

ДИСКУСІЙНИЙ НАПРЯМ 1
«ПОЛІТИКА ТА СТРАТЕГІЇ ПРОТИДІЇ ЗЛОЧИННОСТІ
У СФЕРІ ЕКОНОМІКИ»

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COMBATING CORRUPTION: THE SIGNIFICANCE
OF «INSIDER» INFORMATION AND HOW TO DEAL
WITH IT IN COURT PROCEEDINGS

I. Preliminary Remark

It needs no further elaboration: corruption in any form is harmful to the national economy. Taxes in the billions of euros fail to serve their legally intended purpose. Even more damaging are the distortions of competition often caused by cartel agreements. In the end, it is the taxpayer who pays the (excessive) bill. Competitors who are not part of the cartel fall by the wayside, and the jobs they provide become precarious.

Corruption in all its forms is also socially harmful. Those involved in it ignore the prohibitions of discrimination under international and constitutional law on the basis of their economic performance. It no longer applies to them that everyone participates equally in public services according to the legally defined conditions. Contrary to the guiding principles of constitutional law, a divided society is created between those who can «afford it» and those who cannot. In unstable medical care situations e. g., this can degenerate into a threat. Those who can, receive medical care at the time agreed upon by themselves and their partners. The one who cannot, has to wait for the care until he does not need it anymore in the worst case. Accelerating «hand-outs» interfere with legally ordered procedures and thus have something blatantly contrary to the rule of law.

Corruption is also a blatant contradiction to ethics. Ethical action – broken down to the essentials – is based on the principles of the question of what is appropriate in a society. This question soon brings us to the subject of the «culture of corruption», the basically unbearable description, from a German point of view, of a phenomenon in certain societies in which certain extra-legal exchange relationships have been established as «normal» since their existence. From the point of view of a country with a very low tolerance for any extra-legal exchange, it is difficult to attribute a legal relevance to these «cultural interrelations between give and take». Their actual existence, however, cannot be denied. Under no culture and society of any kind is it acceptable that, in violation of legal regulations, assets are accumulated with the help of extra-legal networks of relationships, which often enough allow their owners to «legalize» the processes leading to their accumulation

afterwards. From the above, it may be concluded that corruption is fatally related to organized crime, which is characterized by secrecy, seclusion from the outside world, and the establishment of secret structures (management and execution levels), and to which all forms of illegal profiteering (theft, receiving stolen goods, fraud, extortion, money laundering, tax evasion) are inherent.

II. Objectives of the investigation and persons involved in the investigation

The primary goal of investigations in the area of this "grand" and organized corruption is to break down the compartmentalization structures in order to be able to determine

- who is involved in the criminal network
- how the structures of action function,
- what concrete actions are taken to create illegal profits,
- how the relevant money flows and in the end
- where the illegal profit remains and among which participants it is distributed in which amount.

To state that the above-mentioned gain in knowledge and evidence cannot be achieved with «ordinary» investigative methods is like carrying coals to Newcastle. The wall around organized corruption is first the wall of iron silence. Non-public investigative methods (telephonic [§ 100a of the German Criminal Procedure Code (StPO)] and other communications surveillance [see, for example, § 100b StPO]) produce results only to a limited extent, if only because the targeted networks make use of ciphering and the ciphered content of the communications cannot be broken down without further aids and means of detection. For this reason, acoustic surveillance of living quarters (Section 100c of the Code of Criminal Procedure) is only suitable to a limited extent and then only as a secondary measure. Undercover operations are hardly suitable. (Police) undercover investigators (cf. § 110a of the Code of Criminal Procedure) can only get into the forecourts of the corrupt fortress, if at all. They also lack the «professional» knowledge («legend» in the sense of § 110c Sentence 2 of the Code of Criminal Procedure) that is a prerequisite for building the necessary trust in the inner circle of network participants.

From a German point of view, this is perhaps also the reason why intelligence information is virtually irrelevant in corruption investigations. Moreover, the German Offices for the Protection of the Constitution (responsible for internal security at the federal and state levels) and the Federal Intelligence Service (responsible for the external security of the Federal Republic of Germany) only take action when the internal or external security of the country is in danger. The country has not yet had to experience corruption on such a scale as to endanger its existence. The strict separation between the police and the intelligence service, a legacy of the special German experience with the secret state police of the Hitler regime, may also

contribute to the finding that intelligence information is generally irrelevant in the area of economic criminality. Therefore, no further attention needs to be paid to the constitutional protection authorities for the purposes at hand.

