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COMPLIANCE ELLIANCE JOURNAL

INTERNAL INVESTIGATIONS UNDER GERMAN LAW

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I. CLASSIFICATION

There is no law in Germany that regulates internal investigations. Perhaps more correctly stated: there is no single specific law because there are indeed numerous statutory provisions applicable to internal investigations that must be observed. Nevertheless, these provisions are not combined into a single code. It would not be so bad if the relevant statutory provisions were systematically organized, but because they are not, it is essential to understand which respective rules could potentially be applied, in which ways they relate to each other and to other rules, and finally, what specific content is contained in the applicable standards.

Starting at the top of the hierarchy of norms is a view towards the constitution. Our *Grundgesetz*, often referred to in English as the Basic Law, permits all persons to do what they want so long as it is not expressly forbidden. Despite the flood of normative standards, there is no provision that prohibits curiosity. Anybody can investigate, whether it is a private detective, journalist, captain of industry, or even lawyer.[1] The state does not hold a monopoly over investigations.[2] Therefore, internal investigations are legal.[3] However, this does not mean that everybody can exercise all conceivable means without limits and arbitrarily use all information.[4]

II. SEPARATION BETWEEN INTERNAL INVESTIGATIONS AND OFFICIAL LEGAL PROCEEDINGS

A. Differences

Looking at internal investigations as the repressive arm of compliance, then private investigations also tread similarly on the side of the state: specifically, judicial investigations and the classic investigation procedure of the prosecutor's office. But this is nothing special or new. In Germany, the principle of party presentation applies in civil proceedings, limiting also in proceedings before labor courts. Here, the law requires that the

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1 Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht No. 15/24 & 25 (Achenbach et al. eds., 4th ed. 2015); Bockemühl, *in* FS Beulke 647 (2015).

2 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis No. 18/74 (Böttger ed., 2nd ed. 2015); *see also* Wehnert, StraFo 2012, 253 (254); Knierim, *in* Internal Investigations No. 15/157 (Knierem et al. eds., 2013); priority of state investigations, but no monopoly, *see also* Moosmayer, *in* Criminal Compliance § 34 B, No. 74. (Rotsch ed., 2015).

3 Theile, *Internal Investigations & Selbstbelastung*, StV 381 (2011); Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/60; *see also* Nestler, *in* Internal Investigations, *supra* note 2, at No. 1/18; *see also* Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/49.

4 *See* Salvenmoser & Schreier, *supra* note 1, at No. 15/40; for the admissibility and limits of state prosecution investigative activities after indictment, *see* Engländer & Zimmermann, FS Beulke 669 (2015).

party and acting lawyer present the facts of the case. However, this is only possible if the relevant facts are presented. Given the procedural obligation to truth and completeness found under Section 138 of the Code of Civil Procedure, nobody is allowed to simply declare what is favorable to his or her side, but must at least ensure the essentiality of the circumstances identified. Because the accused/defendant can turn to experts and interview potential witnesses on his or her own, so too should the defense lawyer exercise this right.[5] Nothing different applies to plaintiffs and their counsel. This is harmless as long as neither objective nor subjective manipulation of evidence arises. Internal investigators classify themselves in this manner[6] and they can come from inland or abroad.[7]

According to Article 92 of the Basic Law, judicial power is exclusively vested in judges. Sentencing is also reserved to judges. However, the existence of an investigation separate from the judiciary is not forbidden. The tasks of collecting evidence, clarifying facts, and deciding whether there should be a criminal case are the responsibility of the judiciary and are delegated according to constitutional categories to the Second Authority (administration) and public prosecutor's office (including their police investigators).[8] The judiciary holds a monopoly over prosecution.[9] Law enforcement by private investigators is fundamentally different from legal authorities because of the special intervention rights conferred on the state (e.g. search, seizure, surveillance of telecommunications, and compelling witnesses). In internal investigations, the information gained depends on whether, for example, the respondent was voluntarily questioned and the custodian of certain documents made them readily available. This applies even in cases where there is a legal duty to testify or surrender items.[10] While a refusal may violate legal obligations (e.g. corporate or labor law), this can only be overcome through recourse to the courts

5 BGH, Urt. v. 10.2.2000 – 4 StR 616/99, No. 15 = BGHSt 46, 1; Wimmer, *in* FS Imme Roxin, 537, 539.

6 For an understanding of the term, *see* Salvenmoser & Schreier, *supra* note 1, at No. 15/13.

7 Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC: Legitimer Baustein des globalisierten Wirtschaftsstrafverfahrens oder rechtswidriges Parallelverfahren zur Strafprozeßordnung? – Eine Problemskizze*, StV 41, 41-42 (2009). Therein lies no circumvention of the provisions on international legal assistance in criminal matters because the private investigations are not carried out directly in a criminal procedure. *See also* Wastl et al., NStZ 68, 71 (2009); *see also* Rosen, BB 230 (2009); albeit contradictory, *see* Wehnert, NJW 1190-1191 (2009); Wehnert, FS Egon Müller 729; *Wybitul*, BB 606 (2009); for the situation in the U.S. *see* Behrens, RIW 22, 27 (2009); Mengel & Ulrich, NZA 240 (2006).

8 Detailing the prosecutor's position, *see* Carsten & Rautenberg, Die Geschichte der Staatsanwaltschaft in Deutschland bis zur Gegenwart 358, 503 (2d ed. 2012).

9 Exception: private action, §374 and the following, StPO (Code of Criminal Procedure).

10 Kirmes, WiJ 150 (2013). His demand for a legal basis for internal investigations may be a professional legal appeal to increase the quality of authority. But private investigators are carriers, not addressees, of fundamental rights. They would need an (expanding?) legal basis only for their actions for the purpose of transmitting intervention powers: but who would want that?

because there is no right to self-help in this area,[11] as this is instead limited to other issues.

Another crucial difference: in contrast to the justice department, internal investigators take on a party role.[12] Of course, prosecutors and judges have their own self-interests. However, their official actions should not be based on these interests. They are required to scrutinize circumstances that might potentially show criminal relevance without respect to the person involved and to legally evaluate the facts. In this sense, they must make their decisions in a neutral manner. This applies already at the outset of the investigation. The Code of Criminal Procedure also sets the necessary criteria for admission, including a clarification of coercive measures, as well as providing restrictions such as the conditions and scope of their permissible use. By contrast, internal investigators act under the mandate granted to them and are inevitably directed by a specific interest.[13] This applies even if the assignment is to gather information, regardless of its content, thereby gathering insights about operations and persons affected therefrom.[14] The legal obligation of internal investigators to fulfill this goal extends only so far as the mandate and may therefore be limited or terminated at any time.[15] In fact, an unlimited mandate often overlaps with the task of the state investigative authorities.[16]

Even then, there can be no talk of parallelism considering the disparity of legal goals and the resources available for investigation. Only the justice department is subject to the obligation to respect the rights of everybody involved. They must comply meticulously with the procedural provisions. This becomes apparent in the obligations for instructing both witnesses and the accused. In civil and labor proceedings, there is an obligation to warn about rights, but this is only for the court. This does not extend to pretrial depositions made in private. These are subject to absolutely no previous duty to inform of rights.[17] The Federal Bar Association[18] recommends that its members (i.e. lawyers) make

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11 Ex. § 229 BGB (German Civil Code).

12 Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 27; FS Uwe H. Schneider 701, 706; Wehnert, StraFo 253-254 (2012); compare to Kort, FS Günther H. Roth 407 (2011).

13 Wehnert, StraFo 253-254 (2012); *see also* Knauer, ZWH 41, 47 (2012).

14 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 18/78 (rightly emphasizing the need for an objective clarification); *see also* Knauer, ZWH 81, 83 (2012).

