The Latest Criminal Law Reforms in the General and Special Part of the German Criminal Code[1]

Martin Wassmer

Professor, Chair for Criminal Law and Criminal Law Procedure, Institute for Criminal Law and Criminal Law Procedure, University of Cologne, Doctor of Juridical Sciences. Address: Albertus-Magnus-Platz, 50923 Cologne, Germany. E-mail: martin.wassmer@uni-koeln.de

Abstract

In the previous legislative period, that is from 2013 to 2017, the Grand Coalition in the Federal Republic of Germany, consisting of Christian Democratic Party (CDU, CSU) and Social Democratic Party (SPD), under leadership of Angela Merkel, has carried out numerous reforms in the area of criminal law. Not only have the penal provisions of the Special Part of the German Criminal Code (Strafgesetzbuch — StGB) been supplemented and expanded, but the basic provisions of its General Part, which are relevant and applicable to all criminal offences, have also been modified. This article presents the most important reforms. Not only are the respective motives of the legislator presented, but also the reactions of criminal science and practice. The aim is to critically assess the reforms and their impact. In addition, the article gives a brief outlook on the forthcoming German legislation in the current legislative period. The article concludes that criminal law reforms in the last legislative period mainly consisted of tightening and broadening criminal law provisions reflecting "actionism" and "populism". The German Federal Constitutional Court is expected to review the constitutionality of several provisions. The German legislator failed to recognise that tightened rules would be ineffective in practice if prosecution did not become more effective and the likelihood of detecting crimes was not increased. In future, the re-elected Grand Coalition should take greater account of the findings of criminal science. One proposal in this context would be that the planned reform of the sanctions law for companies would also strengthen the rights of defence of companies.

Keywords

Criminal law; reforms; German Criminal Code; special part; general part; corruption; stalking; interception of telecommunications; online searches and seizures; criminal asset confiscation; sanctions law for companies.

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Introduction

In the previous legislative period (2013–2017) there has been a veritable "flood" of criminal law reforms in Germany. This was made possible by the fact that since November 2013 a solid Grand Coalition of Christian Democrats (CDU, CSU) and Social Democrats (SPD) under the leadership of Chancellor Angela Merkel had been in power, which was able to implement legislative projects without much parliamentary resistance. The various reforms which, on the one hand, were a product of European and international requirements and, on the other hand, were triggered by current events, are outlined and evaluated below. Finally, an outlook on the legislation of the current legislative period is also presented.

1. Corruption of a Member of Parliament

The "48th Criminal Law Amendment Act" of 23 April 2014[2] considerably extended the corruption punishment of Members of Parliament with effect from 1 September 2014. Corruption in politics is regarded as a very much unwanted and "sidelined'" part of German legislation. Criminal liability was abolished in 1953 in the course of a new regulation on voter bribery, and the intention was to make it punishable again at a later stage. However, this did not happen until 40 years later, once corruption rumours circulated during the 1992 vote on the issue of the federal capital (Bonn or Berlin). However, § 108e StGB, which was finally introduced in 1994, could only offer very limited protection, as it only covered the corruption of elected officials in relation to the "buying" and "sale" of votes in elections and votes in the European Parliament or in a federal, state or local parliament. Furthermore, the provision fell short of international standards, such as those contained in the 1999 Council of Europe Criminal Law Convention on Corruption and the 2003 United Nations Convention against Corruption. Finally, on 9 May 2006[3], the 5th Criminal Senate of the Federal Court of Justice held that municipal elected

[2] Bundesgesetzblatt [Federal Law Gazette] I 2014, p. 410; draft law Bundestagsdrucksache [Bundestag paper] 18/476; resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection (6th Committee) BT-Drs 18/607.

[3] Federal Court of Justice, Judgement of 9 May 2006, 5 StR 453/05 // Entscheidungen des Bundesgerichtshofs in Strafsachen, vol. 51, p. 45.

representatives are not public officials within the meaning of § 11 (1) No. 2 StGB, and stated a need for legislative action.

