The Public Prosecutor in Germany. Aspects of his position and duties, procedural principles

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Abstract: *Il Pubblico Ministero in Germania. Aspetti della sui posizione e dei suoi doveri, principi procedurali* - This contribution provides a brief overview of the historical and current role of the German public prosecutor in criminal proceedings and the procedural principles that guide their work. It delves into various aspects of the prosecutor's legal position and their relationships with other actors in the criminal justice system, including law enforcement officials. It addresses the 2019 ECJ verdict, which denied German public prosecutors the status of an "issuing judicial authority," and its implications for the controversial ability of the Minister of Justice to issue case-related instructions to prosecutors. To this end, the authors advocate for reforms.

Keywords: Public Prosecutor; Germany; Procedural Principles; Instructions; Hierarchy.

1. A Retrospective

The public prosecutor's office in Germany was introduced hesitantly by the then independent States of the German Confederation[1], and with differences in their scope of jurisdiction. On the left bank of the Rhine, which had been ceded to France by the Peace of Lunéville of 9 February 1801, Napoleon I had introduced the Code pénal of 1808 and the Code d'instruction criminelle of 1810, which knew the institution of the "procureur impérial"[2]. Even before that, France had successively established a public prosecutor's office system

[1] The German Confederation was founded by the Confederation Act of 8 May 1815, which was integral part of the Congress Act of Vienna of 9 June 1815, as an association of the 41 sovereign German States and restructured Germany as a consequence of the dissolution of the Holy Roman Empire of German Nation and as a consequence of the defeat of Napoleon I. The German Confederation existed until 1866 und disappeared as a consequence of the German War (cf. A. Funk, *Der Deutsche Bund 1815 – 1848*, in A. Funk (ed.), *Kleine Geschichte des Föderalismus*, Paderborn, 2010, 153-172).

[2] The controversial discussion whether the Napoleonic prosecutor found its roots in the old-french institution of the "procureur du roi", which legally was not able to file indictments neither was it an investigative authority is left out (cf. J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, Berlin, 1994, 91 ff.; G. Haber, *Strafgerichtliche Öffentlichkeit und öffentlicher Ankläger in der französischen Aufklärung mit einem Ausblick auf die Gesetzgebung der Konstituante*, Berlin, 1979, 36 ff., 52 ff., 252 ff. – both with further references).

in the occupied territories on the left bank of the Rhine. This French legal situation, which was reflected in the so-called "Rhenish law" (not only in the area of criminal law)[3], was maintained due to the resistance of the population on the left bank of the Rhine when the left bank of the Rhine returned to Germany through the regulations of the Congress of Vienna in 1815 and became Prussian, Hesse-Darmstadt or, through the Treaty of Munich of 14 April 1816, Bavarian territory[4]. Compared to the old Prussian law and the Bavarian law on the right bank of the Rhine with its non-public and therefore non-transparent so-called "cabinet justice" inherited from absolutism, the "Rhenish law" was perceived as more progressive and, because of the participation of the citizens in the criminal proceedings through the jury courts, as more democratic[5]. It is true that French law was also introduced in the Kingdom of Westphalia[6], a Napoleonic satellite state under Napoleon's younger brother, King Jérôme, "Köng Lustig" (= "Funny King"), who resided in Kassel, and therefore also applied in parts of the Kingdom of Hanover[7]. In contrast to Prussia, Bavaria and Hesse-Darmstadt, which received French territories on the left bank of the Rhine as a result of the Congress of Vienna (today Rhineland-Palatinate's province of Rhinehesse, and the Rhineland as well as Westphalia), the King of Hanover abolished Westphalian law - without major resistance from the local population - which meant that the Westphalian public prosecutor's office ceased to exist. Starting with court councilors appointed as public prosecutors by the Grand Duke of Baden in 1832 by means of an instructional decree[8], these early prosecutors had only to deal with the criminal law and criminal procedure as far as enshrined in the regulations of §§ 18 to 22 of the Baden Press Law of 1 March 1832[9], i.e. had a very limited

[3] H.J. Becker, *Das Rheinische Recht und seine Bedeutung für die Rechtsentwicklung in Deutschland im 19. Jahrhundert*, in *Juristische Schulung (JuS)*, 1985, 338-345.

[4] J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 90.

[5] The Rhenish Criminal Law became ineffective in Prussia when the Prussian Criminal Code of 1851 was enacted. In the meantime, prosecutors were introduced in the old-prussian territories (G. Otto, *Die preußische Staatsanwaltschaft*, Berlin, 1899, 53 ff.; J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 78). However in Bavaria the Bavarian Palatinate kept the "French particularity" until the kingdom-wide unification of criminal law in 1862. The Palatinate Prosecutor General kept existing until the dissolution of the Palatinate "Cour de cassation" in 1870 (W. Biebl, *Die Staatsanwaltschaft bei dem Bayerischen Obersten Landesgericht*, 3rd ed., München, 1995, 73 ff.).

[6] J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 102 ff., 131 ff., in particular 166 ff.

[7] Not the Code pénal (J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 36).

[8] With supportive views on the new institution see L. Frey, *Die Staatsanwaltschaft in Deutschland und Frankreich*, Erlangen, 1850 – reprint 2012; with regard to the historical status of discussion: J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 79 ff.

[9] Staats- und Regierungs-Blatt (= State and Government's Official Gazette) 1832, 29 ff.; also see R. Schimpf, *Der „Freisinnige" und der Kampf der badischen Liberalen für die Pressefreiheit 1831/32*, in H. Reinalter (ed.), *Die Anfänge des Liberalismus und der Demokratie in Deutschland und Österreich 1830 – 1848/49*, Frankfurt am Main, 2002, 157-190.

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area of jurisdiction[10]. Only after the founding of the 2nd German Empire in 1871 and the Imperial Judiciary Laws of 1879, Germany received public prosecution offices throughout the Empire, from which today's authorities do not differ significantly. Historically, the public prosecutor's offices were also an instrument that enabled monarchial governments to influence the administration of criminal justice[11]. The public prosecutor's office acquired its modern form, which is characterised in particular by its activity as an investigative authority and by its rule over criminal proceedings, through the 1st Federal Act on Reforming Criminal Law (StVRG)[12] in 1974[13]. One can twist it and turn it, but to put it exaggeratedly: Like their colleagues in Baden in 1832 or the public attorneys introduced in Hanover by law of 16 February 1841[14] or the public prosecutor's office established there by law of 24 December 1849 and 8 November 1850[15] respectively, German prosecutors remained and still are "public servants" bound by instructions, on whose tasks the view did not always remain the same[16]. However, the

[10] V. Finger, *Die Verwaltung des Strafrechts. Eine Rechtsgeschichte der deutschen Staatsanwaltschaft*, Dissertation Berlin, 2016, 60 ff. Due to policies of repression by the German Confederation, which immediately followed the July Revolution in France and the subsequent events in Germany, the Grand Duchy of Baden was forced to revoke its press related regulations on 28 July 1832 (K.A. Germann, *Die Einflüsse der Julirevolution auf Gesetzgebung in Baden*, Dissertation Freiburg, 1948 [micro films], 222 ff., 226 ff.). The Criminal Procedure Code of the Kingdom of Württemberg of 22 June 1843 introduced some sort of public accusation authority (J. Knapp, *Geschichte und Quellen der württembergischen Gerichtsverfassung von 1800 bis 1879*, Dissertation Tübingen, 1948 [micro films], 145 ff.; M. Arnold, *Pressefreiheit und Zensur im Baden des Vormärz. Im Spannungsfeld zwischen Bundestreue und Liberalismus*, Berlin, 2003, 111 ff., 133 ff.).

[11] W. Wohlers, in J. Wolter (ed.), *Systematischer Kommentar zur Strafprozessordnung (SK-StPO)*, 6th ed., vol. 9, Hürth, 2023, GVG Vor. §§ 141 margin. 4.

[12] BGBl. (= Federal Official Gazette) 1974 I, 3393.

[13] W. Wohlers, cit., margin 5.

[14] J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 106 ff.

[15] J.W. Knollmann, *Die Einführung der Staatsanwaltschaft im Königreich Hannover*, cit., 179 ff.; also see with regards to history R. Börker, *Aus der Geschichte der Staatsanwaltschaft im Herzogtum Braunschweig*, in R. Glanzmann (ed.), *Ehrengabe für Bruno Heusinger*, München, 1986, 35 ff.

[16] When the Prussian public prosecutor's office was established by the law of 17 July 1846 (prGS [= Prussian Official Law Collection] 1846, p. 267), the then Minister of Justice von Savigny spoke of a "guardianship" of the public prosecutor's office: "In this, the prosecutor's office, as guardian of the law, shall be empowered to act from the beginning of the proceedings against the accused to ensure that the law is complied with everywhere (cf. also § 6 of the Ordinance on the Introduction of Oral and Public Proceedings with Juries of 3 January 1849 [prGS 1849, p. 14] with a similar characterisation), although he concealed the fact that this only came about because the Inquisition trial, which until then had been conducted in accordance with the Prussian Criminal Code of 1805, threatened to fail miserably because of the extensive high treason trial against Polish insurgents (= so-called Poland Trial [V. Finger, *Die Verwaltung des Strafrechts. Eine Rechtsgeschichte der deutschen Staatsanwaltschaft*, cit., 8 ff.]). Incidentally, it took the March Revolution of 1848 to set in motion a process of rethinking in the individual German states (cf. G. Urban, *Die Stellung der Paulskirche zu Gerichtsverfassung und Strafverfahren*, Dissertation Tübingen, 1946 [micro film]). At the time of the creation of the Reich Code of Criminal Procedure and the Courts

dependence on the government, the supervision exercised by it and its possibilities of exerting influence in the form of instructions have remained a permanent and so far unsatisfactorily solved annoyance[17].

