing Peptides'?'" (Zoll 3)

bb) Procedural law and investigatory powers

With regard to investigation methods, two points were raised: the introduction of a leniency comparable to the BtMG and an extension of section 100a StPO in order to include further modi operandi.

"*The introduction of a leniency analogous to section 31 BtMG would be important to us. Because in drug-related cases section 31 BtMG comes into effect on a regular basis when large amounts of narcotics are involved. There is nothing like it in the AntiDopG so it would be a great advantage to introduce something similar.*" *(Zoll 1)*

A public prosecutor also suggested to extend section 100a (2) StPO:

"*One could think about widening the scope of section 100a StPO by including section 4 (4) as a whole. That would be a very reasonable consideration perhaps.*" *(StA 1)*

Several times, the investigators addressed the need for greater coordination and collaboration of investigations as well as communication. Particularly with regard to lifestyle drugs that – according to criminalistic experience – are often used by middle-aged or older people for other purposes than doping in sport, one investigator expressed the wish for better pre-structuring of the proceedings and the conduct of fewer time-consuming and often even unsuccessful investigations:

"*Our experience has shown that certain medicinal products usually cannot be associated with criminal acts in accordance with the AntiDopG. And this can be communicated with other investigating authorities. Besides, one could think about cutting these proceedings short when certain indicators are given.*" *(Zoll 2)*

The question of who should be responsible for the seized doping substances was also of practical importance. One interviewee said that "*the main problem is that it hasn't yet been clarified who is responsible for destroying the doping substances after seizure, how and at whose expenses it should be done. Right now, every case is treated differently.*" *(Zoll 3)*

Lastly, when asked about improvements, a customs officer referred to the lack of resources:

> "*In terms of resources, we are short on staff. However, communication and cooperation with our international colleagues works perfectly.*" *(Zoll 1)*

III. Overarching aspects

In the following, the findings of the evaluation study that concern both of the previously examined provisions (sections 2 to 4) or go beyond the issues that are directly related to the substantive provisions will be presented.

1. Sentencing range and limitation period

The sentencing ranges for sections 2 and 3 are laid down in the common provision of section 4. The limitation period is based on the maximum set out in section 4. The issues related to section 4 shall therefore be discussed jointly.

a) Sentencing range contained in section 4

Infringements of sections 2 and 3 are generally punishable with up to three years' imprisonment or a fine (section 4 (1)). In this respect, the legislator has decided upon a consistent scheme of sanctions, although the criminal offences concerning self-doping do not contain the legally protected right to public health, but rather the legally protected right to integrity of organised sport and its fundamental ethical and moral values such as fairness

and equal chances.[127] In view of the fact that the legal prohibition of self-doping has been particularly controversial, it is – seen from a criminal policy perspective – understandable that the legislator does not criminalise self-doping more harshly than infringements of section 2.

However, the consistent scheme of sanctions is disrupted at two points:

On the one hand, the penalty enhancing offences of section 4 (4) solely refer to infringements of section 2 (no. 1 applies to all criminal acts of section 2, no. 2 only applies to section 2 (1) and (2)). Here, a penalty of imprisonment of one to ten years may be incurred; the criminal acts are therefore serious criminal offences.[128] This provision is not only relevant to the sentencing, but also to the admissibility of telecommunications surveillance since it is restricted to cases of section 4 (4) no. 2 (b) as referred to in section 100a (2) no. 3 StPO, as well as to the leniency contained in section 46b StGB that only applies to the penalty enhancing offences of section 4 (4).

On the other hand, the threatened penalties for the criminal liability for purchase and possession differ from each other. The purchase or possession of significant quantities of a doping substance in accordance with section 2 (3) shall be punishable with up to three years' imprisonment (section 4 (1)). However, anyone who purchases or possesses a doping substance with the aim of administering it or having it administered to oneself without medical justification in order to gain an advantage in a competition of organised sport shall be punishable with up to two years' imprisonment (section 4 (2)).

If the perpetrator acts negligently (in the cases covered by section 2 (1)) the penalty shall be imprisonment for a period of not more than one year or a fine, section 4 (6).

127 BT-Drs. 18/4898, p. 18; *Momsen,* KriPoZ 2018, 21, 22; Graf/Jäger/Wittig/*Eschelbach*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, AntiDopG, § 4 Rn. 1. Cf. *Kubiciel*, KriPoZ 2018, 21 seq.

128 However, section 4 (5) provides for the possibility of a less serious case; the penalty under subsection 4 shall then be reduced to imprisonment for a period of three months to five years.

aa) Increasing the maximum sentence contained in section 4 (1)

Some of the experts from law enforcement[129] were in favour of increasing the maximum sentence contained in section 4 (1) up to five years. This was justified by the fact that the previous sentencing would suggest that the handling of doping substances is a petty crime.

> "*The maximum sentence contained in section 4 (1) is far too low. I would call for a maximum sentence of imprisonment of five years. Because it is contradictory to emphasize the importance of the prosecution of offenders under the AntiDopG on the one hand but to punish these offences like a petty crime on the other hand. So, we need to increase the maximum sentence.*" *(StA 3)*

The respondents also pointed out that the unlawful handling of doping substances would be comparable to crime involving narcotic drugs. By increasing the maximum sentence, the AntiDopG could get in line with the provisions of the BtMG.[130]

> "*The maximum sentence contained in section 4 (1) AntiDopG is only three years whereas the maximum sentence contained in section 29 (1) BtMG is five years in fact. So, increasing the maximum sentence up to five years would certainly be appreciated.*" *(StA 1)*

Other interviewees from law enforcement, however, considered the sentencing range to be appropriate and could not see any need for change. The athletes' representatives were also against an increase of the sentencing range.

> "*The sentencing range is average. And only in rare cases the maximum sentence of imprisonment of three years will even be ordered.*" *(R 2)*

> "*Well, the sentencing range is a bit lower than others. But I think it's sufficient. It leaves enough room for appropriate sentences in individual cases.*" *(StA 6)*

> "*I'm not in favor of increasing the sentences.*" *(A 2)*

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129 Three of the prosecutors considered the increase to be reasonable, four prosecutors – as well as the judges – saw no need for change.

130 One expert also mentioned that the AntiDopG does not provide for trafficking during which the offender carries a weapon as contained in section 30a BtMG in the form of a penalty enhancing offence.

It has also been pointed out that an increase of the sentencing range would not have a deterrent effect on athletes. Enhancing the effectiveness of criminal prosecution and creating a real risk of detection would be much more decisive.[131]

> "*I don't think that increasing the sentencing range would have such a big impact on athletes. Any violations against the AntiDopG already have far-reaching consequences for them, e.g. being excluded from sport, being disrespected, losing their livelihood. (...) So, it would be more efficient to just increase the risk of detection than increasing the actual sentencing range.*" *(A 1)*

bb) Inconsistency of the applicable sentencing ranges?

Some interviewees referred to a possible inconsistency in the determination of sentencing ranges for the criminal liability for purchase and possession. As explained above, the purchase or possession of significant quantities of a doping substance in accordance with section 2 (3) shall be punishable with up to three years' imprisonment whereas purchase or possession of doping substances for the purpose of self-doping in accordance with section 3 (4) shall only be punishable with up to two years' imprisonment. This discrepancy in the maximum sentences was sometimes considered to be an unnecessary privileged treatment of athletes.

