PRINCIPAL WITNESS REGULATIONS TO SUPPRESS ORGANIZED CRIME IN GERMANY

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I. INTRODUCTION

The history of the principal witness regulation in Germany is turbulent from a legal policy point of view, but not excessively long. I will start by explaining to you what principal witness regulations have previously existed, and which remain today. In doing so, because of the context of the regulations, I will also touch briefly on the principal witness regulation relating to terrorism. Following that, I will briefly explain the factual and political discussion in Germany.

II. THE INDIVIDUAL REGULATIONS

A. Section 129 of the Criminal Code (StGB)

Section 129 of the Criminal Code governs the punishability of the formation of criminal organisations and membership therein.

"Whoever forms an organisation, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organisation as a member, recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine."

This criminal offence is an offence relating to membership of proscribed organisations. In accordance with this provision, a (criminal) organisation is an organisational union for a certain duration of at least three individuals who, whilst subsuming the will of the individual to that of the whole, pursue common goals (commission of criminal offences) and are linked such that they feel themselves to constitute a unit together. This goal distinguishes such an organisation from mere complicity. Furthermore, an organisation is dependent on a minimum degree of permanent organisation; a mere gang does not fulfil this precondition as a rule.

Subsection 6 of this provision contains a "minor principal witness regulation", or to put it better, a contribution by the offender towards prevention of an offence. The court may mitigate the punishment at its discretion or dispense with punishment in accordance with section 129 if the offender (1.) voluntarily and earnestly attempts to prevent the continued existence of the organisation or the commission of a criminal offence consistent with its goals, or (2.) voluntarily discloses his/her knowledge to a competent agency in good time that further criminal offences, where he/she is aware of their planning, may still be prevented.

This provision was and is relatively unattractive. It is restricted to the criminal offence defined by section 129, and retroactive assistance in detecting offences already committed may not be rewarded. The provision has therefore not assumed any major significance in practice.

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B. Section 31 of the Narcotics Act (BtMG)

In accordance with this provision, the court may, at its discretion, mitigate or dispense with punishment in respect of specific narcotics-related criminal offences if the offender

(i) by voluntary disclosure of his/her knowledge has substantially contributed to the offence being detected beyond his/her own contribution to the offence, or

(ii) voluntarily discloses his/her knowledge of planned offences to a competent agency so timely that specific narcotics-related criminal offences, where he/she is aware of their planning, may still be prevented.

This provision, which entered into force in 1981, was the subject of much controversy at the time. Its aim is to provide special privileges to narcotics offenders in the non-organized crime area who, beyond the confession of their own offences, disclose their knowledge of clients and criminal organisations. The fear that this principal witness regulation, which is restricted to narcotics-related crime, might prove detrimental to the principle of mandatory prosecution and lead to undesirable trading between criminal prosecution authorities and accused persons was at that time put aside in favour of the expectation that one would be able to break up international organisations effectively trafficking in narcotics through granting privileges to offenders willing to testify and cooperate ("detection helpers") and to convict major dealers.

The provision finds particularly inflationary application in Germany today. The provision makes it possible to provide comprehensive information on a part of the drug scene and to apprehend offenders dealer by dealer until the thread of the detection assistance breaks. The provision permits an unusually high success rate in detection, particularly in the area of organized narcotics crime. Of decisive significance for the overall success is that, at the outset, a central gang member is willing to testify, and that there is initially no outside knowledge of their comprehensive, detailed statement. If a special commission of the police is then able to collect evidence on a large number of the dealers described without being noticed and in separate sets of proceedings, and to apprehend these suspects in a raid, the persons apprehended as a rule compete against one another with their comprehensive confessions. If a special commission has the staff to also evaluate these statements quickly and in relation to persons, and to convict the suspects, there is a chain reaction of confessions, which unravel the links between the dealers like running balls of wool and open up a part of the drug scene like a net. The information provided by the detection helpers directly after their apprehension is as a rule much more reliable than after a long period of detention, when they have had time to brood and imagine alleged backgrounds and supporters of the organisations. Detection helpers may, for instance, be able to give a detailed description of procedures in the drug scene using seized address books and photograph albums. In cities in particular, detection helpers have in individual cases blown the covers on 20, 50 and more suspects. The provision also encourages dealers who have been frequently apprehended, and who expect a severe sentence, to disclose to the investigating authorities their narcotics stashes and deposits which have not yet been discovered. No one is now thinking about rescinding this provision in light of this experience.