2. The Public Prosecutor's Office and Hierarchy-related Possibilities for Issuing Instructions

2.1

(Criminal) justice in Germany is, according to the constitutional concept of the national constitution, which is called Grundgesetz ("Basic Law") (hereinafter: GG) and first came into effect on 23 May 1949, a matter for the 16 Länder, which are the origin and holders of state power, and only exceptionally, where the GG expressly provides for it, a matter for the Federation or the Central State[18]. This concept also applies to the public prosecutor's office. Whenever a Land establishes a (local or regional) court[19] in the area of ordinary jurisdiction by Land law[20], it must also establish a prosecutor's office[21]. As a rule, they exist at the level of regional courts and at the higher regional courts (public prosecutor's general's office). A total of 115 prosecutor's offices and 23 general prosecutor's offices have been established nationwide[22].

At the federal level, the authority of the Federal Prosecutor General (GBA) is established[23], which performs the tasks assigned to it under § 142a GVG[24], including a special jurisdiction on submitting legal remedies to the Federal Supreme Court of Justice (Bundesgerichtshof [= BGH]). The GBA's Office is a special authority and is not part of the hierarchy of the prosecutor's offices of the Länder, which is the main criminal investigation

Constitution Act of 1877, which came into effect on 1 January 1879, the public prosecutor's office was already almost a self-evident institution.

[17] Comprehensively E.S. Carchen, E.C. Rautenberg, *Die Geschichte der Staatsanwaltschaft in Deutschland bis zur Gegenwart*, 3rd ed., Baden-Baden, 2016.

[18] Art. 92, 95 para. 1, 96 GG.

[19] For Bavaria, cf. Art. 2, Art. 4 of the Law on the Organisation of Courts in the Free State of Bavaria (GerOrgG) of 25 April 1973 (BayRS 300-2-2-J [= Official Collection of Laws and Degrees of Bavaria]) - last amended by Act of 12 July 2018 (GVBl. 2018, p. 545 [= Bavarian Official Gazette]) in conjunction with Art. 13 para. 1 Act on the Execution of the Courts Constitution Act and of Federal Procedural Act (AGGVG) of 23 June 1983 (BayRS 300-1-1-J) - last amended by Act of 26 March 2019 (GVBl. 2019, p. 98).

[20] § 12 GVG.

[21] § 141 of the Courts Constitution Act (GVG) in the version promulgated on 9 May 1975 (BGBl. 1975 I, p. 1077) - last amended by the Act of 7 July 2021 (BGBl. 2021 I, p. 2363).

[22] The public prosecutor's offices for minor offences (§ 142 para. 3 GVG) are neglected. Only the Land of Berlin has established such an authority.

[23] § 142 para. 1 no. 1 GVG.

[24] These are the first-instance investigation of state protection offences, which § 120 GVG describes in more detail, and the representation of appeals, which the BGH has to decide.

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and prosecution authority under § 152 of the Code of Criminal Procedure (StPO).

The fact that the prosecutor's office is often located in the courts' vicinity or is sharing same buildings with the courts, which also have local jurisdiction, often results in close informal contacts and relationships between the prosecutor's office and the court beyond their formal jurisdiction. In individual cases, this can result in close familiarity, which is also confirmed by the fact that prosecutors move to judicial positions in the course of their careers and vice versa in particular when it comes to their advancements.

2.2

The structure of the public prosecutor's offices is hierarchical. The hierarchy runs from the public prosecutor's offices to the general prosecutor's offices up to the respective Länder judicial administrations of the respective Ministers of Justice.

Neither the GG nor the constitutions of the 16 federal states (Länder) take note of the public prosecutors and their organisation. This distinguishes them from their judicial colleagues and from the courts, whose institutional and personal independence is expressly guaranteed[25]. The constitutions contain only a few indispensable principles, such as the prohibition of double punishment and retroactivity or the abolition of the death penalty[26] and the prohibition of exceptional courts[27]. The constitutions of the Federation and the Länder leave it to the parliamentary legislature to shape the procedure and the organs involved in it. The legislature has made its decision in the form of the StPO and the GVG, the basic structures of which have been in force for about 150 years[28]. Further relevant procedural and status law provisions concerning public prosecutors can be found in special federal laws, such as the Juvenile Courts Act, the German Judges Act or the Civil Servants Status Act and additionally in Länder law provisions on Länder judges and public prosecutors and on Länder civil servants. The overall view of these regulations also shows how the relationship between the prosecutor's office and the criminal courts is structured. The public prosecutor's office acts independently of the courts[29]; judicial and prosecutorial staff are separate. Judicial duties may not be assigned to a prosecutor[30]. In German understanding, the (English) term authority (= Behörde) is unusual for a judicial institution but nevertheless used in the context of prosecutor's offices which indicates that the lawmaker regards prosecutors as being part of the executive power. Article 20 para. 2 GG establishes the separation of powers between the executive, the judiciary and

[25] Art. 97 and 98 GG; § 1 GVG; on the dependency of German public prosecutors see expressly II. 3. u. 5.
[26] Art. 103 para. 2, para. 3; Art. 101 GG.
[27] Art. 101 para. 1 1st sentence GG; § 16 1st sentence GVG.
[28] So-called Reich Justice Laws that entered into force on 1 October 1879.
[29] Expressly § 150 GVG.
[30] § 151 GVG

the legislature as a principle of order. Whether the public prosecutor's office belongs to the executive or the judiciary or somewhere in between has not yet been clearly clarified finally[31]. The dispute has no direct legal effect on the position of the public prosecutor's office and can therefore be left aside at this point.

A criminal prosecution without a public prosecutor's office is hardly conceivable in view of a 170-year-old German tradition, even if the constitutions are silent on this matter[32]. Today, it is the central organ of investigation within the given criminal justice system. Following the establishment of the European Public Prosecutor's Office[33] and the increased cooperation with national authorities required by European law[34], it can now be argued with good reason that the national prosecutor's offices are guaranteed by European law and are no longer (fully) subject to the discretion of the national legislature.

2.3

German constitutional law guarantees the statutory judge and his independence[35]. However, constitutional law or other law does not

[31] J. Thomas, *Die deutsche Staatsanwaltschaft – „objektivste Behörde der Welt" oder doch nur ein Handlanger der Politik?*, in *Kriminalpolitische Zeitschrift (KriPoZ)*, issue 2, 2020, 85-90, s. 86, with further references. Predominant opinion regards prosecutor's offices having a status sui generis within the executive power but incorporated organically to justice sector, cf. BVerfG (Bundesverfassungsgericht = BVerfG), judgement of 17 March 1959 = BVerfGE (= Official Collection of Decisions of the Federal Constitutional Court) 9, 223 (228); BVerfG, judgement of 15 November 1971 – 2 BvF 1/70 = NJW (= Neue Juristische Wochenschrift) 1972, 25 (25); BVerfG, judgement of 20 February 2001 – 2 BvR 1444/00 = NJW 2001, 1121 (1123); BVerfG, decision of 5 November 2001 – 2 BvR 1551/01 = NStZ (= Neue Zeitschrift für Strafrecht) 2002, 211 (211), affirmative T. Fischer, in C. Barthe, J. Gericke (eds.), *Karlsruher Kommentar zur Strafprozessordnung (KK-StPO)*, 9th ed., München, 2023, Einleitung E. margin 197; R. Schnabl, in H. Satzger, W. Schluckebier (eds.), *Strafprozessordnung (StPO)*, 5th ed., Köln, 2023, GVG Vor §§ 141 ff. margin. 3.; T. Schuster, in C. Knauer, H. Kudlich, H. Schneider (eds.), *Münchener Kommentar zur Strafprozessordnung (MüKoStPO)*, 1st ed. Aufl., volume 3, 2, München, 2018, GVG § 13 margin. 7; W. Wohlers, cit., margin 13 ff.

[32] BVerfGE 9, 228: In the system of separation of powers, the public prosecutor's office and the court jointly fulfil the task of providing justice with different functions in the field of criminal law. Also T. Fischer, cit., margin. 197; B. Schmitt, in L. Meyer-Goßner, B. Schmitt (eds.), *Strafprozessordnung*, 66th ed., München, 2023, Einl. margin. 87 - both with further references.

[33] ABl. L 283 of 31 October 2017, p. 1.

[34] Regulation implementing enhanced cooperation to establish the European Public Prosecutor's Office (EuPPO), Regulation (EU) 2017/1939 (OJ L 283, 31 October 2017, p. 1).

[35] Art. 101 para. 1 sent. 2; Art. 97 GG; Art. 86 para. 1 sentence 2; Art. 87 Bavarian Constitution. Cf. also G. Oberto, *Judicial Independence - A Comparative Legal Analysis of its Institutional Design*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2004, 207-210; Id., *The Independence of Judges in Europe and its Safeguarding by a Supreme Judicial Council. Lecture at the annual conference of the Hessian Association of Judges*, 1 - 3 July 2004 - www.hefam.de/koll/obert200407.pdf.