> "*I don't understand why competitive athletes shall only be punishable with up to two years imprisonment whereas recreational athletes shall be punishable with up to three years' imprisonment. It seems like athletes are having privileges. But there is no reason for it. Especially with respect to their significance in sport, competitive athletes should be prosecuted just like any other recreational athlete.*" *(StA 3)*

> "*It's contradictory that the competitive athlete's possession of doping substances will not be punished as severely as the recreational athlete's possession of doping substances. I don't think that's appropriate.*" *(StA 2)*

Other respondents disagreed with the criticism by referring to the fact that the offences demand different prerequisites for criminal liability.

131 See also *Eising*, Die Strafbarkeit des Eigendopings, 2018, p. 165 et seq.

> "*It's actually the opposite of privileged treatment because recreational athletes shall only be held criminally liable for the possession of a significant quantity of doping substances whereas competitive athletes shall always be held criminally liable for the possession of doping substances no matter what.*" *(StA 7)*

b) Limitation period

The general limitation period of five years contained in section 78 (3) no. 4 StPO applies to the criminal offences pursuant to section 4 (1) and (2). If the perpetrator meets the conditions of the penalty enhancing offences under section 4 (4), the limitation period is ten years in accordance with section 78 (3) no. 3 StPO. According to section 78 (4) StPO, this applies regardless of whether there are any less serious cases pursuant to section 4 (5). The limitation period is three years in the case of negligence pursuant to section 4 (6) as referred to in section 78 (3) no. 5 StPO.

When analysing the files, issues regarding the limitation period did not occur. This is probably also due to the fact that the AntiDopG and with it the offence of self-doping has entered into force in December 2015, thus only less than five years ago.

With regard to the limitation periods, the respondents did not see any need for change.

> "*So far, there haven't been any problems with the limitation periods. I have no requests for change.*" *(StA 4)*

Increasing the limitation period for penalty enhancing offences pursuant to section 4 (4) up to ten years compared with a former limitation period of five years contained in the previous provision under section 95 AMG was appreciated by the interviewees. This is where the fact that the provision is no longer formulated as an example of especially serious cases, but as a serious criminal offence comes into play.

> "*Due to the fact that the limitation period has only been five years under the AMG, many doping-related crimes have gone unpunished – just think of the German physician carrying out blood doping since 2011 ("Operation Aderlass") or the Olympic Games in Sochi in February 2014. These criminal of-*

fences could have been prosecuted if there had already been a limitation period of 10 years back then."[132]

c) Assessment

aa) Maximum sentence

There is no reason to believe that a maximum sentence of three years will lead to a relativization of the wrongfulness contained in the AntiDopG. A maximum sentence of three years does not only apply to typical cases of "petty crime", but also to handling stolen data (section 202d StGB) or dissemination, procurement and possession of youth pornography (section 184c StGB) or incitement of masses (section 130 (2) StGB). Increasing the maximum sentence would also have no practical significance: On the one hand, it is common practice in German Courts - as it is pointed out by the *respondent R 2*–that the penalties rather approach the respective minimum sentence than the maximum sentence. On the other hand, the empirical study has shown that almost all of the proceedings for self-doping are terminated without further consequences. Only three of the evaluated proceedings for self-doping have been concluded by summary penalty orders; in two cases fines of 30 or 40 daily rates have been imposed bearing in mind the minimum of five and the maximum of 360 daily rates in accordance with section 40 (1) StGB. Therefore, it cannot be said that the applicable sentencing ranges would not allow for a sentence that meets the degree of the offender's guilt in consideration of the severity of the offence committed. From this perspective, the discussion on increasing the maximum sentences currently has no significance in legal practice. Apart from this, there is reason to doubt whether an increase of the maximum sentences would have a greatly increased general and special preventive effect.[133]

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132 Due to the concrete reference to the proceeding "Operation Aderlass", a number is not given here in order to avoid any conclusions on the other statements made by the public prosecutor.

133 It is recognised in criminology and criminal justice theory that preventive effects are not so much achieved due to the threatened penalty and its severity but rather due to the probability of detection and sanctioning and the rapidity of the State's reaction to the crime. See *Eisenberg/Kölbel*, Kriminologie, 7th ed. 2017, § 41 Rn. 14, 22 et seq., § 42 Rn. 5 et seq.

Nevertheless, the legislator is of course free to adjust the sentencing ranges of the AntiDopG to the ones of the BtMG for symbolic reasons. However, such an alignment is not mandatory, also due to systematic reasons; the AntiDopG and the BtMG do resemble each other in terms of structure and formulations, but pursue different protective purposes. In addition, narcotics cause considerably greater harm to individuals and society than doping substances.

bb) Criminal liability for purchase and possession

The criminal offences pursuant to sections 2 (3) and 3 (4) do not only differ in terms of addressees, but primarily in terms of their scope of protection. According to section 2 (3) the purchase and possession of significant quantities shall be punishable as it is an offence that includes actions prior to trafficking.[134] In contrast, according to section 3 (4) the purchase and possession of insignificant quantities of doping substances shall be punishable because it is an offence that includes actions prior to self-doping. Due to the fact that section 4 (1) provides for the same sentencing range for trafficking and self-doping, it could be well justified – in terms of systematics – to also align the threatened penalties for the respective offences that include actions prior to the crime. In this case, however, it would be consistent to decrease the maximum sentence under section 2 (3) in order to take into account the less extensive wrongfulness of an offence that only includes actions prior to crime. Whether this is advisable in terms of legal policy is up to the legislator.

cc) Limitation period

Currently, there is no reason to change the limitation periods.

2. Establishment of specialised public prosecutor's offices and courts

Currently, there are specialised public prosecutor's offices in Freiburg, Munich and Zweibrücken focusing on combatting doping; in other federal

134 BT-Drs. 18/4898, p. 25; Körner/Patzak/Volkmer/*Volkmer*, BtMG, 9th ed. 2019, AntiDopG, § 4 Rn. 42.

States – for example in Hesse – their establishment is being discussed. A specialised court for doping has only been established in Zweibrücken (Rhineland-Palatinate) so far.

a) The demand of the NADA and the athlete's associations

In various opinions, the NADA and the athlete's associations have called for the establishment of further specialised public prosecutor's offices and courts. The reason given for the proposal is the complexity of the matter, which would require a particular specialisation, especially of the investigating officers.

> "Lastly, the NADA calls for the establishment of further specialised public prosecutor's offices for the purpose of fighting against violations of the AntiDopG. Only those trained and specialised investigators are able to work quickly, efficiently and well-focused. The good cooperation between the specialised public prosecutor's office Munich I and the Austrian investigators serves as a positive example."[135]
>
> "In order to detect similar cases in future, we need sufficient capacities and expertise of the investigating authorities. We therefore consider it useful to establish additional specialised public prosecutor's offices for the purpose of combatting doping."[136]

During the interviews, the experts from the NADA and the athletes associations re-emphasised their wish for greater specialisation of the judiciary. The experts reported negative experiences with public prosecutor's offices and courts that had little expertise in handling doping offences.

> "*If we're lucky we're working with one of the few public prosecutors who are interested in this matter and have at least a bit of experience from a previous case. But mostly it is a matter of coincidence which public prosecutor you are working with and if he or she has got any experience at all.*" *(N)*

135 NADA, public hearing of the Sports Committee of the German Bundestag, Need for Amendments and Supplements to the Act against doping in sport (AntiDopG), p. 5.

