

COMPANY-INTERNAL STUDIES FROM THE PUBLIC PROSECUTOR'S PERSPECTIVE

*A Critical Analysis of "10 Years after Siemens"*¹

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Ms Wimmer likes to give lectures about White Collar Crime and Compliance Matters especially about Internal Investigation. She is also publishing about this frequently discussed legal matters.

ABSTRACT

The processing of the "Siemens case" has not only triggered an unexpected compliance shaft in Germany but has also meant that in the meantime internal investigations are commissioned in nearly all the major public investigations for corruption or other economic crimes by the companies concerned. A critical analysis of "10 years after Siemens" shows that this trend has led to a variety of open legal issues and a different handling in the judicial practice. A legal regulation is likely to be inevitable in the long run.

¹ The author presented this text on May 10, 2016 in Munich before the Munich Law Society. The presentation style has been kept, footnotes have been added to the text.

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I. REVIEW OF “10 YEARS AFTER SIEMENS”

Marked by a major search measure by the Prosecuting Attorney Munich I in the “Investigation Complex Siemens”, November 15, 2006 is not only a milestone for the public disclosure of one of the largest German investigations into suspected corruption, but also the start of a development/continued development of compliance measures not yet foreseeable at this time and concurrently of company-internal investigations, which as a repressive component form a necessary part of compliance measures in the company.

Whereas the company-internal investigations initiated by the Siemens company group very quickly after disclosure of the accusations in Penal Law were still at this time “uncharted territory” for the German investigation authorities, a “foreign body” in German investigation proceedings, this perception has changed fundamentally over the last 10 years.

Actually, company-internal investigations are no longer a “foreign body” in German investigation proceedings. In almost all major investigation proceedings in which responsibility of the company concerned in accordance with § 30 OWiG (Administrative Offense Act) is the focus internal investigations are now being conducted. In the majority of the cases, external law firms are hired for this. The legal admissibility of these measures has not yet been questioned².

The fact that this development has led to a new, lucrative field of activity in the legal counsel sector does not require any further explanation. In view of the intensity of time and manpower normally associated with company-internal investigations and the costs thereby incurred Stoffer³ even speaks of a “gold-digger attitude”.

This is accompanied by what has now become innumerable publications from attorneys, academia and in some cases representatives of the judiciary⁴. The image of internal investigations being depicted is highly diverse and partly influenced by the respective role of the author in the investigation/penal proceedings. At times it seems as if a complete privatization of the German investigation proceedings is feared⁵.

² cf. on the general topic in detail: *Renate Wimmer*, in *Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 6ff. (Werner Leitner & Henning Rosenau, 1st. ed. 2017).

³ HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGSVERFAHREN? Marginal No. 902, (1st. ed. 2016).

⁴ cf. the academic literature references in *Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 6ff. (Werner Leitner & Henning Rosenau, 1st. ed. 2017); further: Rolf Raum, *Die Verwertung unternehmensinterner Ermittlungen*, STRAFVERTEIDIGER FORUM, 395ff. (2012); Amr Sarhan, *Unternehmensinterne Privatermittlungen im Spannungsfeld zur strafprozessualen Aussagefreiheit*, 12, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 449ff. (2015).

⁵ Presentation by Attorney-at-law Dr. Anne Wehnert on the occasion of the event of the Institute for Law and Finance “Economy, Criminal Law, Ethics (ECLÉ) – Third Symposium“, “Economy versus Law on the

From the legal aspect company-internal investigations remain “foreign bodies” in German penal proceedings. For, neither the Penal Procedure Ordinance nor the Administrative Offense Act mentions a word of this phenomenon. The legislator has not followed the “power of the factual”, leaving the clarification of the open legal questions “imported” with the internal investigations to be resolved in legal practice. The fact that this is not easy at times, particularly within the context of an aspired uniformity of the legal order, will be proven.