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guarantee a statutory and independent prosecutor. The prosecutor's offices are usually divided into departments and divisions, in which the individual prosecutor performs the resulting tasks within the framework of his or her assigned division[36]. The heads of department (senior public prosecutor [= Oberstaatsanwälte]) who instruct them are subordinate to a "first official" who heads the authority (directing senior public prosecutor [= Leitender Oberstaatsanwalt])[37]. The superior officials have the right to issue instructions[38] to the officers and exercise official supervision[39] over them. According to the simple legal, federal and Länder regulations, the prosecutors are civil servants in terms of status[40]. The fact that they are bound by instructions within the hierarchy has been discussed for a long time in the sense of a stronger independence of the individual prosecutor, and yet the position has not changed so far[41].

However, it has always been recognised that the right of superiors to issue instructions is limited by the principle of legality as provided for by § 152 para. 2 StPO[42]. The right to issue instructions is also limited by Article 20 para. 3 GG[43], which stipulates that the executive power is bound by law and justice. In particular, an instruction is inadmissible that requires a public prosecutor to perform his duties in a manner that is contrary to the provisions of StPO. Official performances by the public prosecutor that would itself constitute a criminal offence (cf. obstruction of justice in office, § 258a of the Criminal Code (Strafgesetzbuch [= StGB]); prosecution of innocent persons, § 344 StGB; execution against innocent persons, § 345 StGB; perverting the course of justice, § 339 StGB) may also not be the content of an instruction. Where factual circumstances indicate the commission of a criminal offence, the prosecutor must intervene and clarify the facts in order to decide whether a public prosecution is justified (§ 160 para. 1 StPO[44]). If his examination, for which he is responsible, shows that the factual circumstances do not result in a violation of a criminal law, he may not intervene, regardless of what the superior's instruction says. In the event of a conflict between § 152 para. 2 StPO and an instruction, he is obliged to take counter-measures against the instruction, maybe to submit the conflicting situation within the system to the Prosecutor General or to

[36] This organisational scheme also underlies the structure of the Prosecutor General's Offices.

[37] § 144 GVG.

[38] § 146 GVG; cf. also Art. 89 of the Bavarian Constitution of 2 December 1946 (GVBl. 1946, p. 355), which expressly states that the public prosecutor's office is bound by instructions.

[39] § 147 no. 3 GVG.

[40] Expressly so characterised by § 146 GVG.

[41] Cf. further references with B. Schmitt, cit., GVG § 146 margin. 1; H. Mayer, in C. Barthe, J. Gericke (eds.), *Karlsruher Kommentar zur Strafprozessordnung (KK-StPO)*, 9. Aufl. 2023, § 146 margin. 2.

[42] B. Schmitt, cit., footnote 32, GVG § 146 margin. 3 et seqq.; H. Mayer, cit., § 146 margin. 5 with further references.

[43] BVerfG, judgement of 17 March 1959 = BVerfGE 9, 223 (228): The instruction is only admissible if it complies with justice-related purposes.

[44] Cf. the general investigative power of the public prosecutor's office under § 161 StPO.

the Ministry of Justice[45]. The details of conflict resolution are disputed[46], but in the end the person instructed bears the risk of any disobedience. Since an instruction regularly lacks the external effect pursuant to § 35 of the Administrative Procedure Act, it cannot be challenged before the administrative courts[47]. Procedural individual instructions are also not to be qualified as measures of official supervision without further ado, so that a review by the Prosecutors' Service Courts is also not permissible.

The hierarchical organisation of the public prosecutor's office implies that its respective head distributes the business among his subordinate prosecutors. This is done at the end of each business year for the upcoming business year through means of a generally abstract business distribution plan, for which there is no legal regulation[48] and which can be changed in the course of a business year if necessary. The public prosecutors subordinate to the head of the authority shall not be involved in the preparation of this business allocation plan and need not be heard on it prior to its issuance[49]. The head of the authority may transfer individual public prosecutors within his office in other positions (after hearing them and but without their consent), entrust them with additional tasks or withdraw proceedings from them and assign them to another public prosecutor (§ 145 para. 1 GVG). In the case of conflict between the principle of legality and instructions, this withdrawal is one of the thinkable solutions. The withdrawal of case handling is not a disciplinary measure, so that the protective regulations under disciplinary law do not apply in this respect. However, this disciplinary measure can be reviewed by the Service Court for Prosecutors - at least if it is arbitrarily handled by the head of the authority[50].

2.4

The Prosecutor General has the same authority of "supervision" according to § 145 para. 1 GVG and vis-à-vis the public prosecutors subordinate to his authority[51]. He may, at his own discretion, instruct another public prosecutor's office to conduct a certain investigation in place of the competent one (substitution). However, he can also take over these

[45] Cf. also the general right of appeal under civil service law pursuant to Art. 7 BayBG (= Bayerisches Beamtengesetz [= Bavarian Civil Service Act]); H. Mayer, cit., § 146 margin. 11.

[46] B. Schmitt, cit., GVG § 146 margin. 6 et seq.

[47] B. Schmitt, cit., GVG § 146 margin. 7.

[48] In difference to the courts §§ 21a et seqq. GVG.

[49] In the courts, a democratically elected presidium consisting of judges and the president (§ 21b GVG) decides on the allocation of business and any amendments thereto (cf. § 21e GVG) (cf. on this Bertram Schmitt, footnote 32, § 21e, margins. 1 and 13 et seq.). Within a collegiate panel, the judges assigned to it decide on the internal distribution of business (§ 21f GVG).

[50] § 78 para. 1 DRiG (Deutsches Richtergesetz [= German Act on Judges]) in conjunction with Art. 2 para. 1; para. 2 lit. e BayRiStG (Bayerisches Richter- und Staatsanwaltsgesetz [Bavarian Act on Judges and Public Prosecutors]).

[51] The GBA also has the rights of devolution and substitution, but only vis-à-vis the federal prosecutors of his own office (Bertram Schmitt, footnote 32, GVG § 145 margin. 4).

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investigations and have them carried out by a senior public prosecutor of his office (devolution)[52]. However, he should not intervene in the structure of the individual public prosecutor's office bypassing the head of the authority. If he wishes to do so, the only legal possibility is usually to instruct the Chief Prosecutor to take certain measures. In all other respects, the Prosecutor General is responsible for the supervision of the subordinate public prosecution offices[53].

2.5

The top of the prosecutorial hierarchy is the Ministry of Justice, which is responsible for supervising[54] the prosecutors of the Land[55]. The authority to issue so-called external instructions, which is derived from this and used by the Ministers of Justice, has been criticised in the literature for decades[56] because its exercise potentially entails the danger of influencing individual cases. The criticism has so far fallen flat, even when the European Court of Justice (ECJ), in connection with the unclear conditions for exercising the right to issue external instructions in the context of the European Arrest Warrant, denied the German prosecutor's office the status of an "issuing judicial authority"[57]. According to Article 6 para. 1 of the Framework Decision 2002/584[58], European arrest warrants are to be issued by judicial authorities. In its judgement, the European Court of Justice (ECJ) sets clear requirements for these judicial authorities: "The issuing judicial authority within the meaning of Article 6 para.1 of Framework Decision 2002/584 must therefore be in a position to perform this task in an objective manner, taking into account all relevant factors and without running the risk of its decision-making power being subject to external orders or instructions, in particular from the executive (...)"[59]. . In the view of the ECJ, the German

[52] B. Schmitt, cit., GVG § 145 margin. 1.

[53] § 147 no. 3 GVG.

[54] On the term B. Schmitt, cit., GVG § 147 margin. 1.

[55] § 147 no. 2 GVG.

[56] As early as the 1960s, Claus Roxin demanded that the assessment of legal cases as a process of knowledge should not be subject to command and obedience and that the public prosecutor should not be a "mouthpiece of foreign opinions" (C. Roxin, *Strafverfahrensrecht*, 9th ed., München 1969, 385 ff.) Cf. on early critics also the references in H. Mayer, cit., margins 2. Cf. also the references in B. Schmitt, cit., GVG § 146 margin. 1; see also the references above). As early as 1976, the draft bill for an Act on the Law of the Public Prosecutor's Office (StaatsanwaltschaftÄG), which was never submitted to parliament, provided for a written form requirement and a restriction of the right to issue instructions during the main hearing.

[57] ECJ, judgement of 27 May 2019 – ECLI:EU:C:2019:456.

[58] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ No. L 190 of 18/07/2002, p. 1 - 20); enforcement in national law by Act of 20 July 2006 (Act implementing the Framework Decision on the European arrest warrant and the surrender procedures between Member States (European Arrest Warrant Act - EuHbG, BGBl. 2006 I, p. 1721) with amendments to the Act on International Mutual Assistance in Criminal Matters (IRG).

[59] ECJ, judgement of 27 May 2019 – ECLI:EU:C:2019:456, margin. 73.

public prosecutor's office does not fulfil these criteria due to the external right of the Minister of Justice to issue instructions, which is enshrined in §§ 145, 146, 147 GVG. In particular, neither general references to the principle of legality[60] nor the civil servant status of public prosecutors existing in individual Länder[61] or Land-specific coalition agreements on the (temporary) non-exercise of the right to issue instructions[62] had a positive effect on the result of the independence review. Likewise, the fact that in the event of ministerial influence, the person concerned can assert legal remedies against the decision before the competent German courts does not have any effect[63]. As a result of the ruling, German public prosecutors were no longer able to issue European arrest warrants on their own. The ruling was not the first time that Germany had to face international criticism of the organisation of its public prosecutor's office in addition to domestic discussions.

The Parliamentary Assembly of the Council of Europe[64] had already included Germany 10 years earlier on the list of members in which the possibility of political influence on the prosecution system existed and called on Germany to put an end to the possibility of individual case referrals[65]. In 2014, the Council of Europe's Group of States against Corruption (GRECO) recommended that the abolition of the right to issue instructions be considered[66].

