

**On the remarks preceding the recommendations under Margin No. 10**

**THE GERMAN CODE OF CRIMINAL PROCEDURE**

**Section 68b**

**[Assignment of Legal Counsel]**

(1) Witnesses may avail themselves of the assistance of legal counsel. Legal counsel appearing at the examination of the witness shall be permitted to be present. He may be barred from the examination if certain facts justify the assumption that his presence would not only negligibly hinder the orderly taking of evidence. As a rule, this shall be the case if, on the basis of certain facts, it can be assumed that

1. counsel participated in the offence to be investigated or in accessoryship after the fact, obstruction of justice or handling of stolen goods connected therewith;
2. the testimony of the witness will be influenced by the fact that counsel appears committed not only to the interests of the witness; or
3. counsel will use information obtained during the examination for tampering with evidence within the meaning of Section 112 subsection (2), number 3, or pass on such information in a manner detrimental to the purpose of the investigation.

(2) A witness who does not have the assistance of legal counsel at his examination and whose interests meriting protection cannot be taken into account in another way shall be assigned such counsel for the duration of the examination if special circumstances obtain from which it is evident that the witness is unable to exercise his rights himself at his examination.

Section 142 subsection (1) shall apply *mutatis mutandis*.

(3) Decisions pursuant to subsection (1), third sentence, and subsection (2), first sentence, shall not be contestable. The grounds therefor shall be documented, insofar as this does not endanger the purpose of the investigation.

**Section 161a****[Witnesses and Experts Before the Public Prosecution Office]**

(1) Witnesses and experts shall be obliged to appear before the public prosecution office upon being summoned and to make a statement on the subject matter or to render their opinion.

Unless otherwise provided, the provisions of Chapters VI and VII of Part One concerning witnesses and experts shall apply *mutatis mutandis*. Examination under oath shall be reserved for the judge.

(2) If a witness or expert fails, or refuses, to appear without justification, the public prosecution office shall have the authority to take the measures provided in Sections 51, 70 and 77. However, the imposition of detention shall remain reserved for the court competent pursuant to Section 162.

(3) A decision by the court competent pursuant to Section 162 may be requested against decisions of the public prosecution office pursuant to subsection (2), first sentence. The same shall apply where the public prosecution office has taken decisions within the meaning of Section 68b. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall each apply *mutatis mutandis*. Court decisions pursuant to the first and second sentences shall not be contestable.

(4) If the public prosecution office requests another public prosecution office to examine a witness or expert, the powers pursuant to subsection (2), first sentence, shall also be vested in the requested public prosecution office.

**Section 163****[Duties of the Police]**

(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind insofar as there are no other statutory provisions specifically regulating their powers.

(2) The authorities and officials in the police force shall transmit their records to the public prosecution office without delay. Where it appears necessary that a judicial investigation be performed promptly, transmission directly to the Local Court shall be possible.

(3) Section 52 subsection (3), Section 55 subsection (2), Section 57 subsection (1) and Sections 58, 58a, 58b and 68 to 69 shall apply *mutatis mutandis* to the examination of a witness by officials in the police force. The decision on permission pursuant to Section 68 subsection (3), first sentence, and on the assignment of counsel to a witness shall be taken by the public prosecution office; in all other cases the necessary decisions shall be taken by the person in charge of the examination. Section 161a subsection (3), second to fourth sentences, shall apply *mutatis mutandis* to decisions by officials in the police force pursuant to Section 68b subsection (1), third sentence. Section 52 subsection (3) and Section 55 subsection (2) shall apply *mutatis mutandis* to the instruction of an expert by officials in the police force. In the cases referred to in Section 81c subsection (3), first and second sentences, Section 52 subsection (3) shall also apply *mutatis mutandis* to examinations by officials in the police force.

## **ARTICLE 6 of the European Convention on Human Rights**

### **Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **On the Recommendations under Margin No. 10**

##### **10 b) (i)**

#### **No. 15 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine: Establishing the circumstances relevant for determining the legal consequences of the act**

(1) All circumstances that might be relevant for sentencing, probationary suspension of sentence, warning with sentence reserved, dispensing with punishment, collateral punishment and collateral consequences or for ordering measures of reform and prevention, forfeiture or other measures (section 11 (1) no. 8 of the Criminal Code), are to be established in the preparatory proceedings. The public prosecutor may make use of the court assistance agency in order to do so.