The investigating authorities are therefore compelled to rely on «insider» knowledge. This can come from persons who are or were themselves involved in the crime and who - for whatever reason - decide to share their knowledge with the police and prosecution authorities. With a view to possible judicial criminal proceedings, these are persons whom Anglo-American linguistic usage refers to as «prosecution witnesses» or «key witnesses». So-called «whistle blowers» also come into question. They can be involved in the crime. However, this is not necessary. They are persons to whom certain processes within an organization appear to be irregular and who do not necessarily share their knowledge of them anonymously or openly with the law enforcement agencies. The "whistle" can also be «blown» in the direction of the media. Finally, those persons come into play who have insider knowledge but share it with the law enforcement agencies only on condition that they are assured of confidentiality, with the consequence that these persons are not available as witnesses in formal legal proceedings.

III. Dealing with the Persons with Information

1 *The so-called «key witness»:*

a) If a person involved in organized crime turns his back on it, the Italians refer to him as a «pentito» if he cooperates with the law enforcement authorities, discloses his own contributions to the crime, but also those of others, i.e. hands over the key to the Mafia's castle gate.

German criminal law deals with these repentants in connection with the regulations on sentencing in § 46b of the German Criminal Code (StGB = Criminal Code; comparable regulations are found in §§ 31; 31a of the Narcotics Traffic Act [BtMG] in the fight against narcotics crime). The provision has gained particular importance in recent years in connection with returnees from the Syrian civil war in the fight against terrorism and violations of international humanitarian law.

§ 46b StGB indicates that those who repent do not receive special treatment in terms of criminal procedure. German law does not have a provision of the kind found in Anglo-American law, for example, with a declaration of immunity for a «convert». Such immunity from prosecution, which is often enough the subject of plea or bargaining agreements in America, is inadmissible in Germany and would probably also be contrary to the rule of law and equality. If the repentant is involved in the crime and bears criminal guilt, he must answer to the criminal judge despite his disclosures. § 46b StGB provides the criminal judge with legal guidelines on the conditions under which and the extent to which the remorseful party to the crime may be accommodated in the sentencing. The application of § 46b StGB is excluded if the accused offender discloses his knowledge only after the opening of the main

proceedings against him has been decided (§ 46(3) StGB). However, cooperation with the judiciary after this point in time may constitute a general reason for mitigating the sentence under § 46 StGB. Determining the requirements of § 46b StGB requires considerable effort on the part of the trial judge in a specific individual case, but in extreme cases it can lead to a waiver of the forfeited sentence in favor of the remorseful person under the requirements of § 46b (1) Sentence 4 StGB.

b) Procedural questions of the evaluation of evidence arise in the case of the «pentito» in the subsequent proceedings if he testifies against other parties involved in the crime.

The examination of his credibility is the task of the trial judge *ex officio*, and it is also the challenge of the defense to question it. The circumstances of his own conviction are amenable to proof. This is because any agreements on the amount of the sentence against the repentant must be recorded in the minutes of his main hearing in accordance with § 257c StPO (Criminal Procedure Code) in conjunction with § 273(1a) StPO. If the person willing to cooperate is at risk, he is usually admitted to a police witness protection program. The conditions for inclusion and the details of the protection are confidential and, as a result, are not accessible to evidence in criminal proceedings, but are of particular interest as a credibility criterion for the defense, because the question of any assurances/advantages always arises in this context. As a rule, the police witness protection officers will not receive the statement approval required under civil service law for their statement (§ 54 StPO).

The evaluation of the statements of so-called «pentiti» is often a challenge of walking down a very narrow path. In this respect, however, it is no difference from the constellation in which one defendant confesses and the other does not, and in which the confession of the one incriminates the defendant who remains silent or denies the testimony of the other. In the end, it is up to the judge, who – not bound by any rules of evidence – often has a very difficult task of evaluating the evidence (§ 261 StPO), to explain why he follows the statements of the «repentant».

2. The Whistle Blower:

a) German criminal procedure law does not pay any attention to the whistle blower. Whether this will remain the case as a result of EU Directive (EU) 2019/1937 of October 23, 2019 (Official Gazette L 305 of November 26, 2019), which Germany is obligated to transpose into national law, is an open question; namely, as the Directive primarily concerns the private and commercial law area.