136 Athleten Deutschland e.V., hearing of the Sports Committee, 23.10.2019, p. 3.

The interviewees traced the frequent termination of proceedings particularly back to the fact that public prosecutors are not familiar with the AntiDopG and the practical challenges of investigations in the field of doping in sport.

> "*In general, you get the impression that the ordinary public prosecutor's offices are just way too unfamiliar with these very specific issues and that the proceedings are therefore terminated very, very quickly. (...) This is probably due to the fact that these cases do require certain knowledge of how to properly investigate doping offences.*" *(A 3)*

However, the respondents have made positive experiences with the specialised public prosecutor's offices.

> "*The specialised public prosecutor's offices in Munich, Freiburg and Zweibrücken are well-organised in order to act quickly, professionally and focused. (...) Therefore, cases like the ones that just happened in Erfurt, Munich or Seefeld for example can quickly be dealt with.*" *(N)*

b) On the establishment of specialised public prosecutor's offices

aa) The perspective of the judiciary

The interviewed public prosecutors were predominantly in favour of the establishment of specialised public prosecutor's offices. They shared the associations' assessment that an effective implementation of the AntiDopG would require special knowledge, not only in terms of law but also in terms of sports medicine.

> "*The establishment of specialised public prosecutor's offices seems very reasonable to me. (...) Proceedings under the AntiDopG require a lot of special knowledge, e.g. regarding section 4 (7) or the determination of significant quantities in accordance with section 4 (1) no. 3. (...) Bearing that in mind, we would wish for even more specialised public prosecutor's offices.*" *(StA 1)*

> "*I think that a specialisation of public prosecutors is necessary because they do not only need to know about criminal law, but also about medicine, pharmacy, anatomy or chemistry. They need to know how these medicinal products affect the human body or how they are manufactured. So, these doping cases are just too complicated and too complex to not be dealt with exclusively. Therefore, I consider specialised public prosecutor's offices absolutely necessary.*" *(StA 3)*

Even those public prosecutors who did not work at specialised public prosecutor's offices considered a concentration of proceedings to be useful.

> "*The establishment of specialised public prosecutor's offices seems reasonable to me in order to pool knowledge on the subject of doping and be able to prosecute competitive athletes on a larger scale.*" *(StA 2)*

Besides greater knowledge on this subject, the fact that public prosecutors would have a better overview of the doping scene within their federal State was seen as an advantage of the specialised public prosecutor's offices.

> "*The advantages of the specialised public prosecutor's offices include, above all, the specialisation and the possibility to properly address the doping scene within the respective federal State. Because if you start looking for it, you will find a lot of doping cases. In 2009, when we started, we only had 170 cases and last year we have been dealing with 1500 cases.*" *(StA 3)*

Furthermore, the public prosecutors at specialised public prosecutor's offices are able to establish fixed ways of communication with their contacts at customs authorities or the NADA, for example.

> "*The reason given for the establishment of specialised public prosecutor's offices is the need for special knowledge and better cooperation between the public prosecutors and the customs authorities, the police and the NADA. It certainly is an advantage that the cooperation with the customs authorities, the police or the NADA becomes a matter of routine.*" *(StA 6)*

Other interviewees did not consider the establishment of specialised public prosecutor's offices to be mandatory. One respondent believed that a specialisation would be advantageous to every area of law and that the AntiDopG would not have any fundamental particularities in this respect.

> "*I mean, the specialised public prosecutor's offices obviously have the advantage of specialized staff that can run such proceedings more easily and quickly. But this would also be advantageous to every other area of law such as the BtMG or sexual offences. So, I am neither for nor against it.*" *(StA 5)*

Another public prosecutor pointed out that the concentration of proceedings under the AntiDopG could also lead to difficulties when conducting the proceedings; for example, if besides the alleged offence of unlawful handling of doping substances suspicions of drug offences need to considered.

> "*But there are also disadvantages. In our experience, proceedings that are somehow connected are often split up due to this distribution of responsibili-*

ties. If, for example, doping substances as well as narcotics are found during a search of the offender's private premises, the proceedings under the BtMG will be conducted in Koblenz and the proceedings under the AntiDopG will be handed over to us. But then, before we can even start investigating, we need to sort out whether these two proceedings should be run together or on their own and who should run them. That's always a bit of a problem." *(StA*[137]*)*

Only one of the respondents (who did not work in a specialised public prosecutor's office) was against a concentration of competence. It would make sense for high-profile cases in competitive sport, but not for the majority of cases in the field of bodybuilding or popular sport.

"*The establishment of specialised public prosecutor's offices would only make sense if they were investigating crimes in competitive sport. That would not only include the competitive athletes themselves, but also their support personnel. However, a concentration of all the proceedings under the AntiDopG, including cases in the field of popular sport like bodybuilding, would simply lead to a waste of resources.*" *(StA*[138]*)*

bb) Findings from the evaluation of files

The evaluation of files– prudently – supports the assessment that specialised public prosecutor's offices can provide more effective criminal prosecution due to established structures and greater experience of handling doping offences. However, the findings from the evaluation of files should not be overestimated here as they are limited to cases of self-doping.

Two of three summary penalty orders were issued by the specialised public prosecutor's office in Freiburg; they also provided most of the proceedings for self-doping for the evaluation. In contrast, only one relevant proceeding was made available by the specialised public prosecutor's office in Zweibrücken; the proceeding was conducted thoroughly and by means

137 Due to the concrete reference to the federal State, a number is not given here in order to avoid any conclusions on the other statements made by the public prosecutor.

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of various investigation measures though. The fact that there were concrete allegations rather than just a general reference to the AntiDopG as otherwise frequently found (see p. 12 above) applies to all of the specialised public prosecutor's offices. Communication between the specialised public prosecutor's offices and the NADA or the customs authorities ran smoothly, too. The specialised public prosecutor's offices have terminated the proceedings less frequently in accordance with section 153 StPO and more often in accordance with section 170 (2) StPO. This can be taken as an indication that the elements were reviewed more intensively and that the proceedings were not simply terminated due to considerations of practical expediency in case of investigative difficulties.

c) On the establishment of specialised courts

With regard to the establishment of specialised courts, the interviews revealed a differentiated picture. While the representative of the NADA fully endorsed specialised courts, only two of the interviewed experts from the judiciary were clearly in favour of a centralised jurisdiction of the courts. The remaining respondents saw advantages and disadvantages that largely balanced each other.

> "*Specialised courts are certainly a mixed blessing.*" *(StA 1)*

First of all, the benefit of uniform case law within each federal State for the interpretation of the AntiDopG was discussed. While some considered a consistent interpretation of law to be useful, others saw a danger of the consolidation of the case law on a regional level.

> "*One of the disadvantages could be the consolidation of the case law. But then again, a quick development of established case law can also be advantageous.*" *(StA 4)*

Considerations of practicability were also of importance. Some of the interviewed public prosecutors saw the establishment of specialised courts as a chance to avoid time-consuming travelling to different courts throughout the federal State.

> "*It would have the positive effect that we can avoid external sessional services. Then we would not have to travel so much.*" *(StA 1)*

It was recognised, however, that a centralised jurisdiction of the courts would mean considerable effort by the accused or the summoned witnesses on the other hand.

> "*It's an advantage for us. We don't have to travel a long way just in order to get to the sessional service. But then of course, the accused or other witnesses need to travel to Zweibrücken. So, there are pros and cons.*" *(StA 5)*

A public prosecutor from Zweibrücken, who had made experiences with the specialised court, also pointed out this aspect.