(2) In accordance with (1) above, the injury suffered by the aggrieved person as a result of the act is to be determined to the extent that it might be relevant in the criminal proceedings. The

public prosecutor also examines whether and with what degree of success the accused has undertaken efforts to make amends.

(3) If the accused is a member of the senior management of a legal person or association and if the imposition of a regulatory fine against such person or association is to be considered (no. 180a), investigation as to the amount of the economic advantage attained by the act is to be undertaken in the preparatory proceedings.

(4) In the case of bodily harm, determinations are to be made as to the severity of the injury, the length of time required for it to heal, any possible long-term consequences and the degree of any potential loss of earnings. In the case of not entirely inconsequential injuries, a medical certificate will be required from the physician in charge of the treatment.

(5) To the extent that indications exist of racist, xenophobic or other motives evidencing contempt for humanity, the investigations are to be extended to include such circumstances of the offence.

#### **No. 86 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine: General**

(1) As soon as the public prosecutor learns of a criminal offence that can be prosecuted by means of private prosecution, he examines whether there is a public interest in an *ex officio* prosecution.

(2) There will generally be a public interest if there has been a breach of peaceful relations under the law that goes beyond the environment of the aggrieved person himself and the prosecution is a matter of current concern to the general public, e.g. because of the scale of the infringement of a right, the barbarity or dangerous nature of the offence, the perpetrator's racist, xenophobic or other motives evidencing contempt for humanity, or the position of the aggrieved person in public life. If the breach of peaceful relations under the law does not go beyond the environment of the aggrieved person himself, there may still be a public interest if the aggrieved person cannot reasonably be expected to file a private prosecution on account of

his personal relationship with the perpetrator, and criminal prosecution is a matter of current concern to the general public.

(3) The public prosecutor may investigate whether there is a public interest.

**No. 234 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine: Special public interest in criminal prosecution (section 230 (1) of the Criminal Code)**

(1) A special public interest in the prosecution of assaults causing bodily harm (section 230 (1), first sentence, of the Criminal Code) is to be assumed if the perpetrator has a relevant previous conviction, acted with barbarity or particular recklessness, or with racist, xenophobic or other motives evidencing contempt for humanity, if the act has caused considerable injury or if the victim cannot reasonably be expected to file an application for criminal prosecution on account of his personal relationship with the perpetrator, and criminal prosecution is a matter of current concern to the general public. No. 235 (3) applies *mutatis mutandis*. However, it might also be important to consider that the aggrieved person does not place any value on punishing the perpetrator.

(2) If it emerges following the preferment of public charges in proceedings concerning an act to be prosecuted *ex officio* that, potentially, only a conviction for bodily harm (section 230 (1) of the Criminal Code) is conceivable, or that such conviction is additionally considered urgently necessary following the taking of evidence, the public prosecutor will declare whether he considers *ex officio* intervention necessary.

(3) No. 243 (3) is to be taken into account in the case of bodily harm committed in road traffic.

**No. 205 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine: Informing the authorities for the protection of the constitution in proceedings relating to crimes against the State and other proceedings**

(1) In proceedings relating to crimes against the State (sections 74a, 120 (1) and (2) of the Courts Constitution Act, Articles 7, 8 of the 4th Criminal Law Amendment Act), the prosecutor works with the Federal Office for the Protection of the Constitution and the *Land* authorities for the protection of the constitution in a suitable manner in accordance with statutory provisions, in particular considering the principle of informational separation, in order to ensure that the information gathered by these authorities can be evaluated in the prosecutor's investigation and that his insights can be evaluated for the tasks performed by the domestic intelligence agencies. This also applies to other proceedings in which there are factual indications that the offences have been committed in order to achieve anti-constitutional goals.

(2) The public prosecutor will, upon his own initiative and in a suitable manner, provide information on the initiation and progress of proceedings, as well as on decisions that are essential for evaluation (e.g. bills of indictment, judgments, orders for the termination or proceedings), to the Federal Office for the Protection of the Constitution in cases where facts pursuant to section 18 (1) of the Federal Act on Protection of the Constitution become known, and to the *Land* authorities for the protection of the constitution in accordance with the corresponding *Land* legislation. Information should be provided pursuant to the first sentence in particular in proceedings pertaining to

- preparation of or establishing contacts for the purpose of committing a serious violent offence endangering the State (sections 89a and 89b of the Criminal Code),
- treason and endangering national security (sections 94 to 100a of the Criminal Code),
- criminal offences pursuant to sections 129a and 129b of the Criminal Code and criminal offences that may be factually related to these,
- criminal offences pursuant to sections 17, 18 of the Foreign Trade and Payments Act and sections 19 to 22a of the War Weapons Control Act related to foreign intelligence services,

– violent criminal offences to the extent that factual indications exist that these were perpetrated in order to achieve anti-constitutional goals.

