Dominik Brodowski
Manuel Espinoza de los Monteros de la Parra
Klaus Tiedemann · Joachim Vogel *Editors*

Regulating Corporate Criminal Liability

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Dominik Brodowski • Manuel Espinoza de los Monteros de la Parra • Klaus Tiedemann • Joachim Vogel†
Editors

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Editors
Dominik Brodowski
Faculty of Law
LMU Munich
Munich
Germany

Manuel Espinoza de los Monteros de la Parra
ROXIN Rechtsanwälte LLP
Munich
Germany

Klaus Tiedemann
University of Fribourg
Freiburg
Germany

Joachim Vogel†
Faculty of Law
LMU Munich
Munich
Germany

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Preface

Dedication to our co-editor, Professor Dr. *Joachim Vogel*†
On 17 August 2013, a family of five lost its father in a tragic boating accident in Venice, Italy—and the world of criminal justice lost one of its brightest stars, *Joachim Vogel*. As a professor at the University of Munich and as a judge at the Oberlandesgericht Munich, he built bridges between academia and the judiciary; as an inspiring mentor and enthusiastic academic teacher, he bridged the gap between legal systems and between generations. Without him and without his dedication to regulatory aspects of corporate criminal justice, this book would never be.

Munich, Germany — Dominik Brodowski
Munich, Germany — Manuel Espinoza de los Monteros de la Parra
Freiburg, Germany — Klaus Tiedemann

Contents

List of Contributors

Gemma Aiolfi International Centre for Collective Action, Basel Institute on Governance, Basel, Switzerland

Devrim Aydın Faculty of Political Science, Ankara University, Ankara, Turkey

Patrick Bernau Frankfurter Allgemeine Zeitung, Frankfurt, Germany

Anna Błachnio-Parzych Institute of Law Studies, Polish Academy of Science, Warsaw, Poland

Axel-Dirk Blumenberg Roxin Rechtsanwälte LLP, Munich, Germany

Dominik Brodowski University of Munich, Munich, Germany

Moran Cerf Kellogg School of Management, Northwestern University, Chicago, IL, USA

Camilla Cravetto Department of Criminal Law and Criminal Business Law, Faculty of Law, University of Turin, Turin, Italy

Emmanuelle De Bock University of Antwerp, Antwerp, Belgium

Wendy De Bondt Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium

Manuel Espinoza de los Monteros de la Parra Roxin Alliance, Munich, Germany

Marc Engelhart Max Planck Institute for Foreign and International Criminal Law, Freiburg i. Br., Germany

Jordi Gimeno Beviá Universidad de Castilla-La Mancha, Toledo, Spain

Jacqueline Hellman Instituto de Empresa University, Madrid, Spain

Yurika Ishii National Defense Academy of Japan, Yokosuka, Japan

Stijn Lamberigts University of Luxembourg, Luxembourg, Luxembourg

William S. Laufer The Wharton School, University of Pennsylvania, Philadelphia, PA, USA

Andrea Lehner Department of Criminal Law and Criminology, Law School, University of Vienna, Vienna, Austria

Avital Mentovich Department of Psychology, University of California, Los Angeles, CA, USA

Ana María Neira Pena Department of Public Law (Procedural Law), University of A Coruña, A Coruña, Spain

Thomas Richter HammPartner, Frankfurt am Main, Germany

Eduardo Saad-Diniz Faculty of Law, University of São Paulo, Ribeirão Preto, Brazil

Anne Schneider Department of Criminal Law, Criminal Procedure and International and European Criminal Law, University of Bonn, Bonn, Germany

Klaus Tiedemann University of Freiburg, Freiburg, Germany

Aikaterini Tzouma University of Munich, Munich, Germany

Anna Salvina Valenzano Department of Law, Philosophy and Economic Studies (DiGEF), Sapienza University of Rome, Rome, Italy

Yasmin Van Damme Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium

Gert Vermeulen Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium; Maastricht University, Maastricht, The Netherlands

Lynn Verrydt Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium

Joachim Vogel[✠] University of Munich, Munich, Germany

Emanuele Zanalda Department of Criminal Law and Criminal Business Law, Doctoral School of Law and Social organizations, University of Turin, Turin, Italy

Regulating Corporate Criminal Liability: An Introduction

Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, and Klaus Tiedemann

Abstract Corporate criminal liability is on the rise worldwide: More and more criminal justice systems now include criminal sanctions against legal entities; other jurisdictions contemplate to introduce new legal provisions on this matter. The regulatory approaches taken are manifold—even in otherwise similar criminal justice systems. Therefore, many lessons can be learned by providing an international and comparative, topical outlook on the different paths and their implications to criminal justice, to the regulation of the corporate world, and to the economy in general. In this volume, specific emphasis is put on procedural questions relating to corporate criminal liability, on alternative sanctions such as blacklisting of corporations, on common corporate crimes and on questions of transnational and international criminal justice.

1 On the Need to Regulate Corporate Criminal Liability

Societas delinquere non potest is clearly on its way out. This principle consecrated by Pope Innocent IV originally aimed at preventing the papal excommunication of civil or business corporations, cities and legal entities for offenses committed by one of its members—but it is no longer a dogma in secularized and enlightened

D. Brodowski (✉)
Chair for Criminal Law, Criminal Procedure and Economic Crimes (Prof. Dr. Joachim Vogel), University of Munich, Munich, Germany
e-mail: law@dominikbrodowski.net

M. Espinoza de los Monteros de la Parra
Roxin Alliance, Munich, Germany
e-mail: espinoza@roxin.de

K. Tiedemann
University of Freiburg, Freiburg, Germany

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criminal justice, and it does not provide a constitutionally binding barrier[1] to corporate criminal liability.

The current, worldwide trend to corporate criminal liability has its origin in the common law countries, most notably in the US, where the Supreme Court stated in its 1886 decision in Santa Clara County v. Southern Railroad that a corporation can be treated like a natural person; 20 years later—in 1909—the Supreme Court, in its landmark decision on New York Central v. Hudson River Railroad Co., gave birth to the concept of "*societas delinquere potest*". Historically, the liability *ex crimine* of corporations may adequately be explained as a reaction to the increasing importance of legal entities, particularly in the economic field, which also lead to more and more delinquency originating in legal entities, or to more and more crimes committed for (financial) gains of legal entities. But why did it take over around hundred years until corporate criminal liability spread worldwide?[2]

One historic—but regionally limited—facet is that the Soviet Union and other socialist countries did not require implementing a criminal liability for legal entities, since all corporations were closely regulated by—or even belonged to—the state. Another explanation is that the US increasingly made use of corporate criminal liability against foreign corporations,[3] causing pressure in the home states of these corporations to introduce a better—and criminal—regulation of legal entities. Most importantly, though, the corporate world has changed dramatically over the past 30 years: In a globalized world, where corporations grow ever larger, operate world-wide, and make use of the differing regulatory frameworks not only to save taxes, but also to elude public regulation and even to commit corporate wrongdoings detriment to public interest, the need to regulate corporate behavior—also by the *ultima ratio* of criminal liability—becomes ever more pressing.[4] This is underlined by corporate scandals like Enron and WorldCom in the US or Parmalat and Siemens in Europe which served as a catalyst towards establishing or reforming corporate criminal liability.

This trend to corporate criminal liability can not only be seen at the national, but also at a supra- and international level. Numerous international instruments, standards and initiatives require or recommend a liability of corporations; legally binding instruments, though, so far only envisage that States Parties shall adopt the necessary measures to establish the liability of a legal person for the commission of offenses laid down in those instruments, but do not express a position whether the liability of legal persons should be administrative, civil or criminal in

[1] On (German) constitutional barriers on corporate criminal liability or the lack thereof, cf. Vogel (2012); see also Tiedemann (2013); Tiedemann, in this volume, pp. 11ff.; Vogel, in this volume, pp. 337ff.

[2] See also the criminal policy analysis by Vogel, in this volume, pp. 337ff.

[3] See also Ishii, in this volume, pp. 237ff.

[4] See also Laufer, in this volume, pp. 19ff.

nature, and thus leave this decision to the states.[5] Similarly, at the European level, there are a multitude of instruments calling for a direct responsibility of legal persons for crimes, but none of those do yet call, with binding force, for corporate criminal liability.[6]

Besides this legal and political reasoning, psychology has shown that there indeed is a strong relation between a "corrupt corporate culture" and to crimes such as corruption being committed by employees.[7] This may serve as empirical evidence for the need of actively shaping a compliant "corporate culture", which may be encouraged by the state by the threat of corporate criminal liability—and by the "carrot" of honoring effective compliance programs.[8] However, other empiric research has shown that punishment against corporations is lower than against individuals;[9] and economists warn that decision-making processes in (top) management may not be adequately influenced by a corporate liability, but only by an effective individual liability.[10] In our opinion, though, this does not speak against introducing corporate criminal liability. Instead, it should serve as a warning to consider corporate criminal liability as an addition to individual criminal liability, but not as a replacement.[11]

Like in the theory of evolution, in legal systems only the principles, rules and institutions that best adapt to new circumstances can survive in the long run. In these days, we see an evolution of the criminal justice systems, which began in the US and which is clearly influenced by European and international (soft) law, and which uses criminal liability of legal entities as a regulatory strategy to prevent and sanction offenses committed by corporations—and in this evolution, we are nowadays experiencing the end of the juridical dinosaur that *societas delinquere non potest*.

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[5] For example, the United Nations have addressed this matter of liability of legal entities in the International Convention for the Suppression of the Financing of Terrorism (Art. 5), in the Convention against Transnational Organized Crime (Art. 10) and, more interestingly, in the Convention against Corruption (Art. 26); for measures in the framework of the Organization for Economic Co-operation and Development (OECD), just see their Anti-Bribery Convention and the Recommendations of the Financial Action Task Force (FATF).

[6] For the Council of Europe, just see recommendations R. (77) 28, R. (81) 12, R. (82) 15 e R. (88) 18; for the European Union, the Second Protocol of the Convention on the protection of the European Communities' financial interests from 1997 may be seen as the starting point for its efforts to introduce and shape corporate liability. On European regulations on corporate criminal liability in general cf. Engelhart (2012); and also the overview by Engelhart, in this volume, pp. 53ff.

[7] See Campbell and Göritz (2013).

[8] On the procedural implications of compliance programs as a mitigating factor see Gimeno Beviá, in this volume, pp. 227ff.

[9] See Tyler and Mentovich (2011); Mentovich and Cerf, in this volume, pp. 33ff.

[10] See Bernau, in this volume, pp. 47ff.

[11] See also Richter, in this volume, pp. 321ff., on the relation between individual and corporate criminal liability in the new German Ringfencing Act.

2 Diverging Regulatory Approaches in Corporate Criminal Liability

At a national level, despite the clear tendency towards the introduction of criminal liability, there are notable differences in the way that states legislate this issue. There are considerable differences regarding the nature and the scope of the liability, the attribution criteria, the procedural aspects and the sanctions applicable to corporations.[12] While much speaks for considering corporate criminal liability as a third track to punishment of individuals and to incapacitation of individual offenders *de lege ferenda*,[13] the diverging current approaches in corporate criminal liability *de lege lata*—even in otherwise similar criminal justice systems—require scrutiny.

2.1 Attributing Corporate Crimes to Corporations and the Sanctioning of Corporations

In this volume, selected models in attributing criminal liability to corporations are highlighted[14] and underline the options at this fundamental bifurcation of regulating corporate criminal liability. Closely related to this question are, however, matters of substantive criminal law and of sanctioning. As to the first issue, certain crimes which are typically committed in a corporate context or to the profit or detriment of a corporation, such as corruption,[15] money laundering[16] and market manipulation,[17] but also labor exploitation[18] need to be highlighted and are thus addressed in this volume. Regarding the second issue of sanctioning, fines are only one of many answers,[19] and agreements, bargains or "deals" to introduce effective[20] compliance structures and to change out the board of directors may be both more punitive and more preventive than classical approaches of criminal sanctioning.

[12] Just see the overview by Engelhart, in this volume, pp. 53ff.

[13] See Tiedemann, in this volume, pp. 11ff.

[14] De Bock, in this volume, pp. 87ff.; Cravetto and Zanalda, in this volume, pp. 109ff.; Lehner, in this volume, pp. 79ff.; Salvina Valenzano, in this volume, pp. 95ff.

[15] See Aiolfi, in this volume, pp. 125ff.

[16] See Saad-Diniz, in this volume, pp. 135ff.

[17] See Blachnio-Parzych, in this volume, pp. 145ff.; Blumenberg, in this volume, pp. 159ff.

[18] See Van Damme and Vermeulen, in this volume, pp. 171ff.

[19] See De Bondt, in this volume, pp. 297ff.; Aydin, in this volume, pp. 311ff.

[20] See Gimeno Beviá, in this volume, pp. 227ff.

2.2 Corporate Criminal Procedure

Specific emphasis has to be put on matters of procedural aspects of corporate criminal liability, as procedural aspects—which are often predetermined by fundamental rights and constitutional law—shape how the substantive rules (the "law in the books") can actually be worked with in practice, and whether the approaches taken by the legislator in the field of attributing criminal liability to corporations are actually effective to the aim of regulating corporations. In this volume, it is shown that diverging constitutional, fundamental rights and criminal justice system frameworks may actually mean that corporate criminal liability is a tool to prosecution in one country, but an obstacle in another.[21] In addition, while the fundamental rights protections for corporations in criminal procedure may be lower from a constitutional and fundamental rights perspective, there are sound reasons to actually provide similar protections to corporations as compared to natural persons.[22]

2.3 Transnational and International Corporate Criminal Justice

Inasmuch as the classic theories of jurisdiction also apply—or can be made to apply—to corporate criminal liability,[23] conflicts of jurisdiction present a most pressing issue in corporate criminal justice, as it not only may lead to a multiplication of punishment whenever there is no *ne bis in idem* protection,[24] but also to multiple—and diverging—regulatory frameworks being applicable to the same corporations. Therefore, the extra-territorial enforcement of criminal justice, such as it is common practice by the United States, warrants a close look;[25] but it also calls for more harmonization in the field of criminal justice, which could start with a limited catalogue of common crimes typically committed in a corporate context. Some also consider that there is a need for a genuinely international enforcement of corporate criminal liability.[26]

[21] See Neira Pena, in this volume, pp. 197ff.

[22] See Brodowski, in this volume, pp. 211ff.; see also Neira Pena, in this volume, pp. 197ff.

[23] See Schneider, in this volume, pp. 249ff.

[24] On ne bis in idem in the context of the European Union see Tzouma, in this volume, pp. 261ff.

[25] See Ishii, in this volume, pp. 237ff.

[26] See Hellmann, in this volume, pp. 273ff.; Verrydt, in this volume, pp. 281ff.

3 Rethinking Corporate Criminal Justice

All this shows a need to re-think corporate criminal justice and to look far beyond the question of whether corporate criminal justice is in line with criminal law dogmatics:[27] A multi-faceted, topical approach is necessary to understand the challenges and choices of corporate criminal liability, and to understand the effectiveness of non-criminal and of criminal sanctions in a corporate context. Questions of psychology, economy and of regulatory theory must be taken into account; the existing theories of corporate criminal liability must be validated by empirical studies; and strong focus must be put on the procedural implications of corporate criminal justice, as they shape how the law in the books works in practice.[28] Within this large analytical scope, this volume can be nothing more than one building block;[29] it is our hope that it serves as one starting point for future interdisciplinary and international research on the regulation of corporate criminal liability.

4 On the Third Symposium for Young Penalists

This volume largely builds on contributions to the Third Symposium for Young Penalists of the International Association of Penal Law (IADP/AIDP),[30] hosted by the German national group of the AIDP[31] and by the University of Munich.[32] In June 2013, academics and practitioners from five continents and from more than 20 different countries discussed corporate criminal liability in its substantive, procedural, constitutional and international facets, as well as interdisciplinary aspects of corporate criminal liability. The minutes of the symposium[33] as well as the closing remarks by *Prof. Peter Wilkitzki*[34] shall therefore contextualize the other contributions to this volume. The symposium was organized by *Dominik Brodowski*, *Manuel Espinoza de los Monteros de la Parra* and the late *Prof. Dr. Joachim* Vogel—his encouragement, his enthusiasm and his expertise were essential building blocks in framing both the symposium and this volume.

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[27] Just see Tiedemann, in this volume, pp. 11ff.; Vogel, in this volume, pp. 337ff.

[28] See also Vogel, in this volume, pp. 337ff.

[29] The diverseness of the issues addressed by our international and interdisciplinary group of authors has led to certain differences in style in their contributions. This we did not seek to inhibit, but to strengthen, as we consider diverseness in legal reasoning to be rather a tool than an obstacle.

[30] http://www.penal.org/ (12.2.2014).

[31] http://www.aidp-germany.de/ (12.2.2014).

[32] http://www.uni-muenchen.de/ (12.2.2014).

[33] Lamberigts, in this volume, pp. 345ff.

[34] See Lamberigts, in this volume, p. 359f.

Acknowledgments We thank Roxin Alliance for their generous donation which made the symposium and this volume possible, and the moderators—*Prof. Dr. William S. Laufer*, *Prof. Dr. Holger Matt*, *Prof. Dr. Helmut Satzger*, *Alexander Schemmel* and *Prof. Dr. Petra Wittig*—for shaping the symposium, and *Dr. Klaus Moosmayer* for his valuable contributions from a practitioner's perspective. We are grateful to *Franziska Kahlbau*, *Hannah-Sophie Aures*, *Christiane Junken*, *Benedikt Linder* and, last but not least, *Anke Seyfried* and *Dhivya Geno Savariraj* for their support in furtherance of the symposium and the volume.

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Part I
Regulatory Options in Corporate Criminal Liability

Corporate Criminal Liability as a Third Track

Klaus Tiedemann

Abstract For this book project, a topic was chosen which causes quite a stir internationally—from Japan to Argentina and Mexico, from Finland to Turkey. This topic indeed has lead and is leading to numerous debates and reforms all over the world. In Germany, however, the topic is categorically rejected both by the *lex lata* and by the majority of—mostly older—scholars. The European Union has long been calling for dissuasive and effective sanctions against corporations. Apart from Germany, only Greece, Italy and a few Eastern-European member states of the European Union still think that these supranational demands may be met by administrative sanctions.

As to my thoughts on the liability of legal persons and corporations: After a brief historical introduction, my contribution will start with a question of both European law and of European criminal policy—a question which is too rarely asked: Do administrative sanctions actually deter economic actors, and which conditions influence the effectiveness of such sanctions? Then, I will address in more detail the main question; specifically, I will explain the opportunities given by a comparative analysis by criminal law scholars in order to properly solve the issue at stake. Finally, I will conclude with a brief summary, which takes the form of a legislative model.

1 Historical Introduction

Globalization and the interconnection of economies, the consequences of modern technology, and the catastrophic threats to the environment have strengthened the view that not only the individual actors—the individuals—but also corporations

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K. Tiedemann (✉)
University of Freiburg, Freiburg, Germany

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must face criminal liability for the harm they cause to legal interests which are internationally recognized.

This perception gained relevance as early as the beginning of the industrialization in England and the United States during the nineteenth century, when new large-scale projects such as railways or the mass-production of foodstuffs and chemicals gave birth to anonymous commercial companies requiring high capital investments. In continental Europe, sanctions against corporations were introduced at latest with the emergence of a new business law regime after the end of the First World War; in Germany, they can be traced back to jurisprudence on the regulation against the abuse of economic power of 1923.[1]

These sanctions against legal persons took many forms. In their weakest form—most prominent in Romance countries—, corporations became *liable in the second degree* to fines and penalties imposed against their employees. The underlying theoretical background is the doctrine on the legal force of final convictions ("Rechtskraftlehre"). This doctrine states that whenever a conviction becomes final, any imposed *fine* is transformed into a mere pecuniary *debt*.

The most severe sanction included in many commercial codes was the compulsory liquidation of companies. Because of its drastic effect, this "death penalty" was rarely imposed on corporations. In recent years, however, this sanction has gained importance in the fight against organized crime.

Historically, administrative sanctions were most prevalent in Central Europe. These root in police fines already known in the nineteenth century, and these notably address tax and tariff violations. They were first introduced into the "main" branch of criminal law only during the 1930s, after the publications by *Carl Stooß* had paved the way for a second track in criminal law, a second track to punishment: *Incapacitation* of offenders who are incapable of contracting guilt. Imposing such measures—in this case in the form of freezing and confiscation of proceeds from crime etc.—had been seen as an appropriate tool in the fight against corporate crime since the AIDP Congress in Bucharest in 1929.[2]

In Germany, this *incapacitation* approach has long influenced the discussion on reforms far beyond the end of World War II; but not only here: The Turkish legislative—which historically has strong ties to the Italian school of thought on criminal law—still opted in 2004 for a system of incapacitation which is independent of guilt.

In most European countries, the second half of the twentieth century gave rise to further development of the law of administrative sanctions, which—under the influence of constitutional law—became a "droit administratif-pénal" (*Delmas Marty*). Today, administrative sanctions are considered—also by the European Court of Human Rights—to be punishment (at least in a broader sense) and to be

[1] Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen vom 2. November 1923, RGBl I, S. 1067.

[2] Second International Congress of Penal Law, Bucharest, 1929—Section One. The resolutions are re-printed in de la Cuesta (2007), p. 15.

subject to criminal principles and guarantees. As administrative sanctions require only social guilt, but not individual-ethical guilt, they are still considered to be an appropriate means to fight corporate crimes in Germany, Italy, Greece and some Eastern-European countries, but also in Peru, for example.

It is a well-known fact that during the last two decades, numerous European countries have gone much further. Following the early example of England (1842) and later the Netherlands (1952), the Nordic countries were first to introduce a genuine criminal liability for legal persons in the 1990s, followed by France (1994), Belgium (1999), Switzerland (2003), Austria (2006), Portugal (2007) and Spain (2010). Other Eastern-European countries like the Czech Republic (2011) followed this path, as did Chile (2009) in South America.

Considering this short historical background it has become evident that it is primarily a matter of *criminal policy* whether sanctions *similar to* criminal punishment suffice or whether there is a need for genuine criminal punishment against corporations. On this policy basis, criminal law theory has then to decide the question which legal theories and constructions are possible and adequate when implementing the criminal policy decision into national law, or to explain what the legislator has decided. In my general report to the XIV International Congress on Comparative Law (Athens 1994), I had already recalled the words first expressed by the Argentinean pioneer in criminal business law, *Enrique Aftalión* in 1945, and later taken up by *Zugaldía Espinar* in Spain: "If difficulties remain to reconcile criminal liability of legal persons with criminal law theory – so much the worse for the latter!" In a similar vein, the Swiss legislator in its Message from 1998 concerning the amendment of the Swiss criminal code, and *Joachim Vogel*, in his Frankfurt speech in 2011, have given priority to criminal policy decisions and have considered them to be independent of any chains of dogmatic categories.

However, criminal policy and criminal law theory have to be in alignment with constitutional law and also with the criminal law culture—meaning the social values and social circumstances of each society, which themselves are embedded into regional legal cultures, such as the European legal culture.

This cultural aspect points to a fundamental *bifurcation*. The division is largely in line with the different legal traditions which have evolved historically—and which is a golden thread in analyzing the national models on how legal persons are sanctioned in European countries. On the one hand, there is the classic "dogmatic" view with its close ties to civil law, which focuses on legal persons and its bodies; on the other hand, there is the pragmatic view, influenced by sociology, which focuses on enterprises and their employees instead. Both views converge under the influence of European legislation, but still face frictions because of the differences in the underlying concepts of criminal guilt—that is, a philosophical and metaphysical concept on the one hand, and a sociological and realist concept on the other hand. The first trend corresponds more or less to the German and classical Romance tradition, the second trend to the Anglo-American, Scandinavian and Dutch tradition.

2 Deterring Economic Actors

It is a trilogy often repeated by the EU in many areas of white-collar crime law that corporations must be subject to "proportionate", but also "effective" and "dissuasive" sanctions. In this regard, there can be no doubts that a genuine criminal liability to legal persons is the more *effective solution* as compared to administrative fines, as long as it is embedded into an appropriate framework. Such a framework notably consists of procedural provisions on criminal proceedings against legal persons. Also, criminal prosecution authorities should be empowered—legally and factually—to investigate corporate crimes, as it is the case in many countries which introduced specialized public prosecution offices against corruption and other white-collar crimes.

