

Doctoral project – Abstract

Author Andreas Glock, LL.M.
Supervisor Prof. Dr. Karsten Gaede
Status 20th March 2021

T I T L E

Embezzlement through public purchase of information – Budgetary embezzlement as a result of the public purchase of illegally obtained information from confidential informants and whistleblowers with special consideration of public legal foundations and purpose considerations

C O N T E N T

Introduction

In **part 1 A** (pp. 1-7) the research question is grouped into both the concept of a state's duties and the duty of criminal prosecution. The relevance of this work is derived from the continuing topicality of the demarcation between security and freedom as well as from the increasing lack of knowledge in the context of criminal investigations. The purchase of information is characterised in the light of its assumed objective to enforce the state's both criminal claim and tax claim. The author understands the purchasing behavior as a conflict of the state's purpose of guaranteeing security and exercising freedom. In **part 1 B** (pp. 8-15) the methodological basis and the course of the presentation are explained. The author assigns the development of the research question to legal dogmatics (part 1 B I – p. 8).

Part 2 (pp. 15-39) examines the phenomenology of the state's acquisition of information. In **part 2 A** (pp. 15-18) whistleblowing is explained as a terminological basis and a basic requirement for obtaining information. In **part 2 B** (pp. 18-31) the author analyses the public information gathering through confidential informers. For this purpose, a definition of the term is carried out and the lack of a uniform legal definition is worked out (part 2 B I – pp. 18-20). Furthermore, the historical development of confidential informers is traced (part 2 B II – pp. 20-21) and the divided reception of the use of confidential informers is presented (part 2 B III – pp. 21-22). This is followed by a description of the procedure for the use of confidential informants (part 2 B IV – pp. 22-25). In this context, the author focuses on the characteristic of confidentiality with regard to the cooperation between confidential informants and state agencies. In addition, the importance of secrecy for the

effectiveness of the use of confidential informants is explained and the diversity of possible areas of application is emphasised, with particular emphasis on organised crime. Also, the long-lasting cooperation between informants and state agencies is discussed, which contrasts with the acquisition of information that usually involves only a one-time interaction. The legal implementation of the use of confidential informants is also examined (part 2 B IV – pp. 25-28). In this course, confidential informants are classified as administrative assistants. This is followed by an account of the practice of the legal obligation and de facto remuneration of criminal informants.

In part 2 C (pp. 32-37) the author lists state information purchases that have been realised so far. On the basis of the information material generated in this respect, the author comes to the conclusion that the acquisition of information has been carried out both by the federal government and by individual states, and that it still proves to be relevant in practice. The author elaborates that the individual monetary amounts spent in this respect are considerable in each case. By way of example, the purchase of the Liechtenstein bank information realised by German authorities is used to illustrate how a purchase transaction actually proceeds and to outline its long-lasting effects (part 2 C III – pp. 36-38).

The element of a crime in form of a breach of duty

Part 3 (pp. 39-395) forms the core of the elaboration and takes up extensive space. Here, the author explores the criminal liability for embezzlement through information purchases. In this respect, it is based on the examination structure of Sec. 266 of the German Criminal Code. In part 3 A (pp. 39-40) the procedure is set, part 3 B (pp. 40-45) focuses on the constituent element of the duty to safeguard the pecuniary interests, whereas part 3 C (pp. 45-186) deals with the abuse of the power of disposal or a possible breach of duty. In part 3 D (pp. 187-390) the damage of assets is addressed, part 3 E (pp. 390-393) as well as part 3 F (pp. 393-395) then conclude the verification procedure with the subjective facts as well as both the unlawfulness and guilt. With regard to the first two elements of the crime, the author differentiates between two variants of an information acquisition that he has developed separately, on the one hand the use of confidential informers and on the other hand the acquisition of information itself, such as the purchase of (tax) information. In the context of damage of assets, due to lack of necessity, such differentiation is waived and the investigation is continued uniformly.