At this point, the structure of the right to issue instructions should be discussed in more detail. A distinction can be made between the general external right to issue instructions and the external right to issue instructions on a case-by-case basis. In principle, the external right to issue instructions is initially directed at the Prosecutor General. By exercising this right, he is instructed to issue certain orders to the public prosecutor's offices subordinate to his authority. Thus, an external instruction to the Prosecutor General leads to the Prosecutor General converting the external instruction into an internal instruction and passing it on in the hierarchy. The instruction can be of a general nature, but also case-specific. The general right to issue instructions enables the Minister of Justice or the Ministry of Justice to organise the operation of the service by issuing directives[67] or orders[68] and also to issue other general instructions or instructions relating to groups of cases, by means of which, for example, an uniform prosecution

[60] See point V.

[61] ECJ, judgement of 27 May 2019 – ECLI:EU:C:2019:456, margins. 79, 80-83.

[62] ECJ, judgment of 27 May 2019 - ECLI:EU:C:2019:456, margins. 79, 80-83; cf. "Preserving what has been achieved, enabling new things, connecting people: Together for Saxony", Coalition Agreement 2019 to 2024, p. 107.

[63] ECJ, judgement of 27 May 2019 – ECLI:EU:C:2019:456, margins. 85-87.

[64] Parliamentary Assembly of the Council of Europe/Assemblée parlementaire de L' Conseil de l'Europe (PACE).

[65] PACE, Resolution 1685 (2009), p. 4.

[66] Group of States against Corruption/Group d' États contre la corruption (GRECO), Evaluation Report Germany of 10 October 2014, p. 62.

[67] See, for example, the Guidelines for Criminal Proceedings and Fines (RiStBV).

[68] See, for example, the Order on Communications in Criminal Matters (MiStra).

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can be promoted. The general external right to issue (general) instructions is hardly subject to criticism due to its low susceptibility to abuse.

With the individual case-related right to issue external instructions, the Office of the Prosecutor General is instructed to demand that the Office of the Prosecutor deals with a specific matter. The right to issue instructions on a case-by-case basis thus makes it possible to exert a concrete influence on proceedings and on all decisions of the public prosecutor's office at all stages of the proceedings[69]. Such an influence can be exerted not only by a formal letter, but also by suggestions, the formulation of expectations or even proactively by the public prosecutor out of "anticipatory obedience"[70]. The instructions are documented in case files or report folders, as they are internal procedures that do not have to be documented in the court file[71,72]. The public prosecutor's draft files[73] and report books[74] are therefore not subject to the right of the defence lawyer or the unrepresented accused to inspect files (§ 147 StPO)[75]. The exercise of the right to issue instructions is therefore not transparent to the public[76]. In practice, moreover, internal staff meetings or "requests" from superiors are the most subtle and dangerous, because even more opaque, ways of exerting influence[77].

The external right to issue instructions is out of date and dates from a time when the (criminal) courts became independent in the 19th century and the Minister of Justice lost his ability to influence them[78]. Today, it is

[69] H. Mayer, cit., margin. 4.

[70] BT-Drs. 19/13516, p. 5. (Bundestags-Drucksache = Printed materials of the German Bundestag).

[71] W. Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2003, 387-391, 387.

[72] D. Inhofer, in J. Graf (ed.), *BeckOK GVG*, 18th ed., München, 2023, § 146 margin. 12; J. Wessing, in J. Graf (ed.), *BeckOKStPO*, 46th ed., München, 2023, § 147 margin. 20.

[73] BGH, decision of 27 April 2001 – 3 StR 112/01 = NStZ (Neue Zeitschrift für Strafrecht) 2001, 551 (552); S. Kämpfer, D. Travers, in H. Kudlich (ed.), *Münchener Kommentar zur Strafprozessordnung (MüKoStPO)*, 2nd ed., vol. 1, München, 2023, § 147 margin. 17.

[74] Likewise, recourse to the Freedom of Information Act (IFG) does not allow for the right to inspect instruction booklets, cf. VG (administration court) Greifswald, judgement of 4 May 2010 - 4 A 2059/07; OVG (higher administration court) Mecklenburg-Western Pomerania, judgement of 24 April 2013 - 1 L 140/10 = NVwZ (= Neue Zeitschrift für Verwaltungsrecht) 2013, 1503 (1504); VG Karlsruhe, judgement of 16 June 2016 - 3 K 4229/15, Juris margin. no. 23.

[75] This is also expressly the case with No. 186 para. 3 sentence 1 RiStBV (Guidelines for Criminal Proceedings and Proceedings for Imposing Fines - RiStBV).

[76] In the affirmative on the question of whether a public prosecutor is liable to prosecution under § 353b StGB if he publishes contents from draft files, W. Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, cit., as well as J. Thomas, *Die deutsche Staatsanwaltschaft – „objektivste Behörde der Welt" oder doch nur ein Handlanger der Politik?*, cit., 86 and T. Harden, *Schriftliche Stellungnahme zur Sachverständigenanhörung im Ausschuss für Justiz und Verbraucherschutz des Deutschen Bundetages am 6. Mai 2020*, 34, https://kripoz.de/wp-content/uploads/2020/05/stellungnahme-harden-unabh-sta.pdf.

[77] W. Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, cit., 387.

[78] In the 19th century, the so-called right of confirmation of the German monarchs still represented a possibility inherited from absolutism to exert a lasting influence on

defended with the constitutional argument that this is the only way the Minister of Justice can fulfil his political responsibility towards parliament and, moreover, ensure uniform enforcement of criminal law. The external right to issue instructions is in fact linked to extensive reporting obligations of the public prosecutor's office, also and especially in individual cases. Even in the absence of instructions, this can influence the work of the individual prosecutor's offices and individual proceedings. These reporting obligations are regulated by respective Land law. In Bavaria[79], the public prosecutor's offices are to report to the Ministry of Justice in all criminal cases which, because of the "personality or position of a party involved" (BeStra No. 1), "occupy or are likely to occupy wider circles". This applies in particular to investigations against members of parliament and private prosecutions in which participants have a special "personality or position" (BeStra nos. 2, 3). The Saxon Statute of Organisation[80] states that the Prosecutor General "shall report as early as possible on all important occurrences, significant proceedings and on such matters which may give rise to special instructions", whereby the Prosecutor General shall in turn report to the Minister of Justice on all those proceedings which have aroused or will arouse public interest (No. 9 Saxon Statute of Organisation). This reporting obligation includes not only reporting on past or present proceedings, but also the preparation of reports on investigative measures planned for the future (so-called "reports of intent"[81]). Finally, it cannot be ruled out that the hierarchical structure of the public prosecutor's offices influences the actions and decisions of the individual public prosecutors with regard to promotion opportunities, if facts are to be dealt with that could trigger a reporting duty[82]. The appeal to parliamentary ministerial responsibility is not convincing. The Minister of Justice is also responsible for the decisions of the independent courts vis-à-vis the parliament and, as a rule, withdraws from them because he is forbidden to exert any influence, or even to criticise individual cases. If the minister respected an independent public prosecutor's office, the situation would not be significantly different, would be more in line with the separation of powers and would ultimately indirectly support the independence of courts. It may be that the ministers of justice exercise

criminal justice. The head of state, as "supreme judge", took the right to change guilty verdicts, to aggravate or mitigate sentences imposed. Without his approval, the execution of sentences could not begin; in particular, death sentences could not be carried out.

[79] Berichtspflichten in Strafsachen (BeStra = Reporting Obligations on Criminal Matters), Bekanntmachung des Bayerischen Staatsministeriums der Justiz über die Berichtspflichten in Strafsachen betreffend of 7 December 2005 (JMBl. [Justizministerialblatt = Official Gazette of the Ministry of Justice] 2006 p. 2).

[80] Organisationsstatut der Staatsanwaltschaften (Saxonian Statute on the Organisation of Prosecutor's Offices) of 12 January 1998 (SächsJMBl. [Saxonian Justice Ministerial Gazette] 1998 p. 18), last amended by Administrative Degree of 8 September 2020 (SächsJMBl. 2020 p. 87) and last promulgated by Administrative Degree of 9 December 2021 (SächsABl. [Saxonian Official Administrative Gazette] 2021 SDr. p. 199).

[81] G.W. Mackenroth, H. Teetzmann, *Mehr Selbstverwaltung der Justiz: Markenzeichen zukunftsfähiger Rechtsstaaten*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2002, 337-343, 342; W. Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, cit., 388.

[82] W. Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, cit., 388.

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the external power with extreme restraint. However, its sheer existence still contains the potential for political influence. The mere fact that in criminal proceedings a public prosecutor has to report "upwards" on the facts of a particular individual case can trigger unobjective inhibitions[83].

