

Penn State International Law Review

Volume 19

Number 1 *Dickinson Journal of International Law*

Article 6

9-1-2000

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Recommended Citation

Lipp, Volker (2000) "Parallel Proceedings in Germany: Problems and Solutions," *Penn State International Law Review*: Vol. 19: No. 1, Article 6.

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Parallel Proceedings in Germany: Problems and Solutions

Dr. Volker Lipp*

I. Introduction

This paper examines the problems of parallel proceedings against financial intermediaries, and the solutions offered by German law. The first part identifies the practical problems and principal questions of parallel proceedings. The second part describes the proceedings which can be brought against financial intermediaries in Germany. The third part provides an overview how the fundamental problems and questions of parallel proceedings are dealt with under German law. The fourth and final part analyzes special problems and constellations.

II. Practical Problems and Principal Questions of Parallel Proceedings¹

Fraud or other wrongdoings in the financial sector may lead to various proceedings brought by different bodies or individuals against financial intermediaries whether individuals, companies or other forms of business associations. Criminal proceedings may be brought by criminal prosecution authorities. Civil proceedings may be initiated by liquidators against those who may have defrauded the now insolvent company, and by private litigants seeking compensation for their losses. Regulatory bodies may commence regulatory proceedings, and consumers may bring proceedings before an ombudsman. A single event may thus give rise to a multitude of proceedings, commencing in quick succession and running parallel. Cases like Maxwell or BCCI caught the eye of the international public, but there have been many others which have

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1. Cf. FIN. REG. WORKING GROUP, SOCIETY OF ADVANCED LEGAL STUDIES, REPORT ON PARALLEL PROCEEDINGS para. 2 (1999).

likewise led to a large number of parallel proceedings on the same set of facts.

Each kind of proceedings serves a different function, and has different rules of procedure accordingly. Whereas parallel proceedings of the same kind and on the same subject matter are barred by virtue of the rules of *lis pendens*, and *res judicata*, respectively, proceedings of a different kind can run parallel.

Nevertheless, even if they have different purposes, multiple proceedings on the same set of facts cause a number of difficulties:

- For prosecutors and regulatory bodies, it means a duplication of resources in investigations.
- Information gathered by the appropriate authority for one set of proceedings may be not available in another.
- Defendants, on the other hand, have to defend themselves in a number of fora, face problems of logistics because they have to be in two or even more places at one time, and feel impaired in their ability to prepare properly for all sets of proceedings.
- Proceedings may have “spill over” effects. Proceedings and decisions in one forum have the potential of prejudicing the proceedings and outcome in another.
- Multiple proceedings can mean multiple use of evidence gained initially for a single purpose. This may compromise privileges of witnesses and parties guaranteed only in the type of proceedings that come later.
- Different proceedings on the same set of facts may lead to inconsistent decisions thus affecting public confidence in the legal system and its ability to deal with financial crime coherently.

In view of these problems with parallel yet different kinds of proceedings, the very first question is:

- Should there be one, or better: a unified set of proceedings, instead of different proceedings which may run parallel?

If this question is answered in the negative, and parallel proceedings are regarded unobjectionable in principle, further questions arise:

- One is priority: Which proceedings should come first—criminal, regulatory, civil, or investigative proceedings?
- Another important issue concerns the flow of information, and the regulation of that flow, between public bodies, prosecution authorities, and private parties involved in different proceedings. Are there limitations on passing on information and evidence? Do private litigants have access

to information collected by public authorities? Is there a role for the privilege against self-incrimination outside the criminal process?

III. Proceedings Against Financial Intermediaries in Germany

Having laid out the practical problems and principal questions arising from parallel proceedings, we are now in a position to explore the approach taken in Germany. Let us first have a look at the public or private bodies that may start investigations and proceedings against a financial intermediary, and the type of proceedings that may arise.

A. *Regulatory or Supervisory Authorities and Proceedings*

Firms offering financial services are required to obtain a licence in order to do business within Germany. These licences are granted by supervisory authorities which are federal government agencies, such as the Federal Banking Supervisory Office (BAKred), the Federal Supervisory Office for Securities Trading (BAWe), and the Federal Insurance Supervisory Authority (BAV). The same authorities also provide continuous supervision on the way in which businesses are carried out by these firms.

