# The limitation on prosecution in the German criminal code

*di Marco Mansdörfer*[1]

**Abstract:** The limitation on prosecution in Germany is regulated by law in the sections 78 ff. of the German criminal code (Strafgesetzbuch or StGB). This article contributes a short introduction to the central regulations and the questions arising from this topic.

**Keywords**: Limitation on prosecution; legal nature; statutes in German Criminal Code; Exceptions and special cases; european and nationial case law.

## A. Legal theoretical considerations on the nature of the limitation on prosecution

When classifying the statute of limitations, there is initially a fundamental discussion about the nature of the limitation period per se. The points of view concerning this matter can be roughly divided into two camps: A less strongly represented point of view assigns the norms of the statute of limitations a substantive effect and significance.[2] This classification is particularly supported by the fact that the duration of the statute of limitations is generally linked to the sentence provided for the criminal offense. However, the prevailing opinion and jurisdiction emphasize the procedural character of the statute of limitations. The prevailing opinion does not initially attribute any significant indicative effect to the position of the statute of limitations in the Criminal Code. Rather, the passage of time does not affect the existence of injustice, so that the statute of limitations only affects the criminal procedural traceability of the offence and the legal nature of the statute of limitations per se is also procedural.[3]



[1] Thank you very much for the support from my research assistants *Christina Ost* and *Victoria Voelker*.

[2] *M. Asholt*, Verjährung im Strafrecht, Tübingen, 2016; *M. Asholt* in: K. Leipold/M. Tsambikakis/M. A. Zöller, 3. Auflage, Heidelberg, 2020, Vor § 78 Rn. 3.

[3] *BGH* v. 07.06.2005 – 2 StR 122/05 in NJW 2005, 2566; *W. Mitsch* in: MüKo-StGB, Band 2, 4. Auflage, München, 2020, § 78 Rn. 1; *F. Saliger* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 78 Rn. 3; *D. Sternberg-Lieben/N. Bosch* in: A. Schönke/H. Schröder-StGB, 30. Auflage, München, 2019, Vor § 78 Rn. 3; *A. Greger/J. Weingarten* in: LK-StGB, Band 6, 13. Auflage, Berlin, 2020, Vor § 78 Rn. 8 f.; *U. Kindhäuser* in: LPK-StGB, 8. Auflage, Baden-Baden, 2019, § 78 Rn. 2; *S. Beukelmann* in: HK-StGB, 2. Auflage, München, 2011, § 78 Rn. 2; *H. Hilger* in: AnwK-StGB, 3. Auflage, Heidelberg, 2020, Vor § 78 Rn 3; *C. Roxin/L. Greco* Strafrecht AT, Band 1, 5. Auflage, München, 2020, § 23 Rn.

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In fact, the statute of limitation is twofold:[4] Based on the community's claim to punishment, the need for punishment actually decreases with increasing time. The guilt of the perpetrator as a person at the current moment of the criminal proceedings is to be classified as lower in the case of offenses that have taken place a long time ago, because the offence is increasingly less an expression of the current person to be judged due to the development of personality that is necessary over time. Our current German criminal law is indeed an offence focused criminal law and the subject of the judgment is first of all the offence and not the person; however absolute and relative punitive purposes connect offence and person to an inseparable unit. Every offence focused criminal law is, to a certain extent, also necessarily an offender focused criminal law, and section 46 StGB, the basic norm of German sentence law, clearly expresses this. In terms of criminal theory, the impression of a fresh offence is deeper than the one of an offence that was a considerable time ago. Correspondingly, the need for retribution and thus the basis for the absolute criminal theory decreases. The offence fades until it is finally forgotten. Correspondingly, preventive punishments detoriate. Of course, it is up to the individual society not to want to abandon extraordinary behaviour to be forgotten and thus to withdraw material from the statute of limitations. On the other hand, in a constitutional state, law is also to be considered in its procedural law dimensions. Hence it can be fundamentally concluded that in any case on the basis of a democratically contractualist understanding of the state, the right of the state to inflict punishment must be thought of as a procedurally domesticated claim. The right of the state to inflict punishment exists, but the offender also has the right to enforcement of this criminal claim, which cannot be delayed indefinitely.[5] The idea of pacification within society increases as the time lapse after the offence increases, while the need for punishment decreases accordingly until it finally disappears altogether.