Moreover, a corporate criminal sanction is more *deterrent* as compared to an administrative fine. In terms of general prevention, this results from the same effect already known from comparing criminal offenses to administrative offenses. Imposing administrative sanctions for crimes is, instead, inconsistent and counterproductive to deterrent effects. Finally, the stronger stigmatization of a corporation by criminal law measures reflects the social role corporations play in the perception of the general public in a much better way.

How much corporations fear any negative impact by criminal proceedings to their *good will* and their position as a *good corporate citizen*, is exemplified by corporations changing their names after serious criminal wrongdoings, as done, for example, by the United Brands Corp. ("Chiquita") in the USA or by Imhausen Chemie in Germany. Moreover, it is illustrated by the long-standing fight of the German construction sector against the criminalization of antitrust violations against cartelizing territories or fixing prices, and even against being named in administrative antitrust proceedings.

The deterrent and preventive effects of criminal liability of legal persons can even be measured empirically by projectively questioning potential addressees, in particular the bodies and legal representatives of corporations. We had already taken such an approach in the mid-1970s (with *Breland*) in a pilot-study concerning sanctions against entrepreneurs.[3] As long as such empirical evidence is missing, however, an effective (!) system of administrative, non-criminal sanctions against corporations cannot be considered as to be in violation of European law. On the subject of effectiveness: It is, without doubt, necessary that trials are *public*—an aspect which classically is, or at least *was* missing in administrative sanctioning proceedings. In particular, trials which concern severe violations in specific areas (such as labor law, competition law and environmental law), which concern serious damages or which concern perseverant repetition should be required to be held in public, also in those EU member states which continue to opt for administrative, non-criminal sanctions against corporations. The European Commission should take steps in this direction.

[3] Breland (1975) and Tiedemann (1976), p. 249 with further references.

3 Regulatory Options in Corporate Criminal Law

In criminal law theory—in particular, in the Italian/Turin criminal law school of thought—some scholars developed a distinct category ("*capacità penale*"/ "*Straffähigkeit*") in order to clarify who may be subject to criminal law. In contrast, within the functionalism view held in (parts of) Germany (*Jakobs*), Spain and Latin America, it is quite easy to ascribe criminal liability to legal persons, same as to natural persons.

The main focus of the classical theory lies on the capacity to act and on the capacity to be culpable. The first aspect should not pose a problem for a modern point of view: In recent criminal law rulings, the German Federal Supreme Court repeatedly refers to company-related actions ("*unternehmensbezogene Handlungen*")—such as distributing dangerous products, disposing of toxic waste, or operating a mountain railway—in a manner that it is the corporation which is acting (and this action is then to be attributed to natural persons, not *vice versa*).

It has long been considered to be a most problematic question whether corporations or legal persons can be culpable. In the US, this question has only gained attention since the introduction of sentencing guidelines at the end of the twentieth century, as its concept of criminal liability of legal person roots in civil law. In contrast, English common law developed the *alter ego* or identification theory that crimes committed by high-ranking employees—those of the "brain area" of a corporation—are also crimes of the corporation itself. From a practical point of view, the same results follow from the theory of *vicarious liability*, as it determines the liability of corporations by attributing the liability of the acting natural persons to the corporation. Such a "classical" approach is more or less self-evident when it concerns misdeeds of bodies or legal representatives of legal persons, and several Constitutional Courts in European countries—also the German Constitutional Court in the body of a ruling—have raised no concerns over such a legislative approach. Also, the jurisprudence of German Higher Regional Courts of Appeal requires culpability of bodies or legal representatives of legal persons in cases on administrative fines ("Ordnungswidrigkeiten").

Such an approach focusing on attribution seems to be in conflict with the notion that criminal guilt is closely linked to human beings, and—in the Christian view on sins and penance—is bound to individuals. Therefore in the thirteenth century's conflict with Emperor Frederick II, the Roman church famously stated: "*societas delinquere non potest*"—arguing against the postglossators' opinion and arguing with the aim of avoiding the Papal excommunication of corporations. *Arroyo Zapatero* commented in an Istanbul conference (2011) on this far-reaching but selfish historic decision by Pope Innocent IV with the irony it deserves.[4]

[4] See Arroyo Zapatero (2012), p. 711.

Aside from Christian culture and tradition, an attributional approach becomes questionable when it concerns actions and guilt of employees in the middle or lower parts of the corporation hierarchy, or when criminal liability of legal persons (as in France, Spain and Switzerland) is extended to all *enterprises*.

The historic and classic limitation of criminal legal systems to *legal persons* seems to be outdated in the light of social reality. Moreover, probably all modern states—and the EU—target their competition law on corporations, as they are the main economic actors. Outdated, too, is the exclusion of mid-level or lower-level employees. Organization models in corporations are highly diverse and complex—different from sector to sector, different in large multinationals and in small- and medium-sized businesses. In addition, it must become impossible to manipulate the organizational structures in a way to secure impunity for the corporation.

One solution in line with criminal policy and criminal law dogmatics can be seen in the regulatory options taken by the USA, England, Spain, most recently by the Czech Republic, and—for administrative sanctions—by Germany as well as (in terms of the outcome) by Italy: Culpable acts by bodies, legal representatives or other decision-makers or supervisors are attributed directly to the corporation. The same natural persons also face oversight and control duties to prevent corporation-related crimes by their subordinates. This means that crimes committed by subordinates may be attributed to a corporation indirectly, if these supervisory duties have been breached with.

An opposing model can be found, for example, in Sweden, Switzerland and—regarding administrative sanctions—in Italy. In their laws, an independent, autonomous guilt of corporations is presupposed, which roots in organizational shortcomings leading to the commission of crimes. Corporations can only exculpate themselves from this guilt if they have taken all necessary and reasonable measures to prevent the commission of corporation-related crimes by their employees. Such necessary and reasonable measures notably include effective *compliance programs* and *corporate codes of conduct* or *corporate codes of ethics*.

However, any model chosen can only become effective if, firstly, the burden of proof for causation is shifted (so the UK Bribery Act of 2010) or if it suffices to prove that shortcomings in the organizational structure or in the supervision have alleviated or facilitated the commission of crimes—in other words: that the shortcomings have increased the risk (so the US and § 130 OWiG in Germany). Secondly, there has to be a statutory presumption—as there is in England and was, until 2010, in the US[5]—that organizational shortcomings are present whenever corporation-related crimes are committed by high-ranking employees, which means that such shortcomings need not to be specifically proven in these cases. Similarly, the Italian law on administrative sanctions only allows for the exculpation of corporations in cases of fraudulent breaches of organizational rules by bodies if the corporation could *not* foresee such acts—a necessary consequence of the concept of autonomous guilt of corporations.

[5] Engelhart (2012), p. 735.

If one accepts these limitations, there is no practically important difference between these two regulatory options. In particular, attributing the guilt of another is only problematic insofar as it concerns questions closely related to human nature. Besides the capability of contracting guilt (which is equivalent to the legal order recognizing a corporation as such), this relates only to the appreciation of the wrongfulness of the conduct. This question of (not) being aware of (criminal) prohibitions may be answered, however, autonomously from the perspective of a corporation, as is shown by jurisprudence by the European Court of Justice and by some German Higher Regional Courts of Appeals on administrative sanctioning: The legal person has its own duty to align its acts in accordance with the laws and regulations, and to know the law of the land. The same is true of negligence liability.

Attributed guilt differs from own, personal guilt. In both models, though, it concerns the *social guilt* of the corporation. This social guilt primarily reflects the breach of legal, normative requirements on behavior, in line with the traditional concept of negligence liability. Therefore, it is consistent to consider criminal liability of legal persons to be a third track in criminal law, a third track to punishment and to incapacitation of offenders who are incapable of contracting guilt. This view should, as far as linguistically possible, be reflected in a distinct denomination (such as "Verbandsgeldstrafe" in Austria, and especially "coima" in Portugal and "företagsbot" in Sweden, both of which recourse to historic denominations).

4 Conclusions

To summarize: I consider administrative sanctions only to be dissuasive and effective if trials are public, at least in serious cases. I propose to take a mixed approach as a model for criminal law reform which aims at introducing criminal liability of corporations. Within this approach, criminal liability of corporations should be introduced as a third track—a third track to punishment and to incapacitation of offenders who are incapable of contracting guilt. It should be based on a vicarious basis of attributing acts—and *mens rea*—of bodies and legal representatives of corporations; moreover, culpability of the bodies and legal representatives should be attributed to the corporation itself, with two notable exceptions—the awareness of (criminal) prohibitions and negligence—which are to be determined autonomously from the perspective of the corporation. Crimes committed by other employees may be attributed to the corporation based on the (collective) element of insufficient organization or insufficient oversight; however, this attribution ends whenever a corporation has taken all necessary and reasonable measures to prevent or hinder crimes from being committed.

Let me finish this brief contribution by recalling a quotation by *Victor Hugo* which I had already used almost 20 years ago in a conference at the University of Madrid concerning our topic: "Nothing else has the force of an idea the time of which has come!" *Rien ne vaut la force d'une idée dont le temps est venu*.[6]

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[6] Tiedemann (1995), p. 35.

Where Is the Moral Indignation Over Corporate Crime?

William S. Laufer

Abstract Neo-liberalists promise a just and measured response from the state to corporate crime without resort to the force of a "criminal" justice. The argument is that there is more than enough justice done in administrative and civil regulatory regimes. In this contribution, I argue that this promise of justice done is betrayed. Evidence of this betrayal is found in the absence of any genuine moral indignation over corporate wrongdoing. Asking questions such as why there is so little moral disapprobation over corporate crime, and how is corporate moral integrity laundered, lead to a simple but important conclusion. These multi-stakeholder games serve and support a regulatory equilibration. This equilibration maintains the *status quo* of a system tilted in favor of corporations of scale and power, and fails to prompt the emotions necessary to support a strong sense of the wrong in corporate criminal wrongdoing.

Lost in the increasingly popular neo-libertarian account of criminal law in the United States is the kind of moral reflection over corporate wrongdoing that boils the blood of retributivists and calls for the exercise of state power with little reflection. It is difficult to conceive of a corporate harm deserving of criminal punishment according to the hardened liberalist.[1] Murder, rape, and aggravated assault encourage and mobilize the state in ways that the full spectrum of financial frauds, deceptions, and manipulations simply do not. One may ask, who is morally outraged by corporate fraud? Moreover, resort to corporate criminal justice is chock full of externalities. It is misguided, anthropomorphic silliness and, worse, harmful

[1] Hasnas (2005), pp. 187ff.; Hasnas (2006, 2009), pp. 1329ff.

W.S. Laufer (✉)
The Wharton School, University of Pennsylvania, Philadelphia, PA, USA
e-mail: lauferw@wharton.upenn.edu

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in itself.[2] Beneath the surface rhetoric of freedom and independence from governmental social controls over business and deregulation are intuitions about the muted seriousness of corporate offenses. Fundamental questions remain over the very fiction of extending criminal liability to the firm.

The genius behind these neo-liberalist musings is the heartfelt promise of a just and measured response from the state without resort to the force of a "criminal" justice. There is more than enough justice done in administrative and civil regulatory regimes. The direct and collateral consequences of criminal law to innocent stakeholders must be tempered. Remedies in tort and the vast regulatory state will be sufficient. Those promoting the very idea of a corporate criminal law while questioning the constitutional rights of firms are "corporate bashing" and exposing a political hostility aimed directly at the modern for-profit corporation.[3]

In this contribution, I argue that this neo-liberal promise of justice done is simply but quite deftly betrayed. It is, though, not only this betrayal that is of concern. An even more significant obstacle to corporate criminal justice is with the government functionaries who pontificate about the immorality of corporate deviance and the need for justice from the powerful and privileged. Their disingenuousness, and that of their corporate contemporaries, combine to ensure a regulatory equilibrium that has all the appearances of a fair administration of justice, but appearances only.

At times in this contribution, I am pressed by my reaction to the pretense of indignation and make what amounts to a progressive case of corporate criminal law. In doing so, I bear no hostility to for-profit corporations, only a sense of shame that the lion's share of moral indignation is reserved for certain crimes, and a certain kind and class of people. Tilting the system so significantly to get justice for street crimes, and against those of color, the poor and the disaffiliated, exacts a steep and distorted price.

The neo-liberal promise of justice, like that *status quo* of the regulatory equilibrium, stands as an impressive monument to the failure of corporate criminal law reform over the past century, specifically the conceptualization of culpability and liability that reflect the complex nature of the firm. Add to this the failure to anticipate the successful shifting of legal risks within the firm; and failure to fully appreciate the power and influence of private sector interests in fashioning any responsive law reform. All of these failures are, as I maintain elsewhere, a grand concession to an unabashed and unapologetic brand of corporatism.[4]

If there is a single thread connecting these failures, though, a thread that allows for the neo-liberal account to bully its way on stage, it is the absence of any genuine moral indignation over corporate wrongdoing.[5] Prosecutors and regulators are long on rhetoric, providing a deep text of outrage. They are, regrettably, short on authentic anger and indignation. The faint but steady cries of indignation from

[2] See, e.g., Reich (2007).

[3] Redish and Siegal (2013), pp. 1447ff.

[4] Laufer (2008).

[5] Cf. Cullen et al. (1982), pp. 83ff.

civil society activists on the left are pushed on the margins by those on the right with a dismissive and patronizing arrogance about appropriate deference to firms, markets, risk-taking, entrepreneurship, and capitalism. It is hard to muster the kind of moral disapproval necessary to support moral indignation when corporations are called to arms as the main engines of economic growth.

There is, alas, no shortage of genuine indignation, outrage, fear, and anger over street crime, where, as Alexander so poetically notes, "...the stigma of race has become the stigma of criminality".[6] With the highest per capita incarceration rate in the world, state and federal justice expenditures in the United States support one of the most elaborate state owned enterprises—fueled by a near insatiable fear of crime, fear of drugs, and craving for the banishment of the "bad guys." No industrial complex with even remotely comparable expenditures supports corporate criminal justice. The images of thugs, street-level dealers, and violent predators do not include members of the board and senior management from corporations of scale, influence, and power. When we think about the evils perpetrated by drug cartels and terrorist organizations, who thinks about the facilitating role of HSBC? There is no perennial if not perpetual fear of corporate deviance touching and compromising our lives. Quite simply, our sense of being wronged by corporations and their agents does not engender a brand of moral outrage, indignation, and fear adequate to support a fair, equitable, and proportional regime of corporate criminal justice.[7]

In Sect. 1 of this contribution, I briefly explore why there is so little moral disapprobation over corporate crime. This exploration requires a deconstruction of the moral rhetoric employed by criminal justice functionaries, moving from the given text to the more meaningful subtext. The disingenuous rhetoric of indignation is defined and placed into the context of a multi-stakeholder game, a game that leverages the power of facades and pretense. Section 2 reveals how corporate moral integrity is, at times, successfully laundered by firms, regulators, and in games that carefully accommodate the convincing rhetoric of the state. Laundering and gamesmanship make any authentic moral disapprobation that much more unlikely. Section 3 concludes with a discussion of how these games serve a regulatory equilibration. This equilibration maintains the *status quo* of a system tilted in favor of corporations of scale and power. The outcome is exactly what neo-libertarians dream about: A corporate criminal law that is fully dressed on Saturday night, but without a date and with essentially nowhere to go.

1 What Happened to Our Moral Indignation?

The construct of moral indignation reflects the emotion felt over an immoral act. This emotion is captured by a person's disapproval of that act as unjust, unworthy, and malicious.[8] Indignation, accordingly, is the anger that results from moral

[6] Alexander (2012), p. 199.

[7] Cf. Hagan (2010) and Laufer (2013), p. 679.

[8] Beardsley (1970), pp. 161ff.

disapproval. Sunstein[9] deconstructs the notion of indignation further, seeing it as a complex of disgust, shame, and hatred.[10] This complex, according to Sunstein, consists of moral emotions, intuitions, and response tendencies that are not necessarily connected to reasons, are automatic, and may be expressed as something else. Reasons, we are told, are not the *sine quon non* of judgments. For some people, moral principle does not consciously fashion or drive their indignation. Instead, we may be agnostic as to why we feel such indignation.[11] As Fingarette writes, constructing a coherent account of moral disapproval and blame requires "...an affective tone reminiscent of anger".[12] Moral indignation may devolve into an empty kind of fear. And anger, mixed at times with this fear, fuels a thirst for the state to respond with an indignation that is nothing short of palpable.

The predictable incoherence of moral judgments, as Sustein calls it,[13] may nevertheless produce a coherent set of outcomes. While scholars from a host of disciplines still unpack this construct, few would argue that the kind of anger, disgust, and contempt associated with moral indignation strongly influences the priority given to the allocation of criminal justice expenditures; strategies for use of resources in municipal policing; charging decisions by prosecutors; the deliberations of jury decision making; sentencing outcomes from judges; and the treatment of inmates in correctional institutions.

Race and the perceived badness of an actor or an act are, at times, inextricably intertwined with moral approbation.[14] For example, research on the salience of race as a heuristic for determining the blameworthiness of the defendant and the perniciousness of the crime is as telling and remarkable, as it is shocking. Eberhardt et al. found that in capital cases where the defendant is Black and the victim is white, juror decision making about life or death hinges, for some, on the extent to which the defendant appears stereotypically Black.[15] In non-capital cases, those defendants with stereotypical Black facial features were given longer prison sentences (up to 8 months) than those least stereotypical.[16]

Our collective moral indignation, it seems, is reserved for certain kinds of wrongdoers (or images of wrongdoers), and certain kinds of wrongs. And offers to explain the absence of indignation, in terms of one or another, may be incomplete. For wrongdoers, indignation is likely mediated by complex heuristics, framing effects, social dynamics, and a host of other factors, e.g., the "outrage heuristic,"

[9] Sunstein (2009), pp. 405ff.
[10] Cf. Jones (2007), pp. 768ff.
[11] Sunstein (2009), pp. 405ff.
[12] Fingarette (1963), p. 118.
[13] Sunstein (2009), pp. 405ff.
[14] Johnson and Newmeyer (1975), pp. 82ff; Greenwald and Krieger (2006), pp. 945ff.; Jolls and Sunstein (2006), pp. 969ff.
[15] Eberhardt et al. (2006), pp. 383ff.
[16] Eberhardt et al. (2006).

"moral framing," and "rhetorical asymmetry".[17] For wrongdoing, the now obvious complexity of indignation places into context some of the intuitive conclusions that flow from research comparing white collar and street crimes, i.e., that perceived seriousness of crimes simply determines the value that law enforcement, prosecutors, and judges give different offenses. Explaining variance in the perceived seriousness of offenses and offenders is more complex.

Early research on the seriousness of crimes revealed only a modest level of wrongfulness attributed to white collar offenses.[18] Cullen et al., for example, found that white-collar crime was ranked 7th out of 11 categories of crime, and concluded that, "While the above data support the conclusion that white-collar crime has come to be viewed by the public as more serious not only on an absolute level but also relative to other forms of crime, it does not appear that the public has yet reached the point of considering white-collar crime to be as serious as most other offense categories".[19] More recent efforts to tease apart the relative seriousness of street versus white collar offending find an increase in rankings of the latter. Piquero, Carmichael, and Piquero, for example, found white collar crimes were more serious than street crimes in four of the six comparisons.[20]

There are, of course, other ways of asking why the victimization or possible victimization from some wrongdoing elicits deeply-held fears, while wrongdoing of another type engenders anger, frustration, but little to no moral indignation. Research on fear of street crime and the effects of victimization consistently shows a strong association with life satisfaction, quality of life, and risk of such crime.[21] Fear of violent crime, at its core, is an emotional reaction driven by a "...sense of danger and anxiety produced by the threat of *physical harm*".[22] Criminologists speak of this kind of fear of crime as a concern over possible "invasion of self" or serious threats to one's personal autonomy. No one claims that fear of crime corresponds perfectly with crime rates.[23] Actual and anticipated fear of serious

[17] See, e.g., Sunstein et al. (2002), pp. 1153ff; McCaffery et al. (1995), pp. 1341ff.; Schkade et al. (2000), pp. 1139ff.

[18] See, Rossi et al. (1974); Gottfredson et al. (1980), pp. 26ff.; Evans et al. (1993), pp. 85ff.; Rosenmerkel (2001), pp. 308ff.

[19] Cullen et al. (1982), p. 94.

[20] Piquero et al. (2008), pp. 291ff. To say that these data reveal a commensurate seriousness for white collar and street crimes would be a vast overstatement. Research exploring the seriousness of white collar "offenses" often offers subjects offense scenarios that are not criminal offenses. When researchers are good about selecting criminal offenses, though, they are rarely corporate offenses. Not attending to the criminal law and, at the same time, recognizing differences between the acts of agents and those of the entity, make this research difficult to place in the overall discussion of moral indignation.

[21] Hansimaier (2013), pp. 515ff.; LaGrange et al. (1992), pp. 311ff.; Garofalo and Laub (1979), pp. 242ff.

[22] Garofalo (1981), p. 840.

[23] Skogan (1986), pp. 203ff.

violent and property crime are far more complex "social facts." The proportion of crime that is interracial, for example, may mediate variance in fear.[24]

The rhetoric of moral indignation that comes from criminal justice functionaries obscures the conclusion that a certain kind of outrage is reserved for certain kinds of wrongdoers and wrongdoing. Carefully chosen words from the offices of federal prosecutors on the indictment or conviction of corporate offenders are so very familiar. They speak of thieves and fraudsters as not playing by the rules, compromising integrity, violating the public trust, swindling the American public, taking advantage, cheating, and unfair dealing. Wrongdoers must compete on a level playing field, we are told, be held responsible for wrongdoing, and be brought to justice for acting as if the laws do not apply to them. All corporations, we are told, no matter how large, will be held accountable. And there is an urgency and exigency associated with the prosecutorial response: there is "the need to be relentless," we "will not hesitate to prosecute," and we "will continue to aggressively pursue. . .." The extension of moral agency to the body corporate is personal, human, and remarkably emotional.

Often, the language of prosecutors blends strong retributive and deterrence messages, couched in stern, biblical, and paternalistic tones. In the press release from the recent announcement of a criminal indictment against the hedge fund S.A.C. Capital, the United States Attorney of the Southern District of New York proclaimed: "A company reaps what it sows, and as alleged, S.A.C. seeded itself with corrupt traders, empowered to engage in criminal acts by a culture that looked the other way despite red flags all around. S.A.C. deliberately encouraged the no-holds-barred pursuit of an 'edge' that literally carried it over the edge into corporate criminality. Companies, like individuals, need to be held to account and need to be deterred from becoming dens of corruption. To all those who run companies and value their enterprises, but pay attention only to the money their employees make and not how they make it, today's indictment hopefully gets your attention."[25]

Listening to the Executive Branch make much of the need for Main Street and Wall Street to play by the same rules, and be held accountable for serious wrongdoing, is wonderfully inspirational, convincing, and comforting—particularly at times when our markets reveal regulatory lacunae and are weak. The sub-text, or deeper meaning, of this language is just as important. Reconciling the text with its deeper meaning is the challenge (see Fig. 1).

Functionaries use moral rhetoric to convey a definite outrage at the temerity of such privileged wrongdoing. The message that justice must be done is conveyed with a pretense and sense of righteousness that mimics the emotions felt over an immoral act. Beneath the words one would expect anger, disgust, and a sense of

[24] Liska et al. (1982), pp. 760ff.

[25] Manhattan U.S. Attorney and FBI Assistant Director-In-Charge Announce Insider Trading Charges Against Four SAC Capital Management Companies and SAC Portfolio Manager, July 25, 2013, available at: http://www.justice.gov/usao/nys/pressreleases/?m=07&y=2013/ (12.2.2014).

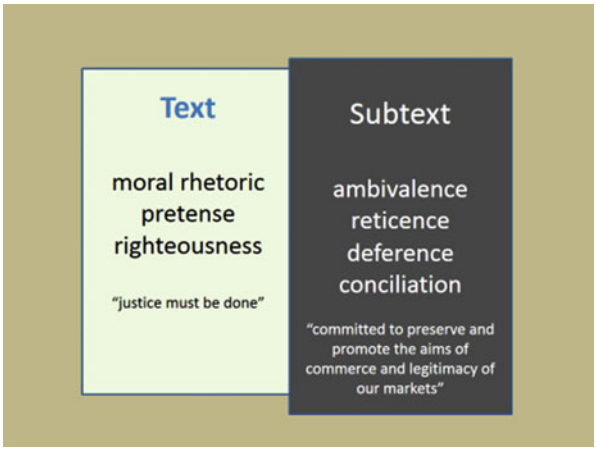

Fig. 1 Faux indignation?

shame. With lobbied and muted regulatory reforms, the diversion of large firms into plea agreements, and the recognition that some firms are simply too big or too risky to prosecute, no less convict, the subtext reflects an ambivalence and reticence to use this heavy-handed social control with the engines of our economic growth. Prosecutorial deference and a desire for conciliation are masked by a strongly worded metaphoric text. Expenditures, priorities, strategies, and allocation of criminal justice resources are so oriented to street crime, and toward certain kind of wrongdoers, that we should be surprised, if not disturbed, by just how convincing the text is.