1. *The Federal Banking Supervisory Office (Bundesaufsichtsamt für das Kreditwesen—BAKred)*—The BAKred is an independent superior federal agency established in 1962. It is located in Berlin and will soon be transferred to Bonn. Under the Banking Act (Gesetz über das Kreditwesen—KWG), the BAKred has the mandate to regulate banks and other financial services institutions. Its aim is to protect the operations of the financial market, especially in ensuring the liquidity of the firms through monitoring their annual accounts.²

Moreover, the BAKred may carry out audits at the firms or request the production of certain documents.³ If a firm suffers a financial crisis, the BAKred has the authority to prohibit the proprietors and managers from carrying out their business⁴ and to order the firm to be temporarily closed.⁵ It may also revoke the licence or request the dismissal of the responsible managers if the terms and conditions of the licence are no longer met.

2. Regulated firms have to submit their annual accounts to the BAKred accordingly, para. 26 (1) KWG.

3. Para. 44 KWG.

4. Para. 46 (1) KWG.

5. Para. 46a (1) KWG.

In the event of a breach of administrative regulations the BAKred has the authority to impose fines on the firms and their individual officers for administrative offences⁶ although it has no power to bring criminal proceedings. Such administrative offences (Ordnungswidrigkeiten) are to be distinguished from criminal offences, which cannot be committed by companies or associations but only by individuals, and which, according to the German constitution,⁷ are sanctioned only by criminal courts and not by public bodies.

2. *The Bundesbank*—The German Bundesbank has some supervisory duties pursuant to the Banking Act. It collects and processes the reports regularly submitted by financial institutions,⁸ analyses data concerning the economic situation of these institutions, and comments on planned regulatory measures. The Bundesbank also acts on request and upon the legal powers of the BAKred thus making available its resources and expertise to the BAKred.

3. *The Federal Supervisory Office for Securities Trading (Bundesaufsichtsamt für den Wertpapierhandel—BAWe)*—The BAWe, an independent superior federal authority established in 1995, is located in Frankfurt/Main. Under Securities Trading Act (Gesetz über den Wertpapierhandel -WpHG) it has to protect investors and to safeguard market transparency and integrity, for instance by fighting insider dealing. If the BAWe has evidence indicating insider dealing, it has the power to request relevant information and the production of documents from the firms in question.⁹

The BAWe also monitors changes of voting rights in listed companies and can issue orders regulating the manner in which they are to be exercised. Consequently, firms are obliged to disclose to the BAWe any relevant changes of their shareholding in listed companies.¹⁰ Besides, the WpHG sets up certain rules of conduct for investment services enterprises¹¹ giving the BAWe the power to ensure compliance. It may also request the disclosure of relevant information and the production of documents for that purpose.

6. Paras. 56, 59 KWG.

7. Art. 92 GG (Grundgesetz - German Basic Law); cf. Vol. 22, para. 49, at 73 BverfGE (Bundesverfassungsgericht - German Constitutional Court).

8. Para. 25 KWG.

9. Para. 16 WpHG.

10. Para. 21 WpHG.

11. Paras. 31 ff. WpHG.

Like the BAKred, the BAWe also has the power to sanction the breach of administrative regulations by firms and individuals,¹² but it has no power to institute any criminal proceedings.

4. *The Bundesaufsichtsamt für das Versicherungswesen (Federal Insurance Supervisory Authority—BAV)*—The BAV, established in 1901 under the Law on the Supervision of Insurance Undertakings (Gesetz über die Beaufsichtigung der Versicherungsunternehmen -VAG), is located in Berlin. Like the BAWe and the BAKred, the BAV is an independent superior federal authority. The businesses under its supervision are all undertakings which carry on insurance business in Germany, with the exception of social insurance.¹³ The main task of the BAV is to safeguard the interests of the insured, especially in ensuring that the liabilities under the insurance contracts may be fulfilled at any time.¹⁴

