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Active Repentance

Basic questions regarding the timeliness and voluntary nature of damage compensation



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The legal institution of active repentance in the case of property crimes pursuant to Section 167 of the Austrian Criminal Code (StGB) is an internationally recognisable core element of the Austrian (criminal) legal culture. Active repentance enables the peaceful reconciliation of perpetrators and victims, and is thus, so to speak, a door-opener towards restorative justice. Active repentance completely compensates for the legal consequences of the particular concluded and reprehensible property crime. The perpetrator is thus exempt from punishment by being positioned as though he had never formally committed the crime. This legal institution enjoys a great deal of acceptance in the country. The Austrian regulation partially provokes astonishment in related (criminal) jurisdictions. The fact that positive behaviour after the infringement – in the form of restitution for damages – does not merely reduce the punishment, but removes the punishment in toto, is something special in any case. In the opinion of the authors, the legal institution of active repentance has its full justification in the Austrian legal system. By the meeting of existential interests of the victim and the accused, it seems only in keeping with the notion that the state should take a step back with its requirement for prosecution and provide an attractive possibility to the involved parties to solve the “problem” themselves. The Austrian regulation of active repentance currently is a kind of driving force in Germany for reform ideas desirable from the perspective of the victim. There is also a certain need for action in Austria in terms of legal policy: The extension of the applicability of the regulation to at least Section 136 of the Austrian Criminal Code (unauthorised use of vehicles) is indicated, since it is, *de lege lata*, contrary to the system if the car thief can become exempt from punishment by active repentance (Section 127 of the Austrian Criminal Code), but at the same time, the temporary (car) thief who has made unauthorised use of a motorised vehicle is punished despite repentance for his behaviour. Furthermore, making a wider repentance regulation available for crimes related to the protection of non-cash means of payment (Sections 241a ff. of the Austrian Criminal Code), which have a certain proximity to property crime, must be considered.

I. INTRODUCTION

The legal institution of active repentance in the case of property crime (Section 167 of the Austrian Criminal Code) is a peculiarity of Austrian (criminal) legal culture and

looks back on a long legal tradition and development.¹ This extremely practical provision, indispensable in the Austrian Criminal Code, provides the opportunity for perpetrators of non-violent property

crime (see para. 1 leg. cit.) to actively remove an arisen criminal liability under certain conditions.

Active repentance gives perpetrators and victims the possibility for peaceful reconciliation, and is thus a door-opener towards restorative justice.

The concept of active repentance is not a recent invention: the Josephine Criminal Code contains a provision which is at the core of the current norm.² This legal institution has subsequently undergone changes which are reflected in the broad field of application in force today.

According to the prevailing view, active repentance is understood as a personal basis for the suspension of punishment.³ The criminal, system-contrary, culpable, reprehensible and concluded (property) crime is “neutralised” by the remedy and the perpetrator is rendered exempt from punishment *ex tunc*. In short, active repentance wholly compensates for the punishment arising as a legal consequence of the (concluded and reprehensible) property crime,⁴ although the perpetrator enters the punishment stage for at least a brief moment.⁵ The law thus renders the perpetrator exempt from punishment, as if he had never committed the crime in question.⁶

It should be noted that active repentance is fundamentally only possible in the case of concluded crimes.⁷ This regulation, which is largely accepted in the country, partially causes astonishment in other related (criminal) jurisdictions. Admittedly, it appears peculiar that positive behaviour after the infringement – in the form of restitution for damages – does not merely reduce the punishment, but removes it in toto. Due to a similar *telos* and its legal construction, Section 167 of the Austrian Criminal Code possesses a certain proximity to the withdrawal from the attempt (Section 16 of the Austrian Criminal Code).⁸

Nevertheless, it is correctly understood as an independent legal institution.

II. LEGITIMACY OF ACTIVE REPENTANCE

It is interesting to consider why the (historical) legislator opted for this legal institution in the case of property crime and how the generously designed “loophole” back into legality is now legitimised in the Austrian Criminal Code.

1. THEORY OF CRIMINAL JUSTICE

In the first place, this rule can be justified by the prevailing theory of criminal justice, although it must be noted that this theory is “slightly” vague,⁹ which cannot be discussed further here.

According to the theory of criminal justice, the perpetrator of a concluded reprehensible property crime performs a special preventative contraindication through his timely “voluntary” *contrarius actus* and re-socialises himself, so to speak.¹⁰ In short, punishment is not (or no longer) needed to deter the perpetrator from further criminal offences. The perpetrator, by means of his voluntary and timely repentance, illustrates that it was wrong to commit the property crime.¹¹ Through this out-of-court procedure, he expresses the fact that he wants to continue to live integrated in society.¹²

At the same time, the perpetrator makes amends with the victim, as he returns the victim to its former state, i.e. before the property offence.¹³

Furthermore, the remedies create a general preventive effect, since the commonality of crimes is prevented in that the perpetrators’ awareness of the validity of norms is strengthened and they can, by their act of repentance, recognise the basic validity of rules.¹⁴ These considerations eliminate criminal purpose – if the conditions of Section 167 of the Austrian

Criminal Code are present at the same time – *ex tunc*,¹⁵ and the punishment as an actual or compulsory substantive legal consequence is rendered superfluous in a modern prevention-based criminal legal system.¹⁶

2. VICTIMOLOGICAL APPROACH

However, the intention of the (historical) legislator is not only understood today from the point of view of the perpetrator, as granting the perpetrator complete impunity by means of material criminal law. It should now be scrutinised from the victimological point of view whether Section 167 of the Austrian Criminal Code reflects the interests of the victim or is (at least partially) borne by this.

