

# The Public Prosecutor in Austria

by Klaus Schwaighofer

**Abstract:** The Austrian public prosecutor's office was established in 1873 as a criminal prosecution authority and operates based on the principles of indictment and mandatory prosecution. Although it has been part of the judiciary since 2008, its judicial guarantees are limited, as it is bound by the instructions of the Minister of Justice, which is a source of constant controversy. The office is responsible for determining charges and leading investigations. Since 2001, the public prosecutor's office has also been able to terminate investigations through diversion, which is similar to the role of a judge. The principle of mandatory prosecution prescribes the prosecution of all criminal offences, with some exceptions, such as authorisation and private prosecution offences. The public prosecutor's office leads the investigation, orders evidence and coercive measures and requires judicial authorisation only in cases involving fundamental rights. During the main hearing, the public prosecutor's office takes a position that is similar to that of the defendant and is on an equal footing with them. However, the public prosecutor's office retains the power to decide on the indictment.

**Keywords:** organs of the judiciary; head of the investigation proceedings; bound by instructions; monopoly on indictment; mandatory prosecution.

## I. Preliminary remarks

According to Art 90 para 2 Federal Constitutional Act (*Bundesverfassungsgesetz – B-VG*), the indictment procedure applies in Austria. The principle of indictment entails the obligation to create a public prosecutor's office that is separate and independent from the courts: the prosecution authority (PPA). The PPA is an objective and impartial authority that is entrusted with essential tasks in a constitutional state and thus fulfils an important state function. The Austrian Federal Constitution declares public prosecutors (since 2008) to be functionaries of the judiciary (Art 90a B-VG). However, they do not have the judicial guarantees of independence (not being bound by instructions), irremovability and non-transferability.<sup>1</sup>

The core tasks of the PPA are to lead the investigation proceedings and to prosecute, that is to decide whether a case is discontinued or indicted. However, since the introduction of diversion, the PPA has also taken on significant judge-like functions.<sup>2</sup>

<sup>1</sup> T. Öhlinger, H. Eberhard, *Verfassungsrecht*, Wien, 2016, 281 ff.

<sup>2</sup> M. Vogl, *Staatsanwaltschaft und StPO-Reform*, in 16 JRP 2, 121-125 (2008).

In the main proceedings (after the indictment has been filed), the role of the PPA changes: it is a party with essentially the same rights and obligations as the defendant (and his defence counsel). It no longer has independent investigative powers, but must submit motions to hear evidence to the court. However, it still retains influence over the criminal proceedings, as it can withdraw or extend the indictment.<sup>3</sup>

## II. Historical development of the public prosecution authority in Austria

The prosecution authority was first stipulated as a public prosecutor in Austria in 1848, but only for the prosecution of press offences. It was not until 1867, with the incorporation of the principle of indictment in the Basic Law of the State (*Staatsgrundgesetz*) and its subsequent implementation in the Austrian Code of Criminal Procedure (*Strafprozessordnung – StPO*) in 1873,<sup>4</sup> that the prosecution authority was finally established as a public prosecution authority (PPA). Since then, the PPA and the principle of indictment have been an integral part of the Austrian legal system.<sup>5</sup>

The PPA's role was initially limited to initiating investigations, assessing the evidence gathered by an investigating judge and submitting the indictment to the court. The PPA was prohibited from conducting its own investigations.<sup>6</sup>

However, with the introduction of the diversion in 2000<sup>7</sup>, the PPA was given a new task: It can withdraw from the prosecution of minor and medium-sized crime offences and carry out a diversion itself, but only after sufficiently clarifying the facts of the case. The PPA has acquired a court-like function as it can terminate the criminal proceedings without court involvement.<sup>8</sup> Over half of criminal proceedings are settled by diversion without a verdict.<sup>9</sup>

One of the most significant changes to the position and role of the PPA was brought about by the “*Strafprozessreformgesetz*” (law reforming the

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<sup>3</sup> H. Schroll, B. Oshidari, *Vor §§ 19–24 StPO*, in H. Fuchs, E. Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung (WK-StPO)*, Wien, 2020, 15.

<sup>4</sup> RGBl 1873/119.

<sup>5</sup> G. Kohl, *Zwischen Justiz-Controlling und Anklagevertretung. Zur Geschichte der Staatsanwaltschaft in Österreich im 19. Jahrhundert*, in G. Kohl, I. Reiter-Zatloukal (Eds.), „...das Interesse des Staates zu wahren“. *Staatsanwaltschaften und andere Einrichtungen zur Vertretung öffentlicher Interessen*, Wien, 2018, 13, 21 f.

<sup>6</sup> H. Steininger, *Staatsanwaltschaft und Gericht*, in W. Pilgermair (Eds.), *Staatsanwaltschaft im 21. Jahrhundert. Aufgaben – Positionen – Perspektiven*, Wien, 2001, 25.

<sup>7</sup> Strafprozessnovelle 1999, BGBl I 1999/55.

<sup>8</sup> B. Funk, K. Lachmayer, *Der Staatsanwalt im Verfassungsgefüge*, in W. Pilgermair (Eds.), *Staatsanwaltschaft im 21. Jahrhundert. Aufgaben – Positionen – Perspektiven*, Wien, 2001, 46 f.

<sup>9</sup> R. Miklau, *Die Staatsanwaltschaft vor und nach der Reform des Ermittlungsverfahrens 2004/2008*, in G. Kohl, I. Reiter-Zatloukal (Eds.), „...das Interesse des Staates zu wahren“. *Staatsanwaltschaften und andere Einrichtungen zur Vertretung öffentlicher Interessen*, Wien, 2018, 365.

StPO), which came into force in 2008:<sup>10</sup> The role of the PPA in the investigation proceedings was significantly re-evaluated. The investigating judge, who had previously played the leading role in the preliminary proceedings, was abolished and the PPA was put in charge of the investigation proceedings. Investigations are (still) mainly carried out by the criminal investigation authorities. The PPA typically issues directions for (further) investigations by the criminal investigation authorities. However, it may also conduct investigations itself, including questioning, and participating in investigative actions by the criminal investigation authorities.<sup>11</sup> During the investigation proceedings, the court's jurisdiction is essentially limited to deciding on coercive measures that impact fundamental rights. If the PPA deems such investigative measures necessary but lacks the authority to carry them out, it must submit an application to the court for approval. Furthermore, the court has jurisdiction to rule on appellate instruments lodged by the accused and other persons who claim that their rights have been violated in the course of the investigation proceedings.<sup>12</sup>

The 2008 amendment to the Federal Constitutional Act<sup>13</sup> reflects the enhanced role of the PPA, which was a result of the significant expansion of its tasks: prior to the reform, public prosecutors were considered as part of the administration, despite their involvement in the administration of criminal justice and their requirement to undergo judge training. Since 2008, Art 90a B-VG explicitly states that public prosecutors are organs of the judiciary.<sup>14</sup> However, public prosecutors are considered special organs of the judiciary because they are obligated to follow instructions (Art 90a, last sentence, B-VG) and are not subject to the same judicial guarantees.<sup>15</sup> Therefore, the constitutional amendment did not result in any significant substantive changes.<sup>16</sup>

### III. The organisation of the public prosecution authority in Austria

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<sup>10</sup> BGBl I 2004/19.