In **part 3 B** (pp. 40-45) the author affirms with regard to both cases an obligation of the state authorities involved to take care of the assets. He arrives at this conclusion by discussing the relevant criteria of case law and doctrine for determining the obligation to look after property. The author attributes a significant difference between the case variants to the varying intensity of the involvement of state authorities.

The breach of duty in the context of the deployment of confidential informants

At the beginning of part 3 C (pp. 45-187), the author elaborates on what he considers to be the necessary differentiation between various possible connecting factors for action by government agencies in breach of duty in the context of obtaining information (part 3 C I 1 – pp. 45-51). Thus, he appeals firstly to the lack of budgetary authorisation, secondly to the breach of trust through a possible misappropriation of funds, and thirdly to a possible violation of the principles of efficiency and economy. He then examines the preceding connecting factors step by step. With regard to the aspect of budgetary authorisation, he comes to the conclusion that in many cases the respective budgetary legislator has not created a corresponding normative basis for authorisation. For this purpose, he uses the budget of the state of North Rhine-Westphalia as an example, which has excelled in particular in the acquisition of information. The author considers recourse to executive emergency powers to be incompatible with the budgetary sovereignty of parliaments (part 3 C II 1 b – pp. 53-55).

The main focus of the investigation of a possible breach of duty is the question of an improper use of funds. The author differentiates between the use of confidential informants and the acquisition of information by the state. With regard to the use of confidential informants, the first step is to discuss whether the need for a legal basis for their use can arise from the fact that it is associated with an encroachment on fundamental rights (part 3 C II 2 a – pp. 56-70). In his opinion, the author cites possible fundamental rights that are affected. Thus, he refers to the right to informational self-determination (pp. 56-58), to the right to a fair trial according to Art. 6 para. 1 sentence 1 ECHR (p. 58 et seq.), to the right to preserve the social claim to validity (p. 59) and to the human dignity according to Art. 1 para. 1 of the Basic Law (p. 60).

In a second step, the author investigates a possible attribution of the confidential informants' activity (pp. 60-66). Only insofar as acts committed by confidential informers as private persons prove to be attributable activities, an encroachment of fundamental rights by them can take place. The author explains the relevant criteria of case law and literature on attribution in the context of the use of confidential informants and then

positions himself in favour of attribution. He justifies this with the classification of confidential informants as a so called extended arm of state security authorities. As a result, he assumes an attributable encroachment on the right to informational self-determination, the preservation of the claim to social validity and the right to a fair trial (pp. 67-70). Only in individual cases there is an unjustifiable encroachment on human dignity.

Having thus demonstrated the need for a legal basis for the use of confidential informants, the author then examines possible legal bases for their use (part 3 C II 2 b – pp. 70-82). The author denies the applicability of special legal regulations for the use of confidential informants by the police (pp. 71 et seq.) and denies the possibility of applying customary law (pp. 73 et seq.). An analogous application of Sec. 110a et seq. of the Criminal Procedure Code is rejected with reference to the legal genealogy, according to which the standardisation of a legal basis for the use of confidential informants was expressly rejected (p. 75 et seq.). A potential recourse to the general investigation clause is then rejected with reference to the constitutionally anchored legal reservation and the intensity of the intervention associated with the use of undercover agents (pp. 76-79). Other points of reference for a possible basis for authorisation, such as an extraordinary investigative emergency (p. 80) or recourse to Sec. 244 (2) of the German Criminal Procedure Code (p. 81), to budgetary law (p. 81 et seq.) or to internal administrative law (p. 82) are also rejected. As a result of the lack of a legal basis for the use of confidential informants, as stated by the author, he denies that there was any abuse of power (pp. 87-89) and concludes by examining whether there was a breach of trust due to the use of funds that was characterised as being contrary to the intended purpose (pp. 89-93). The author considers the state's expenditure of funds for an activity that has no legal basis to be a breach of duty. The breach of duty relevant to embezzlement is located in the settlement of a void claim, i.e. a payment without a legal basis, so that the author comes in the same course to the assumption of an appropriate asset protection. According to the author, the asset-protecting character of the primary law violation, i.e. the violation of the reservation of the law, is therefore irrelevant (p. 91).