> "*There is one disadvantage: If we conduct court proceedings from all over Rhineland-Palatinate right here, all the witnesses, police officers, attorneys and the accused himself need to travel to Zweibrücken. Whereas, if we would maintain the ordinary jurisdiction of the courts, the public prosecutor will be the only one to travel around in order to represent the prosecution at court. So, it has its advantages and disadvantages.*" *(StA*[139]*)*

However, most respondents believed that a centralised jurisdiction would be useful in terms of expertise.

> "*We are calling for specialised public prosecutor's offices and courts, because we see a lot of county courts that are struggling to conduct proceedings concerning such a specific area of law besides their daily business. Proceedings under the AntiDopG depend on testimonies and the expert's assessment. Due to the fact that this all new to the courts, one should consider establishing specialised courts.*" *(N)*

A public prosecutor from the specialised public prosecutor's office in Munich reported that he and his colleagues often had to assist the courts in dealing with the largely unknown offences under the AntiDopG. He therefore suggested to establish specialised courts, at least in the respective districts of Higher Regional Courts.

> "*Specialised courts do make sense because county court judges just do not have enough experience or knowledge on this subject. To start with, they are usually not familiar with the wording of the law or the conduction of proceedings under the AntiDopG. And that's what we need to help them with. So, a certain specialisation of the courts would be appreciated. I would prefer the establishment of specialised courts within the three districts of the Bavarian*

139 Due to the concrete reference to the federal State, a number is not given here in order to avoid any conclusions on the other statements made by the public prosecutor.

> *Higher Regional Courts instead of just one specialised court for Bavaria as a whole in order to consider the local peculiarities of the respective doping scene.*" *(StA*[140]*)*

A public prosecutor from Zweibrücken praised the judges' work at the specialised court and saw clear advantages for a centralised jurisdiction in terms of expertise.

> "*Well, the judges who are now concerned with this matter are real experts in their field. Everything runs smoothly. So, in terms of expertise the concentration of proceedings at specialised public prosecutor's offices and courts would certainly be advantageous.*" *(StA*[141]*)*

The interviewed judges were divided on this matter. While one of the judges was in favour of establishing specialised courts due to the complexity of the subject, the other judge considered the legal difficulties to be manageable and centralised jurisdiction of the courts to be unnecessary.

> "*The establishment of specialised courts does make sense because the AntiDopG is very complex and difficult to understand at first reading.*" *(R 1)*

> "*Well, I don't think that's necessary. Similar proceedings under the BtMG are not centralised either (...) And it's nothing new that we have to familiarise ourselves with uncommon areas of law. I mean, right now I have to deal with a violation of the Animal Welfare Act. So please.*" *(R 2)*

d) Assessment

The criminal prosecution of doping violations challenges the investigating authorities in several new ways. The AntiDopG is specialised criminal law and regulates the subject of doping that most public prosecutors had little to do within their training or in later practice. The implementation of the AntiDopG requires knowledge of various sports, their organisation, their competitions and compensation structures as well as the areas of application and effects of performance-enhancing substances in order to evaluate

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the detection of illicit substances in doping samples as well as the experts' opinions. The evaluation of files has shown that this lack of practical experience with doping cases constitutes ground for the termination of proceedings. Investigators who have rarely dealt with doping cases before showed uncertainty in handling the accused's denial for instance and greater reluctance to obtain an expert opinion.

In order to prosecute violations of the AntiDopG more effectively, the establishment of specialised public prosecutor's offices seems to be reasonable. The responsible public prosecutors can acquire the necessary knowledge in terms of law and sports medicine and establish long-lasting contacts with the NADA, athletes' associations and experts. The advantage of centralised jurisdiction not only lies in the concentration of competence and structures, but also in a stronger identification with the subject and the associated responsibility towards the punishment of doping offences. It is unlikely that the specialised public prosecutor's offices will terminate the proceedings due to an aversion to unknown areas of law or simply due to considerations of practicability[142].

In order to address the justified criticism of splitting up coherent cases into two proceedings under the AntiDopG and the BtMG for example, determining the specialised public prosecutor's offices' jurisdiction in somehow connected proceedings would be useful.

With regard to the establishment of specialised courts, the evaluation has shown an ambivalent picture. The particular professional expertise that goes along with centralised jurisdiction and the frequent handling of similar cases speaks in favour of specialised courts – just as much as it does for specialised public prosecutor's offices. However, a specialisation of courts seems less urgent: the judges will only receive the few cases that are brought to trial, so that they should – particularly on the basis of the public prosecutors' groundwork–be able to familiarise themselves with the subject without any problems. Whether a specialised court should be established, therefore largely depends on the particularities of the respective federal State; that is why the experts do not make a clear recommendation here.

142 StA 6: "*Sometimes, the proceedings are terminated due to the fact, that the investigations are just too complex and you don't really know where and how to proceed with the investigations. And I don't think it is worthwhile to investigate even more deeply, because in the end a comparably mild sentence will be imposed. Of course, these are also considerations of practicability. I mean, we always have to ask ourselves: Is it worthwhile to invest so much work?*"

3. Cooperation with the NADA and section 8

According to section 8, courts and public prosecutor's offices may, ex officio, transmit personal data from criminal proceedings to the NADA if the transmitting body considers it necessary to take disciplinary measures in the framework of the doping control system, unless the data subject has a legitimate interest in not having the data. By including this provision, the legislator intended to support the NADA in conducting disciplinary proceedings; the investigation results of the prosecution authorities should be provided to the NADA for the sanctioning of athletes and athlete support personnel.[143]

According to the findings of this study, cooperation between the NADA and the public prosecutor's offices is of particular importance to the prosecution authorities: in cases of self-doping, the NADA is usually the one to report the offence or to inform about positive doping samples and other anomalies. Furthermore, the NADA has often acted as a contact point for questions regarding the type of doping substance or whether the athlete is included in a Registered Testing Pool.

> "*We can always contact the NADA if we need to know whether the athlete concerned is included in a Registered Testing Pool, for example.*" *(StA 5)*

> "*I believe communication is very important because the NADA obviously has the relevant know-how regarding the structure of certain substances or whether the athlete is included in a Registered Testing Pool, for example. That often needs to be checked.*" *(StA 2)*

Respondents from the specialised public prosecutor's offices, who regularly share their experiences with the representatives of the NADA, saw an advantage in these existing, sometimes even informal contacts.

> "*It's good that we know each other. We are in regular contact by telephone or by mail and meet each other at conferences. And this is really useful. Because if you have already met someone in person, you will be less hesitant to call or e-mail them.*" *(StA 6)*

While the NADA often provides important information to the public prosecutor's offices, the reverse flow of information is generally less extensive and less important. Cooperation in the actual sense of section 8 therefore

143 BT-Drs. 18/4898, p. 35.

rarely took place. Some public prosecutors were not aware of the provision in detail.

> "*To be honest, I don't really know what's contained in section 8. I'll take another look.*" *(StA 7)*

An established practice to provide the NADA with the investigation results for their disciplinary proceedings could not be found in most public prosecutors' offices. Considering the small number of cases that have been relevant so far, this finding should not be overestimated though.

> "*I'm not so sure whether I have made use of the transmission of data as referred to in section 8 so far. If our investigation results are relevant for the proceeding under sports law, we will of course provide them with our findings if legally permissible. But I can't remember ever having done that.*" *(StA 4)*

When the proceeding was initiated on the basis of evidence submitted by the NADA, the public prosecutor's closure statement was – as it appears from the case-files – often sent to the NADA.

