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Consequences of leniency programmes and whistleblowing measures for the sanctioning process in criminal proceedings**

ABSTRACT: Whistleblowing and leniency programmes are important instruments to detect and successfully solve crimes. Whereas whistleblowers are natural persons who report or disclose legal violations in which they are not necessarily involved, principal witnesses are involved in criminal activities and report their knowledge to the authorities. Legal systems must provide incentives for people to report their knowledge and make it available to the authorities. Whistleblowers must therefore be guaranteed adequate protection, and principal witnesses must benefit from disclosing their knowledge by having their penalties reduced or waived entirely.

KEYWORDS: Leniency programme, whistleblowing, purposes of criminal law.

1. Introduction

Leniency programmes and whistleblowing measures are considered necessary for detecting and investigating criminal offenses. These instruments are therefore becoming increasingly important. Whistleblowers and key witnesses are necessary in some areas of crime in order for convictions and punishments to be handed down at all. At the same time, cooperation with law enforcement authorities can also have an impact on whether and to what extent a penalty is imposed.

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2. Whistleblowing and leniency programmes

"Whistleblowing" means that a natural person working in the private or public sector obtains information about legal violations and irregularities in connection with their work activities and reports or discloses these to internal or external bodies.¹ In particular, it concerns reports relating to criminal economic offences (corruption, breach of trust, antitrust violations, etc.). But whistleblowing can also refer to the disclosure of other grievances, such as shortcomings under administrative law, environmental law or labour law. Whistleblowers are usually driven by a desire to remedy an irregularity within the organization. Since they are usually unable to do this on their own, they turn to someone else (internal or external). Depending on whether the information is disclosed within or outside the organization, the term internal or external whistleblowing is used (Art. 5 Z 4 and 5 Directive 2019/1937/EU). Whistleblowing can occur both in the private sector and in public administration or civil service.²

A principal witness is a person who has committed a crime him/herself but now cooperates with the law enforcement authorities and discloses his/her knowledge to them in order to help investigate criminal offences. The difference to a "whistleblower" in the true sense of the word is that the whistleblower was not himself involved in the criminal act. Leniency regulations provide for the state to make concessions in the context of the prosecution or punishment to the principal witness who discloses his knowledge of the criminal acts of others to the prosecuting authorities. The aim is to offer the accused incentives to disclose information beyond their own contribution to the criminal offence and thus facilitate or enable further investigations.

3. Criticism of whistleblowers and leniency programmes

Critics of both whistleblowing and leniency programs often argue that these instruments promote denunciation and villainization and give troublemakers a platform. However, the experience from companies and public whistleblower platforms shows that these fears are largely unjustified and that only a negligible proportion of reports are actually "unjustified" or are used to falsely accuse people of misconduct.

¹ Sixt, 2020, p. 22; Yurttagül, 2021, p. 24.

² Soyer and Pollak, 2022, No. 28.68.

In addition to these objections to both institutions, opponents of leniency programs often argue that such programmes do not fit into our legal systems to negotiate punishment or sanctions, that judicial authorities should not make "deals" with criminals and that the leniency program weakens the principle of the search for substantive truth as well as the official principle in favor of the principle of opportunity.

4. Use of whistleblowing and leniency programmes

Is it nevertheless useful and perhaps even necessary to introduce and provide for such instruments to learn about criminal offences and to investigate the commission of criminal offenses? To see the use of whistleblowing and leniency programmes it is necessary to have a look at the goals and purposes of criminal law.

- The purpose of modern criminal law is prevention. Criminal law instruments are intended to prevent the commission of criminal offenses. This is to be achieved on the one hand through deterrence (negative (general) prevention) and on the other hand by strengthening the awareness of norms (positive prevention).³
- Modern research into sanctions shows that the preventive effect of criminal law depends less on the threat and imposition of severe penalties, but that it is important for prevention that crimes are prosecuted, investigated and solved by the criminal prosecution authorities. If criminals feel safe in the knowledge that their criminal behaviour will not be discovered and solved anyway, this is not deterrent on the one hand. But above all, there is then also a lack of the necessary confirmation of norms for those who would generally adhere to these norms.
- The task and aim of criminal proceedings is the investigation of criminal offences and enforcement of the state's right to inflict punishment. From the point of view of the citizen affected by a criminal offence, this state monopoly on punishment corresponds to a so-called "right to justice" ("Strafgewährleistungsanspruch"). The state is obliged to enforce the right to punishment resulting from the offence in question. From the victim's point of view, this is a claim for satisfaction. Another purpose of criminal law is thus to ensure that

³ Roxin and Greco, 2020, § 3 No. 27; Jescheck and Weigend, 1996, p. 68; Kienapfel, Höpfel and Kert, 2024, No. 2.11.

society shows solidarity with the victim.⁴ The victim also plays a very important role in criminal proceedings in order to obtain justice.

