

Criminal aspects of Privacy

TOPICS

- ▶ Why criminal law?
- ▶ Crime characteristics
- ▶ Sanctions
- ▶ Course of criminal proceedings
- ▶ „Cyber-delicts“
- ▶ Violation of honour
- ▶ Tutorial/Questions

LEARNING GOALS

- ▶ Know the deadline of **90 days** for application offences!
- ▶ Know the course of criminal proceedings.
- ▶ Know „practitioners tips“.

ABOUT PUNISHMENT/SANCTIONS

*„The punishment is a sanction against a certain behaviour, which is usually qualified as an injustice or (in the concrete situation) as inappropriate by the **educator, state or superior**. The concept of punishment is dealt with especially in the field of law, but also in theology, philosophy, psychology and especially in educational science.*



In learning theory, sanction or punishment is used in two forms, as positive and negative punishment, and simply refers to the opposite of reinforcement. Here positive sanctions means that a certain behaviour as contingency is followed by an unpleasant stimulus (e.g. social pressure) and negative sanctions means that a certain behaviour as contingency is followed by an unpleasant stimulus (e.g. food, reward) being prevented or denied or taken away.”

(Wikipedia)

Evidenz based criminology: **Does harsh punishment have the effect of reducing crime?** [LINK] [[LINK](#)]

WHERE WE CAME FROM... WHY CRIMINAL LAW? (1)

► In early societies:

lex talionis: „eye-for-an-eye“ - then we're „quitt“ (even) again. But this principle has a strong tendency to escalate („blood revenge“ - never ending conflicts among families, tribes etc.). To limit that, the authorities (king, prince etc.) monopolised the right to punish. They installed courts and judges. Enforcing the "right" independently became illegal.

Based on the lex talionis principle, there was also the now incomprehensible practice of „animal trials“. Animals that had harmed people or behaved incorrectly were brought before a judge and punished. Sometimes even with death.

► Since Age of Enlightenment (17th - 19th-century):

The aim of criminal sanctions are, among other things (theory of revenge, atonement etc.) deterrence (Abschreckung = „**general prevention**“) and individual improvement („**special prevention**“). The latter is the reason why children and adolescents are treated differently (juvenile criminal law).

► Today: **Monopole** of public power as a stabilising, cultural achievement. **But only if** the monopole is **democratically legitimated** and **procedures and sanctions** are predictable & legally controllable (appealable)! Strict (democratic) principle of "**nulla poena sine lege**"! (No crime & punishment without law!).



WHERE WE CAME FROM... WHY CRIMINAL LAW? (2)

WHY GUILT?

With the Enlightenment came the central idea of the „**free man**“ with a „**free will**“. People were no longer dependent on God, the church or the state (or „Lehnherr“). However, those who are able to act rationally and freely **can also be held responsible for their actions!**

Philosophical representatives of this period:

- ▶ **Immanuel Kant** (1724-1804): argued that freedom is the 'prerequisite of morality'. Without freedom, no responsibility can be attributed ('You can, because you should').
- ▶ **Christian Wolff** (1679-1754): understood man as an 'actus liber' - as a free subject in his actions.
- ▶ **Cesare Beccaria** (*Dei delitti e delle pene*, 1764): laid the foundations of modern criminal law by calling for punishments to be based solely on freely made decisions, not on social origin or divine order.

BUT - is there really a free will??

- ▶ Brain research (and criminology) shows us: Mostly not! „Mean offenders“ had been often already victims in their childhood. Thus they get punished a second time. Read: Gerhard ROTH: „Über den Menschen“ (On Humanity). -> Neurodeterminisme
- ▶ The public mainstream actually want „security“ and „consequences“. But strict punishment is not successful: USA has about 541 prisoners/100k inhabitants and executes the death sentences (1999: 98 / 2024: 25 / 2025 until today: 15). Europe has ca. 100 prisoners/100k inhabitants (CH ca. 77) and no executions. Is living here less secure?
- ▶ Would be mediation between offender and victim not success-fuller? Special young offenders gets confronted with their crimes. Part of the „Restorative Justice“.
- ▶ Important impulses from the former german prison director Thomas Galli - „Locked away - Why prisons are of no use to anyone“
- ▶ **Actually no signs of real development of the sanction-system.** Actual principle is called „Compatibilism“: Even if processes are causally determined, responsibility can exist if the will corresponds to the personality.