<sup>11</sup> M. Vogl, *Staatsanwaltschaft und StPO-Reform*, cit.

<sup>12</sup> C. Pilnacek, M. Stricker, *Vor §§ 104-108a StPO*, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2017, 15 ff.

<sup>13</sup> Art 90a B-VG, BGBl I 2008/2.

<sup>14</sup> Different interpretation: U. Zellenberg, *Die Stellung der Staatsanwälte im System der Trennung von Justiz und Verwaltung*, ZfV 2015/48, 358; H. Rill, *Art 90a B-VG*, in B. Kneihls, G. Lienbacher (Eds.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, 12. Lfg, 2013, 6 f.

<sup>15</sup> B. Funk, K. Lachmayer, *Der Staatsanwalt im Verfassungsgefüge*, cit., 46 ff.

<sup>16</sup> On the discussion about the significance and effects of the constitutional amendment: E. Wiederin, *Staatsanwaltschaft und Bundesverfassung*, in: Österreichische Juristenkommission (Ed.), *Strafverfolgung auf dem Prüfstand* (Kritik und Fortschritt im Rechtsstaat vol. 38), Wien, 2012, 33 ff; M. Burgstaller, *Art 90a B-VG*, in K. Korinek, M. Holoubek (Eds.), *Österreichisches Bundesverfassungsrecht*, 9. Lfg, 2009, H. Rill, *Art 90a B-VG*, cit., 12. Lfg, 2013, R. Thienel, *Die Stellung der Staatsanwälte nach Art 90 a B-VG – eine Zwischenbilanz*, in Jabloner et al (Eds.), *Gedenkschrift Robert Walter*, Wien, 2013, 819 ff.

## 1. Structure and functionaries of the PPA

A PPA is attached to every regional court that acts in criminal proceedings. Its geographical jurisdiction coincides with the district of the respective regional court.<sup>17</sup> There are **16 public prosecution authorities** in Austria, with a total of approximately 430 public prosecutors. The largest PPA is the Vienna Public Prosecutor's Office with more than 100 posts. In Austria, there are nearly five public prosecutors for every 100,000 inhabitants.<sup>18</sup>

Since 2009, there has been another special PPA: **The “Central Prosecution Authority of Economic Crime and Corruption” (WKStA)** has nationwide jurisdiction over serious economic and corruption crimes (§ 20a StPO) and is under the instructions of the “Chief Prosecution Authority” in Vienna. It can request other prosecution authorities to conduct individual investigative actions, but it can also claim jurisdiction over white-collar criminal proceedings (§ 20b StPO). The WKStA is staffed by specialists who are particularly trained and versed in the economic sector.<sup>19</sup>

**District prosecutors**, who are public officials with special training but not academically trained jurists, perform prosecutorial duties before the district courts.<sup>20</sup> They are under the direction and supervision of a designated public prosecutor (§ 20 Abs 2 StPO).

At each of the four higher regional courts (Vienna, Graz, Linz and Innsbruck), a **“Chief Prosecution Authority” (Oberstaatsanwaltschaft)** is established.

The **“Procurator-General's Office” (Generalprokuratur)** is affiliated with the Supreme Court of Austria: It is a public prosecution organ of the administration of justice (§ 2 Public Prosecutors' Act – *Staatsanwaltschaftsgesetz – StAG*), but it is not an indicting authority (§ 22 StPO). It is directly subordinate to the Federal Minister of Justice and does not have authority to issue instructions to the PPA and “Chief Prosecution Authorities” (CPA).<sup>21</sup> The “Procurator-General's Office” participates in criminal proceedings brought before the Supreme Court of Austria (statements on appeals for nullity). It also examines the legality of judgments of the criminal courts throughout Austria and, if necessary, can refer them to the Supreme Court of Austria by means of a special legal redress (Appeal for nullity “to safeguard the law” – *Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*: § 23 StPO).

In Austria, the **Federal Minister of Justice (Bundesminister für Justiz – BMJ)** serves as the supreme prosecution authority and head of instructions.

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<sup>17</sup> T. Mühlbacher, § 2 *StAG*, in T. Mühlbacher (Eds.), *Staatsanwaltschaftsgesetz. Kommentar. Dienst- und Organisationsrecht der Staatsanwaltschaft in StAG, DV-StAG und RStDG (StAG Kommentar)*, Wien, 2018, 5 f.

<sup>18</sup> *Personalstand im Justizressort*, in <https://www.justiz.gv.at/file/8ab4a8a422985de30122a92fc5bc63a9.de.0/Personalstand%20im%20Justizressort%20012023.pdf>, 22.06.2023.

<sup>19</sup> H. Schroll, B. Oshidari, § 20a *StPO*, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2020, 40 ff.

<sup>20</sup> BGBl 1986/164 idgF.

<sup>21</sup> W. Wohlmuth, § 22 *StPO*, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *Linzer Kommentar zur Strafprozessordnung (LK-StPO)*, Linz, 2020, 230 ff.

It is also worth mentioning the **European Public Prosecutor's Office** (EPPO) in Luxembourg, established by Regulation (EU) 2017/1939 of the Council of the European Union, in which Austria participates. Austria has two European Delegated Prosecutors who carry out the prosecution tasks of the EPPO (investigation and prosecution of fraud and other offences against the financial interests of the EU) on the spot and are bound by instructions from the EPPO. Additionally, there is a “European Prosecutor” for Austria, who is based in Luxembourg.<sup>22</sup> There are currently twelve EPPO investigation proceedings pending in Austria.<sup>23</sup>

## 2. Structure and internal organisation of the PPA

The PPA is a **monocratic**, hierarchical authority. The PPA is headed by a leading public prosecutor or leading chief public prosecutor, to whom the public prosecutors or chief public prosecutors working in the respective PPA are subordinated. The heads may issue instructions to the subordinate prosecutors in individual cases and may also claim individual cases to themselves (*Devolutionsbefugnis*).<sup>24</sup> The head of the CPA shall have the same right with regard to all public prosecutors of the district (§ 21 StPO).

The tasks of a PPA are divided into **departments** (*Referate*). The departments are organized into **groups**, each of which is led by a group leader (§ 5 StAG).