In other cases, the public prosecutor provides information to the Federal Office for the Protection of the Constitution under the conditions laid out in section 18 (2) of the Federal Act on Protection of the Constitution and to the *Land* authorities for the protection of the constitution in accordance with the corresponding *Land* legislation where this is necessary for those authorities to perform their tasks and is relevant beyond the individual case.

(2a) In all proceedings within the meaning of (1) and (2) above, the public prosecutor should request, in accordance with statutory provisions, that the authorities for the protection of the constitution provide him with information they have which might be relevant to the investigation proceedings.

(3) Where the authorities for the protection of the constitution so request, the public prosecutor will inform them of any insights he may have (cf. section 18 (3) of the Federal Act on Protection of the Constitution and corresponding *Land* provisions). He may also provide them with transcripts of examinations or memoranda pertaining to other investigative acts.

(4) Reference is made to the bans on the provision of information under section 23 of the Federal Act on Protection of the Constitution, the protection of minors under section 24 of the Federal Act on Protection of the Constitution and the corresponding *Land* provisions.

(5) Members of the authorities for the protection of the constitution may be involved as experts or providers of information in examinations and other investigative acts (e.g. visits to the scene of the crime, search or seizure). Their involvement is to be recorded in the files.

(6) Without affecting existing reporting duties, direct transactions among the authorities referred to in (1) above are allowed within the framework of (1) to (3) and (5) above.



## **No. 207 of the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine: Informing the Federal Criminal Police Office**

(1) The Federal Criminal Police Office, Thaerstrasse 11, 65193 Wiesbaden is to be informed of the initiation of proceedings due to an offence relating to membership in or support of a proscribed organisation (sections 84, 85, 129, 129a, 129b of the Criminal Code; section 20 (1) nos. 1 to 4 of the Act on Associations; section 95 (1) no. 8 of the Residence Act). Upon request, this will provide information based on the files it maintains as to whether and where further proceedings are or have been pending due to the same or a connected offence relating to membership in or support of a proscribed organisation.

### **(2) Files on investigation and criminal proceedings due to**

1. endangering the democratic state governed by the rule of law in the cases of sections 84, 85, 89a, 89b and 91 of the Criminal Code,

2. treason and endangering national security in the cases of sections 93 to 101a of the Criminal Code,

3. criminal offences in violation of law and order in the cases of sections 129, 129a and 129b of the Criminal Code,

4. criminal offences against life or physical integrity in the cases of sections 211, 212 and 227 of the Criminal Code, if the act is politically motivated,

5. criminal offences which pose a danger to the general public in the cases of sections 306 to 306c, 308, 310 (1) no. 2 of the Criminal Code, if the act is politically motivated,

6. criminal offences pursuant to section 20 (1) nos. 1 to 4 of the Act on Associations,

7. criminal offences pursuant to section 95 (1) no. 8 of the Residence Act

are sent by the public prosecutor's office immediately following conclusion of the proceedings to the Federal Criminal Police Office, Thaerstrasse 11, 65193 Wiesbaden for analysis.

The exceptions are

- a) files that do not contain any intelligence of a factual or personal nature, e.g. files on proceedings that have been terminated due to a lack of indications for solving the offence and
- b) files on independent confiscation proceedings.

(3) Criminal offences within the meaning of (2) nos. 4 and 5 above are politically motivated if, upon assessing the circumstances of the offence and/or the attitude taken by the perpetrator, there are indications that

– they are meant to influence the democratic formation of will, they serve the achievement or prevention of political aims or they are directed against the implementation of political decisions,

– they are directed against the free democratic order and/or one of the essential features thereof, the existence and the security of the Federation or a *Land*, or their goal is to unlawfully impair the conduct of official duties by members of the constitutional organs of the Federation or a *Land*,

– through the use of violence or preparatory acts therefor, they jeopardise the foreign interests of the Federal Republic of Germany,

– they are directed against a person on the basis of that person's political views, nationality, ethnic origins, race, skin colour, religion, beliefs, origins, or because of that person's external appearance, disability, sexual orientation, or status in society, and the offence is causally related to this or is committed in this context against an institution, object or premises.