15 Golombek, WiJ 162, 166 (2012)(correctly stressing that there is no duty to large scale internal investigations provided that appropriate resolution of the facts are guaranteed within the investigation); *see also* Knauer, ZWH 41, 47 (2012); Knierim, FS Volk 247; Reichert & Ott, ZIP 2173-2174 (2009); Potinecke &Block, *in* Internal Investigations, *supra* note 2, at No. 2, 157; for ad hoc measures upon notification of grievances, *see* Idler & Waeber, *in* Internal Investigations, *supra* note 2, at ch. 20.

16 There is no duty to bring charges as a result of internal investigations. *See* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at Rn. 18/2; Knauer, ZWH 41, 44 (2012); Kremer, FS Uwe H. Schneider 701, 713; Rübenstahl & Skoupil, WiJ 177 (2012).

17 Salvenmoser &Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/174.

the interviewees aware of their rights at the very beginning. This expresses the aspirational goal of fairness. However, this is not binding from the outset on any other internal investigator such as an auditor, as it is not covering an official state duty. So what must the internal investigator warn about? It cannot be the mandatory criminal procedural warnings, precisely because, as will be shown below,[19] the respondents are legally obliged under labor and corporate law to disclose information, so they are not granted a right to remain silent.

All of this speaks by no means against an internal investigation,[20] but rather to the significant differences when compared to criminal procedure.[21] This has consequences. It is a matter of *different* procedures. Rules and goals are in no way uniform and therefore automatically identical. The approach by both bodies is legally separate and independent of each other.[22] To the extent that a legal obligation to perform an internal investigation exists,[23] whether as a result of corporate law or from Section 130[24] of the Act on Regulatory Offenses, the affected company must fulfill this duty. It does not matter if an additional criminal or civil investigation is conducted or not. The same is true vice versa. To meet the statutory requirements, the prosecution takes up an investigation and the regulatory offense authority must decide upon their intervention after due consideration. Each authority must therefore carry out its own duties, regardless of whether

18 *See* explanatory notes BRAK, Stellungnahme 2010/35, zum Unternehmensanwalt im Strafrecht, *available at* http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2010/november/stellungnahme-der-brak-2010-35.pdf (Nov. 2010).

19 *See* Section III, A.

20 For considerable skepticism, *see* Greeve, StraFo 89 (2013); Nieto Martin, *in* Compliance & Strafrecht 51 (Kuhlen et al. eds. 2013).

21 Knauer, ZWH 41, 47 (2012); Momsen & Grützner, DB 1792 (2011).

22 Knauer, ZWH 41, 47, 81 (2012); Gädigk, *in* Internal Investigations, *supra* note 2, at 18/5 and 44; Kremer, FS Uwe H. Schneider 701; Bung, ZStW 125 (2013); Theile, FS Kühne 489, 498 (2013).

23 Bock, Criminal Compliance 441 (2011); Knauer, ZWH 41, 46 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/4; Grützner, *in* Wirtschaftsstrafrecht No. 4/46 (Momsen & Grützner eds., 2013); Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/36; Golombek, WiJ 162, 164 (2012)(emphasizing that the legal basis for the organizational duties of a manager are not found in Section 130 of the Act on Regulatory Offences, but rather in corporate law); *see also* Kindler, FS Günther H. Roth 367; Kindler, *in* Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion 1 (Rotsch ed., 2012); Knierem, *in* Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion 77, 91 (Rotsch ed., 2012); Kuhlen, *in* Compliance & Strafrecht, *supra* note 20, at 11; Moosmayer, *in* Criminal Compliance, *supra* note 2, at No. 68; Reichert & Ott, ZIP 2173, 2174 (2009); Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts No. 5/114 (Wabnitz & Janovski eds., 4th ed. 2014); against the prevailing opinion, *see* Reichert & Ott, ZIP 2173, 2176 (2009); Golombek, WiJ 162, 167 (2012)(with regard to whether the clarification has a margin of discretion); *see also* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 6; Knauer, ZWH 81, 82 (2012); Kudlich & Wittig, ZWH 253, 303 (2013).

24 Concerning limited influence on organizational duties in the Group, OLG München, StraFo 82 (2015).

the other authorities are likewise doing so or not. The only basis for their own actions is the relevant regulations for their office.

As it would be disallowed, an authority abstains from referencing an inquiry of its own activities led by the other side, and it rules out at face value the insights that were gained in the process because they were discovered through different standards and in pursuit of different purposes and interests. It is thus necessary in each respective case to accurately clarify what significance is inherent in the other process.

The duty of neutrality and the variety of goals and rules preclude a judicial privatization of law enforcement.[25] Whether such a process would be sensible at all and how it would be legally and technically implemented remains an open question. In any event, only legislators are allowed to limit the hitherto unrestricted prosecutorial compulsion to investigate, for example, in cases of internal investigations. Also, the justice administration may not prevent criminal justice from having reference to the admissibility of internal investigations from their own inquiries. A statutory clause that leads to the subsidiarity of the state in relation to private investigations cannot be easily inserted into prosecution law.

The mixing of private and criminal investigations would also be deemed inappropriate because it is the task of the criminal justice system to pursue any offenses committed during the course of internal investigations. Violations of both the Privacy Act and other general criminal offenses (ex. Sections 201, 201a, and 240 of the Criminal Code) may be associated with private monitoring of mail correspondence, conversations, or sanitary facilities. Compliance is wielded for its part.[26] Prosecutors could hardly investigate at ease due to the obvious dangers that accompany their inquiry.

B. Existing Opportunities for Cooperation

1. Prosecutor's Duty to Preserve Evidence

An unlimited demand of independent procedure control corresponds to neither a ban

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25 *Gädigk*, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 46; Jahn, ZWH 1, 6 (2013)(from the perspective of the defense, highlighting the ambivalence of such a partial privatization); Regarding search and seizure in the absence of cooperation, *see* BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236.

26 Bock, *supra* note 23, at 476; Wybitul, *in* Internal Investigations, *supra* note 2, at Ch. 11; Mengel, *in* Internal Investigations, *supra* note 2, at Ch. 13; Brockhaus, *in* Internal Investigations, *supra* note 2, at Ch. 26; Kuhlen, *in* Compliance & Strafrecht, *supra* note 20, at 22 & 24; Kuhlen & Maschmann, *in* Compliance & Strafrecht, *supra* note 20, at 85; Kuhlen & Sahan, *in* Compliance & Strafrecht, *supra* note 20, at 171; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/193; Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts *supra* note 23, at No. 5/134 & 4/412; Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at 15/41; Rotsch, ZStW 125, 481 (2013).

on mutual consideration nor a coordinated approach.[27] Both are permitted, albeit only within limits. Clear rules of the game are still lacking.

The obligation to consider cooperation with the prosecutor's office and to make an informed decision originates from the general duty of care that management possesses.[28] There is, however, no absolute requirement to cooperate with prosecutors under all circumstances.[29]

Despite an ongoing internal investigation, prosecutors must not only carry out their own duty to investigate, but they must also fulfill their role as so-called leader of the process.[30] Thus, nobody other than the prosecutor decides what is required for clearing up any suspicion of an alleged offense. The prosecution fulfills its obligation in a dutiful manner only when it is led by the need for best possible findings.[31] This necessity cannot be shaken off. Exactly how the prosecutor is supposed to satisfy its task in a particular case is not described in detail and is not always the same for all similar cases. The investigating authorities have flexibility in determining the responsibility of the prosecutor, while also taking account of the individual circumstances of the case.