About „fairness” in sentences

- ▶ Our western penal-system is based on the „Guilt”. In other words how you could behave different in a specific situation - but didn't. Example: I'm taking your jacket by mistake vs. I'm taking your jacket on purpose.
- ▶ Therefore it would be unfair not to consider the personal behaviour in each case:
„Relevant factors are... criminal record, socialisation biography and work behaviour, the existence of social ties, indications of risk of addiction - up to the time of the decision to be included” (BGE 134 IV 1).

FOR THE CRIMINAL LIABILITY THERE ARE ALWAYS (CUMULATIVELY) TO CHECK ...

1. Human action

2. Threatened with penalty/sanction (**legal base**)

3. The constituent elements of the offence (**objective/subjective**)

- are in the legal base stated objective elements of the facts fulfilled?
- Had been the acting intentional/eventual intentional/negligent (gross or slight negligence)?

4. **Unlawful** (mostly given upon pt. 2 & 3. Exceptions: self-defence or emergency)

5. **Criminal liable** (exception: incapacitated/reduced capacity for criminal liability/culpability)



EXAMPLE

- ▶ Noah had a good evening with some friends (and some alcohol...). While he was walking home he saw a private unlocked e-scooter. Thus he took the e-scooter and drove home. There he parked the e-scooter in front of his house.

Some days later his girlfriend saw the e-scooter and wasn't not at all amused that he had to confess that he had „borrowed“ the e-scooter. Due to a tracker on the e-scooter the other day the police asked about him.

SANKTIONS

Punishments:

- **Imprisonment** (offense \leq 3 years / crime \geq 3 years)
- **Daily allowance („Geldstrafe“) & Fines („Busse“)**
- **Charitable work**

Measures:

- **Therapeutic measure** (stationary/ambulatory)
- **Custody** (lifelong)
- **Others** (professional ban/driving ban/confiscation etc.)

PUNISHMENTS

- ▶ **Sentences:** 3 days to 20 years, in some cases life-long
- ▶ **Daily allowance:** 1 daily rate up to 360 daily rates (daily rate upon income and assets)
- ▶ **Fines:** in principle up to CHF 10'000, but also higher if stated by law
- ▶ **Non-profit work:** up to 720 hours

- ▶ A **conditional punishment** can be combined with an **unconditional punishment!** (e.g. conditional Daily Allowance with an unconditional Fine)
- ▶ Several offences (e.g. "burglary" = trespassing and theft) have an aggravating effect (increased penalty, but not adding up the individual penalties for trespassing plus theft!)
- ▶ Note: Reduction of penalty/increase of penalty ≠ Penalty aggravation!

COURSE OF CRIMINAL PROCEEDINGS

- ▶ First: the course of criminal proceedings is (mainly) ruled in the **StGB**, the **StPO** and **cantonal police law**.
- ▶ The police or the **Public Prosecutor** (StA) becomes active.
- ▶ Lead in the investigation has the **Public Prosecutor**. He has the right to delegate the investigation to the police.
- ▶ The Public Prosecutor has (would have...) the **task of investigating incriminating & exonerating aspects** (in case of doubt, however, he will accuse!).
- ▶ The Public Prosecutor decides whether the case is to be referred to criminal court for evaluation or not.
- ▶ The Public Prosecutor has criminal competence in "simple" cases (**finances, allowances up to 180 daily rates, community service of 720h or imprisonment of max. 6 months**). It issues a penal order for this purpose. **Objection within (only) 10 days**.
- ▶ **90%** of all criminal cases are sentenced by the Public Prosecutor. Efficient but what about democratic control? Research showed 2018 that many sentences had severe legal/procedural faults. [[LINK](#)]

CRIMINAL RECORD (StGB & VOSTRA)

- ▶ Registration: Convictions and/or measures by civil & military criminal authorities for crimes (≥ 3 years) or misdemeanours (3 days ≥ 3 years). Violations only if more than **5'000.-- fine or 180 h of community service**. Prohibition of activity or contact and district prohibition. **Pending criminal proceedings** for crimes or misdemeanours.
- ▶ Cancellation: after 20 years if imprisonment ≥ 5 years. 15 years in case of imprisonment ≤ 5 years. 10 years in case of imprisonment ≤ 1 year. Conditional imprisonment, fine or allowance: 10 years.
- ▶ Private extract: A judgment containing a penalty will no longer be included in the private extract if 2/3 of the period relevant for removal under Article 369 paragraphs 1-5 and 6 of the Penal Code has expired.
A judgment containing a conditional or partial sentence no longer appears in the extract from the criminal record if the convicted person has proved his or her worth by the end of the probationary period.



