Code of Criminal Procedure

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ONLINE COMMENTARY
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COMMENTARY ON

Art. 68 CrimPC

A commentary by Flavia Bianchi / Caroline Schär

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Art. 68 Translation and interpretation

[1] Where a party to the proceedings does not understand the language of the proceedings or is unable to express him- or herself adequately, the director of proceedings shall appoint an interpreter. In minor or urgent cases, the director of proceedings may, if the person concerned consents, dispense with appointing an interpreter provided the director of proceedings and the clerk of court have an adequate command of the foreign language concerned.

[2] Even if he or she has a defence lawyer, the accused shall be notified in a language that he or she understands, either orally or in writing, of at least the essential content of the most important procedural acts. There is no right to have all procedural acts and files translated in full.

[3] Files that are not submissions made by parties shall, if required, be translated in writing or orally translated for the record of proceedings.

[4] A person of the same sex must be appointed to translate questions to be put to the victim of a sexual offence where the victim so requests and it is possible without causing an unreasonable delay to the proceedings.

[5] The provisions on expert witnesses (Art. 73, 105, 182–191) apply *mutatis mutandis* to translators and interpreters.

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I. SYSTEMATICS, HISTORY, CODIFICATION

1 The right to translation in criminal proceedings is inextricably linked to the principle of **fairness of proceedings**. Only if the person involved in criminal proceedings is aware of the criminal charges and the proceedings can they defend themselves effectively and play an active role in the proceedings. This requires that the accused be informed in an understandable manner about the criminal charges against them and about the content and significance of the proceedings.

2 The right to translation arises primarily from **convention and constitutional law**, which provide minimum guarantees. Article 5(2) of the ECHR guarantees that arrested persons shall be informed, within a reasonable time, in a language they understand, of the reasons for their arrest and of the charges against them. Furthermore, Article 6(3)(a) of the ECHR gives the accused the right to be informed as soon as possible, in a language they understand, of the nature and cause of the accusation against them in detail. Article 6(3)(e) of the ECHR also guarantees the accused the right to free assistance from an interpreter. The same provisions are also found in Article 14(3)(a) and (f) of the International Covenant on Civil and Political Rights (ICCPR). A right to translation also arises from Art. 32 para. 2 of the FC.

3 The earlier cantonal codes of criminal procedure already provided for a right to translation. This right was formulated in varying degrees of detail; for example, the code of criminal procedure of the canton of Zurich also contained a specific provision concerning witnesses and deaf-mute persons, while other codes of criminal procedure only contained an explicit provision relating to the accused. Since the entry into force of the **CrimPC**, the right to translation has been enshrined in Art. 68 in Chapter 8 under "General Rules of Procedure." The same section also contains provisions on the oral nature of the proceedings and the language of the proceedings.

4 The right guaranteed by the CrimPC goes beyond that provided for in convention and constitutional law. It does not only apply to the accused or detained person. Based on the provisions of the CrimPC, **other parties to the proceedings**, such as witnesses and informants, are also entitled to translation (see III.A. below).

While Art. 68 CrimPC refers to cantonal proceedings and proceedings conducted by the federal criminal authorities, the right to translation in **federal court proceedings** is governed by Art. 54 BGG. 5

Further provisions concerning translations – in particular in the context of international service of documents – can be found in **international agreements** such as Art. 52 no. 2 of the Schengen Convention of 19 June 1990 (SDÜ), Art. 28 no. 2 of the Agreement of 26 October 2004 on cooperation between the Swiss Confederation, on the one hand, and the European Community and its Member States, on the other hand, to combat fraud and other illegal activities affecting their financial interests, and in Art. 15 of the Second Additional Protocol of November 8, 2001, to the European Convention on Mutual Assistance in Criminal Matters (ZPII EUeR). 6

II. TERMINOLOGY AND FIELDS OF APPLICATION

Art. 68 CrimPC only uses the term **translation**. Translation is generally understood to mean written translation. However, Art. 68 CrimPC covers not only written translations, but also interpreting (oral translations). In this commentary, the term "translation" is used synonymously for written translation and oral interpretation. 7

The provision also covers **language mediation** in communication surveillance. This means that transcribed telephone calls and text messages or information and conversation content obtained through other (secret) surveillance measures are translated into the language of the proceedings. In this context, para. 5 of Art. 68 CrimPC is particularly important, which must also be observed when members of the police carry out the translation (see VII.C. below). 8

Translation is also required in a broader sense for **speech- and hearing-impaired persons** (see also Art. 143 para. 7 of the CrimPC, according to which speech- and hearing-impaired persons are to be questioned in writing or with the assistance of a suitable person). If necessary, a person who is proficient in sign language must be called in. 9

The same applies to **illiteracy**. The focus here is on translating or bringing documents to the attention of the person concerned, although in the case of parties represented by a lawyer, it is to be expected that the legal representa- 10

tive will take on this task. However, if the person concerned is not represented by a lawyer, it may be necessary to order an official defense.

III. RIGHT TO TRANSLATION OF PERSONS INVOLVED IN THE PROCEEDINGS (PARA. 1)

A. Personal and material scope

11 According to the wording of the law (para. 1), **all parties to the proceedings** are entitled to translation, i.e. not only the accused but also informants, witnesses, and other parties to the proceedings within the meaning of Art. 105 para. 1 CrimPC.

12 Legal counsel do not have a right to translation for themselves. According to Federal Supreme Court case law, lawyers are also expected to understand the official languages German, French, and Italian.

13 Para. 1 focuses on **oral proceedings**, i.e., interrogations. In the case of written submissions by foreign-language speakers, the involvement of an official defense counsel or free legal representative may be considered.

B. Target language

14 As far as possible, translations should be provided in the **native language** of the person concerned who is not proficient in the language of the proceedings. However, there is no absolute right to translation into the native language. Art. 68 CrimPC merely guarantees the right to translation into a language that the person concerned understands (cf. wording of para. 2). This means that translation into a third language that the person concerned understands is also possible. Whether translation into a third language is sufficient will depend in each specific case on factors such as whether there is a time constraint and, ultimately, how quickly a suitable person can be found to do the translation. If a translation into the native language of the person concerned cannot be ensured within a reasonable time, in practice the translation is made into a common third language such as English or French, even if the person concerned does not have a perfect command of that language. In our opinion, this is permissible as long as effective communication is guaranteed.

C. Mandating and assessing the need for translation

The right to translation applies from the first police interview. The respective **proceedings management** is responsible for calling in a translator, as is directly apparent from the wording of the law. This means that the public prosecutor's office is generally responsible in the preliminary proceedings and subsequently the court proceedings management within the meaning of Art. 61 CrimPC. The police are also authorized and obliged to call in a translator if necessary during police investigations. The head of the proceedings is also responsible for informing the accused of their right to translation at the beginning of the proceedings (cf. Art. 158 para. 1 lit. d CrimPC). 15

Translation is required if the person involved in the proceedings does not understand the language of the proceedings (cf. Art. 67 CrimPC) or cannot express themselves in that language (lack of active or passive language skills). The right of a foreign-language accused person to translation must be determined on the basis of their actual needs and the specific circumstances. The following criteria may be used: the subject matter of the proceedings, the complexity of the proceedings, and the nature of the procedural action. For example, a foreign-language witness who only has to identify a person will be able to make a statement even without the assistance of a translator, despite having limited language skills. The presiding judge assesses the need for translation and appoints a translator ex officio. A translator may also be appointed at the request of the person concerned. In addition, the person involved in the proceedings who requires translation, or their legal representative, has a duty to indicate any need for translation at an early stage. According to Federal Supreme Court case law, persons involved in the proceedings are also required to actively inquire about the content of a decision or to report to the authorities if they do not understand it, otherwise they are acting in bad faith. 16

The question arises as to how the presiding judge should assess the **language skills** of a person involved in the proceedings. As a rule, it should be readily apparent from the answers given by the person being questioned whether they have sufficient language skills. The presiding judge must be granted discretion in this matter, which they must exercise in accordance with their duties. However, sufficient language skills must not be assumed lightly. It is true that a case may appear to be relatively straightforward in terms of the facts. In case of doubt, however, a translator should be consulted, especially since every word is crucial in reaching a verdict and conceptual distinctions are gen- 17

erally of central importance in jurisprudence. If the person concerned has provided a self-assessment, this should be taken into account with a certain degree of caution. It should be borne in mind that criminal proceedings are associated with considerable stress for those involved and that any information provided on language skills may be influenced by other considerations relating to their position in the proceedings. For example, when assessing linguistic integration with a view to possible expulsion, the accused person's statements regarding their need for translation may be taken into account under certain circumstances.

D. Waiver of the use of a translator

18 According to para. 1, the use of a translator may be waived in exceptional cases. This is subject to the **cumulative** conditions that the case is simple or urgent, that the person concerned has given their consent, and that both the person conducting the proceedings and the person taking the minutes have a sufficient command of the foreign language.

1. Simplicity and urgency

19 Whether a case is **simple** is assessed on the basis of the circumstances of the individual case. The dispatch mentions the questioning of a foreign-language witness in criminal proceedings for an offense. However, the type of offense is not (alone) decisive. The complexity of the case and the legal or factual aspects of the proceedings must also be taken into account. A case is generally considered simple if summary proceedings are applied and the facts of the case are clear, for example because of a confession.

20 **Urgency** is assumed if the proceedings would be delayed to such an extent by the involvement of a translator that their conduct would be jeopardized. It is conceivable, for example, that a witness is to be questioned who is about to leave the country or be deported and there is not enough time to call in a translator. In practice, the exception is most likely to be applied in cases of provisional arrest.

2. Consent

21 Consent to waive the right to translation must be obtained from the person who, according to para. 1, sentence 1, is entitled to translation or who is required to participate in the proceedings. This does not refer to other persons

who participate in the proceedings, for example on the basis of Art. 147 CrimPC.

The waiver of the right to a translator is only valid if the person concerned has been informed in advance of the essential points of the proceedings, i.e., the criminal charge, in summary proceedings, the consequences of not contesting the summary order, and the right to call upon an independent translator. 22

3. Language skills of the presiding judge

The third requirement is that both the presiding judge and the person taking the minutes must be **proficient in the foreign language**. Taken literally, this means that if a translator is not called in, a person taking the minutes must always be present in addition to the presiding judge. In our opinion, in cases where the presiding judge drafts the minutes themselves, it is sufficient for them to be proficient in the foreign language. The minutes themselves must generally be drafted in the language of the proceedings. However, essential statements must be recorded verbatim and thus in the language in which the person being questioned made their statement (see Art. 78 para. 2 CrimPC). 23

4. Restrictions

The exception should be used with **restraint**. It should be limited to individual procedural steps or procedural actions. In case of doubt, a translation must be provided. 24

It is problematic to dispense with the services of a translator in cases where **members of the court** perform the translation. In such cases, the person translating assumes a dual role, which can lead to problematic situations given that the recusal rules in Art. 56 lit. b CrimPC must be observed in the case of translators. This issue has hardly been discussed in case law to date. This is likely due to the fact that the question has rarely arisen in practice. Only the Cantonal Court of St. Gallen pointed out in a decision of August 24, 2017, that the dual role of judge/translator could be problematic (see also VII.C.). 25

IV. THE ACCUSED PERSON'S RIGHT TO TRANSLATION (PARA. 2)

A. Scope of the right

26 The right to translation of the **accused person** is more extensive than that of the other parties to the proceedings. Para. 2 therefore contains more specific provisions in favor of the accused person. First, they are entitled to be informed immediately, either orally or in writing, of at least the essential content of the most important procedural steps in a language they understand. Essentially, the provision aims to ensure that the accused is informed of the allegations made against them. This also includes providing simple and "non-technical" information. At the beginning of the first interrogation, the accused must be informed in a language they understand that they may request a translator (Art. 158 para. 1 lit. d CrimPC), otherwise the interrogation may be deemed inadmissible (Art. 158 para. 2 CrimPC).

27 According to para. 2, the **most important procedural acts** must be translated. Unlike the right under para. 1, this right does not primarily relate to oral procedural acts. However, there is still no right to have all procedural acts and the entire case file translated. According to the dispatch, the principle of procedural fairness serves as a guideline for assessing the right to translation. Those procedural steps must be translated which the accused person needs to understand in order to ensure a fair trial and an effective defense. These include the decisive witness statements, the essential content of expert opinions and other relevant evidence, the indictment, the parties' submissions with the main motions, and the wording of the operative part of the decision and essential parts of the grounds for the decision. There is also a right to translation of the preliminary discussions with the defense, especially since an effective defense is hardly conceivable without preliminary discussions between the party and their legal representative.

28 Whether or not the accused is represented by a lawyer may also play a role in determining the scope of the right to translation. Any **foreign language skills of the defense** cannot, in principle, replace a missing translation. However, the scope of the translation may be smaller in such cases. The message stated that the accused person represented by a lawyer is not entitled to a translation of the entire judgment.

B. Right to translation in summary proceedings

The right to translation is particularly important in **summary proceedings**. In order for the accused to be able to decide whether to accept the summary order and the associated consequences, some of which may be far-reaching, it is essential that they understand the content of the summary order. According to Federal Supreme Court case law, there is therefore a right to translation of the operative part of the decision and the information on legal remedies in summary proceedings. However, it seems questionable whether the right to translation is satisfied if only the operative part and the information on legal remedies are translated. In our opinion, the right to translation also extends to other elements of the penalty order, such as the core elements of the facts of the case. In addition, the essential elements of the reasoning behind the decision must also be translated (see IV.A. above). 29

In **practice**, a translation can either be delivered in written form or the person concerned can be summoned to an oral hearing. On the other hand, the requirement of Art. 68 para. 2 of the CrimPC is not satisfied if the accused person is merely handed an information sheet with general information on the criminal (order) proceedings, which contains a reference to translation assistance. With regard to oral translation, the Federal Supreme Court has also specified that oral translation when the summary penalty order is handed over, while at the same time encouraging the accused to waive their right to appeal, violates the principle of procedural fairness. This deprives the accused of the opportunity to make use of the ten-day reflection period to calmly analyze the consequences of the summary penalty order after it has been served, to consult a lawyer if necessary, and to voluntarily waive their right to appeal. The burden of proof for proper service and translation lies with the prosecuting authorities. The lack of a translation of a penalty order does not constitute grounds for nullity. 30

If the information on legal remedies was **wrongly not translated**, the same case law applies as for decisions that were not properly served. The parties must not suffer any disadvantages as a result of the lack of translation. The time limit for appeal must therefore not be shortened. The aforementioned case law must also apply in the event of failure to translate the operative part of the decision. However, this is subject to the condition that the person concerned can invoke the protection of legitimate expectations and cannot be accused of procedural negligence. 31

V. TRANSLATION OF FILES (PARA. 3)

A. Scope of application

32 Art. 68 para. 3 CrimPC regulates the right to have files translated. Art. 68 para. 3 CrimPC adopts the subdivision according to Art. 100 para. 1 lit. a–c CrimPC concerning the content of the file. The term "files" in Art. 68 para. 3 CrimPC refers to the **proceedings and interrogation records as well as the files compiled by the criminal authority** (cf. Art. 100 para. 1 lit. a and b CrimPC), which are to be distinguished from the files submitted by the parties (cf. Art. 100 para. 1 lit. c CrimPC). Information from foreign authorities or other authorities may also be considered as files to be translated.

33 With regard to the **term "party"** used in Art. 68 para. 3 CrimPC, reference should generally be made to Art. 104 para. 1 lit. a–c CrimPC. According to this, the accused, the private prosecutor, and, in the main and appeal proceedings, the public prosecutor's office are covered by the term "party." E contrario, it can be inferred from this that files that are submissions from other parties to the proceedings – i.e., the injured party, witnesses, informants, complainants, or other persons affected by procedural actions – must be translated in accordance with para. 2 and 3 of Art. 68 of the CrimPC, if necessary.

34 The right to have files translated already applies in **preliminary investigations**, in which the accused must be provided with translations of those documents that they need to understand. This applies in particular to files and statements presented to the accused during questioning, as well as documents that the person concerned must sign, such as house search and seizure reports.

B. Obligations of the authorities

35 The obligation to translate the files is limited by the principle laid down in para. 68 (2) of the CrimPC, according to which there is **no right to a complete translation of all procedural documents and files**. This restriction is taken into account by the wording "to the extent necessary" used in para. 68 (3) of the CrimPC. As already explained, the limits are set by the principle of procedural fairness (above, I.).

In particular, a translation is **not necessary** if a document is written in a language that is understood by both the parties and the presiding judge. 36

It is questionable to what extent the accused person can request the **translation of documents** that are in a language that they understand but the court does not. The Federal Supreme Court has not made a final ruling on this issue. In a case where the complainant objected that the documents in his native language had not been translated into the language of the proceedings (French), it pointed out that there was no entitlement to a complete translation of all procedural documents and files. Any such request must be limited to the documents required under Art. 68 para. 3 of the CrimPC. Under certain circumstances, such a translation may be required in accordance with the principle of investigation. 37

C. Obligations of the parties

It follows a contrario from Art. 68 para. 3 of the CrimPC that it is in principle **the responsibility of the parties** to translate the files they submit into the language of the proceedings. The preliminary draft of the Swiss CrimPC of June 2001 (VE-StPO) still expressly provided for a corresponding regulation (cf. Art. 73 para. 2 VE-StPO). 38

If a submission is made by a party in a foreign language, it is not generally the responsibility of the authority to carry out the translation itself, and it is sufficient to set a **deadline for the translation**. In order to prevent excessive formalism, the criminal authority must grant an additional deadline for translation in the case of a submission that is not written in the language of the proceedings and is submitted within the deadline, unless it is satisfied with the document or has it translated itself. In the event of a rejection for correction or translation, the requirements are set out in Art. 110 para. 4 CrimPC. According to this provision, the party concerned must be informed in particular that the submission will be disregarded if it is not revised within the set deadline. 39

The **limits** of the parties' obligation to translate may arise from the principle of investigation and the right to an effective defense. As already explained, the authority does not, in principle, have to carry out the translation itself. However, a corresponding obligation on the part of the authorities may arise from the right to an effective defense, as the Federal Supreme Court has held in re- 40

lation to a statement of appeal in cantonal proceedings by an appellant who was not proficient in the language of the proceedings and did not have the necessary means to have his statement of appeal translated. Furthermore, the principle of investigation may require that evidence not translated by the parties be taken into account if it appears relevant to the outcome of the proceedings.

VI. VICTIM'S RIGHT TO TRANSLATION BY A PERSON OF THE SAME SEX (PARA. 4)

A. Scope of the protective measure

41 Art. 68 para. 4 of the CrimPC is one of the protective measures provided for victims of crimes against sexual integrity (for further protective measures, see Art. 153 [Special measures for the protection of victims], Art. 169 para. 4 [right to refuse to testify for one's own protection or for the protection of close persons] and Art. 335 para. 4 CrimPC [composition of the court]). According to the wording of Art. 68 para. 4 CrimPC, the right to have a person of the same sex present does not apply absolutely, but, unlike Art. 153 of the CrimPC, is subject to the **reservation of undue procedural delay**. Such an exception should only be accepted with restraint. Undue procedural delay can be assumed in particular if the questioning of the victim is objectively important and urgent and the translation by a person of the same sex cannot be carried out within a reasonable period of time. In legal doctrine, with reference to Art. 144 CrimPC, it is suggested that, depending on the circumstances, a translator should be connected via video conference in order to guarantee the right.