The breach of duty in the context of public purchase of information

In **part 3 C II 4** (pp. 93-159), the author applies the same examination scheme for the use of confidential informants to other state acquisitions of information, but also poses the additional question of whether a legal basis is also required for these state acquisitions of information as a result of the criminal nature of their acquisition. (pp. 94-126). He supports this requirement by referring to *Böckenförde*, according to whom every

state action potentially fulfilling an element of an offense is in need of justification in such a way that it requires a special regulation. To answer this, the author deals with criminal offenses possibly fulfilled by state information purchases (pp. 95-126), such as the aiding after the fact according to Sec. 257 of the German Criminal Code (pp. 95-102), the handling of stolen goods according to Sec. 259 of the German Criminal Code (pp. 102-107), the handling of stolen data according to Sec. 202d of the German Criminal Code (pp. 107-112), the penal provisions of the Federal Data Protection Act (BDSG) (pp. 112-115), Sec. 23 of the German Secrecy Protection Act (GeschGehG) (pp. 115-125) and Sec. 111 of the German Criminal Code (pp. 125 et seq.).

In regard of the aiding after the fact the author states that a payment to the seller can also be considered a valid advantage (pp. 96-98). In this respect, the wording of the norm is characterised as open and is explored in a legal-systematic way in comparison to the law of confiscation. For the author, however, the punishable nature of the state's acquisition of information with regard to Sec. 257 (aiding after the fact) fails because the state agencies involved in the purchase lack an intent to favour. Thus, it is not the goal of the purchasers to secure the disclosed information for the predicate offender. Their goal could also be realised through a counterfeit payment or any other recognition of a consideration (pp. 101 et seq.). In the author's opinion, Sec. 257 (handling stolen goods) are also ruled out in the context of state information purchases. He concludes this from the fact that there is no intention of enrichment. Stolen property requires that the perpetrator must aim to achieve an economic profit on balance with his action. There is no intention of enrichment if, according to the perpetrator's conception, equivalent goods are exchanged (pp. 105 et seq.).

In turn, the author considers the elements of a crime of Sec. 202d (handling stolen data) to be fulfilled in principle (pp. 107-109). The decisive factor in this respect is the understanding of the exclusion under Sec. 202d (3) of the Criminal Code, which is linked to the lawfulness of the performance of duty. Only if the official performance of duty is lawful the element of exclusion itself is justified, which is why a legal basis is necessary for the application of this exclusion of the element of crime and for the denial of the element of crime of state information purchases (pp. 110-112). In regard of the penal provisions of the Federal Data Protection Act (BDSG), the author draws the same conclusion (part 3 C II 4 a dd – pp. 112-115). Thus, the existence of a legal basis for state information purchases is a mandatory prerequisite for the affirmation of an authorisation.

With regard to Sec. 23 German Secrecy Protection Act (GeschGehG), the author explores the extent to which information on legal violations covered by the state's interest in acquisitions can be considered a suitable object of crime at all (pp. 116-119). He argues in favour of this with a decided discussion of the discussion already held in the context of Sec. 17 Act Against Unfair Competition (UWG) (old version). As justification, he cites the complexity of categorising corresponding information and, in terms of the legal system, Sec. 5 No. 2 German Secrecy Protection Act (GeschGehG), for which, in the author's view, a scope of application in the event of exclusion would hardly be conceivable. In the author's view, the decisive factor for Sec. 23 German Secrecy Protection Act (GeschGehG) is whether the state's acquisition of information is in the public interest and thus whether there is a corresponding legal basis for this (pp. 122 et seq.). With regard to Sec. 17 Act Against Unfair Competition (UWG) (old version), the author also assumes the same result.