TYPICAL „CYBER CRIMES” (StGB)

- ▶ Unauthorized data procurement (Unbefugte Datenbeschaffung - 143 StGB)
- ▶ Unauthorized intrusion into data processing systems (Unbefugtes Eindringen in Datenverarbeitungssystem - 143bis StGB)
- ▶ Data corruption (Datenbeschädigung - Art. 144bis StGB)
- ▶ Fraudulent abuse of a data processing system (Betrügerischer Missbrauch einer Datenverarbeitungsanlage - Art. 147 StGB)
- ▶ Production and marketing of materials for the unauthorised decoding of coded offers (Herstellen und Inverkehrbringen von Materialien zur unbefugten Entschlüsselung codierter Angebote - Art. 150Bis StGB)
- ▶ Violation of manufacturing or trade secret (Verletzung des Fabrikations- oder Geschäftsgeheimnisses - Art. 162 StGB)
- ▶ Violations of honour (Ehrverletzungen - 173 ff StGB)
- ▶ Violation of the secrecy of correspondence (Verletzung des Schriftgeheimnisses - 179 StGB)
- ▶ Unbefugtes Beschaffen von Personendaten (179novies StGB)
- ▶ Pornography (197 StGB)
- ▶ Disturbance of establishments serving the general public (Störung von Betrieben, die der Allgemeinheit dienen - 239 StGB)
- ▶ Racial discrimination (Rassendiskriminierung - 261bis StGB)
- ▶ Economic Intelligence Service (Wirtschaftlicher Nachrichtendienst - 273 StGB)

TYPICAL „CYBER CRIMES” (non StGB)

- ▶ **Violation of Copy Right Law (URG)**
- ▶ **Violation of Unfair Competition Law (UWG)**
- ▶ **Violation of Trade Mark Law (MSchG)**
- ▶ Very seldom: Violation of Private Data Protection Law (Art. 60 ff DSGVO)
- ▶ Very seldom: Violation of GeBüV (Art. 325 StGB)

CURRENT FIGURES CYBER CRIME (1)

Digitale Kriminalität: Straftaten nach Modusgruppe

Schweiz Jahr 2024

	Total	davon mit einem Cybermodus ¹⁾	davon mit einem anderen Modus ²⁾
Total	121 465	59 034	62 431
Betrug (Art. 146)	34 392	27 508	6 884
Betrügerischer Missbrauch einer Datenverarbeitungsanlage (Art. 147)	19 702	10 859	8 843
Beschimpfung (Art. 177)	12 286	85	12 201
Drohung (Art. 180)	10 839	72	10 767
Identitätsmissbrauch (Art. 179decies)	7 209	5 045	2 164
Geldwäscherei (Art. 305bis)	5 758	5 075	683
Urkundenfälschung (Art. 251)	4 046	657	3 389
Unbefugte Datenbeschaffung (Art. 143)	3 434	2 822	612
Pornografie (Art. 197)	3 421	2 938	483
Nötigung (Art. 181)	2 902	52	2 850
Fälschung von Ausweisen (Art. 252)	2 409	25	2 384
Üble Nachrede (Art. 173)	1 722	247	1 475
Hehlerei (Art. 160)	1 687	42	1 645
Sexuelle Belästigungen (Art. 198)	1 613	8	1 605
Erpressung (Art. 156)	1 554	1 086	468
Unbefugtes Eindringen in ein Datenverarbeitungssystem (Art. 143bis)	1 462	1 179	283
Missbrauch einer Fernmeldeanlage (Art. 179septies)	1 422	51	1 371
Verleumdung (Art. 174)	1 343	133	1 210
Sexuelle Handlungen mit Kindern (Art. 187)	1 073	59	1 014
Verletzung des Geheim- oder Privatbereichs durch Aufnahmegeräte (Art. 179quater)	969	275	694
Datenbeschädigung (Art. 144bis)	723	601	122
Diskriminierung oder Aufruf zu Hass (Art. 261bis)	595	18	577
Störung von Betrieben, die der Allgemeinheit dienen (Art. 239)	316	0	316
Unbefugtes Beschaffen von Personendaten (Art. 179novies)	293	196	97
Verletzung Post-/Fernmeldegeheimnis (Art. 321ter)	161	0	161
Verletzung Amtsgeheimnis (Art. 320)	68	0	68
Verletzung des Fabrikations oder Geschäftsgeheimnisses (Art. 162)	33	0	33
Verletzung Berufsgeheimnis (Art. 321)	33	1	32
Berufsgeheimnis in der Forschung am Menschen (Art. 321bis)	0	0	0

1) Wenn für eine Straftat mehrere Cybermodi erfasst wurden, wurde bei dieser Auswertung nur der erste Modus berücksichtigt.