B. Request by the victim

42 From a procedural point of view, it should be noted that the wording of the provision makes the right dependent on a **request by the victim**. This presupposes that the victim is aware that they can make such a request. With regard to the victim's rights to information, Art. 305 para. 1 of the CrimPC stipulates that the police and the public prosecutor's office must inform the victim comprehensively about their rights and obligations in the criminal proceedings during the first interrogation. For organizational reasons, it seems appropriate to provide advance information regarding the victim's right to transla-

tion by a person of the same sex if the presiding judge does not automatically call in a person of the same sex to provide translation. It is recommended that the presiding judge automatically call in a person of the same sex to provide translation during the victim's questioning if such a person is available.

With regard to the **time limit** within which an application must be made, different practices apply in the cantons, whereby forfeiture of the right is likely to be subject only to the proviso of abusive conduct or undue delay in the proceedings. 43

VII. REQUIREMENTS CONCERNING TRANSLATORS (PARA. 5)

A. Rights and obligations of translators

As parties to the proceedings, translators are entitled to the rights set out in Art. 105 ff. CrimPC and are subject to the same liability and criminal provisions as **expert witnesses**. The reference to the provisions on expert witnesses imposes the corresponding confidentiality obligations (Art. 73 CrimPC) on translators. 44

In particular, the translator must be informed of the criminal consequences of false translation (Art. 184 para. 2 lit. f CrimPC in conjunction with Art. 307 SCC) and the duty of confidentiality (Art. 184 para. 2 lit. e CrimPC in conjunction with Art. 320 SCC). If the criminal files do not indicate who produced the translated transcripts of telephone surveillance and whether the translators were informed of the criminal consequences of Art. 307 SCC, they may not be used against the accused according to Federal Supreme Court case law. **Instructions and division of labor** must be traceable. If the translated wiretap transcript does not meet these requirements, it may be re-examined by the court, for example by listening to the relevant conversations at the court hearing and translating them directly. 45

B. Requirements

With regard to the requirements to be met by translators, the CrimPC stipulates in general terms in Art. 183 that they must possess the **necessary knowledge and skills**. 46

47 In principle, no degrees, diplomas, or other certifications of expertise are required to qualify as a translator. However, not only **very good knowledge of the source and target languages** is required, but also social and, in particular, cultural skills, which influence the interpretation of the statements made by the person being questioned and thus the recording of the transcript. The interpreter must be able to translate the statements accurately in terms of content and understand idioms and allusions in their cultural context in order to faithfully reproduce the meaning of the statements.

48 It is left to the cantons, within the scope of their responsibility for the organization of the courts, to specify the requirements to be met by translators. The **cantonal regulations** vary greatly. In some cantons, there are lists of interpreters for the police, public prosecutors, and the judiciary, which allow for quality control, and courses are offered that can be completed as part of an accreditation process. The canton of Zurich has detailed regulations governing the provision of language services on behalf of cantonal judicial and administrative authorities, in particular an accreditation procedure for quality assurance.

49 Translators are subject to the **grounds for recusal** under Art. 56 of the CrimPC. Translators must also have the necessary independence and be neutral.

C. Translation by members of the police force

50 The Federal Supreme Court has dealt with the question of whether members of the police force can act as translators on several occasions. The use of members of the police force who are not themselves involved in the case as translators of wiretap transcripts is not prohibited in principle, provided that the **necessary independence** is maintained. According to Federal Supreme Court case law, police personnel conducting the interview (as well as the public prosecutor conducting the interview) cannot simultaneously act as translators if they have already been involved in the proceedings in another capacity. A deviation from this is only permissible under the conditions of Art. 68 para. 1 sentence 2 CrimPC. With regard to the instruction, the Federal Supreme Court has ruled that when police personnel are called in for translation purposes, it can be assumed that they are aware of the criminal consequences under Art. 307 of the SCC due to their training and activities, in particular as a result of their cooperation with court interpreters.

D. Anonymity of the translator

If there is reason to believe that the translator's participation in the proceedings could expose them or a person close to them to a significant risk to life and limb or other serious disadvantage, the presiding judge shall take appropriate protective measures in accordance with Art. 149 para. 1 CrimPC. Art. 149 para. 2 lit. a CrimPC provides in particular for the **guarantee of anonymity**. 51

The guarantee of anonymity must be approved by the **compulsory measures court.** 52

A blanket reference to the cultural milieu and environment of organized crime is not sufficient to meet the requirements of Art. 149 para. 1 of the CrimPC in order to prove serious indications of a concrete danger to the translator. Indications are required that provide **concrete evidence of such a danger**. 53

The Federal Supreme Court has ruled that the anonymity of the original translator would not justify removing the transcripts from the case file, as the recorded conversations were retranslated in a **contradictory hearing** in the presence of the parties. 54

VIII. TRANSLATION COSTS

Translation costs are part of the **costs of the proceedings** (Art. 422 para. 2 lit. b CrimPC). Costs of the proceedings incurred due to the accused person's foreign language skills cannot be imposed on that person (Art. 426 para. 3 lit. b CrimPC). This entitlement already arises from Art. 6 no. 3(e) ECHR. The accused may therefore not be required to pay translation costs even if they are found guilty and even if they are in a very good financial position. In contrast, the other parties to the proceedings may in principle be required to pay the translation costs. The private prosecutor may apply for free legal aid, which also includes exemption from procedural costs and thus from translation costs (Art. 136 para. 2 lit. b CrimPC in conjunction with Art. 422 para. 2 lit. b CrimPC). 55

The Federal Supreme Court has ruled that, with regard to documents that are translated not because of the accused person but because the prosecuting authority and the court require a translation, the **convention guarantee** (Art. 6 56

no. 3 lit. e ECHR) is not affected. In this case, the translation costs are generally to be borne by the convicted person. The Federal Supreme Court's case law outlined above has been codified in the provisions of Art. 422 para. 2 lit. b and Art. 426 para. 3 lit. b of the CrimPC.

57 In connection with the right to have **investigative interviews** with the defense translated, the question of who bears the costs arises. The defense must engage a translator for investigative interviews and submit a request for a cost approval. The approval of costs will depend on the specific circumstances, in particular the seriousness and complexity of the case, the possibility of engaging a defense attorney who is proficient in the foreign language, and the question of whether the fairness of the proceedings can be guaranteed without the involvement of a translator. If the (freely chosen) defense counsel themselves engage a translator for client meetings, they generally assume a cost risk.

58 The translator is entitled to **reasonable compensation**, whereby reference can be made to Art. 190 CrimPC in this regard.

IX. LEGAL REMEDIES

59 If the presiding judge rejects a request for translation made by a person involved in the proceedings, this constitutes a procedural order within the meaning of Art. 65 CrimPC. The rejection of a request for translation can be challenged by means of a **criminal procedural appeal** (Art. 393 para. 1 lit. a CrimPC). If the decision is made by a court, it can, as a procedural order within the meaning of Art. 65 CrimPC, generally only be challenged with the decision on the merits, unless the person concerned suffers irreparable harm as a result. The rejection of a request for the involvement of a translator of the same sex in cases involving victims of crimes against sexual integrity may also be challenged by means of an appeal. The translator may also lodge a criminal appeal to defend themselves against a reduction in compensation. The decision of the appeal authority may be appealed to the Federal Supreme Court in criminal matters (Art. 78 ff. BGG), whereby the latter requires the assertion of irreparable harm in the case of appeals against interim decisions (Art. 93 para. 1 lit. a BGG).

60 Refusal to provide a translation constitutes a **formal denial of justice**, which means that, for example, the private prosecutor is entitled to appeal to the Federal Supreme Court in criminal matters on this point despite the lack of

civil claims (Star practice). In proceedings before the Federal Supreme Court, it should also be noted that determining a person's language level is a question of fact, which the Federal Supreme Court reviews only with limited jurisdiction (Art. 97 para. 1 BGG).

X. DISTINCTIONS

The right to translation must be distinguished from the right to **free legal representation and necessary or official defense**. These rights are not identical, but may overlap. 61

According to Art. 130 lit. c CrimPC, the accused must be defended if they are unable to adequately protect their interests in the proceedings due to their physical or mental condition or for other reasons and the legal representative is unable to do so (**necessary defense**). In combination with other reasons, a lack of language skills can also justify a claim to necessary defense, according to the Federal Supreme Court. According to Federal Supreme Court case law, private plaintiffs with language difficulties in written proceedings may be appointed free legal counsel within the meaning of Art. 136 of the CrimPC, at least if the civil action and, in the case of victims, the criminal action is not futile. 62

Since the need for translation may also depend on whether a person is represented by a lawyer (above, IV.A.), it is clear that a clear **separation between translation work and legal representation**, as is sometimes demanded, is not always possible, nor is it necessary. Here, too, the needs of the persons concerned are very individual and depend on the specific case, and the question of whether a translation or free representation should be ordered must be decided with the necessary discretion and taking into account the principle of procedural fairness. 63

XI. CASE STUDIES

No right to the same translator: 64

In its judgment 1B_404/2012 of December 4, 2012, the Federal Supreme Court clarified that “compelling objective reasons” would argue against using the same translator for confidential instruction discussions between the defense and the accused and for formal hearings. These compelling reasons in-

clude attorney-client privilege, the requirement to establish the truth in court proceedings, and the avoidance of conflicts of interest. There is therefore no entitlement to the same person acting as the official translator and the translator for preliminary hearings. The aforementioned decision also states that it is the responsibility of the defense to provide a translator for communication with clients during preliminary hearings, whereby the court can provide a list of suitable translators.

65 Right to translation during a house search:

In its judgment 1B_564/2022 and 1B_569/2022 of February 14, 2023 (E. 3.3), the Federal Supreme Court had to assess – in proceedings conducted in French – whether the Office of the Attorney General should have called in a translator during a house search on the premises of a company, which it carried out in the presence of a French-speaking board member and the English-speaking managing director. The Federal Supreme Court took into account that the French-speaking member of the board of directors was present during the search, had taken note of the search warrant and, in particular, the instructions, and had translated and explained them to the managing director. It also pointed out that no translation had been requested and concluded that, under these circumstances, the foreign-language managing director could not claim that a translator should have been called in.

66 Timing of the translation of interviews:

In judgment 6B_1079/2022 of February 8, 2023, the right to translation was not considered to have been violated, even though the accused was not granted immediate translation during the questioning of parties to the proceedings. The interviews were only translated after the fact, and the accused was able to ask supplementary questions with the help of a translator. This approach could also be advantageous for the accused compared to simultaneous translation with the party's right to ask questions immediately following the questioning by the presiding judge, as it allowed them to concentrate on the relevant statements recorded in the minutes, have more time to prepare and discuss their supplementary questions with their defense, and that simultaneous translation during the questioning of the person being questioned by the presiding judge could lead to communication problems.

67 Translation by relatives during assessments:

Translation may also be necessary for the purpose of conducting a psychiatric assessment. In this context, the Federal Supreme Court – albeit in relation to an IV assessment – dealt with the question of whether relatives of the person being assessed could also be called upon to provide translation. It rightly rejected this and pointed out that translation by relatives was problematic due to bias and a lack of distance. Relatives would not be able to guarantee a neutral, complete, and truthful translation. Furthermore, relatives would not be able to guarantee the quality of translation required for the assessment. These considerations must also apply in criminal proceedings. Translation by relatives is therefore not permissible in psychiatric assessments, nor in other procedural acts.

Right to translation of the indictment: 68

According to Federal Supreme Court case law, the indictment must generally be translated in writing for the accused, although this right only extends to those charges in which allegations are made against the foreign-language accused. The Federal Court denied a violation of the right to translation and to be heard in proceedings conducted in German in the case of a French-speaking defendant who had been provided with translations of the (largely) identical draft indictments and who, due to the specific circumstances (in particular the detailed final hearings, his personal circumstances, his two German-speaking defense attorneys, and the detailed legal documents and pleadings before the court of first instance) was able to understand the essential content of the indictment and defend himself effectively against the criminal charges.

Time of translation of a judgment delivered orally: 69

Judgment 6B_719/2011 of November 12, 2012, was based on a case in which a person was convicted and the judgment was delivered orally but not immediately translated (orally). The convicted person was taken away by the police after the hearing before they could discuss their defense again. The convicted person only became aware of the content of the judgment when they were already back in prison. In this case, the Federal Supreme Court considered the right to translation to have been violated. However, it was deemed sufficient to record the violation of the right to translation in the written considerations of the judgment. It can be inferred from this that the accused person has, in principle, a right to oral translation of the operative part of the judgment and a brief statement of reasons when the judgment is announced orally.

XII. OUTLOOK: TECHNICAL AIDS

70 In view of technological progress, the judiciary and law enforcement agencies must address the question of whether translation services can be provided in the future using **technical aids and artificial intelligence or AI-based applications**. It is conceivable that such systems could be used both in interrogations and oral proceedings and in the translation of documents.

71 It cannot be denied that the increasing availability of AI-based applications will reduce costs and, overall, increase the **efficiency of the proceedings**. On the other hand, there is a risk that other positive aspects of translation by a translator will be lost, at least in part. A translator can immediately point out and ask about any misunderstandings or ambiguities. It is also important to note that translators are also "cultural mediators" who can grasp and convey linguistic nuances in a cultural context. It is unclear to what extent artificial intelligence is already capable of correctly translating dialects, accents, or specific language usage. However, given the rapid pace of development, it can be assumed that technical feasibility will no longer be an obstacle in the future. Finally, there are also data protection concerns and questions about the protection of official secrecy, which must be guaranteed in AI applications.

72 The use of AI-based systems in oral translation is associated with further uncertainties. In particular, the question arises as to the procedure, i.e., whether a prior transcription in the foreign language or a direct translation is carried out and how this affects verifiability. When translating documents using AI-based systems, regional and cultural characteristics are generally less important, and existing translation programs are already able to handle this task well. In order to meet the requirements of a fair procedure, it is essential in all cases that AI-generated translations are checked by a human translator (**human-in-the-loop [HITL] principle**). The applications mentioned may only be used in a supporting role, for example for the pre-translation of documents. Finally, the use of AI-based systems by a translator must always be disclosed.

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COMMENTARY ON

Art. 91 CrimPC

A commentary by Simon Betschmann / Florian Niessner / Simone Steiner

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Art. 91 Compliance with time limits

[1] The time limit is complied with if the procedural act is carried out to the satisfaction of the competent authority on the day of expiry at the latest.

[2] Submissions must be delivered on the day of expiry of the time limit at the latest to the criminal justice authority or handed for delivery to SwissPost, a Swiss diplomatic or consular representation or, in the case of persons in custody, the governor of the institution.

[3] In case of electronic submission, the relevant time for compliance with a time limit is that at which the receipt is issued that confirms that all the steps have been completed that the party must carry out for transmission.

[4] The time limit is also deemed to be complied with if the submission is received by a Swiss authority not competent in the matter on the day of expiry at the latest. This authority shall pass the submission on immediately to the competent criminal justice authority.

[5] The time limit for making a payment to a criminal justice authority is complied with if the amount due is handed to SwissPost or is debited from a postal or bank account in Switzerland in favour of the criminal justice authority on the day of expiry at the latest.

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I. GENERAL

1 Analogous provisions to Art. 91 CrimPC are found in fact in all procedural laws (cf. Art. 143 CrimPC, Art. 21 APA, Art. 39 ATSG, Art. 48 BGG). In particular, Art. 91 CrimPC is closely based on Art. 48 BGG. Art. 91 CrimPC applies to the parties and participants in the proceedings. The provision also applies to authorities when they themselves act as parties or other participants in the proceedings, for example the public prosecutor's office in appeal proceedings.

2 The provision on "compliance with time limits" regulates compliance with time limits for procedural acts (para. 1), for a traditional paper submission (para. 2), for electronic submission (para. 3) and for making payments (para. 5). Likewise, the provision contains a regulation regarding the observance of time limits in the case of submission to a Swiss authority that is not competent (para. 4).

3 Although Art. 91 CrimPC refers to "criminal authorities" or "authorities", it also applies to submissions to the courts. The criminal authorities addressed are the police, the public prosecutor's offices and the criminal authorities for transgressions, for example the governor's offices in the Canton of Zurich (cf. Art. 12 CrimPC).

4 No changes will be made to Art. 91 CrimPC with the upcoming CrimPC revision, which will enter into force on January 1, 2024.

II. PROCEDURAL ACTS (PARA. 1)

5 Parties and participants in proceedings may comply with time limits if the required procedural act is performed at the competent authority on the last day of the time limit.

6 For the purposes of Article 91 para. 1 CrimPC, a "procedural act" is any act with the exception of the submission of a petition (by post or electronically, cf. para. 2 and para. 3) or the making of a payment (cf. para. 5). Paragraph 1 thus applies in particular to oral submissions that should or must be made within the time limit. An example is the oral filing of an appeal with the court of first instance (cf. Art. 399 para. 1 CrimPC).

In principle, procedural acts may be performed until the end of the last day of the time limit. However, if they must be performed at the competent authority, they are limited by its opening hours. 7

III. WRITTEN SUBMISSIONS (PARA. 2)

A. General

Paragraph 2 refers to written submissions in paper form, not to electronic (cf. para. 3) or oral submissions (cf. para. 1). The wording of Art. 91 para. 2 CrimPC is identical to Art. 48 para. 1 BGG; accordingly, the case law on Art. 48 para. 1 BGG applies by analogy. 8

As with procedural acts, the delivery of a submission is possible until the end of the last day of the time limit. 9

The time limit may be observed by handing over the submission to the criminal justice authority, to the Swiss postal service, to a Swiss diplomatic or consular representation - or in the exceptional case of imprisonment - to the management of the institution. Relevant for the observance of the time limit is not the receipt of the submission by the criminal justice authority, but the dispatch or delivery of the same within the time limit via one of the designated channels. 10

B. Criminal authorities

The parties or participants in the proceedings do not have an absolute right to hand in the submission personally to the criminal authorities during the entire period. The submission must be made during business hours in exchange for an acknowledgement of receipt as evidence. If the submission is deposited directly in the mailbox of the criminal authority or the courts, there is a (rebuttable) presumption that the submission was made on the day corresponding to the date of receipt (cf. n. 13 below). 11

C. (Swiss) post and courier services

The time limit is deemed to have been observed if the submission is handed over to Swiss Post on the last day of the same at the latest. The postmark certifies the time of posting and establishes a presumption of the time of delivery. 12

The dating by means of a franking machine, on the other hand, is merely a party assertion, since the franking may already have taken place in advance.

13 The party or party to the proceedings who wishes to derive rights from his submission bears the burden of proof for its timeliness. The sender has the right to rebut the presumption resulting from the postmark with all suitable evidence. Possible suitable evidence includes, for example, witnesses or videos. The offer of evidence must be unsolicited and made before the deadline, for example by means of a note on the envelope. In the case of witnesses, the proximity to the party or party to the proceedings is a question of the assessment of evidence. The credibility of the witness's testimony must be examined in the light of the circumstances as a whole. If the counter-evidence does not succeed, the party concerned bears the risk of proving that the mail was actually posted. Only if a party or party to the proceedings cannot prove the timeliness of the posting for reasons for which the criminal authority is responsible, can the burden of proof be deviated from. This is the case, for example, if the authority does not include the envelope with the relevant postmark in the files.