## 3. Documentations

In certain cases, particularly those of significant public interest, **mandatory reporting** is required (§§ 8, 8a StAG): Prior to making a decision to indict or discontinue such a case, the PPA must submit a report to the CPA (known as a “*Vorhabensbericht*”). The CPA then submits the file, along with its own statement to the BMJ. In some cases, both the CPA and the BMJ may request reports.<sup>25</sup>

## 4. Instructions

The PPA, CPA and Procurator-General's Office are organisational units **bound by instructions**.<sup>26</sup> The Austrian Constitution (Art. 90a B-VG) provides for this obligation to follow instructions. The PPA is bound by instructions to the CPA, which in turn is bound by instructions to the BMJ. The BMJ is at the top of the instruction pyramid and is accountable to Parliament.<sup>27</sup> Instructions by the BMJ or the CPA on the handling of a case

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<sup>22</sup> B. Oshidari, *Die Europäische Staatsanwaltschaft*, in 5 JSt 3, 193–200 (2018).

<sup>23</sup> According to information from the European Delegated Prosecutor Dr. Kmetec.

<sup>24</sup> T. Mühlbacher, § 2 StAG, cit., 5.

<sup>25</sup> H. Schroll, B. Oshidari, *Vor §§ 19–24 StPO*, cit., 20 ff.

<sup>26</sup> H. Schroll, B. Oshidari, *Vor §§ 19–24 StPO*, cit., 15.

<sup>27</sup> S. Storr, *Von der hierarchischen Ordnung und der Kontrolle der Staatsanwälte (FN 1)*, in 28 österreichische Richterzeitung 12, 274 (2010).

in a particular proceeding must always be given in writing (§§ 29, 29a StAG).

Since 2016, a so-called “**Instruction Council**” (*Weisungsrat*) has been established in the Ministry of Justice. It consists of the Procurator General and two other persons from the criminal justice system. The Instruction Council provides advice to the BMJ on final decisions (§ 29b StAG) and is not subject to. In certain cases – such as criminal cases involving high-ranking officials from the administration (ministers, provincial governors) and judiciary (members of the Supreme Court) – the matter must be referred to the Instruction Council. However, the BMJ may also seek the expertise of the Instruction Council in other cases where an instruction regarding the handling of a case is intended (§ 29c Abs 1 StAG). Although the opinion of the Instruction Council is not binding for the BMJ, any deviation from its opinion must be justified in his annual report to the National Council and the Federal Council (§ 29a Abs 3 StAG).<sup>28</sup>

Public prosecutors working at the PPA or at the CPA are subordinate to their respective heads and must follow their instructions (§ 2 StAG). If a public prosecutor receives an internal instruction but has concerns about its lawfulness, they may request that the **instruction** be issued again **in writing**. Furthermore, he can request that he be relieved of handling the case so that he does not have to act against his own conscience (so called “*Remonstrationsrecht*”: § 30 StAG).

A certain degree of control over the instructions is also exercised by the public prosecutor's right to **disclose the content of the instruction**, as provided for in § 31 StAG.

The obligation of the PPA to adhere to instructions is a frequently discussed topic in Austria. The internal right to issue instructions is generally accepted and unproblematic: Instructions serve as a means of quality assurance and control and can prevent legal errors. However, the external right of the BMJ to issue instructions is a contentious issue due to the BMJ political appointment.<sup>29</sup> The very possibility that the BMJ can stop proceedings by issuing instructions is seen as problematic, although in practice political instructions rarely occur due to the transparency of instructions.

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<sup>28</sup> T. Mühlbacher, § 29a StAG, in T. Mühlbacher (Eds.), *StAG. Kommentar*, cit., 41 ff.

<sup>29</sup> In the opinion of some authors, the right to issue instructions (of the BMJ as an administrative body) to public prosecutors (judicial bodies) enshrined in Art 90a B-VG leads to a breach of the principle of separation standardised in Art 94 B-VG, which states that the judiciary must be separated from the administration in all instances. See M. Burgstaller, *Art 90a B-VG*, cit., 9. Lfg, 2009, 5; in favor E. Wiederin, *Staatsanwaltschaft und Bundesverfassung*, cit., 42 ff., G. Muzak, *Art 90a B-VG*, in G. Muzak (Eds.), *Bundes-Verfassungsrecht*, 2020, Rz 1, M. Vogl, § 98 *StPO*, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2022, Rz 9. According to Thienel, the prevailing opinion assumes that the provision of Art 94 B-VG only concerns the relationship between administrative authorities and courts. See R. Thienel, *Die Stellung der Staatsanwälte nach Art 90a B-VG – eine Zwischenbilanz*, cit., 838. IdS auch G. Heißl, A. Lehner, *Staatsanwälte in der Verfassung*, ZfV 2009, 192 f, who differentiate between jurisdiction and the judiciary and restrict the judiciary to judicial bodies, which is why the fact that public prosecutors are bound by instructions does not conflict with Art 94 B-VG.

Currently, there is a discussion about creating a new, independent head of instructions instead of the BMJ to minimize political influence (*Bundesstaatsanwalt* or *Generalstaatsanwaltschaft*).<sup>30</sup> This position could be held by a single person or by one or two senates, each consisting of three persons.

## 5. Appointment requirements for public prosecutors

In Austria, public prosecutors are required to meet the same appointment requirements as judges: These requirements include successfully completing a law degree, completing a four-year training period at court (“judicial preparatory service” as a “judicial trainee”) and passing the judicial office examination (§ 26 Judges and Prosecutors Service Act – *Richter- und Staatsanwaltschaftsdienstgesetz* – *RStDG*<sup>31</sup>).

Only individuals with a minimum of one year's experience as a judge at a court are eligible for appointment as a public prosecutor. However, in cases where no suitable candidate is available, this requirement may be waived for service-related reasons (§ 174 RStDG).

All public prosecutor positions must be publicly advertised and those who meet the appointment requirements may apply. Applications are reviewed by Personnel Commissions consisting of four members, established at the four CPA. The Personnel Commissions submit a proposal for appointment to the BMJ (§§ 177, 180 RStDG).

Each CPA has a number of public prosecutors within its judicial district (*Sprengelstaatsanwälte*) who can be assigned by the head of the CPA to a subordinate PPA if there is a special need, such as due to illness, accident or overwork (§ 175 Abs 2 RStDG).

## 6. The disciplinary law on public prosecutors

The regulation of disciplinary law for public prosecutors is outlined in the second part of the RStDG (§§ 101 ff). Disciplinary jurisdiction over public prosecutors (and judges) is exercised by the **courts of justice** (*ordentliche Gerichte*). In Austria, there are no special courts for disciplinary cases.