This situation is exacerbated by the draft of a law for the introduction of responsibility of companies and other associations of the state of North Rhine Westphalia under Penal Law⁶. § 5 Sect. 2 stipulates that the Court can desist from a penalty where the association significantly contributed toward detecting a penal offense by the association and provided the investigation authorities with evidence suitable for proving the offense as well took adequate organizational and human resources-related measures to prevent similar offenses by the association in future. This promotion of assistance with detection of the crime, which is essentially to be welcomed, and self-exoneration of the companies is likely to have as a consequence that the associations concerned conduct their own investigations with even greater intensity in order to enjoy freedom from prosecution. However, the draft of the law does not provide for the organization of company-internal investigations⁷.

It presently remains an open-ended question whether the legislator ultimately will take a stance within the scope of any re-regulation of responsibility of associations under Penal Law/Administrative Offense law.

II. HANDLING OF COMPANY-INTERNAL INVESTIGATIONS BY THE INVESTIGATION AUTHORITIES

Legal practice is highly fragmented due to the fact that there have been no specific legal provisions on the handling of company-internal investigations.

Unlawful, as they are in breach of the official investigations principle set out in § 152 Sect. 2 StPO both are in my opinion extreme positions. The attitude of “sitting back and taking things easy” exhibited by public investigators frequently invoked in academic

Financial Market?“ on Nov. 20, 2010 in Frankfurt am Main; critical on internal investigations but more differentiated: Klaus Leipold, *Internal Investigations – Fluch und Segen zugleich?*, FESTSCHRIFT FÜR WOLFSCHILLER, 418, (2014); highly critical also HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGS-VERFAHREN?, Marginal No. 901ff, (1st. ed. 2016).

⁶ Presented on September 19th 2013.

⁷ cf. in detail Elisa Hoven et al., *Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzes – Kritische Anmerkungen aus Wissenschaft und Praxis, Teil 2, 6*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, WTEUER- UND UNTERNEHMENSSTRAFRECHT, 201ff. (2014).

literature⁸ and the suspension of all independent investigation activity in the case of announced company-internal investigations or even the demand thereof with reference to tight independent resources and the communication of detailed investigation orders is definitely in breach of § Sect. 152 para. 2 StPO. This does not do justice to the role of the prosecuting attorney as the “master of the investigation proceedings” and leads to a distorted establishment of truth. However, simply ignoring the results of internal investigations is not compatible with the official investigations principle either. Because the prosecuting attorney must exhaust all evidence available to him. This includes the results of private investigators. For example, it can be expedient for assessment of the credibility of a statement to consult records or notes on an internal interview with witnesses/cross-examine the internal investigator as a witness. If necessary this can be asserted by force where there is no seizure prohibition or right to refuse testimony in the individual case.

There is no “one size fits all solution” as to how investigation authorities are to handle company-internal investigations. This depends on the situation and motivation of the initiation of the investigations (self-reporting on the basis of independent investigations already conducted, commissioning after disclosure of events in the company relevant in Penal Law by press reporting or search measures by the prosecuting attorney) as well as on the seriousness of the company’s intention to detect the offense.

The judiciary, including the judicial administration, needs to meet the challenge of sensible handling of company-internal investigations in light of the development depicted above. It is not helpful here to lament the “power of the factual” or to consider the possibility of prosecuting private investigators on grounds of unauthorized assumption of official authority (§ 132 StGB) as they usurp the public proceedings with an actual precedence because they (initially) seize all key evidence using a high volume of personnel capacities/efficient technical means⁹. It would make more sense to consider clear statutory regulations followed by internal investigations, answering the open questions of the influence of the internal investigations on the proceedings against the employees and bodies concerned. The fact that white collar crime can only be fought effectively with adequately trained expert personnel needs no further discussion.

III. OPEN LEGAL QUESTIONS

Company-internal investigations being alien to German penal proceedings, the legal user is confronted with the same legal questions for which neither the Penal Procedure Ordinance or Administrative Offense Act have a clear answer. There has not yet been

⁸ cf. as an example: Presentation by Attorney-at-law Dr. Anne Wehnert on the occasion of the event of the Institute for Law and Finance “Economy, Criminal Law, Ethics (ECLÉ) – Third Symposium”, “Economy versus Law on the Financial Market”²⁴ on Nov. 20, 2010 in Frankfurt am Main.

⁹ But this is argued by HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGSVERFAHREN?, Marginal No. 9II, (1st. ed. 2016).

any ruling by a higher court or even by the Supreme Court.