The author denies that Sec. 111 of the Criminal Code is committed through the purchase of information by the state (p. 125). The mere receipt of relevant information material does not constitute a criminal request. In summary, the author already derives the requirement of a legal basis for state information purchases from the possible constituent elements with regard to several criminal law violations. In addition, in part II 4 b (pp. 127-129), he argues that a legal basis is also required for state purchases of information because of the encroachment on the right to informational self-determination.

In part 3 II 4 c (pp. 130-187), the author takes a detailed look at possible legal bases for state purchases of information. In particular, he focuses on the often propagated recourse to the investigation general clause (pp. 131-154). In this respect, the author essentially focuses on the intensity of the encroachment in order to determine whether recourse to the investigation general clause is appropriate at all. In order to determine this, he refers to various criteria in order to work out whether, as a result of the severity of the encroachment, a special authorisation for state purchases of information is required, irrespective of the existence of the investigation general clause. For him, state information purchases are characterised by a broad scope and lack of suspicion (pp. 133-136).

The purchases also affects uninvolved parties; the danger of a "grab by the side" is therefore well-founded. Moreover, there is usually no initial suspicion in the case of state information purchases. Rather, in many cases, this suspicion is only justified by the information material obtained. In the author's opinion, the content of the information obtained also argues for a high intensity of intrusion. For this purpose, he applies the

three sphere theory and assigns the information regularly affected in the context of state information acquisitions to the private sphere (pp. 136-138). In the author's view, the consequences associated with information acquisitions and the clandestine nature of this form of information acquisition increase the intensity of the intrusion (pp. 128-142). As an additional criterion for the intensity of intervention, the author also mentions the controversial nature of the matter. This makes it necessary to pass a unequivocal legislative decision – especially taking into account the monetary component of the state's acquisition of information (p. 143 et seq.). Finally, a comparison with other special powers is sought in order to give relative weight to the intensity of intervention by the state in acquiring information (pp. 145-150). In this respect, the author arrives at the thesis that state information purchases are just as invasive as standardised special powers. In an overall view of the criteria set out, a high intensity of interference is then assumed, which in itself prohibits recourse to the general investigative clause and makes a special provision necessary (pp. 152-154).

In the opinion of the author, other legal bases are also out of the question. He considers both the tax law regulations on administrative assistance and the emergency regulation of Sec. 34 s. 1 of the German Criminal Code as not sufficient (pp. 154-156). For legal dogmatic reasons alone, he denies the possibility of a remote effect of the exclusion of the elements of the crime pursuant to Sec. 202d (3) 1 of the German Criminal Code as a legal basis for the acquisition of information by the state (pp. 156 et seq.). Based on this starting position, the author comes to the assumption that an abuse of power is out of question due to the lack of a legal basis (pp. 158 et seq.). However, he affirms a breach of trust with reference to the misappropriation of funds for legally unintended purposes (pp. 159-161).

In Part 3 II 6 (pp. 161-187), after affirming that both the use of confidential informants and the acquisition of information by the state were contrary to duty, the author addresses the question of whether – assuming that these public measures are lawful – a violation of the principles of economic efficiency and austerity can nevertheless be considered. In a first step, he discusses the principles of efficiency and austerity (pp. 161-163). In a second step, the author elaborates criteria that should be taken into account when applying these principles. In this way, he refers to the criteria for risk transactions, citing some examples from case law (pp. 164 et seq.).

He considers the dogmatics for risky transactions to be suitable for adequately specifying the scope of action required within the framework of the principles of economic efficiency and economy (pp. 165-168). Public law cases and, in particular, the acquisition of

information for public purposes are also characterised by uncertainty. Starting from this foundation, the author develops criteria, the fulfilment of which excludes a violation of the principles of economy and austerity and, based on this, a breach of duty in principle (pp. 168-172). Conversely, in the author's opinion, their non-fulfilment suggests a violation. What is required is a decision with a wide scope for action, made on an adequate comprehensive basis of information and for the good of society. Furthermore, there must be a need for a risk decision and the principle of economy in the narrower sense must be observed. In the opinion of the author, the latter, like the proportionality test, involves a precise examination of the appropriateness of the measure.