Although the judiciary must be consciously aware that the objectivity of internal investigations is not always self-evident and therefore requires professional distance and special protection of the interests of individuals accused, it would be inappropriate to hold a complete institutional distrust of internal investigations and of the people who ordered or carried them out. The head of the legal department of a defense company found no suspicion against the company with an internal corruption investigation. However, the Federal Constitutional Court might decide this yet.[32] The circumstances of the specific case are also relevant. If suspicion is directed against the Chief Executive Officer, then a cooperative approach will rarely be appropriate at the beginning of the investigation. Where it involves a question of self-enrichment of a senior employee be-

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27 For reasons in favor of a cooperation from the perspective of a company, *see* Knierim, FS Volk, 247, 256; Knierem, *in* Internal Investigations, *supra* note 2, at No. 15/185; Kremer, FS Uwe H. Schneider 701; Wehnert, StraFo 253, 254 (2012). For the perspective of a prosecutor, *see* Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 44; For questions of corruption, *see* Hoven, WiJ 28 (2014).

28 Kremer, FS Uwe H. Schneider 701, 704.

29 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 69; Golombek, WiJ 162, 169 (2012); Knauer, ZWH 41, 44, 48 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/184; Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/192; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/65, 142 & 4/458.

30 Wimmer, FS Imme Roxin 537, 551. *See also* BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236; Gädigk, *in* Internal Investigations, *supra* note 2, at Ch. 18.

31 Jahn, GA 588 (2014).

32 Such as in the case, BVerfG v. 13.3.2014 – 2 BvR 974/12 = NJW 2014, 1650.

low the highest level of leadership, then there is quite often a greater harmony between the interests of business and criminal justice.

There are inevitably points of contact between large companies and the public prosecutors that are responsible for them. Criminal offenses against such a company and resulting from it are fairly common. If a certain trust has developed as a result of cooperation[33] in previous cases (such an arrangement makes sense for compliance officers in large companies),[34] it would still be naïve to put only this officer on a case. Nevertheless, it can be appropriate for the compliance officer to make an effort in the voluntary disclosure of information and documents.

However, this is not mandatory. The public prosecutor is further authorized to take immediate action, despite prior good experiences, by utilizing measures to preserve evidence, provided that there are sufficient substantive grounds. A belligerent initial demeanor is ruled out under such circumstances from the outset.

Safeguarding the possibility of clarifying suspicion must be the guiding principle for the public prosecutor's actions in each case. It is often imperative to take possession of essential evidence. This includes both electronic data of the company concerned (per backup copy), as well as all relevant documents (the most important in original form, others as a photocopy, perhaps also drafts and different versions). It is generally possible for only the public prosecutor to review the results of existing or later initiated internal investigations for whatever the case may be.

The public prosecutor's approach is further influenced by whether internal investigations are already under way when the initial suspicion is raised and the extent to which they have progressed. It may be opportune to inquire about this if a sufficient foundation of trust has been established. If the internal investigations are coming to an end or were already completed, the public prosecutor can make its own actions dependent on whether the present investigation results are made accessible promptly, completely, and under permission of review from the company. Potential irregularities, inconsistencies, gaps, or biases can be shown during examination of the disclosed material. Responses to inquiries and demands to submit further documents demonstrate how seriously the company considers the entire process.

The prosecution must pursue any remaining doubts. They must not destroy the peaceful atmosphere that has been developed in their relationship, although the affected company will not greet the use of criminal procedural means of coercion with approval.

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33 For cooperation outside concrete procedures, *see* Kremer, FS Uwe H. Schneider 701, 712.

34 Kremer, FS Uwe H. Schneider 701, 714.

Moreover, they should exhaust the investigative measures provided under the Code of Criminal Procedure only with serious and practically necessary reason.

If the public prosecutor refrained from finding out from the affected company whether internal investigations were conducted because of a particular set of circumstances, then it expresses an existing mistrust that is indeed quite normal, provided there are objective reasons for this. In such a situation (as in any normal case), clarifications may be required of things that are not yet readily revealed in pending investigations. Whether prosecution must subsequently use coercive actions or whether the incoming information makes it much more possible to cooperatively approach the company depends on the progress of the discovery process. Along these lines, the company's behavior is also a crucial factor in determining the prosecution's further actions in the case. The leeway here is not only restricted to the dualism of cooperating trust versus coercive use, but also extends to steps such as a possible coordination of internal and criminal procedural investigations.

2. Evidence Abroad

Cooperation with the company and its internal investigators is most effective for the public prosecutor when the necessary evidence is not readily available for state authorities. That is often the case when documents or servers are located abroad. Even if it can be expected that the country in question would provide legal assistance, this seldom happens within a short period of time. In the stage between knowledge of suspicion and gaining the ability to obtain evidence across borders, the abstract opportunity exists for the company's employees to destroy or manipulate relevant information without good intention. This means that it is practically impossible to ensure the reliability of evidence. In light of this, it is usually appropriate to accept the declared willingness of voluntary production. The following inevitable examination of the probative value does not constitute any special peculiarity of voluntarily produced evidence.

3. Taking Evidence from Large Companies

It is not just the realm of evidence from abroad that provides far-reaching opportunities for cooperation. Relevant information from a large company is often found concentrated in a particular location. To gather all of this information at once is hardly possible. This leaves room for suppression of evidence. There is often no fear of additional substantial hindrance of the investigation of facts if the public prosecutor initially offers the company the opportunity to submit evidence. With such wholehearted disclosure, it acquires the chance to avoid the disadvantages associated with a potential intensive

search for evidence.[35]

If there is evidence of further substantial and relevant material despite the voluntary surrender of documents, the prosecutor must pursue this in a manner dictated by the circumstances. This might be extremely unpleasant for the company, such as what Deutsche Bank experienced in the winter of 2012-2013: according to reports in the daily press,[36] they only produced selected documents associated with an investigation of tax evasion in the context of the trading of carbon certificates. As a result, the justice department launched a full-blown search operation by utilizing a large contingent of police officers through the deployment of a helicopter and also through the underground parking garage.

The prosecution is free to coordinate its own approach to the company and to the investigators engaged, provided that it deems the exploration for truth as secure. Under this condition, the prosecution is authorized to defer all or part of its own investigations. The prosecution may allow precedence to the internal investigation, but only under its own securing of the evidence and if it remains in constant close contact with the company. Required preservation of evidence nevertheless continues without delay, regardless of whether it is in inaccessible locations for the company. If the internal investigators lead the prosecution to such sources, this demonstrates their interest and seriousness in cooperating.

The problem of quantity is not greater in comparison to investigations led solely by public prosecutors. To the contrary, relief can occur because company-based personnel or internal investigators turn over documents or they answer questions so comprehensively that the prosecutor can more quickly develop the connections needed for a case.

4. Prosecution's Instructions to Postpone Internal Investigations

According to Moosmayer,[37] the criminal justice department has the right to stop the internal investigation, at least temporarily. However, a legal basis for such an arrangement is not clearly evident. It is not expressly included in Section 258 of the Criminal Code. Adequate social contacts are not themselves suitable factual actions, even in the

35 BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236.

36 E.g. DPA*, Deutsche Bank: der kriminelle Handel mit CO2-Zertifikaten*, Zeit Online, Dec. 13, 2012 at 2:05 pm, http://www.zeit.de/wirtschaft/2012-12/deutsche-bank-umsatzsteuerbetrug.