C. Art. 5 of the Principal Witness Act (Kronzeugengesetz)

The actual principal witness regulation to detect and suppress organized crime was governed by Art. 5 of the Principal Witness Act. The provision was introduced in 1994[1] and ceased to apply on 31 December 1999.

It read as follows: "Article 4 sections 1 to 5 (of this Act) shall apply mutatis mutandis to disclosing by an offender or participant in a criminal offence in accordance with section 129 of the Criminal Code or of an offence related to such offence in respect of which time-limited imprisonment of at least one year is imposable if the objectives or activity of the organisation are directed towards the commission of offences in respect of which extended forfeiture (section 73 d of the Criminal Code) may be ordered. In accordance with Article 4 sections 1 and 2 second sentence, the public prosecution office and the court are responsible which would be responsible for the main trial."

Article 4 sections 1 to 5, to which the provision refers, was the principal witness regulation for terrorist offences. It read as follows:

"If the offender or participant in a terrorist criminal offence (section 129 a of the Criminal Code) or in a criminal offence related to such offence him/herself or through the mediation of a third party discloses his/her knowledge of facts to a criminal prosecution authority which is likely

(1) to prevent the commission of such a criminal offence,

(2) to promote the detection of such a criminal offence, if he/she was involved therein, beyond his/her own contribution to the offence, or

(3) to lead to the apprehension of an offender or participant in such a criminal offence,

the Federal Public Prosecutor General, with the agreement of the Criminal Panel of the Federal Court of Justice, may dispense with prosecution if the significance of what the offender or participant disclosed, in particular in connection with the prevention of future offences, justifies this in relation to that individual's offence."

Once the charge had been filed, the court was able in such cases to dispense with a sentence in the judgment, or to mitigate the punishment at its discretion; in doing so, it was able to exhaust the minimum statutory punishment to be ordered, or to impose a criminal fine in place of imprisonment. Furthermore, the court - once the charge had been filed, but prior to the initiation of the main trial - was able to discontinue the proceedings with the permission of the Federal Public Prosecutor General.[2]

If one applies these provisions mutatis mutandis to specific criminal offences of organized crime - as stated in Article 5 - this means:

"If the offender or participant in a criminal offence in accordance with section 129 of the Criminal Code (membership of a criminal organisation) or the offender/participant in a major crime connected with this offence, if the objectives or activity of the organisation are directed towards the commission of offences in respect of which extended forfeiture may be ordered, he/herself or through the mediation of a third

[1] Verbrechensbekämpfungsgesetz vom 28.10.1994 - BGBl. I S.3186.

[2] Restrictions in § 3.

party discloses his/her knowledge of facts to a criminal prosecution authority which is likely,

(1) to prevent the commission of such an offence,

(2) to promote detection, or

(3) to lead to the apprehension of an offender of such an offence,the competent public prosecution office, with the agreement of the competent court, may discontinue the proceedings before a charge has been filed

and if the charge has been filed, the court may discontinue the proceedings prior to the main trial, or mitigate the sentence by judgment or dispense with punishment."

The aim[3] of this provision, which was inserted by the 1994 Act on the Suppression of Crime, is to prevent the continued existence of a criminal organisation, or at least to prevent the commission of offences consistent with its goals. By linking to section 129 of the Criminal Code, the criminal offence of forming a criminal organisation, it has been made possible to restrict the provision to participants in criminal offences which are or are to be committed by organisations. Here, a further restriction applies by virtue of limiting to specific serious criminal offences.

The individual preconditions:

"An offence in accordance with section 129 of the Criminal Code, or a major crime linked to such an offence, must be disclosed by a member of the criminal organisation. The application of the provision is however restricted to organisations the objectives or activity of which are directed towards the commission of such major crimes, in other words to offences in respect of which a minimum prison sentence of one year is imposable, where, additionally, extended forfeiture may be ordered in accordance with section 73 d of the Criminal Code. These are counterfeiting money in accordance with sections 146 and 152 a of the Criminal Code, grievous trafficking in human beings in accordance with section 181 of the Criminal Code, grievous gang theft in accordance with section 244 a of the Criminal Code, blackmail resembling robbery in accordance with section 255 of the Criminal Code, handling stolen property on a commercial and gang basis in accordance with section 260 a of the Criminal Code, as well as specific narcotics-related offences, commercial and gang smuggling of aliens, commercial and gang incitement to file wrongful asylum applications, offences in accordance with the Act Governing Control of Weapons of War (Kriegswaffenkontrollgesetz), in accordance with the Firearms Act (Waffengesetz) and in accordance with the Foreign Trade and Payments Act (Außenwirtschaftsgesetz). The intention here is to apply this principal witness regulation, in addition to the suppression of serious narcotics-related crimes which are regarded as typical of organized crime, to also suppress holding to ransom, smuggling of human beings, illegal arms trade and technology transfer."