2) Zu dieser Kategorie gehören "Nicht-Cyber", unbekannte oder fehlende Tatvorgehen.

Stand der Datenbank: 14.02.2025

Quelle: BFS - Polizeiliche Kriminalstatistik (PKS)

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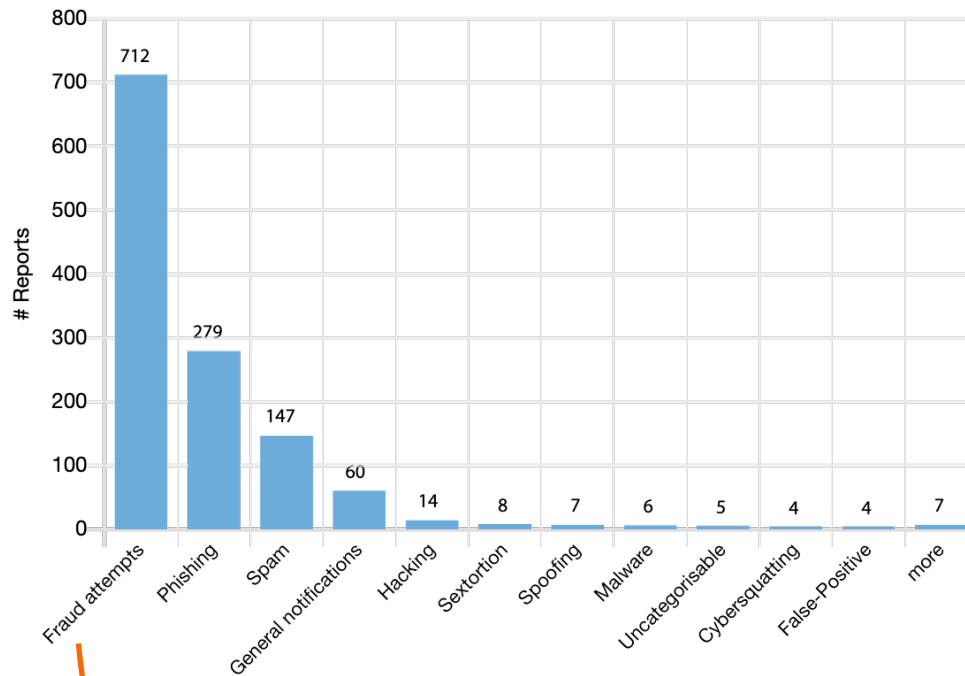
CURRENT FIGURES CYBER CRIME (2)

Digitale Kriminalität: Modi Operandi der digitalen Kriminalität und beschuldigte Personen Schweiz Jahr 2024