37 Moosmayer, *in* Criminal Compliance, *supra* note 2, at No. 34 B/74 (note: Moosmayer is head of the compliance department of Siemens, Munich); *See also* Knierem, *in* Internal Investigations, *supra* note 2, at No. 15/167.

event of thwarting success.[38] This is particularly true for legally necessary actions. Internal investigations at least tend to be by-the-book matters. Leading them is commonly the core legal obligation of the company. However, they deserve no unrestricted priority,[39] even before the uptake of public prosecutorial investigations. It is foreseeable that only the use of the prosecutor's investigative powers promises the clarification of suspicions, as the company's requirement to resolve facts is often possible only through engagement of the prosecution. It is therefore logical, of course, not to endanger the success of the full investigation through its own actions and this may require pausing the internal investigation. Even if its continuation may be permissible, one might still deny the reliability of the investigation if it is evident that the evidence gathered was influenced or defeated in any shape or form. One might see an obstruction of justice if an internal investigation continues to be carried out alone and against the wishes of the public prosecutor. In specific cases, this continuation of the internal investigation might be done solely for public relations purposes.

If the company does not wish to endanger an existing or desired relationship of professional trust through a confrontation with the prosecutor, it will therefore not ignore the prosecutor's request to pause the internal investigation. In most cases, this will be a temporary demand and/or be limited to certain areas. If it is assumed that the accused does not know the suspicions levied against them, then it is in the mutual interest of the company and the law enforcement agencies to allow initial access to the public prosecutor. It may be appropriate to suspend internal investigations if surprise evidence-taking actions are foreseen outside the company.

To avoid unnecessary legal disadvantages,[40] the company will express its interest and the prosecutor may submit its request in writing after waiting for the internal investigations. They will comply with this without having to pronounce a ban (although the company would prefer this). It is in its own interests for the company to record in writing the considerations affecting its decision and immediately send this to the prosecutor. In the event of an actual pause for possible liability and/or protection against unfair dismissal of an employee or member of the board, the company thus creates tangible proof that its actions were guided by the pursuit of the best possible investigation. That should be sufficient to protect against any legal harm, especially since the statutory time limit for termination (Section 626 German Civil Code) begins to run only after knowledge of the allegations and prosecutorial actions hold their own further clarification measures and are more reliable. Even in the case of the continuation of its own investigation, the com-

38 Fischer, StGB, 62nd ed. 2015, § 258 StGB No. 7.

39 Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts, *supra* note 23, at No. 5/117.

40 *Moosmayer*, *in* Criminal Compliance, *supra* note 2, at No. 34 B/75; *see also* Rotsch, Criminal Compliance vor den Aufgaben der Zukunft 3, 16 (2013).

pany should immediately disclose this to the prosecutor and detail the underlying reasons because such openness brings everything into accord.

5. Postponement of Prosecutorial Investigations

If it appears that the search for truth is guaranteed, the public prosecutor must not only take the internal investigation into consideration, but must also set out the legal basis for discontinuation. As a state body, it is bound by the prohibition on excessiveness. Therefore, it may only resort to coercion if this is necessary to fulfill its tasks. An accuracy check does not take place in view of the principle of free design of the investigation. Leeway is not given for free to the public prosecutor, but is only granted after its obligatory professional judgment is met. Whether or not it is complying with the limits set out by law is judicially verifiable all the way up to the Constitutional Court. The established doctrine comes from fundamental rights and is further developed out of documentation and justification obligations.[41] It represents an effective filter from keeping the investigative authorities away from using illegal coercive measures because it is unnecessary to employ. This legal compulsion to a proportionate approach is supported in fact by legal resources. Even if there is just a temporary passiveness in the interest of clarification, it is legal for a public prosecutor to await the outcome of an internal investigation.

6. Testing Probative Value of an Internal Investigation's Findings

Reports, evidence submitted, and other findings of internal investigations are subject to the prosecution's own careful review. Their intensity is variable. It is necessary to at least have a conclusiveness test and a clarification of whether the results are consistent with other findings. This control is needed even when the accused has confessed because it might be possible that this was a false confession and/or a scapegoat was given so as to hide the real culprits. Here, there must be no deviations from procedures unrelated to internal investigations: in each case, the prosecutor must make its own preliminary assessment. The hypothesis must then withstand any confrontation with all respective findings. Each bit of information is comprehensively assessed and placed in the context of other findings. The point at which the hypothesis solidifies to a sufficient ground for suspicion varies in each individual case. It is essential that the conceptual meaning of the given evidence remain. However, the circumstances of their collection and the handling of those involved in the allegations of the proceedings plays a significant role.

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[41] For evidence supporting the search, *see* Schmitt, StPO No. 3 & 5 (Meyer-Goßner & Schmitt eds., 58th ed. 2015); The German Constitutional Court stresses the importance of documentation, especially in the following judgments: 19.3.2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 = BVerfGE 133, 168, in particular No. 80 & 114.

III. ESSENTIAL QUESTIONS OF LAW

A. Duty to Give Evidence

Whether employees in Germany are required to testify to private investigators in accordance with German law depends on the circumstances. In the case of employees, it is usually German labor law that applies,[42] while company law is generally relevant for members of the representative and supervising bodies. For the most part, the results of both branches of law do not differ.

1. Duty to Give Information based on an Employment Contract

The employment contract, constituting a special form of a service contract (Section 611 of the Civil Code), requires a mutual exchange of information.[43] If one side requires information that the other side has, there is a valid claim to be informed so long as the party that knows the information can easily share it.[44] If this information can be found elsewhere (ex. through third parties or resulting from the content of documents), then the party lacks sufficient need to obtain this information from the other party.[45] The legal basis for disclosure requirements is found in Sections 611 and 241, Paragraph 2 of the Civil Code, and possibly in conjunction with Section 242 of the Civil Code.[46] Their scope varies and is at the widest with executive powers.[47] For business transactions, Section 675, Paragraph 1 of the Civil Code provides specific additional information, as well as Sections 662 and 666 of the Civil Code.[48] This provision standardizes the duty of the representative to communicate required information. Outside of labor law, company law also leads to comparable results. Refusal[49] to supply information can lead to a com-

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42 Consideration of the participation rights of the works council is irrelevant to the topic treated here. There will thus be no discussion of the collective labor law.

43 Greeve, StraFo 89, 94 (2013); Thüsing, § 611 BGB No. 242 (Henssler et al. eds.); Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/41; Rödiger, *Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von Mitarbeitergeständnissen* 258 (2012); Wehnert, Strafo, 253, 256 (2012).

44 BAG, Urt. v. 18.1.1996 – 6 AZR 314/95 = NZA 1997, 41; BAG, Urt. v. 7.9.1995 – 8 AZR 828/93 = NZA 1996, 637; Thüsing, § 611 BGB No. 242 (Henssler et al. eds.).

45 Imme Roxin, StV 116 (2012).

46 Wastl et al., NStZ 68, 70 (2009).

47 BAG, Urt. v. 13.3.1964 – 1 AZR 100/63 = AP Nr. 32 zu § 611 BGB Haftung des Arbeitnehmers; Göpfert et al., NJW 1703, 1706 (2008).

48 Göpfert et al., NJW 1703, 1705 (2008); Momsen & Grützner, DB 1792, 1795 (2011); Thüsing, § 611 BGB No. 242 (Henssler et al. eds.); Wastl et al., NStZ 68, 70 (2009); Wybitul, BB 606, 610 (2009).

49 For possible labor law consequences, *see* Göpfert et al., NJW 1703, 1706 (2008).

plaint at a labor or other ordinary court.[50] This is enforceable through setting a fine or detention, pursuant to Section 888, Paragraph 1 of the Code of Civil Procedure.[51] In addition, claims for damages can be made.[52]

2. No Exception for Risk of Self-Incrimination

There is no duty to one's own self-incrimination[53] or to the disclosure of facts that could lead to termination.[54] According to case law, the obligation to disclose information refers to the context of necessity,[55] but also at its own professional misconduct or even criminal actions.[56] Companies partially try to facilitate the fulfillment of their obligation to provide information to those affected. Amnesty programs speak of a waiver of repression.[57] It is important to note that this does not extend to the prosecution. Responsibility for this lies only with the prosecutor's office. This is especially true as far as the principle of legality goes.[58] Its breach is allowed to the prosecutor only in exceptional circumstances and within legally permitted limits, but never to third parties.