14 The handover of the item to a foreign postal company has no effect on the observance of the time limit; with the exception of posting at Liechtensteinische Post AG. What is relevant for posting with a foreign postal company is not the posting date, but the time at which the item is handed over to Swiss Post for onward carriage. The corresponding period of time must therefore be taken into account. However, Art. 91 para. 2 CrimPC can only be held against a party residing abroad or a party to the proceedings if he/she has been explicitly instructed that only the handover of the item to Swiss Post is time-keeping. This instruction requirement does not apply in the case of (foreign) legal representation. The latter must accept that it is aware of Swiss law if it accepts such a mandate.

15 Courier services are to be regarded as auxiliary persons of their client: Their fault is therefore imputed to the person making the submission as if it were his own. The handing over of the submission by the party or the party to the proceedings to a courier service does not have the effect of preserving the time limit. The time limit is only observed if the courier delivers the submission to the addressee before expiry of the time limit or hands it over to Swiss Post for onward delivery. In contrast, the time limit is observed if the submission is handed over to Swiss Post before expiry of the time limit but Swiss

Post uses third parties to process the order, i.e. the third parties act on behalf of Swiss Post (and not the sender).

D. Swiss diplomatic or consular representation

Delivery to a Swiss diplomatic or consular representation is treated in the same way as delivery to the criminal authorities or Swiss Post. This provision originates from the PILA and is intended to lead to equal treatment of parties and participants in proceedings abroad with those in Switzerland. Here too, analogous to the handover to the criminal authorities, the personal handover as well as the posting in the mailbox is to be considered as keeping the time limit, whereby the party or party to the proceedings has the risk in the case of a posting in the mailbox that the receipt stamp possibly only bears the date of the following day. The submission must be made to an official Swiss representation. Submission to honorary consulates, which do not have consular authority, is not to be considered as meeting the deadline due to the lack of such authority. 16

E. Institutional management

Inmates may - since they generally do not have access to a Swiss Post letterbox and cannot hand in their submissions personally to the criminal justice authorities or to a Swiss representation - hand in their submissions to the management of the institution within the time limit. The term "management of the institution" is to be interpreted in a reasonably broad manner: a detainee has no influence on which employees of an institution he comes into contact with. Nor can he influence how and how quickly his mail is processed internally. Whether the prison management hands over the received submission to Swiss Post on the same day is not decisive. The delivery to the management of the institution shall be deemed to meet the deadline. In the case of a submission that is received late by the criminal justice authority or the court, it must be clarified when it was handed over to the management of the institution. If no such proof is possible and the petition itself is dated within the time limit, it must be assumed that the person in custody used all the time available to him to hand over the petition on the evening of the last day of the time limit. Riedo rightly states that "detained" in the sense of Art. 91 para. 2 CrimPC does not only refer to persons who are in the execution of a sentence or measure or otherwise in custody, but also to persons whose freedom of 17

movement is restricted by the state in some other way - such as, for example, in the case of persons in a custodial placement (Art. 426 et seq. CC) or juveniles who are placed in a private institution.

IV. ELECTRONIC SUBMISSIONS (PARA. 3)

A. Form of transmission

18 Electronic submissions to an authority shall be sent to its official address on the recognized delivery platform used by it. Parties and other participants in proceedings may not send electronic submissions to any known e-mail addresses, for example, of the department of a court responsible for their proceedings or of the competent public prosecutor. This also does not apply if the submission is sent via a recognized platform. A list of all addresses of authorities for electronic submissions in civil and criminal proceedings on the recognized delivery platforms used by them can be found online at https://www.ch.ch/de/e-justice. The provisions of the VeÜ-ZSSV do not preclude the authorities from using other official addresses which they do not publish in the public directory but, for example, only communicate among the authorities. One might think here, for example, of the compulsory measures courts, in whose proceedings concerning covert compulsory measures only the public prosecutor's office is a party from the outset.

19 The recognized service platform shall immediately issue a receipt proving the time of receipt of a submission and the documents transmitted. Pursuant to Art. 91 para. 3 CrimPC, in the case of electronic submission of a petition, the time at which the receipt is issued confirming that all steps necessary on the party's side for transmission have been completed is decisive for compliance with a time limit. The concretization follows in Art. 8b VeÜ-ZSSV: "The time at which the delivery platform used by the parties to the proceedings issues the receipt that it has received the submission for the attention of the authority (delivery receipt) is decisive for the observance of a time limit."

20 The moment when the criminal authority opens the document and actually takes note of it is irrelevant. When the original provision of Article 91 para. 3 CrimPC was enacted, it was assumed that each court or authority would develop and use its own delivery system that would issue appropriate receipts. The time limit was met "if the receipt by the criminal authority was confirmed by its IT system on the last day of the time limit at the latest". However, in

practice, a system with various recognized delivery platforms issuing the receipts and serving the authorities with the submissions was implemented. In practice, this led to legal uncertainty, which is why the procedural laws (Art. 91 para. 3 CrimPC, Art. 143 para. 2 CPC and Art. 21a para. 3 APA) were amended with the Federal Act of 18 March 2016 on Electronic Signature (ZertES) in its current version. Currently, the two platforms PrivaSphere Secure Messaging of the company PrivaSphere AG and IncaMail of Swiss Post are definitely recognized for secure delivery within the scope of legal proceedings.

The receipt in which the delivery platform used by the sender certifies the point in time at which the sender successfully transmitted its submission to the platform is therefore decisive for determining the timeliness of a submission. In contrast to written submissions (Art. 91 para. 2 CrimPC), it is not the time of sending (expedition principle) that is decisive, but rather a corresponding reaction in the environment of the addressee in the form of an acknowledgement of receipt (receipt principle). The sender thus bears the risk of missing the deadline if the receipt is not issued in time. In this case, she must additionally submit her submission in due time by mail or successfully (i.e. against a receipt) electronically. This ensures that the risk of default remains with the sender only - but still - as long as she can control it and know immediately if she needs to act further to meet the deadlines. Accordingly, the sender must take into account all the deficiencies that are directly indicated to her with the delivery receipt of her platform. In this context, technical problems are not a reason for restoring deadlines. 21

If the sender has not used a recognized delivery platform, the entry is deemed not to have been made from the outset. An improvable (formal) error with entitlement to the setting of a period of grace does not exist. In this respect, the case law qualifies the use of a recognized delivery platform as far as can be seen as a validity requirement (and not merely as a purely regulatory requirement). 22

As far as can be seen, the literature and case law have not yet answered the question of what happens if a submission that is in itself formally valid, i.e. correctly electronically signed, is submitted via a recognized delivery platform, but no delivery receipt is issued (e.g. because only the dispatch type "confidential" was selected instead of "registered mail" [designation with IncaMail] or "eGov registered mail" [designation with PrivaSphere]), but the sub- 23

mission is proven to have arrived at the authority within the deadline. In our opinion, the authority would be lapsing into excessive formalism here if it were to qualify such a submission as not having been received within the deadline, only on the grounds that no submission receipt had been issued. Analogous to the case law concerning postal items, the proof of timeliness would also have to be possible with all admissible means of evidence. It should be added that the FDJP has only specified the requirements for such a receipt in the Annex to the Ordinance on the Recognition of Platforms for Secure Delivery in Legal Proceedings of 16 September 2014 no. 5. In the absence of publication of this annex in the AS or in the SR, however, it seems at least questionable whether this list of criteria is capable of having general legal effects.

24 As a result, there is a procedural causal liability, which is obviously intended by the legislator. However, as long as the parties have to bear the risk of a technical error not only for themselves and their own systems used, but also for the recognized delivery platforms, this is anything but conducive to electronic legal transactions.

B. Time of transmission

25 If the determination of the last day is sufficient to determine timeliness in the case of written submissions, the time must be defined to the second in the case of electronic submissions. Art. 110 para. 6 SCC states that a day consists of 24 consecutive hours. This implies that a new day begins after the expiration of these 24 hours. Consequently, the last day of a period begins at 00.00 (midnight) and ends with the completion of the last second of that day, that is, with the completion of the 59th second of 23.59 hours. This time is again referred to as 00.00 and marks the beginning of the following day. The formulation predominantly used by the Federal Supreme Court and in the literature (with respect to written submissions), that a day ends at 24.00 hrs, is outdated and not (any longer) permissible today according to the international standard "ISO 8601".

V. SUBMISSIONS TO NON-COMPETENT AUTHORITIES (PARA. 4)

If a party or party to proceedings submits its submission to a Swiss authority that is not competent or addresses it to such an authority, Art. 91 para. 4 CrimPC obliges the authority that is not competent to forward the submission in question to the competent authority without delay. Under this exception, a submission to a non-competent authority - provided that the time limit was observed and the submission was made in the correct form - complies with the time limit. The Federal Supreme Court has recognized this procedure as a general procedural principle that applies to all areas of law; it derives from the rules of good faith and applies to all areas of law. 26

However, this principle applies only if the authority lacking jurisdiction was seized by mistake or because of doubts about jurisdiction or because of an incorrect instruction on the right of appeal. It does not apply if the incompetent authority was called upon deliberately and in the knowledge that it lacked jurisdiction. If an incompetent authority or an authority that considers itself incompetent is deliberately called upon, but the calling party or party to the proceedings is convinced that it is the competent authority, para. 4 applies. In such a case, it is not likely to be an abuse of rights, which would not merit legal protection - with the exception of those cases in which the party or party to the proceedings insists on being dealt with by the (wrongly) called authority. 27

All criminal authorities within the meaning of Art. 12 ff. CrimPC as well as federal, cantonal and municipal judicial and administrative authorities. In accordance with the case law of the Federal Supreme Court, the submission should be forwarded to the competent authority within two to three days. 28

VI. PAYMENTS (PARA. 5)

A. General

Para. 5 of the provision regulates the observance of deadlines for payments to criminal authorities. The provision essentially corresponds to the provisions of civil and administrative proceedings and to those of proceedings before the Federal Supreme Court. 29

30 According to the wording of the provision, it applies only to payments in respect of which a criminal authority has set a deadline for payment to the persons subject to the law or has requested them to make payment. Accordingly, the provision applies only to payments for which the legal ground is derived from the CrimPC, but not to payments in the course of enforcement.

B. Compliance with the time limit

31 According to the provision, a deadline set by the criminal authority for the payment of a sum of money is initially deemed to have been met in time if the full amount was handed over to the Swiss Post for the benefit of the criminal authority no later than on the last day of the deadline. The decisive factor for meeting the deadline is thus not the receipt of the payment by the criminal authority (principle of receipt), but the time of handover or debiting.

32 This variant of payment within the time limit means handing over the required amount to Swiss Post or Postfinance. This can be done directly at the post office counter by means of cash or card payment and has a time-preserving effect provided the payment is made on the last day of the deadline, whereby the postmark or the receipt must be taken into account.

33 Furthermore, in accordance with Art. 91 para. 5 CrimPC, a payment is deemed to be made within the time limit if the amount has been debited to a postal or bank account in Switzerland for the benefit of the criminal justice authority on the last day of the time limit at the latest. According to the provision, domestic bank accounts are thus treated in the same way as Swiss postal accounts. The deadline is met if the debit of the account associated with the processing of the payment order or the actual discharge of the person liable to pay has occurred on the last day of the deadline. However, the order for payment or the payment instruction to the bank or post office shall not be deemed to meet the deadline if the payment is not processed within the deadline. In this case, it is the responsibility of the person liable for payment to ensure that the bank or post office executes the payment order in accordance with its instructions within the deadline. The person liable to pay must accept responsibility for any fault on the part of the bank within the meaning of the case law on auxiliary persons with regard to any restoration of deadlines. If the payment is received on the account of a criminal authority after the expiry of the time limit, it shall set a time limit for the person liable to pay

to prove the timely payment or debit. The burden of proof for compliance with the time limit shall be on the person liable to pay.

In our opinion, the relevant point in time for meeting the deadline in electronic payment transactions corresponds to that of electronic submissions in accordance with the above explanations. Accordingly, only payments made before the end of the last day of the deadline period (by 11:59 p.m.) have the effect of meeting the deadline. 34

C. Individual issues

The law does not explicitly regulate how payments from abroad or from foreign bank accounts are to be treated. Although not explicitly provided for, it must be possible to make payments from foreign bank accounts within the time limit, especially since a person involved in criminal proceedings cannot be expected to open an account in Switzerland in order to protect his or her rights. Particularly in the case of persons with foreign nationality or domicile abroad, this is likely to be possible only under difficult conditions or, under certain circumstances, not at all. The Federal Supreme Court therefore also accepts payments from abroad. However, in the case of payments from foreign accounts, the Federal Supreme Court - contrary to the rule for domestic accounts - does not focus on the debiting of the account of the person liable to pay, but rather on the receipt of the payment. Therefore, it is necessary that the requested amount was either credited to the account of the competent authority within the time limit or "at least reached the sphere of influence of the auxiliary person designated by the authority (bank or Swiss Post)". 35

Similarly, the provision does not comment on payments made to the criminal authority on the spot and does not state whether the authorities are obliged to accept cash or card payments. Given that the provision applies only to payments made at the request of the authority, the competent authority must have the infrastructure and resources to process payments. Accordingly, in our opinion, it must also be possible to hand over cash or - if the relevant infrastructure in the form of a payment terminal is available - electronic payment directly at the authority's premises. Of course, this does not protect abusive practices, such as the payment of a security deposit with 5-centime coins. However, for reasons of practicability and considerations of combating money laundering, an upper limit for cash payments should be permissible in individual cases. 36

37 Finally, the question arises as to whether Art. 91 para. 4 CrimPC should be applied by analogy to payments to the incompetent authority. In principle, this must be denied, especially since the person liable for payment must be explicitly requested by the competent authority to make payment to it and erroneous payments are thus unlikely. Moreover, the systematic position of para. 4, which refers to the preceding paras. 1-3, also speaks against this. A certain strictness is certainly justified by this, but legal seekers should not be deprived of the assessment of their request without necessity. Therefore, the suggestion of Stoll seems convincing, who sees the possibility of preserving the time limit at least in the case of an erroneous payment to the lower court in the appeal proceedings. If the authority itself has caused the error, this may not be to the detriment of the person liable to pay.

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Chapter 4 Procedure in the Absence of the Accused

Section 1 Requirements and Conduct

Art. 366 Requirements

[1] If an accused who has been duly summoned fails to appear before the court of first instance, the court shall fix a new hearing and summon the person again or arrange for him or her to be brought before the court. It shall take evidence where this cannot be delayed.

[2] If the accused fails to appear for the re-arranged main hearing or if it is not possible to bring him or her before the court, the main hearing may be held in the absence of the accused. The court may also suspend the proceedings.

[3] If the accused is suffering from a voluntarily induced unfitness to plead or if he or she refuses to be brought from detention to the main hearing, the court may conduct proceedings immediately in absentia.

[4] Proceedings in absentia may only be held if:

a. the accused has previously had adequate opportunity in the proceedings to comment on the offences of which he or she is accused

b. sufficient evidence is available to reach a judgment without the presence of the accused.

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I. INTRODUCTION

1 The term "proceedings in absentia", also known as "contumacious proceedings", refers to main judicial proceedings that are concluded with a judgment without the accused having appeared in court in person.

2 Proceedings in the absence of the accused person affect the right to a fair trial that flows from convention law (Art. 6 ECHR), constitutional law (Art. 29 para. 2 BV) and statutory law (Art. 3 StPO). According to this principle of "fair trial", the accused person can participate in criminal proceedings directed against him and exercise party rights, which he is denied if he does not participate in the court hearing. Likewise, the in absentia procedure contradicts the "immediacy principle" enshrined in Article 343 of the Code of Criminal Procedure, according to which the court shall obtain a personal impression of the accused person, whereby the questioning of the accused person shall by law take place in detail and right at the beginning of the evidentiary proceedings (Article 341(4) of the Code of Criminal Procedure). The direct impression of an accused person on the court may, under certain circumstances, be of essential importance for reaching a verdict. This impression is lacking if the accused person does not participate in the main hearing. Against the background of these tangential procedural principles, it is not surprising that the conduct of trials in absentia receives opposing votes.

3 Despite these concerns, according to the view expressed here, in absentia proceedings cannot and must not be eliminated from practice. Even if an accused person cannot be required to contribute to his conviction under the principle of nemo tenetur se ipsum accusare, there is a fundamental interest in effective prosecution in a constitutional state. The right to attend the trial in person can therefore - as has also been clearly stated by the Federal Supreme Court - not claim absolute validity.

4 Without the possibility of trial in the absence of the accused, numerous charges could not be dealt with by the courts and the proceedings could not be concluded, or at least not in a timely manner, because it is not possible to persuade the accused to appear in court for a wide variety of reasons (e.g. lack of knowledge of the accused's whereabouts or due to the accused's refusal to submit to criminal proceedings, etc.). The number of proceedings that would have to be delayed due to the impossibility of holding a main hearing would

be too high, and at best they would have to be suspended and finally discontinued due to the occurrence of the statute of limitations for prosecution, which is unacceptable from the point of view of the rule of law. According to the view expressed here, it should not and must not be allowed to depend on the conduct of the accused person whether proceedings against that person can be concluded or not.

It is also unacceptable that the accused person can significantly delay the proceedings through his or her own conduct by staying away from the hearing for reasons that cannot be excused. This would also be contradicted by the acceleration requirement under Article 5(1) of the Code of Criminal Procedure, which is also based on convention law (Article 6 ECHR) and constitutional law (Article 29(1) of the Federal Constitution) and obliges the prosecution authorities to start the proceedings immediately and to conclude them without unjustified delay. 5

General preventive considerations also play a role. For example, the sense of justice should not be undermined by the pacification effect of the punishment between the offender and the victim by the fact that the accused person can evade the proceedings. Finally, the general public should be deterred from committing crimes, which is unlikely to produce the desired effect when proceedings are discontinued due to the accused person's refusal to submit to criminal proceedings. 6

Overall, the encroachment on the procedural rights of the accused person in the event of non-appearance in court by conducting proceedings in absentia is justified and - if the statutory requirements are met, which will be discussed in detail below - can be accepted accordingly. 7

II. THE PREREQUISITES FOR PROCEEDINGS IN ABSENTIA

A. Preliminary remark

In order to be able to meet the demands of the "fair trial", proceedings in absentia must always be regarded as an exception. Accordingly, the legislator has strictly formulated the prerequisites for the conduct of such proceedings. In addition to the existence of general procedural requirements, such as a proper indictment, jurisdiction of the court, criminal complaint in the case of petition offenses, no other lis pendens or already occurred res judicata, ability of the 8

accused to stand trial, etc., further requirements must be met by law when conducting a trial in absentia: Thus, a contumacious judgment cannot be issued already after the first unexcused absence of the accused person at the main hearing, but a summons must be issued for a second main hearing date (Art. 366 para. 1 StPO).