Every insurance firm requires authorisation by the BAV to do business.¹⁵ The firm has to provide the BAV with a wide range of information about its organization and intended business. The BAV may request for additional information or the production of documents or even carry out inspections.¹⁶ In order to fulfill its functions, the BAV can take any action necessary to prevent or remedy any irregularities.¹⁷ For example, it can prohibit the insurance firm from concluding certain contracts.¹⁸ The BAV also ensures compliance by imposing administrative fines,¹⁹ or even revoking the authorisation to do business. Like the BAKred and the BAWe, the BAV may impose fines for administrative offences (Ordnungswidrigkeiten) against firms and individuals,²⁰ but cannot institute any criminal proceedings.

5. *Judicial Control of Supervisory Authorities*—According to the German constitution,²¹ firms and individuals must have a legal remedy against any order of a supervisory authority. Such cases will generally be heard by Administrative Courts. However, if an offender challenges the fine imposed by a supervisory authority for

12. Paras. 39, 40 WpHG.

13. Para. 1 VAG.

14. Para. 81 (1) VAG.

15. Para. 5 VAG.

16. Para. 83 (1) VAG.

17. Para. 81 (2) VAG.

18. Para. 81 (2a) VAG.

19. Para. 93 VAG.

20. Para. 145, 145a VAG.

21. Art. 19 (4) GG.

an administrative offence, this case will be heard by a criminal court because of the punitive character of the fine.

B. Disciplinary Bodies and Proceedings

1. *Chambers of Professionals*—Chambers of Professionals are set up by the statutes regulating the respective professions. Every lawyer, tax consultant, or accountant is a member of the regional chamber for his profession which supervises his professional conduct and has the disciplinary power to formally reprimand him in minor cases.²² In more serious cases, the regional chamber can ask the public prosecution to institute disciplinary proceedings. The professional can also apply to the public prosecution to bring proceedings in order to clear himself from accusations of misconduct. These cases will be heard by professional tribunals established by the statute regulating the respective profession.

2. *Professional Tribunals*—Professional tribunals will hear serious cases of professional misconduct that have been instituted by the public prosecution. Sanctions include grave reprimands (“Warnung,” “Verweis”), pecuniary fines, prohibition to work as professional up to 5 years, and expulsion from the profession, and are for disciplinary purposes only.²³

C. Criminal Proceedings

As there are activities in the field of financial services that constitute a criminal offence (e.g. insider dealing), it is the task of the criminal prosecution authorities assisted by the police to carry on investigations and charge individuals with criminal offences. Those trials will be held before criminal courts. Companies and other business associations as such cannot be criminally liable in German law, although sanctions for administrative offences may be imposed.²⁴

D. Civil Litigation/Civil Proceedings

Private parties suffering loss through the conduct of firms or individuals providing financial services are able to commence proceedings against these in the civil courts. If one of the parties

22. Para. 74 BRAO (Bundesrechtsanwaltsordnung - Lawyers Act), para. 81 StBerG (Steuerberatungsgesetz - Tax Consultants Act); para. 63 WPO (Wirtschaftsprüferordnung - Accountants Act).

23. Para. 113 BRAO; para. 89 StBerG; para. 67 WPO.

24. See *supra* Parts III.A.1., III.A.3., and III.A.4.

becomes insolvent, and an administrator has been appointed by the insolvency court, the administrator steps into the shoes of the insolvent party.²⁵ Then he is the person to sue or to be sued.²⁶

IV. The German Approach to Parallel Proceedings—An Overview

As we have discussed above, different kind of proceedings address different concerns and serve different purposes they are specifically designed for:²⁷

- Supervisory authorities and their proceedings are concerned with regulation of the financial sector in the public interest. These authorities and their actions are under the judicial control of the administrative courts.
- Disciplinary proceedings serve to regulate professional conduct and to ensure that professional standards are met.
- Criminal proceedings are concerned with the liability of an individual for an alleged criminal offence.
- In civil proceedings, the court has to decide a legal dispute over the rights of the parties under private law. In our context, these will mainly be lawsuits brought by private individuals against financial intermediaries for compensation of loss.