One reasonable conclusion from a reconciliation of the text and subtext is that functionaries are offering a kind of *faux indignation*. Their objective: Placate market stakeholders with a carefully constructed retributive text, use the prosecutorial function to skillfully deter as much misconduct as possible, and yet leave undisturbed the risk-taking behavior that drives the kind of unbridled innovation and entrepreneurship necessary to move the economy forward. What makes this indignation *faux*? The text is calculated and crafted in ways that reveal an inauthenticity. The moral emotions and affect that capture indignation are missing. The anger and fear that combined in a very real way with street crime are simply not there. *Faux indignation* is, plain and simple, a convenient moral placeholder.[26]

It would be incomplete and naïve to begin and end an examination of the meaning of text and sub-text with the law enforcement and prosecutorial functions. While these functionaries are crafting language to convey their "outrage" at corporate wrongdoing, firms are deftly positioning their behavior in equally inauthentic ways.[27] They, too, placate, by pandering compliance back to regulators with

[26] None of this is to suggest, of course, that law enforcement lacks a desire or even resolve to bring about justice in cases of corporate wrongdoing. The disconnect among desire, resolve, and commitment of resources simply reflects a very different reality.

[27] See, Laufer (1999), pp. 1343ff.

their fair share of moral outrage over the "rogue behavior" of agents that so clearly violate corporate policies. Their authenticity is so often a casualty of the simple prescription that cooperation with authorities, acceptance of responsibility, and the commitment of additional compliance expenditures will result in a diversion from the criminal process—into the far more comfortable world of deferred prosecutions and non-prosecutions.

I argue below that the laundering of moral integrity by the regulated, combined with the washing of moral indignation by regulators, make for a dynamic regulatory game where appearances, posturing, and self-presentation regularly trump genuine ethicality and accountability. And the appearance of players in this game, the sense that the ethics of a firm matter, that deviant firms are subjected to the strictures of the criminal law fairly and justly, promote the kind of confidence in our justice system (all largely undeserved) that make it far less likely that the public would feel moral indignation. With so many stakeholders invested in the outcome of this game, it is little wonder that it works so well. With certain stakeholders playing the game with near unlimited resources, and otherwise much to lose, it is also little wonder that genuine moral indignation for wrongdoing is all but forgotten.

How can you blame a company that is "beyond petroleum" for an unprecedented oil spill? How can you blame a financial institution for untrustworthiness when it is an icon of trust? How can you blame a company for the harmful and addictive nature of their products when they tell you not to buy them? From all appearances, and carefully orchestrated messages, images, and gestures, these are good companies. They are companies with souls. They are companies with an agent who, quite simply, did not fit with the corporate culture or failed to appreciate just how committed the firm is to doing the right thing.

2 Faux Indignation Meets Corporate Inauthenticity

Lurking behind the corporate scandals that now seem common place on Wall Street is an inauthenticity, a disconnect between what corporations say they do and what they actually do, that leads to public displays by top management of naïve surprise when the public hears the news of a criminal investigation or indictment.[28] From Goldman Sachs to British Petroleum, and Enron to WorldCom, images of pristine corporate reputations tarnished by allegations of an incompatible rash of wrongdoing make it difficult to appreciate the polished spin associated with a professed commitment to corporate social responsibility. The disconnect should leave lasting suspicions and even cynicism about those corporate commitments to ethics,

[28] The construct of authenticity, with differing roots in existential philosophy, psychoanalytic schools of thought, and classical literature, extends to corporations with all the usual anthropomorphic and ontological questions and concerns. Even so, the word "authenticity," according to Trilling, first referred to material and immaterial "things" and not persons. Its metaphorical use began in the sixteenth century. See, Trilling (1972).

compliance, and responsibility that are paraded as both genuine and authentic. But this disconnect is so rarely noted, and so regularly overlooked.

Corporate inauthenticity comes with a cost to multiple stakeholders of the firm, from shareholders, debt holders, to vendors, customers and clients.[29] Most significant, regulators, prosecutors, and judges are left without the tools to determine a firm's compliance with laws and good governance. This is non-trivial because independent, evidenced-based assessments of compliance effectiveness are generally not available from extant gatekeepers. As a result, investigatory, charging, adjudicatory, and sentencing decisions are most often made on the faithful and overtly cooperative representations of an accused or convicted firm. At the same time, all firms are encouraged to spend generously on compliance and good governance functions without any corresponding empirical evidence of their efficacy.[30] Finally, to make matters even more complex, firms have multiple incentives to maintain an external posture of full cooperation, compliance, good governance, integrity, and responsibility that may or may not reflect their genuine commitment.

The fact that both criminal justice and corporate functions are, at times, disingenuous makes the script of this regulatory game so deceptive, intriguing, and compelling.[31] Countless examples of corporate misfeasance and malfeasance over the past century expose the difference between the text of a corporation's commitment to ethics, integrity, and compliance, and the subtext of their rhetoric and public communications. This disconnect obscures elaborate games that companies play to avoid detection, deflect regulation, minimize compliance and governance costs, and at times launder questionable corporate decisions if not reputations. In the end, the longstanding and somewhat successful campaign for corporate transparency runs a serious risk of being compromised by the failure of state and non-state regulators to hold firms accountable for their inauthenticity. Allowing firms to escape any accountability for their inauthenticity only seems to encourage

[29] If the appearance of corporate authenticity is nothing more than a guise or pretense, then its expression is instrumental and strategic. While nuanced differences in appearance may make an appearance of authenticity and inauthenticity indistinguishable, I suggest that corporations fall along a behavioral continuum from opacity (i.e., where firms are characteristically obscure, elusive, and dense) to transparency (i.e., organizations that are open with communications, frank, candid, and forthcoming), sincerity (i.e., firms that act, as a means to an end, without pretense and dissimulation), and finally authenticity (i.e., companies that, as an end in itself, align their decisions, policies, and actions with actual desires, motivations, and intentions).

[30] Codes, compliance programs, and the products from a cottage industry of ethics consultancies are part of an overall regulatory prescription but remain of questionable value if behavioral compliance is the dependent variable.

[31] The task for firms, more specifically, is one of genuinely aligning their corporate vision, leadership, culture, value propositions, operations, and decisions with the expression of their collective moral sentiments, whether conceived as a sense of citizenship, integrity, or a sense of social responsibility. This task is quite challenging given the increasing range of incentives offered companies for voluntary social initiatives and evidence of regulatory compliance. Calls for a social conscience from non-governmental organizations, non-profits, and activist organizations make this challenge that much more potent.

firms to maintain an appearance of authenticity while, in fact, being opaque, or worse.

The price associated with this opacity is not limited to problems of ensuring faithful compliance with laws and regulation. It also reflects the inauthenticity of corporate representations about their lofty social and environmental commitments and accomplishments. The emergence and widespread acceptance of voluntary corporate social responsibility initiatives tend to lure signatory companies into making commitments, representations and declarations that add a green or blue luster to their reputations, and give them membership in an apparently exclusive club, often without authentic commitment. Meeting voluntary social and environmental expectations in any genuine way is costly and, without authenticity, disconnected from or out of step with the vision and values of corporate leadership.

Civil society activists set threshold expectations for firms quite low in their conception of corporate transparency. The new conventional bar, that firms should aspire to be revealing rather than withholding or decidedly opaque, is quite insubstantial. The position that transparency is actually ambitious, if not more, reflects the closed nature of the firm, the legitimate need for confidentiality, and the intensity of competition, among a wide variety of factors. Simply put, this position asks too little of the private sector.

This kind of corporate inauthenticity, and the pretense of moral indignation from prosecutors described earlier, combine in some very compelling ways. First, corporations and prosecutors accommodate each other by sharing a guise. The pretense of one often fits nicely with the faux indignation of the other. More practically, the product of a disingenuous indignation and organizational inauthenticity feed a regulatory equilibrium that produces stable rates of white collar and corporate prosecutions.[32] On the surface, and reading the text, the threat of the criminal law seems to work. Cases are brought with the usual moral fanfare, and corporations fall on the sword knowing that a compliance reincarnation is only a matter of time and cost. Both sides express condemnation and make amends.[33] And, to add just one last swipe at the disingenuousness of corporate criminal prosecution, criminal fines in corporate fraud cases are, apparently, very difficult if not sometimes impossible to collect.[34]

In a final section below, I wonder what should be done with a regulatory equilibrium, fashioned by the pretense and deception of government and corporate functionaries that protects and safeguards the corporate person in ways that are never extended to biological persons. Should it matter that we reserve our anger, outrage, and fear in ways that only fuel inner city policing, keep municipal

[32] The number of white collar crime prosecutions, combining all federal enforcement agencies, is remarkably stable over time—with between 8,000 and 9,000 cases per year. This is a true equilibrium given the number of referring agencies and organizations. Interesting, recent data on white collar cases originating with the Federal Bureau of Investigation show a decline or slump. See, e.g., Trac data [available at: http://trac.syr.edu/tracreports/crim/331/ (12.2.2014)].

[33] Laufer and Strudler (2007), pp. 1307ff.

[34] Government Accountability Office (2005).

prosecutors up all night, and drive incarceration rates even higher? Who talks about the externalities of street crime the way we talk about the costs of corporate prosecution? We worry about innocent shareholders and employees, as casualties. Who cares about the casualties of mass incarceration? These rhetorical questions are recast in the brief section below.

3 Measured Indignation and the Bad Guys

Criminal justice functionaries take comfort in casting morality as a simple dichotomy. There are good guys and bad guys. Municipal police and local prosecutors know what it means to "get" the bad guys. Alas, it is the task of good guys to get the bad guys. Conventional musings about "bad guys" are part of a shared language deeply encoded in our popular culture.

We know who is bad. Apprehending, prosecuting, convicting, and incarcerating bad guys is just like it was on the concrete school playground, where playing cops and robbers pit good against bad in a simple morality game. There are important differences, though, between the Kohlbergian-type shenanigans of children at recess and the psychological splitting seen throughout the criminal process. The former are acts reflecting age appropriate, stage appropriate, pre-conventional moral reasoning. The latter is an adaptive denial, a vestige of worn-torn experience with the administration of justice that ravages the idealism of rookie cops, assistant district attorneys, judges, probation officers, and corrections officers.

Experience in the criminal process makes the very notion of a continuum of morality inimical. Experience brings perceptions and prompts biases that confound what it means to be labeled *bad*. Experience gives permission to disregard the devastation, the tragedy, and the inhumanity found in the disaffiliated, indigent areas that generously contribute human capital to the criminal justice system. Perhaps most significant, a long shadow of race and abject poverty makes these experiences look so stark, and people look so good or so bad. Moral nuances simply come with too high a price.

Law enforcement brethren freely dismiss all of this talk about possible gradations between good and bad as naïve sentimentality, an exaggerated recognition of race and class, insensitivity to the plight of genuine victims of crime, and a failed appreciation for the simple notion of what makes a person who does bad things, bad. Seeing more in those who commit bad acts inexplicably disregards the evil behind the crime and its harm, or so the argument goes. Hard retributivists following the Kantian line would likely go one or more steps further.

To see the frailty, weakness, and humanness that accompany economic, psychological, and sociological deprivation counters this convention and the powerful press of professional socialization. To see more than archetypal images of miscreant Black and Hispanic youth defies deeply encoded suspicions, fears, predispositions and resentment. To experience criminal justice and yet decouple race, ethnicity and class from perceived immoralities require an understanding of our racial heritage, unusual discipline and, at times, courage. *Status quo* in the criminal

process is too tempting for most, too intuitive for many, and the desire for fraternal inclusion and recognition simply too great.

And to see badness in corporations also counters the convention that we should believe and invest in free markets and capitalism. Corporate criminal liability doesn't only seem wrong because of unjustifiable externalities. It is wrong because corporations are not "bad" the way real criminals are.[35] Their wrongs are not worthy of genuine moral indignation. Firms, as a wrongdoer, are not worthy of moral indignation.

There is simply not enough hate, fear, and anger to go around. And the façade of compliance, the diversion of large businesses out of the criminal process into artfully crafted "integrity" agreements, and redemption from compliance reincarnations all contribute to something less than a sense of badness. Their badness is undone by extolling the virtues of corporate social responsibility, a commitment to sustainability, and an investment in the community. They are the good guys who, regrettably, and only so very rarely, do bad things.

It is not too late for a plea for genuine moral indignation over corporate crime. It is a tall order to muster, though, even with much better accounts of just how corporate crime touches our lives directly, and the toll that these offenders take. It will require more than academic musings, more than a complex table listing primary, secondary, and tertiary victimizations from corporate wrongdoing. Any genuine indignation of victimization or harm will inevitably meet a well-dressed and neatly-coiffured neo-libertarian, along with a well-tested strategy of posturing, pandering, greening, and apology from one of the most powerful "persons" in the world—the corporation. Street level drug dealers and thugs can only fantasize what it might be like to position themselves this way. And we can only think about the price that all of us continue to pay for conceiving justice in such a tilted manner.

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[35] Cullen et al. (2009).

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A Psychological Perspective on Punishing Corporate Entities

Avital Mentovich and Moran Cerf

Abstract This chapter takes a psychological perspective to examine how individuals make decisions about culpability and punishment of corporations versus people. Drawing on relevant empirical research we make the argument that while corporate crime raises the social need and public demand for retribution and deterrence, it is principally difficult to attribute mental life, character, intention, and hence, culpability to corporate entities. Since the psychology of punishment is more fitting to assess the culpability of individuals, corporations as collective entities are deemed as less responsible and less culpable compared with individuals when conducting equivalent wrongdoings, particularly those that demand intent. At the same time, corporate entities are also seen as less deserving of constitutional rights. These findings carry implications for criminal law and legal design.

1 Introduction

Humans have a tendency to attribute moral, logic and meaning to the choices, decisions and behaviors of other humans.[1] The tendency to seek meaning in the behavior of others is ingrained in human nature and is unsurprisingly suitable to constructing narratives about the motives of others people.[2] It is not, however,

[1] Heider (1958).

[2] See Kelley (1967).

A. Mentovich (✉)
Department of Psychology, University of California, Los Angeles, CA, USA
e-mail: mentovich@ucla.edu

M. Cerf
Kellogg School of Management, Northwestern University, Chicago, IL, USA
e-mail: moran@morancerf.com

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strictly applicable to the understanding of non-human entities. The legal perspective of corporate personhood,[3] which promotes the view that corporations and other organizational entities are 'people' for many legal purposes, does not address this psychological limitation. The results, as this contribution argues, may be particularly problematic in areas of the law that rely on uniquely human qualities such as criminal responsibility and intent.

Corporations are seen as people for many legal purposes including (at least in common law systems) criminal liability, but they are not typical targets for punishment. This is not because corporations do not take part in criminal activity. On the contrary, with growing dominance in the political and economic spheres, corporations have become increasingly involved in criminal behaviors, resulting too often in tremendous damage to societies and individuals alike.[4] While there is little argument that corporate crime is a problem, the question of whether and how corporations can carry criminal responsibility as collective entities, independently of the individuals constituting them, has been a source of relentless legal debates.[5]

The challenges surrounding corporate criminal liability are almost exclusively discussed from a legal perspective, which is theoretical in essence and involves legal experts and expertise. This chapter, however, aims at looking at this issue from a psychological perspective, drawing on social scientific framework and empirical findings. The main question addressed in this chapter is how lay people, unlike legal professionals, infer intent, assess culpability, and assign punishment to collective versus individual entities, and when they find it more easy or difficult to do so.

We argue that while corporate crime elicits individual desire and social need for retribution and deterrence, judgments of corporate culpability and blame are principally more problematic. That is because human assessments of blameworthiness are heavily rooted in uniquely human qualities.[6] Specifically, we argue that: (a) people rely on uniquely human features such as character, motivation, and intent when they judge individuals but not when they judge collective entities; (b) individuals are usually seen as more responsible for their actions than collective entities; consequently, (c) individuals are deemed more culpable and are more severely punished compared to corporations even when they are involved in equivalent misconducts; (d) while it may be possible under some circumstances to 'personalize' non-human entities, the capacity to do so is always deficient in comparison to the personalization of actual people, and does not fit with modern-day mega corporate structure.

[3] See Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394, pp. 394–396 (1886); and more recently, Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).

[4] See generally Laufer (2006).

[5] See for example, Foerschler (1990), Arlen (1994), and Khanna (1996).

[6] Tyler and Mentovich (2011).

2 Why Do We Punish Individuals and Why Should We Punish Collective Entities?

The notion that law-breaking deserves punishment is fundamental to the establishment of any law and ordered society.[7] Punishment helps to maintain the moral fabric of societies, to regulate the behaviors of individuals, and to prevent reoccurrence of crime in the future. Importantly, the same reasons for which punishment is utilized to respond to crimes committed by people are equally (if not more) valid in the case of corporate crime.

Broadly speaking, there are two key justifications for punishment: the need for retribution and the need for deterrence.[8] The retributive perspective holds that the main goal of punishment is to address the moral violation presented by law-breaking and the harm it caused. Therefore, according to the retributive accounts, punishment should reflect the seriousness and the severity of the moral violation and be proportional to the crime committed.[9] Importantly, these retributive justifications hold for both individual and corporate wrongdoings. If a violation of a normatively accepted rule distorts the balance of justice in a society, and punishment is needed to restore that balance, it makes little difference whether the moral violation that caused the imbalance was perpetrated by an individual or an organization. The idea that corporate crime equally raises the need for retribution can be seen in the public demand to prosecute and punish corporations for wrongdoings, and in the manifestations of public outrage when the legal system fails to take prosecutorial or punitive measures against corporations.

In addition, a situation in which corporations are not prosecuted or punished for law-breaking which would have been otherwise prosecuted in the case of individuals can in itself violate public perception of the fairness of the legal system.[10] Not only does a failure to punish corporate crime render some moral violations unanswered and fails to express the moral condemnation caused by the criminal act, but it also creates a sense of differential treatment that unjustly favors corporations. A violation of the perceived equality in the application of the law can easily be seen as a double legal standard in the prosecution of individual versus corporate crime and is likely to cause public outrage which will undermine public trust in the law and in law enforcement institutions.[11]

[7] Tyler and Darley (2000).

[8] See Carlsmith et al. (2002).

[9] See Darley and Pittman (2003).

[10] See Laufer (2006), pp. 1–5.

[11] See Tyler (2006).

A second central function of punishment is deterrence: punishment is needed in order to deter individuals—or in our case, corporate entities—from engaging in future law-breaking. Deterrence models of punishment are based on cost-benefit concerns and are built on the premise of rationality.[12] The role of enforcement and punishment according to the deterrence perspective is to make criminal activity non-beneficial because of the risk of prosecution and the cost of punishment.[13] Interestingly, research shows that deterrence concerns do not play a major role in shaping the behavior of individuals. People do not follow law out of the fear of being punished. Instead, they do so since the law corresponds with their internalized sense of right and wrong and because they see the law and its enforcement institutions as legitimate. Most people would not break the law even if it were worthwhile for them to do so simply because they believe following the law is the right thing to do.[14]

While deterrence plays a less important role in the case of law-breaking of individuals, this may not be the case for corporate crime. Corporations are artificial entities, which do not possess an internal sense of right and wrong or other intrinsic values. Corporations, like any business, operate—and are legally obligated to operate—for the goal of maximizing profit. Therefore, corporations may be more likely to break the law when enforcement is ineffective or when the profits from law-breaking exceed the cost of punishment. That suggests that corporations, unlike individuals, may be more affected by deterrence concerns. Thus, if anything, there are more reasons for why we should deter corporate versus individual crime.

It seems that individuals and societies should be, and often are, motivated to punish corporate criminal misconduct. Yet, judging the criminal or moral responsibility of an organization as a whole is a difficult task. We propose that one of the difficulties in punishing corporate misconduct is related to the psychological sense-making of culpability and punishment, and to the central role of intent and other uniquely human qualities in making inferences about the appropriate degree of blameworthiness.

Both in law and in humans' judgments of blame, the existence of a criminal act is not in itself a sufficient justification for punishment. Culpability and punishment are not dependent solely on the criminal act but also on the criminal actor.[15] Even if one's action constitutes a morally or legally reprehensive behavior that resulted in severe damages, one would be punished only to the extent that he or she can be held morally responsible for their conduct. Importantly, moral responsibility for a bad action (and at times, the lack of action) is premised on the notion that it has been

[12] See generally, Tyler (2006).

[13] See Nagin (1998) for a review.

[14] See Jackson et al. (2012), Tyler (2006), and Tyler and Jackson (2014).

[15] See Gardner (1993), p. 654.

carried out by a willful actor who operated volitionally. In other words, moral responsibility is linked to the mental state of the perpetrator. Criminal law in most legal systems echoes this logic. Criminal liability and punishment correspond with the mental state and the degree of intentionality and deliberation of the perpetrator. Most legal systems differentiate between at least three types of mental states (*mens rea*)—intent, recklessness and negligence. These mental states determine the degree of culpability and the severity of the punishment. Severe crimes and severe punishments typically require proof of intent.

3 The Group/Corporate Mind

The first challenge with culpability being so heavily rooted in mental states is that we think mainly about people as fully capable of possessing mental processes. Such mental activity can be easily attributed to individuals, but can people attribute mental deliberations to collectives? Research shows that groups that display high group cohesion can sometimes be seen as possessing a group mind. For example, groups that share goals, appearance, and conduct joint actions can more easily be seen as having a group mind.[16] More so, entities that operate in a level of randomness, yet driving towards a goal, often are attributed with similar sense of mindfulness. However, can people attribute mind to a group as easily as they do in the case of individuals? Recent research examined this question directly by presenting to people several groups (including, for example, blondes, Facebook users, McDonald's Corporation, City Bank and United Auto Workers) and asking them to rate the extent to which each group has a mind of its own (defined by, among others, the capability of forming *intentions*), as well as the extent to which respective group members possess a mind of their own.[17] The results of this study showed that on the one hand, people were better able to attribute mind to groups as a function of how cohesive these groups were. However, across *all* groups presented in the study people were *always* better able to attribute mind to group members than to their respective groups. Taken together, this suggests that while it is possible to attribute mind-like qualities to collective entities this possibility is a function of the group exhibiting individual-like characteristics (having a singular goal, a unified set of values, and cohesive structure), and that in any case, individuals are always seen as a more appropriate target to attributions of mental life. For illustration of the results, see Fig. 1.

[16] Bloom and Veres (1999) and O'Laughlin and Malle (2002).

[17] See Waytz and Young (2012).

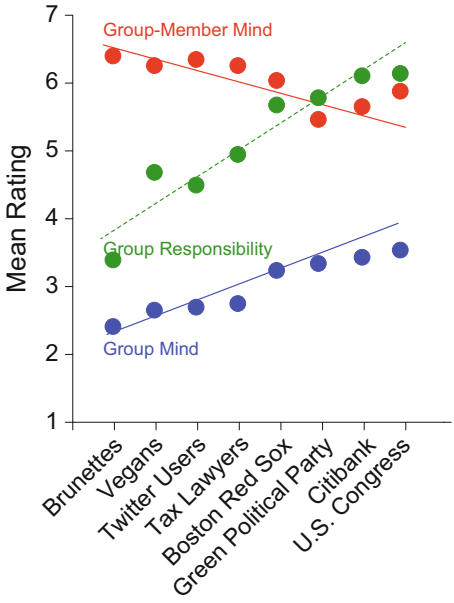

Fig. 1 Participants' ratings for group mind, group responsibility and group-member mind for eight selected groups, as rated by subjects in Wayz and Young (2012) (adapted from the original)

A second challenge in judging the criminal responsibility of collectives is related to the particular state of mind of intent, which is key in determining levels of blameworthiness. We do not have direct access to the intention, motivation, or will of other people. Understanding the mental state of others and particularly whether they possess intent is not directly observable and thus based on inference. The processes by which people infer intent are personalized and specifically tailored to human properties. In making inferences about intent, individuals draw heavily on what they perceive to be a person nature or characters.[18] The tendency to understand one's intentions in terms of character is functional since it allows not only to explain past behaviors but also to predict future ones. That is, in assessing intent individuals move from one's actions to one's moral nature, and use this moral nature to infer intent.[19] These processes, however, are individual-based and fit better to assess people rather than non-human entities.