9 Both summonses must be duly issued in each case. Next, a judgment may be rendered in the absence of the accused person only if the accused person has had sufficient opportunity in the proceedings to date to comment on the criminal offences with which he is charged (Art. 366 para. 4 lit. a CCP) and the facts of the case are liquid, i.e. ripe for adjudication (Art. 366 para. 4 lit. b CCP). The strict requirements and the risk that, in the event of a request for a new trial (Art. 368 StPO), a third main hearing may have to be held, which would mean a considerable effort for all parties involved - in particular for the criminal authorities - mean that the in absentia procedure is used rather cautiously in practice.

B. Unexcused non-appearance of the accused person

10 If the accused person fails to appear at the main hearing without excuse, the provisions on the in absentia procedure are applicable according to the law (Art. 336 para. 4 CCP). Absence means default under Art. 93 Code of Criminal Procedure, according to which a party is in default if he or she fails to appear at a hearing. The failure to appear must then be unexcused, which is why, for example, a prior dispensation cannot be considered a default. The defaulting person must credibly present any excusable reasons that may exist. The criminal authorities must examine the excusable reasons. The actual requirement of excusability is a question of proof. The assessment of the evidence is the task of the court of fact.

11 A summons must be obeyed and anyone who is prevented from attending must inform the summoning authority immediately (Art. 205 paras. 1 and 2 Criminal Procedure Code). In this respect, anyone who has received the correctly issued summons and has not appeared at the hearing date, although it would have been possible to request a postponement or at least to give reasons for the non-appearance in good time if there were reasons for being prevented, shall in principle be deemed to be without excuse.

Unexcused non-appearance within the meaning of Art. 366 f. StPO requires a culpable absence. It is required that the accused deliberately and voluntarily fails to attend the hearing. For example, absence without excuse can be assumed if the summoned person does not appear at the main hearing out of fear of a conviction, shame, laziness or indifference. Absence due to fear of arrest is also not considered an excusable subjective impossibility according to Federal Supreme Court case law, since the public interest in the conduct of the criminal proceedings (even against an absent person) outweighs the opposing personal interest of the accused person in being able to escape a sentence already pronounced in another proceeding by fleeing. Furthermore, non-appearance due to work overload, lack of language skills, mere ignorance of the law, etc. is not excusable. Failure to appear following a rejected request for postponement (Art. 205 Para. 2 Code of Criminal Procedure) or a rejected request for dispensation (Art. 336 Para. 3 Code of Criminal Procedure) also leads to unexcused tardiness. 12

A person who places himself in a state of incapacity to stand trial or refuses to be brought out of custody for the main hearing is then deemed by law to be without excuse. In both cases, proceedings in absentia may be conducted by law immediately, i.e. at the first hearing (Art. 366 para. 3 Code of Criminal Procedure). The refusal to bring the accused to court can usually be easily recognized by the fact that the police officers in charge of bringing the accused to court are unable to persuade the accused to be brought to court. The second variant of being placed in a state incapable of being heard is fulfilled by anyone who is physically and/or mentally incapable (any longer) of following the hearing (Art. 114 para. 1 StPO e contrario). An incapacity to stand trial is self-inflicted, for example, if participation in the trial is rendered impossible due to prior drug or alcohol consumption or due to prior self-injury or self-endangerment. Both by refusing to appear in court and by independently placing himself in a state incapable of negotiating, the accused person shows his disinterest in participating in the court proceedings. He or she is absent from the court hearing due to his or her own fault or is unable to follow the hearing. An implied waiver of the procedural rights to which he or she is entitled, in particular the right to attend the main hearing in person and the right to make a statement, must be assumed. If the personal presence of the duly summoned accused person is not mandatory, the court may hear the case in the absence of the defaulting party at the first hearing if the facts are liquid and render a contumacious judgment. Otherwise, the defaulting party must be 13

summoned to the court by means of a summons to the police or the main hearing must be postponed or, if necessary, the proceedings must be suspended.

14 On the other hand, a person who cannot appear at the hearing due to objective impossibility (force majeure) or subjective impossibility (personal circumstances, error) is excused from appearing. The prerequisite is that it was impossible for the person concerned to appear at the hearing, e.g. due to natural disasters, war events, accidents with serious health consequences, imprisonment, serious illness of the person concerned himself or, if applicable, of a third person in need of assistance for whom the person concerned is responsible, death in the family, short-term deployment in military service, etc.

15 If there is an error regarding the obligation to appear, the court must ascertain how this error occurred and whether the accused person himself is responsible for the error. In this context, it must be taken into account whether the default occurred due to a circumstance which, according to the rules of reasonable protection of interests, must not be feared even by a diligent person. Thus, for example, the erroneous assumption of an accused person that the subpoena has become obsolete through the submission of what he or she considers to be a sufficient evidence photo cannot be protected as an excusable reason. This is all the more the case if the defendant was expressly informed on the subpoena of the obligation to appear.

16 In the current pandemic situation, the question arises with regard to excusability as to how to proceed in the case of persons who go to court on time but refuse to enter the courthouse because of the mask requirement that applies temporarily in public buildings. According to the opinion expressed here, in such constellations a voluntary or self-inflicted non-appearance may be assumed and consequently an unexcused absence of the accused person with the corresponding legal consequences.

17 In order for proceedings in absentia to be conducted, it is a prerequisite in personal terms that the accused person is in default. If the accused but not the defense appears at the main hearing, no in absentia proceedings are to be conducted - except in cases of abuse - and the hearing is to be postponed (Art. 336 para. 5 Code of Criminal Procedure). If the public prosecutor's office fails to appear, a new date must also be set (Art. 337 para. 5 CCP). Likewise, there is no reason for conducting proceedings in absentia if the private plain-

tiff fails to appear at the hearing without excuse: in this case, the hearing may be continued in accordance with Art. 339 et seq. StPO and concluded with a judgment in the ordinary proceedings. The private plaintiff may appeal against the judgment rendered in his absence. The possibility of requesting a new assessment pursuant to Art. 368 Code of Criminal Procedure is not available to it, since this legal remedy is directed solely at the convicted person.

The court must decide in each individual case, exercising its due discretion, when a default exists in terms of time. If, for example, the accused person has made it known in advance that he or she is not interested in attending the main hearing, it does not appear necessary to wait for a longer period of time until the main hearing is broken off and a new hearing is summoned or the in absentia proceedings are conducted at the second hearing. If the accused is unknown and the summons has been published in a public announcement, the granting of a so-called "respectful quarter of an hour" appears to be sufficient according to the opinion represented here. If a delay has been announced by the accused, it seems appropriate to wait for the arrival of the accused or to accept a longer delay, i.e. beyond the respect quarter of an hour, and to open the main hearing only in the presence of the accused. Otherwise, the court would run the risk of lapsing into excessive formalism or entering into an unreasonable violation of the constitutionally guaranteed procedural rights. 18

C. Summons to the main hearing in due form

Only those who have been duly summoned in advance may be absent from a hearing without excuse. Properly summoned within the meaning of Art. 201 et seq. in conjunction with Art. 85 et seq. Art. 85 ff. Code of Criminal Procedure means that the summons was either served directly on the accused or - if the relevant requirements are met - a public summons was issued in accordance with Art. 88 SCC and the deadlines for a legally valid summons were met. 19

Proper direct service on the accused is deemed to have taken place if dispatch was by registered mail and the summons was delivered against signature. In this context, service on an employee or housemate is sufficient in principle (Art. 85 Para. 3 StPO). It is also sufficient if the accused person actually received knowledge of the summons. This must be examined on a case-by-case basis and can be affirmed, for example, if the accused person makes dispositions shortly after (presumably) receiving the summons, such as book- 20

ing airline tickets or absconding abroad or going into hiding. It can also be assumed that the summons has been duly served if the accused submits evidence in view of the date of the main hearing within the period set by the summons. In these cases, according to the view taken here, it may be assumed that the accused person has actually become aware of the main hearing date and the corresponding summons, otherwise he or she would hardly make submissions in compliance with the deadline. However, the burden of proof for actual knowledge and thus for the existence of proper service lies in any case with the criminal authorities.

21 A service is also valid under the assumption of the fiction of service pursuant to Art. 85 para. 4 CCP if the registered mail has not been collected or if the addressee has refused to accept the registered mail. In application of the fiction of service, in the event of failure or refusal to collect, service is deemed to have been effected on the seventh day after the unsuccessful attempt at service, provided that the accused person could have expected service. This is usually the case if a preliminary investigation has already been conducted against the accused person and charges have been brought against him or her or a penalty order has been issued.

22 On the other hand, service of the summons is not proper if it is issued solely to the official or private defense counsel. In practice, both the courts and the legal profession often fail to recognize that this method of service does not satisfy the statutory requirements. Although service on the defense is explicitly provided for by law for notices (Art. 87 para. 3 CCP), it does not apply to service of the summons, which requires personal service on the party appearing at the hearing and thus on the accused person himself, due to the explicit provision of Art. 87 para. 4 CCP. A feasible way seems to be to hand over an additional copy of the summons to the defense together with its orientation copy, so that it forwards it to its client - quasi as an auxiliary person of the court. In such cases, however, the court must be provided with a certificate of service, signed by the accused person, proving that the subpoena was actually taken note of by the accused person. Not all attorneys are willing to act as the "court's messenger for service." However, this would be desirable from the point of view of the criminal authorities in view of the simplification of sometimes complicated and often lengthy service routes - especially in the case of service abroad, which must be effected by mutual legal assistance.

A valid summons to a main hearing can also be issued by means of a public announcement in accordance with Art. 88 SCC. This is subject to the alternative conditions that the whereabouts of the addressee are unknown and cannot be ascertained despite reasonable inquiries (Art. 88 lit. a CCP), service is impossible or would involve extraordinary inconvenience (Art. 88 lit. b CCP) or a party or his legal counsel with domicile, habitual residence or registered office abroad has not designated an address for service in Switzerland (Art. 88 lit. c CCP). The lawful public announcement creates the fiction of service, i.e. the irrebuttable presumption that the content of the communication has come to the attention of the addressee. Service is deemed to have been effected from the date of publication of the notice (Art. 88 para. 2 Criminal Procedure Code). A summons by public notice is not sufficient if an accused person has been declared untraceable even though his foreign address was known to the authorities or at least could have been ascertained by the exercise of due diligence. 23

A subpoena is always validly served only if the time limit under Article 202 of the Code of Criminal Procedure has been observed. Thus, subpoenas in judicial proceedings must be served at least 10 days before the procedural act (Art. 202 para. 1 lit. b CCP). Public subpoenas must be published at least one month before the procedural act (Art. 202 para. 2 CCP). 24

D. Sufficient opportunity to make representations (right to be heard; para. 4 lit. a)

The substantive requirement contained in Art. 366 para. 4 lit. a CCP flows directly from the convention and constitutional principle under Art. 6 ECHR or the general procedural guarantees of Art. 29 BV, according to which the accused person has the right to participate in the proceedings and to be able to express his or her views on all allegations. The provision makes it clear that there are no preliminary proceedings against absent persons; if the accused person cannot be heard in the preliminary proceedings due to unknown whereabouts, the proceedings must already be suspended by the public prosecutor's office. In this respect, Art. 366 et seq. of the Code of Criminal Procedure only regulate the absence of an accused person from the main hearing. 25

Sufficient opportunity to make a statement was always granted if the accused person was questioned by the public prosecutor's office in the pre-trial proceedings on all the facts charged. In this context, the questioning delegated to 26

the police authorities in accordance with Art. 312 para. 2 of the Code of Criminal Procedure as well as the questioning carried out by a prosecutor's office outside the canton or a foreign prosecutor's office in accordance with the rights of the parties are to be equated with the questioning by the public prosecutor's office. Even if the law does not expressly prescribe a hearing by the public prosecutor, a police hearing is generally not sufficient. However, if the accused has also contacted the prosecution authorities, e.g. by letter or e-mail, and made a statement on the matter, this may be sufficient according to the view expressed here. This is particularly the case if the accused person expressed his or her disinterest in participating in the hearing from the outset or vehemently refused to testify on the matter during the earlier hearing(s). It is also decisive whether the accused person was able to comment on the results of the preliminary proceedings or on the facts of which he was accused. It goes without saying that questioning on the charge of simple bodily injury is not sufficient to satisfy the right to be heard with regard to an intentional homicide that is later brought to trial. Consequently, the court must weigh up in each individual case whether the accused's right to be heard has been satisfied.

27 If the accused did not have sufficient opportunity to make a statement in the preliminary proceedings and cannot be granted the right to be heard in the main judicial proceedings either, no judgment may be handed down at this stage. The proceedings shall be conducted in application of Art. 366 para. 2 in conjunction with Art. Art. 329 para. 2 Code of Criminal Procedure.

E. Liquid facts (para. 4 lit. b)

28 For the conduct of proceedings in absentia, it is further required that the facts of the case are liquid or ripe for adjudication. In other words, the court must be in a position to render a judgment based on the available evidence.

29 The facts of the case are liquid if the accused makes a verifiable or credible confession to the facts of which he is accused. If this confession can be supported by the files, there is nothing to prevent an immediate assessment of the case in the in absentia proceedings - provided the other requirements are also met.

30 If there is no confession by the accused, it is a prerequisite for the existence of a verdict that the evidence is clear and the guilt can be proven by sound ev-

idence. It may also be clear already at the beginning of the trial that a conviction in application of the principle "in dubio pro reo" does not appear possible. In this case, the accused person may also be acquitted in absentia proceedings.

On the other hand, the facts of the case are not liquid if the personal impression of the person summoned but who failed to appear without excuse is of decisive importance for the court in reaching a verdict. If the file and the resulting evidence do not permit an assessment without the presence of the accused, the hearing must be terminated and a new hearing summoned or the summoned person must be brought to the court hearing with the assistance of the police. If the summons is also unsuccessful, the proceedings must be suspended in accordance with Art. 366 para. 2 last sentence of the Code of Criminal Procedure. 31

III. SUSPENSION (ART. 366 PARA. 2, LAST SENTENCE OF THE CODE OF CRIMINAL PROCEDURE)

As an alternative to conducting proceedings in absentia, the law allows the proceedings to be suspended in the absence of the accused under Article 366(2), last sentence, of the Code of Criminal Procedure. This procedure makes sense primarily if the accused is only temporarily absent (e.g. on vacation) or unable to stand trial and it can be expected that the proceedings can be completed within a reasonable period of time while granting the constitutionally guaranteed right to participate in the ordinary proceedings. A stay is also indicated if the court deems it necessary to question the accused or to take further evidence. The decision whether to suspend proceedings is at the discretion of the court. 32

IV. EXCEPTIONS AND DELIMITATIONS

A. Dispensation from the main hearing (Art. 336 StPO)

Unexcused failure to appear must be distinguished from the possibility under Art. 336 Code of Criminal Procedure of being excused from attending the main hearing in person. Pursuant to Art. 336 para. 3 Code of Criminal Procedure, the director of proceedings may excuse the accused from appearing in person at the main hearing at his request if he puts forward important reasons 33

and his presence is not required. If the defendant requests to be excused and the request is granted, the court may hold the main hearing and pass judgment at the first hearing. In this case, an ordinary trial will take place. As a rule, in the case of a dispensation, the accused person is defended by a lawyer in court, but this is not mandatory. If the accused person's whereabouts are unknown and there is no contact between the defense and the client, the filing of a request for dispensation is generally not conceivable, since the defense is usually not in a position to file such a request with the court due to a lack of appropriate instruction. In this case - in the absence of a request for dispensation - only the procedure in absentia can be considered under the condition that the defense is summoned to a second hearing.

B. Leaving the place of trial (Art. 340 para. 1 lit. c Code of Criminal Procedure)

34 If the main hearing was opened in the presence of the accused and if he or she leaves the place of the hearing at a later date without having been excused in advance, the hearing shall be continued and concluded without the absent accused (Art. 340 para. 1 lit. c CCP). In this case, the proceedings shall be continued in the manner specified at the beginning of the hearing. The in absentia procedure shall not apply in this case.

C. Failure to appear at the continuation hearing

35 If the accused appears at the main hearing in accordance with the summons, but the main hearing must be discontinued for other reasons and continued at a continuation hearing, then, according to the view expressed here, proceedings in absentia are also not to be conducted in the event of unexcused non-appearance at the continuation hearing.

36 The type of proceedings was determined at the opening of the hearing on the first date and cannot be changed afterwards. Failure to appear at the continuation hearing is considered a special form of leaving the place of the hearing according to the view expressed here, and what has been said above regarding item II. B. is to be applied by analogy. Under the circumstances, however, it seems appropriate to grant the accused person a "respect quarter hour" and, if possible, to attempt to contact him. Based on the appearance at the first appointment, it cannot be assumed per se, without indications to the contrary,

that the accused person is not (or no longer) interested in the further course of the proceedings.

If it turns out that the accused person missed the continuation date through no fault of his or her own, he or she must be given a second chance according to the view expressed here and the hearing must be terminated again. If the default is repeated at the next continuation hearing, the proceedings can be concluded in the ordinary procedure without further ado. In any case, abuse of rights and purely procedural conduct on the part of the accused person remains reserved. Such conduct is not to be protected. 37

D. Exclusion from further proceedings (Art. 63 para. 4 Code of Criminal Procedure)

If the accused person who is obliged to attend must be excluded from further proceedings as a result of his or her conduct in application of session police measures (Art. 63 para. 4 Criminal Procedure Code), the hearing shall be continued and concluded without the accused person. Here, too, the type of proceedings established at the beginning of the hearing in the presence of the party or parties shall be maintained. The in absentia procedure shall not apply. 38

E. Default in objection proceedings against a penalty order (Art. 356 para. 4 Code of Criminal Procedure)

If the court has to rule on an objection to a penalty order, the person lodging the objection has a duty to cooperate: if, despite being summoned, he fails to attend a hearing without excuse, his objection is deemed by law to have been withdrawn (Art. 355 para. 2 Code of Criminal Procedure). According to Art. 356 para. 2 Code of Criminal Procedure, this fiction of withdrawal, which was conceived primarily for the public prosecutor's objection proceedings, also applies by analogy if the objecting person fails to appear at the main court hearing. Accordingly, the withdrawal of the objection is deemed to have occurred if the accused was duly summoned to the main hearing and is not represented by a lawyer in court. If the defense appears at the main hearing but not the objecting person, the hearing must be terminated and rescheduled for a later date. This is subject to any dispensation by the accused that permits the hearing to be held without the accused. 39

40 For the question of when an opposing person is deemed to be in default without excuse pursuant to Art. 356 para. 4 Code of Criminal Procedure, reference can be made to what has been said above. Also, according to the view taken here, refusal to be brought out of custody or independently placing oneself in a state incapable of being heard (Art. 366 para. 3 Criminal Procedure Code) are considered inexcusable reasons by analogy in the criminal warrant proceedings as well. In these cases, however, the conduct of proceedings in absentia becomes obsolete - unlike in ordinary proceedings - and the objection proceedings are to be written off from the record as irrelevant the first time the objection fails to appear at the first hearing due to withdrawal of the objection.