In order to achieve all these goals, it is necessary that criminal offences are discovered and solved. However, there are fields of crime in which it is difficult or almost impossible to solve a crime unless one of the parties involved discloses information that could lead to the initiation of criminal proceedings or facilitate the investigation. This is the case, for example, in corruption, where none of the parties involved has an interest in solving the crime. This is because neither the briber nor the bribee faces any punishment. Furthermore, both parties often gain an advantage from the offence, while the state administration or the national economy suffers damage. This is also the case in organized crime or in other cases of commercial criminal proceedings such as embezzlement, environmental crime or cartels. In these areas of crime, there are often no direct victims, but only perpetrators who cover for each other in a secret coercive community. Companies in particular also make it possible to conceal and disguise responsibilities for the commission of crimes, so that only information from insiders makes it possible for state law enforcement authorities to fulfill their task. Therefore, the traditional instruments of criminal investigation often do not lead to a successful investigation because there is a lack of usable evidence. In order to achieve the aforementioned purposes of criminal law and criminal procedure law, information from principal witnesses and whistleblowers is therefore necessary, as it enables and promotes the investigation of serious crimes.

However, whistleblowing regulations and leniency programs can also have general preventive effects even before criminal proceedings are initiated. After all, the mere existence of a leniency program or reporting offices for whistleblowers means that accomplices must be afraid that an accomplice goes to the public prosecutor's office and reports about criminal behaviour in the company. Whistleblowing is a method of detecting corruption, but also other grievances in the company or in the public sector at an early stage. On the one hand, it serves to discover and clarify misconduct in companies and from within companies. However, this does not only have to happen when criminal law is involved, but even earlier in the case of minor violations. It is therefore also important for companies themselves to prevent major damage in good time by protecting employees, but above all by protecting the company's reputation. Whistleblowing

⁴ Kienapfel, Höpfel and Kert, 2024, No. 2.27.

should therefore not be perceived by companies as an attack, but rather as an opportunity to improve and prevent damage. Whistleblowers are an essential tool especially, but not only, in the fight against corruption and other economic crimes.

5. Leniency programmes

The idea of leniency programmes is basically that an accused person actively approaches the prosecution authorities on his own initiative and provides information about criminal acts in which he is (partially) involved, over and above his own involvement, before the prosecution authorities know anything about them or have started any investigation. The motivation to go to the law enforcement authorities, to provide information to them and to help to investigate crimes lies in the expectation of receiving no punishment or a lesser punishment.⁵ In practice, the success of such programmes differs between the states and between the legal fields. Whilst it is a regular occurrence in competition law for leniency applicants to contact the competition authorities, in Austrian criminal procedure for a long time the regulation has only been applied in very few cases in the time of its existence.⁶

It has been shown that it is very rare for an accused person to go to the prosecution authorities before concrete prosecution steps have been taken by the prosecution authorities or are at least imminent. It has been seen as particularly problematic that it is unclear for a long period of time whether the potential leniency applicant will be granted leniency status and that the risk is therefore considered too great. Even if the legislator amended the provision several times, the number of cases where principal witnesses actually received leniency status is quite low. The main reason is that it is a quite long and risky procedure before the status is received. Furthermore, principal witnesses must fear that they will be subject to civil claims by the injured parties.

The prerequisite for leniency status under the Austrian Code of Criminal Procedure is that the perpetrator of one of the listed serious criminal offenses voluntarily approaches the public prosecutor's office or the criminal investigation department, makes a remorseful confession and discloses his knowledge of new facts or evidence, knowledge of which

⁵ See Lewisch, 2022, No. 11.1.

⁶ Hofinger, 2015.

contributes significantly to the comprehensive investigation of a criminal offense beyond his own contribution to the crime. Such a procedure is excluded if the offender has already been questioned as a defendant because of his knowledge of the aforementioned offenses or if coercion has been used against him because of these offenses. However, in the last years in two cases accused received a leniency status even after house searches have been carried out or even if they have already been arrested. It was argued that this is still possible, if the concerned persons disclose information to the prosecution authorities on facts which have not been known to the authorities.