Modi operandi ¹⁾	Straftaten ²⁾	aufgeklärte Straftaten	Aufklärungsrate
Total digitale Kriminalität	59 034	10 962	18.6%
Cyber Wirtschaftskriminalität	55 413	7 869	14.2%
Cyberbetrug	42 505	5 802	13.7%
davon: Missbrauch von Online-Zahlungssyst./Wertkarten oder einer fremden Identität, um einen Betrug zu begehen	22 293	2 656	11.9%
davon: Kleinanzeigepattformen – Ware nicht geliefert	10 625	2 214	20.8%
Phishing	5 930	317	5.3%
Money/Package Mules	3 757	1 397	37.2%
davon: Online Anlagebetrug	2 974	196	6.6%
Cyber Sexualdelikte	2 922	2 694	92.2%
Verbotene Pornografie	2 705	2 541	93.9%
davon: Betrügerischer technischer Support	1 570	75	4.8%
Sextortion (money)	1 385	133	9.6%
Hacking: Eindringen in ein Datenverarbeitungssystem mit fremden Zugangsdaten	1 164	164	14.1%
davon: Betrügerische Internetshops	890	186	20.9%
davon: Anderer Internetbetrug	862	173	20.1%
Cyber Rufschädigung und unlauteres Verhalten	698	398	57.0%
davon: Falsche Immobilienanzeigen	657	47	7.2%
davon: Romance Scam	639	88	13.8%
Cyberbullying/Cybermobbing	586	364	62.1%
davon: Falsche Unterstützungsanfragen	571	29	5.1%
davon: CEO/BEC Betrug	504	25	5.0%
davon: Vorschussbetrug	472	44	9.3%
davon: Kleinanzeigepattformen – Ware nicht bezahlt	448	69	15.4%
Hacking: Gewalttätiges Eindringen in ein Datenverarbeitungssystem	186	18	9.7%
Malware – Ransomware	174	3	1.7%
Grooming	135	110	81.5%
Malware – Rogueware/Scareware	110	10	9.1%
Diebstahl von Kryptowährungen	95	12	12.6%
Sextortion (sex)	68	33	48.5%
Cybersquatting	58	5	8.6%
Cyber-Rufschädigung (Geschäftlich)	54	29	53.7%
Malware – E-Banking Trojaner	49	5	10.2%
DDoS	30	3	10.0%
Malware – Spyware	19	5	26.3%
Live Streaming	14	10	71.4%
Malware – Botnet	9	0	0.0%
Andere	1	1	100.0%
Data leaking	1	1	100.0%
Darknet	0	0	-
Illegal Handel im Darknet	0	0	-

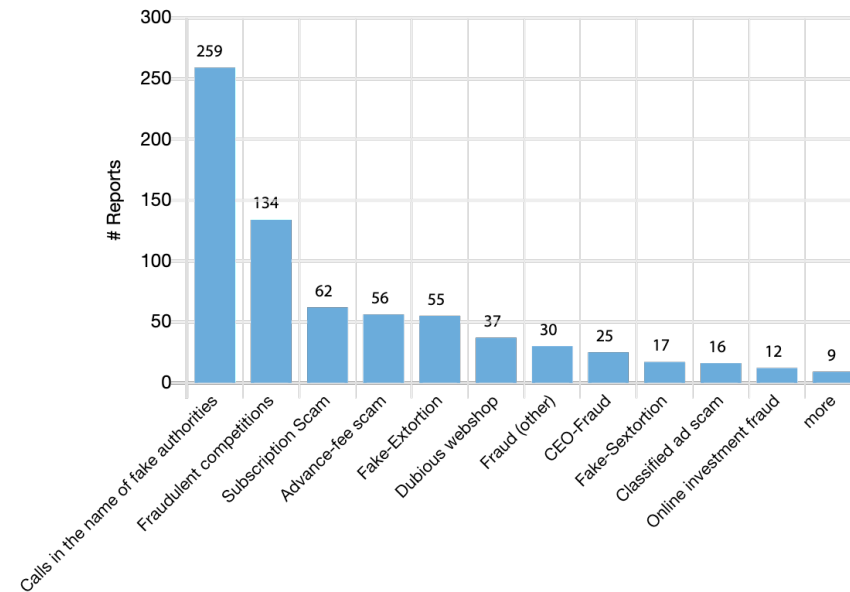
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Chart 2 - NCSC.ch: reports received by category:
Week 18/2025



Total 1253 reports in week 18/2025

Chart 3 - NCSC.ch: reports received by category:
Fraud attempts



712 reports in the category Fraud attempts in the Week 18/2025

ART. 143 StGB – UNBEFUGTE DATENBESCHAFFUNG („digital stealing“)

1 Wer in der Absicht, sich oder einen andern **unrechtmässig** zu **bereichern**, sich oder einem andern elektronisch oder in vergleichbarer Weise gespeicherte oder übermittelte Daten **beschafft, die nicht für ihn bestimmt** und gegen seinen **unbefugten Zugriff besonders gesichert sind**, wird mit Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe bestraft.