41 However, the fiction of withdrawal is not applicable in objection proceedings if the accused lives abroad and the summons is to be served abroad. According to Art. 69 IMAC (SR 351.1), anyone who receives a summons to appear before a foreign authority is not obliged to comply with it (para. 1). Subpoenas containing threats of coercion are not served (para. 2). In this respect, the Swiss authorities may send summonses to the accused who is abroad, but these may not contain threats of coercion. In substance, they constitute mere invitations, which the accused person may or may not accept. If the opponent residing abroad does not appear at the main hearing, the court must, in analogous application of Art. 366 para. 1 Code of Criminal Procedure, if the conditions are met, hold out the prospect of proceedings in absentia and summon him or her to a second hearing. If the opposing party fails to appear at the second hearing without excuse, the in absentia proceedings must be conducted if all the requirements are met. The Swiss authorities may only threaten the accused with the fiction of withdrawal if he or she voluntarily goes to Switzerland and the summons can be served here.

F. Default in summary proceedings (Art. 358 ff. StPO)

42 In summary proceedings pursuant to Art. 358 et seq. of the Code of Criminal Procedure, proceedings in absentia cannot be conducted if the accused fails to appear. Proceedings without the presence of the accused person would contradict the express provision of Art. 361 para. 2 CCP, according to which in abbreviated proceedings the personal questioning of the accused person is mandatory for the purpose of verifying the confession and checking the consistency of the facts with the case file. If the accused person fails to appear at

the trial date without excuse, the trial shall be rescheduled. It may be assumed that the accused person has an interest in attending the main hearing, especially since he or she can usually expect a lower sentence and lower procedural costs in summary proceedings than in ordinary proceedings.

G. Absence of the accused in the proceedings in the case of persons incapable of committing criminal offences (Art. 374 para. 2 lit. a Code of Criminal Procedure)

No proceedings in absentia pursuant to Art. 366 et seq. of the Code of Criminal Procedure must be conducted if the court sits in the absence of an incapacitated person in view of his or her state of health or in order to protect his or her personal rights. In this case, it is a form of application of the dispensation from the main hearing pursuant to Art. 336 Para. 3 Code of Criminal Procedure that is specifically regulated in the law. In application of Art. 374 para. 2 CCP, ordinary proceedings shall be conducted in the absence of the accused person. 43

H. Default in appeal proceedings

In appeal proceedings, the conduct of proceedings in absentia based on Art. 407 para. 2 Code of Criminal Procedure may only be considered if the public prosecutor or the private plaintiff has filed an appeal against the first-instance judgment. If, in this constellation, the accused person, as a non-appealing person, remains absent from the appeal hearing without excuse, the absence proceedings pursuant to Art. 366 et seq. of the Code of Criminal Procedure must be envisaged and summoned to a second hearing. If the accused fails to appear at the second hearing and the other requirements are met, a judgment in absentia may also be handed down in the appeal proceedings. 44

If the accused is the appellant and in this capacity fails to appear at the appeal hearing without excuse and is not represented, the appeal is deemed by law to be withdrawn (Art. 407 para. 1 lit. a Code of Criminal Procedure). If the defaulting defendant is represented by a lawyer before the second instance, the appeal hearing must nevertheless be held in the ordinary proceedings. In this case, proceedings in absentia pursuant to Art. 366 et seq. of the Code of Criminal Procedure shall not take place (Art. 407 para. 2 Code of Criminal Procedure, e contrario). If the appellant accused appears at the appeal hear- 45

ing, but the (official) necessary defense fails to appear, the hearing must be postponed by operation of law (Art. 336 para. 5 Code of Criminal Procedure in conjunction with Art. 405 para. 1 Code of Criminal Procedure).

46 If proceedings in absentia took place before the first instance and the official defense filed an appeal in the exercise of its duty of care as a lawyer on behalf of the accused who is still absent, an appeal that has been withdrawn must be assumed on the basis of the fiction of withdrawal pursuant to Art. 407 para. 1 subpara. c Code of Criminal Procedure due to the lack of knowledge of the whereabouts of the appellant and thus due to the impossibility of serving the summons to the appeal hearing.

SCHEMATIC OVERVIEW OF THE ABSENCE PROCEDURE

Schematic overview of the absence procedure

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COMMENTARY ON

Art. 367 CrimPC

A commentary by Denise Weingart

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Art. 367 Conduct and decision

[1] The parties and the defence shall be permitted to make party submissions.

[2] The court shall reach its judgment based on the evidence taken in the preliminary proceedings and the main proceedings.

[3] On conclusion of the party submissions the court may issue a judgment or suspend the proceedings until the accused appears in court in person.

[4] Proceedings in absentia are otherwise governed by the provisions on the main proceedings in the first instance.

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I. GENERAL

If, at the first hearing, the court finds that the accused has failed to appear without justification despite having been duly summoned, it shall schedule a second main hearing. If the accused fails to appear at this hearing without excuse, the in absentia proceedings may be conducted at the second main hearing. Article 367 of the Code of Criminal Procedure deals with the modalities of conducting the in absentia proceedings on the occasion of this second main hearing. 1

II. CONDUCT OF THE IN ABSENTIA PROCEEDINGS

A. Granting of the parties' rights (para. 1)

The procedural rights of the parties shall also be guaranteed wherever possible in the conduct of the proceedings in absentia. Any further discrimination against the absent accused would no longer be in keeping with current ideas or with the international requirements of a fair trial in accordance with Article 6 of the ECHR. 2

If the in absentia proceedings are conducted, it must be possible for the accused who is absent without excuse to submit motions in the proceedings through the defence, which is guaranteed by law in Art. 367 para. 1 Criminal Procedure Code by admitting the parties and the defence to present their case. The accused must then have the opportunity to request access to the files or to appeal and/or seek redress against procedural acts or against the judgment that concludes the proceedings. 3

The same applies to the other parties, whose rights in the proceedings in absentia must also be guaranteed as far as possible. The private plaintiff's right to (renewed) public questioning of the accused at the main hearing or to be granted the right to ask questions in accordance with Article 147 of the Code of Criminal Procedure cannot, by its very nature, be satisfied in the absence of the accused. Such restrictions on the parties' procedural rights are conditional on the absence and are to be accepted within the limits of what is constitutionally permissible. 4

B. Evidence on which the judgment is based (para. 2)

5 Pursuant to Art. 367 para. 2 Code of Criminal Procedure, the court shall judge on the basis of the evidence gathered in the preliminary proceedings and in the main proceedings. In doing so, the early evidence collected pursuant to Art. 332 para. 3 Code of Criminal Procedure may also be taken into account. In application of the investigative principle, the court is then free to take additional evidence during the main hearing, e.g. to question witnesses, persons providing information or experts, to edit documents, to have expert opinions drawn up, etc. The parties are entitled to have evidence taken in the preliminary proceedings and in the main proceedings. However, the parties do not have a right to conduct an evidentiary proceeding pursuant to Art. 341 et seq. StPO does not exist, however.

6 Nevertheless, it seems appropriate that the court does not conduct a pure file trial, but rather conducts a complete evidentiary procedure with the exception of the questioning of the accused person. This is because it already follows from Art. 366 para. 4 lit. b Code of Criminal Procedure that for a judgment in absentia proceedings, there must be a liquid factual basis, i.e. it must be ripe for adjudication. In other words, the court must be in a position to render a judgement based on the available evidence. If the file and the resulting evidence do not permit a judgement without the presence of the accused, the hearing must be terminated and a new hearing summoned or the proceedings suspended.

C. Judgment in absentia proceedings or suspension (para. 3)

7 If all the requirements are met, the court may give a judgment in absentia or suspend the proceedings. Since this is an "optional" provision, the court has discretion as to the choice of procedure. According to the dispatch, a judgement is generally to be handed down if there is a public interest in an immediate conclusion of the criminal case, e.g. if the statute of limitations for prosecution is threatening to expire or in the case of a case that has caused a stir in the public. In addition, according to the view expressed here, pending proceedings are to be concluded by a judgement whenever possible. The court is bound by the acceleration requirement under Art. 5 of the Code of Criminal Procedure and must bring criminal proceedings to a conclusion without unjustified delay. It could even be tantamount to a denial of justice if, given the prerequisites for a contumacious judgement, the proceedings were to be sus-

pended and ultimately discontinued because the statute of limitations for prosecution had run.

In the choice of further proceedings, the interests of any victims or injured parties must be taken into account. Not least from the point of view of atonement and retribution for the wrong committed by the accused, the latter have an interest in the criminal proceedings being concluded by a final judgement. 8

Suspension, on the other hand, always appears to be appropriate if it can be assumed that ordinary proceedings can be conducted within a reasonable period of time - i.e. at least before the statute of limitations for prosecution has run - while preserving the rights of the accused to participate. This is the case, for example, if the accused is merely on holiday abroad. 9

The provisions on the main proceedings in the first instance as referred to in para. 1 also apply with regard to the service of the judgment handed down under para. 3 in accordance with Art. 82 ff. Code of Criminal Procedure as well as with regard to the legal force of this judgment, which occurs in accordance with the usual requirements of Art. 437 ff. Code of Criminal Procedure, but is a legal force that is merely resolutive (resolutive). The final legal force of the decision rendered in absentia only comes into effect if the convicted person does not request a new assessment within 10 days of being personally served with the decision or if this is rejected by the court. This requires that the accused person's whereabouts could be established or that he or she was otherwise surrendered. 10

Appeals and complaints against a judgment rendered in absentia are then possible, as is the additional remedy of a new assessment under Article 368 of the Code of Criminal Procedure. 11

D. Applicable procedural provisions (para. 4)

Pursuant to Art. 367 para. 4 CCP, proceedings in absentia are in principle governed by Art. 367 CCP and - where this norm does not contain a special provision - subsidiarily by the provisions on the main proceedings in the first instance pursuant to Art. 335 et seq. CCP. Of course, for proceedings in absentia to be conducted, the generally applicable procedural requirements such as local, subject-matter and functional jurisdiction, criminal complaint in the case of petition offences, no other lis pendens or res judicata already having occurred, etc. must be met and the parties must be duly summoned to both the 12

first and the second main hearing. If the defence or a party to the proceedings fails to appear, the court must also examine at the second hearing whether there is an unexcused failure to appear or whether a further postponement of the hearing is necessary. In cases of necessary defence pursuant to Art. 130 Code of Criminal Procedure, the hearing may only be held in the presence of a lawyer; if the defence also fails to appear, the hearing must be postponed again.

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Section 2 Re-assessment

Art. 368 Application for a re-assessment

[1] If it is possible to serve the judgment in absentia personally, the person convicted shall be notified that he or she has 10 days to make a written or oral application to the court that issued the judgment for it to re-assess the case.

[2] In the application, the person convicted must briefly explain why he or she was unable to appear at the main hearing.

[3] The court shall reject the application if the person convicted was duly summoned, but failed to appear at the main hearing without excuse.

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I. GENERAL

Proceedings in absentia are only admissible against the background of Art. 6 No. 1 ECHR if the convicted person can subsequently (in principle also after the statute of limitations has run) demand that a court, after hearing him or her on the merits, re-examine whether the charges against him or her are well-founded. This right under international law is expressly taken into account with the remedy of reconsideration under Art. 368 Criminal Procedure Code and a retrospective assessment of the decision rendered in absentia is opened up. With this possibility, the encroachments on the right to participate and to make statements inherent in proceedings in absentia can be corrected or mitigated. 1

II. PERSONAL AND MATERIAL SCOPE OF APPLICATION

The remedy of reconsideration is expressly available only to the person convicted in absentia proceedings. It is thus clear that neither the public prosecutor's office nor the private plaintiff can demand a new assessment under Art. 368 Criminal Procedure Code. The public prosecutor's office or the private plaintiff who wishes to defend against a judgment handed down in his or her absence must be referred to the ordinary legal remedies of appeal and complaint. 2

With regard to a judgment that was not handed down in absentia proceedings, a new judgment is not possible in accordance with Art. 368 et seq. of the Code of Criminal Procedure. If the in absentia proceedings are discontinued due to the absence of a procedural requirement pursuant to Art. 329 para. 4 Criminal Procedure Code, the absent party may likewise not request a new assessment, as the requirement for a conviction is lacking. 3

III. REQUEST FOR A NEW ASSESSMENT

A. Personal service of the judgment (para. 1)

If the whereabouts of the accused person who has twice been absent from the main hearing without justification are established or if he or she is brought before the court in some other way, he or she shall be served with the disposi- 4

tion of the decision rendered in absentia. This may still be the case years after the conviction.

5 At the same time as the judgment is handed over, the convicted person must be informed of the possibility of requesting a new assessment in accordance with Art. 368 ff. of the Code of Criminal Procedure within 10 days of receipt (Art. 368 para. 1 Code of Criminal Procedure). In practice, this information is printed on the judgment as an instruction on the right of appeal. Attention must also be drawn to the obligation to state reasons under para. 2 and to the possibility, if any, of declaring the appeal in parallel under Art. 371 para. 1 CCP.

6 In Art. 368 para. 1 CCP, the law expressly requires personal service of the decision rendered in absentia in order to trigger the 10-day appeal period. The embassy assumes that the accused person's whereabouts are established or that he or she is otherwise brought before the court and can be served with the decision rendered in absentia. This is the case, for example, if a convicted person has been issued an alert for arrest and has been arrested on the basis of an arrest warrant.

7 In this case, the convicted person is handed over personally. What is meant by this is a hand-to-hand delivery. The handing over of the judgment to a person over sixteen years of age living in the same household pursuant to Art. 85 para. 3 CCP as well as the application of the fiction of service pursuant to Art. 85 para. 4 lit. a CCP, on the other hand, does not trigger the time limit pursuant to Art. 368 para. 1 CCP. In other words, it must be ensured that the accused actually receives the contumacious judgment and thus actually takes note of it. Service on the defence or on a domiciliary or publication of a judgment is likewise not sufficient in principle. According to the view expressed here, however, personal delivery may be dispensed with in exceptional cases if the defence is in contact with the sentenced person and can expressly confirm that the sentenced person has actually taken note of the judgment rendered in absentia and of the possibility of lodging an appeal, but this may conflict with the lawyer's duties, because the sentenced person may have an interest in not triggering the time limit, e.g. in order to wait for the limitation period to expire. The determination of the time of service and thus the beginning of the time limit could also present difficulties, which is why it makes sense to obtain a signed certificate of service from the defendant. The burden of proof in this regard lies with the state.

As long as the personal service of the judgment has not taken place and the time limit for appeal has neither begun to run nor expired as a result, and also as long as a request for a new assessment that has been made has not been rejected, the legal force of the judgment in absentia remains resolutely conditional and the judgment is not (yet) enforceable. 8

B. Request and obligation to state reasons (para. 2)

The proceedings under Art. 368 Code of Criminal Procedure require a written or oral request on the record by the person sentenced in absentia. The application must be submitted to the original sentencing court within 10 days of taking cognisance of the contumacious judgment. In the application for reconsideration, the sentenced person must briefly explain why he or she did not attend the main hearing or hearings. He or she must credibly present these reasons that justify his or her absence. The criminal justice authorities must examine any excuses submitted. If no reasons are given, the person making the request must first be granted a period of grace and if the period of grace expires unused, the request must be dismissed. The decision not to proceed is made in writing in the form of a decision or order (Art. 80 para. 1 Criminal Procedure Code). Decisions and orders of the courts of first instance are subject to appeal (Art. 393 para. 1 Code of Criminal Procedure). 9

The statutory obligation for the convicted person to give reasons for his or her absence is in line with the case law of the Convention and does not violate the principle of nemo tenetur se ipsum accusare, according to which no one is required to incriminate himself or herself. This is because it is generally true that appeals and legal remedies must be substantiated, otherwise they will not be pursued. 10

C. Grounds for refusal (para. 3)

Art. 368 para. 3 Code of Criminal Procedure regulates the question under which conditions the request for a reassessment is to be granted or when it is to be rejected. Accordingly, the court rejects the request if the convicted person was duly summoned but failed to attend the main hearing without excuse. 11

The term "without excuse" used in Art. 368 para. 3 CCP and Art. 369 para. 4 CCP is to be interpreted in the same way in both provisions and is the same as that used in Art. 366 CCP. What is required is a culpable absence. The focus is 12

on cases in which the accused refuses to appear at the main hearing. For example, if it is known from statements made by the accused that he or she does not intend to comply with a summons. If the accused person, knowing that he or she will be prosecuted, unequivocally renounces participation in the main hearing or if there are clear and concrete indications that he or she intends to evade the criminal proceedings by fleeing, the reopening of the proceedings is excluded. In this case, the accused person has clearly waived participation in the (first and second) main hearing. He or she cannot come back to it later.

13 However, the burden of proof for the failure to appear through one's own fault lies with the state - as is also the case with default under Art. 366 Criminal Procedure Code. The fact that, according to Strasbourg practice, the accused may not be required to prove that he or she was not at fault does not mean, however, that in the proceedings concerning the request for a new assessment it is not necessary to take into account whether the reasons asserted make the absence appear to be credibly without fault. If it cannot be proven that the accused was absent from the main hearing without excuse, the application for a new assessment must be approved.

IV. LEGAL CONSEQUENCES / LEGAL EFFECT

14 Insofar as the application for reassessment is approved and a new judgment is handed down in accordance with Art. 369 f. Code of Criminal Procedure, the judgment in absentia lapses. In this respect, it is no longer considered a first-instance judgment under the statute of limitations.

15 If, on the other hand, the court rejects the request for a new judgment, it issues a formal order (collegiate court) or a decree (individual court) in accordance with Art. 80 para. 1 CCP. An appeal against this is admissible under the general provisions (Art. 393 para. 1 lit. b Code of Criminal Procedure). The decision rendered in absentia remains in force in this case (Art. 369 para. 4 Criminal Procedure Code). In this case, the judgment rendered in absentia becomes final in accordance with the general rules (cf. Art. 437 ff. Code of Criminal Procedure).

16 If no ordinary appeal is lodged against the judgment in absentia within the time limit for appeal, which - unlike the time limit for appeal - does not require personal service of the judgment, the judgment can in principle be said to be final. However, this is merely a resolutive (suspensive) conditional legal

force and the judgment is not (yet) enforceable. The final legal force of the decision rendered in absentia only comes into effect if the convicted person does not request a new assessment within 10 days of personal service of the decision within the meaning of Art. 368 Code of Criminal Procedure or if the court rejects the new assessment. This requires that the accused person's whereabouts could be ascertained or that he or she was otherwise placed before the court and that he or she was informed of the possibility of lodging an appeal.