Research shows, for example, that in the context of punishment, kids show ease of attribution of responsibility to inanimate objects when exposed to a probing situation (i.e. "who ate the last cookie, you or the doll?"), this tendency however, disappears as they grow up. Presumably, the development of a theory of mind also entails the realization that there is a difference between humans and other inanimate entities such that blame can be attributed only to living objects.[20]

[18] See Heider (1958) and Maselli and Altrocchi (1969), p. 445.

[19] See Heider (1958) and Tyler and Mentovich (2011), pp. 107–108.

[20] See generally Piaget (1960).

4 Over-Personalization of Intent

Not only do people rely on a person's character to make inferences about intention, but also research shows that they tend to discredit situational or systematic sources of wrongdoing (which often mark corporate misconduct) in favor of explanations highlighting a person's character and personality. Personality is perceived to be immutable and relatively less susceptive to situational changes. Once personality is inferred it is easier to explain any behaviors in terms of one's personality and character. Furthermore, individuals tend to explain bad behaviors of others in terms of personality flaws and not mitigating situational factors. This tendency to link bad behaviors to personality is termed 'fundamental attribution error' and is a robust and widely replicated psychological phenomenon.[21] When hearing about a person who has conducted misconduct—for example, used inside-trading information to make profit—people are more likely to infer that this person has a bad character (i.e. he or she is greedy, dishonest, and unethical). Situational factors—such as that this person's company explicitly or implicitly encouraged employees to use any tactic to increase profit, or that it was part of the organizational culture in the company, or that it was the only way to be promoted—are likely to be discarded in favor of the simple explanation that a bad action is done by a bad person. After inferences about the person character are made, it is also more likely that this person's behavior will be perceived as intentional.

It is easy to see how inferences of character and intent fit well to individuals but not to collective entities. Supporting this argument, studies have shown that people typically evaluate individual members of an organization (i.e., their bosses, managers or other organizational decision-makers) in terms of their perceived motives. However, when they evaluate the equivalent organization, people do no longer rely on judgments of character and intent, but rather draw on the company's policies and decision making procedures.[22] One study examined this issue directly by comparing the factors that influence employees' desire to punish (i.e., by harming) their organization versus their supervisor within the organization.[23] The results of the study show that, again, judgments of character and intent were significantly more predictive of the desire to punish individuals than organization. These findings support the idea that intent is personalized, it is better inferred in the case of individuals, and ultimately better used to evaluate individuals rather than corporations.

This puts companies in a unique place. On the one hand companies are made of people, who can take the blame of actions. On the other hand, the company shields its members, allowing them to behave differently under the umbrella and mask of a corporate body. Studies in psychology of negative behavior show that the absence of individual responsibility and judgment leads people to behave less morally.

[21] Jones and Nisbett (1972), pp. 79–94; Jones et al. (1979), pp. 1230–1238.

[22] See Tyler and Mentovich (2011), p. 117.

[23] See Tyler and Mentovich (2011), p. 122.

Simply put, people are more likely to act unethically when their identity is masked or hidden via the umbrella of a company, rather than when they are directly responsible for the behavior.[24] Similarly, the mediating platform of correspondence is shown to affect the level of morality of one's choices. People would steal money easier when using online transactions, or money-equivalent objects, than when an actual pack of dollar bills is the thing they need to steal.[25]

4.1 Individual Versus Organizational Based Judgments of Culpability and Punishment

If it is harder to impute intent to collective entities in comparison to real people, it also follows that real people, compared with collective entities, are seen as more culpable for their actions. And indeed, this is precisely what research suggests. First, a study looking at how people perceive the moral responsibility of several groups versus their respective group members showed that individuals are deemed as more responsible than the groups or the organizations they are part of.[26] Furthermore, a study that directly examined punishment of equivalent wrongdoing conducted by either a real person or a collective entity demonstrated that *the same* wrongdoing conducted by an individual is seen as more serious and deserving more severe punishment when conducted by a person compared with a corporation. In this study, participants read one of two versions of a newspaper article both describing an unlawful discrimination against women in a certain company. The only difference between the two versions of the article involved the identity of the culprit. In one version the wrongdoer was an individual (a supervisor within that company) and in a second version the wrongdoer was the company itself. This design ensures that differences in judgments of moral responsibility and punishment can *only* stem from the individual versus collective identity of the wrongdoer. The results of the study demonstrated that whether the discrimination was conducted by a supervisor or a company affected both the perceived severity of the misconduct, as well as the punishment participants thought was appropriate in this case. Discriminatory behavior of a person (versus a company) was seen as more morally reprehensible and received a harsher punishment compared with the same behavior when conducted by a company.[27] These results provide a direct and casual support to the claim that individuals are held more morally responsible than collective entities even when they commit an identical wrongdoing.

While in general people find it easier to see humans as more morally responsible for their actions compared to collectives, there are some likely moderating

[24] For a review see Darley (1992).

[25] Ariely (2012), pp. 436–446.

[26] See Waytz and Young (2012).

[27] See Tyler and Mentovich (2011), p. 126.

circumstances that facilitate (or hinder) this tendency. If it is hard to assess intent of collectives it is possible that assigning moral responsibility to corporations is particularly challenging in more severe wrongdoing that typically require intent. This conclusion fits well with a jury study showing that juries hold corporate to higher legal standard in assessments of negligence.[28] In addition, since group cohesion facilitates the attribution of group mind and increases perception of moral responsibility of the group, it is likely that it would be easier to impute intent and punish organizations that are more cohesive and comprise of similarly minded members. The punishment of big and complex mega-corporations in this case would be particularly challenging.

5 The Provision of Rights to Corporations Versus Individuals

One area in which the courts (at least in the U.S.) find it easy to attribute individual-like qualities to corporations is constitutional protection, particularly with regard to the First Amendment right of freedom of speech. In discussing state statutory limitation to corporate speech (e.g. Bank of Boston vs. Bellotti) the Supreme Court argued that 'if the speaker here were not corporations no one would suggest that the State could silence their proposed speech'. The Court used this reasoning to protect corporate speech concluding that freedom of speech protection is 'no less true because the speech comes from corporation rather than an individual'. While the identity of the speaker seems to be insignificant for the courts it is likely to matter to how lay-people judge constitutional entitlement.

Because of the same reasons that people find it hard to see corporations as moral agents for the purpose of punishment they may also find it difficult to see corporations as entitled to some legal privileges. Legal rights were originally constructed to protect the rights of individuals. These rights are specifically tailored to uniquely human qualities such as the capacity to think, to speak, to form conscience and to act upon it. It should make little sense for people to grant such protections to non-human entities. Supporting this notion, research shows that limitations to individual freedom of speech were judged more severely when targeted individual compared with corporate speech.[29] While, thus far, studies have focused on the constitutional right of freedom of speech, the same may be true for other legal rights such as due process, equal protection, or even Fifth Amendment protections against self-incrimination.

[28] See Hans (2000).

[29] See, Tyler and Mentovich (2011), p. 127.

6 The Legal Implications of the Psychology of Culpability and Punishment

The first question regarding the research reviewed here is whether it is relevant to the legal discourse regarding corporate criminal liability? After all, legal doctrines and practices often do not correspond with lay people's judgments, assumptions, or behaviors. In recent years, however, there has been an increasing demand for the law to reflect some degree of behavioral realism—namely, to establish legal doctrines that carry 'real world' validity and are supported by the best available scientific evidence.[30] This call is anchored in the realization that doctrines that correspond with how people realistically think or behave are more likely to be effective in achieving legal and policy goals.[31]

In the context of corporate criminal liability, utilizing an empirical framework to explore how people think about the culpability and punishment of collective entities can be particularly beneficial.

First, legal actors (i.e., prosecutors, defenders, juries and judges) are people too; as such the ways they assess culpability, impute intent and peruse punishment are similar to how lay individuals do so. A direct support for this notion is found in a study conducted on district attorneys in California, which showed that Californian prosecutors felt discouraged from prosecuting corporations for criminal activity due to the difficulties in establishing intent.[32] This demonstrates that legal professionals are susceptible to similar psychological difficulties that characterize lay-people's assessments of culpability.

Second, while mainly theoretical, the discussion involving corporate criminal liability has highlighted legal difficulties that are remarkably similar to the psychological difficulties individuals encounter when trying to attribute blame and punishment to non-human entities. Both legal theories and human judgments of culpability and punishment have been developed in order to judge the moral and legal responsibility of individuals. Therefore, the legal conception of criminal liability is similar to that of lay people at least in the sense that both perspectives rely on individual-level understanding of crime and punishment.

7 Summary

If both people and criminal law find it hard to attribute intent to corporations using the same framework that applies to individuals then we propose that new frameworks for collective criminal liability should be developed, such that they will

[30] Krieger and Fiske (2006), Kang and Banaji (2006), and Mentovich and Jost (2008).

[31] See for example Krieger (1998) and Krieger and Fiske (2006).

[32] Benson et al. (1998).

account for the difficulties of imputing intent to collectives. One way to do that is to replace demands for specific intent with a violation of a specified legal standard. That would make liability inferences similar to judgments of recklessness and negligence. These, as research suggests, are not difficult to apply to corporations.[33]

Another solution is for the law to specify the ways by which a collective intention can be inferred. One of the problems with the current situation is that while criminal liability was extended to collective entities, the doctrines of liability remained individual-based. That situation is problematic since we want to be able to punish and deter collectives but find it easier to assess culpability of individuals. The law can address these difficulties by delineating the specific ways in which corporate criminal intent can be imputed from the intent of specific individuals within the corporation. Existing models in the U.S. allow inferring corporate intent based on the intentions of individual members. These models, however, have been criticized as too simplistic since they require intent to be *fully* imputed to at least one corporate member as an individual. In other words, to establish corporate intent the prosecution needs to find at least one corporate officer who *fully* possesses the level of intent required for the specific crime at stake. This requirement does not capture situations—more common in complex corporate structure—in which full intent cannot be entirely reduced to one individual member within the organization, but can be found in the aggregated knowledge and intentions of several corporate members. Since people find it quite easy to assess intentions of individuals, the law can specify how individual intents can be combined to form a comprehensive corporate intent, as well as to identify the specific corporate officers whose aggregated individual intent can qualify for imputing collective intent.

Another possibility is to base criminal liability on corporate policies or actions rather than mental state. This idea is consistent with research showing that people naturally evaluate corporations based on policies and decision-making processes.[34] One of such suggestion, for example, posits that corporate criminal liability should be anchored in assessing whether or not the law-breaking was a reasonably predicted consequence of corporate policies and whether the corporation benefitted from the legal violation. Inferring culpability from corporate actions and policies should not encounter the same psychological difficulties that mark the assignment of intent.

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[33] See Hans (2000).

[34] See Tyler and Mentovich (2011).

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Decision and Punishment: Or—Hold Bankers Responsible! Corporate Criminal Liability from an Economic Perspective

Patrick Bernau

Abstract From an economic perspective, the "principle of liability" is central: Those who decide should pay. This should hold true for white-collar crime. The decision-makers are not the corporations, but the managers—during the financial crisis, they often acted against the interests of the companies. Yet "modern" criminal prosecution focuses on prosecuting corporations. This leads to wrong incentives. Prosecution should increase its focus on managers, even if this turns out to be more difficult than prosecuting the corporation.

1 Introduction

Perhaps Dale Lattanzio was nothing but a nice colleague. He was working as a Managing Director with the investment bank Merrill Lynch, when some of his colleagues got into trouble. It was their job to create securities from mortgages. But on the market, these securities were not regarded as being too safe anymore, and buyers were hard to find. So Dale Lattanzio created a group of Merrill Lynch employees and ordered them to buy these securities, which another group at Merrill Lynch had created and which nobody else wanted to buy. The securities' creators received several million dollars in bonuses and shared them with the securities' buyers, which was not uncommon. But later, these securities had to be written down. In the financial crisis, Dale Lattanzio was fired. In high distress, Merrill Lynch was sold to Bank of America.[1] The U.S. regulator, the Securities and Exchange Commission (SEC), thoroughly checked Merrill Lynch's bonuses and sued the company. But up to this day we do not know whether Dale Lattanzio broke

This document reflects the view of the author, not necessarily those of F.A.Z.

[1] Narrated after Bernstein and Eisinger (2010).

P. Bernau (✉)
Frankfurter Allgemeine Zeitung, Frankfurt, Germany
e-mail: p.bernau@faz.de

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the law. There has been no trial. Meanwhile, Lattanzio has founded an investment advisory.

Perhaps Dale Lattanzio is just a nice colleague. But he might also be a good example for current shortcomings in addressing and punishing white-collar crime. From an economic perspective, in crime as in other issues, the "principle of liability" is central: Those who decide should pay. It is not only important for a sense of justice, but first of all this principle is important for setting the right incentives to act. Too often, the principle of liability seems to be disregarded.

2 Who Decides?

In much of the literature about corporate criminal law, companies are seen as a single rational actor. This model may be a good choice for studying interactions on markets or whole economies, but for studying white-collar crime and the question of corporate crime, it seems more useful to have a closer look at corporate decision making.[2]

Unfortunately, economics and management science still lack a widely recognized positive theory of corporate decision making. Of course, there are several normative theories who tell managers how they should be deciding. But the question how decisions actually take place has no reliable answer today.

Fortunately, there is a popular theory which can at least shine a light on one important aspect of the decision-making process. It is the "Principal Agent Theory".[3] The "Principal Agent Theory" formalizes the observation that the agent's (or: the employee's) utility is influenced by more motivations than only the interests of the principal (or: the boss, the shareholders). In practical terms, employees may be motivated by money, status, professional standards, human relations or by other things—for example by fear of prosecution. In discussing white-collar crime, it is mandatory to differentiate between the interests of the company as the interests of shareholders and other stakeholders on the one hand—and the interests of employees themselves on the other hand.

What is the interest of companies and their shareholders? There are several notable calculations which suggest that criminal activity pays off for the company and its shareholders.[4] However, none of these calculations completely consider the damaging effects crime can have to the public image. None of these calculations completely consider subsequent losses of orders, turnover and earnings. In Germany, companies seem to view the Siemens corruption scandal as a particularly bad example. Anecdotal evidence suggests that many Siemens employees thought that bribery was good for the company, but while not all of them are convinced that

[2] Similar arguments in Metzger and Schwenk (1990).

[3] See, e.g. Ross (1973).

[4] See, e.g. The Economist (2012).

business without corruption is possible, many now regard corruption as detrimental to the company because of the public outcry. Judging from actions, top managers of other companies now seem to think in a similar way. Be it because crimes being uncovered brings huge cost, be it because of top managers' own desire for status and a righteous self-image, many companies have introduced compliance systems of rules and controllers in order to prevent crime from happening. In fact, these compliance systems are so excessive that German employees start to talk about a "compliance delusion".[5]

At the same time, another kind of white-collar crime seems to have become more virulent, especially in crime surrounding the financial crisis: It is crime motivated by employees' own agenda, for example their desire for status or for huge bonuses. At least, some action of employees clearly violated their companies' guidelines.

Dale Lattanzio is just one example for bankers who acted not in the interest of their employers, but against them. Another example is the one of J.P. Morgan's trader Bruno Iksil, best known under his nickname "London Whale", who is connected to a $6 billion loss due to overly risky trading and whose losses—according to the SEC's case—were under-reported up the chain[6] and to the regulation authorities.

3 Who Is Punished?

Of course, most bank managers around these incidents have had to bear some consequences, the most severe often being the loss of their job. In the affair around the "London Whale", even Ina Drew, the long-time head of J.P. Morgan's Chief Investment Office, has retired from her job.[7] But: Losing a job cannot be regarded as punishment. Losing a job is part of the risk that most managers face all of the time, sometimes they are forced to retire simply due to a lack of success after circumstances changed. Many just try to avoid being fired by breaking the law.

In the case of the "London Whale", only two of J.P. Morgan's employees are possibly facing prison, not including the "London Whale" himself. According to George Canellos, Co-Director of the SEC's Division of Enforcement, "J.P. Morgan failed to keep watch over its traders".[8] But it is not the managers who are held accountable for this. Instead, the bank J.P. Morgan has agreed to pay fines which total to $920 million, in addition to the loss that the bank already has to bear.[9] The discrepancy between consequences for the bank and for managers seems to be a

[5] See DPA (2012).

[6] Gandel (2013).

[7] Dominus (2012).

[8] SEC (2013).

[9] Schäfer and Saigol (2013).

problem for the public, at least it has quickly been pointed out by the German boulevard website "Deutsche Wirtschafts Nachrichten".[10]

In the United States, it is not unlike in Germany: Up to now only few trials against individual bankers have surfaced. Of course, a financial crisis can happen even without anybody breaking the law. Nonetheless, in the investigations after the financial crisis, some wrongdoings were uncovered. But the main targets of the investigations are the banks, not the bank managers themselves. Deutsche Bank alone has accrued €3bn for possible costs from trials because of the financial crisis and other scandals.[11] At the same time, only few bank managers have been put to trial in person, e.g. Stefan Ortseifen (IKB) and Dirk Jens Nonnenmacher (HSH Nordbank). Germany's national newspaper F.A.Z. concludes that most of the bankers "fell softly".[12]

But punishing companies does not necessarily punish the right entities. In economics, the "incidence of costs" has been studied at least since 1924.[13] In general, it is widely accepted that costs—such as criminal fines—are not borne by those who are charged with the costs, but the costs are passed on: to the owners of a company, to managers or workers, to customers, to other stakeholders or to any combination of these. This is not just some kind of spillover effect, but a fundamental change in the distribution of costs. In the end, costs are borne by those stakeholders whose elasticity of their relationship to the company and the cost is lowest. Put less technically, the cost is borne by those stakeholders who cannot or will not turn away.

Who is this? This question cannot be answered in general. Elasticities differ from company to company, from industry to industry. In an extreme example of a competitive market with entry-barriers, customers might even pay a fine which was originally designed to protect them. For example, if all the members of an oligopoly had joined a cartel and were fined for this, the fine would be nothing but an additional one-time cost for all suppliers, which might make it necessary and allow them to all raise their prices.

When the fine has to be paid, the managers who were responsible for the crimes often have already left the company, as has been previously discussed. This is not only the case with bankers. Some criminals even utilize the fact that authorities first look at the companies and not at the individuals behind them. The German "telecommunications law" ("Telekommunikationsgesetz") allows for administrative fines up to 100,000 Euro. There was a time in the early years of the twenty-first century when some companies did cold calls. When the fines came, the companies went bankrupt, but their founders just started over with another company, until they were held responsible in person.

[10] Deutsche Wirtschafts Nachrichten (2013).

[11] Armbruster (2013).

[12] F.A.Z. (2013).

[13] Carver (1924).

4 What to Do?

Regarding corporate crime from an economic perspective means taking into account the "principle of liability". With this principle in mind, it seems like there has been too much attention on holding companies responsible and too little attention on individuals.

One thing is certain: Holding individuals responsible is not going to be easy. Often the right law is missing. The more important barrier is the fact that it is difficult to prove criminal intent—and it is absolutely necessary to prove it, since companies need to take risks which may turn out the bad way. Drawing the line between risk and hazard is not going to be easy. Today already, many top managers surround themselves with lawyers in order to bulletproof their decisions, and this situation contributes to discouraging some eligible candidates from aspiring to a top management position.[14]

It gets even more complicated due to the development of "criminal cultures" in companies. According to some analyses, employees—particularly employees at the bottom of the hierarchy—are more inclined to criminal activities because many of their colleagues commit crimes.[15] Still, somebody is responsible for letting such a corporate culture develop and exist.

It is not an economists' expertise to point out which particular laws might be missing, which laws might already be in place and how to prove intent. All an economist can do is to acknowledge that this is a very difficult task. However, it may be worth the while.

Let's take a look back to the case of the London Whale, in which the bank was held responsible for failing to supervise, but the supervisors such as Ina Drew, the long-time head of the chief investment office, were not. Fortune senior editor Stephen Gandel asks: "Why not charge Ina Drew with failure to supervise?".[16]

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[15] See, for example, Campbell and Göritz (2013).

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Corporate Criminal Liability from a Comparative Perspective

Marc Engelhart

Abstract The recognition of legal entities has been an important step in the development of many countries and has often gone hand in hand with their industrialization. Necessary investments for projects such as railways required states to allow private entities to act legally on their own and restrict liability to the money invested, in order to attract investors. Since the middle of the nineteenth century, when economic markets and the emergence of companies had gained momentum as a result of the industrial revolution, legal systems have dealt with the problem of how these entities, with companies being the most important ones, should be treated when its members infringe legal regulations. This question becomes particularly significant for society when members commit crimes.

The effect of such "corporate wrongdoing" can be tremendous. An early example is the collapse of the *South Sea Company* from 1719 to 1721 and the financial ruin left in its wake due to widespread insider trading and corruption. The accounting scandals within *Enron* and *Worldcom* in the US, the case of financial fraud within *Parmalat* in Italy, or the corruption cases within *Siemens* in Germany are vivid examples during the last decade of the scope and severe consequences corporate wrongdoing can have on direct stakeholders and the overall market. In a liberal society, and especially in a free market economy, the freedom of conducting business without state interference is a critical element of the system. Yet the mere scope of the aforementioned cases calls for an adequate response by society and its legal systems. This chapter takes a comparative view of existing national and international solutions to corporate criminal liability (1) from prevailing models (2) over new approaches (3) to new perspectives in regulation (4).

M. Engelhart (✉)
Max Planck Institute for Foreign and International Criminal Law, Freiburg i. Br., Germany
e-mail: m.engelhart@mpicc.de

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1 Status of Corporate Criminal Liability

1.1 International Development

Today, the responsibility of companies for criminal acts of employees is generally accepted at the international level. International treaties in the field of economic criminal law regularly include a provision for corporate sanctions. This trend can only look back on a short history of about 15 years. In the 1980s, the most prominent measure in regard to corporate criminal liability was a recommendation by the Council of Europe,[1] but due to its nature it was non-binding. It took until the mid-1990s for the European Union to resume the topic and create binding obligations.

The central document is the Second Protocol of the Convention on the protection of the European Communities' financial interests from 1997.[2] Although it did not come into force until 2009, it had great influence on European legislation after 1997. Until now, three joint actions (1997–1998, now substituted by framework decisions),[3] 11 framework decisions (2000–2008),[4] seven directives (2003–2013)[5]

[1] Council of Europe, Recommendation No. R (88) 18 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, adopted on 20 October 1988.

[2] Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19.7.1997, p. 11 (Art. 3).

[3] Joint Action 97/154/JHA of 24.2.1997 on trafficking in human beings and the sexual exploitation of children, OJ L 63 of 4.3.1997, p. 2 (under II.A.c.); 98/742/JHA of 21 December 1998 on making it a criminal offense to participate in a criminal organization in the Member States of the European Union, OJ L 351 of 29.12.1998, p. 1 (Art. 3); 98/742/JHA of 22 December 1998 on corruption in the private sector, OJ L 358 of 31.12.1998, p. 2 (Art. 5).

[4] Framework Decision 2000/383/JHA of 29.5.2000 on counterfeiting of the euro, OJ L 140 of 14.6.2000, p. 1 (Art. 8); 2001/413/JHA of 28.5.2001 on fraud and counterfeiting of non-cash means of payment, OJ L 149 of 2.6.2001, p. 1 (Art. 7); 2002/475/JHA of 13.6.2002 on terrorism, OJ L 164 of 22.6.2002, p. 3 (Art. 7); 2002/629/JHA of 19.7.2002 on trafficking in human beings, OJ L 203 of 1.8.2002, p. 1 (Art. 4; replaced by directive 2011/36/EU); 2002/946/JHA of 28.11.2002 on the facilitation of unauthorized entry, transit and residence, OJ L 328 of 5.12.2002, p. 1. (Art. 2); 2003/568/JHA of 22.7.2003 on corruption in the private sector, OJ L 192 of 31.7.2003, p. 54 (Art. 5); 2004/68/JHA of 22.12.2003 on the sexual exploitation of children and child pornography, OJ L 13 of 20.1.2004, p. 44 (Art. 6; replaced by directive 2011/93/EU); 2004/757/JHA of 25.10.2004 on illicit drug trafficking, OJ L 335 of 11.11.2004, p. 8 (Art. 6); 2005/222/JHA on attacks against information systems, OJ L 69 of 24.2.2005, p. 67 (Art. 8, replaced by directive 2013/40/EU); 2008/841/JHA of 24.10.2008 on organized crime, OJ L 300 of 11.11.2008, p. 42 (Art. 5); 2008/913/JHA of 28.11.2008 on racism and xenophobia , OJ L 328 of 6.12.2008, p. 55 (Art. 5).