The higher regional courts serve as disciplinary courts for public prosecutors, but not for their own district: The Supreme Court of Austria serves as the disciplinary court for the heads and first deputies of the CPA. Decisions are made by senates of three judges (§§ 111 f RStDG).

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<sup>30</sup> Bundesministerium für Justiz, *Arbeitsgruppe zur Schaffung einer unabhängigen und weisungsfreien Bundesstaatsanwaltschaft. Endbericht*, in [https://www.bmj.gv.at/dam/jcr:62444f8f-c8f7-409e-ad1c-37b16539b196/AG\\_Bundesstaatsanwaltschaft\\_-\\_Endbericht.pdf](https://www.bmj.gv.at/dam/jcr:62444f8f-c8f7-409e-ad1c-37b16539b196/AG_Bundesstaatsanwaltschaft_-_Endbericht.pdf), 26.06.2023. For the discussion on the right to issue instructions, see further: E. Wiederin, *Staatsanwaltschaft und Bundesverfassung*, cit., 42 ff., H. Rill, *Art 90a B-VG*, cit., 12. Lfg, 2013, 15 ff., R. Moos, *Wozu brauchen wir Staatsanwälte?* in: Österreichische Juristenkommission (Ed.), *Strafverfolgung auf dem Prüfstand* (Kritik und Fortschritt im Rechtsstaat vol. 38), Wien, 2012, 19 (26).

<sup>31</sup> BGBl 1961/305 idgF.

**Disciplinary sanctions** may include a reprimand, a fine of up to five months' salary, transfer to another place of employment without entitlement to relocation fees, or dismissal from the service (§ 104 Abs 1 RStDG).

#### IV. The “Principle of Indictment” – Disposition over the indictment

The PPA is responsible for prosecution and indictment, except for private prosecution offences. It is the ultimate decision-maker on whether or not to bring charges and for which offence(s) to bring charges. **No criminal proceedings may be conducted against the will of the PPA.** Without an indictment, there is no main proceeding and no main trial (§ 4 StPO).<sup>32</sup>

In Austria, an **indictment cannot be compelled.** If the PPA discontinues the investigation, the alleged victim can file a motion for the continuation of the investigation proceedings. The court will then decide on the motion (§ 195 StPO). If the court grants the motion, the PPA must continue the proceedings, but it may discontinue them again after further investigations.<sup>33</sup>

The Public Prosecutor retains the **authority to dispose of the indictment throughout the main proceedings**, which commence with the filing of the indictment: If the PPA **withdraws the indictment** before the beginning of the main trial or **outside the main trial**, the court must notify any private party.<sup>34</sup> He may declare to maintain the indictment and thereby becomes a subsidiary plaintiff (§ 72 Abs 3 StPO). Otherwise, court will order the discontinuation of the criminal proceedings (§ 227 Abs 1 StPO).

If the PPA **withdraws the indictment only during the main trial**, any private party must promptly declare whether they maintain the indictment.<sup>35</sup> Failure to do so will result in the court acquitting the defendant on formal grounds (§ 259 Z 2 StPO).

In the main trial, it is possible to withdraw from the indictment until the court retires to render the judgement or the judge rises to deliver the judgement. After this moment, especially in appellate proceedings, the indictment must always be decided.<sup>36</sup>

#### V. Obligation to prosecute ex officio (principle of legality, principle of officiality)

##### 1. Mandatory prosecution

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<sup>32</sup> E. Fabrizio, K. Kirchbacher, § 4 StPO, in E. Fabrizio, K. Kirchbacher (Eds.), *Die österreichische Strafprozessordnung. Kurzkomentar*, Wien, 2020, 55 ff.

<sup>33</sup> R. Steiner, § 195 StPO, in A. Birkbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 1535 ff.

<sup>34</sup> Persons who have suffered damage as a result of a criminal offence may join the criminal proceedings to enforce their civil claims as private parties.

<sup>35</sup> G. Kirschenhofer, § 72 StPO, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, Wien, 2021, 476 ff.

<sup>36</sup> A. Birkbauer, *Vor §§ 210–215*, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2019, 18 ff.

In Austria, criminal **prosecution** is in generally **mandatory** (for limitations see 2. below), with criminal investigation authorities and PPA being required to prosecute ex officio criminal offences brought to their attention. This obligation is not contained in the Constitution, but (only) **in the Austrian Code of Criminal Procedure** (§ 2 Abs 1 StPO).

If a criminal offence is reported the PPA must check whether there are sufficient grounds to initiate investigation proceedings, regardless of who reports it, including anonymous reports. If there is no reasonable suspicion (*Anfangsverdacht*) that a criminal offence has been committed, the PPA will not initiate investigation proceedings (§ 35c StAG). Once an investigation is conducted on the based on reasonable suspicion, the criminal proceedings begin. In Austria, **investigation proceedings are not formally initiated** (e.g. by a court order):<sup>37</sup> Instead, a “substantive concept of the accused” is applied.<sup>38</sup>

The decision to discontinue the proceedings or file an indictment is primarily made by the PPA; without the involvement of a judicial decision. However, the accused has the right to file a motion to discontinue the investigation proceedings (§ 108 StPO), which will be decided by a single judge at the regional court. If the court discontinues the investigation proceedings the PPA has the option to lodge a complaint with the higher regional court. The higher regional court will then make a final decision on the matter.<sup>39</sup>

The PPA is responsible for ensuring that all necessary, reasonable and admissible investigations are carried out during the investigation proceedings that are useful in clarifying the facts of the case. In accordance with the **obligation of objectivity**, both incriminating and exculpatory evidence must be investigated equally (§ 3 Abs 2 StPO).<sup>40</sup> If the investigations conducted by the criminal investigation authorities are insufficient, the PPA has the authority and obligation to order supplementary investigations or conduct them itself.<sup>41</sup>

## 2. Restrictions on the obligation to prosecute

### a) **Obligation to discontinue proceedings**

In Austria, the PPA is obligated to discontinue criminal proceedings under certain conditions due to legal provisions: In addition to the grounds for discontinuation according to §§ 190 – 191 StPO<sup>42</sup> (see V.3.b below) and the obligation for diversion measures according to §§ 198 ff StPO (see V.3.c

<sup>37</sup> K. Haslinger, V. McAllister, § 91 *StPO*, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 725 ff.

<sup>38</sup> V. McAllister, N. Wess, § 48 *StPO*, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 420.

<sup>39</sup> S. Huber, § 108 *StPO*, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 835 ff.

<sup>40</sup> C. Bertel, § 3 *StPO*, in C. Bertel, A. Venier (Eds.), *Kommentar zur StPO. Band I*, Wien, 2022, 9 ff.