A. Seizure of results of company-internal investigations

As discussed, it can be expedient in accordance with the official investigation principle to consult documents from company-internal investigations, where necessary using means of force. However, the prerequisite for this is that the documents be subject to seizure.

1. Seizure in the company affected

In the companies affected the results of company-internal investigations may only be subject to a seizure prohibition if they are defense documents as defined by § 148 StPO. Defense documents are exempt from seizure beyond the wording of § 97 Sect. Clause 2 StPO where they are being kept by the defendant. The same applies to the company affected as an ancillary party via § 444 Sect. 2 Clause 2, § 432 Sect. 2, § 434 Sect. 2 Clause. 2 StPO¹⁰.

The fact that internal investigations commissioned by the company cannot be any defense documents by the employee or body requires no further discussion. The objective of self-investigations by the company is normally also detection of misconduct by the employee or body who may later become the defendant in public investigation proceedings in order to take corresponding legal steps against him. To classify these documents as defense documents of the employee or body would be a contradiction and put the investigator in an unresolvable conflict of interest¹¹.

The question is more nuanced in the case of the ancillary participation of the company. Here the company can invoke the rights of the defendant from the Penal Procedure

¹⁰ *Klaus Rogall in: KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN*, §30 Marginal No. 209, (4th ed. 2014); Frank Peter Schuster, *LG Mannheim*, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: *Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO*, 11, *NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT*, 424 ff. (2012); Alexander von Saucken, *Zur Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen nach §§ 160a, 97 Abs. 2 StPO*, *JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V.*, 1 (2013); Renate Wimmer, „*Gesetzliche Privilegierung“ von internal investigations durch externe Kanzleien?*, *JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V.*, 2 (2013); cf. also Werner Leitner, *Die Nebenbeteiligung des Unternehmens – Das Unternehmensmandat als Verteidigungsverhältnis*, *Unternehmensstrafrecht – Festschrift für Jürgen Wessing*, 149ff. (Heiko Ahlbrecht et al. 2015); without substantiation *Serini/Witzigmann*, in *Handbuch für den Staatsanwalt* (Helmut Vordermayer & Bernd v. Heintschel-Heinegg 5th ed. 2016) 2nd part Chapter, 595f. generally reject a right of silence by the association concerned referring to the Supreme Court ruling of Jan. 23,2014 – KRB 48/13. This cannot be concluded from the cited ruling which refers exclusively to the information by the association as set out in §§81 a Sect. 1 and Sect. 2 GWB and is contrary to the law that concedes the company a right of silence at least under ordinary law (cf. *Klaus Rogall in: KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN*, § 30 Marginal No. 209, (4th ed. 2014)).

¹¹ cf. here District Court of Hamburg, ruling of October 15, 2015 – 608 Qs 18/10, NJW 2011, 942.

Ordinance according to § 444 Sect. 2 Clause 2, § 432 Sect. 2, § 434 Sect. 1 Clause 2 StPO and accordingly refuse the release of defense documents as defined in § 148 StPO.

The assessment whether there are defense documents as defined by § 148 StPO depends on a **chronological** and **substance-related** component.

From the **chronological aspect** the question arises whether documents already prepared before initiation of the proceedings could constitute defense documents. This is assessed differently in rulings by municipal courts and in academic literature. The Municipal Courts of Gießen and Braunschweig are very extensive in their rulings of June 25, 2012¹² – 7 Qs 100/12 – resp. July 21, 2015¹³ – 6 Qs 116/15. According to these, documents which were prepared well in advance of the knowledge of the incriminating facts by the public investigators could constitute defense documents. Large portions of academic literature follow this opinion¹⁴. This cannot be followed just as little as can the highly formalistic opinion by the Municipal Court of Bonn which seems to rely in its ruling of June 21, 2012¹⁵ - 27 Qs 2/12 – on the date on which the proceedings were formally initiated by the investigation officials. § 97 StPO presupposes the defendant character as defined by the Penal Procedure Ordinance and a subsequent associated defense relationship¹⁶. However, it is not relevant here when the prosecution attorneys formally initiated the proceedings but when they should have done it, i.e. the time at which an initial suspicion of responsibility pursuant to §30 OWG should have formed from the perspective and status of knowledge of the prosecuting attorney.