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50 Wastl et al., NStZ 68, 73 (2009). Not quite conclusively advocating the labor court's jurisdiction for the legal protection of an employee against an action initiated by a foreign public authority. Apart from the fact that the administrative courts would prefer to have jurisdiction, it lacks the need for legal protection: The official action itself encroaches on nobody's rights and private investigators do not exercise official action therefrom. On the other hand, labor courts are quite interested in the right of the employee to non- or limited disclosure of information on behalf of the employer and therefore also by the privately mandated investigators.

51 The enforcement ban of Sec. 888, Para. 3 of the Code of Civil Procedure only applies to the main duty, i.e. for the work performance as such.

52 BAG, Urt. v. 21.11.2000 – 3 AZR 13/00 = NZA 2002 (claims for damages relating to the lack of information about entitlement to benefits).

53 BGH, Urt. v. 23.2.1989 – IX ZR 236/86 = NJW-RR 1989, 614 (615).

54 BAG, Urt. v. 7.9.1995 – 8 AZR 828/93 = NZA 1996, 637; *see also* Göpfert et al., NJW 1703, 1708 (2008).

55 Imme Roxin, StV 116 (2012); Knauer, ZWH 81, 85 (2012).

56 BGH, Urt. v. 30.4.1964 – VII ZR 156/62 = AP Nr. 11 zu § 242 BGB Auskunftspflicht (zu § 260 BGB); BAG, Urt. v. 27.9.1988 – 3 AZR 59/87 = NZA 1989, 467; VG Frankfurt, Beschl. v. 28.8.2000 – 23 L 1642/00 (V) = HessVGRspr 2001, 51; Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 132; Greeve, StraFo 89, 95 (2013); Momsen & Grützner, DB 1792, 1795 (2011); Rödiger, *supra* note 43, at 294; Wehnert, StraFo 253, 256 (2012); Wimmer, FS Imme Roxin 537, 540; Bung, ZStW 125, 536, 548 (2013); Imme Roxin, StV 116, 121 (2012); Tscherwinka, FS Imme Roxin 521; Wastl et al., NStZ 68, 70 (2009); Böhm, WM 1923 (2009); Zerbes, ZStW 125, 551, 559 (2013); Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/174; Mengel, *in* Internal Investigations, *supra* note 2, at No. 13/37; Beckemper, *in* Internal Investigations, *supra* note 2, at 15/245; Rieble, ZIP 1273 (2003).

57 Göpfert et al., NJW 1703, 1704 (2008); Knauer, ZWH 81, 84 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/168; Leisner, *in* Internal Investigations, *supra* note 2, at Ch. 9; Mengel, *in* Internal Investigations, *supra* note 2, at No. 13/65; Wastl et al., NStZ 68, 71 (2009).

58 That is indisputable. *See* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 130; Kremer, FS Uwe H. Schneider 701, 708; Grützner, *in in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/404.

The broad duty to disclose information to the company is not only questioned in labor law, but it must also resist fundamental concerns: much literature, that is also the viewpoint of many young scholars, focuses on each conceivable interest of criminal justice relating to the findings of internal investigations and concludes with a forward displacement of criminal procedural protection standards in labor law. However, the extent of such transfers varies. The asserted commitments of the company to law enforcement purposes are established.[59] Labor law is thus partially regarded as substantive criminal procedure law.

The need for any transfers of any criminal procedural rules protecting the accused to labor law stands and falls with the validity of the starting point of the discussion. In this regard, it is held that the function to assist criminal investigations is not the only motivation that leads to the performance of an internal investigation. Whoever bases his or her argument on this aspect alone is diminishing the problem. As already mentioned, the duty of launching an internal investigation was originally rooted in civil and corporate law obligations. The company is also subject to an obligation to shape its activities so that criminal offenses are avoided at all costs. This obligation is already legally secure. Management must provide proper organization. If they violate this duty, they fulfill Section 130 of the Act on Regulatory Offences. The violation is also attributed to the company itself, in addition to punishment in accordance with Section 30 of the Act on Regulatory Offences. In the case of a causal occurring violation of a legally protected interest, the principal's liability in criminal law comes into play.[60] In addition, the company has to consider whether it is entitled to liability claims. If that is the case and these claims are recoverable, then it must enforce them. Otherwise, the members of its competent bodies are committing a criminal breach of trust. It is therefore in the overriding interests of the company and its own institutions to recognize and enforce vulnerabilities and any possible liability claims: in general, that means to carry out internal investigations.

Cooperation with the public prosecutor's office is seen as a side effect and certainly changes nothing regarding the existence of its own obligations of the company and institutions. If the relationship between a criminal procedural approach and internal investigations is designed in a manner such as what has been stated above, it may be an obligation of the company to not seriously disclose information for investigative purposes.

It would be naïve to assume that no such attempts are made (by all accounts, at least in the U.S. too). That does not force into question fundamental German legal decisions

59 Zerbes, ZStW 125 (2013)(very engaging as well as one-sided); Anders, wistra 329 (2014)(differentiating and reducing the actual approach of the prosecutorial action); similarly, *see also* Greco & Caracas, NStZ 7 (2015).

60 For an expert and precise summary, *see* Roxin, FS Beulke 239 (2015).

such as the difference between labor and criminal law. Where the cooperation between prosecutors and companies purposefully or even inevitably leads to the devaluation of the criminal procedural rights of the employees, then this of course cannot enjoy the protection of the legal system.[61]

The company can determine (in accordance with Section 241, Paragraph 2 or Section 242 of the Civil Code)[62] to which individual or board it will give information. Conceivable possibilities are the executive body, one of its members, the immediate supervisor, or the internally competent department, such as the compliance department, as well as external private investigators. The scope of the information disclosure shall be determined in each individual case. If the information is sufficient, then the claim is limited.

One of the prevailing opinions (concerning labor- and company law obligations to disclose) is revealed in a study from the University of Konstanz,[63] which found that the practice of refraining from taking statements (often self-incriminating) is enforced with the available legal means of coercion. However, no normative meaning can be attributed to this finding.[64] The reserved use of coercive measures should be based on the notion that legal process promises no quick and usually only doubtful success. The practice of criminal justice is not influenced by the compulsion of witness testimony, but one would think that this might be the case due to legal reasons or the normative constraints of the relevant provisions.

3. Multiple Parties

If the obligation to disclose information in the context of an internal investigation were to involve more than one person, then this naturally leads to the question of whether the duty to disclose information also extends to the names of the additional people involved. The respective legitimate interest of the company is essential. It is therefore important to determine if it is sufficient to present the facts as such (ex. in terms of obstruction, whether a bribe payment was procured) so that it requires no further knowledge by other individual parties. If the company wants to separate itself from employees involved in illegal transactions or if it wants to request damages, then the obligation to disclose information extends (at least in serious cases) to the names of those involved and to the content of their contributions.

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61 For possible solutions *de lege lata*, see below number 2.