<sup>41</sup> K. Tauschmann, § 101 *StPO*, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, cit., 619 ff.

<sup>42</sup> There is another ground for discontinuance under § 192 StPO, which, however, does not grant an obligation, but only the right to discontinue.

below), there are also provisions in secondary legislation that oblige the PPA to discontinue proceedings for certain offences: For instance, for minor narcotic offences, specifically the acquisition and possession of narcotic drugs for personal use (§ 35 *Suchtmittelgesetz* – *SMG* – Narcotic Drugs Act).

**b) inadmissible evidence**

Although the principle of legality requires investigation, it is important to note that there are limitations to this duty: Prosecuting authorities must adhere to **prohibitions on evidence** to protect higher-value interests, such as the protection of secrets. Not everything that is technically possible is permissible. Certain investigative measures are inadmissible altogether.<sup>43</sup> Additionally, certain investigative measures are only allowed for solving crimes of a certain severity or type.<sup>44</sup>

**c) Principle of proportionality**

Considering limited resources, the **investigative effort must be proportional to the severity of the offence**. Not all possible, possibly promising (admissible) investigation possibilities can be exhausted in every case. However, the principle of proportionality must be upheld. This means that if there are multiple effective measures available, those that interfere the least with the rights of the individual in question must be taken (§ 5 StPO).<sup>45</sup> When appointing expert witnesses, the law explicitly states that the principles of thrift, efficiency and expediency are to be applied (§ 126 Abs 2c StPO).

**d) Authorisation offences (*Ermächtigungsdelikte*)**

The duty to prosecute exclusively applies to ex officio offences. **Pure ex officio offences**, which must be prosecuted independently of the will of the injured person, are distinguished from other ex officio offences. Charges relating to ex officio offences cannot be withdrawn and must be prosecuted ex officio.

However, there are also weakened ex officio offences (“**authorisation offences**”; § 92 StPO), in which the prosecution depends on the **consent of a person authorised** to do so (e.g. trespassing under § 109 Abs 1 *Strafgesetzbuch* – *StGB* – Austrian Criminal Code, appropriation under § 141 StGB, stalking under § 107a StGB). In cases of authorisation offences, criminal investigation authorities and the PPA can initiate investigations immediately without delay. Nevertheless, they must ask the person affected by the offence whether she/he will authorise the prosecution. If the authorisation is not granted, (further) prosecution is inadmissible, and the investigation proceedings must be discontinued. Without authorisation, an indictment cannot be brought; an authorisation granted can be withdrawn even during the main trial, which leads to an acquittal (§ 259 Z 3 StPO).<sup>46</sup>

<sup>43</sup> e.g. the interception of encrypted messages: see § 135a StPO, which was repealed by the VfGH through BGBl I 2019/113.

<sup>44</sup> e.g. optical and acoustic surveillance of persons § 136 StPO. See V. McAllister, N. Wess, § 3 *StPO*, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 38 ff.

<sup>45</sup> A. Venier, A. Tipold, *Strafprozessrecht*, Wien, 2022, 7 ff.

<sup>46</sup> S. Seiler, *Strafprozessrecht*, Wien, 2020, 26 ff.

**Motion offenses**, which could only be prosecuted after an application for prosecution had been submitted by the aggrieved party, were abolished in 2008 with the “*Strafprozessreformgesetz*”.<sup>47</sup>

#### e) Private prosecution offences

Private prosecution Offences (§ 71 StPO) are offences that can only be prosecuted at the **request of the injured party**: e.g. the criminal defamation, the insult of private persons (§§ 111, 115, 117 StGB) and minor offences against property committed within the family (§ 166 StGB). Supplementary criminal laws, such as the Copyright Law (*Urheberrechtsgesetz*) and the Trademark and Design Protection Act (*Marken- und Musterrechtsgesetz*), contain additional private prosecution offences.<sup>48</sup> These are offences for which there is **no sufficient public interest in prosecution** because the unlawfulness is rather minor and the legal interest protected is predominantly in the private sphere of the victim.<sup>49</sup>

Private prosecution offences are exempt from the mandatory prosecution of the PPA and the criminal investigation authorities (§ 2 Abs 1 StPO). The **injured (aggrieved) person must file a substantiated indictment** with the competent court **himself/herself** (§ 71 StPO). In this process, the private plaintiff assumes the entire financial risk: if there is no conviction, they must bear not only their own expenses and the costs of the proceedings but also the costs of the defendant’s representation (§ 390 StPO).

In cases of private prosecution offences, there are typically no investigation proceedings. The private prosecutor must obtain the necessary evidence themselves and, if the perpetrator is unknown, attempt to find them. However, a few years ago, a new law<sup>50</sup> was introduced to provide relief for victims of “online hate”, making it easier for them to enforce their rights: Individuals who have been insulted, through means such as SMS, telephone, email or other messages have the option to seek legal action. This involves applying to the court for an order that telecommunication providers disclose user data to identify the accused (§ 76a, § 135 Abs 2 Z 1 StPO).<sup>51</sup> The applicant is responsible for covering the costs of this motion but only if he or she has knowingly made a false allegation (§ 390 Abs 1a StPO).

In practice, private prosecutions are not very common. The primary reason is the financial risk which private individuals seldom assume. Additionally, private prosecutors are procedurally disadvantaged (§ 71 Abs 6 StPO).

## VI. The tasks of the PPA in investigation proceedings

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<sup>47</sup> G. Ramsauer, § 196 StGB, in O. Triffterer, C. Rosbaud, H. Hinterhofer (Eds.), *StGB. Salzburger Kommentar zum Strafgesetzbuch*, Wien, 2023, 2.

<sup>48</sup> G. Kirschenhofer, § 71 StPO, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, cit., 467 ff.

<sup>49</sup> S. Seiler, *Strafprozessrecht*, cit., 26 ff.

<sup>50</sup> HiNBG, BGBl I 2020/148.

<sup>51</sup> G. Mair, S. Feurstein, *Das neue Gesetzespaket „Hass im Netz“ sowie die zwei Verordnungsentwürfe auf EU-Ebene* in SWK 13–14, 837–844 (2021).

## 1. Direction of the investigation proceedings

The “*Strafprozessreformgesetz 2008*” made the PPA the **head of the investigation proceedings (“dominus litis”)**, which are to be conducted by the criminal investigation authorities and the public prosecution authorities in cooperation if possible. A judicial investigation must only be requested by the PPA in exceptional cases (§ 101 StPO).

The PPA is solely responsible for deciding whether and which investigative measures are to be taken by issuing directions to the criminal investigation authorities. At any time, the PPA can direct the investigation in a certain direction by issuing specific instructions.<sup>52</sup> It should be noted that, apart from a few exceptions (e.g. adversarial hearings), the court itself does not conduct any investigations in the course of the investigation proceedings.