> "*We provide them with our closure statement. Due to the fact that these aspects of criminal law and sports law are so closely linked, the NADA is relying on our investigation results. And they do have a right to receive that information.*" *(StA 7)*

However, two public prosecutors from specialised public prosecutor's offices referred to a closer cooperation. The public prosecutors have often asked the NADA not to directly inform the athlete of the positive doping sample in order not to jeopardize the success of investigation measures like a search of private premises for example. In return, the NADA was informed of the investigation results.

> "*Usually, the NADA reports an offence and starts to conduct their own proceeding under sports law. And this is where we would ask the NADA not to inform the athlete until we have taken our investigation measures. In case of an alleged possession or purchase of doping substances, we will conduct a search of the private premises. And of course, the NADA will reach out to us in order to gain all the information on our investigations. What did the investigations reveal? How did the athlete react to the accusations? And the NADA will certainly use these findings for their own proceeding. So, section 8 allows us to grant inspection of files and to exchange information at an early stage. We practically exchange findings throughout the whole procedure and not only after the proceeding has already been concluded.*" *(StA 3)*

Even though the interviewees themselves had little or no experience with section 8, they considered the provision useful. No amendments were proposed.

> "*I would consider the provision sufficient. I think it is very useful because it provides a legal basis for this cooperation.*" *(StA 1)*

> "*Clearly defining the role of the NADA has been a big step forward. I don't see any problems and I couldn't think of anything I would change.*" *(StA 2)*

This positive assessment was also shared by the athletes' representatives.

> "*The transmission of data between the NADA, the courts and the public prosecutor's offices has always been a problem due to the lack of a legal basis. The NADA has always shared their findings, but the public prosecutor's offices, on the other hand, weren't permitted to transmit their data. The fact that this is now regulated by the AntiDopG simply shows the need for cooperation.*" *(A 3)*

The opinion of the NADA calls for the extension of the scope of section 8 in order to include all "competent national and international Anti-Doping Organisations". The "international ties between the NADA and the Anti-Doping Organisations of other countries as well as the WADA" would require "an advanced exchange of information on an international level". This demand was confirmed in the interview.

> "*We had evidence, submitted from North America, that a coach intended to enter Europe, in particular Germany, with doping substances. We were able to inform the customs authorities who could then seizure the accused's doping substances right at the airport. But there was one problem: he was not a German citizen. So, even though he may have made himself punishable under German law in accordance with the AntiDopG, the proceeding under sports law was much more complicated. The NADA could not proceed against him because his case was not within their competence. And there was no legal basis for the inspection of files at foreign Anti-Doping Organisations. So, this example has shown that international exchange must be strengthened.*" *(N)*

4. Training

The interviewees were also asked if there has been any training on the subject of the AntiDopG after its entry into force and who was performing it.

While the public prosecutors and judges reported no systematic training, the customs authorities seem to have developed more training activities:

> "*Yes, we have performed training, in particular the Customs Criminal Office in cooperation with my predecessor. He designed a nationwide training concept for customs investigators to introduce the subject of doping even before the AntiDopG has entered into force. That happened to be a huge advantage compared to the police.*" *(Zoll 1)*

> "*Yes, I attended training that was provided by a leading colleague in this field. He was mainly involved in customs investigations so he put a focus on that. And when the AntiDopG has entered into force, I asked him to carry out training for all our airport staff that is concerned with the matter.*" *(Zoll 2)*

> "*We actually perform training for the customs investigation service ourselves. And we obviously include the AntiDopG.*" *(Zoll 3)*

A representative of the Federal Criminal Police Office did not report any training, but an exchange of information and experience (nationally as well as internationally):

> "*We also provide political consulting and we participate in conferences once a year where specialist services from all over Germany including the NADA meets up in order to exchange information.*" *(BKA)*

In terms of training, the sports federations primarily work with the NADA. It could not be established through the interviews to what extent this training was carried out and if it had a lasting impact. Nevertheless, one federation representative reported that the subjects of integrity in sport and doping should be given even more importance in the future:

> "*We definitely want to take this issue forward. In the past, we used to perform training for the anti-doping commissioners of our member organisations. But right now, this is mostly done by the NADA in consultation with us. However, we want to make sure to rebuild closer relationships with our member organisations again and we want to provide our assistance.*" *(D)*

Especially due to the fact that the AntiDopG is a rather recent law that involves complex issues of law and sports medicine, training is important in order to give the fullest practical effect to its provisions. Training as provided by the customs authorities is therefore just as useful as training in the federations and training for athletes and their environment (coaches, support personnel and physicians). This is not only useful in order to elimi-

nate occasional information deficits (e.g. regarding the party to whom the standard is addressed to), but above all to enable a cultural change and to firmly anchor the significance of the doping ban in individual and institutional awareness.

C. Final opinion of the experts

I. General assessment

The prohibition of self-doping (section 3 in conjunction with section 4 (1) nos. 4 to 5 and (2)) represents the major substantive amendment of the AntiDopG. Besides, the legislator has incorporated the criminal offences under the AMG into the AntiDopG in modified and extended form (see section 2 in conjunction with section 4 (1) nos. 1 to 3). According to section 1, the purpose of fighting the use of doping substances and doping methods in sport is to protect the health of athletes, to ensure fairness and equal chances in sport competitions and thereby preserve the integrity of sport. These objectives are achieved to different extents. The evaluation has shown that the AntiDopG, in practice, primarily protects the health of recreational athletes (from self-damaging acts) rather than the integrity of sport.

1. Self-doping (section 3)

Proceedings for self-doping in the field of competitive sport represent a comparatively small proportion of the preliminary investigations. Most of them are terminated and only in very rare cases they are concluded by a summary penalty order; the inspected files that were provided by the public prosecutor's offices did not once indicate that there was a conviction.

The fact that only few of the preliminary investigations concern violations of the ban on self-doping is not so much due to the formulation of sections 3 and 4. More decisive is that the prosecution authorities rarely receive incriminating information on cases of self-doping. None of the investigated proceedings were initiated following a report made by a federation or sports club. Usually, criminal proceedings are initiated following a report made by the NADA or on the basis of information about positive doping samples as provided by the NADA. These naturally concern individual athletes rather than structures and networks.

Among the investigating authorities there is still some uncertainty in handling cases of self-doping. Regarding the subjective element, some public prosecutor's offices laid down clearly excessive requirements for suffi-

cient grounds for suspicion. In view of negligibility, expert opinions were often not obtained and the proceedings were terminated in accordance with section 153 StPO.

According to the experts, the prosecution of self-doping could be improved by changes at an institutional level and in procedural law – in particular by establishing more specialised public prosecutor's offices and by introducing a leniency (see below II., 2.). In order to punish infringements of the ban on self-doping more effectively, the will of those involved in sport and the enforcement of regular testing for doping are crucial. In addition, the experts consider a moderate revision of sections 3 and 4 to be necessary in order to define the scope of the ban on self-doping more clearly and to eliminate existing ambiguities, especially concerning the determination of addressees contained in section 4 (7) (see II.1. below).

Overall, the recommendations should allow for a refocusing of the practical implementation of the AntiDopG: Investigations into violations of the doping ban in a competition of organised sport should become more central –rather than continuing to devote the majority of resources of the customs authorities, the police and the public prosecutor's offices to investigations against bodybuilders and other self-users in recreational sport. The proposals concerning section 2 serve the same purpose.