Whether company-internal investigations represent defense documents, **from the substance-related aspect** as defined by § 148 StPO cannot be generally assessed but is always subject to individual review. The time of commissioning, the specific content of the investigation assignment/ documents are relevant here.

However, in no case are documents which were not produced by the protected relationship of trust, i.e. business documents submitted to the investigator for conducting the

¹² *LG Gießen*, *Beschluss vom 25.06.2012 – 7 Qs 100/12 : Beschlagnahmeverbot für Verteidigungsunterlagen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 409ff. (2012).

¹³ *LG Braunschweig*, *Beschluss vom 21.07.2015 – 6 Qs 116/15 : Verteidigungsunterlagen und interne Ermittlungen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 40ff. (2016).

¹⁴ cf. exemplary: Reinhard Michalke, *Verteidigungsunterlagen sind auch vor Einleitung eines förmlichen Ermittlungsverfahrens geschützt*, 1, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V. (2013); Bastian Mehle & Volkmar Mehle, *Beschlagnahmefreiheit von Verteidigungsunterlagen – insbesondere in Kartellbußgeldverfahren*, 23, NEUE JURISTISCHE WOCHENSCHRIFT, 1639 (2011); Emanuel H. F. Ballo, *LG Braunschweig vom 21.07.2015 – 6 Qs 116/15 – Verteidigungsunterlagen und interne Ermittlungen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 43 (2016).

¹⁵ Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren*, 1, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 21 (2013).

¹⁶ *Betram Schmitt*, in *Strafprozessordnung*, § 97 Marginal No. 36 (Lutz Meyer-Goßner & Betram Schmitt 59th ed. 2016).

internal investigation, exempt from seizure. In this sense the Municipal Court of Gießen exempts the documents which “do not specifically concern the defense relationship”, “but general accounting documents/letters to third parties” from seizure in its ruling of June 25, 2012¹⁷. The statements by the Municipal Court of Braunschweig in its ruling of July 21, 2015¹⁸ follow the same line.

2. Seizure by the external investigator

Where documents are to be seized from company-internal investigations by an external law firm hired for the purpose the Municipal Court of Mannheim in its ruling of July 3, 2012¹⁹ - 24 Qs 1/12 – as well as the vast proportion of academic literature²⁰ assumes exemption from seizure with regard to § 160a StPO new version even in investigation proceedings against an employee or body.

This cannot be followed with the convincing arguments by the Municipal Court of Hamburg in its ruling of October 15, 2010²¹ - 608 Qs 18/10, which continues to be valid even after the new version of § 160a StPO²².

§ 160a Sect. 5 StPO in the version applicable since Feb. 1, 2011 with which attorneys in the absolute area of protection of § 160a Sect. 1 StPO were included beyond the defense attorney continues to assume precedence of § 97 StPO over § 160a StPO as *lex specialis*. Due to this ranking the District Court of Hamburg assumed exemption of seizure with

¹⁷ LG Gießen, *Beschluss vom 25.06.2012 - 7 Qs 100/12 : Beschlagnahmeverbot für Verteidigungsunterlagen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 409ff. (2012).

¹⁸ LG Braunschweig, *Beschluss vom 21.07.2015 - 6 Qs 116/15 : Verteidigungsunterlagen und interne Ermittlungen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 40ff. (2016).

¹⁹ Frank Peter Schuster, *LG Mannheim*, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: *Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO*, II, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 424 ff. (2012).