This twofold character of the legal institution of the statute of limitations explains the connection between substantive and criminal procedural regulations and justification ideas in statute of limitations in general and in sections 78 ff. StGB in particular. The time lapse already arises beyond the statute of limitations as an outflow of the substantive elements of the statute of limitations as an attribution problem within the

[4] In this direction too *M. Heger* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78 Rn. 1; *H.-J. Rudolphi/ J.* Wolter, SK-StGB, 9. Auflage, Köln, 2017, Vor § 78 Rn. 10; *H. Rosenau* in: H. Satzger/W. Schluckebier/G. Widmaier, 5. Auflage, Köln, 2020, § 78 Rn. 4; *H. Satzger*, Die Verjährung im Strafrecht, in Jura 2012, 433, 435, who describes this point of view as the prevailing opinion; see also *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78 Rn. 3 or the statute of limitations; compare BT-Drucks. IV/650, 257.

[5] On this subject, see also the corresponding statements on the prohibition of multiple criminal prosecutions from *M. Mansdörfer*, Das Prinzip des ne bis in idem, Berlin, 2004.

general doctrine of criminal offences.[6] In the individual case, the temporal dimension of the behavior relevant to criminal law does not only become apparent when the offense is ended, but rather when the offense is carried out. In extreme cases of in German criminal law called "Erfolgsdelikte", such a period of time can elapse between the offence and the occurrence of the offence that the wrongdoing of the act as the basis of the wrongdoing has faded in such a way that the attribution in the sense of an attribution of responsibility becomes fragile.[7] In the extreme case, lifelong responsibility for any negligence would break the boundaries of criminal law and turn the state's criminal claim, which per se has to withstand human rights ideas of proportionality, into a cruel, metaphysical apparatus of retaliation.

## B. The system of the sections 78 ff. StGB

### Beginning of the limitation period

The beginning of the limitation period is regulated in section 78a StGB.[8]

### 1. Completion of the offence

According to section 78a sentence 1 StGB, the limitation period begins to run as soon as the offence is completed. Therefore, the relevant point in time basically is the completion of the offence. But what does that mean?



What is required first, is a criminal offence and consequently the completion of that. On the one hand the completion of an offence is existent if the elements of the offences are realized and on the other hand as soon as the offender stopped realising the elements of the offences.[9]

However, the completion of the offence depends on the type of the concrete offence. In the German criminal law, there are several types of offences. For example, in German criminal law there are types of offences called "Erfolgsdelikt", "Tätigkeitsdelikt", "Unterlassungsdelikt" and "Versuch". These different types of offences have different completion points

[6] *M. Mansdörfer* in: R. Esser/M. Rübenstahl/F. Saliger/M. Tsambikakis, Wirtschaftsstrafrecht, 1. Auflage, Köln, 2017, Vor § 13 Rn. 60.
[7] Different LG Traunstein v. 18.11.2008 – 2 KLS 200 Js 865/06 in the event of negligent homicide: „The fact that there are more than 30 years between the infringement of the duty to take care and the occurrence of offence success does not mean that the attribution context is no longer applicable."
[8] ***Section 78a – Commencement:***
*The limitation period begins to run as soon as the offence is completed. If a result constituting an element of the offence occurs later, the limitation period begins to run as of that time.*
[9] *BGH* v. 23.08.1961 – 2 StR 267/61 in BGHSt 16, 207; BGH v. 02.11.1978 – 4 StE 2/77 in BGHSt 28, 169; *D. Bock*, Die strafrechtliche Verfolgungsverjährung, in JuS 2006, 12, 13; *K. Kühl* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78a Rn. 2.

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in time. Before analyzing the relevant point in time for each type of offence, I will give a short overview what is meant by the different types of offences.

## 2. "Erfolgsdelikt"

First of all, the "classic" type of offence in German criminal law is called **"Erfolgsdelikt"**. This implies that the offender realizes all elements of the offence. In regard to the beginning of the limitation period the "Erfolgsdelikt", e. g. section 212 (1) StGB, Murder[10] is the basic case: the relevant point in time is the completion of the offence (= the death of a person), so the point in time when all elements of the offence are realized.

## 3. Tätigkeitsdelikt"

Moreover, the next type offence in German criminal law called **"Tätigkeitsdelikt"** is more complicated regarding the beginning. The term "Tätigkeitsdelikt" means that the German StGB already penalizes the mere acting. Whether the offender's actions lead to a violence of a harm is irrelevant in this context. The mere acting is penalized. An example for a "Tätigkeitsdelikt" in German criminal law is section 316 StGB.[11]

You see, section 316 StGB penalizes driving a vehicle in traffic (…) itself. But relating to the beginning what is the relevant point in time? Due to the fact that the "Tätigkeitsdelikt" doesn't require a completion of the offence, this point in time can't be the relevant one. The "Tätigkeitsdelikt" is completed when the offender ceases to act.[12] E. g. in case of section 316 StGB when the offender stops driving the vehicle.