2. Unlawful handling of doping substances and unlawful application of doping methods (section 2)

The main focus of the investigations under the AntiDopG lies on the violations of the prohibitions pursuant to section 2. Self-users – primarily from the field of bodybuilding –represent the majority of the accused. Due to the fact that they do not participate in competitions where sporting and competition rules would need to be respected, fairness and equal chances or the integrity of sport cannot be adversely affected by the use of doping substances. The provision thereby primarily protects recreational athletes who are using doping substances from self-damaging acts. This is largely due to the fact that – according to the respondents – the DmMV lays down comparatively low thresholds for a significant quantity, so that the bodybuilders also who are using doping substances for themselves and not for the purpose of trafficking are prosecuted for the purchase and possession of doping substances. A large amount of the investigative resources taken up by the AntiDopG is therefore used to prosecute recreational athletes

who are using doping substances regardless of any competitions and who are mostly harming themselves.

Investigations against people who traffic in doping substances on a large scale or manufacture doping substances are the exception. How far legal practice has currently widened the scope of the prohibition under section 2 is impressively demonstrated by a preliminary investigation that has been conducted against an overweight defendant who had ordered a dietary product that contained an ingredient pursuant to the AntiDopG.

> "*An obviously overweight man had ordered doping substances, or at least substances listed in the DmMV. He told the police he was only looking for a weight loss product. But training in order to reduce weight that is supported by the use of doping substances can also be regarded as doping in sport. But things get more complicated when he says that he never even wanted to do sport in the first place.*" *(StA 5)*

With such a broad understanding of the offence, the criminal liability thus depends on whether the accused wants to achieve weight loss (also) through exercising or solely by taking the medicinal product. If he does exercise, he could fall within the scope of section 2; if he refrains from doing so and only takes the medicinal product, he clearly goes unpunished. The different handling of these variations cannot be justified by the purpose of the Act – health protection and protection of the integrity of sport. Even more: the discrepancy confirms the doubts whether the broad interpretation of the prohibition of purchase and possession would be compatible with the objectives of the AntiDopG and the purpose of section 2 (3). For the investigative resources to be more focused on punishable acts, a proposal that considers the objectives referred to in section 1 and implements the legislative purpose pursued by section 2 (3) more consistently is made below (see II.2.b. below); an amendment of section 2 (3) or even a redesign of the legitimation model of section 2 is not necessary.

II. Specific recommendations of the experts

1. Substantive amendments

a) Self-doping

The evaluation has shown that the restriction of the group of perpetrators contained in section 4 (7) has proven to be the main substantive issue con-

cerning the ban on self-doping. In particular, the determination of "significant revenue" causes difficulties in practice and often is the main reason for the termination of the proceeding. These issues can be addressed in two ways: (1) By specifying section 4 (7) or (2) by removing the restriction.

(1) The widespread uncertainties as to what constitutes significant revenue are not that untypical for a new law. However, given the rarity of criminal convictions, it might take some time for these issues to be clarified by the highest court. Since athletes apparently assume a much higher threshold than the public prosecutors do and are therefore not aware of the actual risks of criminal liability, a clarification of the provision – if one wants to maintain such a restriction of offenders – seems reasonable. Where the legislator wants to set the threshold for significant revenue is a question of legal policy. In accordance with current practice, it would make sense to assume significant revenue if it exceeds the marginal earnings threshold referred to in section 8 (1) of Volume IV of the Social Insurance Code after the expenses incurred for the sporting activity have been deducted.

Within the context of a reform of section 4 (7), it would also be advisable to incorporate the regulation on the group of perpetrators into section 3. The prerequisites for being a perpetrator represents a considerable restriction of criminal liability, which –including for reasons of comprehensibility – should already be contained in the prohibition itself and not only in the provision on sanctions.

Whether the prerequisites for being a perpetrator will be formulated as an element or as a solely objective condition of criminal liability is within the discretion of the legislator; however, there is little reason to decide for a solely objective condition of criminal liability.

(2) However, a moderate reform of section 4 (7) in accordance with the principles outlined above cannot solve the fundamental problems related to the restriction of the circle of addressees. A specification of "significant revenue" does indeed provide clarity for the criterion. However, it does not change the fact that the investigations are complex: The public prosecutor's offices would have to reconstruct the accused's income from sport and his or her expenses for sport. This encourages the termination of proceedings due to considerations of practical expediency at an early stage.

The restriction of perpetrators was introduced by the legislator in order to exempt "mere recreational athletes" from criminal liability. As explained above, however, section 4 (7) defines the circle of addressees much narrower (see in detail above B. I. 2.c.). Competitive athletes who have not (yet) been included in a Registered Testing Pool (such as athletes from the

B-squad) and who – which is usual for a large number of sports – do not generate significant revenue are also exempted from criminal liability. However, the purpose of the AntiDopG (especially of section 3) to protect fundamental values of sport from being jeopardised by doping will be affected regardless of whether the participant in a sport competition is included in a Registered Testing Pool or is about to be included.[144] Participation in a competition of organised sport where sport-specific rules need to be respected is crucial for the legally protected right to "integrity of sport". However, it is not relevant whether the athletes are included in a Registered Testing Pool or whether they generate any revenue from these competitions.[145] In the public perception, the focus will also lie on the sporting event only; the fact whether or not the athlete is covered by the provision will not become relevant for the undermining of the trust in fairness of sport.

In addition, the restriction of perpetrators contradicts fundamental equity considerations and only provides insufficient protection for honest athletes. The regulation in section 4 (7) leads to a different treatment of athletes who compete against each other in the same competition. It would probably be very difficult to communicate to an athlete included in a Registered Testing Pool that he or she is subject to the AntiDopG, whereas his or her competitor who is also fighting for victory at the exact same event will not be covered by the AntiDopG.

Nor is it necessary to limit the scope of the group of perpetrators just in order to respect the principle of proportionality.[146] The requirement of (planned) participation in a "competition of organised sport" constitutes a sufficiently high hurdle in order to exempt mere recreational sport from criminal liability. According to the explanatory memorandum to the Act, "sport competitions of top-level and competitive sport" where recreational athletes do not participate shall be covered. Private tournaments are therefore exempted from the scope of the prohibition.[147] The fact that recreational athletes take part in competitions of organised sport is clearly an

144 See also MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 112; *Brill*, SpuRt 2015, 153 et seq.

145 Particularly with regard to the legally protected right, it is not convincing that the generation of significant revenue should be decisive for criminal liability: Monetary aspects cannot decide over the question whether the integrity of sport has been harmed.

146 BT-Drs. 18/4898, p. 31.

147 BT-Drs. 18/4898, p. 27.

exception that is mainly limited to bigger running events. Doping should probably not have any practical significance for such groups of persons.[148]

The experts therefore recommend to remove the restriction of the group of perpetrators contained in section 4 (7).