²⁰ cf. as an example: Tido Park, *Schutz der im Rahmen von unternehmensinternen Untersuchungen gewonnenen Informationen vor behördlicher Beschlagnahme nach deutschem Recht*, JOURNAL FÜR STRAFRECHT, 20 (2014); Margarete Gräfin v. Galen, *LG Hamburg*, 15. 10. 2010 - 608 Qs 18/10: *Beschlagnahme von Interviewprotokollen nach „Internal Investigations“ - HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942 (2011); Matthias Jahn & Stefan Kirsch, *Anmerkung zu LG Hamburg, Beschluss v. 15.10.2010 - 608 Qs 18/10*, 3, *Strafverteidiger*, 151 (2011); Thomas C. Knierim, *LG Hamburg: Beschlagnahmefähigkeit von Grundlagen eines Rechtsgutachtens*, FACHDIENST STRAFRECHT, 314177 (2011); Frank Peter Schuster, *LG Mannheim*, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: *Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO*, II, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 424 (2012); Emanuel H. F. Ballo, *Beschlagnahmeschutz im Rahmen von Internal Investigations - Zur Reichweite und Grenze des § 160a StPO*, 2, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 46 (2013).

²¹ Margarete Gräfin v. Galen, *LG Hamburg*, 15. 10. 2010 - 608 Qs 18/10: *Beschlagnahme von Interviewprotokollen nach „Internal Investigations“ - HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942 (2011).

²² Cf. here also: Renate Wimmer, *„Gesetzliche Privilegierung“ von internal investigations durch externe Kanzleien?*, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V., 2 (2013).

convincing ratio decidendi in its ruling of October 15, 2010. §97 StPO only protects the relationship of the accused and party subject to professional secrecy. There is no relationship similar to a retainer or a retainer per se between the external investigator and the body or employee. Nothing is to be added to this. A different result could only be justified if one were to take a minority opinion²³ that § 97 StPO does not only apply with regard to the accused party in the respective penal and investigation proceedings. With regard to the unambiguous adjudication by the Federal Constitutional Court²⁴ this is not convincing²⁵.

However, something else would have to apply with regard to § 444 Sect. 2 Clause. 2, § 432 Sect. 2, § 434 Sect. 1 Clause 1 StPO where the company is an “affected party” in § 30 OWiG proceedings. The company can invoke the defendant rights of the Penal Procedure Ordinance as well as protection from seizure under § 97 StPO in this case. The contrary stance sometimes taken by the public investigators is to be rejected and is not justified on the basis of the ruling by the Federal Constitutional Court of February 26, 2009²⁶ - 1 BvR 2172/96. The Federal Constitutional Court merely concludes therein that the legal entity does not need to be granted exemption from self-incrimination from the constitutional aspect. However this does not prevent the legislator from conceding the association this right on the basis of ordinary law. The ruling by the Supreme Court of Jan. 23, 2014²⁷ – KRB 48/13 – specified in this context does not justify denial of the right of silence either. The ruling by the anti-trust senate refers exclusively to the information by the association as set out in §§ 81 a Sect.1 and Sect. 2 GWB. (Act Against Restraints on Competition). Here an exception from the right of the association to not have to incriminate itself is regulated with regard to the facts necessary for determining the amount of the fine (§ 81 Sect. 4 Clause 2, 3 GWB).

B. Validity of self-incriminating information

Investigation and disclosure can be of decisive, often existential significance for the company not only de lege ferenda, but also de lege lata with regard to the bonus system in Anti-trust Law. The interest of the association in a complete and rapid clarification of the facts of the case, also through questioning of the employees concerned, is in conflict with its interest not to incriminate itself with detrimental facts.

The solution approaches for solving this conflict of interest mostly have only a possible

²³ Cf.: Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 544 (Lorenz Schulz et al. 2012).

²⁴ BVerfG, Ruling of October 27, – 2 BvR 2211/00, NStZ-RR 2004, 83 ff.

²⁵ Cf. Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 544 (Lorenz Schulz et al. 2012).

²⁶ BVerfGE 95, 220ff.

²⁷ NZKart 2014, 236ff.

investigation by the prosecuting attorney as a negative consequence for the employee. A vast proportion of academic literature²⁸ – predominantly invoking the joint and several debtor ruling by the Federal Constitution Court²⁹ – assumes with regard to the nemo-tenetur principle resulting from Art. 2 in conjunction with Art 1 Sect. 1 GG (Basic Law) that self-incriminating information by the subsequent defendant in public investigation proceedings are subject to a prohibition of use or exploitation as evidence. Already from the dogmatic aspect this is not convincing, as the nemo-tenetur principle only protects against compulsory public self-incrimination and essentially does not apply to private law situations. A comparison of the handling of self-incriminating information in other legal situations shows that the law has always assumed it is usable in investigation or penal proceedings if it was not provided on the basis of a statutory duty³⁰ (e.g. in the case of self-incriminating information in civil proceedings or toward a third party liability insurer). In the case of company-internal investigations the latter are conducted on the basis of a self-incrimination duty from the private law employment relationship according to rulings by the Employment Court. Taking into account the result just now elaborated that only a statutory information duty leads to prohibition of use, the latter does not apply to self-incriminating information in company-internal investigations.