Accordingly, the different proceedings are governed by different rules of procedure, including rules governing the role of the respective courts in gathering evidence, or the production of evidence by the parties. For instance, in civil proceedings it is up to the parties to make statements of fact and to produce evidence which will only be heard if facts are in dispute,²⁸ whereas in criminal proceedings all facts material to the charge have to be proved by evidence collected by the public prosecution and the judge, and which must be heard in open court.²⁹

As a result of their different functions and rules of procedure, different proceedings are independent of each other even though

25. Para. 80 (1) InsO (Insolvenzordnung - Insolvency Act).

26. Cf. REINHARD BORK, EINFÜHRUNG IN DAS NEUE INSOLVENZRECHT 69, 182 (2nd ed. 1998).

27. Cf. FIN. REG. WORKING GROUP, SOCIETY OF ADVANCED LEGAL STUDIES, REPORT ON PARALLEL PROCEEDINGS para. 2.2 (1999).

28. Paras. 138, 355 ZPO (Zivilprozeßordnung - Code on Civil Procedure); cf. OTHMAR JAUERNIG, ZIVILPROZESSRECHT 78 (25th ed. 1998).

29. Paras. 160, 200, 214 (3) and (4), 244 (2) StPO (Strafprozeßordnung - Code on Criminal Procedure); cf. CLAUDIUS ROXIN, STRAFVERFAHRENSRECHT 94 (25th ed. 1998).

they rest upon the same set of facts. Consequently, no court or authority is bound by the findings (as to facts or points of law) or by the final decision of another court or authority.³⁰ Each has to reach its own decision. Parallel court proceedings will only be precluded if there is the same type of proceedings on the same subject matter (e.g. criminal proceedings concerning the same offence against the same offender) by virtue of the rules of *lis pendens*, and *res judicata*, respectively.³¹ Therefore, the phenomenon of parallel proceedings is not unique to German law, and is not objected in principle.³²

With few exceptions, there is no unified proceeding, serving different purposes within one set of proceedings, because experience shows that one purpose will almost certainly outweigh the other. For example, German law enables the victim of a crime to bring a claim for damages against the accused within the criminal proceedings. The same criminal court that hears the criminal case will then adjudicate the civil case, too.³³ The underlying idea is to make the evidence and findings of the criminal case easily available to the civil case.³⁴

In practice, however, the criminal element of these unified proceedings has always prevailed over the civil claim for damages.³⁵ To criminal courts, the civil case simply is an tiresome additional task alien to them. What is most important, criminal courts tend to assess damages not to compensate financial loss but to punish the convicted defendant. The victim's loss may therefore be under- or overcompensated, according to the degree of guilt of the convict. As a result, this unified procedure is rarely used by the victim, and

30. For criminal proceedings: para. 262 (1) StPO; for civil proceedings: para. 14 (2) EGZPO (Einführungsgesetz zur Zivilprozeßordnung - Introductory Act to the Code on Civil Procedure).

31. Art. 103 (3) GG (this type of issue preclusion is constitutionally guaranteed in criminal proceedings; *see also* ROXIN, *supra* note 29, at 410; *cf.* paras. 265 (3), 322 ZPO (for civil proceedings)).

32. During the second half of the 19th century, the issue was discussed at large. It was decided by way of legislation. Both, the Code on Civil Procedure as well as the Code on Criminal Procedure explicitly stated that the respective courts should proceed completely independent from each other. *Cf.* 1 C. HAHN, *DIE GESAMMTEN MATERIALIEN ZU DER CIVILPROCEßORDNUNG* 280 (1880); 2 C. HAHN, *DIE GESAMMTEN MATERIALIEN ZU DER CIVILPROCEßORDNUNG* 1088-90 (1880); for a more recent discussion, *cf.* Otto R. Kissel, *Fremde Verfahrensgegenstände vor den Strafgerichten*, STRAFRECHT. UNTERNEHMENSRECHT. ANWALTSRECHT. FESTSCHRIFT FÜR GERD PFEIFFER 189 (1988).