The implementation required a new version of § 108e StGB. The paragraph was renamed to "corruptibility and bribery of mandate holders" to express that both forms, passive (§ 108 (1) StGB) and active corruption (§ 108e (2) StGB) are punishable. The offence now also applies to members of all German regional and local authorities, as well as members of a parliamentary assembly of an international organisation or a legislative body of a foreign state. It was made clear that an "unjustified advantage" does not exist, in particular, if the acceptance of the advantage is in accordance with the provisions applicable to the legal position of the member (§ 108 (4) sentence 1 StGB). In addition, neither a political mandate/function nor a donation permitted by law are considered unjustified advantages (§ 108 (4) sentence 2 StGB). A further secondary consequence of a prison sentence of at least 6 months is now the withdrawal of the right to vote (§ 108e (5) StGB). In addition, the offence was included in the catalogue of predicate offences of money laundering (§ 261 (1) sentence 2 No. 2 letter a StGB). The courts of first instance now are the Higher Regional Courts.

The reform has been met with mixed reactions [Bachmann M., 2014: 404].

The main criticism was that further conduct should have been covered and the scope of application should have been wider; at present only a member who plays the fool or does indeed act foolishly when testifying can be punished. For example, bribery only exists if the Member has acted "by order or on instruction". However, a counterargument to this is that the new criminal offence covers the core area of punishable conduct. Moreover, it is very difficult to draw the line between permissible political influence and punishable corruption, since political parties in Germany are also financed by donations. It is assumed that the new regulations will be of greater practical relevance at the local level, where concrete decisions and projects are often involved, than at the federal or state level [Willems H., 2015: 33].

2. Sexual Criminal Law

Extensive European provisions on sexual criminal law were transposed into national law with the "49th Act Amending the Criminal Code" of 21 January 2015[4], with effect from 27 January 2015. More specifically, the Act was based on the 2007 Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, the 2011 Council of Europe Convention for the Prevention and Suppression of Violence against Women and Domestic Violence and the Directive 2011/93/EU on combating sexual abuse and exploitation of children

[4] Bundesgesetzblatt [Federal Law Gazette], I 2015, p. 10; Bundestagsdrucksache [Bundestag paper] 18/2601; Resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection (6th Committee) Bundestagsdrucksache [Bundestag paper] 18/3202.

and child pornography. German law essentially already met the requirements of these legal acts, but there were some gaps that needed to be filled.

In addition, the "Edathy Affair" caused a public sensation[5]. In February 2014, the apartments and offices of Sebastian Edathy, a member of the Bundestag, was illegally searched by the police despite his immunity. In July 2014, Edathy was accused of child pornography for the images and videos he possessed, and for accessing material via the Internet using his service laptop on the server of the Bundestag. In March 2015, the proceedings were discontinued due to low guilt as per § 153a StPO. However, the legislator felt compelled to create special provisions for the retrieval of content harmful to children and young persons and to strengthen the protection of the general personality right against the production, distribution and dissemination of photographs suitable to substantially damage the reputation.

The reform has amended and supplemented many provisions. Numerous additions were made to sexual offences (§§ 174 et seqq. StGB). In this context, the statute of limitations is now suspended for many offences until the victim reaches the age of 30 (§ 78b (1) No. 1 StGB). Furthermore, §§ 184b StGB and 184c StGB, which are intended to protect against pornographic content, were extended to include representations which depict adolescents "in an unnaturally gender-emphatic posture". § 184e StGB was introduced to criminalise the organisation or participation in pornographic (live) performances of children and adolescents. In addition, the penal provision on the violation of intimate privacy by taking photographs (§ 201a StGB) was considerably extended, so that even those who make an image available to a third person, that is suitable "to substantially damage the reputation of the person depicted" without authorization are punished (§ 201a (2) StGB). Furthermore, a penalty is now also imposed on anyone who "takes or offers to take a picture which relates to the nudity of another person under the age of eighteen" in order to obtain it for a third person in return for payment, or procures it for himself or a third person in return for payment (§ 201a (3) StGB). A "social adequacy clause" (§ 201a (4) StGB) is intended to exempt acts "which are carried out in the context of overriding legitimate interests", namely in arts or science, research or teaching, in reporting on current events, on history or for similar purposes.

Already part of the legislative process, there was a lot of controversy around the intended tightening of §§ 184b et seqq., 201 StGB ("Lex Edathy"), which were originally intended to go much further and would have covered large parts of street photography and photojournalism [Bachmann M., 2014: 407]; [Krings G., 2014: 69–72]. However, even the regulations that were relaxed through the inclusion of the "social adequacy clause" following this criticism, have significantly aggravated the legal situation and have a considerable impact on fundamental rights due to the allowance of private photographs in the public sphere. It should be noted that, on

[5] Available at: http://www.spiegel.de/politik/deutschland/sebastian-edathy-prozess-gegen-5000-euro-eingestellt-a-1021339.html. (accessed:12.04.2018)

the one hand, the legislator has left the concretisation to the jurisdiction and, on the other hand, the broad social adequacy clause allows for a number of objections. It therefore remains to be seen whether the new regulations will guarantee the intended increased protection of the general personality right in the form of the right to one's own image and to what extent that will be the case.