There may be a case in which the private investigations are to be **allocated** to public investigators, for instance, where in order to circumvent the nemo-tenetur examination of witnesses who may become defendants the public investigators deliberately transfer the case to the private investigators. However, such constellations tend to be the exception. The very exhaustive allocation of the internal investigations to the public authorities made in parts of academic literature for example because the company cooperates with the investigators and they have raised the prospect of a mitigation of the penalty in the case of internal solution of the case³¹ is not convincing. Because taking into account internal solution of the case is a compulsory allocation criterion as a post-offense action pursuant to § 17 Sect. 3 OWiG, i.e. the investigators and the courts must already take into account de lege lata a serious internal solution of the case by the company. Consistently pursuing this concept, every case of positive post-offense behavior within the context of setting the extent of the penalty would be allocable to the public investigators. De lege ferenda regarding the possibility of an association being exempt from prosecution in the case of independent solution of the case under certain circumstances in § 5 of

²⁸ Cf. the detailed presentation of the opinions represented in academic literature Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips* Festschrift für Imme Roxin, 544ff. (Lorenz Schulz et al. 2012); and *Renate Wimmer, in* Wirtschafts- und Steuerstrafrecht, § 152 Marginal No. 22 (Werner Leitner & Henning Rosenau 1st. ed. 2017).

²⁹ Ruling of January 13, 1981 – 1 BvR 116/77. NJW 1981, 1431ff.

³⁰ cf. in detail: Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 548ff. (Lorenz Schulz et al. 2012 and *Renate Wimmer, in* Wirtschafts- und Steuerstrafrecht, § 152 Marginal No. 23ff. (Werner Leitner & Henning Rosenau 1st. ed. 2017).

³¹ HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGSVERFAHREN?, Marginal No. 938ff., (1st. ed. 2016).

the draft of a law to introduce liability of companies and other associations of the state of North Rhine Westphalia under penal law the same would apply.

The solution approach on the fair trial principle based on Art. 6 EMRK for instance in the case of the exercise of undue force or deception in order to attain a prohibition of use³² is more convincing. However, due to the lack of statutory binding provisions on the organization of company-internal investigations it is difficult to define when unfair proceedings start.

Both solution approaches only take Penal Law into consideration and do not answer the question as to how the employee with self-incriminating information is to be dealt with for example within the framework of proceedings against unfair dismissal or damage compensation.

Hence, in my opinion it would be expedient to reconsider **de legal lata** the employee's duty under Employment Law to incriminate himself, as is the case in an increasing share of academic literature.

De lege ferenda a statutory provision not only on the issue of the validity of self-incriminating information but also on a minimum standard which internal investigations need to meet in order to enable the company affected a penalty mitigation or even exemption from prosecution in accordance with the draft of the law would be desirable.

IV. CONCLUSION

The development triggered by the "corruption case Siemens" in Germany, which allows the observation of company-internal investigations in almost all major investigation proceedings focusing on the imposition of a fine on an association seems unstoppable. The legislator and judiciary need to meet this challenge and should guarantee fair results with an equitable statutory regulation and responsible handling of the cases which comply with both the public (and company's) interest in solution of the case but also account for the rights of the individual defendants. Solution approaches to counter "negative spin-offs" with criminalization of the internal investigators on grounds of unauthorized assumption of authority or coercion to not seem to be sensible or harbor prospects of success.

³² As argued in Christoph Knauer & Michael Gaul, *Internal investigations und fair trial – Überlegungen zu einer Anwendung des Fairnessgedankens*, 4, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 193 (2013).