[5] Directive 2003/6/EC of 28.1.2003 on insider dealing and market manipulation (market abuse), OJ L 96 of 12.4.2003, p. 16 (Art. 1 Nr. 6, Art. 2); 2005/60/EC of 26.10.2005 on money laundering and terrorist financing, OJ L 309 of 25.11.2005, p. 15 (Art. 2, 39); 2008/99/EC of 19.11.2008 on the protection of the environment, OJ L 328 of 6.12.2008, p. 28 (Art. 6); 2009/123/EC of 21.10.2009 on ship-source pollution, OJ L 280 of 27.10.2009, p. 52 (Art. 8); 2011/36/EU of

as well as four new proposals for directives[6] have included provisions on corporate criminal liability, mostly based on the Second Protocol.[7]

Alike, eight international treaties by the Council of Europe from 1998 onwards have included provisions on corporate liability that are very similar to the model of the Second Protocol.[8] The development is not restricted to Europe but can also be seen worldwide. Three UN conventions on financing terrorism (1999), organized crime (2000), and corruption (2003) address companies.[9] The same applies to the influential OECD convention on corruption of 1997.[10] Besides these acts, a number of further regional agreements[11] exist as well as soft law instruments that promote corporate criminal liability.[12]

A common feature of these international measures is the open approach concerning the kind of responsibility a member state or party to the treaty should introduce for companies in the national system. Regularly, the states have the choice between criminal, administrative, or civil sanctions as long as such a

5.4.2011 on trafficking in human beings, OJ L 101 of 15.4.2011, p. 1 (Art. 5); 2011/92/EU [corrected: 2011/93/EU] of 13.12.2011 on sexual abuse and sexual exploitation of children and child pornography, OJ L 335 of 17.12.2011, p. 1 (Art. 12); 2013/40/EU of 12.8.2013 on attacks against information systems, OJ L 218 of 14.8.2013, p. 8 (Art. 10).

[6] Proposal for a directive on insider dealing and market manipulation, document COM (2012) 420 final of 25.7.2012 and COM (2011) 654 final of 20.10.2011 (Art. 7); on fraud to the Union's financial interests, document COM (2012) 363 of 11.7.2012 (Art. 6); on the protection of the euro and other currencies against counterfeiting by criminal law, council document 14085/1/13 of 3.8.2013 (Art. 6); on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, document COM (2013) 45 final of 5.2.2013 (Art. 55).

[7] For details, see Engelhart (2012b), pp. 110ff.

[8] Convention on the Protection of Environment through Criminal Law of 4.11.1998 (not yet in force), ETS No. 172 (Art. 9); Criminal Law Convention on Corruption of 27.1.1999, ETS No. 173 (Art. 18); Convention on Cybercrime of 23.11.2001, ETS No. 185 (Art. 12); Convention on the Prevention of Terrorism of 16.5.2005, ETS No. 196 (Art. 10); Convention on Action against Trafficking in Human Beings of 16.5.2005, ETS No. 197 (Art. 22); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16.5.2005, ETS No. 198 (Art. 10); Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25.10.2007, ETS No. 201 (Art. 26); Convention on the counterfeiting of medical products and similar crimes involving threats to public health of 28.10.2011 (not yet in force), ETS No. 211 (Art. 11).

[9] See the International Convention for the Suppression of the Financing of Terrorism of 9.121999 (Art. 5); United Nations Convention against Transnational Organized Crime of 15.11.2000 (Art. 10); United Nations Convention against Corruption of 31.10.2003 (Art. 26).

[10] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17.12.1997 (Art. 2).

[11] E.g. Inter-American Convention against Corruption of 29.3.1996 (Art. 8 para. 1); Southern African Development Community (SADC) Protocol against corruption of 14.8.2001 (Art. 4 para. 2); African Union Convention on preventing and combating corruption of 11.6.2003 (Art. 11 No. 1).

[12] E.g. the FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations (February 2012), p. 26, 34 (No. 7c.), 37 (No. 8).

sanction is effective and dissuasive. This reflects not only the lack of a common definition at the international level of what is criminal (or even what can be deemed a sanction) but is also symptomatic of the different national systems, that—like the German one—do not regard a "true" criminal sanction as being compatible with criminal law dogmatic.

1.2 National Developments

Traditionally, the national legal systems' answer to corporate wrongdoing has been to provide for a double sanctioning mechanism. On the one hand, the acting member of the legal entity is punished; in many cases, criminal sanctions apply. The number of such sanctions for "economic crimes"[13] has increased substantially in the last decade. On the other hand, the company itself is held responsible. The question as to whether the sanction is a criminal one differs widely among nations. Most common law countries have integrated the responsibility of companies into their criminal system for a long time. In contrast, civil law countries, especially German-speaking ones, have opposed a criminal solution for dogmatic reasons and instead referred to administrative fines for a long time. For example, in 1990, only the United Kingdom and Ireland as traditional common law countries and Denmark (since 1926), the Netherlands (since 1951), and Portugal (since 1984) provided for a corporate criminal sanctions in Europe.

Since 1990, however, the picture has changed completely. Many countries have introduced a system of corporate criminal liability, especially in Europe.[14] Even "restrictive" systems, which heavily opposed the concept of corporate criminal responsibility for decades have opened the door for the prosecution of companies: For example, since 2003 in Switzerland, companies are held responsible if no member can be prosecuted or if the company has not prevented a crime by due care. Since 2006 in Austria, companies are criminally liable if a senior manager commits a crime or if the company has not prevented the crime of a low-level employee by due care. The development has been expedited by the rise of corporate liability at the international level. Although international instruments do not require states to introduce a genuine criminal sanctioning system, the obligation to

[13] Also often called "business crime", "white collar crime", or "financial crime".

[14] E.g. Norway (1991), Iceland (1993), France (1994), Finland (1995), Slovenia (1995), Belgium (1999), Estonia (2001), Hungary (2001), Malta (2002), Croatia (2003), Lithuania (2003), Poland (2003), Switzerland (2003), Slovakia (2004), Romania (2004), Austria (2006), Luxembourg (2010), Spain (2010), Czech Republic (2011); Sweden provides for a corporate criminal sanction but nor for corporate criminal liability since 1986 (as a kind of mixed model); Italy chose a quasi-criminal approach in 2001; Bulgaria introduced a mixed administrative-criminal liability for legal persons in 2005. See Gober and Pascal (2011); Pieth and Ivory (2011); Sieber and Cornils (2008), pp. 347ff.; Vermeulen et al. (2012).

introduce effective and dissuasive sanctions can best be met if states implement a criminal regulation and not a civil or administrative equivalent.

In 2013, only Germany, Latvia, and Greece have not yet introduced some kind of corporate criminal liability in Europe. In Germany, the question of whether a true criminal sanction against companies is necessary is still being discussed intensively.[15] In 2011, the ministers of justice of the 16 German states asked the Federal Ministry of Justice to analyze whether a criminal sanction is necessary in order to fight economic crime. In 2013, the German Bundesrat, the upper house of the German parliament, started an initiative to draw up a law on corporate criminal liability. The near future might therefore bring about a change in German legislation.

2 Prevailing Models

2.1 Construction of Responsibility

The models for corporate criminal liability vary of course from country to country and even among international treaties. But apart from details, most of the countries and international instruments refer to a similar structure. The Second Protocol provides a good example of the common model for corporate liability[16]: If (1) a person, (2) being in a leading position based on the power of representation, has the authority to take decisions or the authority to exercise control (3) within an entity, which is defined as a legal person except for states, public bodies in the exercise of state authority, and public international organizations, (4a) commits an offense for the benefit of the legal person or (4b) his lack of supervision or control enables offenses of persons under his control for the benefit of the legal person, the legal person is liable. The protocol also provides that the company can be held liable besides the natural persons. The question, whether such a dual approach creates problems of "double criminality", is discussed frequently in the literature,[17] but in practice all systems take the line of the protocol.

2.1.1 Common Standard: The Individualized Model

The Second Protocol follows an "individualized" model, as the responsibility of the legal person concentrates on the offense of the natural person.[18] In its basic form,

[15] See Engelhart (2012a), pp. 322ff., 346ff., 599ff.; Mittelsdorf (2007); Ransiek (2012), p. 45.

[16] Second Protocol, supra note 3, Art. 3.

[17] For an overview and further references, see Engelhart (2012a), pp. 458f., 677ff.; von Freier (1998), pp. 230ff.

[18] For possible models, see Engelhart (2012a), pp. 350ff. See also Tiedemann (2012), pp. 9ff.

the offense of an employee is enough to hold the company liable. This construction allows criminal acts and the guilt of a natural person to be attributed to a company. Explanations for this construction vary from viewing the company as an organic being in which the employees are the company[19] to a "real" attribution approach that considers the company necessarily connected to a natural person, as only the natural person enables the company to take part in the legal system (identification approach).[20]

The acceptance of corporate criminal liability pushes the boundaries of the criminal law systems beyond the responsibility of individuals. This conflicts with classic views on individualized criminal guilt—may they be based on religious thinking such as the prohibition to excommunicate a corporation by Pope Innocent IV from 1250, which led to the frequently quoted statement that a corporation has "no soul to be damned and no body to be kicked,"[21] or on the concentration of criminal law on human behavior since the Age of Enlightenment.[22] Nonetheless, social reality in all these systems not only shows that these ideas have outlived their times but also that criminal law structures are much more flexible than the classic legal doctrine accepted in many countries.

As the Second Protocol shows, the basic form of the "individualized" model exists only in theory and is regularly modified in order to restrict an otherwise too extensive liability of the company. Common restrictions are made either by objective elements, e.g. the person must be acting within the activities of the company, or by subjective elements such as when the acting person is required to act for the benefit of the company. These requirements exclude "private" behavior not connected to the company or behavior directly damaging the company's assets (for example, in the case of theft of company property). These elements only have a small effect on limiting company liability.

The requirement of the Second Protocol, which limits liability to acts of persons in a leading position, is in contrast a substantial restriction. National approaches therefore differ substantially. Whereas the federal criminal system of the USA holds a company liable for any employee (and even third parties such as contract partners), the English common law approach and most international instruments restrict liability to high-ranking corporate officials. This point illustrates the difficult question as to which persons within a company can be regarded as "true" representatives of corporate behavior. One solution to this problem, also taken by the Second Protocol, is to include crimes of normal employees if these crimes were enabled by lack of due supervision or control. This second approach broadens

[19] This approach is based on v. Gierke and his theory of real corporate delinquency (Theorie der realen Verbandstäterschaft), see von Gierke (1887), pp. 603ff., 613.

[20] See e.g. Henkel (1960), pp. 91ff.

[21] See e.g. Coffee (1980–1981), p. 386.

[22] See e.g. von Freier (1998), pp. 55ff. who shows that no common philosophical basis for corporate and individual liability can be found. See also Paul (2011), pp. 49ff. for the important case in the 18th century of the South sea company.

liability while still linking it to management behavior that represents the "true nature" of the company.

2.1.2 Open Questions

Not only the question of whether liability is limited to high-ranking officers differs among corporate liability systems. Three other aspects have not been clarified yet: how to define the responsible organization, the exclusion of public entities, and the offenses attributed to the company.

The question of how to define the organization is one of the most difficult ones as the definition determines the scope of liability. The Second Protocol mentions "legal persons", but does not mean a certain type of organization or concept and is therefore not restricted to organizations with a formal legal status. It leaves the question open for the national legislator. To speak of legal persons as some countries like France do restricts liability to legal personhood. To speak of corporations as the term corporate criminal liability suggests would limit the scope to incorporated organizations in the economic field. But besides economic entities, the concept of corporate criminal liability can also be applied to associations such as sport clubs, political parties, trade unions, and religious organizations. Insofar, the best solution seems to be to take a legally undefined term, e.g. "undertaking"[23] or "collective",[24] give a definition, and list the main examples.

The question of whether public entities shall also be responsible is answered differently among the legal systems. Some countries exclude public entities completely. Others have not regulated the question or generally include them. The majority of the countries seem to refer to a mixed solution, which is also taken by the Second Protocol: States and public international organizations as well as public entities in the exercise of state authority are excluded. This means that public entities, especially ones taking part in the economic market, can be held responsible. Such a solution guarantees that public entities that are comparable to private ones, such as a public railroad company or a state-owned brewery, are not privileged while public actions in the exercise of the state monopoly on the use of force cannot be judged under a corporate criminal liability regime.

The last open question is the number of offenses a company can be held liable for. Some countries include all criminal offenses, some make exceptions for specific offenses closely linked to natural persons, e.g. rape and perjury, whereas others list the offenses included one by one (often concentrating on financial crimes and corruption). As business differs greatly among companies, the number of legal regulations that could be violated differs accordingly. For some companies, corruption might be the risk number one, for others it might be product safety, anti-

[23] See e.g. Art. 102 of the Swiss Criminal Codes mentions "Unternehmen".

[24] See e.g. the Austrian Verbandsverantwortlichkeitsgesetz mentions "Verband".

trust law, or environmental crimes. This means that it is almost impossible to draw up a list that covers corporate wrongdoing in all or even in the most important areas.

2.2 Sanctions

The sanctions for companies are very homogenous in the different countries. There always exists a monetary sanction (fine) that is often also the only one provided by criminal law. The Second Protocol puts a fine at the center of its sanctioning system, too. Yet it already opens the door for other measures such as exclusion from entitlement to public benefits or aid, temporary/permanent disqualification from the practice of commercial activities, judicial supervision or a judicial winding-up order. Such elements have been partly taken up as criminal sanctions by national systems. More often, such measures are still regulated in the field of national administrative or civil law, with a clear emphasis on preventive goals, such as the protection of a functioning market, and not as repressive public sanctions.

3 New Approaches

3.1 Shortcomings of the Individualized Model

The aforementioned individualized model has a long history and is widespread. Yet, within the last few years, not only the individualized model has been promoted, but there has also been a development trying to shape corporate criminal liability differently. The classic approach has not been particularly successful in preventing corporate crime if one looks at countries such as the USA that have longstanding experience with this model. One reason is that the individualized model mainly concentrates on the acting employee. The corporate setting and its (decisive) influence on the acting employee is neglected. This means that the main characteristic of actions in companies, the corporate climate and its impact on the behavior of employees, is not taken into account. Additionally, sanctions for companies are mainly monetary. These sanctions can be substantive, such as in the antitrust legislation of the European Union, or in general, e.g. crimes in the federal system in the US. But these sanctions are not aimed at eliminating the corporate failure that led to the infringement of the law and therefore have no great preventive influence.[25]

[25] On preventive effects, see in detail infra Sect. 4.1.

3.2 The New Emphasis on Prevention

Alternative models for corporate criminal liability were fostered by two developments, both starting in the 1980s: the compliance movement in the US and the effects of insufficient organization and oversight in Europe.

3.2.1 Compliance Movement

The compliance movement has been the most influential development within the past decades in the business area.[26] Compliance simply means the adherence to (legal) regulations. The relevant aspect of this development is the so-called compliance program, which comprises all the measures to secure adherence to these regulations. Its roots can be traced back to the 1930s,[27] when solutions were sought for the principal-agent problem, brought up especially by *Berle* and *Means*[28]: The separation of ownership and control means that the management does not have to fear for its personal property when making decisions in the name of the company. In the 1950s, the area of anti-trust regulation introduced the first compliance programs to fight anti-trust violations. With the business ethics movement of the 1970s and 1980s, the prevention of crime became a topic taken up by companies and regulators.

The development of federal guidelines for sentencing in the 1980s made it possible to continue the business ethics approach on a new level. It took until 1991 and the introduction of the Corporate Federal Sentencing Guidelines to go beyond a written "code of ethics", as it requires companies to set up a complete preventive corporate structure and integrates compliance into regulative concepts.[29] Since 1991, compliance has spread not only to all areas of law but also become very popular on the European continent and is on its way to being taken up in Asia and Latin America.[30]

3.2.2 Due Supervision and Control

Whereas compliance was becoming popular in the US, in Europe the legal notion of insufficient organization was taken up and developed. In Germany, Sec. 130 OWiG provides for a regulatory offense when a company owner or a manager breaches his duty of supervision. It was *Tiedemann* who built on the idea of Sec. 130 OWiG and

[26] On compliance, see e.g. Kaplan and Murphy (2013); Hauschka (2010); Moosmayer (2012); Kuhlen (2013), pp. 1ff.; Rotsch (2010), pp. 141ff.; Sieber (2008), pp. 460ff.

[27] See Engelhart (2012a), pp. 285ff.; Eufinger (2012), p. 21; Walsh and Pyrich (1995), pp. 649ff.

[28] Berle and Means (1932), pp. 44ff., 69.

[29] On the Federal Sentencing Guidelines, see infra at Sect. 3.3.2.

[30] See Arroyo Zapatero (2013).

applied it to companies, as he regarded the insufficient organization and supervision as the true basis of corporate liability.[31] Since *Tiedemann* acted as a legal expert for the preparation of the Second Protocol, these ideas were taken to the European level.[32] In the Second Protocol, the idea became law, as national regulations had to base company liability not only on the offense of a leading manager for the benefit of the legal person but also on the lack of supervision or control of a person in a leading position that enables offenses of persons under his control for the benefit of the legal person. Due supervision and control are therefore key elements in avoiding company liability. Compliance programs as preventive measures fit perfectly into this concept.

3.2.3 Opening the Discussion

The main effect of the discussion on compliance and the duty to supervise was to broaden the view on corporate criminal liability. The discussion that previously had its focus on the construction of responsibility and (especially in Germany) on dogmatic problems now took the question of sanctions and procedural aspects into account. Especially compliance can be relevant on all of these three levels. In the following national developments in regard to responsibility, sanctions and proceedings that differ from the individualized model or have contributed to its enhancement will be shortly highlighted.

3.3 Alternative Solutions

3.3.1 Responsibility

The idea of basing corporate criminal liability on the lack of due supervision or control was taken up, e.g. by the legislator in Austria. In 2005, Austria introduced a system comparable to the Second Protocol in a new act, the Corporate Liability Act.[33] Hence, a company is liable if a decision-maker commits an offense for the benefit of the company. Alternatively, the company is liable for the offense of a staff member that has been facilitated by a decision-maker neglecting the necessary diligence in supervising that staff member. This legislation still concentrates very much on the lack of due supervision in the individual case and does not refer to general measures. Also, the act does not specify which measures are necessary in order to exercise "due supervision."

[31] Tiedemann (1988), p. 1173 and Tiedemann (1989), pp. 174ff.

[32] See the final report for the European Commission by Delmas-Marty (1993), pp. 59, 60, 83.

[33] Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG), BGBl. I Nr. 151/2005, Revision: BGBl. I Nr. 112/2007.

In 2003, Switzerland introduced a system of corporate criminal liability,[34] which puts the emphasis more on the organizational structure than merely on the aspect of supervision. The company is responsible for the lack of due organization if this deficiency makes it impossible (for the state) to hold an individual responsible. Additionally, the company is responsible for the commission of certain offenses by employees if the company has not taken all necessary and reasonable organizational measures to prevent such offenses.

In Italy, Legislative Decree No. 231 of 8 June 2001,[35] introduced a quasi-criminal responsibility (administrative by name, but criminal by nature) for legal persons.[36] This legislation has taken up the idea of compliance programs directly. Corporate liability is based on two different forms: If a senior manager commits a crime, the company is assumed guilty unless it can prove (equal to an inversion of the burden of proof) the extraneousness of the crime by demonstrating that it had an effective (compliance) program in place to prevent crimes and that the program had also been controlled effectively. In the case of offenses of subordinate employees, the company is liable if the offense is due to the lack of supervision and control of senior managers but only if the company has no effective (compliance) program.

The Corporate Manslaughter and Corporate Homicide Act 2007, applying to the whole of the United Kingdom, takes the idea of compliance even one step further.[37] A company is liable if the way in which it manages or organizes its activities both causes a death and amounts to a gross breach of a relevant duty of care owed to the deceased by the company. Senior management must have played a substantial role in the gross breach. Yet corporate liability in this case is not dependent on the commission of an offense by any person within the company. Liability merely requires the company to fall below a required standard of due organization and supervision (for which senior management is responsible) that leads to the death of a person.

These newer examples place much more emphasis on the corporate structure established in advance of the incident in question than many regulations in the past. They recognize the influence of the corporate setting on employees and raise the expectation that the companies must provide for adequate measures to reduce the risk of lawbreaking. This requires companies to actively participate in the prevention of crime and therefore puts prevention much more at the center of criminal and corporate regulation than ever before.

[34] Art. 102 Swiss Criminal Code; for details, see Forster (2006); Geiger (2006); Perrin (2011), p. 197.

[35] D.Lgs. 8 guigno 2001, n. 231.

[36] See Castaldo (2006), p. 361, de Maglie (2011), p. 255; Javers (2008), p. 408.

[37] See Almond (2013), Matthews (2008), and Pinto and Evans (2013).

3.3.2 Sanctions

Criminal sanctions for companies are mainly monetary. Of course many national systems allow for other measures by means of civil law or administrative law. Yet such measures are not directly a result of the criminal activity and hence lack the criminal notion, i.e. the stigma. To foster criminal legislation, the Second Protocol opens the door to more creative and non-monetary criminal sanctions. The US federal criminal law system shows how such sanctions can be regulated, especially in connection with the compliance approach.

The United States Corporate Federal Sentencing Guidelines (USSG), regulated as chapter 8 of the Federal Sentencing Guidelines, fully implement the compliance approach on the sentencing stage.[38] As it was not possible to draw up a Federal Criminal Code, no "modern" regulation on the question of liability has been reached. Therefore, everything in regard to compliance was integrated into the rules for sentencing. On the one hand, the guidelines integrate compliance into the determination of a fine. They provide a general framework on how to construct an effective compliance program.[39] An effective compliance program being implemented at the time of the commission of an offense by an employee is a mitigating factor.[40] Vice versa, the lack of an effective compliance program can be an aggravating factor.[41] On the other hand, the guidelines provide for a specific compliance sentence, as the court can order the company to improve or to set up a comprehensive compliance program.[42] Such a sentence restructuring a company can be more severe than any payment. Yet the decisive aspect is that the company has to improve the corporate structures that contributed to the offense of an employee.

3.3.3 Proceedings

In many national systems, criminal proceedings no longer end with a judgment after a public trial. Instead, prosecutors and courts use procedural ways to end the proceedings speedily, especially by reaching a deal with the accused. Again, the US federal criminal system shows the possibilities for (and dangers of) dealing with corporate crime. A deal (non-prosecution agreement—NPA/deferred prosecution agreement—DPA) is commonplace in the US now, not only when individuals are

[38] The current guidelines (effective 1 November 2013) are available online: http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm (12.2.2014). For details on the system, see Engelhart (2012a), pp. 149ff.; Gruner (2013), §§ 8–11; see also Laufer (2006), pp. 99ff.

[39] § 8 B 2.1 USSG.

[40] § 8C 2.5 (f) USSG: The program reduces the so-called culpability score, which determines the minimum and maximum multiplier necessary to calculate the fine range.

[41] § 8C 2.8 (a) (11) USSG: The lack of a compliance program is a circumstance that should be considered by the court when determining the fine within the calculated fine range.

[42] § 8 D 1.4 (b) (1) USSG.

accused but also when the accused is a company.[43] Regularly, such a deal not only requires the company to "confess" certain offenses but also to accept "sanctions." In many cases, this includes a monetary payment as well as the obligation to reform or install a compliance program.[44] This again allows the stakeholders to really reform and improve the company. Such "informal" sanctions of course raise some important questions. A main problem is that of legal certainty and the balance of powers between the executive and the judiciary, as the prosecution imposes sanctions comparable to the judiciary—apart from some guidelines in the United States Attorneys' Manual (USAM)[45]—without a clear legal basis and without judicial review. This contribution is not the forum to analyze this problem; the example is just a means to show that criminal proceedings offer many possibilities besides a formal judgment in order to answer corporate crime and to promote preventive measures such as compliance programs.

Unfortunately, one particular development undermines such preventive efforts. Criminal proceedings in many countries place a very strong emphasis on the aspect of cooperation of the company in order to ease investigations. "Good" cooperation is then often rewarded with a reduction of the sanction. This approach fosters a climate whereby a company does nothing until an incident is taken up by the authorities but then puts all its efforts into a kind of "super-cooperation." Such short-term measures offer no real incentives for creating a good long-term legal climate and structure within a company.