33. Para. 403 StPO; *see* ROXIN, *supra* note 29, at 503 (for an overview).

34. ROXIN, *supra* note 29, at 503; HILGER, LÖWE-ROSENBERG, STPO. GROßKOMMENTAR (25th ed. 1999); § 403 Nrs. 3-7 StPO.

35. HILGER, *supra* note 34, at 8.

criminal and civil proceedings run parallel and independent from each other.³⁶

However, it is important to note that "parallel" does not mean "unconnected." To name but one example: Under German law, the findings or the decision of a court or authority may be introduced as documentary evidence in a different set of proceedings, taking place later or parallel. These findings or the decision must be introduced in accordance with the respective rules of procedure, and within the limits prescribed by them. For example, a criminal court will have to decide questions of civil law or fact without being bound by a decision of a civil court.³⁷ Likewise, the civil court is neither bound by the decision of a criminal court as to points of law³⁸ nor by the facts stated in a criminal judgment. Nonetheless, where these facts are in dispute in civil proceedings the criminal judgment can be introduced as documentary evidence for the facts stated therein,³⁹ and the findings of the criminal court will be of high evidential value.⁴⁰ On the other hand, the similar use of a civil judgment in criminal proceedings is very limited because, in principle, it cannot replace the hearing of a witness.⁴¹

Moreover, the rules of procedure in any kind of proceedings provide the courts with discretion to stay their own proceedings with respect to proceedings of a different kind and before a different court. This applies to proceedings that either run parallel already or are yet to be instituted. For example, a criminal court can stay criminal proceedings with respect to any proceedings of a different kind, e.g. civil or administrative proceedings,⁴² and the same is true for civil proceedings,⁴³ and for proceedings in administrative courts.⁴⁴ When exercising this discretion, the court

36. HILGER, *supra* note 34, at 8.

37. Para. 262 (1) StPO; *cf.* KLEINKNECHT/MEYER-GOBNER, STRAFPROZEBORDNUNG (44th ed. 1999) (This applies also to other than civil proceedings); § 262 Nr. 1 StPO.

38. Para. 14 (2) EGZPO.

39. Paras. 415 ZPO.

40. *Cf.* 2 PETER SCHLOSSER, KOMMENTAR ZUR ZIVILPROZEBORDNUNG (1994); § 14 Nr.2 EGZPO; C. HAHN, *supra* note 32.

41. *See* para. 250 StPO (for the rule and its exceptions).

42. *Id.* at para. 262 (2) (mentions only civil proceedings, but is applied to other kinds of proceedings as well); *cf.* KLEINKNECHT & MEYER-GOBNER, *supra* note 37; § 262 Nr. 5 StPO.

43. Paras. 148, 149 ZPO.

44. Para. 94 VwGO (Verwaltungsgerichtsordnung - Code on Administrative Court Procedure).

has to ask how the objective of its very own proceedings will be best fulfilled.⁴⁵ Factors that the court will take into account include:⁴⁶

- the degree of overlap between the proceedings in question;
- the role and importance of the facts common to both proceedings for its own decision;
- whether a stay may help to obtain better evidence;⁴⁷
- whether a stay may compromise the right of a party to a hearing within a reasonable time under art. 6 (1) of the European Convention on Human Rights;
- whether a stay may avoid inconsistent decisions.⁴⁸

V. Special Problems and Constellations

Having described the general approach of German law to parallel proceedings, we will now examine some special problems and constellations. First, we look at the special case of parallel disciplinary and criminal proceedings against professionals. Second, we will analyze the issues of co-operation and the role of the privilege against self-incrimination outside the criminal process.

A. *A Specific Case: Disciplinary and Criminal Proceedings Against Professionals*

In principle, the general rules as described before also apply to disciplinary proceedings against professionals, i.e. they are independent from any other proceedings, but can be stayed if necessary, and the findings in one set of proceedings can be introduced as documentary evidence in the other. But there is a major exception to this rule with respect to proceedings for administrative or criminal offences against the professional.