## 4."Unterlassungsdelikt"

Furthermore, the German criminal law also knows omission offences, in German called **"Unterlassungsdelikte"**. The German criminal law distinguishes two types of omission offences: "echte Unterlassungsdelikte" and "unechte Unterlassungsdelikte". **"Echte Unterlassungsdelikte"**, for example section 323c (1) StGB[13] penalizes an omission, namely not to render

[10] ***Section 212 StGB – Murder:***
*(1) Whoever kills a person without being a murderer under the conditions of section 211 incurs a penalty of imprisonment for a term of at least five years.*
[11] ***Section 316 StGB – Driving under influence of drink or drugs:***
*(1) Whoever drives a vehicle in traffic (sections 315 to 315e) although they are not in a condition to drive the vehicle safely due to having consumed alcoholic drinks or other intoxicating substances incurs a penalty of imprisonment for a term not exceeding one year or a fine, unless the offence is subject to a penalty under section 315a or 315c.*
*(2) Whoever commits the offence negligently also incurs the penalty specified in subsection (1).*
[12] *D. Bock*, Die strafrechtliche Verfolgungsverjährung, in JuS 2006, 12, 14; *K. Kühl in:* K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78a Rn. 3.
[13] ***Section 323c StGB – Failure to render assistance:***

assistance. In contrast to that, **"unechte Unterlassungsdelikte"** are not omission offences in the first way. Basically, every commission offence set in the StGB can also be commited by omission. In this context section 13 (1) StGB[14] regulates the requirements:

A penalization regarding a "unechtes Unterlassungsdelikt" requires a legal responsibility for ensuring that the result does not occur. Anyway, regarding the beginning "echte Unterlassungsdelikte" are completed as soon as the duty to act is omitted.[15] "Unechte Unterlassungsdelikte" are completed by completing the offence.[16]

### 5. "Versuch"

In addition to that, the attempt (in German criminal law called **"Versuch"**) can be relevant. The attempt is regulated in sections 22 ff. StGB.[17]

In case of an attempt there is a completion if every activity that serves the completion of the offence is finished by the offender.[18]

This short overview has firstly shown the different types of offences and the resultant different completion points in time. Secondly it has illustrated that the limitation period begins to run rather lately.

## I. Limitation period

Afterwards the limitation period has to be clarified. The fifth chapter „Limitation period" of the StGB starts with section 78 StGB[19] which is the central norm of the limitation period.



*(1) Whoever does not render assistance in the case of an accident or a common danger or emergency although it is necessary and can reasonably be expected under the circumstances, in particular if it is possible without substantial danger to that person and without breaching other important duties, incurs a penalty of imprisonment for a term not exceeding one year or a fine.*

[14] ***Section 13 StGB – Commission by omission:***
*(1) Whoever fails to prevent a result which is an element of a criminal provision is only subject to criminal liability under this law if they are legally responsible for ensuring that the result does not occur and if the omission is equivalent to the realisation of the statutory elements of the offence through a positive act.*

[15] BGH v. 04.04.1979 – 3 StR 488/78 in NJW 1980, 406, 408; *D. Bock*, Die strafrechtliche Verfolgungsverjährung, in JuS 2006, 12, 14; *K. Kühl* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78a Rn. 8.

[16] *D. Bock*, Die strafrechtliche Verfolgungsverjährung, in JuS 2006, 12, 14; *N. Bosch* in: A. Schönke/H. Schröder-StGB, 30. Auflage, München, 2019, § 78a Rn. 6.

[17] ***Section 22 StGB – Definition:***
*Whoever takes a direct and immediate step towards the realisation of the offence as envisaged by them attempts to commit an offence.*

[18] BGH v. 26.02.1988 – 3 StR 477/87 in NStZ 1988, 322; *D. Bock*, Die strafrechtliche Verfolgungsverjährung, in JuS 2006, 12, 14; *K. Kühl* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78a Rn. 9.

[19] ***Section 78 StGB – Limitation period:***
*(1) The imposition of a penalty and the ordering of measures (section 11 (1) no. 8) are ruled out following expiry of the limitation period. Section 76a (2) remains unaffected.*

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All criminal offences are subject to limitation on prosecution unless otherwise specified. As per section 78 (2) StGB serious criminal offences under section 211 StGB (murder under specific aggravating circumstances) are not subject to the statute of limitations, as well as criminal offences under section 5 of the code of crimes against international law (Völkerstrafgesetzbuch or VStGB).

Despite these exceptions the period is determined in accordance with the penalty threatened under the law which defines the elements of the offence realised.

An interesting aspect in this context is also the extremely short limitation period in the prosecution of regulatory offences. For example, traffic offences (section 24 of the road traffic act (Straßenverkehrsgesetz or StVG) prescribe in three months as long as no fine has been issued or public charges have been brought, in this case the limitation period is six months.