62 Göpfert et al., NJW 1703, 1706 (2008).

63 Theile, ZIS 378 (2013); *see also* Theile, FS Kühne 489, 490, 497 (2013).

64 Theile, ZIS 378, 382 (2013).

B. Utilization in Investigatory and Criminal Proceedings

In investigations and criminal proceedings, the accused[65] may remain silent (*nemo tenetur se ipsum accusare*). This naturally also applies to employees and members of different bodies within the company. According to Section 55 of the Code of Criminal Procedure, a witness may refuse to provide information in parallel criminal proceedings against another person accused of the same facts if this testimony might come back to harm the witness. The same is true in a civil proceeding (Section 384, Number 2 Code of Civil Procedure) and also in a labor court proceeding (Section 46, Paragraph 2, Sentence 1 Labor Court Act).[66] This right to remain silent would be virtually non-existent if private investigators were to use duly effected statements against the employee or board member that were produced through questioning or reading aloud of protocols drafted by them.

1. Solving the Conflict Based on the Principles of the Common Debtor Decision

a. Comparability of the Situations

The exclusion of evidence improperly obtained[67] could follow from a well-known insolvency decision of the Constitutional Court, hereinafter referred to as the common debtor decision.[68] Consequently, the constitutionally guaranteed right against self-incrimination only applies in investigations and criminal proceedings.[69] By contrast, an obligation to give information is constitutionally unobjectionable in other areas of law (ex. insolvency law). However, the enforceable and unlimited obligation to give information corresponds to a constitutional but dispensable prohibition on the utilization of evidence received in an investigation and criminal proceeding against the respondent.

b. Fairness Principle

It is disputed whether the conflict between an obligation to a truthful disclosure to the company and the criminal procedural right to remain silent can be solved on the basis of the principles of the common debtor decision. A difference is that the obligation to

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65 For individual defense, *see* Litzka, WiJ 79 (2012).

66 Diller, DB 313 (2004)(questioning how and whether an employee must support his employer during proceedings through disclosure, handing over tax documents, or appearing in court).

67 Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/69 (dealing with the utilization of information illegally obtained during the course of an internal investigation and confirming a limited prohibition).

68 BVerfG, Beschl. v. 13.1.1981 – 1 BvR 116/77 = BVerfGE 56, 37 ff.; Mayer, StRR 124 (2015).

69 Rogall, FS Beulke 973 (2015); Wastl et al., NStZ 68, 70 (2009).

disclose information under the Insolvency Statute finds its legal basis in public procedure law, while private law applies between the employer and employee. In particular Knauer[70] and Momsen/Grützner[71] reject the application of the principles enunciated in the common debtor decision and they find justification for their solution in the fair trial principle. But before resorting to a general principle, there is an attempt to develop a legally certain solution from the written law.

c. Fundamental Rights Binding only for Official Actions

The relationship between private individuals does not constitute a legal vacuum. It is defined by rules that, although partially modifiable, are designed to be stringent. These rules not only obtain legal binding nature on account of their own personal capacity, but first on account of their official state recognition (respectively, through legislation). Whether a private entity will want to agree on something is solely a matter for the parties involved. If they have chosen to do so, state law applies insofar as they have not legitimately waived it. This is at least relevant for the "how" of legally binding relationships between private parties. The authority of state regulation flows from the constitution and the content is not free from obligations: even the freedom of the legislator finds itself limited by its requirement to preserve fundamental rights. In the field of civil law, they apply a protective function. Although this leaves vast space, that does not change the fact that the state must recognize the legal situation between private parties in a constitutionally sound manner. Even under private law, the right to request information is based not only on an autonomous interest, but also to a considerable degree on official state action.

Additionally, a claim (governed by public law) to information in an insolvency proceeding is inconceivable without private action: there is no crisis without private sector activity. An insolvency proceeding primarily serves no public policy purpose, but is led by the interest of creditors. Momsen and Grützner[72] consider only the enforcement. In this respect, it is true that the state merely provides the tools at its disposal, as the legal relationship continues to concern private parties. However, this says nothing about the role of the state in the existence of privately binding relationships: just as it is the state that is permitted to make substantive law binding, it is also up to the state to determine the conditions for the enforcement of this substantive law. The assertion that state help will not change anything concerning the private nature of the legal relationship between employer and employee is thus equally true as the conclusion drawn by Momsen and

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70 Knauer, ZWH 81, 86 (2012); Knauer &Gaul, NStZ 192 (2013).

71 Momsen & Grützner, DB 1792, 1796 (2011); Momsen, *in* Criminal Compliance, *supra* note 2, at No. 34B/30 &39.

72 Momsen & Grützner, DB 2011, 1792 (1795).

Grützner. The difference between the information under the Insolvency Statute and according to the employment contract is only in the different amount (qualitative and possibly also quantitative) of private cause. Consequently, a structural difference that would preclude the transfer of principles from the common debtor decision does not exist.

This alone does not exclude any other potential significant differences. The courts have dealt with similar tensions in other circumstances. In each civil proceeding, the parties have the obligation to be truthful (Section 138, Paragraph 1 of the Code of Civil Procedure). With respect to insurance, the insured person must also provide truthful information. If he or she fails to do so, then he or she faces punishment for fraud. However, there is no evidence exclusionary rule for insurance and civil records.[73] What is a sustainable and accessible generalization of classification criterion?

d. Duties and Obligations

Procedural law distinguishes between enforceable obligations and mere procedural burdens.[74] Substantively, there is a parallel to duties on the one hand and obligations on the other hand. Duties are binding and their fulfillment is enforceable. However, the addressee of a procedural burden or substantive obligation can choose between fulfillment or acquiescence of the legal disadvantages that befall him or her. Indeed, the duty to be truthful is not available as such in a civil proceeding. The parties are in control: the private plaintiff is not required to instigate a trial, and the respondent is not required to defend.

A respondent does not have to defend against a claim for issuing information. He or she cannot ensure a right to silence. On the contrary, the substantive claim is precisely focused on the issuance of information: a duty that is documented in the court decision as an enforceable duty to express oneself truthfully. The following relates to employees and board members with respect to internal investigations: insofar as they are obliged to provide information, they lack the freedom to decide whether they want to testify or remain silent. The refusal is unlawful; the statement can be compelled by means of state enforcement. Accordingly, one can also find criteria regarding the duty to testify in the common debtor decision: there is a lack of freedom to decide in this specific situation.[75] It exists neither for the debtor in insolvency proceedings nor with a duty to disclose information according to substantive civil law. The legal consequence is therefore con-

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73 Not clear, OLG Celle, Urt. v. 16.2.1982 – 1 Ss 605/81 = wistra 1982, 120.

74 ZPO No. 56 (Musielak ed.); *see also* MüKo/ZPO No. 32 (Rauscher ed.).

75 BGH, Beschl. v. 15.12.1989 – 2 StR 167/89, Rn. 14 f. = BGHSt 36, 328 ff; Böhm, WM 1913 (2009) , 1913; Wastl et al., NStZ 68, 71 (2009); Schlothauer, FS Gerhard Fezer 267.

gruent: the duty to private disclosure therefore corresponds to a criminal procedural evidence exclusionary rule.[76]

e. Scope of the Prohibition on Utilization

Although the ban on utilization is affirmed, there is little said about its scope. It goes without saying that it applies only with respect to correct information because untrue statements are never based on the fulfillment of a duty.[77] The same applies to information beyond the legal duty. False and voluntary information are freely usable in criminal procedure.[78]

f. Prohibition on Utilization

The further limits of utilization correspond to the rules laid down in the common debtor decision: the conviction of the respondent must not be directly based on their dutiful statements, which means that an indirect use of such information is allowed at one's own risk. However, the Basic Law does not stipulate indirect usability, but leaves the legislators free to decide whether or not to institute a further restriction. As a result of this possibility, the legislators have created Section 97, Paragraph 1, Sentence 3 of the Insolvency Statute. By contrast, there is no such provision for internal investigations. Thus, only the constitutional minimum applies. For this reason, law enforcement is not denied the opportunity to include statements made within the realm of an internal investigation when proceeding with a further investigation against the person who initially made the statement. Indeed, the independent evidence collected in the state investigation may form the basis of the conviction.[79] In Germany, there is thus no ban on using evidence resulting from the so-called fruit of the poisonous tree.

g. Validity Only for One's Own Statements

The scope of the utilization ban in the case of multiple parties is to be determined in

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76 ArbG Saarlouis, Urt. v. 19.10.1983 – 1 Ca 493/83 = ZIP 1984, 364; Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 144; Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/41; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/429; Momsen, *in* Criminal Compliance, *supra* note 2, at No. 34 B/30; LAG Rheinland-Pfalz, Urt. v. 7.9.2004 – 11 Sa 2018/03, No. 73; Bauer, StraFo 488 (2012); Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/29; Raum, StraFo 395, 397 (2012); Wimmer, FS Imme Roxin 537, 542; Rosen, BB 230, 231 (2009).