Disciplinary sanctions by professional tribunals, and sanctions for administrative or criminal offences by criminal courts *fulfill* different functions. Nevertheless, they are sanctions for the same

45. KISSEL, *supra* note 32, at 202.

46. Cf. Greger, ZÖLLER, ZIVILPROZEBORDNUNG (21st. ed. 1999) (for practice in civil procedure); § 148 Nrs. 4, 7, 9 ZPO; § 149 Nr. 1 ZPO; cf. Engelhardt, Karlsruher Kommentar. Strafprozeßordnung (4th ed. 1999) (for practice in criminal procedure); § 262 Nr. 8 StPO.

47. For example, a civil court may stay its proceedings to make available evidence yet to be obtained in parallel criminal proceedings. Greger, *supra* note 46; § 148 Nr. 4 ZPO.

48. It has been pointed out by Kissel that this is but one aspect to be considered because the mere existence of different proceedings necessarily brings about the danger of inconsistent decisions. KISSEL, *supra* note 32, at 197. If the law provides for different proceedings on a single set of facts, it also accepts this inherent danger. *Id.*

misconduct. Therefore, disciplinary proceedings are more closely interrelated to proceedings for administrative or criminal offences than, for example, they are to civil proceedings for damages, because these do not have a punitive character.

German law have regard to this closeness of disciplinary and criminal proceedings in various ways:

- First, proceedings for criminal or administrative offences are given priority over disciplinary proceedings. If there are (parallel) proceedings for criminal or administrative offences, disciplinary proceedings have to be stayed.⁴⁹
- Second, after those proceedings for criminal or administrative offences have been completed, its outcome determines the course of the disciplinary proceedings. If the professional has been already sentenced, a professional tribunal may only impose further disciplinary sanctions if this is necessary to make the professional fulfill his duties in the future, or in the interest of the profession.⁵⁰ If the professional has been acquitted, the professional tribunal is bound by the findings of the criminal court, both in law (i.e. that no administrative or criminal offence was committed) and, in principle, also in the findings of facts.⁵¹

B. Co-operation

So far, we have only touched upon the issue of co-operation between different proceedings when stating that the judgment and findings of facts of a court in one set of proceedings may be introduced as documentary evidence in another. This is but one form of co-operation although one that is generally available in any type of proceedings. We will now ask whether and how the information collected for a specific set of proceedings can be used in another.

1. Supervisory Authorities—Any supervisory authority in exercising its duties collects a huge amount of information that might be of interest to other authorities and proceedings. It is but natural that they should ask to share this information. On the other hand, the mandate of a public authority, and its power to obtain data from citizens and private businesses, is designated for a specific purpose. The German Constitutional Court ruled that in

49. Para. 118 BRAO; para. 109 StBerG; para. 83 WPO.

50. Para. 115b BRAO; para. 92 StBerG; para. 69a WPO.

51. Paras. 118 (2) and (3) BRAO; paras. 109 (2) and (3) StBerG; paras. 83 (2) and (3) WPO.

principle, the use of personal data therefore has to be specified by statute and is limited to the purpose it was obtained for.⁵² However, the ambit of this right of privacy under the German Constitution is yet to be determined.⁵³

The statutes governing the supervisory authorities⁵⁴ contain provisions concerning secrecy. These provisions form the basis for any exchange of information obtained by the supervisory authorities and are almost identical. In general, they prohibit persons employed in the respective authorities to communicate facts they gathered in the course of their activities, although there are important exceptions to this rule. These provisions explicitly allow the communication of facts to criminal prosecution authorities, to criminal courts and to other supervisory authorities, but only insofar as these bodies require the information for the performance of their own functions.

2. *Chambers of Professionals*—The statutes governing the chambers of professionals⁵⁵ follow the same line. If somebody has two different professions he will be a member of two different chambers of professionals (e.g. a lawyer and accountant has to be both a member of the local chambers of lawyers and of the local chambers of accountants). The respective chamber is required to inform the other if it decides to institute disciplinary proceedings. Each professional tribunal has jurisdiction to adjudicate misconduct in another profession.⁵⁶ However, it cannot expel from the other profession.⁵⁷

3. *Criminal Prosecution Authorities and Criminal Courts*—

Under para. 161 StPO, all authorities are obliged to co-operate with the criminal prosecution authorities. Therefore, on request of the prosecution authorities, supervisory authorities or chambers of professionals are required to present information or carry out investigations for them.