In practice, the **criminal investigation authorities investigate largely on their own** when they become aware of a suspicion. In simpler cases where no intervention-intensive investigative measures are necessary (merely interrogations of the accused and witnesses as well as criminalistic activities such as securing evidence), the PPA only learns about the criminal offence and the investigations of the criminal investigation authorities through the so-called “**final report**” (*Abschlussbericht* – § 100 Abs 2 Z 4 StPO), when the criminal investigation authorities consider their activities to be completed. The PPA’s leading function is then to examine whether the facts of the case have been sufficiently ascertained to enable a decision on how to proceed. Additionally, the PPA has the authority to order supplementary investigations by the criminal investigation authorities if deemed necessary.<sup>53</sup>

If the criminal investigation authorities deem it necessary to employ special investigative measures, which require the direction of the PPA or the approval of the court (e.g. an arrest, house search, telephone surveillance: see VI. 2. below), the criminal investigation authorities are required to submit an **occasion-related report** (*Anlassbericht* – § 100 Abs 2 Z 2 StPO), in which the PPA is informed of the status of the investigation and must react: The PPA will either reject the suggestion of the criminal investigation authorities or order the investigative measure in question, if necessary, after obtaining the required court authorisation.<sup>54</sup>

If the criminal investigation authorities become aware of a suspicion of a serious felony or any other criminal offence of particular public interest, they are obliged to inform the PPA immediately by means of a so-called “**report of arising**” (*Anfallsbericht* – § 100 Abs 2 Z 1 StPO).

The PPA has the authority to **participate in investigations conducted by criminal investigation authorities** or to **conduct its own investigations** or have them carried out by an expert witness (§ 103 StPO), if it deems it necessary or useful. However, in practice, self-investigation by the PPA is rare. In contrast, the WKStA more frequently utilizes these

<sup>52</sup> E. Fabrizio, K. Kirchbacher, § 101 StPO, in E. Fabrizio, K. Kirchbacher (Eds.), *Die österreichische Strafprozessordnung. Kurzkomentar*, cit., 298 ff.

<sup>53</sup> M. Flora, § 101 StPO, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2023, 6 ff.

<sup>54</sup> M. Vogl, § 100 StPO, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2022, 47 ff.

possibilities and conducts interrogations itself when investigating prominent individuals.

## 2. Direction of investigative measures

During investigation proceedings, the PPA holds sovereign powers: It directs the taking of evidence and the use of coercive measures, and commissions the criminal investigation authorities to carry out the investigative measures.

The criminal investigation authorities can carry out some investigative measures independently, such as questioning the accused and witnesses but others require a direction from the PPA.<sup>55</sup> If an investigative measure interferes with fundamental rights, the criminal investigation authorities require a court-approved direction from the PPA, unless there is imminent danger.<sup>56</sup>

### **a) Investigative and coercive measures requiring a direction from the public prosecution authority and approval by the court (§ 105 StPO)**

In the following cases, the court must approve an ordered investigative measure (this is a non-exhaustive list):

- Arrest (§ 171 StPO, except cases where an individual is caught in the act or in cases of imminent danger)
- Surveillance of messages (§ 137 StPO)
- Search of dwellings and other places protected by domiciliary rights (§ 120 Abs 1 StPO), except in cases of imminent danger.
- Disclosure of information about bank accounts and bank transactions (§ 116 Abs 4 StPO)

### **b) Investigative and coercive measures requiring only a direction from the public prosecution authority**

The following investigative measures may be taken based solely on a direction from the PPA (without prior court approval); this is only an illustrative list:

- Undercover investigations for a longer period of time (§ 133 Abs 1 in conjunction with § 131 Abs 2 StPO)
- The tracing of persons (§ 169 StPO)
- Securing (§ 110 Abs 2 StPO)
- Disclosure of information contained in the registry of bank accounts (§ 116 Abs 3 StPO)
- Event-specific data storage (*Anlassdatenspeicherung* – § 135 Abs 2b, § 137 StPO)

### **c) Coercive measures that the criminal investigation authorities can conduct themselves (without the direction of the public prosecution authority and without approval by the court)**

The criminal investigation authorities can carry out following “more harmless”, less intrusive coercive measures themselves:

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<sup>55</sup> G. Tauschmann, § 101 StPO, in G. Schmölzer, T. Mühlbacher (Eds.), *stopp Band 1. Kommentar*, cit., 620 ff.

<sup>56</sup> S. Seiler, *Strafprozessrecht*, cit., 182.

- Seizures of weapons used in the commission of a crime and prohibited items (§ 110 Abs 3 StPO)
  - Identity verification (§ 118 Abs 2 StPO: Personal data, photograph, fingerprint)
  - Searches of vehicles and premises not protected by domiciliary rights (§ 120 Abs 2 StPO)
  - Search of a person's clothing (§ 120 Abs 2 StPO)
- In addition, the criminal investigation authorities are allowed to carry out some serious, intrusive coercive measures themselves if there is **imminent danger** (§ 99 Abs 2, 3 StPO), for example:
- Arrest (§ 171 Abs 2 StPO)
  - Search of dwellings (§ 120 Abs 1 StPO)

### 3. Applications to the court

Whenever the **court's approval** is required for an investigative measure, the PPA must submit a reasoned request to the court.<sup>57</sup> The PPA is obliged to request **special investigations** from the court on a case-by-case basis: for example, the PPA must request that minor victims of sexual offences be heard by the court in an adversarial procedure with limited participation of the parties, because such a gentle questioning is mandatory (§ 101 Abs 2 StPO, § 165 Abs 4 StPO). If a criminal offence is of special public interest due to the suspect's identity and the gravity of the offence, such as a corruption offence committed by the Federal Chancellor, the PPA must request that **evidence be taken by the court** (§ 101 Abs 2 StGB): The legislator intended for an independent judge to conduct investigations in sensitive cases, where objectivity is ensured to a special degree.<sup>58</sup>

### 4. Decision on the progression of the proceedings

Once the investigation has been completed, the PPA decides whether or not to continue the criminal proceedings. Investigation proceedings cannot be continued against the will of the PPA (§ 101 Abs 1 StPO).

The PPA has **the following options**:

#### a) Aborting investigation proceedings

If a suspect cannot be identified or if the accused is absconding or their whereabouts are unknown, the proceedings will be **aborted** (§ 197 StPO). They can **be continued at any time** as soon as suspect is identified.<sup>59</sup>

#### b) Discontinuation of the investigation proceedings

If the PPA determines that the conduct is not punishable by criminal law or is not permissible for legal **reasons** (e.g. on grounds of justification, excuse or exemption from punishment), it shall discontinue the investigation proceedings (§ 190 Z 1 StPO).