Against this backdrop, it is even supported that in the case of active repentance, the victim-oriented perspective is brought to the fore.¹⁷ This can also be substantiated historically and teleologically.¹⁸

In order to investigate a criminal offence concerning its efficiency and its legal and political legitimacy from the point of view of the victim, one has to ask the question, “what do victims actually want”. It is clear from empirical investigations – especially victim surveys – that victims’ compensation is one of the most important issues in a criminal case.¹⁹ In short: victims of property crimes want a replacement.²⁰ In addition, the majority of all victims of crime – meaning not only those of property crime – favour a “combination of civil and criminal proceedings”.²¹

Simply put, the victim, above all, wants the spoils or the property assets back from the swindler. As a result, victims of property crime primarily wish to be restored to the position they were in before the crime. The timely and, as it were, voluntary behaviour after the crime – which constitutes active repentance – is therefore charac-

terised by “restoring justice” by the perpetrator. In the case of active repentance, perpetrators and victims generally restore the rightful state (together). At the same time, the state puts its right to criminal justice into the background.²²

This legal institution also takes effect long before alternative compensation for the crime (see Section 204 of the Austrian Code of Criminal Procedure [StPO]) and is based on the “all-or-nothing principle” with respect to criminal sanctions. After all, it is not merely a question of reduced sentence (see also Section 34 (1) 15 of the Austrian Criminal Code). On the contrary, in the case of active repentance, the natural restitution within the meaning of Section 1323 of the Austrian Civil Code (ABGB) (argumentum: compensating for the damage suffered)²³ is also striven for above all, and in some cases, the reversal of the unlawful property transfer or damage (= monetary replacement) is, too.²⁴ The active repentance therefore reflects the cardinal and, as it were, fundamental interests of the victim, as it helps the victims obtain compensation quickly and generally smoothly.²⁵ In addition, the situation in the case of property crime is characterised by a certain peculiarity. If the outcome of a crime affects the legally protected right of life and limb, then it is in fact impossible to establish the state before the crime. In these cases, the primary concern is compensation for the non-material damage (e.g. compensation for pain and suffering). The victims’ interests are completely different in the case of property crime, where damages are by their nature exclusively material damages. This case is a priori concerned with eliminating the state perpetuated by the crime and restoring the original state – before the crime – in accordance with the law, insofar that this is within the realm of possibility. Of course, this is different in

the case of property damage (Section 125 of the Austrian Criminal Code).

3. ULTIMA RATIO PRINCIPLE?

The legitimacy of Section 167 of the Austrian Civil Code can also be discussed from the point of view of the ultima ratio principle.²⁶ According to this, punishment should be treated restrictively. The “criminal law club” should only be reverted to if all other mechanisms fail. In short: in a modern legal system, punishment should be reduced to the absolutely essential level.²⁷

The approach of justifying active repentance with the ultima ratio principle is not convincing. If one speaks about ultima ratio, then it is about the justification of punishment per se, i. e. whether the punishment should be applied. The basic idea of active repentance should be strictly differentiated from the ultima ratio principle. In Section 167 of the Austrian Criminal Code, a concluded crime must be present as a prerequisite – at least for a “logical second”. In order to remove the prerequisites of the punishment, they must first exist. Therefore, in the case of Section 167 of the Austrian Penal Code, an act committed illegally and culpably has to exist – even if for a very short time.

The objection raised here is of a definitional nature, because it is not terminologically correct to speak of the subsidiary of criminal law in this constellation, since the prerequisites for punishment exist for a short time. The continuation of this consideration in the case of Section 167 of the Austrian Criminal Code rather concerns whether unpleasant punishment is no longer needed as the “compulsory” legal consequence of the concluded crime only if the perpetrator “restores” the original situation, i.e. the conditions before the crime. The perpetrator rehabilitates himself in these situations by his contrarius

actus, which reverses (= neutralises) his entire previous criminal behaviour and thus uno actu also replaces the punishability in the presence of the statutory prerequisites of Section 167 of the Austrian Criminal Code. In this respect, the situation in question is fundamentally different from those in which the punishment per se is questioned.

Furthermore, an appeal to the ultima ratio principle appears to be doubtful from another point of view: eventually, the concluded crime is highlighted here. The legislator states that it is a criminal offence in the time before the trial stage (Section 15 of the Austrian Criminal Code), which renders a discussion about whether criminal liability applies invalid in this respect.

4. INTERIM RESULT

It can thus be concluded as an interim result that active repentance in property crimes can be based on two principles: The absence of a criminal purpose and the victimological orientation of the norm indicate that active repentance is equally in the interest of victims and perpetrators.

III. PREREQUISITES OF ACTIVE REPENTANCE

1. TIMELINESS

The legislator defines a timeliness requirement in its unfortunate wording “before the authority was aware of the culpability”. But how can an authority (Section 151 (3) Austrian Criminal Code) know of something that a criminal procedure has to clarify first? In this context, “culpability” can only mean the anticipation of the outcome of the process at the time of the repentance. Namely, from the ex ante point of view of the (tangible) suspicion²⁸ that someone has committed the crime in question. In other words, the suspicion of having committed a criminal property offence that has been

perpetrated in an unlawful, illegal and culpable manner must fall upon a specific initiator and demonstrate a connection between crime and perpetrator.

How, however, must this suspicion be lodged? It is indisputable that this has to be determined objectively.²⁹ The principles of officiality and legality are equally decisive for this concept of suspicion. The principle of investigating the material truth also plays a decisive role, since law enforcement authorities have to determine the material truth without bias and with impartiality³⁰ (Section 3 of the Austrian Code of Criminal Procedure [StPO]). The Austrian Code of Criminal Procedure determines the concept of suspicion (fundamentally). This understanding of suspicion, which forms the basis of the Austrian Code of Criminal Procedure, must therefore be consulted with regard to the interpretation of the culpability.