It seems advisable to emphasise the restrictive potential of the element "competition of organised sport" in terms of criminal liability within the explanatory memorandum to the Act. The evaluation of the files and the expert interviews both indicate that (too) little importance has been attached to this element so far. In this respect, it could also be pointed out that participation in competitions for bodybuilding is not covered by sections 3 and 4. Although the training process may constitute a sporting activity, the subsequent competition is not purely sport-related, but rather a presentation of their body shaping.[149]

If the legislator wishes to maintain an explicit restriction of the circle of addressees, it would be advisable to choose a demarcation criterion that precisely defines the intended scope of application. Here, one could consider formulating an exemption from criminal liability for "recreational athletes". The required legal definition could particularly be developed in cooperation with the NADA, who is currently working on a corresponding definition for the national Anti-Doping Code. Here, it should be considered that the prerequisites are practical and may not result in a major investigative effort.

b) Unlawful handling of doping substances (section 2)

aa) In order to concentrate the scarce resources of the public prosecutor's offices on cases of greater importance and, at the same time, in order not to overburden recreational athletes who were using doping substances with investigations affecting their fundamental rights, two options are possible:

(1) First of all, in accordance with an opinion in literature, one could demand a competitive aspect for the prohibitions contained in section 2 to

148 In case the investigating authorities actually become aware of self-doping in this field, it can be assumed – also in view of the current practice – that such proceedings will be terminated.

149 See also *Brill*, SpuRt 2015, 153, 154; MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 39.

be applied.[150] This would bring the prohibitions in section 2 closer together with those in section 3 and section 2 could thereby not only be justified by the objective of health protection but also by the objective of integrity of sport. However, such an interpretation would lead to the fact that the health protection that has been declared as the primary purpose of section 2 by the legislator becomes less important. Even if the competitive aspect was only limited to section 2 (3), the purchase and possession of significant quantities of doping substances that are clearly not only for personal use would then go unpunished. This would dogmatically and practically undermine the legislative decision to criminalise purchase and possession as precursors of trafficking.

(2) It is therefore preferable to find another way to interpret section 2 (3) in a more appropriate manner bearing in mind the legislative objective and to achieve a more target-oriented use of investigative resources. According to the explanatory memorandum to the Act, "experience has shown [that the purchase and possession of significant quantities of doping substances as referred to in section 2 (3)] are precursors of trafficking in these substances".[151] Due to the fact that these substances, when used for the purpose of doping, have a particularly adverse effect on the health of athletes, "the risk of passing on should already be effectively prevented. Therefore, any actions that typically only serve to prepare for the passing on are already prohibited."[152]

However, the evaluation has shown that proceedings are also conducted against the accused where the quantities found are so small that the purchase or possession – even in the opinion of the investigators – cannot be regarded as a precursor of trafficking or the passing on to third parties. In the interviews, the respondents confirmed that the proceedings were mainly directed against "self-users". The DmMV whose thresholds are set so low that they are exceeded in almost every case so that people without the intention of passing on or trafficking are also included was referred to as the main reason for this by the interviewees.

This is compounded by the fact that in legal practice, several – in itself insignificant– quantities of different substances are often added together in order to exceed the threshold for a significant quantity. In view of the legislative objective and the legitimation model that has been chosen by the

150 MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 23, 64.
151 BT-Drs. 18/4898, p. 25; MüKo-StGB/*Freund*, 3rd ed. 2018, AntiDopG, §§ 1-4 Rn. 58.
152 See BT-Drs. 126/15, p. 24 f.; BT-Drs. 18/4898, p. 25.

legislator, this practice is extremely questionable. If, for example, two opened ampoules containing different doping substances are found, the passing on of the remaining substances for the purpose of trafficking would almost be inconceivable; nevertheless, proceedings were conducted in these cases.

Finally, the evaluation has shown that investigations are increasingly directed against people who have purchased so-called anti-aging and lifestyle drugs for their own use without the intention of doping. This is another proof that there is no reasonable demarcation of non-punishable self-use of insignificant quantities currently.

The experts therefore recommend to further align the DmMV with the legislative objectives of section 2 (3) and to lay down thresholds for quantities where an intention of trafficking can be suggested reasonably certain.

The experts also recommend that the DmMV clarifies that the addition of insignificant quantities it is not permitted.

bb) The offences by negligence under section 4 (6) have not acquired any practical significance. This may also be due to the fact that negligent manufacturing, trafficking or possession of doping substances "for the *purpose of* doping human beings" is hardly conceivable. In practice, proceedings for negligent conduct are very rare and are usually terminated. This also indicates that the public prosecutor's offices consider the wrongfulness and guilt - if given - to be minor. The "health endangering" nature of the provision as referred to by the legislator does not call for a criminalisation. It would rather be necessary to explain why the society needs to be protected from a negligent violation of the prohibitions under section 4 (1) nos. 1 to 3. Justification can hardly be given. The evaluation has shown that there is no need for such protection. Because unlike those offences that were referred to as an example in the explanatory memorandum to the Act (negligent bodily harm, negligent arson and negligent driving under influence of drink or drugs), section 4 (6) plays no major role in practice. The investigative effort and their considerable impact on the accused's fundamental rights are therefore disproportionate to their benefit and especially to the offender's guilt.

Due to the fact that there is no compelling punishable cause for the offences by negligence under section 4 (6) and that the combination of negligent elements and special intentions is hard to conceive and that there is

no practical need for a "catch-all element", the experts give the following recommendation:

The experts recommend deleting section 4 (6).

2. General procedural and institutional changes

a) Leniency and whistleblower systems

Experienced investigators explained that the rather minor practical significance of the ban on self-doping in criminal proceedings and the comparatively few proceedings against competitive athletes can be traced back to the fact that "*we just do not receive such cases*" *(StA 3)*. This is also due to the fact that doping remains secret in this field and that the athletes or their environment have little incentive to reveal knowledge of any criminal offences – especially if this could lead to criminal investigations against themselves.

For this reason, the experts recommend that the sports associations should give their athletes much more information about the existence and functioning of whistleblower systems of the NADA and the WADA.

On the other hand, the experts recommend that a leniency that is adapted to the particularities of doping in sport should be introduced to the AntiDopG.

b) Specialised public prosecutor's offices and specialised courts

The evaluation has shown that the investigation of infringements of the AntiDopG requires a range of legal, medical and criminalistic expertise. This can – according to the findings of the evaluation – predominantly be found in specialised public prosecutor's offices, while other public prosecutor's offices without such specialisation often face problems when implementing the AntiDopG.

For this reason, the experts recommend that all federal States should follow the example of the States of Baden-Wuerttemberg, Bavaria and Rhineland-Palatinate and establish specialised public prosecutor's offices.

However, the evaluation did not find a comparable need for the establishment of specialised courts.

Annex: Guideline for public prosecutors

A. Key data

1) For how long have you been working in a department that deals with cases of doping?
2) Approximately how many cases of doping have you been concerned with?

B. Phenomenon / Cases

What do typical cases of doping that you are concerned with look like?		
What do we want to know?	**Further questions**	**Notes**
	– Which **sports / sports federation** are mostly concerned? – Which **doping substances / doping methods** are mostly used? – How have the cases of doping been detected? Could you give **an illustrative example**? – What is the main focus: **backers or self-users**? **Popular sport or competitive sport**? – Are there also any cases of **organised crime**? Rather in the field of backers or in laboratories? Could you give an illustrative example?	

C. Investigations

Part 1: Initial suspicion What is your initial suspicion – of unlawful handling of doping substances or unlawful application of doping methods (section 2) – of self-doping (section 3) usually based on?		
What do we want to know?	**Further questions**	**Notes**
(ex officio, report of an offence made by whistleblowers, sports federations or the NADA)	– Do **other proceedings** (e.g. against underground laboratories) often provide grounds for further proceedings? Could you give an illustrative example?	
Other proceedings	– Do proceedings for violations of section 2 often provide grounds for proceedings for **self-doping pursuant to section 3?**	
NADA	– How much does your investigative work rely on **information provided by the NADA**? – Have you relied on any documents from **proceedings under the Corporate Liability Act** for your investigations?	
Evaluation and Recommendations	– Would you consider the existing ways of obtaining knowledge **sufficient?** Where appropriate: What could be done to improve the obtainment of knowledge of the public prosecutor's offices?	