<sup>57</sup> A. Venier, A. Tipold, *Strafprozessrecht*, cit., 57.

<sup>58</sup> Although the public prosecution authority is also obliged to be objective: § 3 Abs 2 StPO; E. Fabrizio, K. Kirchbacher, § 101 *StPO*, cit., 299.

<sup>59</sup> G. Tauschmann, § 197 *StPO*, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, cit., 1260.

The investigation proceedings shall also be discontinued if there are **no factual grounds for further prosecution** (§ 190 Z 2 StPO), i.e. if there is insufficient evidence to bring an indictment (see d) below). Furthermore, there are additional grounds for discontinuation, e.g. due to the minor nature of the offence (§ 191 StPO).

Unlike the abortion of the proceedings (above a)), the discontinuation of proceedings has a **“blocking effect”** (“ne bis in idem”): means that further investigations into the same matter are to be desisted from. Proceedings may only be resumed under special conditions, e.g. if new material facts or pieces of evidence become known (§ 193 StPO).<sup>60</sup>

### c) Diversion

Diversion (§§ 198 ff StPO) is a significant addition to the range of responses to criminal conduct in terms of criminal policy. In cases of minor to medium criminality (penalty of up to five years' imprisonment), the criminal proceedings can be resolved by means other than indictment if the facts of the case have been sufficiently clarified:

Alternative measures, primarily intended for first-time offenders, include **payment of a sum of money, community service, probation and victim-offender mediation**.<sup>61</sup> If diversion is successful, there will be no guilty verdict and therefore no entry in the criminal record. The presumption of innocence remains with the accused, but a sanction is imposed that can be quite intrusive.

The accused accepts the diversion measure voluntarily. They have the option to refuse the offer of diversion at any time if they believe that they are not guilty of a criminal offence, thereby causing the criminal proceedings to continue in the conventional way (usually by indictment).<sup>62</sup>

The PPA is primarily responsible for examining the prerequisites and carrying out the diversion (§ 198 Abs 1 StPO), which has given them a certain judge-like role. However, courts are obligated to apply the provisions on diversion even after the indictment has been filed (§ 199 StPO).

Diversion was introduced for juvenile offenders in 1988<sup>63</sup> and later in 2000 for adult criminal law.<sup>64</sup> It quickly became a success story: in the meantime, the number of diversion settlements now exceeds the number of court convictions in Austria.<sup>65</sup> Negligent assault, particularly in road traffic, is the main area of application.<sup>66</sup> Special diversion rules are provided for in the Narcotic Drugs Act (§§ 35 ff SMG).

### d) Filing of the indictment

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<sup>60</sup> H. Nordmeyer, § 190 StPO, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2022, 15 ff.

<sup>61</sup> S. Seiler, *Strafprozessrecht*, cit., 193 ff.

<sup>62</sup> H. Hinterhofer, *Diversion statt Strafe. Untersuchungen zur Strafprozessnovelle 1999*, Wien, 2000, 75 ff.

<sup>63</sup> Jugendgerichtsgesetz (JGG) 1988, BGBl 1988/599.

<sup>64</sup> StPO-Novelle 1999, BGBl I 1999/55.

<sup>65</sup> Bundesministerium für Justiz, *Sicherheitsbericht 2020. Bericht über die Tätigkeit der Straffjustiz*, in [https://www.bundeskanzleramt.gv.at/dam/jcr:2e2e8f1d-9182-495f-a6ae-77d52dca283f/7\\_21\\_bmj\\_NB.pdf](https://www.bundeskanzleramt.gv.at/dam/jcr:2e2e8f1d-9182-495f-a6ae-77d52dca283f/7_21_bmj_NB.pdf), 19.06.2023, 101.

<sup>66</sup> K. Schwaighofer, *Diversion nach Straßenverkehrsunfällen*, in 119 ZVR 6, 227 (2008); E. Leitner, § 200 StPO, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, cit., 1081.

If there is no reason for discontinuing the investigation proceedings (§§ 190 – 192 StPO) or for withdrawing from the prosecution (diversion pursuant to §§ 198 ff StPO), the PPA must file the indictment.<sup>67</sup> The PPA has the monopoly on indictment due to the principle of indictment, meaning it decides whether to bring an indictment or not.<sup>68</sup>

As a prerequisite for an indictment, the law requires that **the facts of the case are sufficiently ascertained and that a conviction appears probable** (§ 210 StPO). Therefore, the PPA must make its own prognosis as to whether the evidence is sufficient for a guilty verdict. It must solve any legal questions independently and evaluate the evidence. According to the prevailing view, a high probability of perpetration in the sense of a strong suspicion is not required.<sup>69</sup>

The defendant can only become aware of the considerations relevant to the indictment (reasons for the indictment) if the PPA has to file a **“bill of indictment”** (*Anklageschrift*). This type of indictment is intended for the collegial court proceedings (court of lay assessors and jury court at the regional court). In a bill of indictment, the PPA must summarise and assess the outcomes of the investigation proceedings (§ 211 Abs 2 letzter Satz StPO). The defendant may also file an appellate instrument against the indictment (“objections against the bill of indictment”):<sup>70</sup> This allows the higher regional court to review (among other things) whether the facts of the case have been sufficiently ascertained and whether the suspicion is sufficient for an indictment to be filed (§ 212 StPO).<sup>71</sup>

In proceedings before a single judge (single judge of the regional court or district court), the indictment is made by filing a **“criminal charge”** (*Strafantrag*). The criminal charge does not have to contain reasons, unlike the indictment (§ 484 StPO, § 451 Abs 1 StPO). Nor can the defendant use an appellate instrument against a criminal charge; however, the court must examine ex officio whether the requirements for bringing an indictment have been met.<sup>72</sup>

#### e) Provision of legal assistance

According to § 20 Abs 3 StPO, the PPA is responsible for processing of mutual legal assistance requests from domestic and foreign justice authorities. Its main task is to determine whether the requested mutual legal assistance is admissible. However, in some cases, a court decision may be necessary.<sup>73</sup>

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<sup>67</sup> C. Bertel, § 210 StPO, in C. Bertel, A. Venier (Eds.), *Kommentar zur StPO. Band II*, Wien, 2020, 4 ff.

<sup>68</sup> E. Wiederin, § 4 StPO, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2012, 6.

<sup>69</sup> C. Bertel, § 210 StPO, cit., 4 ff.

<sup>70</sup> T. Haslwanter, § 210 StPO, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (Eds.), *LK-StPO*, cit., 1718 ff.