1.1 Moment of judgement

The time to the damage compensation or liability is decisive in the judgement of the suspicion. This temporal factor determines the limits for the public prosecutor's office and the court in the evaluation of the material collection that is significant in terms of culpability.

1.2 Objective determination of results as the basis for analysis of suspicion

Accordingly, only the state of the investigation up to the date of the damage compensation or liability must be taken into account for the timeliness requirement of Section 167 of the Austrian Criminal Code.³¹ On the basis of this "petrified" investigation, the public prosecutor's office or the court in the criminal proceedings has to assess the legal question as to whether the authority has already learned of the defendant's culpability. The suspicion must therefore be derived from the results

of these past investigation findings up to the repentance behaviour (without any doubt). In other words, the material collection significant in terms of culpability is in this regard a constant in the entire process. The findings and results of the investigation which were determined after this temporal limitation may no longer be taken into account for the purpose of assessing suspicion. This leads to a strict "ban on innovation" for the assessment of timeliness, which is derived from the telos of Section 167 of the Austrian Criminal Code.

However, if the investigating authority is purely one-sided and not objective from the outset, and only determines a "situation of suspicion" on a random basis – with the exclusion of other procedural-relevant eventualities (Sections 2 f. of the Code of Criminal Procedure) –, then in reality there is no suspicion, rather a mere "subjective speculation of suspicion" due to the one-sidedness of the investigation. In these cases, – despite an (accidentally) correct result – a (speculative and) merely subjective conviction prevails.³² This conviction is therefore not sufficient to rule out timeliness, as the suspicion is not based on an objective result of the investigation (infringement of objectivity).³³ The suspect should namely not be the victim of an "out-of-process" investigation, which cannot be reconciled with the principles of the Austrian criminal procedure (Sections 2 f. of the Code of Criminal Procedure). The axiom of suspicion is therefore its empirical-objective foundation and, as it were, its rational verifiability. For the investigating authority, the suspicion of crime must arise from the investigation without doubt. The acid test is whether an objective, reasonable investigator would have additionally explored the truth in another direction of suspicion in the specific situation.

In the case of an infringement of the exploration of truthfulness by the authority,

that is, in the mere acquisition of a (speculative and) subjective conviction, this one-sided result must be compared with a hypothetical, objectively determined material collection substratum – just like the investigation procedure *lege artis* should have been carried out. This hypothetical material collection substratum must also be able to dispel with practical certainty the existing, non-objectively determined suspicion (= relevance of results) – which can only apply in extreme cases of arbitrary (Art. 7 (1) of the Federal Constitutional Act in conjunction with Art. 2 of the Basic Law on the General Rights of Nationals [StGG]) and one-sided investigation. Therefore, if the suspicion is not as crystal-clear in the course of a properly conducted investigation as in the case of disregarding other potential offenders, one cannot speak of an objective finding (which must serve as the basis of suspicion).

The interpretation of the timeliness presented here is consistent with the legitimating purposes of Section 167 of the Austrian Criminal Code, as it leaves the possibility of active repentance open to the perpetrator, thereby also giving the victim a better chance of effective and uncomplicated compensation.

However, it is debatable how “intensively” this objective suspicion must be developed. Section 167 of the Austrian Criminal Code does not set a standard, therefore, the concept of culpability must be reintroduced again with the understanding of suspicion defined in the Code of Criminal Procedure within the framework of a systematic overall view.

In the first place, this could mean an initial suspicion (in the sense of Section 1 (3) of the Code of Criminal Procedure). In the initial phase of the process, however, there is simply a vague suspicion³⁴ which cannot properly suffice for active repentance

according to the prevailing view.³⁵ Such a suspicious interpretation seems too narrow in view of the victimologically oriented *ratio legis*,³⁶ since the perpetrator is given the incentive for, and the victim the chance of, fast or uncomplicated satisfaction. An investigation merely on the basis of an initial suspicion (in the sense of Section 1 (3) of the Code of Criminal Procedure) and one against a mere suspect (Section 48 (1) of the Code of Criminal Procedure) cannot rule out timeliness.

Correctly, one will have to assign the specific suspicious situation, which reveals a specific condensed connection between perpetrator and the deed according to time, place, object and *modus operandi*³⁷ and at the same time – above all from the point of view of a criminal procedure – acts as a material distinction between the accused and (mere) suspects.³⁸ The suspicion can only be assessed in a systematic way like in Section 170 of the Code of Criminal Procedure.³⁹ In any case, a specific suspicious situation exists when there are indications (= distinct signs) that suffice for an objective, reasonable observer to hold the said person (specifically) suspect⁴⁰ – or to put it another way, as the perpetrator.⁴¹ The specific suspicious situation can result from official investigations or from a report from the victim or a third party.⁴² If further sole offenders – not accomplices – are questioned, there is no specific suspicion.⁴³ A simple probability is sufficient for the analysis of suspicion.⁴⁴

1.3 Analysis of suspicion

The suspicion must therefore be derived from the fact that a specific person has committed the crime known to the authority. However, the meaning of “learn of culpability” is debatable. Since an authority as part of the state organisation cannot learn anything and thus cannot grasp the information intellectually, it can only mean the

reception of the information giving rise to suspicion at the authority's sphere of influence.⁴⁵ This view seems too general for us, as it can only apply in cases where the suspicious circumstance is obtained unequivocally and in an almost intrusive manner from the information received (whether in video format, or as a document, etc). In all other cases, on the other hand, timeliness would exist until the evaluation of the information, and therefore, active repentance would (still) be possible for the perpetrator pursuant to Section 167 of the Austrian Criminal Code.⁴⁶

2. LACK OF COERCION (“VOLUNTARINESS”)

Pursuant to Section 167 (2) of the Austrian Criminal Code, the perpetrator is entitled to exemption, “if he, [...], even if forced by the injured party, yet without being compelled to do so”, undertakes to remedy the situation. The “voluntariness” is therefore interpreted differently and more generously than in the case of rescission from the attempt (Section 16 of the Austrian Criminal Code). According to case law⁴⁷, this involves a certain asymmetry with regard to the possibilities to return to compliance in itself.