2 Die unbefugte Datenbeschaffung zum Nachteil eines Angehörigen oder Familiengenossen wird nur auf Antrag verfolgt.

ART. 143bis StGB – UNBEFUGTES EINDRINGEN IN EIN DATENVERARBEITUNGSSYSTEM (HACKING)

1 Wer auf dem Wege von Datenübertragungseinrichtungen unbefugterweise in ein fremdes, **gegen seinen Zugriff besonders gesichertes** Datenverarbeitungssystem eindringt, wird, auf Antrag, mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

2 Wer Passwörter, Programme oder andere Daten, von denen er weiss oder annehmen muss, dass sie zur Begehung einer strafbaren Handlung gemäss Absatz 1 verwendet werden sollen, in Verkehr bringt oder zugänglich macht, wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

ART. 144bis StGB – DATENBESCHÄDIGUNG

1. Wer unbefugt elektronisch oder in vergleichbarer Weise gespeicherte oder übermittelte Daten **verändert, löscht oder unbrauchbar macht**, wird, auf Antrag, mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

Hat der Täter einen grossen Schaden verursacht, so kann auf Freiheitsstrafe von einem Jahr bis zu fünf Jahren erkannt werden. Die Tat wird von Amtes wegen verfolgt.

2. Wer Programme, von denen er weiss oder annehmen muss, dass sie zu den in Ziffer 1 genannten Zwecken verwendet werden sollen, herstellt, einführt, in Verkehr bringt, anpreist, anbietet oder sonst wie zugänglich macht oder zu ihrer Herstellung Anleitung gibt, wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

Handelt der Täter gewerbsmässig, so kann auf Freiheitsstrafe von einem Jahr bis zu fünf Jahren erkannt werden.

ART. 147 StGB – BETRÜGERISCHER MISSBRAUCH EINER DATENVERARBEITUNGSANLAGE („COMPUTER-BETRUG“)

1 Wer in der Absicht, sich oder einen andern unrechtmässig zu bereichern, **durch unrichtige, unvollständige oder unbefugte Verwendung von Daten** oder in vergleichbarer Weise auf einen elektronischen oder vergleichbaren **Datenverarbeitungs- oder Datenübermittlungsvorgang einwirkt und dadurch eine Vermögensverschiebung zum Schaden eines andern herbeiführt oder eine Vermögensverschiebung unmittelbar darnach verdeckt**, wird mit Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe bestraft.


2 Handelt der Täter gewerbsmässig, so wird er mit Freiheitsstrafe bis zu zehn Jahren oder Geldstrafe nicht unter 90 Tagessätzen bestraft.

3 Der betrügerische Missbrauch einer Datenverarbeitungsanlage zum Nachteil eines Angehörigen oder Familiengenossen wird nur auf Antrag verfolgt.

EXAMPLES "COMPUTER FRAUD"

- ▶ Anton obtains cash at an ATM („Bankomat“) by unauthorised use of an EC-card previously stolen from Beat and an obtained (stolen, sneaked etc.) PIN code.
- ▶ "Phishing": The tapping of personal access elements (ID/passwords) through fake Internet sites, fake e-mails, etc.

„OFFENCE OF LIBEL“ (EHRVERLETZUNG) – ART. 173/174/177 StGB

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- ▶ **Insulting** (Art. 177 StGB, „Beschimpfungen“): Insulting is a criminal offence if someone is attacked in their honour in any other way – i.e. not through slander or defamation – by means of words, writing, images, gestures or physical violence.
 - ▶ **Slander** (Art. 173 StGB, „Üble Nachrede“): The purpose of this offence is to punish someone who towards third parties makes or disseminates defamatory statements about another person that are (intentionally) true (or unintentionally, i.e. falsely in good faith). However, the perpetrator can exonerate themselves and remain punishable if they succeed in providing so-called (exonerating evidence) exculpatory evidence (Condition: must be true & in public interest).
 - ▶ **Defamation** (Art. 174 StGB, „Verleumdung“): Defamation is slander against better knowledge. The perpetrator accuses or suspects a person in front of third parties of dishonourable behaviour or other defamatory facts that do not actually exist and are therefore untrue. The exonerating evidence is not possible.

FACEBOOK LIKENING CAN BE A CRIMINAL OFFENSE...

On FB, the animal rights activist Erwin Kessler and his „Verein gegen Tierfabriken" (VgT) had been called "anti-Semites", "fascists" and "racists". The defendant, who had libelled against such contributions, was punished in 2017 by the Zurich District Court in the first instance on the basis of these libel for multiple defamation (Art. 173 para. 1, paragraphs 1 and 2 of the Swiss Penal Code) at 60 daily rates of CHF 30 each. He was also ordered to pay the court costs of at least CHF 3'000. The trial compensation for the plaintiff was set at CHF 4'600. In addition, the convicted person must bear the costs of his defence (judgement GG160246 of 29 May 2017).

The Supreme Court of Zurich confirmed the sentence in August 2018, in February 2020 the Federal Supreme Court confirmed this sentence.