What are the consequences if the conditions for leniency are met?

In general, leniency programmes lead to a lower sentence than that which would have been imposed without a cooperation with the prosecution authorities or the state refrains from imposing a sentence. This is supposed to be the incentive for cooperation with the prosecution authorities.

The Austrian legislator decided that, if the conditions are met, the public prosecutor's office must provisionally withdraw from the prosecution and, taking into account the weight of the contribution of the information to the clarification or investigation in relation to the nature and extent of his contribution to the crime, a punishment does not appear necessary for special preventive reasons, the public prosecutor's office must order the accused to provide a diversionary measure and further cooperation in the clarification. In such a case, the "offender" is therefore not punished and a diversionary measure is imposed, i.e. the payment of a fine, the provision of community service or the imposition of a probationary period.⁷ Prosecution can be resumed if the obligation to cooperate in the investigation has been breached or the documents and information provided were false.

In European Cartel Law, the leniency programme offers the undertakings involved in a cartel which self-report and hand over evidence, either total immunity from fines or a reduction from the fines which the Commission would have otherwise imposed on them. The first cartel participant that informs the Commission of a cartel and provides sufficient information for the Commission to commence an investigation receives full immunity from any eventual fine, if it complies with the conditions of the Leniency Notice. Any other cartel participants that apply for leniency after the investigation has started can receive a reduction of the fine if they provide sufficient evidence that represents a "significant added value" and

⁷ Schroll and Kert, 2025, No. 53 ff.

cooperate genuinely. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these requirements is granted a reduction of between 30% to 50%, from the fine, which would have otherwise been applied, the second a reduction between 20% to 30%, and subsequent companies up to 20%.⁸

In order to increase the application of the leniency programme, in 2016 the Austrian legislator introduced a basic legal right of the accused to be granted leniency, if the requirements are met. This should provide potential leniency applicants with increased legal certainty and the possibility of judicial review. Nevertheless, the number of cases in which leniency status has actually been granted has so far remained quite low.

To briefly illustrate the problem of leniency programs a current example from Austria shall be used: there was the suspicion that politicians of a political party had commissioned manipulated opinion polls for the benefit of the party, but these opinion polls had been paid with public funds of the Ministry of Finance. In the course of the investigation, houses and offices of a number of politicians and two pollsters were searched and cell phones and computers were seized. A few days later, one of the pollsters, let's call her Ms. B, was arrested. During the subsequent interrogations, Ms. B not only made a comprehensive confession regarding the known offences, but also provided information about a number of other crimes known to her in this context. The public prosecutor's office decided that it grants her leniency if she confirms her statements in the further investigation proceedings and continues to cooperate.

The following questions in particular have now arisen in connection with the public prosecutor's action: How long during the investigation proceedings will a defendant be allowed to benefit from leniency by disclosing new facts? Is the voluntary nature of the leniency still given if the accused has been arrested? Under what conditions can one speak of a voluntary approach to the public prosecutor's office (or criminal investigation department)? What are the consequences of carrying out a house search before the accused has disclosed his/her knowledge?⁹ Does such a coercive measure generally exclude the status of a principal witness?

⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

⁹ See Kert and Schroll, 2022, p. 166.

Is it legally permissible for more than one person to be granted leniency status in the same case?

It is typical for leniency programmes that the state waives the imposition of a penalty or reduces the penalty as a reward for cooperation and the provision of information. Is it legitimate to waive punishment against someone who is believed to have committed a crime in order to motivate them to testify against others? As explained at the beginning, the fight against certain criminal activities requires a cooperation between judicial authorities and justifies to impose no or only a reduced sanction, because these crimes otherwise are almost impossible to solve. And if criminal activities cannot be solved, criminal law cannot fulfill its purpose at all. Reducing the penalty or waiving punishment (under certain conditions) is the incentive to motivate offenders to cooperate. Therefore it is legitimate to provide ways how this cooperation is taken into account in the sentencing process.

However, care must be taken to ensure that the initiative for cooperation comes from the accused, who voluntarily discloses his knowledge without being pressured to do so by the criminal prosecution authorities.¹⁰ Otherwise, the criminal proceedings risk becoming a deal. It is not the prosecution authority that offers something, but the potential principal witness must actively disclose his knowledge on his own initiative. It is therefore not permissible for the prosecution or criminal investigation authority to make a suggestion or offer to the accused as to what might happen if the latter provides new facts or evidence.