"Corruption crimes" are not covered. Whilst there were calls in the parliamentary debate on the Act to Combat

[3] BT-Dr 12/6853, S.119 ff.

[4] BGBl. I S. 2038..

[5] Korte NStZ 1997, S.513.

Corruption of 13 August 1997[4] for a principal witness regulation for corruption-related crimes[5], it was rejected because of legal policy reservations.

In contrast to the situation with the principal witness regulation for terrorist offences, it is not the Federal Public Prosecutor General and the Federal Court of Justice who are responsible for taking the necessary decisions, but the public prosecution office and the court with respective competence. This therefore means, as a rule, a Great Criminal Panel of the Regional Court.

Whether the provision is used is at the discretion of the public prosecution office and the court. In deciding, the degree and significance of the disclosed knowledge must be balanced against the nature and significance of the legal interests which have been injured[6]. In this process, application of the regulation will be deemed to be particularly suitable if the contribution made towards detection makes it possible to prevent the commission of another criminal offence of organized crime. In other respects, the principle applies that assistance in detection must be all the greater the more serious the offence of the "principal witness" is. Granting a privilege is however not dependent, in personal terms, on a hierarchical relationship and, from a factual point of view, on a difference in the severity of wrongdoing. It is therefore not necessary for the accomplice who has been betrayed to be more important or at least as important as the principal witness and for the offence in respect of which freedom from punishment is granted to be less serious than the offence disclosed.

If the public prosecution office wished to avail itself of the provision, it would have two possibilities: either to discontinue the proceedings if the contribution towards detection were to justify such an action on weighing up all relevant circumstances, or filing a charge and applying for mitigation of punishment by the court in the main trial. In its judgment, the court could dispense with punishment or could mitigate the punishment at its discretion, and exhaust the statutory minimum of the imposable punishment, or impose a criminal fine instead of imprisonment.

Discontinuation by the public prosecution office was not final and binding, so that the office could resume its investigations at any time. The decision of the court by virtue of a judgment, on the other hand, was final and led to exhaustion of the available criminal action. The principal witness regulation was the subject of much controversy in Germany from both factual and political points of view.

From a factual point of view, it gave rise to problems, for instance, because in theory several principal witness regulations existed in proximity and might apply to the same case. Furthermore, disagreement existed as to the list of crimes covered, corruption, for instance, not being covered.[7] Politically, the following in the main[8] was levied at the principal witness regulation:

(i) It violates the principle of equality (Art. 3 of the Basic Law [GG]), the principle of the rule of law (Art. 20 III of the Basic Law), is not compatible with the principle of mandatory prosecution.
(ii) It is detrimental to the citizen's

[6] Bernsmann NStZ 1989, S.46o ; Hilger NJW 1989, S. 2377.

[7] Korte NStZ 1997 ,S. 513.

[8] Kleinknecht / Meyer- Goßner , Kronz.G. ,Vorb. Rn 5. Pro :Schlüchter ZRP 1997, S.65.

confidence in the inviolability of the law and of the judiciary.

(iii) In particular, it weakens the citizen's willingness to abide by the law if he/she sees that the state allows itself to buy witnesses by trading with serious criminals.

(iv) It is prone to abuse by virtue of the discretion provided.

(v) It reduces the significance of the main trial and makes things more difficult for the defence. The truth of the statement of the detection helpers is dubious.

(vi) It is questionable from a criminological point of view because, on the one hand, serious doubts must arise as to the plausibility of information provided by a principal witness who hopes to buy considerable advantages through his/her statement, and for another, the entire regulation may be counterproductive in that the danger of betrayal tends to bring the group together rather than to divide it, and that the failure of the regulation could be regarded as a success by large organized crime organisations.

The expectations linked to the regulation appear not to have been fully met in Germany. No significant improvement in detecting and suppressing organized crime is visible. It cannot be ruled out that the regulation has been useful in individual cases.

III. OUTLOOK

The application of the principal witness regulation was time-limited from the outset - it was in other words a temporary statute. By statute of 19 January 1996[9], its application was extended to 31 December 1999, and has hence expired.

It is being examined in Germany at present whether a new, different principal witness regulation should be created, which for instance could be inserted into the Criminal Code (among sections 46 et seqq. as a regulation on assessment of punishment). The examination is however still very much in its initial stages, and no conclusion is to be expected in the immediate future.

[9] BGBl. I , S 58.