„PRACTITIONERS“-TIPS



- ▶ Don't wait in case of application offences - **deadline of 90 days!**
- ▶ Weighing up criminal charges vs. civil law suits well (**time/cost/subsequent consequences**)
- ▶ Do as much „technical investigation“ in favour of the Public Prosecutor! You have to explain him/her the case as exactly as possible! They (still) lack of computer forensics!
- ▶ Only „**Private plaintiffs**“ receive information from the investigation!
- ▶ What is once "unhappily" formulated in the interview protocols **can hardly be corrected!**
- ▶ As a rule, **cooperation is better than refusal to testify!** But as an accused person you do not have to incriminate yourself! You have the right to keep quiet.
- ▶ Prepare emergency plan "house search"! (Do you know where you have the information?)

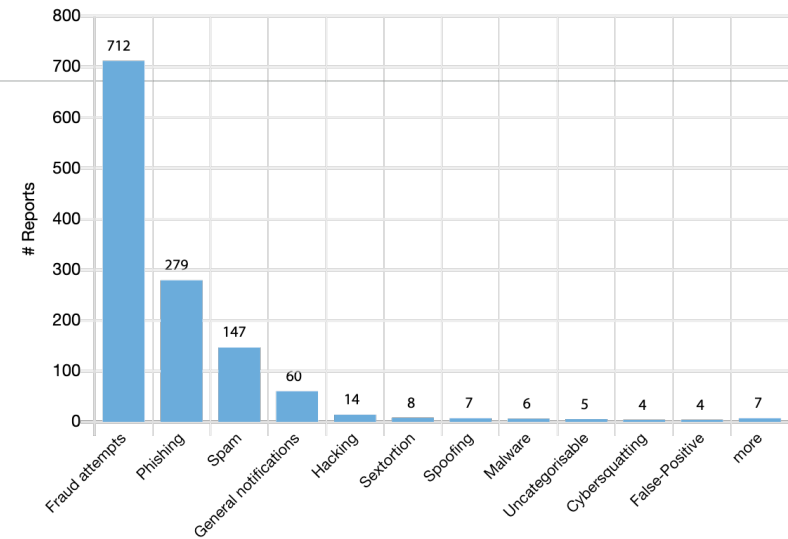
Bundesamt für Cybersecurity/BACS)

former NCSC (National Center for
Cybersecurity)

[ncsc.ch](https://www.ncsc.ch)

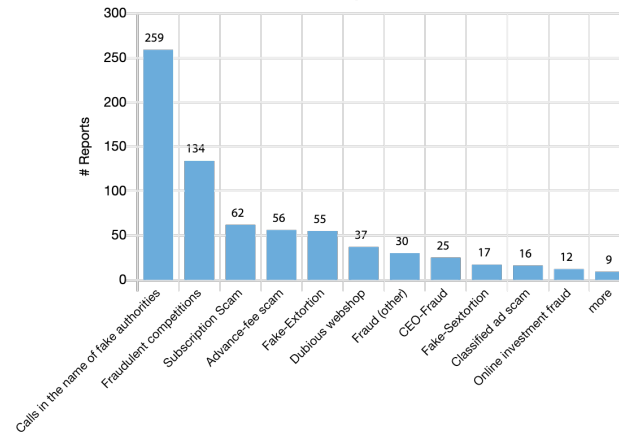
The National Cybersecurity Centre (NCSC/BACS) is the Swiss Confederation's competence centre for cybersecurity and thus the first contact point for businesses, public administrations, educational institutions and the general public for cyberissues.

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PUNISHABLE OR NOT? (1)

- ▶ The employee is repeatedly "chatted up" (offended) by her boss with stupid sayings. She decides to secretly record the conversations with her mobile phone.
- ▶ A customer refuses to pay your invoice. He writes you: if you do not waive the claim, I will publish „very unpleasant facts" about you and the company.
- ▶ Anita "borrows" her employer's credit card again and again and uses it to withdraw several 1'000 CHF privately from the ATM-machine. She had legally the code to make small office purchases.

PUNISHABLE OR NOT? (2)

- ▶ Your neighbour Beat is the accountant of the RICH AG. From him you have heard that the RICH AG will probably go bankrupt soon due to financial problems. In a "round mail" to several colleagues - all businessmen & -women doing business with the RICH AG - you warn them of the imminent bankruptcy.

In fact & truth the RICH AG is doing quite well financially.