If the whistle blower is involved in the crime, he has incurred criminal liability and is to be treated accordingly - again within the framework of Section 46b StGB. If the whistle blower is involved in money laundering, a corresponding provision in § 261(9) Sentence 1 StGB can also help him; in the case of loan fraud § 265b(2) StGB, and in the case of agreements

restricting competition in tenders, § 298(3) StGB. If he is not involved in the commission of the offense, however, his disclosure itself constitutes a criminal offense, e.g. for violation of the confidentiality of the word, violations of the most personal sphere of life and of personal rights through image recordings, the law declares such offense as justified and not punishable if it was committed in the perception of overriding public interests (§ 201(1) Sentence 3 StGB or § 204(4) StGB).

b) In judicial proceedings, regardless of whether the accused incriminates co-defendants or whether he testifies as a witness in separate proceedings, if necessary after appropriate instructions to remain silent in the case of self-incrimination (Section 55 of the Code of Criminal Procedure), the problems of evaluating evidence outlined above under III. 1 a) arise with equal severity.

3. Persons who have been assured of confidentiality:

a) Roughly speaking, these information providers are persons who provide individual information or agree to cooperate with the police authorities for a longer period of time without being investigators themselves, and who have been assured by the prosecution authorities (police and public prosecutor's office) that their identity will be kept secret. This may also apply to whistleblowers who value their anonymity. However, this may also apply to persons who are close enough to the crime to provide further information.

German criminal procedure law does not contain any legal regulations in this regard. The investigative practice can only refer to the administrative guidelines on criminal prosecution. However, the practice is common. The public prosecutor's office decides on the use (and confidentiality) at its own discretion, and it almost goes without saying that such assurances are only given in exceptional cases (when all other sources of information fail) and only in the areas of serious and grave crime.

b) These persons are not available to the judicial proceedings as witnesses. The judicial duty of cognition so becomes restraint, the possibilities of defense are restricted. Requests for such confidentiality files are answered by the executive with so-called blocking declarations according to § 96 sentence 1 StPO. The handing over of the file is refused by the highest service authority because it is detrimental to the welfare of the federal government or a state. The so-called V-person cannot be heard as a witness. The police officer cooperating with him is only available as a hearsay witness. As soon as the identity of the informant is at issue, he will refuse to testify in accordance with § 54 StPO.

In any case, this deprives the defense of its right to confrontation as a core element of fair criminal proceedings under the rule of law (Art. 6(3) ECHR). It is simply inconceivable to base a guilty verdict solely on the hearsay testimony of a confidential informant. At most, a court may use such information as a supplement to answer peripheral questions about a factual situation. On the other hand, it cannot invalidate the police's indication that

these informants are necessary to pick up traces and to give leading hints. Cautious handling of them is more than just obvious from the point of view of the rule of law.

IV. Consequences

A defense lawyer in Munich once said: The success of criminal prosecution depends on the will of those involved in the crime to «mutually betray each other». One may reject that. However: Forensic experience in large-scale proceedings involving corruption also proves that without insider knowledge, clarification of this highly damaging behavior can hardly be expected. Whether the criminal law and procedural means currently available in Germany are sufficient may be questioned if one considers the private law provisions of the EU Directive cited above, which provide for an orderly system of communication channels and their protection. Against this background, the legislator may see reason to distance itself from selective justification rules for whistleblowers and to arrive at a special justification ground. § 46b StGB, however and despite the arguments put forward against it, has proven as an efficient working tool, especially with the trial judge supervising its implementation, and more importantly the rule of law was not damaged by its use.

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БЮРО ЕКОНОМІЧНОЇ БЕЗПЕКИ УКРАЇНИ ЯК СУБ'ЄКТ РЕАЛІЗАЦІЇ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА

Реформування сфери кримінальної юстиції супроводжується оновленням певних галузей законодавства, зокрема й кримінального. Кримінальне законодавство відіграє важливу роль у регламентуванні суспільних відносин, пов'язаних із вчиненням суспільно небезпечних діянь, передбачених КК України. Хоч яким якісним не було б кримінальне законодавство, без належної реалізації неможливо забезпечити ефективне та результативне виконання завдань щодо правового забезпечення охорони прав і свобод людини й громадянина, власності, громадського порядку та громадської безпеки, довкілля, конституційного устрою України від кримінально протиправних посягань, забезпечення миру й безпеки людства, а також запобігання кримінальним правопорушенням.

Реалізація кримінального законодавства – це утілення закріплених у законі про кримінальну відповідальність прав й обов'язків суб'єктів цього процесу в життя (у реальні кримінально-правові відносини). Реалізація кримінального законодавства загалом