## II. Stay of limitation

The limitation on prosecution should not favour the offender if prosecution is not feasible. Therefore, section 78b StGB[20] rules that the limitation period



*(2) Serious criminal offences under section 211 (murder under specific aggravating circumstances) are not subject to the statute of limitations.*
*(3) Where prosecution is subject to the statute of limitations, the limitation period is*
*1. 30 years in the case of offences which are punishable by imprisonment for life,*
*2. 20 years in the case of offences which are punishable by a maximum sentence of imprisonment of more than 10 years,*
*3. 10 years in the case of offences which are punishable by a maximum sentence of imprisonment of more than five years but no more than 10 years,*
*4. five years in the case of offences which are punishable by a maximum sentence of imprisonment of more than one year but no more than five years,*
*5. three years in the case of other offences.*
*(4) The period is determined in accordance with the penalty threatened under the law which defines the elements of the offence realised, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or less serious cases under the Special Part.*

[20] ***Section 78b StGB – Stay of limitation:***
*(1) The limitation period is stayed*
*1. until the victim of an offence under sections 174 to 174c, 176 to 178, section 180 (3), sections 182, 225, 226a and 237 has reached the age of 30,*
*2. as long as the prosecution may, by law, not be commenced or continued; this does not apply if the only reason why the offence cannot be prosecuted is due to the absence of a request or authorisation to prosecute or a request to prosecute by a foreign state.*
*(2) If prosecution is not feasible because the offender is a Member of the Bundestag or of a legislative body of one of the Länder, the stay of the limitation period only commences upon expiry of the day on which*
*1. the public prosecution office or a police authority or police officer gains knowledge of the offence and of the offender's identity or*
*2. an offence is reported or a request to prosecute is filed against the offender (section 158 of the Code of Criminal Procedure).*

is stayed for various reasons. When the limitation period is not stayed anymore the limitation on prosecution continues without the already elapsed time before the limitation stayed.

Some reasons are to be found in section 78b StGB or in section 153a (3) of the German code of criminal procedure (Strafprozessordnung or StPO) or in section 369 (3) of the fiscal code (Abgabenordnung or AO).

Important reasons in Germany are section 78b (1) Nr. 1 and 2 StGB. The background of Nr. 1 is that the victim is dependent on the offender and doesn't want to press charges against the offender.[21] Nr. 2 means reasons like extraterritoriality (sections 18 ff. of the courts constitution act (Gerichtsverfassungsgesetz or GVG)) or immunity from criminal prosecution (articles 46 (2), 60 (IV) of the basic law for the Federal Republic of Germany (Grundgesetz or GG)).[22] In connection with Nr. 2 attention should be paid to section 78b (2) StGB.

Whereas section 78 (4) StGB says that the period is determined irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or less serious cases under the Special Part, the stay of limitation is up to five years in especially serious cases.

Section 78b (3) StGB prevents deferrals resulting from legal remedies. The offender could try to exhaust all remedies in order to reach the limitation period because the proceedings at first instance are not finally concluded if the offender or the prosecutor appeal to court. But section 78b (3) StGB says that the limitation period does not expire before the proceedings have been finally concluded which means the legal remedies are decided.



## III. Interruption

If the criminal proceedings have already started, the elapsed time should not favour the offender. Therefore, section 78c StGB[23] interrupts the limitation

*(3) If a judgment has been delivered in the proceedings at first instance before the expiry of the limitation period, the limitation period does not expire before the time when the proceedings have been finally concluded.*
*(4) Where provision is made for an aggregate sentence of imprisonment of more than five years in especially serious cases and if the main proceedings have been opened before the regional court, the statute of limitations is stayed in the cases under section 78 (3) no. 4 from the time of the opening of the main proceedings, but no longer than for a period of five years; subsection (3) remains unaffected.*
…

[21] BGH v. 07.04.2020 – 3 StR 90/20 in BeckRS 2020, 8986; *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78b Rn. 3; *F. Saliger/T. Schweiger* in: R. Esser/M. Rübenstahl/F. Saliger/M. Tsambikakis, Wirtschaftsstrafrecht, 1. Auflage, Köln, 2017, § 78b Rn. 3.

[22] *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78b Rn. 4 ff.; *K. Kühl* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 78b Rn. 2.