The mere resolutive condition of res judicata applies even if the court does not grant the application for a new conviction a suspensive effect within the meaning of Art. 369 para. 3 Criminal Procedure Code. 17

V. RELATIONSHIP TO ORDINARY APPEALS AND OTHER LEGAL REMEDIES

A. Relationship to the appeal

The legislature devoted a separate statutory provision to the relationship of the new conviction to the appeal. Article 271 of the Code of Criminal Procedure stipulates that, as long as the appeal period is still running, the convicted person may, in addition to or instead of filing a request for a new assessment, also declare an appeal against the decision rendered in absentia. He or she must be informed of this possibility in terms of Art. 368 para. 1 Criminal Procedure Code. An appeal shall only be heard if the request for a new assessment has been rejected. 18

B. Relationship to the appeal

If the request for a new assessment is rejected, which takes the form of a decision or order, the person convicted in absentia may appeal to the appellate court (Art. 393 para. 1 letter b Code of Criminal Procedure). 19

If, after the application for reassessment has been granted, a further (third) main hearing was held at which the accused was again absent without excuse, a further application for reassessment is not considered. The accused who has again failed to appear may appeal against the court's finding under Art. 369 para. 4 Code of Criminal Procedure that the original decision on absence applies on the grounds that the court wrongly assumed an unexcused absence. 20

C. Relationship to restoration in the case of missed appointments (Art. 94 para. 5 Code of Criminal Procedure)

21 In the case of a contumacious judgment, the provisions of Art. 368 et seq. of the Code of Criminal Procedure take precedence as lex specialis over the provisions of Art. 94 of the Code of Criminal Procedure on restoration in the case of missed deadlines, as is clear from the reservation in Art. 94 para. 5 of the Code of Criminal Procedure in favour of the provisions on in absentia proceedings.

22 For reinstatement, the accused person must show credibly that he or she is not at fault for the default. In contrast, in the case of a request for a new trial, as already mentioned above, the state bears the burden of proving that it was at fault for the failure to appear. In this respect, the procedure under Art. 368 et seq. of the Code of Criminal Procedure is always the more favourable for the accused person.

23 In constellations in which Art. 368 et seq. of the Code of Criminal Procedure cannot be applied because an ordinary judgment has been issued rather than a judgment in absentia, the defaulting accused person has the right of appeal under Art. 94 of the Code of Criminal Procedure.

24 Likewise, according to the view taken here, restoration may be requested if the 10-day period for lodging the appeal under Art. 368 CCP has already elapsed but the 30-day period for restoring the time limit is still running.

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COMMENTARY ON

Art. 369 CrimPC

A commentary by Denise Weingart

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Art. 369 Procedure

[1] If it is probable that the requirements for a re-assessment will be fulfilled, the director of proceedings shall fix a new main hearing. At this hearing, the court shall decide on the application for re-assessment and shall if applicable reach a new judgment.

[2] The appeal courts shall suspend any appellate proceedings raised by other parties.

[3] The director of proceedings shall decide before the main hearing on granting suspensive effect and on preventive detention.

[4] If the convicted person again fails to appear for the main hearing, the judgment in absentia shall remain valid.

[5] The application for re-assessment may be withdrawn at any time prior to the conclusion of the party hearing subject to the payment of costs and damages.

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I. GENERAL

1 Art. 369 Code of Criminal Procedure governs the procedure that applies if the request for a new assessment under Art. 368 Code of Criminal Procedure is likely to be approved. In this case, a third main hearing takes place, in which the procedural rights of the accused, in particular his or her rights to participate and testify, are fully respected. If evidence was taken at the hearing in absentia, these examinations must be repeated, regardless of whether the defence was present at the hearing in absentia or not. Consequently, no (!) judgement in absentia is issued within the framework of Art. 369/370 CCP.

II. THE PROCEDURE IN THE CASE OF A REQUEST FOR A NEW EVALUATION IN PARTICULAR

A. Summary preliminary examination and new main hearing (para. 1)

2 In accordance with the legal provision of Art. 369 para. 1 Code of Criminal Procedure, the court shall first examine, and in this respect only summarily, whether the requirements for the approval of the request for a new assessment could presumably be fulfilled. If this is to be affirmed, e.g. if the convicted person can show that he or she was either not summoned properly or was unable to attend the main hearing through no fault of his or her own, the court must summon him or her to a further, i.e. third, main hearing.

3 Only at the subsequent main hearing shall the court finally assess the request for a new assessment. If the court grants a new assessment, it shall immediately proceed to repeat the main hearing and conduct it in accordance with the principles of Art. 339 et seq. StPO and granting all the rights of the parties. There is no (independent) possibility of appeal against the granting of a retrial. However, the new judgment may be challenged on appeal, claiming that the requirements for a retrial were not met.

4 In the event that the requirements for granting the application are clearly not met, the court shall, after granting the parties the right to be heard, dismiss the application by means of a written decision. In this case, according to the opinion expressed here, it is unnecessary to schedule a third main hearing, espe-

cially since it would not make sense from a procedural economic point of view to have the parties prepare the pleadings if it is already clear from the outset that the application will be rejected. The sentenced person has the right to appeal against this interim decision, which is to be issued in written proceedings, to the appellate authority in accordance with Art. 393 et seq. StPO to the appellate court.

B. Suspension of appeal proceedings already initiated (para. 2)

According to Art. 369 para. 2 Code of Criminal Procedure, if appeals have been filed in addition to the application for a new conviction, they are suspended. 5

It is striking that Art. 369 para. 2 CCP only speaks of those appeal proceedings that have been initiated "by other parties". Appeal proceedings initiated by the sentenced person himself are thus excluded. This is due to the fact that Art. 371 para. 2 Code of Criminal Procedure contains a special provision for appeals by the sentenced person, according to which an appeal is only heard if the request for a new assessment has been rejected. If, on the other hand, the request is approved, a new first-instance decision is issued, which is why the appeal filed against the decision rendered in absentia is not to be heard. However, until a decision has been reached on the request for reassessment, it also appears reasonable to suspend the proceedings at the higher instance with regard to the appeals filed by the accused person, which means that the appeals of all parties are to be treated equally with regard to the suspension. 6

C. Decision on suspensive effect and preventive detention (para. 3)

If an appeal is lodged against a decision rendered in absentia, the decision is only resolutely conditional and is not (yet) enforceable, which means that any ordinary execution of sentence initiated on the basis of the decision rendered in absentia cannot take place. The (resolutively conditional) sentenced person is thus formally still in preventive detention, which means that requests for release from detention during the proceedings for reassessment are to be dealt with in the first instance proceedings according to Art. 230 CCP and in the appeal proceedings according to Art. 233 CCP. This also follows from Art. 369 para. 3 CCP, which expressly refers to decisions on preventive detention (and not ordinary detention) in connection with the reassessment. 7

8 The circumstance of a merely resolutive conditional res judicata and enforceability may appear problematic at first glance, especially since the "suspension period" until the appeal can be taken can last a long time, since the service of the decision rendered in absentia is decisive (Art. 368 para. 1 CCP). However, because in detention cases the sentenced person is physically available, there is nothing to prevent personal service, which means that the 10-day period for filing the request for a new judgment can be waited for before the ordinary detention is enforced.

9 The court also decides on the suspensive effect of the decision rendered in absentia that has become resolutively conditional. The mere resolutive conditional legal force applies even if the court does not grant suspensive effect within the meaning of Art. 369 para. 3 Criminal Procedure Code to the application for a new judgment.

III. CONSEQUENCES OF REPEATED UNEXCUSED ABSENCE (PARA. 4)

10 If the convicted person again fails to appear at the third main hearing without excuse, the decision rendered in absentia remains in force. This legal consequence must be pointed out in the summons to the new hearing.

11 The term "without excuse" used in Art. 368 para. 3 CCP and Art. 369 para. 4 CCP is to be interpreted in the same way in both provisions. Here too, unexcused means culpable absence. What is required is that the accused person deliberately and voluntarily stayed away from the hearing.

12 According to the wording of the law in Art. 369 para. 4 CCP, a further/second request for a new assessment is excluded after the first absence for the third main hearing. The law does not provide for any further such appeal. With the renewed unexcused absence within the meaning of Art. 369 para. 4 CCP, the convicted person forfeits, in other words, his or her right to a new assessment.

IV. WITHDRAWAL OF THE REQUEST (PARA. 5)

13 The request for reassessment may be withdrawn until the conclusion of the party hearing at the third main hearing. In the event of a withdrawal, the decision rendered in absentia becomes formally and substantively final.

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COMMENTARY ON

Art. 370 CrimPC

A commentary by Denise Weingart

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Art. 370 New judgment

[1] The court shall issue a new judgment, which is subject to the customary rights of appeal.

[2] When the new judgment becomes legally binding, the judgment in absentia, and appeal against the same and decisions already taken in the appellate proceedings become void.

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I. NEW JUDGMENT (PARA. 1)

Pursuant to Art. 370 Code of Criminal Procedure, if the requirements for a new assessment are met in application of Art. 369 Code of Criminal Procedure and a new main hearing has been held, the court shall pass a new judgment. Since the procedural rights of the accused could be fully respected on the occasion of the third main hearing due to his presence, no judgment in absentia is issued under Art. 369/370 CCP, but an "ordinary" judgment under Art. 348 et seq. CCP. This new judgment may in turn be challenged with the ordinary legal remedies under StPO (Art. 370 para. 1 StPO). Within the framework of these appeals, the parties complained against may in particular complain that the requirements for a new judgment were not met. If the new judgment is a purely procedural judgment, e.g. a discontinuation pursuant to Art. 329 para. 4 CCP due to the statute of limitations that has occurred in the meantime, the appeal is conceivable. 1

II. EFFECT OF THE NEW JUDGMENT (PARA. 2)

The new judgment becomes final in accordance with the requirements of Art. 437 Criminal Procedure Code. It is essential that the judgment in absentia does not lapse as soon as the new proceedings are granted or the new main hearing is opened, but only when there is a final new judgment in accordance with Art. 370 StPO. The original judgment in absentia is replaced by the new judgment. 2

If the earlier judgment in absentia lapses, i.e. the proceedings are as if it had never been issued, the time that has elapsed between the two judgments must be taken into account in the limitation period for prosecution under Art. 97 SCC: It must be assumed that the statute of limitations for prosecution has continued to run as if the judgment in absentia had never existed. With this landmark judgment of 28 October 2019, the Federal Supreme Court has made a change to its case law on the interrupting effect of the statute of limitations for prosecution under Art. 97 para. 3 SCC. Consequently, it may be that the statute of limitations for prosecution has expired in the meantime since the commission of the offense and that the proceedings must be discontinued as a result. If the limitation period for prosecution has not yet expired, the court 3

may, in the new judgment, take into account the lapse of time since the commission of the offence in reducing the sentence.

4 When the new judgment becomes final, the appeals lodged against a judgment in absentia and the decisions already issued in the appeal proceedings also lapse (Art. 370 para. 2 Criminal Procedure Code).

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COMMENTARY ON

Art. 371 CrimPC

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Art. 371 Relationship to an appeal

[1] Within the applicable time limit, a person convicted may file an appeal against the judgment in absentia in addition to or instead of the application for re-assessment. The person convicted must be notified of this possibility in accordance with Article 368 paragraph 1.

[2] An appeal shall only be considered if the application for re-assessment has been rejected.

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I. PARALLEL FILING OF APPEAL/APPEAL.

Art. 371 para. 1 sentence 1 CCP unambiguously states that the convicted person may, in addition to or instead of the request for a new assessment, also declare an appeal under Art. 398 et seq. CCP against the judgment rendered in absentia as long as the appeal period of 10 days is still running. 1

The provision of Art. 371 Code of Criminal Procedure merely clarifies the relationship between the legal remedy (request for a new assessment under Art. 368 Code of Criminal Procedure) and the appeal (appeal under Art. 398 ff. Code of Criminal Procedure) against a judgment rendered in absentia under Art. 367 Code of Criminal Procedure. The appeal may be of particular importance if it is claimed that the requirements for a judgment in absentia did not exist and that the proceedings should therefore have been suspended. 2

The following must be taken into account when choosing the appeal/appeal: If the accused person chooses exclusively the appeal without at the same time requesting a new assessment, he or she loses an instance. If, on the other hand, he/she chooses exclusively the new assessment, he/she runs the risk that the request will not be granted because the requirements of Art. 368 para. 3 Code of Criminal Procedure are not met. In this case, he has no legal remedy at all. The accused person is therefore well advised to keep both options open as a precaution. 3

If both the appeal and the remedy of a request for reassessment are taken, Art. 371 para. 2 Code of Criminal Procedure states that the request for reassessment must be decided first and that only if this is rejected will the - previously suspended - appeal proceedings be taken up by the appellate court. This results in the subsidiarity of the appeal proceedings compared to the petition proceedings, which is also reflected in any appeals by other parties (Art. 369 para. 2 and 370 para. 2 CCP). 4

II. SPECIAL FEATURES OF THE RUNNING OF TIME LIMITS

As far as the running of the time limit is concerned, the following should be noted: The time limit for appeal begins to run with the service of the dispositive, whereby personal service is not required, but also the surrogates of service (such as, for example, the fiction of service or the delivery to a person 5

living in the same household) can come into play. In contrast, personal service is necessary for the start of the time limit for filing a request for a new assessment, which is why the time limits of the appeal and the appeal do not necessarily have to coincide. For example, it may be that the time limit for appeal has long expired before the time limit for appeal even begins to run with service on the convicted person.

III. RELATIONSHIP TO THE APPEAL AND TO THE RESTORATION

6 With regard to the relationship of the request for a new assessment to the appeal and to the restoration of the time limit, reference can be made to the commentary in n. 19 ff. on Art. 368 StPO. A schematic overview of the appeals and remedies in absentia proceedings can be found in No. V. of the commentary on Art. 366 StPO.

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COMMENTARY ON

Rem. to art. 376-378 CrimPC

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I. IN GENERAL, ON SPECIAL TYPES OF PROCEEDINGS

The Swiss Criminal Procedure Code (CrimPC) consists of 12 titles. While the (ordinary) main proceedings at first instance are regulated in Title 7, Title 8 contains provisions on special types of proceedings. These include summary proceedings and proceedings for minor offenses, abbreviated proceedings, proceedings for independent subsequent decisions by the court, proceedings in the absence of the accused, and independent proceedings for the imposition of measures. In the latter case, the CrimPC distinguishes between the ordering of a surety, proceedings for an accused who is not criminally liable, and independent proceedings for the forfeiture of property. 1

Measures within the meaning of the SCC are generally ordered in the context of the first-instance main proceedings, in which the indictment against a specific person or specific persons for specific criminal acts is dealt with and judged. However, there are situations in which measures may need to be ordered outside of the ordinary main proceedings. These constellations are the subject of the independent proceedings regulated in the CrimPC. 2

II. IN PARTICULAR, THE INDEPENDENT FORFEITURE PROCEEDINGS (ART. 376-378 CRIMPC)

The independent forfeiture proceedings under Art. 376-378 CrimPC are a special type of procedure in the sense described above. This type of procedure is "special" because forfeiture under Art. 69 et seq. SCC is generally ordered *accessorily* as part of ordinary criminal proceedings against one or more defendants. 3

As a rule, the order of confiscation is thus made together with the substantive assessment of the offense. Accessory confiscation can be ordered either by the court in its judgment on the merits of the case (Art. 351 para. 1 CrimPC) or by the public prosecutor in the penalty order (Art. 352 para. 2 CrimPC). 4

In most cases, accessory forfeiture is ordered in a criminal conviction. However, it is also possible that an acquittal or a dismissal of proceedings is accessory to a forfeiture. This is because the order of forfeiture is generally issued without regard to the punishability of a specific person. A factual and unlawful (but not necessarily culpable) underlying offense is sufficient. 5

6 The terms "proceedings *in personam*" and "proceedings *in rem*" are sometimes used as synonyms for accessory and independent forfeiture respectively.

7 It is the responsibility of the competent authority to examine the question of forfeiture ex officio and with the necessary diligence. The order of this substantive criminal law measure is in principle mandatory if the statutory requirements are met.

8 According to the case law of the Federal Supreme Court, the forfeiture proceedings should not be decoupled from pending criminal proceedings without good cause, since it is primarily in the criminal proceedings that a decision must be made as to whether a criminal offense has been committed and whether the object or asset has been produced or acquired as a result. In this sense, it is rightly pointed out in the literature that the possibility of independent forfeiture under Art. 376 et seq. of the Swiss Criminal Procedure Code (CrimPC) is not a free pass to only worry about the financial consequences of an offense.

9 The possibility of conducting independent forfeiture proceedings is not only provided for under the CrimPC (see Art. 1 CrimPC). Rather, the Federal Act on Administrative Criminal Law (ACLA) also provides for this possibility in Art. 66 ACLA in the context of administrative criminal proceedings, i.e. in cases in which the prosecution and judgment of violations is delegated to a federal administrative authority (Art. 1 ACLA).

III. CRIMPC REVISION

10 As part of the last revision of the CrimPC, which came into force on January 1, 2024, the provisions regarding the independent forfeiture procedure were also partially amended. The changes and additions concern Art. 377 CrimPC and thus the only CrimPC provision that deals with the independent forfeiture procedure. This will be discussed in more detail in the commentary on the article in question.

About the author

Dr. iur. Tommaso Caprana, attorney-at-law, CAS Forensics, is a law clerk at the Second Criminal Division of the Swiss Federal Supreme Court in Lausanne.

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Section 3 Separate Forfeiture Proceedings

Art. 376 Requirements

Separate forfeiture proceedings are conducted if a decision must be made on the forfeiture of property or assets outside of criminal proceedings.

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I. PURPOSE OF THE PROCEEDINGS

The purpose of the independent forfeiture proceedings under Art. 376-378 CrimPC is derived from the purposes pursued by the various types of forfeiture. These are regulated in the Swiss Criminal Code (SCC). 1

The purpose of precautionary forfeiture (Art. 69 SCC) is to forfeit property that is connected to a crime and should be removed from its owner in view of the danger it poses to public legal interests. According to the practice of the Federal Supreme Court, the purpose of precautionary forfeiture is to protect the general public from the (re)use of dangerous objects that pose a danger to legal interests. 2

The purpose of the forfeiture of assets (Art. 70 SCC) is to offset the proceeds of crime. The offender (or the beneficiary) should not be allowed to keep the financial advantage gained from a criminal offense. This type of forfeiture thus serves to fulfill the socio-ethical imperative that criminal behavior should not be rewarded. The function of confiscation under SCC Art. 70 is more accurately expressed in the term 'absorption or compensatory confiscation', which is sometimes used in doctrine and case law as a synonym for the aforementioned type of confiscation. 3

Finally, the confiscation of assets belonging to a criminal or terrorist organization (SCC Art. 72) aims to remove the operating capital of such an organization. In this context, it is immaterial whether the assets in question were acquired legally or illegally. The decisive criterion for this type of forfeiture is rather the fact that the assets in question are subject to the power of disposal of a criminal or terrorist organization. The Federal Supreme Court has already referred to the protective purpose of this type of forfeiture. 4

II. LEGAL NATURE

A. Legal nature of confiscation

The question of the legal nature of confiscation is answered differently depending on the type of confiscation. 5

1. Protective confiscation (Art. 69 SCC)

6 In the case of protective confiscation (Art. 69 SCC), the Federal Supreme Court assumes that it is a (factual) measure without a penal character. In view of the purpose of this type of confiscation, this is to be agreed, since the aim is not to punish a specific person for a specific behavior (after the fact), but rather to (preventively) remove objects that have a connection to a crime and should be taken from their owner in view of their endangerment to public legal interests.