The criteria described are then applied in a differentiated manner to the use of confidential informants (pp. 172 et seq.) and to the acquisition of information by the state (pp. 179 et seq.). In both cases, the author comes to the conclusion that, depending on the circumstances of the case, compliance with these criteria may well justify a breach of duty in the use of resources associated with the respective types of action.

The element of a crime in form of a pecuniary detriment

Following the affirmation of the breach of duty, the author devotes the second major topic in **part 3 D** (pp. 187-395) to the success in the form of the pecuniary detriment. At the beginning, the basic principles recognised in this respect and the necessary examination procedure are established (pp. 187-191). The author emphasises the prohibition of proliferation and the importance of the independent consideration of the pecuniary detriment. In particular, he distinguishes between the protection of the mere freedom of disposition and the intended protection of wealth. In his examination, the author refrains from differentiating between different case variants of the financially supported acquisition of information and pursues the question of the pecuniary detriment in a uniform manner. In a first step, he addresses the question of a reduction in assets, which he affirms comparatively briefly due to the state's expenditure of funds (part 3 D II – pp. 191-192). In a second step, possible economic compensation approaches take up considerably more space (part 3 D III – pp. 192-226). Here, the author differentiates between a sole recourse to the obtained information on the one hand (pp. 193-212) and an inclusion of the additional revenues generated with the obtained information on the other hand (pp. 212-226). In a third step, the author addresses the question of the extent to which the adoption of the categories of individual damage impact and misappropriation of purposes develop relevance under damage law (pp. 226-390).

With regard to the compensation variants assumed by him, the author prefaces his examination in part 3 D III (p. 192 et seq.) with the statement that, in order to prevent a dynamic determination of damage, both the time of the damaging act and a concrete quantification of a possible damage-preventing compensation are important. With regard to the information obtained, he approaches its value determination in such a way that he disputes its alleged irrelevance due to the legal groundlessness of the performance. In the author's view, such an approach represents an inadmissible normatisation of the concept of disadvantage (pp. 194-198). Subsequently, he also denies a compensation exclusion based on the argument that there is a supposedly cost-free alternative procurement option (p. 198). In the context of the subsequent determination of value, the author proceeds in two steps, in that on the first step he abstractly sets out approaches for a determination of market value and in the result declares himself in favour of an objective determination. In the second step, the author applies the previously developed approach to the state's purchase of information.

In the first stage, the author deals with possible approaches to the determination of market value. For this purpose, he elaborates on inter-subjective value determination (pp. 199-201) and contrasts this with a purely objective value determination (pp. 201-202). In a subsequent statement, he rejects an inter-subjective value determination as well as a hypothetical price determination in the context of state information purchases. He justifies this with the already legally dogmatically erroneous equation of value and price. In this respect, he also takes issue with the case law of the Constitutional Court and, in particular, with the June decision of 2010. In the following concrete determination of value, he applies the value determination based on economic-objective criteria (pp. 206-212).

The author then turns to a possible damage-preventing compensation based on an inclusion of the additional revenues generated by the use of the obtained information (pp. 212-226). He emphasises such a possibility with reference to a possible overall consideration in the context of an overall balancing. In this respect, the author argues with the requirement, known from economic constellations, to also subject uniform life processes to a uniform consideration. The author identifies the greatest difficulty in affirming an overall consideration as the necessary demarcation between the compensation values taken into account by state purchasers and thus eligible for consideration and merely temporally correlated additional revenues. For this purpose, he elaborates that the perspective of the governmental information purchasers and the additional revenues intended and foreseeable at the relevant point in time can be the

only decisive factors. The author then applies this finding directly to the relevant case scenarios and consequently affirms an economic damage-preventing compensation on the merits.