[23] ***Section 78c StGB – Interruption:***

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period for various reasons (listed in section 78c (1) StGB). After each interruption, the limitation period begins to run anew. However, the prosecution is barred by limitation once double the statutory limitation period has elapsed since the time indicated in section 78a and at least three years if the limitation period is shorter than three years under special laws (section 78c (3) StGB; absolute Verjährung). Relevant is the date of the first examination, the judicial examination and so on (except in the case of a written order or decision section 78c (2) StGB).[24] The limitation period is

*(1) The limitation period is interrupted by*
*1. the first examination of the accused, notice that a preliminary investigation has been initiated against the accused, or the order for such examination or notice of such examination,*
*2. any judicial examination of the accused or the order for a judicial examination of the accused,*
*3. any commissioning of an expert by the judge or public prosecutor if the accused has previously been examined or has been given notice of the launch of a preliminary investigation,*
*4. any judicial seizure or search warrant and judicial decisions upholding them,*
*5. a warrant of arrest, a provisional order for placement, an order to be brought before a judge for examination and judicial decisions upholding them,*
*6. the preferment of public charges,*
*7. the opening of the main proceedings,*
*8. the setting of each date for the main hearing,*
*9. a summary penalty order or another decision equivalent to a judgment,*
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*10. the provisional judicial termination of the proceedings due to the indicted accused's absence, as well as any order of the judge or public prosecutor issued after such termination of the proceedings or in proceedings in absentia to ascertain the indicted accused's whereabouts or to secure evidence,*
*11. the provisional judicial termination of the proceedings due to the indicted accused being unfit to stand trial and any order of the judge or public prosecutor issued after such termination of the proceedings for the purposes of reviewing the indicted accused's fitness to stand trial or*
*12. any judicial request to undertake an investigative act abroad.*
*In preventive detention proceedings and independent proceedings, the limitation period is interrupted on account of those acts done to conduct the preventive detention proceedings and independent proceedings which correspond to those in sentence 1.*
*(2) In the case of a written order or decision being made, the limitation period is interrupted at the time at which the order or decision is signed. If the document is not immediately processed after signing, the time at which it is actually submitted for processing is decisive.*
*(3) After each interruption, the limitation period begins to run anew. However, the prosecution is barred by limitation once double the statutory limitation period has elapsed since the time indicated in section 78a and at least three years if the limitation period is shorter than three years under special laws. Section 78b remains unaffected.*
*(4) The interruption has effect only for the person in relation to whom the interrupting act is done.*
*(5) If a law which applies at the time the offence is completed is amended before a decision is given and the limitation period is thereby shortened, then acts leading to an interruption which were undertaken before the entry into force of the new law retain their effect, notwithstanding that at the time of the interruption the prosecution would have been barred by the statute of limitations under the amended law.*

[24] *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78c Rn. 2; *F. Saliger* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 78c Rn. 33; e.g. BayObLG v. 23.11.1962 – 1 St 608/62 in BayObLGSt 1962, 284 f.

only interrupted by a valid and effective pleading.[25] Mock-pleadings do not fulfil the requirements.[26] The possibilities to interrupt the limitation period are even expansive in the act on regulatory offences (section 33 Ordnungswidrigkeitengesetz or OWiG).

## C. Exceptional and special cases

### I. Tax law and section 370 of the fiscal code (Abgabenordnung or AO)

Tax offences are among the special cases of the criminal limitation period. Regarding the criminal limitation period in fiscal offences the German criminal law distinguishes **the criminal limitation period (sections 78 ff. StGB)** and **the fiscal limitation period for assessment (sections 169 ff. AO)**.

#### 1. Criminal limitation period, section 78 ff. StGB

Concerning the criminal limitation period regarding tax offences sections 78 ff. StGB have to be consulted. According to section 78a sentence 1 StGB, the limitation period begins to run as soon as the offence is completed. As seen before the completion of the offence depends on the type of the concrete offence (e. g. "Unterlassungsdelikt"). This also applies here in the tax law context. Therefore, first of all one has to check if the offender's act is an active acting or an omission. In addition to that, the fiscal law distinguishes different tax types, for example in the German tax law so called "Veranlagungssteuern" and "Fälligkeitssteuern". Depending on which tax type is given in the concrete case, the completion of the offence is at a different point in time. For example, in the case of "Veranlagungssteuern", the relevant point in time for the completion is the announcement day of the incorrect tax assessment.



In particularly serious cases of tax evasion, the fiscal code provides a special limitation period for prosecution. According to section 376 (1) AO, the limitation period is 15 years[27] in cases of section 370 (3) second sentence, numbers 1 to 6. Due to the fact, that the limitation period begins to run as soon as the offence is completed, this special and very long limitation period of 15 years can expose concern. Especially in multi-person cases, i. e. cases with perpetrators and participants, this can result in an apparently infinite limitation period for the participants. Due to the fact, that the limitation

[25] BGH v. 16.10.1980 – 1 BJs 80/78 in NJW 1981, 133 f.; *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78c Rn. 7; *F. Saliger* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 78c Rn. 25.
[26] BGH v. 07.12.1960 – 4 StR 409/60 in NJW 1961, 326 f.; *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78c Rn. 7; *F. Saliger* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 78c Rn. 30.
[27] Until 2021 the limitation period was ("only") 10 years.