2. Confiscation (Art. 70 SCC)

7 There is widespread uncertainty regarding the legal nature of confiscation (Art. 70 SCC). The prevailing doctrine qualifies confiscation as a substantive measure. As such, its ordering – in contrast to personal measures – does not depend on the punishability of a specific person. It must be ordered if the legal requirements are met.

8 However, legal scholars are not in agreement as to which criteria should be used to distinguish between punishments and measures. Without going into the details of the discussion in the specialist literature, it can be generally stated that the punishment is aimed at a person. It is linked to an unlawful and culpably committed offense. The repressive function of punishment lies in the compensation for guilt and in atonement. In addition, the purpose of the penalty is to rehabilitate the offender and thus to protect society from future criminal acts. Measures, on the other hand, have no repressive or "expiatory" function, but primarily a future-oriented security function.

9 The Federal Supreme Court has repeatedly referred to the confiscation of assets under Article 70 SCC as a substantive measure, but at the same time pointed out its repressive character. When assessing the legal nature of this type of confiscation, the Federal Supreme Court bases its decision on the good or bad faith of the third party concerned: According to this, the confiscation of the good-faith third party encroaches on a legal position protected by civil law and should therefore be qualified as a "sanction close to punishment". In the case of a purchaser in bad faith, however, the confiscation does not encroach on his property rights, which is why it is not considered to be a penalty. In a recent judgment, the Federal Supreme Court referred to previ-

ous case law and the state of opinion in legal doctrine, but ultimately left open the question of whether the confiscation of assets is a measure or a penalty.

The lack of clarification of this question by the Federal Supreme Court and the fact that there is no agreement in the specialist literature on the legal nature of the confiscation of assets suggest that neither the category of "punishment" nor that of "measure" are suitable for satisfactorily capturing this type of confiscation. According to Scholl's correct view, the reason for this lies in the independent characteristic of the confiscation of assets. It is intended to undo the consequences of a crime – in line with its purpose – and thus restore the financial situation that existed before the crime was committed. Consequently, the confiscation of assets should be qualified as a reparative measure. 10

3. Confiscation of assets of a criminal or terrorist organization (Art. 72 SCC)

Confiscation under SCC Art. 72 is not (as with SCC Art. 70) about offsetting the advantages gained by criminal means, but about accessing the operating capital of criminal or terrorist organizations. This type of confiscation can also be ordered without having to prove whether a particular asset comes from a specific crime. 11

In view of the objective, one could assume that this type of confiscation is a preventive measure. The assets are to be confiscated because it would be too dangerous to leave them in the power of disposal of the criminal or terrorist organization. In this sense, this type of confiscation is similar to the precautionary seizure (Art. 69 SCC): The object that was used or intended to be used to commit a crime and continues to pose a danger to the public is to be equated with the working capital that is in the power of disposal of the criminal or terrorist organization. 12

However, legal literature rightly points out that this type of confiscation also has penal elements and is therefore of a repressive nature. This is supported, first of all, by the reversal of the burden of proof in Art. 72 SCC. Accordingly, in the case of assets belonging to a person who has participated in or supported a criminal or terrorist organization, the organization's power of disposition (which, according to Art. 72 sentence 1 SCC, justifies confiscation) is presumed until the contrary is proven. This type of confiscation then risks de- 13

generating into a penalty if, as a result of the reversal of the burden of proof, assets are seized that have been legally acquired and used. Furthermore, the freezing order under Art. 72 SCC lacks the typical earmarking for preventive security measures, since – unlike the freezing order under Art. 69 SCC – there is no examination of the extent to which there is a future risk to the general public when it is ordered.

B. Legal nature of the independent forfeiture proceedings

14 Regardless of how the individual types of forfeiture are classified (penalty or measure), it should be noted that the independent forfeiture proceedings under Art. 376 et seq. CrimPC can certainly be classified as "criminal proceedings" in the broader sense. This is because it is carried out by criminal authorities in application of the CrimPC. The wording of Art. 376 CrimPC, according to which independent forfeiture is ordered "outside of criminal proceedings", merely expresses the fact that this measure is ordered outside of criminal proceedings against a specific person or specific persons. Accordingly, independent forfeiture orders are to be qualified as decisions in criminal matters.

III. SUBSTANTIVE CONDITIONS FOR CONFISCATION

15 The substantive conditions for ordering independent confiscation are not derived from Art. 376-378 CrimPC, but from the substantive provisions of the SCC, which govern the various types of confiscation (Art. 69 et seq. SCC).

IV. PERSONS AFFECTED BY CONFISCATION

16 In the context of the independent forfeiture procedure, the following may have property forfeited: the possessor of the dangerous object (Art. 69 SCC), the offender and the directly benefiting third party (Art. 70 para. 1 SCC), subsequent acquirers (Art. 70 para. 2 SCC) and participants or supporters of a criminal or terrorist organization (Art. 72 SCC).

V. SCOPE OF APPLICATION OF THE INDEPENDENT FORFEITURE PROCEDURE

A. Wording

According to the wording of Art. 376 CrimPC, an independent forfeiture procedure is carried out when a decision on the forfeiture of objects or assets is to be made "outside of criminal proceedings". This wording has been criticized in legal doctrine. Specifically, it was argued that the independent confiscation of criminal assets by the criminal authorities is also ordered in application of the CrimPC, which is why, in the broader sense, the order is indeed issued in criminal proceedings. Furthermore, it was rightly objected that it does not follow from the wording of Article 376 CrimPC that a decision on confiscation within the meaning of Article 69 et seq. SCC must in principle be taken in the context of criminal proceedings. 17

B. Subsidiary character

Once criminal proceedings have been formally opened (see Art. 309 CrimPC), there is in principle no longer any room for the special procedure for independent confiscation regulated in Art. 376 et seq. CrimPC, which is therefore subsidiary in nature. 18

The subsidiary nature of the independent forfeiture procedure cannot be circumvented by, for example, seizing objects or assets in court shortly before the first-instance trial or the appeal hearing is held, with the indication that the court will only decide on the forfeiture after the person affected by the forfeiture has been granted a legal hearing. Firstly, such a procedure would violate the right to a fair hearing (Art. 29 para. 2 FC) of the person affected by the confiscation. Secondly, such a procedure would be tantamount to the de facto implementation of an independent confiscation procedure, which is not provided for in the CrimPC. 19

C. Confiscation in the event of grounds for excluding guilt

If it is determined in the course of ordinary criminal proceedings that the accused is not criminally liable because there are grounds for excluding guilt, the ordering of forfeiture remains possible. This is because the ordering of forfeiture does not depend on the criminal liability of a specific person. In such 20

cases, too, the forfeiture is accessory to the criminal proceedings against the accused.

D. Object of independent forfeiture

21 In the context of independent forfeiture proceedings, a protective forfeiture (Art. 69 SCC), the forfeiture of assets (Art. 70 SCC) or the forfeiture of assets of a criminal or terrorist organization (Art. 72 SCC) may be ordered. The independent forfeiture proceedings may involve both a forfeiture in kind (Art. 70 SCC) and a confiscation by means of a compensation claim (Art. 71 SCC). The direct handover of the seized assets to the injured party (Art. 70 para. 1 in fine SCC) or the subsequent allocation to the injured party (Art. 73 SCC) can also be ordered as part of the independent confiscation procedure (see Art. 378 CrimPC).

22 Criminal proceedings include all objects and assets that are seized after formal proceedings have been opened. According to Art. 263 para. 1 let. d CrimPC, objects and assets belonging to an accused person or a third party may be seized if they are likely to be confiscated. The confiscation seizure is a conservative provisional measure. To order it, it is sufficient if there is a possibility that the objects and assets in question could be confiscated in the future. In the case of a confiscation seizure, there must be a connection between the offense and the seized objects or assets. It is the preliminary stage of a confiscation.

E. Cases of application

1. Principle: independent confiscation in the absence of criminal proceedings

23 Independent forfeiture is generally considered when criminal proceedings are not held in Switzerland for whatever reason. This is the case, for example, when:

- the public prosecutor orders that the case not be pursued in accordance with Art. 310 CrimPC, e.g. because procedural obstacles (Art. 310 para. 1 let. b CrimPC) exist, which includes the statute of limitations for the offence;

- no criminal complaint has been filed in the case of an offence that requires a criminal complaint to be filed (cf. Art. 30 f. SCC), which precludes criminal proceedings from being conducted against the offender due to a procedural requirement not being met;
- criminal proceedings against the offender fail for objective or factual reasons, e.g. because the offender is deceased, of unknown whereabouts or identity;
- the offense justifying the confiscation (but not the claim to confiscation as such) is time-barred;
- criminal proceedings against the offender have already been concluded and confiscable items or assets subsequently come to light, provided that the criminal authority could not have known about the existence of the confiscable items or assets had it exercised the necessary due diligence;
- in the case of foreign offences, there are assets to be confiscated in Switzerland and the predicate offence falls under Swiss jurisdiction.

According to case law and doctrine, there are certain exceptions to the principle of subsidiarity of the independent confiscation proceedings. These will be discussed below. 24

2. Exceptions to the principle of subsidiarity of the independent confiscation proceedings

a. Special nature of the object to be confiscated

According to the practice of the Federal Supreme Court, an independent forfeiture procedure may also be considered – beyond the wording of Art. 376 CrimPC – if criminal proceedings are in progress but a quick decision on forfeiture should be made because of the nature of the property to be forfeited, for example because the property in question is perishable or subject to rapid depreciation. This condition may be met, for example, in the cultivation of hemp in large quantities. The possibility of independent confiscation – despite ongoing criminal proceedings – should also exist if, given the nature of the seized property, maintaining the seizure proves to be complex and excessively costly. 25

b. Safeguarding the interests of the injured parties

26 According to the practice of the Federal Supreme Court, with a view to protecting the interests of the injured parties, there is also reason to consider the decision on confiscation not as accessory to pending foreign criminal proceedings, but in independent proceedings, even if some time has already passed since the offence was committed and it is not expected that the foreign criminal proceedings will be concluded in the near future. However, the Federal Supreme Court requires that the injured party's claim be "sufficiently liquid" before it will order the early release of the assets to the injured party. This is because, according to the Federal Supreme Court, early release is only justified if it is obvious that the assets originate from the corresponding criminal offense and that the entitled party has been harmed by this offense. Only if the legal situation is clear or provable actual circumstances are immediately available and no better claims of third parties are asserted, there is no danger of contradictory judgments in the forfeiture and criminal proceedings. If this is not the case, the claim of the injured party is not liquid and the result of the foreign criminal proceedings must be awaited, which must be consulted by the judge when deciding on the forfeiture.

27 The possibility of such early independent forfeiture proceedings is generally preferred by some legal scholars (i.e. not limited to cases in which foreign criminal proceedings are pending).

c. Blocking access to websites with criminally relevant content?

28 In legal doctrine and jurisprudence, the view is occasionally expressed that the definitive blocking of access to websites with criminally relevant content (e.g. defamatory or racist content) can be ordered as part of an independent forfeiture procedure under Art. 376 et seq. CrimPC.

29 However, it was rightly objected that such an order for blocking was already lacking the substantive legal requirements of a security forfeiture (Art. 69 SCC) due to the lack of an *instrumentum sceleris*, since the access infrastructure of the access providers neither serves nor is intended for the commission of the communication offenses in question.

VI. COMPATIBILITY WITH THE OFFENDER'S RIGHTS OF DEFENSE?

As already considered, the possibility of ordering confiscation does not depend on the criminal liability of a specific person. Independent confiscation does not involve any criminal accusation of guilt against the person affected by the confiscation. 30

The procedure of independent confiscation is rightly considered problematic if and to the extent that the underlying offence justifying the confiscation is established in this procedure without the alleged perpetrator having been able to defend himself in the context of ordinary criminal proceedings, exercising the rights of defence to which he is entitled. For this reason, the independent confiscation procedure must only be carried out in strict compliance with its subsidiary character. 31

VII. IS IT COMPATIBLE WITH THE PRESUMPTION OF INNOCENCE?

The ordering of a precautionary forfeiture (Art. 69 SCC) requires the existence of a criminal and unlawful underlying offence. The confiscation of assets (Art. 70 para. 1 SCC) also requires conduct that fulfills the objective and subjective elements of a criminal offense and is unlawful. The same conditions apply to the claim for compensation (Art. 71 SCC). 32

According to Art. 32 para. 1 FC and Art. 10 para. 1 CrimPC, everyone is presumed innocent until legally convicted. According to Art. 6 no. 2 ECHR, everyone charged with a criminal offense is presumed innocent until proved guilty according to law. If there is no legally binding conviction, the public prosecutor in the discontinuation order or the court in its judgment may not express the view that they consider the accused to be guilty. Art. 6 no. 2 ECHR protects persons against being treated as if they were guilty of the crimes they have been accused of in the event of acquittal or discontinuation of proceedings. 33

If a person who has not been finally convicted is unreservedly accused of committing the offence in the independent confiscation order, this is problematic from the point of view of the presumption of innocence. In the absence of a final conviction of the perpetrator of the predicate offence, the 34

grounds of an independent confiscation order should not state that the predicate offender is criminally liable. However, since the existence of a criminal and illegal offence is a prerequisite for the ordering of a confiscation, the reasoning of the independent confiscation decision must be made with caution.

35 Regarding the confiscation of property, it follows from SCC Art. 70 para. 2 *a contrario* that assets acquired by criminal means can in principle be confiscated from any third party who acquires them with knowledge of the reasons for the confiscation or without equivalent consideration. According to the case law of the Federal Supreme Court, the third party cannot invoke the presumption of innocence in the confiscation proceedings. Nevertheless, the state is obliged to prove all the conditions for confiscation from the third party. If the third party claims to have provided equivalent consideration within the meaning of Art. 70 para. 2 SCC, they must cooperate in the gathering of evidence in a reasonable manner. The Federal Supreme Court has already ruled that doubts regarding the conditions for confiscation must be applied by analogy to the presumption of innocence in favor of the person concerned. However, it is questionable whether this is really an analogous application of the presumption of innocence. If there are doubts, for example, about the existence of a criminal and unlawful underlying offence, then it would be more obvious to deny the existence of such an underlying offence and thus the corresponding condition for confiscation, in application of the principle of "in dubio pro reo" (cf. Art. 10 para. 3 CrimPC), which would have to be taken into account in favor of the person affected by the confiscation.

VIII. IS IT COMPATIBLE WITH THE "NE BIS IN IDEM" PRINCIPLE?

36 Independent forfeiture proceedings are possible, among other reasons, if forfeitable objects and assets come to light after the legally binding conclusion of the ordinary criminal proceedings. This raises the question of whether independent forfeiture is compatible with the "ne bis in idem" principle.

37 The ne bis in idem principle is regulated in Art. 11 para. 1 CrimPC. It is also enshrined in Art. 4 of Protocol No. 7 to the ECHR and in Art. 14 para. 7 of the International Covenant on Civil and Political Rights (ICCPR) and, according to the Federal Supreme Court's case law, can be derived directly from the Federal Constitution. Accordingly, anyone who has been legally convicted or

acquitted in Switzerland may not be prosecuted again for the same offense. Identity of the acts exists if the first and second criminal proceedings are based on identical or essentially the same facts. The legal qualification of these facts is not important. The ne bis in idem principle prohibits the repetition of criminal proceedings that have been concluded by a final judgment. It constitutes a procedural obstacle that must be taken into account ex officio at every stage of the proceedings.

If new objects or assets that can be confiscated come to light after the final conclusion of the criminal proceedings, the principle of ne bis in idem and the finality of the judgment in the criminal proceedings do not in principle preclude the subsequent ordering of confiscation in the independent confiscation proceedings, since the two proceedings concern different matters. In such a case, the confiscation of the objects or assets in question has not yet been decided in the criminal proceedings that have already been legally concluded, so there is no case that has been tried (*res iudicata*). 38

However, independent confiscation proceedings cannot be carried out if the criminal authority could have become aware of the existence of the confiscable objects or assets by applying the necessary diligence in the ordinary criminal proceedings. This also applies to future economic benefits that could have been assessed and confiscated at the time of the court judgment or the public prosecutor's decision to dismiss the proceedings. 39

IX. JURISDICTION OF SWISS CRIMINAL AUTHORITIES IN AN INTERNATIONAL CONTEXT

The MAA applies in cases of the handover of assets of criminal origin for the purposes of confiscation. “Confiscation” within the meaning of this agreement refers to a penalty or measure ordered by a court following proceedings in relation to a criminal offense or several criminal offenses and which results in the final forfeiture of the asset (Art. 1 let. d MAA). Art. 13 no. 1 AMLA requires the parties to the proceedings to confiscate the assets, whether this is done by enforcing a confiscation order issued by a court in the requesting party (a) or by forwarding the request for confiscation of instrumentalities or proceeds located in their territory to their competent authorities in order to obtain a confiscation order (b). According to the dispatch, the obligation relates exclusively 40

to criminal asset forfeiture ordered by a court of the requesting party in the context of ordinary or independent criminal proceedings.

41 According to the Federal Supreme Court's case law and prevailing doctrine, an independent forfeiture of assets in Switzerland for foreign offences requires a connecting factor under Article 3 et seq. SCC (concerning the territorial scope of application) and thus Swiss jurisdiction, or that the forfeiture is provided for under a special law or international treaty.

42 In the area of international mutual assistance in criminal matters, the handover for confiscation is regulated in Art. 74a IMAC. The handover can take place at any stage of the foreign proceedings, usually based on a legally binding and enforceable decision of the requesting state (Art. 74a para. 3 IMAC). An independent, legally binding confiscation order is sufficient.

43 In practice, it may take a considerable time for the requesting state to produce such a decision. During this period, the seized assets are to be invested by the competent Swiss criminal justice authorities, usually the cantonal public prosecutors or the Office of the Attorney General of Switzerland, in the most secure, value-preserving and profitable way possible. If an entitled party asserts claims to the seized objects or assets in accordance with Art. 74a para. 4 IMAC, their release to the requesting state is postponed until the legal situation has been clarified (Art. 74a para. 5 sentence 1 IMAC). The objects or assets in dispute may only be handed over to the entitled party under certain circumstances in accordance with Art. 74a para. 5 sentence 2 IMAC, for example if the requesting state agrees (lit. a). If the requesting state does not respond, the competent Swiss criminal authorities must decide on the lifting of the seizure and, if the conditions are met, initiate independent forfeiture proceedings in Switzerland in accordance with Art. 376 et seq. CrimPC. This is to prevent assets of criminal origin from having to be handed over merely because of a lack of cooperation from the requesting state.

About the author

Dr. iur. Tommaso Caprara, attorney, CAS Forensics, is a law clerk at the Second Criminal Division of the Swiss Federal Supreme Court in Lausanne.

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COMMENTARY ON

Art. 377 CrimPC

A commentary by Tommaso Caprara

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Art. 377 Procedure

[1] Property or assets that will probably be forfeited in separate proceedings shall be seized.

[2] If the requirements for forfeiture are fulfilled the public prosecutor shall order their forfeiture in a forfeiture order; it shall give the person concerned the opportunity to respond.

[3] If the requirements are not fulfilled, it shall order the abandonment of the proceedings and return the property or assets to the entitled person.

[4] The rejection procedure is governed by the provisions on summary penalty orders. Any decision made by the court shall be issued in the form of a judgment.[259] The court's decision may be contested by appeal.