6. Whistleblowing

Different questions arise referring to whistleblowing. The focus here is less on punishment, since the whistleblower is often not the perpetrator of a criminal offence, but another person who learns about illegal activities in a company or public department. Instead, it is about protecting the person who discloses or reveals wrongdoing in a company. This is because the disclosure of wrongdoing is linked with a number of risks for the whistleblower (such as termination of employment, harassment, criminal law prosecution or social ostracism). However, whistleblower regulations aim at getting information to detect irregularities and clarify them, to end up illegal behaviour in a company or in public authorities.

¹⁰ Schroll and Kert, 2025, No. 16 ff.

Whistleblower regulations have been in place in the EU for some time in various areas, such as in the case of reports of breaches of anti-money laundering obligations¹¹ or the Market Abuse Regulation¹².

The Whistleblower Directive¹³ is intended to harmonize the protection of whistleblowers at EU level. The directive aims to establish minimum standards that ensure a high level of protection for persons who report breaches of Union law. It obliges companies in the private and public sectors to set up internal reporting channels for legal entities under private and public law with 50 or more employees (Art. 8 and 9) and Member States to set up external reporting channels with Member State authorities to be designated, which should forward the information received to competent EU institutions in a timely manner (Art. 11 to 14). Both types of reporting channels must protect the confidentiality of the whistleblower (Art. 16). Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorised staff members competent to receive or follow up on reports, without the explicit consent of that person.

The whistleblower may make the information about the breach publicly available if neither the internal nor the external report leads to appropriate action or if he has reasonable grounds to assume that the breach constitutes an immediate or manifest threat to the public interest or that, in the case of an external report, there is a risk of retaliation or little prospect of effective action against the breach (Art. 15).

If a whistleblower makes an internal or external report in good faith (Art. 6 (1)) or makes a disclosure if the conditions are met, the Whistleblower Directive provides for a series of protective measures, ranging from precautions under employment and disciplinary law (prohibition of suspension and dismissal, prohibition of imposition or

¹¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73.

¹² Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, p. 1.

¹³ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17.

administering of any disciplinary measure, reprimand or other penalty, including a financial penalty, etc.) coercion, intimidation, harassment or ostracism, to protection against *de facto* disadvantages such as bullying and the prohibition of psychiatric referrals (Art. 19). In addition, support measures are provided for the whistleblower to protect against retaliation (Art. 21). The Whistleblower Directive also provides for measures for the protection of persons concerned, as the existence of an effective legal remedy, the presumption of innocence and the right of access to the file for persons accused of a violation by the whistleblower (Art. 22).

For reasons of competence, the Directive only applies to reports of breaches of Union law, i.e. breaches of one of the numerous EU legal acts listed in the Annex to the Directive (e.g. in the areas of public procurement, financial services, product safety or environmental protection; Art. 2 (1) (a)), as well as breaches of the Union's financial interests as defined in Art. 325 TFEU (Art 2 (1) (b)) and the internal market rules, including competition and state aid law and the ECSC rules (Art 2 (1) (c)). The area of protection of the Directive includes persons who have become aware of an infringement of EU law in a professional context and have reported it in accordance with the requirements of the Directive. The prerequisite for this is good faith in relation to the accuracy of the reported infringement and that the report falls within the scope of the Directive. The Directive had to be implemented into national law by December 17, 2021.

7. Conclusion

Leniency programs and whistleblowers are indispensable for the detection of legal violations that endanger or harm the public interest and in particular for the detection of cases of corruption and other criminal offenses. Without them, many cases of white-collar crime and abuse of authority would remain undetected. Furthermore, whistleblower systems as well as leniency programs also have a preventive effect against misconduct because the probability of detection is increased. However, such systems require that legal systems provide for incentives for people to report their knowledge and make it available to the authorities. Whistleblowers must therefore be guaranteed adequate protection, and principal witnesses must benefit from disclosing their knowledge by having their penalties reduced or waived entirely.

As the practice of leniency programs also shows, the functioning of such systems presupposes that the persons concerned have the greatest possible legal certainty. Otherwise, such systems will deter them because of the risk to be punished after having given information to the authorities. This means that it must be clear under what conditions protection is granted. For whistleblowing to be successful in the prosecution of misconduct in companies or public bodies, it therefore depends on regulations that are as clear and comprehensible as possible and compatible with the rule of law principle.

Whistleblowers often suffer considerable disadvantages, which can also threaten their existence. Sufficient protection is therefore necessary for them.

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