In 2019, in response to the ruling of the ECJ, the FDP (Freie Demokratische Partei = Free Democratic Party) parliamentary group presented a bill that intended to completely abolish the right to issue instructions in individual cases, but retained the general right to issue directives[84]. Only a short time later, the parliamentary group Bündnis 90/DIE GRÜNEN (Alliance 90/The Greens), in reaction to the aforementioned ruling of the ECJ, requested that the federal government draft a law to make the exercise of the right to issue instructions in individual cases more transparent, to abolish the political status of the Federal Prosecutor General[85] and to transfer the responsibility for issuing European arrest warrants to the courts[86]. The discussion initially remained inconclusive. When the ECJ reaffirmed its legal opinion in 2020 by excluding the Dutch Public Prosecutor's Office, which is also bound by instructions, from the circle of "executing judicial authorities" within the meaning of § 6 para. 2 of the Framework Decision 2002/584[87], there was still no legal change in Germany. After this ruling, additional doubts arose as to whether the German prosecution authorities were still allowed to execute the European arrest warrants at all (at least in the simplified procedure, in which no court involvement was required). Finally, a draft law from Thuringia demanded a restriction of the individual case instruction right of the Länder justice administration to cases in which the first officer of the public prosecutor's office did not intervene in an unlawful or incorrect case processing[88]. In 2021, the Federal Ministry of Justice and Consumer Protection then published a ministerial draft bill[89] that provided for a restriction of the right to issue instructions in individual cases only in cases involving European arrest warrants and further formulated the condition that in future the exercise of the right to issue instructions would have to be in writing and with supporting reasons. The criticism of this half-hearted attempt to achieve conformity with European law writes itself. These plans have now been shelved. As expected, the German legislature has reacted in

[83] On the reporting duty B. Schmitt, cit., GVG § 147 margin. 3.

[84] BT-Drs. 19/11095, S. 5.

[85] On that see above II. 5.

[86] BT-Drs. 19/13516, p. 2 et seqq.

[87] ECJ, judgement of 24 November 2020 – ECLI:EU:C:2020:953.

[88] BR-Drs. (Bundesrats-Drucksache = Printed matters of the Federal Council) 644/20, p. 2.

[89] Draft Bill on Strengthening the Independence of Public Prosecutors' Offices and on Criminal Law Cooperation with the Member States of the European Union, available at https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Unabhaengigkeit_Staatsanwaltschaftatsanwaltschaften.pdf;jsessionid=B261738A3CBFE6E392AC50DB86B948B5.2_cid334?__blob=publicationFile&v=1.

such a way that judges now issue European arrest warrants[90]. Compared to the rest of Europe, Germany's adherence to the principle of dependency on instructions is becoming increasingly isolated. In recent years, a large number of EU Member States have taken or are preparing legislative steps to strengthen the independence of public prosecutors' offices[91].

2.6

In this context, it is important to note that the Federal Prosecutor General (GBA) is classified as a "political official" in terms of his civil service status[92]. He is subject to the supervision of the Federal Ministry of Justice and Consumer Protection (BMJV), just as any other state public prosecutor's office is subject to its supervising authorities. The Federal Prosecutor General has no right of instruction of its own vis-à-vis the Länder public prosecutors' offices[93]. An additional characteristic of "political civil servant", however, is that they must have a relationship of continuing (political) confidence with their superior, the BMJV[94]. If this relationship of trust is disturbed, the BMJV has the option of replacing the Federal Prosecutor General and having him or her placed in temporary retirement by the Federal President. This has not happened often, but it has happened in the past[95]. The reason for such a measure can be found in the conduct of the Federal Prosecutor General, but also the handling of an individual case or an individual appearance of the Federal Prosecutor General in public. In the meantime, the Länder have reacted to the criticism against the status of their Prosecutors General as "political officials"[96] and have integrated them into

[90] B. Schmitt, cit., GVG § 148 margin. 4 with further references; for the influences of European Law and for further efforts on reforming the system: H. Mayer, cit., § 146 margin. 2 ff. with further references.

[91] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Rule of Law Report 2022 - The State of the Rule of Law in the European Union, BR-Drs. (Bundesrats-Drucksache = Printed Matters of the Federal Council) 335/22, p. 10 et seqq.

[92] His civil servant status and that of the federal prosecutors subordinate to him clearly follows from § 148 GVG. Unlike the federal judges, he is not elected, but appointed by the Federal President on the proposal of the BMJV with the consent of the Federal Council (§ 149 GVG).

[93] D. Inhofer, cit., § 146 margin. 23; G. Hermann, in M. Heghmanns, G. Hermann (eds.), *Das Arbeitsgebiet des Staatsanwalts*, 6th ed., Köln, 2022, Kapitel A margin. 27.

[94] See § 30 BStG. Also see: A. Steinbach, *Der politische Beamte als verfassungsrechtliches Problem*, in *Verwaltungsarchiv*, vol. 109, 2018, 2-22; J.F. Lindner, *Der politische Beamte als Systemfehler*, in *Zeitschrift für Beamtenrecht*, 2011, 150-161.

[95] The following Federal Prosecutors General were granted temporary retirement by the Federal President (§ 54 para. 1 no. 5 of the Federal Civil Service Act [BBG]): Wolfgang Fränkel on 24 July 1962, Alexander von Stahl on 27 June 1993 and Harald Range on 26 August 2015.

[96] Bavaria had never introduced the "political civil servant" due to fundamental concerns. In view of the years of National Socialist injustice, but also keeping in mind the traditional principles of the civil service, the Free State of Bavaria dispensed with this special feature of civil service law and has managed without this category without any problems since its constitution came into force in 2 December 1946.

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the ordinary civil service system[97]. The criticism against the "political Federal Prosecutor General", which was also made clear in the above-mentioned draft laws, is directed at the fact that its replacement and transfer into temporary retirement represents the possibility of the most lasting influence. The individual Landes prosecutor as well as members of the GBA office (Bundesanwalt or Federal Prosecutors), on the other hand, can only be removed from office after formal judicial proceedings if he is guilty of (serious) disciplinary offences or the commission of criminal offences.

3. Special Public Prosecutor's Offices and Special Divisions in Them

§§ 74a et seqq. GVG provide for the establishment of special criminal chambers (State Protection Chamber, Chamber for Youth Protection Cases and Juvenile Justice, Economic Criminal Chamber). The public prosecutors' offices have responded to these requirements for the organisation of Regional Courts by setting up corresponding departments or units. Further specialisations and associated (local) concentrations can be declared by the Länder governments through ordinances for their public prosecutor's offices[98]. It is not possible to show the specialisations and concentrations for all Länder. However, since a corresponding need has arisen, the Bavarian State Government for example has established an anti-terrorism centre at the Munich Prosecutor General's Office and a centre for cyber-crime and for the prosecution of child pornography at the Bamberg Prosecutor General's Office with Landes-wide jurisdiction (cf. § 143 para. 4 GVG). The public prosecutor's office in Kempten im Allgäu has nationwide jurisdiction for the prosecution of all offences committed by soldiers on foreign missions. Concentrations of jurisdiction are Land matters and can vary from Land to Land. If these concentrations extend across Länder borders, corresponding agreements between the Landes judicial administrations concerned are required.

4. Management of Personnel and the Public Prosecutor's Office

Whoever has qualified as a judge can be appointed as a public prosecutor (§ 122 (1) in conjunction with §§ 5 to 7 of the German Judges Act [DRiG][99]). These are all those who have successfully completed the Second State Examination in Law (§ 5 DRiG). Since the ministries of justice are the hiring authorities, applications are to be addressed to them. In Bavaria, vacancies are not explicitly advertised[100]; however, every successful candidate knows that there are always vacancies in the Bavarian judiciary or

[97] § 30 BStG (Federal Act on the Civil Servants' Status) leaves it up to the Landes legislature which civil servants are to be classified as "political civil servants". Bavaria has not classified any civil servant as such.

[98] § 143 GVG.

[99] In the version published on 19 April 1972 (BGBl. 1972 I, p. 713) last amended by Act of 25 June 2021 (BGBl. 2021 I, p. 2154).

[100] Cf. for the tendering requirement Art. 20 of the Bavarian Civil Service Act (BayBG) of 29 July 2008 (GVBl. 2008, p. 500) - last amended by Act of 23 December 2021 (GVBl. 2021, p. 663).

prosecutor's offices and applies if he or she meets the other legal requirements (German nationality, no previous convictions, fit for service[101]). The applicant does not have to fulfil any further (legal) requirements. However, the justice administration determines how positions are to be filled and what examination grade an applicant must have achieved (so-called "Staatsnote" = "state grade") in order to be considered. If the applicant fulfils the legal requirements and has achieved the required grade in the Second Legal Examination (Staatsnote)[102], he or she is accepted by the Ministry of Justice as a probationary civil servant, and then appointed[103]. There are no committees to participate in this decision. The professional associations of public prosecutors and judges have been calling for a High Judicial Council for years. So far, however, politicians have not allowed themselves to become comfortable with this, even though Germany is thus one of the taillights of a development that began decades ago elsewhere in Europe.

The probationary period for a newly appointed public prosecutor (or judge) is at least six months up to a maximum of five years, but is regularly shortened to three years (or even less in individual cases)[104]. Decisive in this context, and in the later professional life of the public prosecutor in the case of any promotions, is the official evaluation by the Prosecutor General as the authority supervising the service[105]. The service appraisals are based on a comprehensive catalogue of criteria drawn up by the state justice administration and oriented towards § 49 Bundeslaufbahnverordnung (= Federal Career Ordinance)[106]. If the Prosecutor General comes to the conclusion that there are no reasons why the prosecutor on probation should not be appointed as a permanent civil servant, the Minister of Justice appoints the person concerned as a permanent public prosecutor without any further ado. The service appraisals, which take place every three years[107], accompany the public prosecutor throughout his entire service life - regardless of whether he applies for a promotion or not. They always end with a proposal for promotion, from which the appraisee can see whether the Prosecutor General will propose him for promotion. The assessment is based on a catalogue of criteria, which includes legal and linguistic skills, a

[101] § 7 of the (Federal) Law on the Regulation of the Status of Civil Servants in the Länder (Civil Servants Status Act - BeamtStG) of 17 June 2008 (BGBl. 2008 I, p. 1010) - last amended by Act of 28 June 2021 (BGBl. 2021 I, p. 2250).