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period of 15 years can be extended retrospectively, problems with the principal "nulla poena sine lege" (Article 103 (2) Basic Law for the Federal Republic of Germany or GG) may arise if the statute of limitations is assigned a substantive effect and significance.

## 2. Fiscal limitation period for assessment, sections 169 ff. AO

However, the fiscal limitation period for assessment is another independent "system" which is regulated in sections 169 ff. AO.

### a) Beginning of the period for assessment

Section 170 (1) AO[28] regulates the beginning of the fiscal period for assessment:

So basically, the fiscal limitation period for assessment begins at the end of the calendar year in which the tax has arisen. The following paragraphs (2) – (7) imply several special beginning points in time.

### b) Period for assessment

The fiscal period for assessment is set in section 169 AO[29].

Section 169 (2) AO prescribes a period for assessment in the amount of **one year** for excise duties and excise duty rebates and **four years** for taxes and tax rebates that are not the taxes referred to under number 1 above or are not tax rebates under Article 5 numbers 20 and 21 of the Union Customs Code. Moreover, in cases where taxes have been evaded the period for assessment is **ten years** and **five years** where they have been recklessly understated.



Section 169 (1) AO regulates when the time limit for assessing a tax shall be deemed complied with.

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[28] ***Section 170 AO - Beginning of the period for assessment:***
*(1) The period for assessment shall begin at the end of the calendar year in which the tax has arisen or a conditional tax has become unconditional.*

[29] ***Section 169 AO – Period for assessment:***
*(1) A tax assessment and its cancellation or amendment shall no longer be permissible once the period for assessment has expired. This shall also apply to corrections of obvious errors under section 129. The time limit for assessing a tax shall be deemed complied with if, before the period for assessment has expired,*
*1. the tax assessment notice or, in cases where section 122a applies, the electronic notification has left the domain of the revenue authority responsible for assessing the tax or*
*2. the assessment has been disclosed or published in cases of public notification pursuant to section 10 of the Administrative Service of Documents Act.*
*(2) The period for assessment shall be:*
*1. one year for excise duties and excise duty rebates,*
*2. four years for taxes and tax rebates that are not the taxes referred to under number 1 above or are not tax rebates under Article 5 numbers 20 and 21 of the Union Customs Code.*
*The period for assessment shall be ten years where taxes have been evaded and five years where they have been recklessly understated. This shall also apply where the tax evasion or reckless understatement of tax has not been committed by the tax debtor or a person of whose services he avails himself to meet his tax obligations, unless the tax debtor shows that his wealth has not increased as a result of the act and that this act was not brought about by his omission to take the due precautions necessary to prevent an understatement of tax.*

## II. Limitation on prosecution linked to offences in state of insolvency especially bankruptcy (section 283 StGB)

Criminal offences under section 283 (1) and (2) StGB[30] are subject to the statute of limitations. The limitation period is five years because bankruptcy is punishable by a maximum sentence of imprisonment of more than one year but no more than five years (section 78 (3) Nr. 4 StGB).

The limitation period begins to run as soon as the offence is completed. This time is a disputed question among commentators and jurisdiction.

In the commentators view the limitation period begins to run as soon as the "objektive Bedingung der Strafbarkeit" in section 283 (6) StGB (this means the conditions which the offender shall have to fulfill so the act entails criminal liability) is completed.[31] It means that the offender has suspended

[30] ***Section 283 StGB – Bankruptcy:***
*(1) Whoever, in the case of overindebtedness or existing or imminent insolvency,*
*1. secretly removes or hides, or, in a manner contrary to regular business standards, destroys, damages or renders unusable parts of their assets which in the case of the opening of insolvency proceedings would belong to the insolvency estate,*
*2. in a manner contrary to regular business standards, enters into loss-making or speculative ventures or futures trading in goods or securities or consumes excessive sums or becomes indebted through uneconomical expenditures, gambling or wagering,*
*3. procures goods or securities on credit and sells or otherwise sells them or things produced from these goods substantially below market value in a manner contrary to regular business standards,*
*4. feigns the existence of another's rights or recognises fictitious rights,*
*5. fails to keep account books which they are obliged by law to keep, or keeps or modifies them in such a manner that a survey of their current asset status is made more difficult,*
*6. secretly removes, hides, destroys or damages, before expiry of the archiving periods for those obliged to keep books, either account books or other documentation which a merchant is obliged by commercial law to keep, and thereby makes a survey of their current asset status more difficult,*
*7. contrary to commercial law,*
*a) draws up balance sheets in such a manner that a survey of their current asset status is made more difficult or*
*b) fails to draw up a balance sheet of their assets or an inventory in the prescribed time or*
*8. in another manner which grossly contravenes regular business standards diminishes their net assets or hides or conceals their actual business circumstances*
*incurs a penalty of imprisonment for a term not exceeding five years or a fine.*
*(2) Whoever causes their overindebtedness or insolvency by one of the acts referred to in subsection (1) incurs the same penalty.*
*(3) The attempt is punishable.*
…
*(6) The act only entails criminal liability if the offender has suspended any necessary payments or if insolvency proceedings have been opened against the offender's assets or the request to institute proceedings has been refused for insufficiency of assets.*