Supervisory authorities in the field of financial services have the additional duty to report to the public prosecution facts giving reason to suspect a criminal offence. Conversely, in the course of criminal proceedings instituted against the owners or managers of

52. Vol. 65, para. 1, at 46, BverfGE.

53. Cf. 1 VON CHRISTIAN STARCK, DAS BONNER GRUNDGESETZ 108 (Von Mangoldt, Klien & Starck eds., 4th ed. 1999).

54. Para. 9 KWG; para. 8 WpHG; para. 84 VAG.

55. Paras. 76, 118a (2), 120a BRAO; paras. 83, 110 (2) StBerG; paras. 64, 83a (2) WPO.

56. Para. 118a BRAO; para. 110 StBerG; para. 83a WPO.

57. Para. 118a BRAO; para. 110 StBerG; para. 83a WPO.

the respective firms, the court, the prosecuting or the enforcement authority shall forward to the respective supervisory authority the following:⁵⁸

- the indictment or a motion replacing it;
- the application for an order imposing punishment;
- the decision concluding the proceedings, including the statement of reasons;
- all relevant facts, gathered in criminal proceedings.

Some supervisory authorities complain that the criminal prosecution authorities often suspend proceedings pursuant to para. 153a StPO. Consequently, in future, the supervisory authorities are more likely to impose administrative fines, thus no longer relying on the prosecuting authorities to sanction breach of market regulation.

Chambers of professionals co-operate closer with criminal prosecution authorities and courts than supervisory authorities. The reason is because the criminal prosecution authorities are to decide whether to begin proceedings for professional misconduct before the professional tribunal.⁵⁹ They are to inform the chambers of lawyers when they learn of possible professional misconduct of a lawyer.⁶⁰

As any public official, judges in civil courts have a duty to report to the public prosecution if they have reason to believe that a criminal offence was committed.

4. *Private Claimants*—Private claimants cannot make use of information gathered by the supervisory authorities or chambers of professionals due to the general rule of secrecy of their proceedings. Furthermore, chambers of professionals, or supervisory authorities perform their functions and exercise their powers solely in the public interest,⁶¹ not in the interest of private individuals. They are therefore under no obligation to use their administrative powers in the interest of private individuals.

However, if there are proceedings before a criminal or administrative court, private claimants may introduce the findings or the decision of this court as documentary evidence in civil proceedings. This enables private parties to use the information gathered, for example, in criminal proceedings. As a result, they will often wait for the outcome of proceedings concerning criminal

58. Para. 60a KWG; para. 40a WpHG; para. 145b VAG.

59. Para. 121 BRAO; para. 114 StBerG; para. 84 WPO.

60. Para. 120a BRAO.

61. Para. 6 (4) KWG; para. 4 (2) WpHG; para. 81 (1) VAG.

or administrative offences before the criminal courts.

C. *The Role of the Privilege Against Self-Incrimination Outside Criminal Proceedings*

The right to remain silent in criminal proceedings is guaranteed by the German constitution⁶² as well as by the European Convention on Human Rights.⁶³ It is compromised if the individual is placed under an unlimited duty to disclose information in other proceedings, for example in supervisory, disciplinary or civil proceedings, and if his testimony is later used in criminal proceedings against him.⁶⁴

1. *The Influence On Non-Criminal Proceedings*—In principle, there are two different solutions to the problem of indirect self-incrimination.⁶⁵ The law can either give the individual the right to remain silent in other proceedings, or it can put the individual under an unlimited duty to disclose relevant information and prohibit its use in proceedings for criminal or administrative offences.

In proceedings before a court of law, in supervisory and in some disciplinary proceedings, German law follows the first solution. An individual does not have to answer questions in court if the answer would place himself or one of his relatives at risk of criminal prosecution or proceedings for administrative offences.⁶⁶ He also has the right to remain silent vis-à-vis the supervisory authorities,⁶⁷ and the chambers of lawyers,⁶⁸ but not vis-à-vis the chambers of tax consultants or accountants.