[102] Criteria relevant and prohibited for appointment § 9 BeamtStG.

[103] § 4 para. 3 lit. a BeamtStAG.

[104] § 10 BeamtStG; Art. 25 BayBG.

[105] For prosecutors on probation: Art. 5 para. 3 Bayerisches Richter- und Staatsanwaltsgesetz (BayRiStAG) (= Bavarian Act on Judges and Prosecutors) of 22 March 2018 (GVBl. 2018, p. 118) – last amended by Act of 23 December 2021 (GVBl. 2021, S. 654).

[106] Ordinance on the Careers of Federal Officials of 12 February 2009 (BGBl. 2009 I, S. 284) – last amended by Ordinance of 16 August 2021 (BGBl. 2021 I, S. 3582).

[107] Art. 56 para. 1, 1st sentence (Bayerisches) Gesetz über die Leistungslaufbahn und die Fachlaufbahnen der bayerischen Beamten und Beamtinnen (Leistungslaufbahngesetz [LlbG] - Law on the Merits and Special Career Paths of Bavarian Civil Servants) of 5 August 2010 (GVBl. 2010, p. 410, 571) – last amended by Act of 23 December 2021 (GVBl. 2021, p. 663).

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possible scientific working method, the ability to work under pressure (especially against the background of possible case backlogs), appearance and interaction with the parties to the proceedings or the Police, collegiality within the public prosecutor's office, willingness to undergo further training or to familiarise oneself with new subject areas[108]. These are examples. Assessments always include a mark (from one to 16 points[109]). The chances of success towards an advertised promotion position are based on the application proposal and the marks achieved[110]. The Public Prosecutor General collects incoming applications, from which he compiles a reasoned proposal for promotion, which includes a ranking according to the prospects of success. The Ministry of Justice submits this promotion proposal with its own opinion to the Principle Public Prosecutor's Council (Hauptstaatsanwaltsrat)[111], an advisory body democratically elected by all public prosecutors in the country[112], but not comparable to a High Council of Public Prosecutors. The competences of the German council are - unlike the High Councils in third countries[113] - essentially limited to a right to be heard in promotion matters. It does not have disciplinary powers, for example. Nor can it change the evaluation criteria[114]. The Council comments on the opinion of the Ministry of Justice in an individual promotion case[115] and, if it differs from the proposal, there is an agreement procedure[116], at the end of which, however, the Minister of Justice has the final decision. Unsuccessful candidates are informed[117] and can defend themselves against the selection by means of an objection, and if this is unsuccessful, by means of a competitor's action before the administrative court. As long as the administrative court proceedings are not concluded, the appointment is not made, which can lead to vacancies lasting for months. Moreover, the assessments are also subject to review by the administrative court. Despite all its (institutional) weaknesses, the German system of appraisal is an

[108] Art. 58 para. 3, para. 4 BayLlbG.

[109] Art. 59 para. 1 1st sentence BayLlbG.

[110] Art. 59 para. 2 BayLlbG.

[111] Art. 17 para. 1 no. 2, para. 2 2nd sentence; 35 para. 3 BayRiStAG.

[112] Art. 36 BayRiStAG.

[113] G. Salvi, *Selbstverwaltung und Verfassungsrecht: Die italienische Erfahrung*, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)*, vol. 91, 2008, 367-379, 368 ff.; Id., *Das italienische System „offener Rollen". Beurteilungen im Rahmen autonomer Laufbahnstrukturen einer selbstverwalteten Justiz*, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)*, vol. 91, 2008, 423-433, 423 ff.; F. Wittreck, *Die Verwaltung der Dritten Gewalt*, Tübingen, 2006; A. Martin, *Le Conseil supérieur de la magistrature et l'indépendence des juges*, in *RDP*, 1997, 741-781, 775 ff.; C. Strecker, *Selbstverwaltung der Justiz in Spanien*, in *Betrifft Justiz*, 1998, 346-348, 346 ff.; W.J.M. Voermans, P. Albers, *Councils for the Judiciary in EU Countries*, 1999, https://www.encj.eu/images/stories/pdf/judiciaries/voermansalberscouncilsfortheju diciayintheeu.pdf; S. Aage, *Richterliche Selbstverwaltung in Dänemark*, in *DRiZ*, 2001, 436-450, 436.

[114] M. Jeschke, *Modelle einer dritten selbstverwalteten Gewalt in Europa. Vortrag vom 1. Juli 2010 an der Justizakademie Nordrhein-Westfalen*, in *KritV*, vol. 93, 2010, 233-255.

[115] Art. 46 para. 1, para. 2 BayRiStAG.

[116] Art. 46 para. 3 BayRiStAG.

[117] Art. 46 para. 5 BayRiStAG.

objective qualification procedure, which, however, is not cast in ore, but largely excludes unfair or improper influences.

Transfers from one office to another of equal value are administrative acts which require the consent of the person concerned. They can be challenged in court[118].

The Minister of Justice has disciplinary power. He usually commissions the competent Prosecutor General to conduct the necessary preliminary investigations, who hears the disciplinary accused and takes the necessary evidence. After the final hearing, the Prosecutor General submits a reasoned proposal. If the proposal is to continue the disciplinary proceedings, the Ministry of Justice files a disciplinary action on behalf of the Land, which is heard and decided by the Service Court. Until the disciplinary decision has become final, only provisional measures are permissible[119] to a limited extent, albeit measures taken by the Service Court, such as prohibiting the accused from conducting official business[120], usually with a reduction in his or her remuneration. The prerequisite is usually that a disciplinary action has been brought in the main trial before the Service Court.

5. Legality versus Opportunity

Criminal prosecution in Germany follows the principle of legality according to § 152 para. 2 of StPO. Whether there are factual circumstances for the existence of a criminal offence is assessed by the public prosecutor on his own responsibility and without any discretion. If they exist, the investigation is to be started (§ 160 para. 1 StPO). There is no catalogue of criteria for this. Nor is it determined by law how the public prosecutor acquires the necessary knowledge of a criminal offence having been committed. Even a public prosecutor's own private knowledge can or must justify the initiation of preliminary proceedings. However, the principle of legality is broken by a few opportunity rules[121]. The most important breaches in practice are the following:

a) In the case of petty offences, in particular violations of personal honour by insult and defamation, breach of domestic peace, etc., the public prosecutor may refer the injured person to private prosecution if there is no public interest in prosecution. In such a case, it is up to the injured party to seek satisfaction by bringing a private action to the criminal court[122].

b) In the case of minor culpability and mere misdemeanours (not felonies [= offences punishable by a minimum of one year imprisonment[123]]), the public prosecutor may refrain from prosecution (in

[118] Art. 53 para. 1 no. 2 BayRiStAG to the Service Court, which has been established with jurisdiction pursuant to Art. 52 BayRiStAG.

[119] Art. 59 Abs. 1 BayRiStAG.

[120] Art. 60 BayRiStAG.

[121] For an overview and comparative law, T. Weigend, *Anklagepflicht und Ermessen. Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht*, Baden-Baden, 1978.

[122] §§ 374 et seqq. StPO: Procedure on private actions in criminal matters.

[123] § 12 Abs. 1 StGB.

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part only with the consent of the court competent to open the main proceedings) (§ 153 para. 1 StPO). After the public prosecution has been filed, the court may refrain from further prosecution under the same conditions if the public prosecutor and the accused agree.

c) In order to eliminate the public interest in the prosecution of offences and in the absence of culpability, the public prosecutor may refrain from bringing charges and instead impose conditions and instructions on the accused. Such conditions include, in particular, reparation payments, payments to charitable institutions, other charitable services or maintenance payments (§ 153a para. 1 StPO). With the consent of the public prosecutor and the accused, the court to which the indictment is brought may also provisionally discontinue the proceedings (§ 153a para. 2 StPO). If conditions and orders are fulfilled, the proceedings are formally discontinued, and the underlying offence can no longer be prosecuted as a misdemeanour (§ 153a para. 1, sentence 5 StPO [consumption of criminal action]).

d) Furthermore, according to §§ 154, 154a para. 1 StPO, prosecution can be waived without the consent of the accused at any stage of the proceedings (up to the final appellate instance) if, in addition to a further penalty due to other proceedings, the penalty in the proceedings in question is not of considerable weight.

For the procedural constellations described under b) to d) there is not any catalogue of criteria. Although the wording of the law does not reflect this aspect, the opportunity decisions according to c) and d) are also decisions of procedural economy, which is particularly relevant in white-collar criminal proceedings. Economic criminal proceedings are large-scale proceedings and require human resources on all sides, which may be just as urgently needed elsewhere. Public opinion does not always follow when in white-collar criminal proceedings further prosecution is refrained from after payment of fines in the millions (§ 153a StPO as a possibility for the wealthy to buy their way out of punishment). Without the provisions of §§ 153a, 154 StPO, however, the public prosecutors' offices for economic offences and the criminal chambers for economic offences of the regional courts would no longer be able to function. For the accused, who often continue to participate in business life in prominent positions, the provisions open up prospects of being able to devote themselves to their companies again and, in particular, to get out of the media spotlight[124]. On the other hand, the possibilities for the public prosecutor's office to discontinue proceedings against co-accused parties in individual cases and to use them as witnesses in proceedings against third parties. The discontinuation according to opportunity regulations can also be made dependent on such cooperation in the sense of a so-called "leniency programme". There is currently no legal obligation to make such procedures transparent in the other proceedings.