Following this statement, according to which a compensation that prevents damage appears possible from an economic perspective, the author takes up in part 3 D IV (p. 226 et seq.) the idea presented at the beginning of this article as to whether a pecuniary disadvantage can be affirmed for normative considerations despite a full economic compensation. For this purpose, he deals with the dogmatic foundation of normative considerations of purposes. He explains the concepts and the legal doctrinal foundation of individual damage impact and misappropriation of purpose doctrine in the context of fraud. In doing so, he arrives at the significance of these damage categories and also affirms their transferability – with certain reservations with regard to the case variants represented in this respect – to breach of trust (pp. 231-235). The author comprehensively examines the possible consequences of constitutional court rulings. In doing so, he does not recognise any constitutionally founded need for correction of normative considerations of purpose, but considers the disadvantage categories mentioned to be entirely compatible with the constitutionally required definition of disadvantage, taking into account the limitations explained above (pp. 235-239). Founding on this preliminary work, the author then examines the recognition of individual harm impact and purpose misconduct doctrines in the context of budgetary embezzlement (pp. 239-257). The author affirms both, but he elaborates further alternative implementation proposals for the consideration of normative purpose considerations in the context of budgetary embezzlement. In doing so, he elaborates a possible formal, a budget-accessory, a commercialised, and a substantive misappropriation understanding with respect to a state's expenditure of funds. He positions himself in favour of the latter. In the author's opinion, only a materially improper use of funds justifies the assumption of a pecuniary detriment for normative reasons in the case of full economic compensation. In the author's view, only a use of funds that is no longer intended to serve the overall public task that an asset holder is supposed to pursue in accordance with its purpose is materially misappropriated. The author justifies this in detail by stating that this is the only way in which the public-law purpose of state funds can be adequately taken into account in terms of damage law. In addition, he argues that such an understanding of disadvantages is compatible with the substantive law and with the case law of the Constitutional Court, which leaves room for normative considerations of purpose within limits.

Following this theoretical discussion, the author turns to various connecting factors that could substantiate a material misappropriation and thus the existence of a pecuniary detriment. He distils four different connecting factors. Thus, a material misappropriation could be based on a distortion of the state's will (pp. 258-300), an advance effect of a prohibition on the use of evidence (pp. 300-384), an unlawful enforcement of the state's criminal claim (pp. 384-388), and a violation of the principles of economic efficiency and economy (pp. 388-390).

Material Inappropriateness by virtue of Distortion of the Will of the State

In part 3 D IV 3 (pp. 258-300), the author lists various arguments in favour of as well as against the falsification of the will of the state through the acquisition of information outlined in the context of phenomenology. In particular, he sees the danger of undermining powers of intervention under criminal procedure. In this context, he emphasises the importance of the restrictions founded in the criminal procedural enabling norms as well as the individual-protective thrust of the Criminal Procedure Code (pp. 258-263). Subsequently, the undermining of the separation requirement is discussed (pp. 263-271). The author elaborates the legal foundations of the separation requirement, points out partial breaches of it, and concludes that the separation requirement would be undermined if constitutional protection authorities who were not supposed to investigate crimes were called upon to carry out repressive measures.

As a further argument in favour of a distortion of the state's will, however, the author does not see a commercialisation contrary to the system as a result of the financially favoured acquisition of information. Rather, executive practice and jurisprudence could take appropriate countermeasures in the event of an imminent distortion (pp. 271-274). The author devotes extensive attention to the question of the extent to which recourse to private third parties threatens to undermine the principle of objectivity. By providing financial support for the receipt of incriminated material, the state creates incentives for the illegal acquisition of information. In addition, the author considers it necessary to limit the consideration of private contributions in the context of state investigative work (pp. 278-280). In particular, he argues, that it is necessary to prevent a possible one-sidedness of the state's investigative work, which threatens to fall prey to a focus on fiscally lucrative areas of crime. Finally, the author addresses the aspect of the legal system's freedom from contradiction (pp. 282-291). In particular, he considers an undermining of the confiscation provisions under Sec. 73 et seq. of the German Criminal

Code, insofar as the money that has been distributed is not directly confiscated in the course of information acquisition.