<sup>71</sup> E. Fabrizio, K. Kirchbacher, § 212 StPO, in E. Fabrizio, K. Kirchbacher (Eds.), *Die österreichische Strafprozessordnung. Kurzkomentar*, cit., 617 ff.

<sup>72</sup> S. Seiler, *Strafprozessrecht*, cit., 207 ff.

<sup>73</sup> H. Schroll, B. Oshidari, § 20 StPO, cit., 36 ff.

## 5. Control of the actions of the public prosecution authority in investigation proceedings

Public prosecutors are judicial bodies. Therefore, the control of their activity falls within the jurisdiction of the courts of justice.<sup>74</sup>

### a) **Objection because of violation of rights (§ 106 StPO)**

If an individual believes that their personal rights have been violated by a direction of the PPA during the investigation proceedings, they may raise an objection due to a violation of rights (*“Einspruch wegen Rechtsverletzung”* – § 106 StPO). For instance, the accused may file an objection if he was wrongly denied access to the file. Another person who is not the accused may also file an objection if their home was searched by direction of the PPA in order to seize evidence there. The objection is decided by the court, which is presided over by a single judge at the regional court. If the decision is disputed, a complaint can be lodged with the higher regional court. If the court approves the directed, a complaint against this order can be filed directly with the higher regional court (§ 106 Abs 2 StPO).<sup>75</sup>

### b) **Motion for continuation of the investigation proceedings (§ 195 StPO)**

Any individual who has been the victim of a criminal offence (§ 65 StPO) has the right to request the continuation of investigation proceedings that have been discontinued by the PPA (*“Antrag auf Fortführung”* – § 66 Abs 1 Z 8, § 195 StPO).<sup>76</sup> The individual can argue that the discontinuation is unlawful or that there are further (incriminating) pieces of evidence so that the discontinuation is not justified.<sup>77</sup>

A three-judge panel at the Regional Court will decide on the motion for continuation (§ 31 Abs 6 Z 3 StPO). If the motion is granted, the PPA must continue the proceedings, but they can subsequently discontinue the investigation proceedings. The indictment cannot be compelled (see IV. above).<sup>78</sup>

### c) **appellate instrument against an indictment**

The defendant may only use an appellate instrument against the indictment in proceedings before the court of lay assessors and the court of jurors (**“Objections against the bill of indictment”**: *“Einspruch gegen die Anklageschrift”* – § 212 StPO). In an objection, the defendant can argue, for example, that the crime is not punishable at all, that the suspicion of the crime is insufficient to bring an indictment, or that the facts of the case have not yet been sufficiently clarified. The higher regional court rules on the objection.<sup>79</sup> In practice, defendants rarely use this appellate instrument due to its low chances of success.

<sup>74</sup> H. Schroll, B. Oshidari, *Vor §§ 19–24 StPO*, cit., 11.

<sup>75</sup> A. Venier, A. Tipold, *Strafprozessrecht*, Wien, 2022, 58 ff.

<sup>76</sup> The victim of a crime must also be notified of the termination: § 194 StPO.

<sup>77</sup> G. Tauschmann, § 195 StPO, in G. Schmölzer, T. Mühlbacher (Eds.), *StPO Band 1. Kommentar*, cit., 1243.

<sup>78</sup> R. Steiner, § 195 StPO, cit., 1535 ff.

<sup>79</sup> A. Birkbauer, § 212 StPO, in H. Fuchs, E. Ratz (Eds.), *WK-StPO*, Wien, 2019, 44 ff.

The defendant does not have an appellate instrument against an indictment before the single judge of the regional court or before the district court. However, the court itself must examine whether the requirements for an indictment are met (see also 4. d) above).

## 6. The public prosecution authority and the media

The investigation proceedings are typically not public. Public prosecutors are required to maintain confidentiality regarding their investigative activities. However, to meet the public's need for information and to enhance trust in the judiciary, each PPA has established a media office. Media relations are regulated by the provisions of the StPO and the “*Medienerlass 2016*” (Media Decree).<sup>80</sup> The media spokespersons must adhere to legal provisions (e.g. preservation of presumption of innocence, rules on secrecy, rules on the protection of victims, personal rights) and ensure that the conduct of ongoing proceedings is not thereby impeded, delayed or jeopardised.<sup>81</sup>

Information about investigation proceedings often becomes public through party representatives who have the right to inspect files and disclose certain information. However, in some cases information is leaked to the media through violations of the duty to keep official secrets.<sup>82</sup> The identity of perpetrators often remains unknown due to the right of media personnel (journalists) as witnesses to refuse to answer questions about the person of their informant (§ 157 Abs 1 Z 4 StPO: Protection of editorial confidentiality).

## VII. The tasks of the public prosecution authority in the main proceedings

Upon the filing of the indictment, the main proceedings commence (§ 210 Abs 2 StPO). In the main proceedings, the PPA is a “participant” (party) in the criminal proceedings. Unlike in investigation proceedings, there is “equality of arms” in the main proceedings.<sup>83</sup>

The PPA, like the defendant, must submit motions (e.g. motions to hear evidence) to the court. However, the PPA retains the power to dispose of the indictment (see IV. above): If the indictment is withdrawn the court must acquit the defendant on formal grounds (§ 259 Z 2 StPO). The PPA may also extend the indictment if the defendant is accused of an additional

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[https://www.justiz.gv.at/file/2c9484853f31eab6013f32af1be508a5.de.0/bmj\\_medien\\_erlass\\_2016.pdf](https://www.justiz.gv.at/file/2c9484853f31eab6013f32af1be508a5.de.0/bmj_medien_erlass_2016.pdf). On the media work of the PPA, see in particular B. Bierlein, S. Lendl, *Staatsanwaltschaft in der öffentlichen Wahrnehmung*, JRP, 2022, 28 ff.

<sup>81</sup> W. Fellner, G. Nograth, § 35b StAG, in W. Fellner, G. Nograth (Eds.), *RStDG, GOG und StAG*, www.rdb.at, 22.06.2023.

<sup>82</sup> N. Wess, *Grenzen der Öffentlichkeit des Strafverfahrens: Aktuelles zu Persönlichkeitsschutz im Strafverfahren, Leaks, PR-Litigation, behördlicher Medienarbeit und Haftungsfragen*, in P. Lewisch, *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit 2022*, Wien, 2022, 184.

<sup>83</sup> E. Wiederin, § 4 StPO, cit., 25.

offence during the main trial, other than the one for which they have been charged (§ 263 StPO).

### VIII. Summary

The Austrian Public Prosecutor's Office is an impartial and independent authority of the courts that serves an important state function. Since 2008, public prosecutors have been considered part of the judiciary (Art 90a B-VG), due to their essential role in the investigation process and their ability to make judicial decisions in the context of diversion. However, they are bound by instructions and are therefore not considered judges.

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