Where there is no statutory provision extending the right to remain silent to other than criminal proceedings, the individual is required to disclose everything in those non-criminal proceedings. However, the use of the self-incriminating statement in criminal

62. Cf. vol. 45, para. 45, at 43, BVerfGE.

63. Art. 6 (1) Eur. Conv. on H.R.

64. Vol. 56, para. 37, at 50, BVerfGE; Saunders v. United Kingdom, 23 Eur. Ct. H.R. (1977), discussed in 23 EUROPEAN HUMAN RIGHTS REPORT 313; HEINRICH AMADEUS WOLFF, SELBSTBELASTUNG UND VERFAHRENTRENNUNG (1997), 99-134.

65. Cf. WOLFF, *supra* note 64, at 135-144.

66. See e.g., para. 384 ZPO; para. 55 StPO.

67. Para. 44 (6) KWG; para. 16(6) WpHG; para. 83 (6) VAG.

68. Para. 56 BRAO.

proceedings is excluded by the German constitution as well as by the European Convention on Human Rights.⁶⁹

2. *The Role in Civil Proceedings*—With respect to civil proceedings, a third solution has been discussed, namely to stay civil proceedings until the criminal proceedings have definitely come to an end.⁷⁰

In civil proceedings, it is up to the parties to make statements of fact. But if a party chooses to make a statement, he has to disclose all relevant information.⁷¹ In other words, he is not allowed to tell only half of what he knows regardless of its possibly incriminating nature. Unlike a witness, a party to civil proceedings cannot rely on the privilege against self-incrimination. Therefore, it was argued, civil proceedings should be stayed until there is no danger of prosecution.⁷²

The argument is based on the premise that the respective party is legally forced to disclose information in civil proceedings. This would indeed compromise the party's right to remain silent in criminal proceedings taking place later on. However, the rule that a party must not tell only the favourite half of the truth in civil procedure does not put the party under a legal obligation to make an incriminating statement. It is still for the party to decide whether to make a statement. Unlike a witness, under German law a party to civil proceedings need not say anything. The party can and may choose not to make a statement for any kind of reason, and also, of course, for fear of prosecution. If the party is not legally forced to make an possibly incriminating statement, the whole argument fails. The privilege against self-incrimination is to protect the accused in criminal proceedings, not to guarantee his success in civil proceedings, as the German Constitutional Court once stated.⁷³ It follows that there is no need to stay civil proceedings for a party's fear of prosecution.⁷⁴

69. See *supra* note 64.

70. Cf. MARTIN BOESE, DER NEMO-TENETUR-GRUNDSATZ ALS GEBOT ZUR AUSSETZUNG DES ZIVILPROZESSES NACH § 149 ZPO? *Zeitschrift für Wirtschafts- und Steuerrecht (wistra)* 451-56 (1999).

71. Para. 138 (1) ZPO.

72. Regional Court of First Instance in Civil Matters (Landgericht) Dortmund, *Strafverteidiger* 1994, at 36. This decision was endorsed by Neuhaus in *Strafverteidiger* 1994, at 36, and has been followed by Local Court of First Instance in Civil Matters (Amtsgericht) Bremen-Blumenthal, *Strafverteidiger* 1997, at 653.

73. BVerfG, *Neue Zeitschrift für Strafrecht (NStZ)* 1995, para. 599 at 600.

74. Cf. BOESE, *supra* note 700, at 456 (concurring conclusion).

VI. Conclusion

Although there certainly is no single solution to the problems of parallel proceedings, neither at a national nor at an international level, something may be learned from a comparative analysis of these problems within a single jurisdiction.

Although a unified set of proceedings may appear to be a very attractive answer to the problems of parallel proceedings at first sight, it seems almost certain to fall short of solving these problems both in practice as well as in principle. There is no alternative to the cumbersome and tiring way of improving each type of proceedings according to its very own purpose on the one hand, and of adjusting and improving the way they interact.

The privilege against self-incrimination and the right of privacy, enshrined in the European Convention of Human Rights and guaranteed also by other national and international instruments, play a leading role in regulating the flow of information between different proceedings. They may even have influence on the production and admission of evidence in non-criminal proceedings.