3. Hate crimes

With the "Act on the Implementation of the Recommendations of the NSU Investigation Committee of the German Bundestag" of 12 June 2015[6], a provision was included in the catalogue of sentencing circumstances under § 46 (2) of the Criminal Code with effect from 1 August 2015, which is intended to take account of hate crimes. Now "especially racist, xenophobic or other inhuman motives and objectives" can be considered in the sentencing of the offence. This concluded a debate that began after the turn of the millennium and led to several draft laws. However, an inhuman motivation has always been reviewed in the course of sentencing, since the motives and aims as well as the attitude reflected in the offence form sentencing circumstances. This supplement should therefore, above all, send out a signal in terms of legal policy and serve to sensitise the police and judiciary.

The drafts, as well as the final implementation, were discussed vigorously and widely deemed as purely symbolic [Jungbluth D., 2015: 579–585].

On the other hand, it should not be forgotten that the number of hate crimes has risen sharply in recent years. In 2015, the year of the so-called "refugee crisis", the number of cases skyrocketed by more than 75%[7]! Therefore, the intention of criminal law policy to make inhuman motives be viewed as particularly reprehensible by citizens and law enforcement authorities is to be welcomed. In addition, amendments were made to the internal "Guidelines for Criminal Proceedings and the Fines Proceedings (RiStBV)", whereby investigations displaying indications of inhuman motives are to be extended and there is also, "as a rule", a public interest in prosecution.

4. Corruption in the public and private sectors

Far-reaching reforms in the area of corruption in the public and private sectors were introduced by the "Act on Combating Corruption" of 20 November 2015[8]

[6] Bundesgesetzblatt [Federal Law Gazette] I 2015, p. 925.

[7] Cf. *Bundesministerium des Innern* Übersicht „Hasskriminalität — Entwicklung der Fallzahlen 2001–2016", April 2017.

[8] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 2025; draft law. Bundestagsdrucksache [Bundestag paper] 18/4350; resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection (6th Committee). Bundestagsdrucksache [Bundestag paper] 18/6389.

with effect from 26 November 2015, which served not only to (further) implement the 1999 Council of Europe Criminal Law Convention on Corruption together with its 2003 Additional Protocol and the 2002 United Nations Convention against Corruption and the implementation of the EU Framework Decision 2003/568/JHA on Combating Bribery in the Private Sector, but also to elevate several provisions on corruption from secondary criminal law into the Criminal Code. Thus, certain foreign offences with a particular domestic reference were included in the scope of German criminal law by § 5 No. 15 a to d StGB, so that they are now subject to the criminal provisions of §§ 331–337 StGB, which serve to combat corruption of public officials, irrespective of the law of the place of the offence. Furthermore, not only was the concept of the European public official defined in § 11 (1) no. 2a StGB, but such officials were also included in the existing criminal provisions. In the newly inserted § 335a StGB foreign and international employees were also partially placed on an equal footing with German officials and judges. Finally, the criminal provision of § 299 StGB introduced the so-called "principal model", in accordance with the provisions of the 1999 Council of Europe Criminal Law Convention, which is similar to the existing German penal provision on embezzlement and abuse of trust (§ 266 StGB).

The ambitious reform, which took up a failed draft law from 2007[9], was faced with harsh criticism in the field of criminal science [Dann M., 2016: 203–206]; [Schünemann B., 2015: 68–71]. Within its framework, punishability, as well as the general area of application of German criminal law was substantially extended to foreign offences. Nonetheless, it remains to be seen to what extent the new possibilities of criminal prosecution will be used in practice. This is mainly due to the fact that detection and investigation of foreign offences regularly causes enormous difficulties for the German prosecution authorities, as they are dependent on the legal assistance of other states.