The author then addresses arguments against a distortion of the state's will (pp. 293-299). He believes that it is possible to remedy the informational crisis that he has identified, and that the continued existence of criminal prosecution of the seller is sufficient to compensate for this. At the same time, however, he states that this instrument is not used appropriately in practice. Nor can any justification be derived from the partial approval of this state practice by superior courts (pp. 297-298). In conclusion, with reference to the conflicting strands of argument, the author comes to the conclusion that a legislative decision is required in order to bring about a careful balancing of the interests concerned. As long as this legislative specification is lacking, it can only be assumed that the measure is unlawful, which at the same time implies a distortion of the state's will.

Material misappropriation by virtue of the foregoing effect of a prohibition on the use of evidence

This is followed by the author's explanations of a further connecting factor for a material misappropriation that he himself has identified (pp. 300-384). At the beginning of his presentation, he outlines the main features of the doctrine of prohibition of evidence as well as its temporal and personal scope of application (pp. 300-307). He then explores the existence of what he calls an original prohibition of evidence as a result of the imputation of unlawful conduct by private parties. As a premise for this, the author presupposes the imputation of private conduct, which in conjunction with an independent balancing decision can lead to a prohibition of exploitation. Since this premise is relevant to the author's solution, he elaborates the central aspects of the attribution of private conduct in case law and literature (pp. 310-324).

He traces the lack of stringency and plausibility of the case law in this respect and at the same time elaborates central criteria for attribution, such as the decisive nature of control and the absence of merely self-initiated action by private individuals (pp. 324-328). With reference to the relevant positions in the literature, the author explains various approaches to shaping the attribution aspects. For example, he explains that some of the approaches are based on state initiation and others on the state's ability to exert influence. He also states that other voices borrow from the doctrine of the perpetrators and that measures – that can only be qualified as acts of participation – are also considered sufficient.

In his subsequent statement, the author denies attribution in the case of state inaction. He also characterises the mere receipt of incriminated material as insufficient. Instead, he argues for a prosecution-oriented approach and in this respect forms a synopsis of various approaches from case law and literature.

After this preliminary work, he applies the developed attribution criteria to the state's acquisition of information. In this respect, he comes to the conclusion that the current state practice does lead to an attribution of private conduct with regard to the use of confidential informants. In cases of merely financially supported receipt of incriminated material, however, he denies a corresponding imputation and consequently also denies the effect of an (original) prohibition to the use of evidence.

The author comes to the same conclusion with regard to an anticipatory prohibition of the use of evidence as a consequence of the state's duty to protect (pp. 337-348). In a first step, he elaborates the dogmatic foundation of state duties to protect, but rejects a consequential effect derived from their existence in the form of a prohibition on the use of evidence in the case of possible violations of duties to protect. In the author's view, state duties to protect are too vague for this purpose. A concrete, individualised claim to the exercise of state duties to protect cannot be justified.

Following this statement, the author addresses the question of whether a (derivative) prohibition of the use of evidence can be derived from the taking over of the evidence that has been found to be defective (pp. 350-384). In order to answer this question, he presupposes a concrete balancing decision and presents the balancing concerns to be taken into account in this respect. Thus, the hypothetical lawfulness of the state's action, the seriousness of the violation of rights realised by private crime, and the seriousness of the state's intervention in taking over private evidence must be determined. The significance of the crime to be solved and the possible effects of a lack of a ban on the use of evidence on the administration of criminal justice must also be included in the necessary weighing. In the balancing decision based on this, the author addresses the relevant concerns outlined and weighs them accordingly (pp. 356-375). In this respect, he comes to the conclusion that a prohibition of the use of evidence resulting from the acceptance of evidence with a stigma is justified. This is justified with the financially supported receipt of the delictual information material, which would give the procedure a special character. Also only by a prohibition in regard of the utilization of evidence the disapproval of this private proceeding can be realised, which according the author has to be expressed explicitly. In addition, a prohibition on the use of evidence would have a disciplinary effect on the criminal prosecution authorities, which would only be able to

appeal to possible evidence in accordance with the legal basis. As an annex to this, the author also discusses the possible irrelevance of the prohibition on the use of evidence under criminal law due to its possible usability for tax purposes. However, this is also rejected in a comprehensive statement for reasons of legal system and legal doctrine (pp. 375-381).