Prima vista, the perpetrator cannot be compelled to repentant behaviour pursuant to Section 167 of the Austrian Criminal Code. The “voluntariness” is therefore to be interpreted in the case of active repentance by the adoption of norm-specific teleological aspects.⁴⁸ The doctrines for rescission from the attempt⁴⁹ are not easily transferable due to the differently supported legal foundation.⁵⁰ The legislator did not use the word “voluntarily” in Section 167 of the Austrian Criminal Code; instead, it used the expression “without being compelled to do so”. This systematic distinction in wording suggests unequal treatment of the requirements of voluntariness in both

norms.⁵¹ The generous conception of active repentance also reflects the protection of the victims' interests, which explains the generous regulation of voluntariness.⁵²

Therefore, it is only appropriate to assess the requirement of voluntariness of Section 167 in the Austrian Criminal Code autonomously from Section 16 of the Austrian Criminal Code. More precisely, the phrase “lack of coercion” should be used instead of the term “voluntariness” in order to prevent errors.⁵³ If the perpetrator only performs active repentance in order to avoid a report or prosecution, this does not exclude the attribute of voluntariness.⁵⁴

In any event, the “voluntariness” is excluded if the compensation is taken from the perpetrator by means of physical coercion, whether by the victim or a security organisation.⁵⁵ This originates from the following logic: an item violently removed from the perpetrator cannot be recorded as an act of voluntariness on the part of the perpetrator. The quoted expression of the legislative language also functions as corrective if the damage compensation has become almost unavoidable – in a hopeless situation – from the point of view of the perpetrator.⁵⁶ In this case, the perpetrator is only anticipating the physical coercion. The concept of coercion in Section 167 of the Austrian Criminal Code is therefore regarded as physical coercion.⁵⁷ In such a situation, the perpetrator is (hopelessly) “forced” into repentance. In any event, the (subjective) assessment of the perpetrator is decisive.⁵⁸

In summary, the repentant behaviour is compelled if the perpetrator assumes that if he does not surrender the spoils himself, they will be immediately and forcefully taken away from him anyway.⁵⁹ In these situations, he has been deprived of his autonomous decision, since he – no matter how he behaves – will always end up without

the spoils. If, consequently, the perpetrator could easily refuse to compensate the damage or simply refrain from doing so, voluntariness exists a contrario.⁶⁰ As the law already clarifies, the urging of the injured party does not impact active repentance.

3. FORMS OF ACTIVE REPENTANCE

Active repentance can be committed by compensating for damages, by a contractual obligation to compensate for damages or by voluntary declaration and payment. Para. 4 leg. cit. provides the possibility of a “putative repentance” to the perpetrator.

3.1. Damage compensation (Para. 2 item 1 leg. cit.)

The perpetrator “is granted active repentance if he compensates all the damages caused by his act”. He must therefore compensate for all the damage resulting from his act through the restitution of the goods or through (monetary) replacement.⁶¹ The compensation method is based on the individual case⁶² of the respective crime and is not at the discretion of the perpetrator.⁶³ He must return the victim to the state before the crime pursuant to the nature and extent of Section 1323 of the Austrian Civil Code.⁶⁴ In this case, proceeding from an objective, abstract calculation of the damage, normally only direct damage is to be compensated.⁶⁵ Full compliance in the sense of Section 1324 of the Austrian Civil Code is not required by Section 167 of the Austrian Criminal Code.⁶⁶ As a general rule, consequential damages are not to be compensated.⁶⁷ However, it is very important to take into account any reduction in the value of the object when compensating for the damage, e.g. if the item was damaged by the crime.⁶⁸

The perpetrator can also undertake the damage compensation anonymously or without the cooperation of the victim,

by for example sending the item back by post.⁶⁹ However, it should be noted here that the perpetrator bears the risk of providing damage reparations.⁷⁰ The fact that the victim refuses damage reparations does not preclude immunity from prosecution if the perpetrator provides compensation (at any time) for the victim or deposits it with the authority.⁷¹

3.2 Obligation to compensate for damages (para. 2 item 2 leg. cit.)

Likewise, the perpetrator is granted active repentance if he “is contractually required to compensate for the damage to the injured party within a certain time”. This consensual reimbursement of damages between perpetrator and victim suffices – at least for temporary immunity from prosecution –, as long as the perpetrator adheres to it.⁷² In the case of non-compliance, punishability resumes in accordance with the last sentence of Section 167 (2) 2 of the Austrian Criminal Code. This non-compliance is therefore the resolute condition (dissolving condition) regarding the suspension of punishment. The perpetrator is therefore subject to performance risk, whereby it is not due to his own fault.⁷³

The contract for the reimbursement of damages can be concluded either verbally or in writing. *Essentialia negotii* shall be the numerical name of the entire damage to be remedied and the corresponding calendar period.⁷⁴ The contractually defined payment must correspond to the full amount of the damage.⁷⁵ If the actual damage exceeds that agreed in the contract, active repentance is categorically excluded. It is therefore advisable from the point of view of the perpetrator to pay more in order to minimise the risk of the resurgence of punishability.