5. Corruption in the health care system

The "Act to Combat Corruption in the Health Care System" of 30 May 2016[10] created the criminal offences of bribery and corruption in the health care system (§§ 299a, 299b StGB) together with particularly serious cases (§ 300 StGB) with effect from 4 June 2016. The origin of this was a decision of the Grand Senate of the Federal Court of Justice of 29 March 2012[11]. According to this decision, physicians in private practice are neither public officials within the meaning of § 11 (1) no. 2

[9] Bundestagsdrucksache [Bundestag paper] 16/6558.

[10] Bundesgesetzblatt [Federal Law Gazette] I 2016, p. 1254.

[11] Bundesgerichtshof [Federal Court of Justice] Judgement of 29 March 2012 – GSSt 2/11 // Neue Juristische Wochenschrift (NJW) 2012, pp. 2530–2535.

letter c StGB nor representatives of the statutory health insurance funds within the meaning of § 299 StGB (corruption in business transactions). In addition, the giving and taking of bribes can only insufficiently be recorded as breach of trust (§ 266 StGB).

Criminal science has occasionally described the new penal provisions as "the wrong way" and warned against exaggerated expectations [Nestler N., 2016: 70–75].

However, they are predominantly assessed as being necessary [Krüger M., 2017: 129–137], was provided that it is ensured in practice that permissible and desirable efforts of cooperation between service providers, pharmaceutical companies and medical device manufacturers are not criminalised. It is also criticised that the professional group of pharmacists is not covered notwithstanding the considerable risks of corruption [Brettel H., Mand E., 2016: 99–106].

For these purposes, the German Federal Council has asked the Federal Government to closely monitor whether this criminal liability gap will affect confidence in the health care system in the future[12].

6. Trafficking in human beings

The "Act to Improve the Fight against Trafficking in Human Beings" of 11 October 2016[13] completely redesigned §§ 232 to 233a StGB, with effect from 15 October 2016. This went far beyond the adjustments originally envisaged, which only provided for an extension to cases of trafficking in human beings for the purposes of committing criminal offences, begging and organ trafficking. The main impetus was the pending implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. The new conception has led to a higher terminological sharpness, but it has also met criticism, as it has resulted in contradictions in other areas of crime (sexual criminal law, undeclared work) and the protection of victims strived for by the directive continues to be neglected [Petzsche A., 2017: 236–248].

7. Stalking

On 10 March 2017 the "Act for the Improvement of Protection against Stalking" of 1 March 2017 came into force[14]. Previously, § 238 (1) StGB demanded that the victim's lifestyle be seriously impaired by persistent acts of imitation (e.g. relocation, change of job). As a result, around 20,000 cases were reported in 2013,

[12] Bundesratsdrucksache [Federal Council paper] 181/16, p. 2 f.

[13] Bundesgesetzblatt [Federal Law Gazette], I 2016, p. 2226.

[14] Bundesgesetzblatt [Federal Law Gazette], I 2017, p. 386.

but there were only 200 consequential sentences[15]. These incidents should now be avoided through punitive protection. Such acts (§ 238 (1) Nos. 1 to 4 StGB) must merely be capable of seriously impairing the victim's way of life. The catch-all clause of § 238 (1) No. 5 StGB, which is criticised by some on account of its indeterminacy and is linked to the performance of "another comparable act", was rightly retained. A catch-all clause is necessary in order to effectively counteract the various possible actions of stalkers [Kubiciel M., Borutta N., 2016: 194–198].

It is also to be welcomed that § 238 StGB is no longer a so-called private action offence (§ 374 StPO). The victim is therefore no longer expected to appear before the criminal court, as a public prosecutor is against their own stalker!

8. Corruption in sport

With the "51st Criminal Law Amendment Act" of 11 April 2017[16], the penal provisions of "sports betting fraud" (§ 265c StGB) and "manipulation of professional sports competitions" (§ 265d StGB) together with particularly serious cases (§ 265e StGB) were introduced with effect from 19 April 2017. This was intended to close criminal liability gaps in § 263 StGB (fraud) and § 299 StGB (corruption in business transactions). According to the legislature, the outstanding social role of sport, its great economic importance and the property interests associated with it, made it necessary to counter the dangers of manipulation by means of criminal law. In addition, a provision was created through which German criminal law applies to foreign offences irrespective of the law of the place where the offence was committed if the offence relates to a competition taking place in Germany (§ 5 No. 10a StGB). And finally, in the particularly serious cases, the potential authorisation for telecommunications surveillance was introduced (§ 100a (2) No. 1 letter p StGB).