How to deal with instructions from the Prosecutor General or the Minister of Justice in individual cases has been discussed above. In this context, however, it is the matter of opportunity through discretion. However, it is precisely discretionary decisions that break through the principle of legality that are often the target of instructions from superiors

[124] Cf. H. Mayer, cit., § 153a margins. 1 ff. with further references.

or are ideally suited for this purpose. A slightly shifted perspective can completely change the view of the bases of discretion. Often, aspects play a role in this shift that are not necessarily rooted in the individual case. Here, there is a systemic possibility of influence that cannot be eliminated under the conditions of the currently applicable system. If a discretionary decision is made by superior prosecutorial authorities, the only solution for a defendant, if the current conditions continue to apply, is for the instructions to be made public and thus transparent. The secrecy surrounding confidential report files must come to an end.

6. Criminal Reports and (Formal) Prosecution Request

As a rule, investigative proceedings are initiated by filing a criminal report[125], which, according to § 158 para. 1, 1st sentence StPO, can be submitted orally or in writing to the public prosecutor's office, the Police or the district courts. The person filing the report is anyone who – in whatever way – has become aware of a criminal offence having been committed and communicates this knowledge. The filing of a report must be recorded in writing (§ 158 para. 1, 2nd sentence StPO). Only in exceptional cases and in those expressly regulated by law does the initiation of criminal proceedings require a criminal complaint or a formal authorization of the offence victim. Details of such a criminal complaint or authorisation where the law requires it can be found in the provisions of §§ 77 to 77e StGB (entitlement to file a complaint, for example also of the superior, deadline for filing a complaint, withdrawal of the complaint and its consequences). In contrast to the simple criminal report, the legally required criminal complaint is a prerequisite for proceedings[126] and is usually found in offences that affect the personal sphere of a person's life (personal honour [§ 194 StGB], [simple, intentional] bodily harm [§ 230 para. 1 StGB], family offences of a pecuniary nature [§ 247 StGB for theft and embezzlement; § 263, para. 4 StGB for fraud; § 266, para. 2 StGB for breach of trust]). Their background is that, because they concern a personal sphere to be respected, the public prosecutor should not interfere. The StGB combines some of these offences with the possibility for the public prosecutor to affirm the special public interest in the prosecution and thus to take over the prosecution ex officio. In such a case, there is no need for a criminal complaint, but such a complaint would not be harmful either. This is required if the offence not only violates the protected legal sphere, but also has effects beyond it. This influenced the federal legislature in reforming the right to file an application in the case of defamation offences directed against persons in political life[127]. For they are in the public eye and therefore very easily become victims of so-called hate

[125] On the term cf. for all: M. Köhler, in L. Meyer-Goßner, B. Schmitt (eds.), *Strafprozessordnung*, 66th ed., München, 2023, § 158 margin. 1, as well as on the confidentiality of criminal reports and on confidentiality agreements in particular with witnesses from the sphere of Police margins 16 – 17a with further references.

[126] T. Fischer, *Strafgesetzbuch mit Nebengesetzen*, 70th ed., München, 2023, Vorbem. vor § 77 margin. 4.

[127] Act of 30 March 2021 (BGBl. 2021 I, p. 441) – On that T. Fischer, *Strafgesetzbuch mit Nebengesetzen*, cit., § 194 margin. 19a.

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speech[128]. The public interest in prosecution is regularly given, especially in cases of domestic violence. Criminological experience shows that injured persons fear disadvantages if the public prosecutor's office "interferes in the domestic conflict situation" and therefore do not file a criminal complaint. Today, however, society finds it intolerable when family violence goes unpunished and families become a "legal vacuum"[129] (cf. § 230 para. 1 StGB)[130].

If it can be disputed whether a specific individual behaviour is a criminal offence, the question arises as to whether the public prosecutor is bound by the highest court's interpretation of legal concepts. The BGH has ruled that investigating authorities such as the public prosecutor's office should be bound by the supreme court's interpretation at least if otherwise criminal conduct would not be punished[131]. This is justified with the argument that otherwise the interpretation of the law would no longer be in the hands of independent case law[132]. Academia, on the other hand, predominantly rejects binding the public prosecutor's office[133]. If the public prosecutor's office considers a conduct to be unpunishable, it is nevertheless obliged to bring charges, since it has to pay attention to the uniformity of the legal system and can only work towards a change in case law through a conviction. Therefore, as soon as the supreme court consider a certain conduct to be punishable and has confirmed respective convictions, the public prosecutor's office must follow these decisions on the basis of the principle of legality. It is to be seen differently, if the BGH has declared a conduct to be unpunishable or have not yet judged it to be punishable. In this case, the public prosecutor's office must be in a position to give the BGH the chance in terms of reviewing previous case law or to subject new

[128] H. Bedford-Strohm, *Konsequent gegen Hass*, in *Deutsche Richterzeitung (DRiZ)*, 2020, 251; U. Backes, S. Gräfe, A.M. Haase, M. Kreter, M. Logvinov, S. Segelke, *Rechte Hassgewalt in Sachsen*, Göttingen, 2019; B. Schellenberg, *Wenn der Staat versagt. Pfade zum „hausgemachten" Terrorismus*, in K. Rehberg, F. Kunz, T. Schlinzig (eds.), *PEGIDA-Rechtspopulismus zwischen Fremdenangst und „Wende" Enttäuschung?, Analysen im Überblick*, Bielefeld, 2016, 323-336; B. Schellenberg, *Hassrede, Vorurteilskriminalität und rechte Radikalisierung in Deutschland*, in W. Benz (ed.), *Fremdenfeinde und Wutbürger. Verliert die demokratische Gesellschaft ihre Mitte?*, Berlin, 2016, 99-116; O. Sundermeyer, *Rechter Terror in Deutschland. Eine Geschichte der Gewalt*, München, 2012; C. Apostel, *Hate Speech – zur Relevanz und den Folgen eines Massenphänomens*, in *Kriminalpolitische Zeitschrift (KriPoZ)*, 2020, 287-292.

[129] The "legal vacuum" is complex and the penetration of Islamic law into it is a social problem (see K. Bauwens, *Religiöse Paralleljustiz. Zulässigkeit und Grenzen informeller Streitschlichtung und Streitentscheidung unter Muslimen in Deutschland*, Schriften zum öffentlichen Recht, vol. 1332, Berlin, 2016).

[130] Cf. Bernd-Dieter Meier, *Kriminologie*, 6th ed., München, 2021, 223 ff.

[131] BGH, judgement of 23 September 1960 - 3 StR 28/60 = NJW 1960, 2346 (2347): "The prosecuting authority may not disregard fixed supreme court decisions, even if it does disagree with them".

[132] BGH, judgement of 23 September 1960 – 3 StR 28/60 = NJW 1960, 2346 (2348).

[133] W. Wohlers, cit., GVG Vor §§ 141 margin 17 – as a representative for many.

developments to judicial review[134]. In this respect, a binding obligation to a supreme court ruling is not to be recognised.

7. Procedure and Procedural Management

It is important to note at the outset that the prevailing view today does not regard the public prosecutor's office in criminal proceedings as a party to the proceedings (in the substantive sense)[135]. This is a consequence of the objective orientation of the public prosecutor's office, which is committed to truth and justice and, in contrast to parties to the proceedings, does not only want to assert its own interests[136]. Moreover, the position of the public prosecutor's office in the proceedings is sufficiently, but not comprehensively, regulated by law. If for example possible bias of the public prosecutor is at issue, the defence lawyer will consider whether he can or must be excluded from the proceedings for this reason. While the procedure for disqualifying a judge on grounds of bias is regulated in §§ 22, 23 StPO, there are no statutory regulations on the rejection of a biased public prosecutor. Since the legislature deliberately omitted such provisions, there is also no gap in the law that could be filled by analogy[137]. While some Länder have adopted special provisions on the disqualification of the public prosecutor[138], these at least do not apply nationwide[139]. The provisions of such Land statutes, insofar as they are applicable, are also classified in the literature as legally questionable[140]. It is recognised that the head of the respective prosecutor's office can make use of his right of replacement and replace the biased prosecutor by another public prosecutor. However, this replacement by the head of the authority cannot be enforced by procedural means and is also not directly subject to judicial review[141]. If a decision is made with the collaboration of the biased public prosecutor, however, at least an indirect review may be possible in appeal proceedings, provided that the court has not acted to replace the public prosecutor[142]. The prerequisite for this is that the involvement of the biased public prosecutor on the basis

[134] R. Schnabl, cit., GVG Vor §§ 141 ff. margin. 6; H. Brocke, in C. Knauer, H. Kudlich, H. Schneider (eds.), *Münchener Kommentar zur Strafprozessordnung (MüKoStPO)*, 2nd ed., vol. 4, München, 2023, GVG § 150 margin 9.

[135] BGH, judgement of 23 September 1960 – 3 StR 28/60 = NJW 1960, 2346 (2347); W. Wohlers, cit., GVG Vor §§ 141 margin. 15 with further references; R. Schnabl, cit., GVG Vor §§ 141 ff., margin. 5.

[136] W. Wohlers, cit., GVG Vor §§ 141 margin. 15.

[137] BGH, judgement of 25 September 1979 – 1 StR 702/78 = NJW 1980, 845 (846).

[138] As examples § 9 AGGVG Berlin (= Act on the Execution of the [Federal] Act on the Courts Constitutiion); § 11 AGGVG Baden-Württemberg.