4 Perspectives

4.1 Preventive Effects of Compliance and Corporate Criminal Liability

Corporate criminal liability and compliance fit together perfectly as they both have preventive effects. A deterrent and preventive effect of corporate criminal liability, although often disputed,[46] has already been proven empirically in the 1970s by *Breland* and *Tiedemann*.[47] New research by the Max Planck Institute for Foreign

[43] See the high numbers of guilty pleas in federal court proceedings that are regularly based on a deal and that reached an all-time high in 2010 at 96 %, see United States Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics, Table 53, Engelhart (2012a), pp. 276, 746.

[44] See Markoff (2012–2013), McConnell et al. (2010–2011), and Ramirez (2009–2010) as well as Engelhart (2012a), pp. 739ff.

[45] Title 9, Chapter 28 USAM.

[46] See e.g. Hefendehl (2007), pp. 826ff., more positively Roxin (2006), § 3 para. 25; see also Engelhart (2012a), pp. 277ff., 661f.

[47] See Breland (1975); Tiedemann (1976), p. 249, see also Tiedemann, in this volume, pp. 11ff.

and International Criminal Law confirms that criminal measures are more effective than imposing administrative or in many cases civil sanctions.[48]

Similarly, empirical evidence indicates that a comprehensive and systematic compliance program is an effective tool to prevent and detect legal infringements within companies.[49] The main reason for such an effect is the influence of the corporate climate on the company. This has particularly come to light in the last two decades and is also the result of the business ethic development that paid attention to the attitudes of employees and the influences on their behavior. Social sciences, especially the works by *Luhmann*,[50] have shown that a company is a system of its own.[51] It exists alongside other systems and, most relevant in this context, the legal system. Companies have their own rules and procedures. *Teubner* calls it "law without state."

The existence of a separate system has the consequence that group dynamic processes can develop independently from other systems. Group dynamics are the result of the interaction of several people and result in the creation of a certain group will, which leads to a specific corporate climate. Organizational psychology[52] and criminological research[53] show that such a climate can be maintained for a long period of time, is experienced by the individual members of the organization, and can greatly influence personal behavior. The climate can have a positive as well as a negative influence on the members of the organization. If the values and rules are the same as those in the legal system, the corporate climate supports members acting legally. If not, if making a profit explicitly—or more commonly unspoken and subtle—is seen as the main (and maybe only) value, the climate erodes the legal thinking and actions of the members. If such an erosion of values goes hand in hand with corporate powers, the risk of breaking the law with severe consequences is high.

If a company is structured from top to bottom in accordance with effective compliance measures, this minimizes the opportunities to commit crimes and maximizes incentives to follow legal rules. This contribution cannot examine the necessary components for a "perfect" compliance program in detail and will only highlight some of the important elements. It is not merely a paper program with a written code of conduct etc. that is the main difference to the business ethics movements of the 1980s. Instead it is a companywide system that influences the entire operational and organizational structure. It is still closely connected to ethical thinking, which is integrated into the compliance concept as a vital element, is

[48] See Sieber and Engelhart (2014).

[49] See for more details Engelhart (2012a), pp. 515ff., 768ff.; Kölbel (2008), pp. 22ff.; Krause (2011), p. 439; Pape (2011), pp. 154ff.; Theile (2008), p. 406.

[50] See Luhmann (1994), pp. 43ff. and Luhmann (1995), pp. 38ff.

[51] See Boers (2001), p. 353; Gómez-Jara Díez (2007), pp. 302ff.; Heine (1995), pp. 79ff.; Sieber (2008), p. 475.

[52] See e.g. von Rosenstiel (2007), pp. 387ff.; Spieß and Winterstein (1999), pp. 121ff.

[53] See supra footnote 50.

implemented into everyday work, and must be lived out especially by the management. The control and supervision of top managers is a crucial part of the program, as they not only make far-reaching decisions for the company but influence lower level employees substantively.

4.2 Regulated Self-Regulation

When corporate criminal liability and compliance work together so well, the question is: what form should they have within a legal system? The development of alternatives to the "individualized" model also opens the door for a new perspective on corporate regulation and the prevention of crime in the form of regulated self-regulation. Such a system is preferable to self-regulation and "classic" regulation, as these two forms have clear limits.

4.2.1 Self-Regulation and Regulation

In a free-market society based on individual rights, self-regulation is the starting point if one asks who should regulate corporate conduct. This includes the freedom from state regulation. Yet self-regulation has its clear limits. Although business ethics are widely promoted and one can assume that many managers are willing to act ethically, such efforts are often not effective. Ethics are not only made for fine weather days but must particularly be applied and enforced in times of conflict (hence in difficult business environments). And in such cases, monetary interests of the company often prevail; the good will, legal and ethical rules are then set aside.

Besides these factual limits, there are two important differences compared to individuals that speak against too much self-regulation: power and corporate climate. Companies are an agglomerate of goods and people. This gives them not only monetary power but, especially because of their often specialized and highly qualified personnel, far-reaching possibilities to influence the markets, the media, public discussion, and often even politics and law-making. The corporate climate and its (potential negative) impact on individual behavior have already been mentioned and constitute a second argument against self-regulation. These risks justify state intervention and state regulation. Yet, as companies are separate systems of their own,[54] the legal system cannot easily influence internal behavior, which makes the concept of classic criminal regulation too short-sighted. The approach "do that/do not do that or you will be punished" does not reach the internal level and the corporate climate of the company. As it is often stated, these types of regulations do not "pierce the corporate veil".[55]

[54] See supra footnote 51 and surrounding text.

[55] See e.g. Alting (1994–1995).

4.2.2 Regulated Self-Regulation

A solution to this problem would be to combine classic regulation and self-regulation, which will be referred to here as "regulated self-regulation." It assimilates ideas discussed earlier as "responsive regulation"[56] or "interactive compliance"[57] and has become a special field of research, especially in German administrative law[58] and more in criminal law.[59] This approach does not refrain from state regulation. It includes self-regulatory measures into an overall regulative concept of steering and stimulating corporate behavior while still leaving companies the flexibility to implement and individually adjust measures. According to this concept, the state imposes the fundamental framework whereas the companies are responsible for regulating the details. It requires companies to actively contribute to the prevention of legal infringements—especially crimes—but does not go into detail on how to go about it, in order not to impair their business dealings.

The objective of the approach is the creation or maintenance of a good corporate climate. It aims to make use of the "good" dynamics within the closed social system of a company. This requires determining how such a good corporate climate can be achieved. At this point, compliance programs as an effective tool in preventing and detecting legal infringements within companies is of great importance. The compliance approach is a suitable means of regulated self-regulation, as it allows the state to set a framework for company structures, which is deemed necessary for a good corporate climate but need not necessarily prescribe the measures in detail for the companies. This makes it manageable (and cost-efficient) for the state while at the same time leaving room for companies and their individual business, risks, size, and corporate structure.

Basically, the legislator has the possibility to implement the approach of regulated self-regulation in private law, administrative law, and the law of public sanctions.[60] Yet not all of these areas of law are equally suitable. Private law offers only a low level of possibilities to steer company behavior. It leaves too many aspects to the discretion of the parties and is, in general, money-oriented, especially the law of torts. However, an implementation in administrative law leads to strong state influence, as such rules would be directly addressed to all companies and a state authority would have to be responsible for controlling these companies. Therefore, private and administrative law can have only a supporting function in an overall approach of regulated self-regulation.

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[56] Ayres and Braithwaite (1995), pp. 101ff.

[57] Sigler and Murphy (1988), pp. 169ff.

[58] Eifert (2012), pp. 1345ff.; Hoffmann-Riem (2006), pp. 447ff.; Voßkuhle (2001), p. 213.

[59] See Engelhart (2012a), pp. 645ff.; Sieber (2000), p. 326.

[60] The advantages and disadvantages of such a legislative choice have rarely been discussed, as the main focus is on the distinction between public and private law and on the (constitutional) limits of such measures and therefore only addresses a small aspect of the subject, especially in regard to criminal law. For a basic analysis of the different legal regimes, see Burgi (2012); Hoffmann-Riem (2007); Waldhoff (2009), pp. 381ff.

The best place to regulate is the law of sanctions as an indirect implementation system: although it addresses all companies, its rules only become relevant if there is suspicion of an infringement. The allocation of public resources is more efficient, and state interference with companies' rights is lower than in the case of administrative regulations. Moreover, it offers the possibility to steer company behavior by motivation, if incentives for implementing measures are included into the concept. The question as to how exactly the state could implement such an approach is laid out in the section below.[61]

4.2.3 Levels of Regulated Self-Regulation

Five levels of state action may be distinguished, which vary in the influence of the state on companies and in the degree of regulative action:

- Informal support by the state
- Rewarding compliance
- Sanctioning the lack of compliance
- Excluding responsibility
- General obligation to implement compliance programs

Informal Support by the State

The first level of regulated self-regulation is informal support of the state for a good corporate climate. This includes motivating the self-regulation of companies and, more importantly, of company associations for setting up best practice standards, e.g. in the banking sector.[62] It also includes motivating private institutions to make a good corporate structure a precondition for business. The requirements of some stock markets for being a publicly listed company are an example of such a measure.[63] Yet state authorities can be of an even greater help. They can advise companies on programs or set up model compliance programs. Such compliance assistance is, for example, provided by the US Environmental Protection Agency (EPA).[64] In this case, the specific knowledge of administrative authorities is used without making them a formal and binding instrument in law enforcement as normally the case in administrative law. Such advice should not be underestimated,

[61] For the emergence of global corporate norms from the interplay of public and private actors, see Dilling (2012), pp. 388ff.

[62] See e.g. Bundesverband deutscher Banken, Best-Practice-Leitlinien für Wertpapier-Compliance (June 2011); see also Basel Committee on Banking Supervision, Compliance and the Compliance Function in Banks (April 2005).

[63] See e.g. NYSE, NASDAQ, or AmEx.

[64] See the Website of the EPA: http://www.epa.gov/compliance/assistance/index.html (12.2.2014).

as many companies are willing to take steps to improve their regulation but do not know how to go about it.

Rewarding Compliance

At a second level, the state could reward good compliance and thereby motivate companies to implement measures. This is the best possibility in the law of sanctions. A main incentive could be for authorities to retain from initiating proceedings or to close proceedings if compliance measures show that the company had done what it possibly could to prevent the illegal act of a member of the company. As it is never possible to completely avoid any illegal acts within a company, one has to evaluate whether the company had taken reasonable steps before the act was committed (ex ante approach). In the US, the United States Attorneys' Manual offers federal prosecutors such a possibility for the dismissal of charges (although the company almost always has to accept some conditions of probation).[65] However, it is important that, unlike in the US, the cooperation policy of public authorities, (which expects companies to "willingly" cooperate to a large extent and gives great credit for doing so) does not undermine long-term compliance efforts, because compliance is valued and credited much less than cooperation.

Additionally, compliance can be important at the sentencing stage such as within the Federal Sentencing Guidelines in the US.[66] An effective compliance program can reduce a fine. If a sanction requires looking at the corporate climate in which the act of a member took place, it is possible to take into account how much the climate contributed to the act and how strong the measures to prevent such an act were. The sanctioning authority should have sufficient discretion to take the scope and the effectiveness of the measures into account. The US sentencing guidelines only grant a reduction if a comprehensive and effective program exists. This is too inflexible and reduces the incentive for companies substantially to implement at least some measures. Besides the law of sanctions, an implementation in administrative law is also possible, especially by reducing public supervision. One way could be to extend the cycle of public controls from 2 to 4 years if an effective compliance program exists. Such measures not only integrate preventive efforts into a public sanction and supervision system but can offer real incentives for implementing adequate measures.

Sanctioning the Lack of Compliance

On the third level, the state can sanction the lack of compliance. When determining a sanction, the lack of compliance measures can be regarded as an aggravating

[65] See supra Sect. 3.3.3.

[66] See supra Sect. 3.3.2.

factor under certain circumstances. This should be the case if compliance measures are merely undertaken to give the company the appearance of a being a good corporate citizen but are, in practice, ineffective and merely window dressing. It could also be taken into account when the company does not take concrete action, though obvious risks of lawbreaking exist. Such rules would clearly send the message that neither misleading measures nor the acceptance of too risky business is tolerated.

The lack of compliance can also be sanctioned by a specific compliance sentence. Such a sentence would comprise the obligation to implement certain compliance measures or a comprehensive compliance program. The US Federal Sentencing Guidelines and the practice of the federal prosecution in the US often serve as examples for such an approach.[67] This allows the sanctioning authority to directly influence the corporate structure and address the deficiencies that led to the illegal act of the member of the company. It would also enable a genuine resocialization of the company, something that is much more difficult to achieve when the accused is an individual (and where the "nothing works" attitude is much more prevalent). The threat of such a sanction for structural reforms would be a great incentive for companies to take up efficient compliance measures. It offers a much greater incentive than existing monetary sanctions and gives the state great power to do something effectively against corporate crime.

Excluding Responsibility

On a fourth level, the state can provide for rules, which exclude corporate responsibility if efficient compliance measures are taken. The exclusion of liability is the ultimate incentive for companies. Such regulations have become increasingly popular in recent years. The UK Corporate Manslaughter and Corporate Homicide Act 2007 or the Italian legislation on corporate criminal liability of 2001 demonstrate how such an approach can be implemented.

This kind of regulation is not only a strong incentive, but it is also a just and fair solution, as it only holds the company responsible if the corporate climate has contributed to the offense (the entity can be literally called "guilty"). If the company is not liable, an individual might still be responsible, and the company might even be held responsible under a strict liability regime for civil damages: Rules for damages are based on a different rationale (especially risk distribution) than sanctioning systems with their emphasis on social blame. Such a compliance approach is of course not necessarily limited to the law of public sanctions but can also be implemented in private law (e.g. the law of torts) or in administrative law (especially in cases in which the company has to supervise certain acts). Of course the exclusion of liability is only possible where the compliance measures meet maximum standards. Insofar, this kind of regulation can only be taken up in

[67] See supra Sects. 3.3.2 and 3.3.3.

addition to the previously mentioned steps in order to also offer incentives for measures beneath this high standard.

General Obligation to Implement Compliance Programs

The fifth level would be to provide for a general (enforceable) obligation to implement compliance programs. The strongest influence could be achieved if such a rule is accompanied by a sanction in case of insufficient implementation. This would be a very strict approach but would also be at the upper margin of regulated self-regulation and closely approximate classic "regulation." Whereas such a broad general obligation does not seem to exist at present, sector obligations are already common. For example, the German securities trading act requires financial institutions to set up compliance measures for the prevention of insider trading and punishes non-implementation with an administrative fine.[68]

Currently, however, a general obligation does not seem warranted, as it would substantially interfere with the companies' right of freedom of business beyond a reasonable level. Such measures should only be taken in specific areas in which the legislator deems it absolutely necessary to effectively regulate the sector. This could be the case when the aforementioned measures do not provide enough incentives for legal behavior or when the protected legal goods in question make special measures necessary.

5 Conclusion

The above analysis shows that the state can rely on a variety of mechanisms to influence corporate behavior by using the public sanction system. These measures (except the introduction of a general obligation to implement compliance programs) can be merged into a comprehensive and coherent corporate criminal liability system.[69] Such a system would be just, as it addresses the corporate defects that lead to the commission of crimes and would shift the emphasis in criminal law from a repressive sanctioning approach to a new preventive crime strategy. Corporate criminal liability can then be established beside individual liability as a second track, or in systems that recognize criminal and quasi-criminal sanctions—such as the German "Strafrecht" and "Ordnungswidrigkeitenrecht"—as a third track, and as

[68] See Sec. 33 para. 1s. 2 No. 2, Sec. 39 para. 2 Nr. 17b securities trading act (Wertpapierhandelsgesetz—WpHG).

[69] See Engelhart (2012a), pp. 720ff. with a preformulated proposal for a Corporate Sanctions Act ("Unternehmenssanktionsgesetz") comprising criminal and quasi-criminal ("ordnungswidrigkeitenrechtliche") regulations for substantive and procedural law.

corporate quasi-criminal liability as a fourth track.[70] Under such a system, companies are responsible if their corporate climate has contributed to the commission of offenses of their employees. However, if the company has taken adequate preventive measures, there is no basis for a public sanction, although such incidents may be the basis for granting damages—based on a risk distribution between the damaged party and the company—or for taking up administrative measures.

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[70] Systems such as the German one have the great advantage of differentiating between different levels of protection for legal goods: The most important legal goods are protected by criminal law, less important ones by quasi-criminal law regulations. This differentiation fosters legal clarity and legal certainty and should also be used in a corporate sanction system.

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Part II
Models in Attributing Criminal Liability to Corporations

The Austrian Model of Attributing Criminal Responsibility to Legal Entities

Andrea Lehner

Abstract With the Act on the Responsibility of Legal Entities for Criminal Offences ("*Verbandsverantwortlichkeitsgesetz*"—VbVG), which came into force in 2006, the Austrian legislator implemented a number of international and European legal instruments. The criteria for attributing criminal responsibility to legal entities are the core element of the VbVG. Such responsibility can be triggered by criminal offences committed either by decision makers or by staff members. Offences committed by decision makers are attributed to the entity, if the decision maker commits the offence culpably (in the sense of blameworthiness), thus fulfills all requirements for a conviction. As regards offences committed by staff members it is not necessary that the staff member acts culpably, the offence he or she commits merely has to be against the law (without justificatory defense). Additionally, the offence must have been made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances. In both instances, the entity can be held responsible only if the offence was committed for its benefit or if duties of the entity were neglected. This provision presents a new model of attributing criminal responsibility in Austrian criminal law.

1 Introduction

The Austrian legislator introduced the Act on the Responsibility of Legal Entities for Criminal Offences ("*Verbandsverantwortlichkeitsgesetz*"—VbVG) into Austrian law in 2005 containing special provisions for the criminal responsibility of

A. Lehner (✉)
Department of Criminal Law and Criminology, Law School, University of Vienna, Vienna, Austria
e-mail: andrea.b.lehner@univie.ac.at

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legal entities. The law entered into force on 1 January 2006. The legislator hereby especially implemented legal instruments of the European Union, notably the Second Protocol of the Convention on the protection of the European Communities' financial interests of 1997 (Second Protocol).[1] The Second Protocol defines in its Article 3 certain conditions under which legal persons shall be held liable by the Member States. Article 4 of the Protocol says that each Member State shall take the necessary measures to ensure that a legal person is punishable by effective, proportionate and dissuasive sanctions if the conditions under Article 3 are met. Thus, the Protocol does not specify which kind of liability—criminal, administrative or civil—the Member States shall introduce.

Austria chose to introduce the responsibility of legal entities within the *framework of criminal law*. This decision is supported by the fact that a criminal offence is the subject of the charge against the entity. Furthermore, according to the Explanatory Remarks to the Governmental Bill, the same investigation powers of the police and judicial authorities and the same procedural safeguards should equally apply to natural and legal persons.[2] Pursuant to Sections 12 and 14 VbVG, the general provisions of criminal law and criminal proceedings also apply to legal entities unless special provisions in the VbVG exist or the general provisions exclusively apply to natural persons.[3]

Discussion during the drafting of the VbVG led to the question whether an entity is able to act culpably in the sense of the Austrian Criminal Code.[4] The Criminal Code stipulates the principle "*nulla poena sine culpa*" and thus requires individual fault or blameworthiness as prerequisite of a punishment. According to the VbVG also the criminal responsibility of entities requires some kind of fault, which is not an individual blame, but could be described as an "*organizational responsibility*" (*Organisationsverschulden*). The entity is blamed with deficits in the organizational structure of the entity or in its business ethics. The principle of individual fault concerning natural persons thus has been modified for entities and a separate category of organizational responsibility applies.[5]

[1] Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19.07.1997, pp. 12ff.

[2] Explanatory Remarks to the Governmental Bill (EBRV) 994 BlgNR 22. GP, pp. 11ff.; see also Schmoller (2008), p. 14.

[3] EBRV 994 BlgNR 22. GP, pp. 30ff.; Hilf (2006), p. 112.

[4] See for example Lewisch and Parker (2001), pp. 137ff.; Boller (2007), pp. 60ff.

[5] Kert (2007), p. 22.

2 Liability Model

The liability model for legal entities presents a new model of attributing criminal responsibility in Austrian criminal law.[6] It combines elements of an "identification model" and of a "model of direct liability". The *identification model* requires a criminal offence, illegally and culpably committed by an individual (mostly decision maker). The wrongdoing of the individual is considered as the wrongdoing of the entity. Thus, the entity is identified with the decision maker who illegally and culpably committed the offence. The *model of direct liability* requires liability criteria which directly refer to the entity. Here, the responsibility is primarily based on the faulty organization of the entity.[7]

In Austria the responsibility of entities is based on a criminal offence committed by a natural person, either by a decision maker or staff member of the respective entity (identification model). Additionally, the law requires that the entity failed to exercise due and reasonable care in the given circumstances; especially that it did not prevent the offence committed by the decision maker or staff member. Such failure is an expression of the above mentioned organizational responsibility (direct liability model). Overall, the liability of entities is established *out of*, and not only for, the behavior of an agent.[8] In the Explanatory Remarks, it is emphasized that the charge against the entity lies mainly in the failure of the entity to act with due and reasonable care and not so much in the criminal offence committed by the individual.[9]

According to Section 3 para 4 VbVG, the responsibility of legal entities is neither subsidiary to individual liability nor does it prevail. Neither kind of criminal liability excludes the other, so that *cumulative proceedings and sanctions* against the individual working for the corporation and the corporation itself are possible.

3 Criteria for Establishing Criminal Responsibility

3.1 "Triggering Persons"

The criteria for establishing criminal responsibility for entities are the core element of the VbVG. They differ, depending on whether a *decision maker* or a *staff member* triggered the responsibility by committing an underlying criminal offence (*Anlasstat*).

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[6] Sautner (2012), p. 550.

[7] Heine (1998), pp. 102f.; Sautner (2012), p. 547; see also Boller (2007), p. 62.

[8] Höpfel and Kert (2006), pp. 105f.

[9] EBRV 994 BlgNR 22. GP, pp. 22, 25.

This is in line with Article 3 of the *Second Protocol* which requires that legal persons shall be held liable for criminal offences committed (1) by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, or (2) by a person under the authority of the legal entity.

Decision makers under the *Austrian VbVG* are directors, members of the board, *Prokuristen* (holder of a power of attorney as defined in the Austrian Companies Code) and other persons who are authorized to represent the company vis-à-vis third parties. Furthermore, members of a supervisory board or administrative board or other persons with supervisory powers also qualify as decision makers (Section 2 para 1 VbVG).[10]

According to Section 2 para 2 VbVG, the term *staff members* includes persons who work for the entity, for example on the basis of an employer-employee relationship or of a training relationship. Family members or volunteers, for example, do not qualify as staff members.[11]

*3.2 Underlying Criminal Offence (*Anlasstat*)*

3.2.1 Offences Committed by Decision Makers

Criminal offences committed by decision makers may be attributed to the entity if the following conditions are met (see Section 3 para 2 VbVG): the act or omission has to fulfill all elements of the definition of a criminal offence (*Tatbestand—actus reus* and *mens rea*), the decision maker has to act unlawfully (*rechtswidrig*), which means without any justificatory defenses, and he or she has to act culpably (*schuldhaft*), meaning with individual fault. Thus, in general all requirements for a conviction of the decision maker have to be fulfilled.[12]

In this case the responsibility of the entity is centrally determined by the conduct of the decision maker. Therefore, this case is very much based on the above described identification model. The culpable conduct by the decision maker can be seen as the basis for the presumption that the entity itself did show a lack of due diligence as it did not prevent criminal offences committed by its decision makers.[13]

The needed prerequisites for attributing criminal responsibility are thus quite strict, as all necessary requirements for a conviction of the decision maker have to be fulfilled. However, there are also *facilitations:* According to parts of the

[10] See, e.g., Lehner (2011), pp. 995f.

[11] Boller (2007), p. 152.

[12] Hilf and Zeder (2010), WK^2 VbVG § 3 at 22ff.; Sautner (2012), pp. 547, 549.

[13] EBRV 994 BlgNR 22. GP, pp. 22ff.; Sautner (2012), p. 549.

academic literature it is not necessary to specify the name of the decision maker, thus it is not necessary that a specific decision maker is identified.[14]

3.2.2 Offences Committed by Staff-Members

The second alternative to trigger criminal responsibility for entities under Austrian law is a quite innovative one. Article 3 para 2 Second Protocol provides in this regard that legal persons shall be held liable where the lack of supervision or control by a decision maker has made possible the commission of a criminal offence by a person under its authority.