In criminal science, the introduction of the provisions was mostly strongly criticized [Nuzinger T., Rübenstahl M., Bittmann F., 2016: 34–37].

It was argued that these provisions were neither necessary nor meaningful [Feltes T., Kabuth D., 2016: 8]. This should be disputed, however, as the legislature has not exceeded its assessment prerogatives given the significant threats to the protected legal interests involved. However, the specific definitions of the offences raise a number of questions, particularly as the terms "professional competition" and "anti-competitive influence" are linked to very vague concepts. Moreover, there is the suspicion that the legislature wanted to enable law enforcement authorities to permanently investigate the events on the betting market [Swoboda S.,

[15] Bundestagsdrucksache [Bundestag paper] 18/9946.

[16] Bundesgesetzblatt [Federal Law Gazette], I 2017, p. 815.

2016: 4]. In practice, the investigations are likely to focus on the German Soccer League and other high-profile competitions.

9. Criminal law on asset confiscation

The "Law on the Reform of the Criminal Law on Asset Confiscation" of 13 April 2017[17] must be regarded as the most significant practical innovation of recent years. Thus, with effect from 1 July 2017, the new regulations also apply, in deviation from § 2 (5) StGB, to proceedings which were already in progress *at the time of the law's entry into force* (Art. 316h sentence 1 EGStGB), i.e. retroactively. The reason for the reform was that the previous law was burdened with numerous questions of doubt. This was particularly the case for victim compensation. For instance, confiscation was excluded if the victim of a crime had a claim for damages. In addition, the victims had to ensure that their claims were enforced themselves under civil law and, in accordance with the principle of priority, had to obtain permission for execution in a separate criminal procedure. The criminal prosecution authorities were thus only able to secure assets provisionally (so-called recovery assistance).

At the heart of the reform is the fundamental change to victim compensation. With the new model (§§ 73 et seq. StGB), victims of crimes are to obtain compensation for damages in a simple manner. The confiscation will now be decided in the main hearing (§§ 421 et seq. StPO). In principle, the victims' claims are satisfied in enforcement proceedings (§§ 459g et seq. StPO), whereby all victims are treated equally. The redefinition of the proceeds from the crime is of central importance, as previously an inconsistent jurisprudence had caused legal uncertainty. In contrast to the previous model, in which the entirety of what had been obtained was accessed without taking expenses into account (gross principle), the legislature now wants to determine what had been obtained in a two-step process: in the first step, what had been obtained is to be determined purely objectively, whereby the provision is based on the civil law of enrichment. In the second step, the value of the acquired assets is then determined, taking into account expenses[18].

In addition, the previous limitation of the scope of "extended confiscation" to offences committed on a professional or gang basis has been removed. Now the "extended confiscation" of proceeds from crime (§ 73a StGB) is prescribed for all unlawful offences. The confiscation of property obtained unlawfully must therefore be carried out even if its origin cannot be established from a specific criminal offence. In addition, the subsequent confiscation of assets is now possible (§ 76 StGB). Finally, a legal instrument was created for the area of terrorism and organ-

[17] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 872.

[18] Bundestagsdrucksache [Bundestag paper] 18/9525, p. 62.

ised crime with which assets of unclear origin resulting from criminal offences can be confiscated irrespective of proof of a concrete criminal offence (§ 76 (4) StGB).

On the one hand, this "all-embracing" approach has been welcomed because it has clarified the definition of what has been achieved and facilitated victim compensation [Trüg G., 2017: 1913–1918], but on the other hand it has also been sharply criticised. It is argued that the reform leads to a considerable additional burden on the criminal prosecution authorities and that the victim is now dependent on a distribution procedure in the execution of the sentence [Heim M., 2017: 248].

In addition, the extensive confiscation of assets prevents the accused from the possibility of voluntary reparation [Köllner R., Mück J., 2017: 593–599]. The now generally prescribed extended confiscation leads to friction, namely with the accusation principle, the guilt principle, the presumption of innocence and the property guarantee. Finally, the ordered retroactive applicability of the new provisions infringes the prohibition of retroactive effect of Art. 7 (1) sentence 2 ECHR[19].