Based on the findings elaborated, the author comes to the assumption of a prohibition of the utilization of evidence and, at the same time, regards this as a material misappropriation of the state resources involved (pp. 381-384). The subsequent discussion of the material misappropriation through unlawful enforcement (part 3 D IV 5 – pp. 384-388) and through violation of the principles of economy and thrift (part 3 D IV 6 – pp. 388-390) reach equivalent conclusions due to the extensive preliminary work with relatively brief explanations. With regard to the subjective elements of the offense as well as illegality and guilt, the author sees no reason to refrain from criminalizing the state's purchasing behavior (pp. 390-395). He also deals with possible constellations of error, which he, however, denies due to the extensive (legal) scientific discourse on state acquisition of information. Rather, as a result of what has been explained, he regards the financially supported acquisition of information by the state as fulfilling the requirement of breach of trust.

Criminal liability for breach of trust by omitting to purchase information

The author devotes **part 4** (pp. 396-416) to the question of whether the failure to purchase information can also constitute a crime of embezzlement, which he sees as a necessary correlate to the investigation of the active commission variant. He lays the necessary foundation for this by outlining the dogmatic superstructure of actual expectancies. He explains the necessary prerequisites in this respect, traces the orientation to *Hefendehl* and concludes with individual recognised cases of application of pecuniary expectancies.

In the context of the examination of possible criminal liability for omission, the author again clearly states the requirement to distinguish between a breach of duty and pecuniary damages, especially in the variant of omission (pp. 400-401). In his opinion, an omission in breach of duty requires that the duty to investigate be specified in such a way that any other variant of action than the purchase of incriminated material must be classified as an error of judgment and thus unlawful. Only in this case a duty to act may be constructed which makes a financially inferior purchase of information necessary and the omission of which can then justify a breach of duty.

The author states that the prosecution authorities have a wide margin of discretion in the performance of their duty to investigate criminal proceedings. The investigative tactics allow them to carry out various measures and to determine the appropriate time for them, while maintaining the necessary conditions for intervention in each case. Referring back to the state's duty to protect, a concretisation in the form of an obligation to purchase is denied. On the part of the state, only the minimum level of corresponding protection efforts is owed. With regard to the concrete form of these efforts, the state authorities have wide room for manoeuvre beyond a full review (pp. 405-408). Moreover, the necessity of a measure in the form of the state's purchase of information can only be considered if it is lawful in itself. It is precisely this lawfulness that is not present as a result of the information obtained and, for these reasons alone, cannot form a connecting factor for criminal liability for omission (pp. 408 et seq.). The author also doubts the property-protecting character of the obligations to investigate under criminal procedure (pp. 409-411). The author confirms that a purchase offer is capable of forming a pecuniary expectance. However, in the light of the above, no other conclusion follows from it, so that the author denies the existence of a purchase obligation and thus also a criminal liability to omit.

Concluding remarks

In the subsequent summary of results in part 5 A (pp. 417-433), the author lists the conclusions he has drawn from the individual components of the work. At the end of his remarks, the author ventures a future outlook in Part 5 B (pp. 433-438). Based on the generated findings, he lists necessary standardisation requirements. He also recurs to possibilities of proceduralisation in order to be able to justify an exemption from punishment in the context of state information purchases. He concludes that the current practice of criminal procedure requires a comprehensive change as long as and to the extent that the legislature does not make use of its broad legislative assessment prerogative.

Andreas Glock