Based on the Second Protocol Section 3 para 3 VbVG provides for an attribution of criminal offences committed by staff members to entities, only under the condition of certain elements of direct corporate responsibility. This case therefore combines elements of both the identification model and the direct liability model. In order to hold the company liable, the staff member has to fulfill all elements of the definition of the respective criminal offence (*Tatbestand*). The law explicitly states that if an offence requires willful action, the staff member has to act with intent. In case of negligence offences the staff member has to disregard due diligence, thus the physical part of the negligence offence has to be fulfilled. Furthermore, the staff member has to act unlawfully (*rechtswidrig*), meaning without justificatory defense.

In contrast to the case of decision makers, it is *not* required that a staff member acts with *personal blameworthiness*.[15] This means that the personal abilities of the staff member are not taken into account. Thus, in case of negligence offences it is not necessary that the staff member fulfills the subjective part of the offence, meaning that it is irrelevant whether the perpetrator could have lived up to the objective standard of care (*subjektive Sorgfaltswidrigkeit*) and whether the perpetrator was able to individually foresee the final result of the offence (*subjektive Vorhersehbarkeit*). Furthermore, it does not matter if in the given circumstances it can be reasonably expected from the perpetrator to abide by the letter of the law (*subjektive Zumutbarkeit*).

However, in *addition* to the unlawful act of the staff member, the *offence* must have been made *possible or considerably easier* due to the fact that *decision makers failed to apply the due and reasonable care* required in the respective circumstances. Here, an element of individual guilt is included, namely the failure of the decision maker to apply *reasonable* care (*subjektive Zumutbarkeit*).[16] In other words, if the decision maker cannot reasonably be expected to exercise due care the conduct of the perpetrator—the staff member—cannot be attributed to the entity. Overall, the offence by the staff member must have been caused or

[14] For example Hilf and Zeder (2010), WK^2 VbVG § 3 at 30; dissenting Sautner (2012), p. 549.
[15] Hilf and Zeder (2010), WK^2 VbVG § 3 at 34.
[16] Cf. Schmoller (2008), p. 10.

facilitated by a failure of the company's management to take appropriate technical, organizational or personnel measures in order to prevent criminal offences.[17] This prerequisite can be seen as the basis for the presumption that the entity itself—not only the decision maker—did show a lack of due diligence as it did not prevent criminal offences committed by their staff members.[18]

It is not necessary that a specific staff member who committed the offence has been identified. The certainty that any staff member of a specific organizational unit has committed the offence is sufficient.[19]

3.3 Additional Connection Between the Criminal Offence and the Sphere of the Entity

In both instances, the entity can only be held responsible if the offence was committed *for its benefit* or if *duties of the entity were neglected*. The offence committed by the individual thus has to reflect an additional connection to the sphere of the entity. The *Second Protocol* foresees in this regard only that Member States shall take necessary measures if the offence was committed *for the benefit* of the legal person.

The offence has been committed for the benefit of the entity if the company has been or was supposed to be *enriched* through the offence or has or should have *saved efforts*. An example would be the committing of fraud by a decision maker which leads to an enrichment of the company. The obtaining of a stronger competitive position through bribery would also fall under this category. However it is necessary that the benefit lies in some material gain.[20]

If the committed offence is not an offence against property, an alternative criterion might be necessary in order to connect the offence to the sphere of the entity. That is why the Austrian legislator decided that also an *infringement of duties of the entity* can lead to corporate responsibility.[21] Relevant duties in this regard basically may derive from the whole legal system. However, the duties have to either be addressed to the company as an employer (deriving from labor law) or address the risks involved in the business pursued by the company. Concerning the latter, the duties mostly will derive from administrative or civil law, for example from fire regulations, the trade and commerce regulation (*Gewerbeordnung*), but also from individual acts of administrative authorities like business premises permits.[22]

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[17] Kert (2007), p. 17; Lehner (2011), at 25/39.

[18] Kert (2007), p. 25.

[19] EBRV 994 BlgNR 22. GP, p. 22.

[20] Hilf and Zeder (2010), WK^2 VbVG § 3 at 8–9.

[21] EBRV 994 BlgNR 22. GP, p. 21.

[22] Lehner (2011), at 25/42.

However, the entity has *no overall duty* to prevent any criminal offence. The entity is not responsible for offences which staff members committed only for their own benefit. For instance if a craftsman doing some work for his company in some customer's flat steals valuables for his own benefit in this flat, his company will not be responsible for the committed offence.[23] The entity also is not responsible for offences which are directed against the interests of the entity.[24]

4 Summary Overview

In order to establish criminal responsibility for entities, a *criminal offence* committed by a decision maker or staff member must be given. The act or omission by a *decision maker* has to fulfill all elements of the definition of a criminal offence (*Tatbestand*), has to be unlawful (*rechtswidrig*) and culpable (*schuldhaft*). If these requirements are fulfilled, the offence may be attributed to the entity. The act or omission by a *staff member* also has to fulfill all elements of the definition of a criminal offence and has to be unlawful. However, the staff member does not have to act culpably. In addition, the offence committed by the staff member must have been made possible, or considerably easier by the fact that a decision maker failed to act with due and reasonable care. In both instances, the offence committed by the individual has to be connected *to the sphere of the entity*. This requirement is met if the offence was committed for the benefit of the entity or if its duties were neglected.

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[23] Lehner (2011), at 25/43.

[24] Hilf and Zeder (2010), WK^2 VbVG § 3 at 19.

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The Belgian *décumul* Rule: A *sui generis* Approach to Criminal Liability of Corporate Agents

Emmanuelle De Bock

Abstract On the fourth of May 1999, Belgium adopted a bill that introduces the concept of corporate criminal liability (Wet 4 mei 1999 tot invoering van de strafrechtelijke verantwoordelijkheid van rechtspersonen, *Belgisch Staatblad—Moniteur belge*, June 22, 1999). As a result of the new law, it is possible that two entities are held criminally responsible for the same crime: on the one hand individuals, physical/natural persons, and on the other hand legal entities or corporations. When the bill on corporate criminal liability was discussed in the Belgian Parliament, considerable attention was devoted to the topic of the criminal liability of corporate agents, i.e. individuals acting on behalf of the legal entity. As a matter of criminal policy, the question arose whether the corporate agent and the corporation should be prosecuted and punished together for the same crime, or if it would be preferable to choose and introduce an 'or'/'or' situation. In the end, Belgium adopted a third way allowing a combined prosecution but not always a combined punishment. Article 5 paragraph 2 of the Belgian Criminal Code introduces a *sui generis* approach to attributing criminal liability and punishing the respective responsible entity. In Belgian literature the rule is known as the "*décumul* rule", derived from the French word *décumuler* which means "not accumulating".

This chapter has four themes. First, there will be a short overview of the development of the bill of 1999. Then, the general principles of the new law are explained, which provides the basis for discussing the *décumul rule* in detail. In the conclusion, some critical remarks are expressed about this mode of liability.

E. De Bock (✉)
University of Antwerp, Antwerp, Belgium
e-mail: emmanuelle.debock@gmail.com

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1 Development of the Concept of Corporate Criminal Liability in Belgium

As part of the French legal system, Belgium law was greatly influenced by the French Revolution and its ideal of individualism. The concept of corporate criminal liability was firmly rejected and no criminal code from those days mentioned the topic. This silence may be explained in two different ways. First of all, the very idea of corporations being submitted to criminal sanctions was thought to be so unreal that legislators did not pay any attention to the idea. Secondly, there were almost no corporations left in the aftermath of the Revolution. Many guilds and monasteries had been cleared away, giving room to economic liberalism.[1]

When Belgium adopted the French *Code Pénal* of 1810, the concept of corporate criminal liability did not have any chance. Punishing a corporation was held to be devoid of any meaning and contrary to the principle of individual punishment. The Belgian Supreme Court[2] highlighted the maxim *societas delinquere non potest,* which means that a corporation cannot commit a crime.[3] As a legal fiction, a corporation cannot fulfil the *actus reus* nor the *mens rea* requirement.

In 1934, the Belgian Supreme Court acknowledged that a corporate body could be the subject of a criminal law *statute,* and after the Second World War the Court accepted the idea that a corporation could *commit* a crime.[4] However, this evolution did not mean that a corporation could also be criminally *punished.* An often-cited opinion of this approach is the one of *Procureur-General R. Hayoit de Termicourt* saying that *societas delinquere, sed non puniri potest* (even though a corporation can commit a crime, it cannot be criminally sanctioned for it).[5] As a result, the maxim *societas delinquere non potest* was maintained.[6]

Belgian prosecutors who wanted to reprimand corporations were left with no alternative but to indict the corporate officers who had acted within the company. This was a very unsatisfactory situation which led to fierce criticism and to numerous legislative initiatives in order to introduce into law the concept of corporate criminal liability.[7] After a long and intense parliamentary debate, corporate criminal liability was accepted which initiated a new era of criminal law enforcement.

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[1] Levasseur (1987), p. 24.

[2] The Belgian Supreme Court is called "*Cour de Cassatation*" and judgments can be found on http://www.cass.be/ (12.2.2014).

[3] Supreme Court, judgment of February 13, 1905, *Pasicrisie* 1905, 127; Supreme Court, judgment of December 18, 1933 *Pasicrisie* 1934, p. 107.

[4] Supreme Court, judgment of 26 February 1934, *Pasicrisie* 1934, I, p. 180; Supreme Court, judgment of December 16, 1948, *Pasicrisie* 1948, p. 723.

[5] Supreme Court, judgment of December 16, 1948, *Pasicrisie* 1948, p. 723; See also Supreme Court of April 8, 1946, *Pasicrisie* 1946, p. 137; De Nauw (1992), p. 554.

[6] See also De Nauw (1992), p. 553; Delatte (1980), pp. 191ff.

[7] Deruyck (1996), pp. 40f.

2 Article 5 of the Belgian Criminal Code

The bill of 1999 introduced a new article 5 to the Belgian Criminal Code, which contains four paragraphs dealing with the concept of corporate criminal liability.[8]

In the first paragraph, it is stated that a corporation can be held criminally liable for an offence if there is a sufficient or a close link between that offence and the corporation. Such a link is established when the offence is intrinsically linked to the realization of the corporate goal, when the offence is linked to the safeguarding of the interests of the corporation, or if the concrete circumstances of the case show that the offence has been committed on account of the corporation. One of these tree alternative criteria must be fulfilled in order to prosecute a corporation, which means that an *automatic* criminal liability for every offence committed within the sphere of a corporation is out of the question.[9] Moreover, it is irrelevant which kind of offence the corporation committed, since the Belgian legislator opted for a general application field which means that, in principle, any kind of offence under Belgian law could be attributed to a corporation, as long as the link to the offence is established.[10]

Paragraph 2 of article 5 of the Criminal Code stipulates de *décumul rule,* which will be discussed in the next chapter. Important to note within the general scope of article 5 is that the Belgian legislator opted for a system where the criminal liability of corporations is strictly separated from that of the individual acting on behalf of the corporation.[11] The attribution system is not a model of derivate corporate criminal liability under which the corporation's liability is derived from that of the (senior) officers of the corporation, but a model of autonomous corporate criminal liability.[12] A corporation is like "a person" and has a "will of its own", clearly distinct from that of the natural persons through which it acts.[13]

Paragraphs 3 and 4 focus on the types of corporations which fall (or do not fall) within the scope of article 5. In principle, any corporate body can be held criminally liable, comprising both private law and public law corporations, although some

[8] Overall literature about the Belgian concept of corporate criminal liability: Nihoul (2005), p. 429; Lugentz and Klees (2008), pp. 190ff.; Overath et al. (2007), p. 114; Stessens (1994), pp. 493ff.; Van Bavel (2005), pp. 125ff.; Waeterinckx (2011), p. 185.

[9] Van den Wyngaert and Vandromme (2011), pp. 125f.; See also, in favor of this approach, Roef and Faure (1995–1996), pp. 419f.

[10] Article 5 belongs to Book I of the Criminal Code which contains the general principles of criminal law that apply to any offence under Belgian law.

[11] Van den Wyngaert and Vandromme (2011), p. 376.

[12] See Parliamentary "*travaux préparatoires*": *Parlementaire Stukken* Senaat 1998–1999, No. 1217/1, pp. 1–2 and 5; De Nauw and Deruyck (1999–2000), pp. 987ff.; Masset (1999), p. 654; Van den Wyngaert and Vandromme (2011), p. 125.

[13] Supreme Court, judgment of October 19, 1992, *Revue critique de jurisprudence belge* 1995, p. 236, annotated by De Nauw (1995); Van den Wyngaert and Vandromme (2011), p. 125.

exceptions exist in respect to the latter category such as the Federal State of Belgium and its Regions.[14]

3 The Belgian *décumul* Rule

With the introduction of the concept of corporate criminal liability, the Belgian legislator created a *sui generis* approach to the criminal liability of corporate agents and corporations, when both entities are responsible for the same negligence offence. This approach is known as the *décumul* rule and fits within the general principles of criminal liability under Belgian law.

3.1 General Principles of Liability Under Belgian Law

According to the general principles of Belgian criminal law, a person can be held liable for a criminal offence if either he is the *principal in the first degree* or an *accomplice*.[15] Two articles of the Belgian Criminal Code are important. First, there is article 66 of the Criminal Code which defines a principal in the first degree as the one who committed the crime (perpetrator) or the one whose aid is of such a substantial nature that the offence could not have been committed without their help (co-perpetrator). Secondly, article 67 of the Criminal Code enumerates a number of modes of aiding and abetting that are important but not vital to the commission of the offence, and which therefore lead to a lower sentence.

Since a corporation has "a will of its own", it has to be considered as "a person" within the meaning of articles 66 and 67 of the Criminal Code. Depending on the facts of the case, a corporation and a corporate agent can both be qualified as principals in the first degree or one of the two entities can be the accomplice to an offence committed by the other entity.

According to the general rules on criminal liability, it is, in principle, possible that a corporation and its officers are cumulatively prosecuted and punished for the same offence. However, the Belgian legislator chose to create *some circumstances* wherein natural persons and corporations cannot be sanctioned together: the so-called *décumul* rule.

[14] The list of exceptions and the types of unincorporated bodies which are equated with corporations for the purposes of corporate criminal liability can be found in article 5, paragraph 3 and 4 of the Belgian Criminal Code: http://www.ejustice.just.fgov.be/wet/wet.htm (12.2.2014).

[15] Van den Wyngaert and Vandromme (2011), p. 363.

3.2 Combined Prosecution but not Always Combined Punishment: The décumul Rule

Article 5, paragraph 2 of the Criminal Code stipulates that when a corporation is held liable solely on the basis of the behavior of an identified natural person, only he who has committed *the most serious fault* can be convicted. The court is obliged to investigate whose negligence is the strongest or whose fault is worse so that solely that entity—which can be either the natural person or the corporation—is convicted.

The core of the *décumul* rule is that only one of two criminally liable entities will receive a sentence. It is an odd situation because both entities are prosecuted together, found guilty together, but are not punished together. If a court of law finds a corporate agent and a corporation criminally liable for an offence, it is statutorily prevented from convicting and punishing both when one entity is guilty of a more serious type of negligence in relation to the same offence than the other entity. The acquittal results from what is known under Belgian law as a "sanction exoneration": a type of "excuse" that does not absolve the illegal nature of an offence, but only results in the offender not receiving a criminal sanction.[16]

The *décumul* rule is not applicable to intentional offences because article 5, paragraph 2 *in fine* of the Criminal Code states that if the identified natural person has committed the fault *willingly and knowingly*, the natural person can be convicted together with the liable corporation.[17]

Even when it seems logical, it is important to emphasize that the *décumul* rule is only applicable if both entities are responsible for the *same* offence.[18] Otherwise, there is no overlap in liability and there is no *décumul* (not accumulating) possible. The criminal fault for the same offence must be established for the corporate agent and the corporation.[19]

4 Some Final Observations and Critical Remarks

Many authors agree that article 5, paragraph 2 of the Belgian Criminal Code causes many interpretational issues labelling the article as *complicated*, *unclear* and *confusing*.[20] The *décumul* rule is an unfounded rule, based on no valid rationale

[16] Supreme Court, judgment of Supreme Court, judgment of October 3, 2000, http://www.cass.be/ (12.2.2014); Supreme Court, judgment of February 26, 2002, *Rechtskundig Weekblad* 2002–2003, p. 134 with conclusion of Advocate-General M. De Swaef; Supreme Court, judgment of November 8, 2006, *Tijdschrift voor Strafrecht* 2007, p. 261; Supreme Court, judgment of February 10, 2010, *Nullum Crimen* 2010, p. 293; See also De Nauw and Deruyck (1999–2000), p. 905.

[17] Van den Wyngaert and Vandromme (2011), p. 376.

[18] Van den Wyngaert and Vandromme (2011), p. 132.

[19] Supreme Court, judgment of September 23, 2008, *Rechtspraak Antwerpen Brussel Gent* 2009/7 annotated by Waeterinckx.

[20] De Nauw and Deruyck (1999–2000), pp. 897 and 905f.; Lagasse (2003), p. 99; Masset (1999), pp. 655f.; Messine (2000), pp. 637ff.; Van den Wyngaert and Vandromme (2011), p. 376; Verhaert

and a source for discussions. In practice, judges are faced with serious difficulties establishing which of the two entities committed the most serious fault. In one case, the Court of First Instance of Leuven wrote in its judgments that it was very difficult, almost impossible, to determine which entity committed the gravest fault.[21] As a consequence judges are obliged to motivate their judgment thoroughly and carefully.

The *décumul* rule is so complicated that judges are in reality relieved if the offence was committed intentionally so they do not have to determine which entity committed the most serious fault. In practice, courts may even try to qualify offences as being committed intentionally in order to avoid the practical difficulties of the *décumul* rule.[22] Regarding offences that do not require intent, mens rea is sometimes *in concreto* qualified as faults that an identified natural person has committed *willingly and knowingly,* which also narrows the scope of the *décumul* rule.

Notwithstanding the *décumul* rule, the introduction of the concept of corporate criminal liability in Belgium lead to a higher number of combined prosecutions of corporate agents and their corporations, resulting in a higher number of convicted natural persons.[23] Taken together with the fact that the *décumul* rule reduces the level of (procedural) protection afforded to victims under Belgium Law, it is undeniable that article 5 paragraph 2, is not very favorable for individuals in general. Applying the *décumul* rule automatically entails that a criminal court can condemn only one defendant (either the corporation or the natural person) to pay damages to the *partie civile*. Although the *partie civile* could subsequently claim damages from the other—acquitted—defendant before a civil court, it cannot be denied that this constitutes a substantial additional procedural and financial hurdle.

Finally, a last critical note goes to the attribution mode under article 5 of the Belgian Criminal Code as a model of autonomous corporate criminal liability. A corporation must be seen as a person with a will of its own, and the corporation's liability is not derived from that of the (senior) officers of the corporation. However, this approach is not very realistic. Even though—legally speaking—it is not required to indicate the individual through which the corporation has acted and has allegedly committed an offence, it is nevertheless true that a corporation, being a fictitious person, can, in principle, act only through individuals. In addition to that, both entities are different and this difference reflects on the kind of fault they

and Waeterinckx (2001–2002), p. 1013; Waeterinckx (2000–2001), pp. 1217ff.; Waeterinckx (2011) p. 65.

[21] Corr. Leuven (22e Chamber), judgment of February 3, 2004, AR n° 26.

[22] See Corr. Antwerpen, judgment of April 21, 2008, *Verkeer, aansprakelijkheid, verzekering* 2008, Vol. 6, p. 516; Corr. Dendermonde, judgment of May 27, 2003, *Tijdschrift voor Milieurecht* 2004, p. 66; Van Bavel (2009), p. 447; Faure and Waeterinckx (2004), p. 332; Waeterinckx (2011), p. 61.

[23] The Bill on Corporate Criminal Liability was evaluated in 2001 by the *Service de la Politique Criminelle*: http://www.dsb-spc.be/web/index.php?Itemid=87&id=62&option=com_content&task=view&lang=french/ (12.2.2014).

commit. When a judge has to determine the fault of a natural person, he will have to decide whether a normal, careful and reasonable person would have acted differently within the same factual situation.[24] The fault of a corporation however will be determined within the context of the corporation and not within the same factual situation as the natural person.[25] A judge comparing both faults in order to determine the most serious one is confronted with these differences which makes comparing them a very difficult task.

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[24] Dupont and Verstraeten (1989), para 448; Waeterinckx (2011), p. 65.

[25] Waeterinckx (2000–2001), pp. 1217ff.; Vandewal (2002), p. 12.

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‘Triggering Persons’ in ‘*Ex Crimine*’ Liability of Legal Entities

Anna Salvina Valenzano

Abstract This analysis aims at identifying the position of the subjects who might be regarded as the perpetrators of a predicate offence that can be attributed to a legal entity (so called ‘triggering persons’).

My idea is to try to distinguish different member states’ legal systems on a scale drawing progressively away from ‘leading positions’, depending on the importance attached to the sole ‘top positions’ or also to the ‘subordinate positions’ or even to the unlawful types of conduct otherwise committed by a ‘third person’ external to the organization, in order to attribute liability ‘*ex crimine*’ to a legal entity for a predicate offence. This analysis will be developed regardless of further distinctions connected to the different framework of criminal, *quasi*-criminal or administrative liability of legal entities.

In the light of the contact points among the legal systems of EU member states, which arise from a comparative analysis, we shall also be able to draw common lines to develop this specific aspect of discipline. The goal is to propose a common regulation which may allow for the approximation and harmonization of member states’ legal systems in accordance with the fundamental ‘principle of personality’ of corporate criminal liability, even under the specific charging criterion connected to the ‘triggering person’.

A.S. Valenzano (✉)
Department of Law, Philosophy and Economic Studies (DiGEF), Sapienza University of Rome, Rome, Italy
e-mail: anna.valenzano@gmail.com; anna.valenzano@uniroma1.it

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1 The Legal Systems of Member States Giving Relevance to the Sole 'Leading Position' of the Offender

My analysis shows that, with reference to the criteria used to identify the 'triggering person', the member states' legal systems may be grouped as follows.

Some member states' legal systems attach importance to the sole 'leading position' of the perpetrator of a predicate offence, as an organ or a representative of the legal entity's 'will'. They are centred on a 'pure' principle of identification, i.e. an 'organic' system to attribute liability to collective entities, wherein who holds a 'leading position' acts in the name of, and on behalf of, the entity because of his/her powers of 'organic representation', since the body corporate can only express its will through its 'organic representative' whom it therefore fully 'identifies itself' with.[1] We can detect this, for instance, in the following legal systems:

- in the United Kingdom, although only for *mens rea* offences, according to the identification principle. As known, case law identified the 'person in a leading position', i.e. the 'directing mind and will' of the body corporate, with its 'senior or controlling officers', who 'speak and act as the company' and so they identify themselves with the corporation[2];
- in France, at least according to the principles originally set in its criminal code, Article 121-2, which expressly refers to the '*organe ou représentant*', as an offender who can trigger liability for the collective entity if the offence is committed on its behalf ('*pour compte*')[3];
- in Luxembourg: Article 34 of the criminal code (as amended in 2010).[4]

My comparative analysis shows that an approach attaching importance to the unlawful types of conduct of the 'sole' subjects in a 'leading position' is now to be regarded as a charging criterion covering a limited number of cases. In the examined legal systems, indeed, there are significant trends to increase the number of subjects who may be perpetrator of a predicate offence, because a too selective choice of offenders as sole subjects in a 'leading position' led to a real evasion of corporate criminal liability, which is grounded on merely 'organic' or 'identification' criteria.[5]

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[1] In this regard, see Coffee (1999), pp. 15ff.; Wells (1999), pp. 219ff.

[2] In these terms, see Trapasso (2012), pp. 252ff., with further references.

[3] For more details on the developments of the notion of '*organe ou représentant*' in French literature and case law, see Tricot (2012a), pp. 151ff.

[4] The new legal provision set forth in Luxembourg's criminal code tends to burst the banks of French legal provision, though going along the same direction. It does not only refer to an organ, as a concept also including the legal representative, but it also refers to a top manager, both a *de iure* manager and a *de facto* manager ('*par un de ses organes légaux ou par un ou plusieurs de ses dirigeants de droit ou de fait*'), who committed a criminal offence in the name and in the interest ('*au nom et dans l'intérêt*') of a collective entity. The question concerning a real rooting '*du modèle* "*identificatoire*"' in Luxembourg's system is stressed in a problematic way by Tricot (2012b), pp. 406ff., which we refer to for any further examination.