10. Home burglary

With the "55th Criminal Law Amendment Act" of 17 July 2017[20], with effect from 22 July 2017, the breaking into a "permanently used private dwelling" was regulated in § 244 (4) StGB. The act is now a felony and punishable with imprisonment from one year to ten years. This was intended, on the one hand, to take account of the serious psychological consequences of a home burglary and, on the other hand, to increase the clarification rate[21]. Already before § 244 (1) No. 3 StGB punished the break-in into a "dwelling" with imprisonment from six months up to ten years, in less severe cases from three months up to five years. However, the act was only a misdemeanour. But now it is questionable which area of application § 244 (1) No. 3 StGB remains, since a "dwelling" will regularly be the "permanently used private dwelling". § 244 (1) No. 3 StGB will in future probably only apply to dwellings which are temporarily used (e.g. holiday dwellings). The intention to increase victim protection is to be welcomed, but it cannot be assumed that the mere increase in the penalty framework will deter criminals. Finally, contradictions have arisen, since the punishment for the gang's committal of a home burglary is not more severe [Mitsch W., 2017: 21–25].

§ 244a StGB (serious gang theft) only qualifies § 244 (1) No. 3 StGB as a felony.

[19] Landgericht (LG) Kaiserslautern Judgement of 20 September 2017 — 7 KLs 6052 Js 8343/16 // Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (NZWiSt) 2018, pp. 149–152.

[20] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 2442.

[21] Bundestagsdrucksache [Bundestag paper] 18/12359, pp. 1–2, 7.

11. Driving ban as a general ancillary penalty

The "Act on the More Effective and Practical Arrangement of Criminal Proceedings" of 17 August 2017[22] redefined the scope of the driving ban (§ 44 StGB) with effect from 24 August 2017. Previously, the driving ban could only be imposed as an ancillary penalty for a period of one month to six months if the offence was committed "during or in connection with the driving of a motor vehicle or in breach of the obligations of a motor vehicle driver". Now the driving ban can be ordered in accordance with § 44 (1) sentence 2 StGB for all criminal offences, "namely" if it "appears necessary to influence the offender or to defend the legal system or if the imposition of a custodial sentence or its execution can thereby be avoided".

In criminal science, the new regulation has been subject to pointed criticism [Berwanger J., 2017: 26–27]. In the first instance, the extension of the scope of the driving ban constitutes a considerable encroachment upon fundamental rights. Furthermore, there is no clear guidance as to when a driving ban should be imposed if the offence was not committed in connection with driving a motor vehicle. The imposition of a driving ban, which is difficult to control in practice, is left solely to the judiciary's devices, which has created the basis for an inconsistent and therefore legally questionable decision-making practice. A restrictive interpretation in conformity with the constitution is accordingly rightly demanded [Schöch H., 2018: 15–18].

It is also proposed to provide for exceptions in such cases where the use of motor vehicles is professionally necessary for the offender [Bode T., 2017: 1–7].

12. Telecommunications surveillance at the source and online investigations

With effect from 24 August 2017, the aforementioned "Act on the More Effective and Practical Arrangement of Criminal Proceedings" also reformed the telecommunications surveillance in § 100a of the German Code of Criminal Procedure (Strafprozessordnung — StPO) and created the possibility of online investigations in § 100b StPO. These extensions were not originally planned, with the corresponding amendments being passed towards the end of the legislative process[23]. As a result, an information technology system used by the suspect may be interfered with and data be collected from it without the knowledge of the suspect. The

[22] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 3202.

[23] Cf. draft law Bundestagsdrucksache [Bundestag paper] 18/11277, p. 8; resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection (6th Committee) Bundestagsdrucksache [Bundestag paper] 18/12785, pp. 46–58.

conditions are, however, strict. Firstly, certain facts must justify the suspicion that someone has committed a particularly serious crime as a perpetrator or participant, or has attempted to do so in cases where the attempt is punishable; secondly, the crime must also weigh particularly heavily in individual cases; and thirdly, the determination of the facts of the case or the location of the accused must otherwise be considerably more difficult or unlikely. The worrying aspect of this though, is the extensive catalogue of particularly serious crimes (§ 100b (2) StPO). These do not only include murder and manslaughter, but also drug offences, gang theft and certain corruption offences.

These greatly extended powers, which are subject to the reservation of judges, have been met with sharp criticism in criminal science [Beukelmann S., 2017: 440]; [Soiné M., 2018: 497–504].