77 Verfassungsgerichtshof des Freistaates Sachsen, Beschl. v. 15.11.2013 – Vf. 89-IV-12.

78 § 97, Para. 1, Pg. 3 InsO; Bittmann & Rudolph, wistra 81 (2001).

79 Böhm, WM 1913 (2009); Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/61; Rödiger, *supra* note 43, at 304; Wastl et al., NStZ 68, 73 (2009); Wehnert, StraFo 253, 257 (2012); Greco & Caracas, NStZ 7, 15 (2015); Stam, StV 130, 133 (2015); Rogall, FS Beulke 973, 978-980 (2015).

each instance: in proceedings against the respondent, it extends to the parts of the information dealing with the role of third parties if this, as in most cases, can allow conclusions at the expense of the respondents.[80] The situation is different in proceedings against an additional party. In this respect, it is not about *self*-incrimination. Therefore, such a personal evidentiary ban can only operate with the result that it does not apply in proceedings against a third party. If separate proceedings are initiated, this means that one's own personal statements are unusable. Statements of others that were made during the course of internal investigations are also unusable when they themselves are imputed to the person who made the self-incriminating statement. The exclusionary rule has therefore only a relative and very limited benefit. If there is a recognized need for expansion, then this is only for the legislator to change.

C. Seizure

1. Seizure and Freedom from Seizure

There is no provision that expressly deals with the ability to seize documents that have originated during the course of the internal investigation. It must therefore be decided in accordance with general provisions. It depends initially on who led the internal investigation. If the right to refuse to give evidence does not extend to this person, then the documents are fully capable of being seized. Documents from inquiries made by company employees (ex. internal auditors, compliance department, in-house lawyers) can be easily seized. The same applies to investigations from a specialized company (ex. a forensic firm). If an accounting firm is commissioned, the following are conceivable: a right to refuse to give evidence according to Section 53, Paragraph 1, Number 3 of the Code of Criminal Procedure and subsequently the seizure protection pursuant to Section 97, Paragraph 1 of the Code of Criminal Procedure. However, this protection extends only to information and documents that were revealed to them in their professional capacity as auditors. It applies to business inspections, in particular financial statements,[81] but not for internal investigations (unless they fall under protected activities in such a way that it makes it impossible to separate the sources). Compiled business records, as well as protocols of statements (interviews) and interim- and final reports drawn up by investigators are capable of seizure even if they were procured from abroad.

The situation is more nuanced if a lawyer led the investigation. Because an internal investigation does not concern a non-professional action, then Section 97, Paragraph 1 of the Code of Criminal Procedure applies. This provision extends only to documents in

80 Senge, KK-StPO, § 55 StPO No. 10; Ignor & Bertheau, § 55 StPO No. 11, & 16; Schmitt, *supra* note 41, at § 55 StPO No. 7; Rogall, SK-StPO, § 55 No. 27.

81 OLG Nürnberg, NJW 690 (2010), No. 13, in reference to Sec. 2, Para. 1 WiPrO.

the custody of the person who holds the right of refusal (Section 97, Paragraph 2, Sentence 1 of the Code of Criminal Procedure) and so it does not apply to documents stored in the company itself or easily accessible to the company. In addition, the attorney-client privilege (also referred to as legal professional privilege) exists solely between the lawyer and company as such.[82] Employees of the company are not included within the scope of this protection. Accordingly, only the company can waive the confidentiality existing with the lawyer. Therefore, in proceedings against natural persons, documents that are voluntarily surrendered by the company or are confiscated from the company are generally usable and are not exempt from seizure.

2. Limited Protection of Legal Entities

Whether that also applies if proceedings are initiated against the company itself (Section 30 of the Act on Regulatory Offences) or it is a third party recipient of items that were possibly gained from criminal actions (Section 73, Paragraph 3 of the Criminal Code), there is doubt in the literature[83] and there are parallels drawn to defense documents that are also exempt from seizure when they are not in possession of the defense (Section 148, Paragraph 1 of the Code of Criminal Procedure).[84] The term *defense* documents is not only procedural, but it is materially defined with the consequence of a pre-effect before the initiation of an internal investigation.[85]

For the latter opinion and also for the absolute protection of defense documents, there are good reasons[86] for a concrete attorney-client relationship between counsel and a natural person. Such a far-reaching scope of privilege is not always justified due to differences between a natural person and legal entity. Human dignity and the general right to personality are only attributable to natural persons. Therefore, legal entities do not enjoy constitutionally protected rights including the right against self-incrimination and a corresponding right to remain silent.[87] Such a general right is not found in ordinary law. Section 444, Paragraph 2 of the Code of Criminal Procedure provides for formal

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82 Schmitt, *supra* note 41, at § 53, No. 16 & § 97 No. 10b StPO.

83 Ballo, NZWiSt 46 (2013); Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 49; Jahn & Kirsch, NZWiSt 28 (2013); Momsen & Grützner, DB 1792, 1796 (2011); Greeve, StraFo 89, 93 (2013).

84 Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/42; Rütters & A. Schneider, GA 160, 164 (2014); Schmitt, *supra* note 41, at § 148 StPO No. 8.

85 LG Gießen, Beschl. v. 25.6.2012 – 7 Qs 100/12 = wistra 2012, 409 f.; Greeve, StraFo 89, 95 (2013); Jahn & Kirsch, NZWiSt 28 (2013); Jahn, ZWH 1, 3, 5 (2013).

86 Whether they can convince is another question. The distinction between preparing the defense on the one hand and participation (aid or subsequent favoring) on the other hand will be precisely defined.

87 BVerfG, Beschl. v. 26.2.1997 – 1 BvR 2172/96, Rn. 85 = BVerfGE 95, 220; Fink, wistra 457 (2014); Bung, ZStW 125, 536, 349 (2013).

additional involvement (as well as the equality of the recovery and forfeiture parties, Sections 442, Paragraph 1 and Section 433 Paragraph 1 of the Code of Criminal Procedure) with a defendant of equal protective effect, including for documents intended for defense against the threat of additional parties, but only first in the main trial stage.[88] Exactly which rights they are due in preceding stages of the trial is left open to determination. Here, protection against seizure (if this protection is possessed at all) is limited to documents in custody of the lawyer pursuant to Section 97 of the Code of Criminal Procedure.

Indeed, the legislature is free to increase the protection of Section 433, Paragraph 1 of the Code of Criminal Procedure to an investigation procedure. It can nevertheless be argued that criminal procedural means of coercion may be used against the later additional party so that a defensive need cannot consequently be denied. The expansion of statutory seizure prohibitions is given to case law in light of its effect on the quest for truth and only in compelling and exceptional cases. Something similar does not exist in relation to the seizure of documents from internal investigations, as the Basic Law does not even grant a right to remain silent to companies.

