

## **FAFO additional questions (complicity: elements of the crime)**

### **German answers**

#### **Question six-one:**

According to the German legal system, *dolus eventualis* (c) is sufficient.

This implies that the offender has reflected on the possibility of realizing the result and must have been aware that the offence might materialize at the time of his action (cf. generally Bundesgerichtshof [German Federal High Court of Justice] MDR 1981, 630). If the offender did not consider that the offence might materialize, the requirements for *dolus eventualis* are not met. Similarly, the requirements are not met if the offender subjectively assumed at the time of the action that the result that was initially deemed possible would not be realized.

However, the requirements for *dolus eventualis* are met if the offender proceeded on the obvious assumption of a possible realization of the result and put up with the risk of the offence materializing. To put it simply: *Dolus eventualis* is met if the offender did not care if the offence materialized ("So what?"). If he hoped that the result of the action would not take place, the requirements for *dolus eventualis* are not met.

In principle, the German legal system does not provide for criminal sanctions against enterprises. It has already been explained that this circumstance is just slightly mitigated through the possibility of § 30 Ordnungswidrigkeitengesetz [German Administrative Offences Act]. Therefore victims always have to take criminal actions against the responsible individuals. They may, however, bring civil actions against the enterprise as such.

#### **Question six-two:**

According to the German legal system, psychological or moral aiding and abetting is sufficient for criminal liability (§ 27 StGB [Strafgesetzbuch, German Criminal Code]).

It is required, however, that the moral aiding and abetting has sufficiently reinforced the offender's decision to commit the offence (substantial contribution). The mere manifestation of consent and solidarity is not sufficient.

Aiding and abetting can also take place through omission. However, in these cases a legal obligation to act is required (cf. Bundesgerichtshof MDR 1985, 89). Such legal obligation only arises if the respective person is responsible for protecting a certain individual. This is particularly the case for the police and other government authorities. Moreover, this applies to close relatives responsible for protecting their family members.

If the offence has already been committed, aiding and abetting is no longer possible. This is because aiding and abetting is only liable to prosecution if it has an effect on the offence. If this is not the case, this only amounts to the attempt of aiding and abetting, which, however, may also be prosecuted.

**Question six-three:**

Criminal sanctions for complicity require that an offence has been committed. If this is not the case, criminal sanctions are limited to the prosecution of an attempt.

Pursuant to § 30 StGB, a person is criminally liable if he or she attempts to induce another person to commit or incite the commission of a felony. This implies that the offence incited by a person must be a felony and thus a particularly serious offence. A crime is an offence that is punished with imprisonment of at least one year (§ 12 StGB). If the minimum penalty is less than one year of imprisonment, this only amounts to misdemeanour. Attempted incitement to a misdemeanour is exempt from punishment.

It is not necessary for the inciter to be charged together with the actual offence. The proceedings may also be conducted separately. However, the same criminal sanctions apply to both the inciter and the actual offender. Consequently, the inciter who incited a consummated offence is subject to the same criminal sanctions as the offender (§ 26 StGB).

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