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I. GENERAL

Art. 377 CrimPC is the only provision of the Code of Criminal Procedure that governs the procedure for independent confiscation. Unlike ordinary criminal proceedings, the aim of independent confiscation proceedings is not to assess whether a specific person or several specific persons are to be convicted of committing or participating in a specific criminal offense. Rather, these (special) proceedings are used to determine whether there are any objects or assets that must be confiscated. 1

It is not out of the question that an independent confiscation order could be based on the results of a police investigation. This is because once criminal proceedings have been formally opened, there is generally no longer any room for the execution of an independent confiscation procedure under Art. 376 et seq. CrimPC. However, the order of an independent forfeiture also always requires that the substantive requirements for forfeiture under Art. 69 et seq. SCC are met. If the Office of the Public Prosecutor is of the opinion that this is the case, it must open independent forfeiture proceedings. In doing so, it must proceed by analogous application of Art. 309 CrimPC and order the opening of the independent forfeiture proceedings in a decree. This does not need to be substantiated or opened and is not contestable (see Art. 309 para. 3 sentences 2 and 3 CrimPC). The investigation that has been opened is limited to the factual and legal clarification of the matter with regard to the confiscation or the claim for compensation. 2

II. SEIZURE (PARA. 1)

Pursuant to Art. 377 para. 1 CrimPC, property or assets that are likely to be confiscated in independent proceedings shall be seized. The possibility of ordering a confiscation seizure in independent confiscation proceedings corresponds to that provided for in accessory confiscation proceedings (Art. 263 para. 1 let. d CrimPC). 3

Art. 377 para. 1 CrimPC makes it clear that the execution of an independent forfeiture procedure is not subject to the requirement that objects or assets have already been seized in advance. Rather, the forfeiture seizure can only be ordered within the framework of the independent forfeiture procedure based on Art. 377 para. 1 CrimPC. 4

5 Seizure is a precautionary measure based on probability or a provisional conservatory measure. To order it, it is sufficient if there is a possibility that the objects and assets concerned could be used, confiscated or restituted in the future.

6 Seizure is a coercive measure under criminal procedure. As such, it requires, among other things, reasonable suspicion (Art. 197 para. 1 let. b CrimPC). In this regard, it must be determined whether, based on the results of the investigation to date, there is sufficient concrete evidence of a criminal offense and of the involvement of the accused in that offense. Evidence of a criminal offense must be substantial and concrete in nature in order to establish reasonable suspicion.

7 As a coercive measure in criminal proceedings, the seizure must also be proportionate. It may only be ordered and maintained to the extent that the objectives it seeks cannot be achieved by less severe measures and the significance of the offense justifies the coercive measure (Art. 197 para. 1 let. c and d CrimPC). The extent of the seizure must be limited to what is necessary. During the proceedings, the criminal justice authorities must continually review whether and to what extent the seizure is still justified. A seizure can also become disproportionate if it is extended for no reason. In the case of a confiscation seizure, all assets must remain seized in principle as long as it is not clear which portion of the assets concerned is of criminal origin. Otherwise, there is a risk that the proceeds of crime will be fed back into the economic cycle and cannot be confiscated or restituted to the aggrieved person.

III. PROCEDURE AND CONFISCATION ORDER (PARA. 2)

A. Competent authority

8 The public prosecutor's office (Art. 377 para. 2 CrimPC) at the location of the property or assets to be confiscated (Art. 37 para. 1 CrimPC) is responsible for ordering the independent confiscation. If the account balances are to be confiscated, the place where the bank accounts in question are held is the determining factor for establishing the place of jurisdiction, i.e. the registered office of the financial institution concerned or the bank branch actually managing the account.

If the objects or assets to be seized are located in several cantons and are connected with the same offense or the same perpetrator, the authorities at the location where the (independent) forfeiture proceedings were first opened have jurisdiction (Art. 37 para. 2 CrimPC). 9

The necessity of Art. 37 CrimPC as a separate rule of jurisdiction for the independent confiscation procedure arises from the fact that the general rules on local jurisdiction (cf. Arts. 31-36 CrimPC) are not applicable to the independent confiscation procedure due to the lack of a link to an offence. 10

B. Procedure

If the (substantive) conditions for confiscation (in accordance with Art. 69 et seq. SCC) are met, the public prosecutor shall order the confiscation in a confiscation order (Art. 377 para. 2 first part of the sentence CrimPC). 11

In terms of content, the confiscation order corresponds to a summary penalty order (cf. Art. 353 CrimPC). This is already evident from the fact that the objection procedure under Art. 377 para. 4 sentence 1 CrimPC is governed by the provisions on the summary penalty order (Art. 352 et seq. CrimPC). 12

Before the confiscation order is issued, the accused and the person affected by the confiscation must be granted the right to a legal hearing (Art. 29 para. 2 FC; Art. 3 para. 2 let. c and Art. 107 CrimPC). The right to be heard encompasses all powers that must be granted to a person concerned so that they can effectively assert their point of view. It follows that the person concerned has the right to express their opinion on the matter before a decision is made that affects their legal position. In this sense, Art. 377 para. 2, second part of the CrimPC stipulates that the public prosecutor must give the person affected (by the confiscation) the opportunity to comment. The CrimPC does not specify in detail the form in which this statement should be made. It is conceivable that both an oral statement be taken in the context of a formal examination in accordance with Art. 142 et seq. of the CrimPC, as well as the obtaining of a written statement. 13

If the person affected by the confiscation is not presented with the draft of the confiscation order for comment, he must be informed about the object and extent of the confiscation, the offence justifying the confiscation (i.e. the underlying offence), the other conditions for confiscation and the reason why the confiscation cannot be accessory to ordinary criminal proceedings. In ad- 14

dition, the party affected by the confiscation must be granted all party rights in accordance with Art. 107 CrimPC, in particular the right to inspect files (Art. 107 para. 1 let. a CrimPC) and the right to request evidence (Art. 107 para. 1 let. e CrimPC).

15 If the party affected by the confiscation is a (non-accused) third party, that party is entitled to the procedural rights of a party as a third party adversely affected by procedural acts (Art. 105 para. 1 let. f CrimPC) to the extent that its rights are directly affected (Art. 105 para. 2 CrimPC). This is because third parties (not accused persons) who are adversely affected by a confiscation must be able to defend themselves against state interference with their rights, just like the accused person. In this respect, their position is comparable to that of an accused person whose assets are confiscated.

16 The injured party (as defined in Art. 115 para. 1 CrimPC) also has the aforementioned rights as a party, regardless of whether they have been constituted as a private claimant. If, for example, bank accounts have been seized in the course of the independent forfeiture proceedings, the granting of access to the records (Art. 107 para. 1 let. a CrimPC) in favor of the alleged injured party requires only that the latter credibly establishes a direct link between the alleged predicate offense and his or her status as an injured party. This is because Art. 73 SCC ("Use for the benefit of the injured party") requires a direct link between the offense and the person injured by that offense, but not between the offense and the seized assets.

17 If the public prosecutor considers the investigation to be complete, it shall, by analogous application of Art. 318 para. 1 CrimPC, notify the parties with known domicile in writing of the imminent conclusion of the investigation and inform them whether it intends to issue a confiscation order (pursuant to Art. 377 para. 2 CrimPC) or to dismiss the proceedings (pursuant to Art. 377 para. 3 CrimPC). In order to ensure the right to be heard, the parties must be given the opportunity to comment before the confiscation order or the dismissal order is issued.

IV. DISCONTINUANCE (PARA. 3)

18 If the conditions for confiscation (in accordance with Art. 69 et seq. SCC) are not met, the public prosecutor shall order the discontinuance of the indepen-

dent confiscation proceedings and shall return the seized objects or assets to the rightful owner (Art. 377 para. 3 CrimPC).

The form and general content of the dismissal order are based on Art. 80 f. and Art. 320 CrimPC. 19

Art. 377 para. 3 CrimPC does not regulate the special case that is regulated in Art. 70 para. 1 SCC, namely the restitution of objects or assets to the aggrieved person "to restore the lawful condition". In such a case, a discontinuation order must also be issued, in which the surrender of the objects or assets to the injured party within the meaning of Art. 267 para. 2 CrimPC is ordered. 20

The party's obligation to bear the costs in the independent proceedings for interim measures is governed by Art. 426 CrimPC. The provisions of Art. 426 paras. 1 to 4 CrimPC concerning the accused's obligation to bear the costs apply mutatis mutandis to the party in the independent proceedings for interim measures if the decision is to their disadvantage, in accordance with Art. 426 para. 5 CrimPC. If the independent forfeiture proceedings are discontinued (in application of Art. 377 para. 3 CrimPC), the party may be ordered to pay all or part of the costs of the proceedings if it has unlawfully and culpably brought about the initiation of the proceedings or impeded their conduct (Art. 426 para. 2 CrimPC). 21

The right to compensation of the person affected by the forfeiture arises from Art. 429 CrimPC. 22

V. OBJECTION PROCEDURE AND LEGAL REMEDIES (PARA. 4)

A. Legal remedies against the dismissal and release order

The decision of the public prosecutor to dismiss the case in accordance with Art. 377 para. 3 CrimPC may be appealed under Art. 393 et seq. CrimPC. 23

B. Objection procedure

According to Art. 377 para. 4 sentence 1 CrimPC, the objection procedure is governed by the provisions on the summary penalty order (Art. 352 et seq. CrimPC). An objection may be raised against the confiscation order under Art. 377 para. 2 CrimPC within 10 days (Art. 354 para. 1 CrimPC). 24

25 The accused (Art. 354 para. 1 let. a CrimPC) and the person affected by the confiscation (Art. 354 para. 1 let. b CrimPC) are authorized to appeal. In the case of asset confiscation, the formal asset holder is primarily authorized to file an objection. In addition, anyone who is merely the beneficial owner of a bank account or other asset is also entitled to object to the confiscation order. The injured party is also entitled to object (Art. 105 para. 1 let. a in conjunction with Art. 105 para. 2 CrimPC), irrespective of whether they have been constituted as a private claimant (see Art. 118 para. 1 CrimPC).

26 If no valid objection is raised, the forfeiture order becomes a legally binding judgment (Art. 354 para. 3 CrimPC).

27 If an objection is raised and the public prosecutor decides to uphold the confiscation order (Art. 355 para. 3 let. a CrimPC) after taking the evidence necessary to assess the objection (Art. 355 para. 1 CrimPC), the public prosecutor shall immediately transfer the files to the court of first instance for the main proceedings (Art. 356 para. 1 sentence 1 CrimPC). The legally provided option of contesting the (independent) confiscation order before a judicial authority with full cognizance of the facts and legal issues satisfies the guarantee of an independent and impartial court under Art. 6 ECHR.

C. Appeals against the court's forfeiture order

28 Under the previous law, the court's forfeiture order obtained by means of an objection took the form of an order or a decree (Art. 377 para. 4 sentence 2 CrimPC). Therefore, this decision could be challenged by appeal (Art. 393 para. 1 let. b CrimPC).

29 In the context of the last revision of the CrimPC, the federal legislature decided that, for reasons of coherence, the court's independent forfeiture decision should be issued in the form of a judgment, as in the accessory proceedings, and should be subject to appeal. Under the new law, the court decision regarding the (independent) confiscation or the rejection of the confiscation request, which is enforced by objection, takes the form of a judgment (Art. 80 para. 1 sentence 1 St CrimPC; Art. 377 para. 4 sentence 2 CrimPC), which can be challenged by appeal (Art. 377 para. 4 sentence 3 CrimPC; Art. 398 para. 1 CrimPC).

The appeal may be dealt with in a written procedure if only measures within the meaning of Art. 66-73 SCC are challenged (Art. 406 para. 1 let. e CrimPC). This also includes (independent) confiscation. 30

The judgment of the court of appeal regarding the independent forfeiture or the rejection of the forfeiture application can be challenged by an appeal in criminal matters under Art. 78 et seq. BGG to the Federal Supreme Court. 31

About the author

Dr. iur. Tommaso Caprara, attorney, CAS Forensics, is a law clerk at the Second Criminal Division of the Swiss Federal Supreme Court in Lausanne.

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COMMENTARY ON

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A commentary by Tommaso Caprara

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Art. 378 Use for the benefit of the person suffering harm

The public prosecutor or the court shall also decide on the applications made by the person suffering harm for the forfeited property or assets to be used for his or her benefit. Article 267 paragraphs 3–6 applies *mutatis mutandis*.

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I. PRINCIPLE

Pursuant to Art. 378, sentence 1, CrimPC, the public prosecutor (in the confiscation order pursuant to Art. 377, para. 2, CrimPC) or the court (if an appeal procedure under Art. 377, para. 4, sentence 1, CrimPC in conjunction with Art. 352 et seq. CrimPC) in the context of the independent forfeiture proceedings, the court (public prosecutor in the case of an objection procedure under Art. 377 para. 4 sentence 1 CrimPC in conjunction with Art. 352 et seq. CrimPC) also decides on the applications of the aggrieved person for the use of the forfeited objects and assets for their benefit. The substantive requirements for this claim of the aggrieved person are regulated in Art. 73 SCC. 1

II. USE FOR THE BENEFIT OF THE AGGRIEVED PERSON UNDER ART. 73 SCC

A. Wording

Pursuant to Art. 73 para. 1 SCC ("Use for the benefit of the aggrieved party"), the court shall, at the request of the aggrieved party who has suffered loss or damage as a result of a felony or misdemeanor that is not covered by insurance, award the aggrieved party up to the amount of the damages or satisfaction determined by court order or settlement, in particular, seized property and assets or the proceeds from their realization, less the realization costs (lit. b), if it can be assumed that the offender will not compensate for the damage or provide satisfaction. However, the court may only order the use of the forfeited property for the benefit of the injured party if the injured party assigns the corresponding part of his claim to the state (Art. 73 para. 2 SCC). 2

B. Regulatory purpose

The purpose of Art. 73 SCC is to help the injured party to enforce his claim for damages by the state waiving a claim to which it is entitled. This provision establishes a claim of the injured party against the state in criminal proceedings. The state should not be able to enrich itself at the expense of the injured party, but rather should prioritize the rights of the injured party when confiscating assets. Accordingly, Art. 73 SCC grants the injured party a right to the 3

awarded confiscated assets, provided that the conditions specified therein are met.

4 The assignment of the claim to the state as a prerequisite for the use of the assets for the benefit of the injured party (Art. 73 para. 2 SCC) also prevents the injured party from being able to benefit twice over from the award of the assets and the enforcement of the claim for compensation for their claim.

C. Capacity as an injured party

5 "Injured party" in the sense of Art. 73 SCC is any natural or legal private person who has suffered a disadvantage as a result of a criminal offense. The definition of "injured party" in Art. 73 SCC is thus broader than in the context of Art. 30 SCC and Art. 115 CrimPC. This status applies not only to the injured party, defined as the owner of the legal interest violated by the offense, but also to any third party who has a civil claim for compensation for the damage suffered. This includes both claims for damages and claims for satisfaction.

6 The right to claim damages within the meaning of Art. 73 SCC is primarily accorded to the directly aggrieved party who has a claim for damages under Art. 41 et seq. CO. Beyond the wording of Art. 73 SCC, an assignment can also be considered in favor of the indirectly aggrieved party (reflex aggrieved party) who has himself assumed the damage of the directly aggrieved party. However, an award to the indirect victim is only considered if the (direct) victim is fully satisfied and there are no better claims to the confiscated assets.

D. Requirements

1. Material requirements

7 The injured party's claim for use in his favor under SCC Art. 73 only applies to assets that are the result of a crime committed against him. The provision does not provide for solidarity between the injured parties.

8 There must be a twofold connection between the damage, the underlying offense and the values to be awarded. Firstly, the damage asserted under Art. 73 SCC must have been caused "by" the underlying offense, i.e. there must be a causal link between the damage and the underlying offense. Secondly, this initial offense must be the same as that from which the values to be awarded (seized items, etc.) originate. The common initial offense is thus the connect-

ing link between the values to be awarded and the damage to be compensated. On the other hand, assets that are not related to the offense can only be used indirectly after seizure and SchKG enforcement of the compensation claim in favor of the injured party. According to the case law of the Federal Supreme Court, Art. 73 SCC is not designed to assist in the enforcement of claims for civil wrongs and to anticipate or secure the claim for them by circumventing the SchKG.

The application of Art. 73 SCC further requires that the amount of damages or satisfaction has been determined by a court or by settlement. In addition, the damage suffered must not have been covered by insurance and it must be expected that the offender will not compensate for the damage or pay satisfaction (Art. 73 para. 1 SCC). 9

2. Formal requirements

From a formal point of view, the use of the forfeited property for the benefit of the injured party requires, firstly, that the latter expressly requests such an allocation (Art. 73 para. 1 SCC) and, secondly, that he assigns the corresponding part of his claim to the state (Art. 73 para. 2 SCC). These conditions must be cumulatively fulfilled. 10

The injured party's application for assignment can be made both as part of the independent forfeiture proceedings before the public prosecutor's office and also initially (after any objection to the forfeiture order; see Art. 377 para. 2 and para. 4 sentence 1 CrimPC) before the court responsible for the main proceedings. The application for assignment can also be made in the pending appeal proceedings or even only after the confiscation decision has become legally binding. 11

If the confiscation decision is made in the context of a discontinuation (cf. Art. 320 para. 2 sentence 2 CrimPC), a criminal judgment (cf. Art. 81 para. 3 let. a and para. 4 let. b CrimPC), a summary penalty order (cf. Art. 353 para. 1 let. h CrimPC) or an independent forfeiture procedure under Art. 376 f. CrimPC, the question of use for the benefit of the aggrieved person under Article 378 CrimPC or Article 73 SCC may only arise at a later date, for example if the compensation claim (see Article 71 SCC) is only paid at a later date. In such a case, the decision on the use of the assets in favor of the aggrieved person 12

must be made in a subsequent supplementary forfeiture order (in the sense of a subsequent judicial decision in accordance with Art. 363 et seq. CrimPC).

3. Legal claim to the award of confiscated assets

13 If the substantive and procedural requirements of Art. 73 SCC are met, the injured party has a legal claim to the award of the confiscated assets.

III. THE APPLICABILITY MUTATIS MUTANDIS OF ART. 267, PARA. 3-6 CRIMPC

14 Art. 378, sentence 2 CrimPC declares Art. 267, para. 3-6 CrimPC to be applicable mutatis mutandis when deciding on the use in favor of the injured party in the independent forfeiture proceedings. However, this reference is unclear, since Art. 267 para. 3-6 CrimPC regulates the situation in which the seized objects or assets are not confiscated, while Art. 378 CrimPC concerns the use in favor of the injured party after confiscation. It must therefore be stated, in line with the prevailing legal opinion, that the reference contained in Art. 378, second sentence, CrimPC actually belongs in Art. 377, para. 3, CrimPC, which governs the return of the seized objects or assets to the entitled person in the absence of the conditions for confiscation.

About the author

Dr. iur. Tommaso Caprara, attorney-at-law, CAS Forensics, is a law clerk at the Second Criminal Division of the Swiss Federal Supreme Court in Lausanne.

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