The measures of forfeiture and recovery are not connected with a value judgment. Forfeiture is similar to the civil law institution of unjust enrichment. The prosecution must not only secure the forfeiture, which additionally serves the adverse party, but also the sources of information and evidence for its order. Since this has a privileged right of access pursuant to Section 406e of the Code of Criminal Procedure, then prohibiting the seizure of such company-owned documents would not work.

Although there is no ethical value judgment against implementing a corporate fine, intent or at the very least negligence is required to impose such a fine according to Section 10 of the Act on Regulatory Offences. In the case of Section 30 of the Act on Regulatory Offences, the company is not accused of its own "guilt", but rather is attributed the inappropriate conduct of a specific representative. That expands the latitude of the legislature following Article 19, Paragraph 3 of the Basic Law. Section 433, Paragraph 1 of the Code of Criminal Procedure does not exceed this. The restriction made therein does not represent a drafting error. Rather, it represents a conscious decision by the legislature, as is also evident elsewhere. Section 81a, Paragraph 1 of the Act Against Restraints of Competition normalized an obligation to cooperate in actions relating to cartel offenses, albeit only in relation to the principles of assessment of the legal consequences.

Therefore, a reference point for the protection of the company from the seizure of documents originating in an internal investigation cannot be found in either constitutional

88 Jahn & Kirsch, *in* Criminal Compliance, *supra* note 2, at No. 33/107; Rütters & Schneider, GA 160, 162 (2014).

or regular statutory law. As a result, nothing else applies for subsequent procedural stages due to the limited protection of legal entities.

3. Documents in Legal Custody

Particularly controversial is the question of whether documents may be seized in a proceeding against a legal entity if those documents originated from a lawyer involved in an internal investigation. To this end, Section 97, Paragraph 1, Numbers 1 and 2 of the Code of Criminal Procedure are useful, as they limit the ability to seize documents in relation to communication arising from the attorney-client relationship. However, the wording of Section 97, Paragraph 1, Number 3 of the Code of Criminal Procedure does not have this restriction. It is simply not possible to derive an unlimited seizure protection for all materials passed on to a lawyer.[89] The very wording does not suggest an *argumentum e contrario* because it is linked with the term "other" in Section 97, Paragraph 1, Number 2 of the Code of Criminal Procedure and builds on a provision that expressly limits the protection to information whose source is the accused. Protection extending beyond Section 97, Paragraph 1, Numbers 1 and 2 would be surprising if attached to Section 97, Paragraph 1, Number 3: the objects appearing under Section 97, Paragraph 1, Numbers 1 and 2 are much more clearly in need of confidentiality as the unnamed objects found under Section 97, Paragraph 1, Number 3. However, it cannot be concluded that the protection of written communication and records is determined solely by Section 97, Paragraph 1, Numbers 1 and 2, as both provisions would lose any application from an expanding interpretation of Section 97, Paragraph 1, Number 3. It cannot be assumed that the legislature wanted to set up two never relevant rules or even overlooked their redundancy. Accordingly, it follows that in proceedings against natural persons there is no freedom from seizure under Section 97, Paragraph 1 when documents from an internal investigation are in the hands of a corporate lawyer.[90]

The freedom from seizure could result from the new Section 160a, Paragraph 1, Sentence 1 of the Code of Criminal Procedure (in force since 2011), which includes all lawyers rather than just defense lawyers[91] and prohibits investigative measures directed against them. However, Section 160a, Paragraph 5 of the Code of Criminal Procedure states that Section 97 remains unaffected. The meaning of this provision does not reveal itself solely from the wording.

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89 Jahn & Kirsch, StV 151 (2011); Jahn, ZIS 453 (2011); Zerbes, ZStW 125, 551, 562 (2013); Erb, FS Kühne 171, 178, 184 (2013).

90 LG Hamburg, Beschl. v. 15.10.2010 – 608 Qs 18/10 = wistra 192 (2011); Greeve, StraFo 89, 95 (2013); *Bock* & *Gerhold*, *in* Internal Investigations, *supra* note 2, at No. 5/31; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/432; Rödiger, *supra* note 43, at 315.

91 BVerfG, StraFo 2015, 61; LG Augsburg, Beschl. v. 2.4.2014 – 8 Ks 401 Js 139206/13, BeckRS 14588 (2014); Gutmann, FD-StrafR 362412 (2014).

Indeed, the grammatical interpretation permits the assumption that both provisions are valid side-by-side.[92] Such an interpretation would occur even without a provision like Section 160a, Paragraph 5 of the Code of Criminal Procedure, whose regulatory content is limited to a purely declaratory or clarifying function. To that effect, the limiting interpretation leads one to believe that Section 160a, Paragraph 5 leaves untouched the seizure prohibition of Section 97,[93] reduces only its scope, and does not attach any nature of a demand. Contributing to legal clarity is an important and sometimes only task of a legal provision. But first there is the presumption that the legislature did not want to regulate with content. From a methodological perspective, this can be described as an important precept. The given presumption is refuted only if every attempt to interpret a provision in terms of meaningful regulatory content fails. The final interpretation would result in the adoption of a purely clarifying meaning.

To regard Section 160a, Paragraph 5 of the Code of Criminal Procedure as a mere declaratory norm would perhaps be plausible, but would require a clarification. If so, the legislature could explain certain terms of Section 97 for further application (for example, the admissibility of the seizure where suspicion arises regarding complicity) and also determine which other variants of Section 97 are withdrawn under Section 160a. Unfortunately, the legislature has not yet done this in terms of the entire Section 97. This full reference speaks in favor of a defined understanding of Section 160a, Paragraph 5 as determining Section 97 as an exception from Section 160a, Paragraph 1, Sentence 1: the freedom from seizure of documents from a lawyer is therefore directed to continue only in accordance with Section 97 of the Code of Criminal Procedure.[94] Correspondingly, messages, records, and other items arising from the attorney-client relationship are protected to the lawyer. Findings from internal investigations do not originate from the defense or other mandate of individual defendants.

After receipt of the release statement from the company, the lawyer that took over the internal investigation is obliged to give testimony or surrender items in proceedings against an employee or board member (Section 95 Code of Criminal Procedure). Relevant documents may be confiscated from the lawyer if necessary. Consequently, Sec-

92 Sahan, *in* Criminal Compliance vor den Aufgaben der Zukunft, *supra* note 40, at 133, 142; LG Mannheim, Beschl. v. 3.7.2012 – 24 Qs 1 und 2/12 = wistra 400 (2012); de Lind van Wijngaarden & Egler, NJW 3549 (2013); Schuster, NZWiSt 431 (2012); Ballo, NZWiSt 46 (2013); Greeve, StraFo 89, 95 (2013).

93 Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/68.

94 Bauer, StraFo 488 (2012); Erb, FS Kühne 171, 175 (2013); Gädigk, *in* Internal Investigations, *supra* note 2, at 18/31; Schmitt, *supra* note 41, at § 97 No. 10b & § 160a StPO No. 17; Wimmer, FS Imme Roxin 537, 545; Zerbes, ZStW 125, 551, 563 (2013); *Minoggio*, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 60; Knauer, ZWH 81, 88 (2012); Beckemper, *in* Internal Investigations, *supra* note 2, at No. 15/257; Mark, ZWH 311, 312 (2012); Raum, StraFo 395, 399 (2012).

tions 97 and 160a, Paragraph 5 of the Code of Criminal Procedure support the principle that a law firm has no shelter for delicate evidence.