3.3 Payment in the case of voluntary declaration (Para. 3 leg. cit.)

The perpetrator will also gain immunity from prosecution if he compensates for “the entire damage resulting from his crime by means of a voluntary declaration, which discloses his culpability to the authority (Section 151 (3)), and by payment to this authority”. The authority may also not have been aware of the culpability until the voluntary declaration according to para. 3 leg. cit. The voluntary declaration must reveal the culpability to the authority, i.e. to bring new insights.⁷⁶ The phrase “in the course of a voluntary declaration” presupposes a temporal and manipulative connection between voluntary declaration and payment.⁷⁷

Payment is not to be understood in such a way that the perpetrator must physically surrender the item immediately in the case of a voluntary declaration, or, in the truest sense of the word, lay it on the table. On the contrary, an effective payment is enough here, i.e. if the perpetrator ensures the immediate receipt of the item to the injured party.⁷⁸

3.4 Damage compensation by a third party (Para. 4 leg. cit.)

In addition, the seriously committed perpetrator can benefit from the immunity from prosecution if a “third party or another person participating in the crime (Section 12 of the Austrian Criminal Code) compensates for the resulting damage in his name pursuant to the conditions set out in para. 2”.

4. SUMMARY AND OUTLOOK

In conclusion, it should be noted that the legal institution of active repentance has its justification in the Austrian legal system. Through the meeting of the interests of the victim on the one hand, and the accused on the other, it is therefore in keeping with the notion that the state should take a step back with its prosecution requirement and enable the “stakeholders” to wipe the slate clean “themselves”.

It is internationally recognised as a cornerstone of Austrian legal tradition and has the potential to be the impetus in other European countries (currently in Germany) for reforms desirable from the point of view of the victim.⁷⁹

De lege ferenda, extending active repentance at least to Section 136 of the Austrian Criminal Code (unauthorised use of vehicles) is also to be considered in Austria, since it is, de lege lata, contrary to the system if a car thief can become exempt through active repentance (Section 127 Austrian Criminal Code), but at the same time the temporary (car) thief who has made unauthorised use of a motorised vehicle is punished despite repentance for his behaviour.⁸⁰ In the same sense, it should be considered on a legal and political level to make a wider repentance regulation available with regards for crimes related to the protection of non-cash means of payment (Sections 241a ff. of the Austrian Criminal Code), which have a certain proximity to property crime, since it can lead to unfair results in certain constellations – in comparison to repentance possibilities for property crime.⁸¹