Part 2: Investigation measures and means of compulsion / evidentiary problems What kind of investigation measures and means of compulsion do you take and to what effect? (differences between sections 2 and 3?)		
What do we want to know?	**Further questions**	**Notes**
Applied measures	– **What kind of investigation measures do** you usually take in order to investigate cases of doping? (differences between sections 2 and 3?)	
Telecommunications surveillance	– Has the admissibility of **telecommunications surveillance** improved your means of investigating?	
Leniency	– How important is the already applicable **leniency that is restricted** to cases of doping committed on a commercial basis or as a gang in accordance with section 2 (1) and (2)*? – Would you consider the extension of the scope of the leniency necessary for your work?	
Evaluation and Recommendations	– What are **new means of investigating** under the AntiDopG? Were they useful and sufficient? **What additional legal authorities** would be useful to effectively investigate cases of doping?	
Evidentiary problems	– What are the **main difficulties** when providing evidence?	
Specialised public prosecutor's office/ specialised court	– What is the advantage of a specialised public prosecutor's office? Would you consider the **es-**	

* Section 46b StGB: Prerequisite is a minimum penalty. This is only the case with gangs/commercial activities.

	tablishment of specialised public prosecutor's offices useful? – Would you consider the establishment of **specialised courts** useful?	

Part 3: Conclusion of proceedings – **How are the proceedings under section 2 usually concluded? Are there any particularities compared to other offences?** – **How are the proceedings under section 3 usually concluded? Are there any particularities compared to other offences?**

Part 4: Information-sharing with the NADA How important is the information-sharing pursuant to section 8 AntiDopG?		
What do we want to know?	**Further questions**	**Notes**
Practical procedures	– How does the cooperation work in practice? – How often do you submit information and for what reasons? (in general or in individual cases only – according to which criteria?)	
NADA's response	– Were there any consequences on the part of the NADA in those cases where you have provided the information? Is this the usual case?	
Evaluation and recommendations	– How would you rate the relevant amendments? Would you have any suggestions for improvement or do you consider the provision sufficient?	

D. Legal issues

Part 1: Legal issues arising under section 2 AntiDopG The provisions of the AMG have been incorporated into the AntiDopG in partly extended and modified form. We would like to discuss these modi operandi contained in section 2 before we go over to the subject of self-doping. How important was the new amendment for your work? Could you give an illustrative case example where the new provision has been of practical importance for you?		
What do we want to know?	**Further questions**	**Notes**
Incorporation of the offences under the AMG into the AntiDopG	– Have the relevant offences gained **a new symbolic and practical meaning due to their inclusion in the AntiDopG?**	
Extension of the scope to include new criminal acts	– The AntiDopG has extended the prohibitions by adding new modi operandi (manufacturing, trafficking, selling, dispensing, carrying to or through the territory governed by this act): ▪ How would **you evaluate these extensions?** ▪ Could you give an **illustrative case example** where the legislative amendment has made a legal difference, e.g. caused a different outcome of the proceeding? ▪ How important and how practical are the **offences by negligence** under section 4 (6)? ▪ Would you consider the restriction of the criminal liability for possession under section 2 (3) to cases of **"si-**	

	gnificant quantities" appropriate?	
Modification of especially serious cases into penalty enhancing offences	– Especially serious cases were modified into **penalty enhancing offences** due to the new version. Did this lead to any changes in practice? (serious criminal offence/ termination no longer possible)	
Possible offences that include actions prior to money laundering	– Has anything changed in practice due to the fact that the criminal acts are now **possible offences that include action prior to money laundering**?	
Explicit inclusion of the unlawful application of doping methods	– The law now also covers the unlawful application of **doping methods**. ▪ How would you evaluate this legislative amendment? ▪ Could you give an illustrative case example where the legislative amendment has made a legal difference, e.g. caused a different outcome of the proceeding?	
Evaluation and recommendations	– Do you consider the offence successful overall? What would you change if necessary?	

Part 2: Legal issues arising under section 3 AntiDopG Have any legal issues occurred when applying the new law on self-doping? Which ones?		
What do we want to know?	**Further questions**	**Notes**
Self-doping: General assessment	– Are the offences concerning self-doping **sufficiently precise and practical**?	Problems regarding competitive athletes? Revenue?
circle of addressees	– Has the circle of addressees contained in section 4 (7) proven itself in practice? ▪ How do you define the term **"significant revenue"?**	
Objective elements	– Which one of the objective elements causes **legal problems** more frequently (circle of addressees, lack of medical indication)? Could you give an illustrative example?	
Subjective elements	– Do the **subjective requirements** cause any particular difficulties? (for example: awareness of the circle of addressees, lack of medical indication, etc.)	
Criminal liability for purchase and possession without quantitative restrictions	– Has the criminalisation of the purchase or possession of **insignificant quantities** for the purpose of self-doping proven itself in practice?	
Lack of criminal liability for attempted purchase or possession	– Is the **lack of criminal liability for attempt appropriate** or do you regard it as a privilege for certain athletes?	

Evaluation and recommendations	– Do you consider the offence successful overall? What would you change if necessary?	

Part 3: Sentencing range and limitation period How would you evaluate the provisions on the sentencing ranges and limitation periods?		
What do we want to know?	**Further questions**	**Notes**
Sentencing ranges	– Do you consider the **sentencing ranges** consistent and appropriate? *Do you consider the privileged treatment of athletes in terms of sentencing range for the criminal liability for possession to be appropriate?*	
Limitation period	– Are the **limitation periods** reasonably long?	
Evaluation and recommendations	– Do you consider the provisions of the AntiDopG successful in these points? What changes would you recommend if necessary?	

E. Court proceedings

Court proceedings What experiences have you made in the subsequent court proceedings?		
What do we want to know?	**Further questions**	**Notes**
Duration	– Approximately **how long** do court proceedings **take**? Is there anything that can cause delays?	
Evidentiary problems	– What were the challenges in **taking evidence** at the main hearing?	

Negotiated agreements	– Were there any negotiated agreements? – What were the prosecution's motives for the negotiated agreement? – Who took the initiative to reach a negotiated agreement?	

F. General assessments

Part 1: Opinion on the criminal liability for self-doping In the literature, the criminal liability for self-doping is sometimes viewed critically. For example, it is argued that the AntiDopG would lead to a "massive over-criminalisation of popular sport" or would use too many undefined legal concepts. Could you comment on this view?		
What do we want to know?	**Further questions**	**Notes**
Opinion	– Do you have the impression that the criminal prosecution of unlawful handling of doping substances or unlawful application of doping methods (1) is generally useful and (2) that you as a public prosecutor can identify with the objective?	

Part 2: General assessment of the law How would you as a practitioner evaluate the AntiDopG? Would you consider the provisions "successful" overall?		
What do we want to know?	**Further questions**	**Notes**
Section 2	– ... with regard to section 2 AntiDopG?	
Section 3	– ... with regard to section 3 AntiDopG?	

Part 3: Concrete reform proposals In your opinion, what are the most urgent areas of improvement on a factual, procedural or practical level?		
What do we want to know?	**Further questions**	**Notes**
Factual level		
Procedural level		
Practical level (institutionally etc.)		

Is there anything else that you think would be relevant to our research project that has not yet been addressed in this conversation?