

ECBA Spring Conference 2011, Budapest – Developments in Germany**A. English Translations of German Criminal Law Statutes in the Internet****1. German Criminal Code (*Strafgesetzbuch – StGB*)**

http://www.gesetze-im-internet.de/englisch_stgb/index.html

The General Part Sec. 1 through 79 b contains provisions applicable to all crimes, also those regulated by other statutes (e.g., participation in a crime, kinds of punishment, limitation on prosecution), the Special Part Sec. 80 through 358 sets forth specific crimes.

2. Fiscal Code of Germany (*Abgabenordnung – AO*)

http://www.gesetze-im-internet.de/englisch_ao/index.html

Contains special provisions on tax crimes (Seq. 369 et seq.), tax offences (Sec. 377 et seq.) as well as respective criminal (Seq. 385 et seq.) and administrative fine proceedings (Sec. 409 et seq.).

3. German Code of Criminal Procedure (*Strafprozessordnung – StPO*)

http://www.gesetze-im-internet.de/englisch_stpo/index.html

Sets forth the proceedings, in particular jurisdiction in criminal matters, witnesses, investigations of criminal offences by the Public Prosecution Office assisted by the police, searches and seizures, attachments, arrest warrant, defence, dispensing or indictment by the Public Prosecution Office, public hearing, written penal order, appeals, participation of the aggrieved person, execution of sentences.

4. Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*)

http://www.gesetze-im-internet.de/englisch_gvg/index.html

Attributes jurisdiction in criminal matters to the local courts (*Amtsgericht*, Sec. 24 et seq., Secs. 28 et seq. also regarding lay judges), Regional Courts (*Landgericht*, Sec. 73 et seq., Secs. 76 et seq., Sec. 78a et seq.), Higher Regional Courts (*Oberlandesgericht*, Sec. 120 et seq.) and the Federal Court of Justice (*Bundesgerichtshof*, Sec. 135) and contains rules regarding the Public Prosecution Office (*Staatsanwaltschaft*, Sec. 141 et seq.).

B. Developments, Cases

1. Federal Constitutional Court, Decision of 23 June 2010 (BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09) - Embezzlement and Abuse of Trust, Sec. 266 StGB*

Notwithstanding the wide range of its application Sec. 266 StGB is not unconstitutional. However, the damage of the aggrieved person has to be established concretely and comprehensibly according to acknowledged economic methods and standards with an expert to be consulted in complex cases.

http://www.bundesverfassungsgericht.de/entscheidungen/rs20100623_2bvr255908.html

2. Federal Court of Justice, Decision of 13 April 2010 (5 StR 428/09) – Embezzlement and Abuse of Trust, Sec. 266 StGB

As a foreign company established in the EU or associated territories (here: British Virgin Islands Limited) has to be acknowledged as separate legal entity under German law the fiduciary duty of its directors has to be determined according to respective foreign law.

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f01491723cce387079e0ebb89d696b39&nr=51997&pos=0&anz=1>

3. Federal Constitutional Court, Decision of 9 November 2010 (2 BvR 2101/09) – Search Warrant, Tax Evasion, Use of Unlawfully Obtained Evidence (Liechtenstein CD)

Evidence obtained in violation of German laws and of international law may still be used to establish initial suspicion on which a legally valid search warrant can be based. Not every violation of the rules on obtaining evidence results in a prohibition of its use against the accused person.

http://www.bundesverfassungsgericht.de/entscheidungen/rk20101109_2bvr210109.html

* Section 266 StGB - Embezzlement and Abuse of Trust

(1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment of not more than five years or a fine.

(2) Section 243 (2), section 247, section 248a and section 263 (3) shall apply mutatis mutandis.

4. Federal Court of Justice, Decision of 20 May 2010 (1 StR 577/09) and Law Combating Unreported Income (*Schwarzgeldbekämpfungsgesetz*) – Voluntary Disclosure of Tax Evasion Resulting in Exemption from Punishment, Sec. 371 AO

The Federal Court of Justice held that the perpetrator has to disclose all and any incorrect, incomplete or omitted particulars to the tax authorities to receive an exemption from punishment because of tax evasion under Sec. 371 AO. In contrast to that it had formerly been assumed that partial disclosure had still resulted in respective partial exemption from punishment.

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=eda24e6e8e343bca114e7bab152c22b3&nr=52138&pos=1&anz=2>

The rationale of the court has been taken up by legislation and implemented in the Law Combating Unreported Income amending Sec. 371 AO and providing for a new Sec. 398a AO with the requirement in the case the evaded tax exceeds EUR 50k to pay also 5 % of the evaded taxes (in addition to the already existing requirement to pay the taxes evaded to the benefit of the disclosing perpetrator). Apart from that, in addition to the existing exclusions, the exemption from punishment is excluded also after an audit order has been issued to the perpetrator or his representative.

5. Federal Court of Justice, Decision of 18 February 2010 (4 ARs 16/09) – European Arrest Warrant, Interruption of Limitation Period for Prosecution

No extradition of a German national on the basis of a European arrest warrant if the time limit for prosecution has expired because no actions interrupting the limitation period were taken by German authorities and courts. Corresponding actions taken by foreign authorities or courts (here: issuance of an arrest warrant by a Polish court) are not sufficient for such interruption.

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=c6f088d2909161504c56ac7d2c65e2ae&nr=51271&pos=3&anz=28>

6. Federal Court of Justice, Decision of 14 September 2010 (3 StR 573/09) – Prohibited Methods of Examination, Sec. 136a StPO, Conversation with Consular Officer

The conversation of a German accused person arrested in a foreign country with a German consular officer does not constitute an examination within the meaning of Secs. 136 and 136a StPO so that the accused person does not have to be informed on his rights and the consular officer can be interviewed as witness on such conversation. The fact that the accused person had been beaten during former interviews by officers of local authorities does not result in a prohibition of the use of his statements vis-à-vis the consular officer as evidence against the accused person, provided the former mistreatment did not have any influence on his statements anymore (suspected German Al Qaida member held in custody by the Pakistani ISI).

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=efa9cf06036d77a34e70d4a23ecfd6b2&nr=54065&pos=0&anz=1>

7. Federal Court of Justice, Decisions of 25 October 2010 (1 StR 57/10) and of 1 December 2010 (2 StR 420/10) – Art. 50 of the Charter of Fundamental Rights of the European Union, Art. 54 of the Convention Implementing the Schengen Agreement – *Ne Bis in Idem*

Art. 50 of the Charter of Fundamental Rights of the European Union is limited and altered by Art. 54 of the Convention Implementing the Schengen Agreement. Thus, any prosecution in Germany is excluded by a penalty in another EU member state for the same acts only if such penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the other EU member state (German and former Dutch war criminals already sentenced for murder by courts in Italy and the Netherlands, respectively).

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=326e4c7cb65a21257916b467b3f4c1a9&nr=53953&pos=1&anz=2>

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=67d1a6bf85b0e66a763bcb8bb2f0352b&nr=54477&pos=0&anz=1>