- ¹ Liebscher in *WK-StGB* § 167 Rz 1; Kienapfel, *BT*³ § 167 Rz 1; Burgstaller in *FS-Platzgummer* 97.
- ² Kienapfel, *BT*³ § 167 Rz 1.
- ³ Tschulik, *ÖJZ* (1973) 653; Fuchs/Reindl-Krauskopf, *BT I*⁵ § 167 281; Lewisch, *BT I*⁵ § 167 294; Kirchbacher in *WK-StGB*² § 167 Rz 1; Rainer in *SbgK* § 167 Rz 2; Kienapfel, *BT*³ § 167 Rz 9; Müller-Dietz, *ÖJZ* (1977) 343; see also Finger, *Strafrecht I*³ 869 ff.; Jeschek/Weigend, *AT*⁵ 548.
- ⁴ Roxin, *AT I*⁴ § 23 Rz 4.
- ⁵ Cf. Medigovic/Reindl-Krauskopf, *AT II* 249.
- ⁶ See Kirchbacher in *WK-StGB*² § 167 Rz 128.
- ⁷ Kirchbacher in *WK-StGB*² § 167 Rz 2 and 4; Tschulik, *ÖJZ* (1973) 653; RS0110959; also: 11 Os 97/98; does not apply to attempts: see RS0090510; 12 Os 26/79; 11 Os 35/81; 13 Os 97/81; 12 Os 12/82.
- ⁸ Kienapfel, *BT*³ § 167 Rz 4; Schroll, *ÖJZ* (1985) 357 f.
- ⁹ Cf. § 167 StGB Burgstaller in *FS Platzgummer* 99, 100 und 102; Müller-Dietz, *ÖJZ* (1977) 351; cf. RS0095166; for (similarly recorded) rescissions in German professional literature (§ 24 dStGB), see also: Lilie/Albrecht in *LK*¹² § 24 Rz 20; Herzberg/Hoffmann-Holland in *MK*² § 24 Rz 32 ff.
- ¹⁰ Cf. Rücktritt vom Versuch Tipold, Rücktritt 20 f. and 24; E. Steininger, *AT II Kap 20 Rz 85*; Fuchs, *AT*⁸ Kap 31 Rz 7; Schroll, *ÖJZ* (1985) 358; as well as BGHSt 9, 48, 52; Roxin, *AT II* § 30 Rz 4; Rudolphi in *SK*⁸ § 24 Rz 4; Frister, *AT*⁵ § 24 Rz 2 f.; Lilie/Albrecht in *LK*¹² § 24 Rz 15; see also Frister, *AT*⁶ § 24 Rz 2 f.
- ¹¹ Cf. Rücktritt vom Versuch Jakobs, *AT*² Abschnitt 26 Rz 1.
- ¹² Schroll, *ÖJZ* (1985) 358.
- ¹³ Cf. Müller-Dietz, *ÖJZ* (1977) 343; Finger, *Strafrecht I*³ 871.
- ¹⁴ Cf. Rücktritt vom Versuch E. Steininger, *AT II Kap 20 Rz 85*; Lilie/Albrecht in *LK*¹² § 24 Rz 15.
- ¹⁵ Leukauf/Steininger, *StGB*³ § 167 Rz 2; Schroll, *ÖJZ* (1985) 358; Burgstaller in *FS-Platzgummer* 99 and 100 f. Cf. Rücktritt vom Versuch E. Steininger, *AT II Kap 20 Rz 85*; Triffterer, *AT*² Kap 15 Rz 50; Tipold, Rücktritt 20 f.; Baumann/Weber/Mitsch, *AT*¹¹ § 27 Rz 8; Roxin, *AT II* § 30 Rz 4; Rudolphi in *SK*⁸ § 24 Rz 4 mN; see also Gössel in *Maurach/Gössel/Zipf*, *AT*⁸ § 41 Rz 31; Lilie/Albrecht in *LK*¹² § 24 Rz 15, BGHSt 9, 48, 52.
- ¹⁶ Cf. Rücktritt vom Versuch Baumann/Weber/Mitsch, *AT*¹¹ § 27 Rz 8.
- ¹⁷ Schroll, *ÖJZ* (1985) 358; Burgstaller in *FS-Platzgummer* 100 ff.; Bertel/Schwaighofer/Venier, *BT*¹³ I § 167 Rz 1; Rainer in *SbgK* § 167 Rz 2.
- ¹⁸ See in detail: Burgstaller in *FS-Platzgummer* 102.
- ¹⁹ Sautner, *Opferinteressen* 297 ff.
- ²⁰ Sautner, *Viktimologie* 188; id., *Opferinteressen* 297 ff.; Sautner/Unterlerchner, *ÖJZ* (2014) 64; zur Gesamtheit aller Opfer; cf. *Wiener Zeitung* (2015).
- ²¹ Kilchling, *Opferinteressen* 349 f.; Sautner, *Viktimologie* 94 ff.; id., *Opferinteressen* 297 ff. and 203 f.
- ²² Moos, *ZStR* 1993 74; Rainer in *SbgK* § 167 Rz 2.
- ²³ Kirchbacher in *WK-StGB*² § 167 Rz 50.
- ²⁴ Kienapfel, *BT*³ § 167 Rz 31.
- ²⁵ Rainer in *SbgK* § 167 Rz 2; as well as Bugelnig in *Lagodny, Strafrechtsfreie Räume* 65.
- ²⁶ Bugelnig in *Lagodny, Strafrechtsfreie Räume* 64 f.; Müller-Dietz, *ÖJZ* (1977) 351.
- ²⁷ In this sense, Weigend in *LK*¹² Einl Rz 1; Hassemer/Neumann in *NK*⁴ Vor § 1 Rz 72; E. Steininger in *SbgK* § 1 Rz 143; Birklbauer/Jesionek, *AT II*⁶ 1.
- ²⁸ Leukauf/Steininger, *StGB*³ § 167 Rz 15 f.; 13 Os 10/08g.
- ²⁹ Kirchbacher in *WK-StGB*² § 167 Rz 35.
- ³⁰ Schmoller in *WK-StPO* § 3 Rz 17 ff.; Fabrizy, *StPO*¹² § 3 Rz 4.
- ³¹ Kirchbacher in *WK-StGB*² § 167 Rz 35.
- ³² Cf. 10 Os 98/80, 11 Os 203/82.
- ³³ For more details on the procedural aspects of objectivity in criminal proceedings: Schmoller in *WK-StPO* § 3 Rz 17 ff. and 84 ff.; Vogl in *WK-StPO* § 91 Rz 3.
- ³⁴ Seiler, *Strafprozessrecht*¹⁴ Rz 186.
- ³⁵ Rainer in *SbgK* § 167 Rz 28; Kirchbacher in *WK-StGB*² § 167 Rz 38; Kienapfel, *BT*³ § 167 Rz 50.
- ³⁶ Related: Rainer in *SbgK* § 167 Rz 28.
- ³⁷ Rainer in *SbgK* § 167 Rz 28; Leukauf/Steininger, *StGB*³ § 167 Rz 16; Kienapfel, *BT*³ § 167 Rz 50; Lewisch, *BT I*⁵ § 167 295 f.; Fuchs/Reindl-Krauskopf, *BT I*⁵ § 167 282 f.; further applicable: OGH 10 Os 98/80 = EvBl 1981/139.
- ³⁸ Markel in *WK-StPO* § 1 Rz 27.
- ³⁹ Fabrizy, *StGB*¹¹ § 167 Rz 9.
- ⁴⁰ Bertel/Venier, *StPO* § 48 Rz 1: zum Beschuldigtenbegriff; see also Bertel/Venier, *StPO* § 170 Rz 2; Fabrizy, *StPO*¹² § 170 Rz 2; Kirchbacher/Rami in *WK-StPO* § 170 Rz 5.
- ⁴¹ Leukauf/Steininger, *StGB*³ § 167 Rz 16; Liebscher in *WK-StGB* § 167 Rz 19.
- ⁴² Lewisch, *BT I*⁵ § 167 295.
- ⁴³ Bertel/Schwaighofer/Venier, *BT*¹³ I § 167 Rz 13.
- ⁴⁴ Kirchbacher/Rami in *WK-StPO* § 170 Rz 5.
- ⁴⁵ Cf. Kirchbacher in *WK-StGB*² § 167 Rz 32; Liebscher in *WK-StGB* § 167 Rz 19.
- ⁴⁶ Cf. Kirchbacher in *WK-StGB*² § 167 Rz 32.
- ⁴⁷ See also Moos, *ZStR* 1993 76; cf. Burgstaller in *FS-Platzgummer* 105; Kirchbacher in *WK-StGB*² § 167 Rz 43.
- ⁴⁸ Kienapfel, *BT*³ § 167 Rz 54.
- ⁴⁹ Cf. current opinion in E. Steininger, *AT II Kap 20 Rz 115 ff.*
- ⁵⁰ Burgstaller in *FS-Platzgummer* 105.
- ⁵¹ Cf. *ibid.*
- ⁵² Cf. *ibid.*