[31] *T. Fischer*-StGB, 68. Auflage, München, 2021, § 78a Rn. 3, 8a; *S. Beukelmann* in: BeckOK-StGB, 49. Edition, München, 2021, § 283 Rn. 111; *G. Heine/F. P. Schuster* in: A. Schönke/H. Schröder-StGB, 30. Auflage, München, 2019, § 283 Rn. 70; *U. Kindhäuser* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 283 Rn. 115; *M. Heger* in: K. Lackner/K. Kühl-StGB, 29. Auflage, München, 2018, § 283 Rn. 32; *K. Tiedemann* in: LK-StGB, Band 9/2, 12. Auflage, Berlin, 2009, § 283 Rn. 221; *A. Oehmichen*, Urteilsanmerkung BGH: Beendigung des

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any necessary payments or if insolvency proceedings have been opened against the offender's assets or the request to institute proceedings has been refused for insufficiency of assets. Exceptional the limitation period begins to run as soon as the offender accomplish the criminal action if this action takes place after the act entails criminal liability.[32]

The Federal High Court of Justice (Bundesgerichtshof or BGH) follows his jurisdiction whereby the limitation period begins to run as soon as the offender terminates his criminal action overall. So in the consumer insolvency the limitation period begins to run as soon as the bankruptcy court determines the discharge of residual debt because the bankruptcy estate is endangered until this decision.[33]

### III. Offences with an endless limitation period

As section 78a StGB – Commencement sentence 2 says the limitation period can also begin to run, if a result constituting an element of the offence occurs later. As a consequence the limitation period can be "endless" if the result occurs years after the original criminal action. In my opinion section 78a sentence 2 StGB therefore suffers from a constructional defect. The "endless" limitation period is not conformable to the nature of the limitation on prosecution as displayed above.



A prominent example is the collapse of the ice rink in Bad Reichenhall. The ice rink was built in the 1970s and collapsed 2006. The trial against the responsible constructors for negligent killing could start in 2008 because the result – the dead of the people – occurred in 2006 though the action itself was more than thirty years in the past. Another example is the ongoing damage deepening in the context of section 266 StGB.

## D. The importance of the limitation on prosecution in sentencing

As article 6 of the European Convention on Human Rights says everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Therefore, the time between the first steps in the investigation of the criminal offence and the final decision should not be too long dependent on the significance of the case (if the offender is under arrest the appropriate time is shorter), the

vorsätzlichen Bankrotts erst nach Restschuldbefreiung, Mainz, in FD-StrafR 2016, 377451.

[32] *U. Kindhäuser* in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen-StGB, 5. Auflage, Baden-Baden, 2017, § 283 Rn. 115; *K. Tiedemann* in: LK-StGB, Band 9/2, 12. Auflage, Berlin, 2009, § 283 Rn. 221; approving *G. Heine/F. P. Schuster* in: A. Schönke/H. Schröder-StGB, 30. Auflage, München, 2019, § 283 Rn. 70.

[33] *BGH* v. 14.03.2016 – 1 StR 337/15 in NJW 2016, 1525, 1526.

complexity, the behaviour of the offender and the investigative authorities.[34] This also applies to the preliminary investigation.[35]

In his leading case the ECHR explicates: *"In criminal matters, the "reasonable time" referred to in Article 6 par. 1 (art. 6-1) begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, par. 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, par. 19, the Neumeister judgment of the same date, Series A no. 8, p. 41, par. 18, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, par. 110). "Charge", for the purposes of Article 6 par. 1 (art. 6-1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see the above-mentioned Deweer judgment, p. 24, par. 46)."*[36]

*"Far from helping to expedite the proceedings, Mr. and Mrs. Eckle increasingly resorted to actions - including the systematic recourse to challenge of judges – likely to delay matters; some of these actions could even be interpreted as illustrating a policy of deliberate obstruction (see paragraphs 15, 20, 22, 23, 24, 25 and 32 above). However, as the Commission rightly pointed out, Article 6 (art. 6) did not require the applicants actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for having made full use of the remedies available under the domestic law. Nonetheless, their conduct referred to above constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6 par. 1 (art. 6-1) (see, mutatis mutandis, the above-mentioned König judgment, pp. 35-36, 37, 38 and 40, par. 103, 105, 108 and 111, and the Buchholz judgment of 6 May 1981, Series A no. 42, pp. 18 and 22, par. 56 and 63)."*[37] *[…] "The Commission likewise considered that the length of the proceedings was primarily referable to the conduct of the judicial authorities."*[38] *[…] "The Court realises that initially the*