This can be seen as a result of the great interference with the "fundamental right to integrity and confidentiality of information technology systems"[24], the so-called "IT fundamental right", that the powers bring with them. In conventional telecommunications surveillance, telephony or Internet providers pass the data traffic and telephone conversations of the suspect over to the investigators. In the case of telecommunications surveillance at the source and online investigations, on the other hand, the communication device is tapped directly. The law enforcement authorities can thereby break into computers and smartphones and infect the devices with the so-called "state trojan". In 2008, the Federal Constitutional Court[25] ruled that online investigations are only admissible if there are factual indications of concrete danger for a legal right of paramount importance. Rights of paramount importance are the body, life and freedom of the person or such goods of general interest whose threat affects the foundations or existence of the state or the foundations of human existence. In addition, the core area of private life must remain protected. It therefore remains to be seen how the Federal Constitutional Court will rule on the constitutional complaints filed against the above far-reaching new regulations.

13. Prohibited motor vehicle races

The "56th Criminal Law Amendment Act" of 30 September 2017[26] introduced § 315d StGB with effect from 13 October 2017. The reason for this was that a scene had formed which increasingly organised illegal motor vehicle races on public roads, but it could not satisfactorily fall under the ambit of the existing road traffic offences. For example, an application of § 315c StGB (endangerment of road traf-

[24] Federal Constitutional Court, Judgement of 27 February 2008, 1 BvR 370/07, 1 BvR 595/07, Entscheidungen des Bundesverfassungsgerichts (BVerfGE), vol. 120, p. 274.

[25] Ibid., pp. 274–350.

[26] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 3532.

fic) was excluded if there was no concrete danger. The application of § 315b StGB (dangerous interventions in road traffic) also failed in most cases, as the vehicles were not misused as "weapons". Punishment through administrative penalties was not suitable as a deterrent, since only short-term driving bans could be imposed, and fines did not adequately reflect the potential danger to life and limb. § 315d (1) StGB now punishes those who organise or conduct an illegal motor vehicle race in road traffic (No. 1), take part in such a race as motor vehicle drivers (No. 2) or move at an unadapted speed and in a grossly traffic violation and reckless manner in order to achieve the highest possible speed (No. 3) with a fine or imprisonment for up to two years. If the life or limb of another person or property of significant value is specifically endangered, the prison sentence is up to five years (§ 315d (2) StGB) and in cases of death or serious damage to the health of another, or damage to the health of a large number of people, the sentence can be from one year to ten years (§ 315d (5) StGB). The attempt is also punishable in the cases of § 315d (1) No. 1 StGB (§ 315d (3) StGB). Whoever causes the danger negligently in the cases of § 315d (2) StGB shall be punished with imprisonment for up to three years (§ 315d (4) StGB). Further, § 315f StGB permits the confiscation of the vehicles. Finally, the driving licences of the perpetrators are to be withdrawn, as they are regularly unsuitable for driving motor vehicles (§ 69 (2) No. 1a StGB).

In criminal science, this tightening was welcomed. However, § 315d (1) No. 3 StGB, in particular, is regarded as being too far-reaching, since it also covers single drivers who race ruthlessly [Eisele J., 2018: 32–38]. In addition, the criminal liability for the attempt exceeds the target, as the criminal responsibility extends too far into the preparatory phase [Mitsch W., 2017: 70–73].

14. Abolition of the "Majesty Insult"

With the "Act on the Reform of Criminal Offences against Foreign States" of 17. July 2017[27], the previous § 103 StGB (Insult to Organs and Representatives of Foreign States) was repealed with effect from 1 January 2018. This penal provision has protected the dignity of the foreign state or its representatives on the one hand, and Germany's itself interest in good and undisturbed relations with foreign nations, on the other. The reform was triggered by a "poem of abuse" by satirist Jan Böhmermann about the Turkish President Erdoğan, which was broadcasted on the German television on 31 March 2016. As a result, the public prosecutor's office in Mainz had initially started investigations on suspicion of the committing of a criminal offence. In April 2016, Chancellor had already advocated the abolition of § 103 StGB, which was considered dispensable. In addition, there was a lack of an obligation under international criminal law to provide special criminal protection

[27] Bundesgesetzblatt [Federal Law Gazette] I 2017, p. 2439.

for foreign representatives[28]. Since the reform, such protection is ensured only by the general offences of insult.

15. A Brief Outlook — Sanctions law for companies

The Grand Coalition (CDU, CSU, SPD), that was re-elected in October 2017 and led once again by Chancellor Merkel, was unable to begin its work until March 2018. The coalition negotiations were extremely difficult this time and almost broke down on several occasions, as the Grand Coalition only received that time a narrow majority in the Bundestag elections and was deeply divided on fundamental issues.