- ⁵³ See also Rainer in SbgK § 167 Rz 30.
- ⁵⁴ RS0095054; 12 Os 21/86; 12 Os 1/89.
- ⁵⁵ Rainer in SbgK § 167 Rz 31.
- ⁵⁶ Relevant: Lewisch, BT I² § 167 296 f.; as well as Fabrizy, StGB¹¹ § 167 Rz 8; Kirchbacher in WK-StGB² § 167 Rz 45; Rainer in SbgK § 167 Rz 31; case law: 12 Os 1/89 = SSt 60/6 = JBl 1989, 666; RS0095274: „Mit der Wendung, ohne hiezu gezwungen zu sein, stellt § 167 Abs 2 StGB nicht auf eine Willensbeeinflussung wegen drohender Anzeigeerstattung und strafgerichtlicher Verfolgung, sondern auf die Unvermeidbarkeit der Schadensgutmachung ab.“
- ⁵⁷ Burgstaller in FS-Platzgummer 108.
- ⁵⁸ Kirchbacher in WK-StGB² § 167 Rz 45.
- ⁵⁹ Bertel/Schwaighofer/Venier, BT¹³ I § 167 Rz 15; Kirchbacher in WK-StGB² § 167 Rz 46; Burgstaller in FS-Platzgummer 107.
- ⁶⁰ Fabrizy, StGB¹¹ § 167 Rz 8.
- ⁶¹ Kirchbacher in WK-StGB § 167 Rz 88; RS0095268; 14 Os 159/03.
- ⁶² Rainer in SbgK § 167 Rz 34.
- ⁶³ Kirchbacher in WK-StGB § 167 Rz 94.
- ⁶⁴ Leukauf/Steininger, StGB³ § 167 Rz 25; Rainer in SbgK § 167 Rz 14.
- ⁶⁵ Kirchbacher in WK-StGB § 167 Rz 51; Rainer in SbgK § 167 Rz 34; Fabrizy, StGB¹¹ § 167 Rz 10; cf. SSt 59/86 = EvBl 1989/71.
- ⁶⁶ Fabrizy, StGB¹¹ § 167 Rz 10; Kirchbacher in WK-StGB § 167 Rz 51; RS 0095116; 12 Os 102/88.
- ⁶⁷ Kirchbacher in WK-StGB § 167 Rz 54.
- ⁶⁸ Fabrizy, StGB¹¹ § 167 Rz 10; RS 0095355; 12 Os 102/88.
- ⁶⁹ Fuchs/Reindl-Krauskopf, BT I⁵ § 167 282.
- ⁷⁰ Kirchbacher in WK-StGB § 167 Rz 89.
- ⁷¹ Leukauf/Steininger, StGB³ § 167 Rz 27; Bertel/Schwaighofer/Venier, BT¹³ I § 167 Rz 11.
- ⁷² Kienapfel, BT³ § 167 Rz 39.
- ⁷³ Leukauf/Steininger, StGB³ § 167 Rz 47; Kienapfel, BT³ § 167 Rz 47; RS0103979; 11 Os 90/96.
- ⁷⁴ Rainer in SbgK § 167 Rz 41 f.; Leukauf/Steininger, StGB³ § 167 Rz 37 f.; Bertel/Schwaighofer/Venier, BT¹³ I § 167 Rz 19; Kienapfel, BT³ § 167 Rz 41 ff.
- ⁷⁵ Bertel/Schwaighofer/Venier, BT¹³ I § 167 Rz 20.
- ⁷⁶ Kienapfel, BT³ § 167 Rz 64; Rainer in SbgK § 167 Rz 50.
- ⁷⁷ Rainer in SbgK § 167 Rz 49.
- ⁷⁸ Kirchbacher in WK-StGB § 167 Rz 121; Kienapfel, BT³ § 167 Rz 65.
- ⁷⁹ Cf. Jahn/Ebner, *Tätige Reue: Fixpunkt einer Gesamtreform honorierungswürdigen Nachtatverhaltens im deutschen Vermögens und Wirtschaftsstrafrecht?* in Gierhake/Bockemühl/Müller/Walter, *Festschrift für Heintschel-Heinegg zum 70. Geburtstag* (2015) 221.
- ⁸⁰ Already for an analogous application: Bertel/Schwaighofer/Venier, BT¹³ I § 167 Rz 3. Otherwise, the conclusive prevailing view; above all Kirchbacher in WK-StGB² § 167 Rz 22; Stricker in SbgK § 136 Rz 121 f.; Rainer in SbgK § 167 Rz 8 and 12.
- ⁸¹ E.g. according to Bertel/Schwaighofer, BT II¹¹ § 241g Rz 2: *A steals B's bank card and goes shopping with it. On the following day, he gives to back to B and compensates for the damages. Active repentance based on Section 241g of the Austrian Criminal Code is not possible due to the use in legal exchange.*
- Source of information**
Baumann/Weber/Mitsch, *Strafrecht Allgemeiner Teil*¹¹ (2003).
Bertel/Schwaighofer, *Strafrecht Besonderer Teil II*¹² (2016).
Bertel/Schwaighofer/Venier, *Strafrecht Besonderer Teil I*¹³ (2015).
Bertel/Venier, *Strafprozessordnung* (2012).
Birklbauer/Jesioneck, *Strafrecht Allgemeiner Teil II*⁶ (2012).
Bockemühl/Gierhake/Müller/T. Walter (Eds.), *Festschrift für Bernd von Heintschel-Heinegg* (2015).
Burgstaller in Fuchs/Brandstetter (Eds.), *Festschrift für Winfried Platzgummer zum 65. Geburtstag* (1995) = Burgstaller in FS-Platzgummer.
E. Steininger, *Strafrecht Allgemeiner Teil II* (2012).
Fabrizy, *Strafgesetzbuch*¹¹ (2013).
Fabrizy, *Strafprozessordnung*¹² (2014).
Finger, *Strafrecht I*³ (1912).
Foregger/Nowakowski (Eds.), *Wiener Kommentar zum Strafgesetzbuch* (1979).
Frister, *Strafrecht Allgemeiner Teil*⁶ (2013).
Fuchs, *Strafrecht Allgemeiner Teil I*⁸ (2012).
Fuchs/Brandstetter (Eds.), *Festschrift für Winfried Platzgummer zum 65. Geburtstag* (1995).
Fuchs/Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung* (2002 ff.).
Fuchs/Reindl-Krauskopf, *Strafrecht Besonderer Teil I*⁵ (2015).
Hassemer/Neumann in Kindhäuser/Neumann/Paeffgen (Eds.), *Nomos Kommentar zum Strafgesetzbuch*⁴ (2013) § 1 StGB.
Herzberg/Hoffmann-Holland in Joecks/Miebach (Eds.), *Münchener Kommentar zum Strafgesetzbuch*² (2011) § 24 StGB.
Höpfel/Ratz (Eds.), *Wiener Kommentar zum Strafgesetzbuch*² (1999 ff.).
Jahn/Ebner, *Tätige Reue: Fixpunkt einer Gesamtreform honorierungswürdigen Nachtatverhaltens im deutschen Vermögens und Wirtschaftsstrafrecht?* in Gierhake/Bockemühl/Müller/Walter, *Festschrift für Heintschel-Heinegg zum 70. Geburtstag* (2015).
Jakobs, *Strafrecht Allgemeiner Teil*² (1991).
Jeschek/Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil*⁵ (1996).
Joecks/Miebach (Eds.), *Münchener Kom-*