[34] Well established case law, e. g.: *ECHR* "Case of Bock v. Germany", Judgment of 29.03.1989, Application no. 11118/84, p. 255 par. 38; *ECHR* "Case of Uhl v. Germany", Judgment of 10.02.2005, Application no. 64387/01, p. 5 par. 27; *ECHR* "Case of Satakunnan Markkinapörssi oy and Satamedia oy v. Finland", Judgment of 27.06.2017, Application no. 931/13, p. 60 par. 209.
[35] *M. Mansdörfer*, Das Recht des Beschuldigten auf ein unverzögertes Ermittlungsverfahren in GA 2010, 153 ff.; *K. Gaede* in: MüKo-StPO, Art. 6 EMRK, 1. Auflage, München, 2018, Rn. 388.
[36] *ECHR* „Case of Eckle v. Germany", Judgment of 15.07.1982, Application no. 8130/78, p. 27 par. 73.
[37] *ECHR* „Case of Eckle v. Germany", Judgment of 15.07.1982, Application no. 8130/78, p. 27 par. 82.
[38] *ECHR* „Case of Eckle v. Germany", Judgment of 15.07.1982, Application no. 8130/78, p. 27 par. 83.

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*specific forms of economic crime caused the judicial authorities a variety of problems, notably in relation to the speedy and smooth conduct of criminal proceedings. It also recognises the efforts made by the Federal Republic of Germany in the legislative and administrative sphere in order to deal with this mischief with the requisite expedition. Nevertheless, the Court cannot attach a decisive weight to these factors for its ruling on the instant case, for the state of affairs confronting the competent authorities was not at all exceptional (see, mutatis mutandis, the above-mentioned Buchholz judgment, pp. 16, 20-21 and 22, par. 51, 61 and 63).“*[39]

If they violate this human right the ECHR requires the state to admit and to retrieve the violation. As a reduction of the punishment is no adequate procedure to react if there is no milder punishment possible (e. g. life imprisonment) (Strafzumessungslösung), the BGH follows another solution since 2008.[40] The court declares a quantified part of the sentence as already carried out (Vollstreckungslösung). If the sentence was one of acquittal a cash benefit is provided.

Therefore, the BGH prefers the ECHR-solution as declared in the “Eckle-Case”.

*„Having regard to the length of the delays attributable to the respondent State, the reduction of sentence that the Regional Court stated it was granting to the applicants was not capable of divesting the latter of their entitlement to claim to be victims, within the meaning of Article 25 (art. 25) (see paragraphs 68 and 70 above): the Regional Court's decision did not contain sufficient indications to allow an assessment of the extent to which the length of the proceedings was being taken into account for the purposes of the Convention.“*[41]



The BGH states: *“As before, the type and extent of the delay and its causes must first be determined and specifically determined in the judgment.”*[42] *[…] “Subsequently, it is to be examined whether against this background the express determination of the unlawful procedural delay is sufficient for compensation; if this is the case, then this statement must be made clear in the grounds of the judgment. If, on the other hand, it is not sufficient as compensation, the court must determine which quantified part of the penalty to compensate for the delay is considered to be enforced. General criteria for this determination cannot be established; The decisive factors are always the circumstances of the individual case, such as the extent of the delay for which the state is responsible, the extent of the misconduct of the prosecuting authorities and the effects of all this on the accused.”*[43]

## E. Conclusion

[39] *ECHR* „Case of Eckle v. Germany“, Judgment of 15.07.1982, Application no. 8130/78, p. 27 par. 85.
[40] *BGH* GK v. 17.01.2008 – GSSt 1/07 in NJW 2008, 860 ff.
[41] *ECHR* „Case of Eckle v. Germany“, Judgment of 15.07.1982, Application no. 8130/78, p. 27 par. 87.
[42] *BGH* GK v. 17.01.2008 – GSSt 1/07 in NJW 2008, 860, 866 Rn. 55.
[43] *BGH* GK v. 17.01.2008 – GSSt 1/07 in NJW 2008, 860, 866 Rn. 56.

The jurisdiction of the ECHR shows that the period of criminal proceedings is an important parameter in sentencing. The statute of limitations only sets the necessary end point for criminal prosecution. However, it is precisely the increasing exceptions of the statute of limitations that show that the constitutional core of the statute of limitations can claim less and less acceptance. The development towards a tightening of the statute of limitations can therefore definitely be classified as kind of a new punitivity in German criminal law.

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