The new coalition agreement concluded in February 2018 provides, among other things, for a comprehensive reform of the "sanctions law for companies"[29]. This could bring a discussion on the introduction of corporate criminal law that has been going on for over 200 years to a close. At present, only administrative fines can be imposed on a legal person or association of persons, as there are strong dogmatic reservations in criminal law science with regard to the introduction of criminal fines. The German economy has, however, also resisted a tightening of sanctions thus far. In contrast, most European Union countries have now introduced corporate criminal law, which allows for criminal fines to be imposed on companies. The last attempt to introduce a corporate criminal law in Germany was made in September 2013. At the time, the North Rhine-Westphalia Justice Minister Kutschaty (SPD) presented a draft of an "Association Criminal Code". Following that blueprint, the Grand Coalition had announced in its (first) coalition agreement of December 2013[30] that it would "examine" a "corporate criminal law for multinational corporations", but legislative measures still did not follow.

It looks like the situation could now change, as the new coalition agreement, unlike in the past, contains concrete information on the planned sanctions law against companies[31]. The intention is to move away from the principle of opportunity and towards the creation of suspension of proceedings and rules on proportionality. This would eliminate the application and enforcement deficits that have existed in practice until now. The range of sanction instruments is also to be expanded. In future, the amount of monetary sanctions shall be based on the economic strength of the company, with the maximum limit for companies with

[28] Bundestagsdrucksache [Bundestag paper] 18/11243, pp. 6–7.

[29] Ein neuer Aufbruch für Europa. Koalitionsvertrag zwischen CDU, CSU und SPD vom 7.2.2018. Berlin, p. 126.

[30] Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD. Berlin, 2013, p. 101.

[31] Ein neuer Aufbruch für Europa. Koalitionsvertrag zwischen CDU, CSU und SPD, p. 126.

a turnover of more than € 100 million being 10 percent of their turnover. In addition, legal requirements for "internal investigations" are to be created, in particular with regard to the confiscation of documents and investigation possibilities. Notwithstanding these specifications, the coalition agreement does not mention the words "penalty" or "criminal fine". As such, it is to be expected that only the regulations on administrative fines will certainly be reformed, whilst at the same time not completely ruling out the possibility of the creation of a modern corporate criminal law. This is essentially supported by the fact that only a punishment can adequately convey the injustice and guilt of a criminal offence committed by a manager on behalf of a company. Secondly, the imposition of a penalty by a court in public criminal proceedings has a greater deterrent effect than the (silent) imposition of an administrative fine by an authority. And thirdly, it would also take account of the fact that most EU countries already have corporate criminal law.

A first draft law is expected to be presented in 2019. The new regulation could be based on the "Cologne Draft of an Association Sanctions Act" presented by Cologne legal specialists in December 2017 [Henssler M., Hoven E., Kubiciel M., Weigend T., 2018: 1–10]. This legislative proposal contains extensive substantive and procedural provisions that solve numerous practical difficulties. The proposal has a significantly preventive focus, which is expressed above all through the fact that a part of the sanctions against the criminal company can be waived if the damage caused is compensated, and suitable technical, organisational and personnel measures are taken in order to avoid future misconduct. This is a very welcome step towards the establishment and expansion of effective compliance structures.

Conclusions

It should be noted that the criminal law reforms in the last legislative period of the Grand Coalition (2013–2017) consisted mainly of tightening and extending existing criminal law regulations. This reflects an "actionism" and "populism", which is rightly staunchly criticised by criminal science. It remains to be seen how the German Federal Constitutional Court will assess these new provisions! In particular, the German Government failed to recognise that tightened rules will remain ineffective in practice if the prosecution does not become more effective and the probability of the detection of criminal offences is not increased. However, this also requires, in particular, that the prosecution authorities are adequately equipped with resources.

In the current legislative period, which began in October 2017, the Grand Coalition has not yet pushed through any legislative proposals in the realm of the Criminal Code. As far as the future is concerned, it is hoped that the Grand Coalition will pursue legislation in the field of criminal law with a greater sense of pro-

portion and, in particular, take the findings of criminal law studies into account to a greater extent. A suggestion in this regard would be that the reform of the sanctions law for companies should not only extend the sanction instruments, but also strengthen the rights of defence of companies.

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