[139] W. Wohlers, cit., GVG § 145 margin. 10 ff.; H. Brocke, cit., GVG § 145 margin. 8.

[140] H. Brocke, cit., GVG § 145 margin. 8 with further references.

[141] In particular, there is the possibility of judicial review in proceedings pursuant to § 23 para. 1 EGGVG (Einführungsgesetz zum GVG = Act on the Introduction of the Court Constitutions Act).

[142] H. Mayer, cit., GVG § 145 margin. 8; H. Brocke, cit., GVG § 145 margin. 16 with further references; E. Kempf, J. Oesterle, in E. Müller, R. Schlothauer, C. Knauer, *Münchener Anwaltshandbuch Strafverteidigung*, 3rd ed., München, 2022, § 6 margin. 96.

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of the obligation of the public prosecutor's office to a judicial and fair procedure was erroneous and may have had an effect on the judgement. In legal practice, this can almost never be proven. Apart from that, only a disciplinary complaint to the superior is conceivable[143].

Likewise, there are only a few legal provisions concerning effective procedural management by public prosecutors. The prohibition of retroactivity, which is guaranteed by the constitution and taken over from the simple legal provisions of the 19th century imperial laws, does not belong to such provisions according to German legal understanding. The StPO assumes - tacitly - that once criminal proceedings have begun, they continue uninterruptedly from the time of the indictment until the judgement, unless there are grounds for interruption or suspension. Art. 6 para. 1 ECHR reinforces this view, as this provision also brings into play the idea of immediacy[144]. An accused person has a right to a decision on the criminal charges against him or her within a reasonable (short) time. This entitlement is primarily directed at the criminal courts, but does not affect the public prosecution any less[145], because the judicial prosecution is conditional on the indictment (§ 170 para. 1 StPO) according to § 155 StPO. Section 121 para. 1 StPO takes up the latter idea for pre-trial detention proceedings, in that the provision limits pre-trial detention – regardless of whether it is still a pre-trial investigation by the public prosecutor's office or already a judicial criminal proceeding – to six months, unless the particular difficulty or the particular scope of the investigation or another important reason does not yet permit the judgement and justifies the continuation of pre-trial detention. Jurisprudence and dogmatics infer from this provision that proceedings involving pre-trial detention are to be conducted with particular expediency. Irrespective of the seriousness of the accusation of guilt, the Higher Regional Courts responsible for reviewing custody take this requirement to expedite proceedings very seriously and also revoke arrest warrants for murder if the proceedings have been delayed. They do not accept reasons within the court's administration, such as the overloading of the criminal courts, and demand that the courts and the administration of justice seek remedies. Against this background, it is clear that investigations (and judicial enquiries) may only be interrupted if legal reasons exist. These can be found, for example, in the absence of the accused or in another reason that lies in his person but can be remedied (such as an illness that leads to his inability to be questioned or even to his inability to stand trial).

8. Public Prosecutor's Office and Police

[143] D.M. Krause, in E. Müller, R. Schlothauer, C. Knauer (eds.), *Münchener Anwaltshandbuch Strafverteidigung*, 3rd ed., München, 2022, § 7 margin. 103; D. Inhofer, cit., footnote 72, GVG § 145 margin. 13.

[144] On that with examples from the European Court for Human Rights' case law F.C. Mayer, in U. Karpenstein, F.C. Mayer (eds.), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar*, 3rd ed., München, 2022, Art. 6 margin. 72 ff.; T. Fischer, cit., Einl. margin. 29 ff.; B. Schmitt, cit., Einl. margin. 160.

[145] F.C. Mayer, cit., margin. 37.

The criminal procedural concept of StPO sees the public prosecutor's office primarily as the investigating and prosecuting authority. The Police also have the legal obligation to investigate criminal offences (§ 163 para. 1 StPO). However, they must submit their findings to the public prosecutor's office for further resolution (§ 163 para. 2, 1st sentence StPO). Only in exceptional cases do the Police deal directly with the court (investigating judge) (§ 163 para. 1, 2nd sentence StPO). In addition to other authorities, Police officers are the investigators of the public prosecutor's office (§ 152 para. 1 GVG)[146]. However, the actual situation does not reflect this priority of the prosecutor's office – also in view of the shortage of personnel at the prosecutor's offices. In the public's perception, the Police have a clear advantage over the prosecutor's office in the fight against crime; the interior ministers of the Federation and the Länder also take advantage of this perception vis-à-vis the finance ministers with regard to increasing personnel and better equipment for the Police authorities. The judicial administration is "lagging behind" and is, so to speak, on the "Police drip"[147]. In the areas of petty to medium crime, the public prosecutors' offices have abandoned investigations and, as a rule, do not carry out any investigations. The Police receive the reports, take over the investigations and decide which evidence to collect. The prosecutor only sees the Police procedures when judicial investigative measures, which he must request, are considered (searches, telephone surveillance, arrest warrants) or when the Police consider their investigations to be concluded. Even when criminal charges are filed with the prosecutor's office, the latter often only gives the Police a blank order to "carry out the necessary investigations" without giving the Police any further instructions as to the content. In addition, the public prosecutors usually do not have any criminalistic training. As a rule, legal training at university does not include a subject on criminology. Specific training in this area, on the other hand, is mainly found at the technical colleges for the Police. It can only be assumed that the public prosecutor's office undertakes its own investigations in prominent white-collar criminal cases, in capital criminal cases and in so-called political criminal cases or in the area of terrorism[148] or organised crime. Statistically, the proceedings

[146] Pursuant to § 152 para. 2 GVG, the Land governments or the Land Ministers of Justice shall determine by statutory order those officials who may be considered as investigators (cf. for Bavaria the Ordinance on the Investigators of the Public Prosecutor's Office of 21 December 1995 [BayRS 300-1-2-J] - last amended by Ordinance of 15 June 2018 [GVBl. 2018, p. 515]).

[147] Cf. in general W. Bräutigam, *Probleme der Sachleitungsbefugnis der Staatsanwaltschaft*, in *DRiZ* 1992, 214-216; M. Wick, *Gefahrenabwehr - vorbeugende Verbrechensbekämpfung - Legalitätsprinzip*, in *DRiZ*, 1992, 217-222. In August 2022, the German Judges' Association estimated that there would be 1,500 vacancies in the German judiciary (including judges), of which 200 vacancies would be in the public prosecutor's office, although the German Judges' Association notes that backfillings are often consumed by growing tasks. This applies all the more in the upheaval situation of the digitisation of the judiciary until consolidation will have occurred, which - optimistically - is estimated for 2030.

[148] However, the GBA is primarily responsible for this (§ 142a para. 1 GVG in conjunction with § 120 GVG), but it can transfer the proceedings to the Land prosecutor's office (general prosecutor's office) in cases of minor importance (§ 142a para. 2 GVG with the restrictions of § 142a para. 3 GVG). However, this does not affect

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with a focus on prosecutorial investigations are not collected. A conservative estimate may put them at 10% of all investigative proceedings.

The situation is similar with investigations by the tax and customs authorities. Only after examination of the proceedings submitted and deemed to be concluded can individual follow-up investigation orders be issued by the public prosecutor to the Police (or other authorities).

9. Outlook

Criminal prosecution, also in Germany, is inconceivable without public prosecutors. Their status with regard to instructions and personnel policy can certainly be improved. Reforms are overdue. After 150 years and more, the current structures seem to have fallen out of time. Other states of the European Union have gone ahead. It is possible to profit from their experience; the German legislator is therefore not dealing with unknown territory. Politicians, however, are not moving. Knowing that one could influence criminal prosecution obviously seems too tempting to them. The fact that the independence of judges and courts would ultimately win if the pronounced hierarchy of public prosecutors were tampered with is not seen in this light. Politicians of all political colours and party affiliations were deaf to instructions. This also applies to the establishment of high councils for the judiciary and prosecutors. A Prussian justice minister of the mid-19th century is said to have had nothing against the independence of judges as long as he could decide on their promotion. Today's ministers of justice would not mouth such words, but it seems that they still like to follow the word. Prosecutors are still needed for quality control. In England and Wales, the Police can bring charges on their own. Unlike there, however, the Police service in Germany does not have a sufficient number of trained lawyers. So this is not the point. Compared to the public prosecutor's offices, however, the German Police are a heavyweight in the prosecution of crimes, which is always strengthened when the prevention of crime publicly demands an increase in personnel or when the lack of personnel on the part of the public prosecutor's office or the courts leads to people having to be released from pre-trial detention, although they are charged with the most serious crimes, but there have been delays in proceedings caused by the judiciary. This is the bonus of the interior ministers responsible for them in the fight against the finance ministers for budget funds. The discrepancy has always existed and will remain. At the end of the paper, a misguided development should be pointed out. When the federalism reform of the Basic Law strengthened the competences of the Länder by returning to the Länder the right to legislate on the remuneration of civil servants and judges, which had previously belonged to the Federation, some Länder, against the background of their respective budgetary situations, went over to lowering the starting salaries of both judges and public prosecutors. This had an undeniable effect. Länder with a higher starting salary recruit new staff more easily, indeed, it cannot be ruled out that a real competition between the Länder for new staff occurs and that the "rich" Länder can skim off the

the first-instance jurisdiction of the state protection senates of the higher regional courts under § 120 GVG.

applicant market. This is all the more worrying in these times, as the baby boomers of the 1960s are about to retire and their vacancies need to be filled. The law enforcement machine in Germany is (still) running smoothly. To stay in the picture, a little more oil on the cogs of the prosecution would not hurt – on the contrary!

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