- mentar zum Strafgesetzbuch² (2011).
- Kienapfel, *Strafrecht Besonderer Teil II*³ (1993).
- Kilchling, *Opferinteressen und Strafverfolgung*¹ (1995).
- Kindhäuser/Neumann/Paeffgen (Eds.), *Nomos Kommentar zum Strafgesetzbuch*⁴ (2013).
- Kirchbacher in Höpfel/Ratz (Eds.), *Wiener Kommentar zum Strafgesetzbuch*² (2013) § 167 StGB.
- Kirchbacher/Rami in Fuchs/Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung*¹ (2015) § 170 StPO.
- Lagodny (Ed.), *Strafrechtsfreie Räume* (2015).
- Laufhütte/Rissing-van Saan/Tiedemann (Eds.), *Leipziger Kommentar zum Strafgesetzbuch I*² (2006).
- Leukauf/Steininger, *Kommentar zum Strafgesetzbuch*³ (1992).
- Lewis, *Strafrecht Besonderer Teil I*² (1997).
- Liebscher in Foregger/Nowakowski (Eds.), *Wiener Kommentar zum Strafgesetzbuch*¹ (1979 ff) § 167 StGB.
- Lilie/Albrecht in Laufhütte/Rissing-van Saan/Tiedemann (Eds.), *Leipziger Kommentar zum Strafgesetzbuch I*² (2006) § 24 StGB.
- Markel in Fuchs/Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung*¹ (2015) § 1 StPO.
- Maurach/Gössel/Zipf (Eds.), *Strafrecht Allgemeiner Teil*⁸ (2014).
- Medigovic/Reindl-Krauskopf, *Strafrecht Allgemeiner Teil II* (2013).
- Moos, *Schweizer Zeitschrift für Strafrecht* 1993, 56.
- Müller-Dietz, *Österreichische Juristen-Zeitung* 1977, 343.
- Rainer in Triffterer/Rosbaud/Hinterhofer, *Salzburger Kommentar zum Strafgesetzbuch* (2003) § 167 StGB.
- Roxin, *Strafrecht Allgemeiner Teil II* (2003).
- Roxin, *Strafrecht Allgemeiner Teil I*⁴ (2006).
- Rudolphi/Wolter (Eds.), *Systematischer Kommentar zum Strafgesetzbuch*⁸.
- Rudolphi in Rudolphi/Wolter (Eds.), *Systematischer Kommentar zum Strafgesetzbuch*⁸ § 24 StGB.
- Sautner, *Opferinteressen und Strafrechtstheorien* (2010).
- Sautner, *Viktimologie*¹ (2014).
- Sautner/Unterlerchner, *Österreichische Juristen-Zeitung* 2014, 63.
- Schmoller in Fuchs/Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung*¹ (2012) § 3 StPO.
- Schroll, *Österreichische Juristen-Zeitung* 1985, 357.
- Seiler, *Strafprozessrecht*¹⁴ (2015).
- Stricker in Triffterer/Rosbaud/Hinterhofer, *Salzburger Kommentar zum Strafgesetzbuch* (2015) § 136 StGB.
- Tipold, *Rücktritt und Reue* (2002).
- Triffterer, *Strafrecht Allgemeiner Teil*² (1994).
- Triffterer/Rosbaud/Hinterhofer, *Salzburger Kommentar zum Strafgesetzbuch* (1992 ff.).
- Tschulik, *Österreichische Juristen-Zeitung* 1973, 653.
- Vogl in Fuchs/Ratz (Eds.), *Wiener Kommentar zur Strafprozessordnung*¹ (2015) § 91 StPO.
- Weigend in Laufhütte/Rissing-van Saan/Tiedemann (Eds.), *Leipziger Kommentar zum Strafgesetzbuch I*² (2006) Einleitung.
- Wiener Zeitung* (2015). *Strafverschärfung ist wenig hilfreich* (09.03.2015), Online: http://www.wienerzeitung.at/nachrichten/oesterreich/politik/739752_Strafverschaeerfung-ist-wenig-hilfreich.html (24.12.2015).