[5] For critical remarks to the 'identification theory', see Gobert (2012), pp. 225ff.

This has paved the way to the progressive abandonment of a 'pure' identification principle in favour of systems of attribution of corporate liability which can be, at least potentially, also 'vicarious' or anyhow defined as 'mixed'.

2 Searching for Common Traits Within Member States' Legislation Attaching Importance to Unlawful Types of Conduct Both of Subjects Who Have a 'Leading Position' and 'Subordinates'

A second group of member states' legal systems can be singled out, which is likely to prevail. The common feature of these systems is represented by the relevance that is given to the unlawful types of conduct of both subjects in a 'leading position' and 'subordinates', if there was a breach of the duties of supervision of a subject in a 'leading position' over an 'employee'.

In our opinion this can be defined as a 'two-tier system', wherein a legal entity can be held liable for both cases: (a) in case a criminal offence is committed by a person in a 'leading position' (according to 'organic' principles); (b) in case an offence is committed by a 'subordinate', provided that there is an actual objective link with the corporation, which in most cases means a breach of the duties of supervision of a person in a 'leading position' over his/her 'employees' (according to principles based upon a 'vicarious' approach).

We should take into account that this system has some roots in EU provisions, going from the Second Protocol to the PIF Convention to the most recent instruments adopted by the European Institutions.[6] In our opinion, therefore, it may now be considered, at least *in nuce*, as a sort of 'European Union statutory model'.

These instruments prescribe that a legal entity can be held liable for offences committed 'for its benefit' by a person in a 'top position', i.e. who has a 'leading position' within the legal person, acting individually or as a part of one of its organs. It is interesting to point out that a person in a 'leading position' is singled out in relation to his/her powers, which are selected for their peculiar 'relevance'. In particular, he/she has at least one of the following powers:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the body corporate;
- an authority to exert control within the legal entity.

[6] We are making special reference here to Article 3 of the Second Protocol to the Convention on the protection of the European Communities' financial interests (PIF), adopted in 1997 and published in the Official Journal C221, 19.07.1997. The imputation pattern outlined in the second Protocol to the PIF Convention has been basically proposed again in the following years by several framework decisions and directives, which have been adopted to oblige member states to introduce corporate liability '*ex crimine*' to protect relevant EC properties, which needed to be safeguarded.

In the second case, instead, an unlawful act is committed by a 'subordinate', if the 'lack of supervision or control' by a person in a 'leading position' made it possible for a person under his/her authority to commit an offence 'for the benefit' of the legal person.

We can observe this 'two-tier system', for instance, in the following legal systems, wherein the relevant law provisions, which could be basically regarded as similar in their contents as to the identification of possible offenders, are somehow different in their wordings:

- in the Italian system, Article 5 of Legislative Decree No. 231/2001 gives relevance to both subjects in a 'leading position' and 'subordinates', i.e. those who are subject to the direction or supervision of a person in a 'top position', provided that a predicate offence is committed because of a breach of his/her duties of direction or supervision.[7] In particular, the legislator adopted a 'functional criterion', prescribing that subjects in a 'leading position' are holders of functions of representation, management or direction in a legal entity or in a single 'organizational unit' of the same body corporate, provided that it has financial and functional autonomy. Moreover, the legislator compares '*de iure* top positions' with '*de facto* top positions', prescribing that those who exert, even *de facto*, powers of management 'and' control over a legal entity can also be considered as subjects in a 'leading position';
- in the German legal system, § 30 of the *Ordnungswidrigkeitengesetz* (OWiG) seems to give relevance to the unlawful types of conduct of sole subjects in a 'leading position' identified through a title catalogue by the same § 30 OWiG.[8] It does not expressly refer to those who are under other subjects' authority, thus making the interpreter at first believe that the German system may be grounded upon 'pure organic' patterns to ascribe liability to a legal entity. However, a more careful analysis shows that in the German legal system the scope of corporate liability '*ex crimine*' is further extended to unlawful types of conduct committed by an 'employee'. This is due to the prevailing interpretation of § 130 OWiG, stating that an administrative wrongdoing of a person in a 'top position' is regarded as a predicate unlawful act upon which a fine can be imposed on the legal entity (pursuant to § 30 OWiG). In other words, the body corporate could also be 'punished' in case an 'employee' committed an unlawful—both criminal and administrative—act, whereas a person in a 'leading position' violated his/her duties to control him/her, because he/she failed to adopt supervisory measures to prevent the unlawful acts of the 'employees'[9];

[7] Fiorella (2006), p. 5103, underlined how the law should be interpreted as referred anyhow to 'quasi-leading positions' ('*para-apicali*'), in order to ensure the principle of personality of corporate liability '*ex crimine*'.

[8] For further details, see Böse (2011), pp. 234ff.

[9] In these terms, see Engelhart (2012), pp. 180ff., who clarifies that an offence committed by a low level employee can trigger corporate liability only if a person in a leading position is responsible for 'lack of supervision' over low level employee.

- in the Austrian system, § 3 of the *Verbandsverantwortlichkeitsgesetz* (VbVG) prescribes that a legal entity may be held liable for an offence committed by a subject in a 'leading position' ('*Entscheidungsträger*'), or by a subject who is under other persons' authority ('*Mitarbeiter*'), provided that an offence is committed because a subject in a 'leading position' omitted to adopt preventive measures against criminal offences, thus making it possible or facilitating its commission to a large extent.[10] The Austrian law typifies the subjects' titles (§ 2 VbVG), also giving relevance to the unlawful types of conduct of subjects *de facto* exerting a decisive influence over corporate management, although they do not have any formal title;
- in the Spanish legal system, Article 31-*bis* of the criminal code prescribes that a legal entity can be held liable for an offence committed by both its legal representatives and directors *de facto* or *de iure* ('*sus representantes legales y administradores de hecho o de derecho*') or by a 'subordinate', because of a 'lack of supervision' of the first over the second one ('*por no haberse ejercido sobre ellos el debido control*')[11];
- in the Portuguese system, Article 11 of the criminal code provides that a corporation can be held liable for an offence committed by a person in a 'top position', i.e. who has a 'leadership position' ('*posição de liderança*') with decision-making powers, or by a 'subordinate' because of a breach of the supervision duties of the first over the second one ('*em virtude de uma violação dos deveres de vigilância ou controlo que lhes incumbem*'). The Portuguese legislator is referring here to organs and representatives of the legal entity, including those who exert, even *de facto*, control powers over corporate activities.[12]

In brief—and also when discussing chances of approximation and harmonization of member states' legal systems—it can be pointed out that all of these legal systems, and others,[13] require that an offence be committed by a triggering person in a 'leading position' or by a 'subordinate' subject to the authority of a person in a 'top position', because of a breach of the supervision duties of the first over the

[10] In this regard, also for further details, see Stärker (2007), §§ 2 and 3.

[11] For further examination on this issue, see Nieto Martín (2012), pp. 190ff.

[12] Arroyo Zapatero (2012), pp. 116ff. See also Espinoza de los Monteros de la Parra (2012), pp. 223ff.

[13] In this perspective, we can point out that a 'two-tier system', which gives relevance to the unlawful types of conduct of both subjects in a 'leading position' and 'subordinates', despite some differences, can be detected in other member states' legal systems, such as, for instance, Bulgaria (Art. 83a of the Law on Administrative Offences and Sanctions), Czech Republic (Section 8 of the Act on Criminal Liability of Legal Persons and Proceedings against them), Finland (Section 2, Chapter 9, criminal code), Hungary (Section 2 of the Act CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law), Lithuania (Art. 20 criminal code), Poland (Art. 3 of the ALCE, Act on Liability of Collective Entities for Acts Prohibited under Penalty), Slovakia (Section 83a–b, criminal code) and Slovenia (Art. 4 of the ZOPOKD, Act on Liability of Legal Persons for Criminal Offences).

second one. Therefore the scope of offenders has been extended to cover 'employees', thus integrating 'organic' patterns with 'vicarious' ones.

3 The Legal Systems of Member States Giving Relevance to Unlawful Types of Conduct Carried Out by a 'Third Person' External to the Organization

Some of the above mentioned member states and others can be assembled in a third group of EU legal systems. This group attaches relevance even to offences committed by a 'third subject' outside the organization, whose unlawful acts may influence the same legal entity.

We believe that in some systems the trend to extend corporate liability '*ex crimine*' to a third person's unlawful conduct may also be due to international organizations. For example the OECD is calling for limiting the frequent use of 'intermediaries' (i.e. persons external to the organization) for committing offences, in practice ensuring impunity for the legal entity itself.[14]

With particular reference to the role of a 'third-triggering person' in the organization, there is a peculiar outline that I would like to develop: it concerns the link between a 'third subject' and a legal entity. With reference to this, I believe that we should further distinguish this third group of EU legal systems into two subgroups:

1. whether the 'third' is identified with a 'representative' of the legal entity, i.e. who acts on its mandate, which gives the agent the powers to act on behalf of and in the name of the legal entity itself;
2. or instead he/she is essentially identified with 'whoever' acts on behalf of, or for the benefit of, the corporation.

3.1 External 'Third Persons' as Representatives of the Legal Entity

In the first subgroup, we can mention, for instance:

[14] The described phenomenon is quite widespread in multinational companies committing offences abroad through 'intermediaries'. In order to limit these phenomena, the OECD has urged member states to recognize corporate liability '*ex crimine*' even if a criminal action is committed by a 'third person' on behalf of the same legal entity. It has also requested that the mechanisms to prevent criminal offences should be actually extended to the 'thirds', 'such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners ("business partners")': see Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009.

- in the Estonian system, § 14 of the criminal code (as amended in 2008) sets forth provisions for corporate liability for an offence committed by a 'competent representative' ('*pädeva esindaja*'). In the explanatory memorandum to the amendment law, it is specified that it is referred to all subjects who represent the legal entity's 'will', i.e. acting on its mandate, even though they are not necessarily corporate 'employees', but 'third subjects' external to the organization (i.e. contractual agents)[15];
- in the Lithuanian legal system, Article 20 of the Lithuanian criminal code, which extends corporate liability to the case of an offence committed by an 'authorized representative' ('*įgaliotas atstovas*'), provided that the offence has been caused by the lack of supervision or control over the agent's acts by a person in a 'leading position'[16];
- in some respects, in the French system. To this extent, we should mention a recent stance of French case law that has extended the notion of '*représentant*' to include a 'third agent', external to the organization. The French Supreme Court has upheld the conviction of a company for the commission of an offence by a 'third person', who acted as a 'representative' and who was not a salaried employee ('*agent commercial non salarié, lié par un contrat de mandat*'), on the assumption that he/she was given the power to represent the legal entity outside to undertake some transactions.[17]

The novelty is even clearer when we consider that both the French system, and the Estonian one before the 2008 reform, were centred on 'pure organic' imputation patterns. From this point of view, we believe that this development can be considered as strictly connected to some enforcement problems that have emerged in those systems where a too selective choice of offenders as sole subjects in a 'leading position' led to a real evasion of corporate criminal liability, especially in very large corporations or in legal entities with a decentralized structure.

These reflections bring us to the following conclusions: with a view to approximating member states' legislation, it has to be taken into account a substantial and progressive overcoming of a 'pure organic' imputation model in those EU systems,

[15] It is interesting to point out that the Estonian criminal code does not currently provide for corporate liability for offences committed by an 'employee' as a result of a breach of the duties of supervision or control by a person in a 'leading position', since it refers to 'a body, a member of a body, a senior official, or a competent representative'. For this reason some legal scholars and international organizations criticized, under this viewpoint, the Estonian system because its legislation would conflict with EU obligations. For further examination on this issue, see Valenzano (2012a), pp. 486ff.

[16] For more details, see Valenzano (2012a), pp. 494ff.

[17] We are referring to the judgment of the Supreme Court of Cassation (*Cour de Cassation, Chambre criminelle*) of 23 February 2010, No. 09-81819, available at http://www.juricaf.org (20.11.2013), which upheld a company's criminal conviction for the commission of an offence by an estate agent acting as a 'representative' of the corporation. For more details on this issue, see Tricot (2012a), pp. 154ff.

where relevance was first attached to the 'sole' unlawful types of conduct of subjects in a 'leading position'.

3.2 *External 'Third Persons' Acting on Behalf of, or for the Benefit of, the Corporation*

In the second mentioned subgroup, the 'third person' is basically identified with 'whoever', that is any natural person acting on behalf of, or for the benefit of, the legal entity.

In the legal systems we grouped under this subgroup the notion is mostly extended, since the 'third person' can trigger liability for the legal entity, although he/she has no specific mandate giving him/her the powers to represent the legal entity outside, i.e. even if he/she cannot act in the name of the corporate body because of his/her lack of power of attorney.

In this perspective, we could find a contact point between the following legal systems.

- In the United Kingdom:
  - on one hand, with reference to 'strict liability' offences, i.e. offences without *mens rea*, since a legal entity can be held liable for an unlawful type of conduct of a 'third person', thus applying 'agency' or 'vicarious liability' principles. In other words, if an offender carries on his/her activities within the control of a corporation, the same legal entity shall also be held liable for the unlawful acts committed by the 'third person' who is not an 'employee' but who acts on behalf of the body corporate (a so-called '*agent*')[18];
  - on the other hand, in the Bribery Act (2010), the legislator has stated that a bribery offence can be committed by an 'associated', i.e. a subject to be determined as 'a person who performs services'. This subject is identified with any natural or legal person who performs services 'for or on behalf' of the entity, apart from his/her capacity (Section 8 Bribery Act)[19];
- in Hungary, Section 2 of the Act CIV 2001 typifies the offenders by dividing subjects in a 'leading position' and 'employees'. It also provides for 'a third level' whereas an offence is committed by whoever, i.e. even by a subject outside the organization, provided that the body corporate has actually gained profits from the offence and a person in a 'leading position' knew it[20];

[18] In this respect, on the possibility that a 'principal-agent relationship' is enough to meet this requirement, without a 'master-servant relationship' between them, see Smith and Hogan (2008), p. 201.

[19] For further details on the notion of 'associated person', see Mongillo (2012), pp. 310ff.

[20] On this point, see Valenzano (2012b), pp. 528ff.

- in Belgium, Article 5 of the criminal code;
- and in the Netherlands, Article 51 of the criminal code.

In both cases it is not associated any difference with the subjective position of the 'triggering person'. It is made a general reference to a 'natural person', that is a '*personne physique*' (in the Belgian criminal code) and a '*natuurlijke personen*' (in the criminal code of the Netherlands).

This notion is widely extended in the Belgian system, since it makes reference to any natural person other than a corporate organ, its legal representative, its agent or its employee, who committed an offence 'on behalf' of the entity.[21] These principles are in accordance with the results of the Netherlands' case law, stating that a legal entity can be held liable for offences committed by 'any person' acting in its name or for its benefit.[22]

In brief, in the legal systems we grouped under this subgroup an offence may be attributed to a legal entity, under different conditions, if it is committed by a person in a 'leading position' or by an 'employee' or by a 'third person' external to the organization without the legal entity's previous assignment of the powers to represent it.

4 Concluding Remarks. Perspectives on Approximation and Harmonization of Member States' Legal Systems

In conclusion, even with a view to discussing chances of approximation and harmonization of member states' legal systems, my research leads to the following results.

4.1 'Common Ground': Offences Committed by a Person in a 'Leading Position'

A 'common ground' to approximate and harmonize EU legal systems can be identified by the fact that member states' legislation share common principles when they hold a corporation liable for an offence committed by a person in a 'leading position', although each national legal system has its own further criteria to link an offence to a legal entity.

As for the criteria chosen to identify 'leading' or 'top' positions, my comparative analysis has shown that the criterion of 'relevance' of a position can be reconstructed in member states' legal systems: (a) because a person in a 'leading

[21] For further examination on this issue, see Verstraeten and Franssen (2012), p. 268.

[22] In these terms, also for an analysis on the further charging criteria, see Tricot (2012b), pp. 377ff.

position' represents the legal entity; or (b) because the powers assigned to a person in a 'top position' are 'considerable'.[23]

4.2 *Why Not Any 'Employee' Should Trigger Corporate Liability* 'Ex Crimine'

With reference to the other position, that is a subject who is 'under the authority' of a person in a 'leading position', our comparative analysis has shown that legal scholars and case law do not pay any special attention to limit the number of subjects within this category, except for some cases. Therefore it is allowed to go down along the hierarchical scale, considering that 'any' hierarchical or functional link to connect the position of an 'employee' to a legal entity is required in several legal systems.[24]

In spite of this, and also in view of discussing chances of approximation and harmonization of member states' legal systems, we believe that it is essential to ensure in any case a real 'connection' between a 'triggering person' and the corporation in relation to the 'subjective position', which should express the legal entity's 'will'. As a result, it should be ensured that the criterion of 'relevance' of a 'subjective position'—i.e. a position is to be linked to the exercise of 'considerable powers'—should be applied, in order to guarantee a link of 'real belonging' between an offence and a legal entity. Therefore these subjects should be in a position closely resembling to a 'top position', which we could define as a 'quasi-leading position'. It means that they should be placed 'just below' top persons or in a very similar position with respect to their functions.

4.3 *Why Not Any 'Third Person' Should Trigger Corporate Liability* 'Ex Crimine'

As for the other category of subjects whose unlawful type of conduct may in abstract trigger corporate criminal liability, as already said, some legal systems acknowledge, under different conditions, that a legal entity is held liable for offences committed by a 'third person' outside the organization, although he/she does not formally belong to the body corporate. In some legal systems the legal entity is held liable for offences committed by 'any natural person' without any distinction.

In my opinion the problem is that in this case there is a high risk to violate the 'principle of personality' to attribute corporate criminal liability, because the 'link

[23] For further analysis on this issue, see Valenzano (2012c), pp. 242ff.

[24] In this regard, see Tiedemann (2012), pp. 4ff.

of real belonging', which grounds the legal entity's 'own' and 'personal' liability, may not be guaranteed. Therefore, to avoid this risk, we should make it clear that a corporation should be held liable for an offence committed by 'a third person', only if the latter received a 'specific mandate' to represent the legal entity's 'will' outside to carry out certain operations, even by acting in its name.

In other words, although a person is placed outside the organization, a body corporate should be equally held liable for his/her unlawful conduct, only if the 'third person' are given 'considerable powers', i.e. he/she exerts 'considerable powers' which are comparable to the powers exerted by a person in a 'top position' o in a '*quasi*-leading' position. In my opinion, this represents an important safety valve that may guarantee against the risk of breaching the 'principle of personality' of corporate criminal liability and may therefore allow for the approximation and harmonization of member states' legal systems in accordance with this fundamental principle.

4.4 Proposal for a Common Regulation

I had the honour to participate, as a researcher, in a 3-year research project financed by the European Commission, devoted to 'Corporate Criminal Liability and Compliance Programs' (JLS/2008/JPEN/009), carried out by Roma Tre University,[25] Sapienza University of Rome,[26] Panthéon-Sorbonne University of Paris[27] and Castilla-La Mancha University.[28]

At the end of the research, in September 2012, we proposed the following rule to the EU Institutions, with a view to approximating and harmonizing member states' legal systems: "*Principle of personality and criteria for charging a legal person*. Member states shall set forth provisions stating that legal persons can be held liable for the offences committed to pursue their interest by:

a) persons who perform a leading function, even *de facto*, in the body corporate, by virtue of their powers of representation, decision or control;
b) other subjects who perform a considerable function, even *de facto*, and those subject to the direction or supervision of a person referred to in point a);
c) persons acting on specific mandate of the legal entity, exerting powers which can be referred to the functions provided for in points a) and b);

[25] Roma Tre University research unit was headed by Prof. A. Fiorella and Prof. A. Maresca.

[26] Sapienza University unit was directed by Prof. A.M. Stile.

[27] Panthéon-Sorbonne University unit was managed by Prof. S. Manacorda and Prof. G. Giudicelli-Delage.

[28] The Spanish Castilla-La Mancha University unit was conducted by Prof. L. Arroyo Zapatero and Prof. A. Nieto Martín.

d) subjects who perform the above mentioned functions in an organizational unit of the legal entity, provided that it has financial and functional autonomy".[29]

This rule, in my opinion, may allow for the approximation and harmonization of member states' legal systems in accordance with the fundamental 'principle of personality' of corporate criminal liability, even under the specific charging criterion connected to the 'triggering person'.

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[29] This is an excerpt from Paragraph 6 of the "Guidelines on Liability '*ex crimine*' of Legal Entities in EU Member States", in Fiorella (2013), p. 441.

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Corporate Criminal Liability in Italy: Criteria for Ascribing "Actus Reus" and Unintentional Crimes

Camilla Cravetto and Emanuele Zanalda

Abstract This chapter examines the Italian legal framework of corporate criminal liability, with specific regard to the issues raised by the introduction of unintentional crimes in the ever-expanding list of offences covered under the regulation. Legislative decree No. 231/2001, implementing the framework statute enacted by the Parliament, has introduced in Italy a new system of liability for corporations and other legal entities for crimes committed in their interest or to their advantage. The original framework statute foresaw a detailed list of both intentional and unintentional crimes, but the Government, drafting the Legislative decree, adopted a mechanism for attributing the *actus reus* to the corporation that is modeled on the scheme of intentional crimes only. As a result, the introduction in 2007 of the offence of corporate manslaughter has posed serious practical problems. In fact, the criteria for ascribing criminal liability to corporations and other legal entities require that the offence be committed "in the interest or to the advantage" of the legal entity (Art. 5 D.Lgs. 231/2001) whereas corporate manslaughter can never logically meet this criteria. Finally, this chapter examines different approaches to the interpretation of the mechanism for ascribing criminal responsibility to corporations with respect to unintentional crimes, with a particular focus on corporate manslaughter and the solution given by the recent case law.

C. Cravetto (✉)
Department of Criminal Law and Criminal Business Law, Faculty of Law, University of Turin, Turin, Italy
e-mail: camicravetto@gmail.com

E. Zanalda
Department of Criminal Law and Criminal Business Law, Faculty of Law, University of Turin, Turin, Italy

Doctoral School of Law and Social Organizations, University of Turin, Turin, Italy
e-mail: emanuele.zanalda@avvocatozanalda.it

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1 Introduction

In 2001, a specific statute, the Legislative Decree n. 231 of June 8th ("the Decree"), introduced for the first time in the Italian legal system the direct "administrative" liability of legal entities, they being considered all entities having juridical personality, companies and associations with or without legal personality (Article 1 of the Decree).

Such "administrative" (but for most "criminal" in nature) liability is foreseen for crimes committed in the "interest" or to the "advantage" of the legal entity by certain individuals (*see below*) and it adds to the liability of the individual who has materially committed the criminal offence, given that the crimes entailing corporate liability are specifically listed in Articles 24 and 25 of the Decree.

Following the Decree's liability structure, companies and other legal entities are directly liable for crimes committed by: individuals carrying out representative, administrative or directive duties within the entity or within its branches granted with financial and functional autonomy or any person who is involved, even as a matter of fact, in the management thereof [Article 5, Paragraph 1 (a) of the Decree]; and individuals in subordinate positions and namely every person supervised by or under the surveillance of a person under letter a) above [Article 5, Paragraph 1 (b) of the Decree].

The Decree establishes two different criteria for the attribution of the "*actus reus*" to the legal entity depending on the role that the agent has in the organisational chart of the company. When the physical person is "an individual in subordinate positions" the attribution of responsibility is structured on the idea of organizational culpability and the burden of proof is on the prosecution (Article 7 of the Decree). On the other hand, when the author of the criminal offence carries out "representative, administrative or directive duties" the responsibility of the company is structured more similarly to the identification principle (or *alter ego doctrine*), with a strict liability mechanism. There is, then, a reversed burden of proof (Article 6 of the Decree).

The legal entity is exempted from liability if the agent(s) responsible for the crime acted in his (their) own exclusive interest or in the exclusive interest of third parties unrelated to the entity (Article 5, Paragraph 2). Moreover, the company is exempted from liability if:

- the company's managing body has adopted and implemented, before the commission of the crime, a compliance program ("*Modello di organizzazione, gestione e controllo*") apt for preventing the misconducts sanctioned by the Decree, when the crime has been committed by "an individual in subordinate positions" as described by Article 5, Paragraph 1 (b) (Article 7 of the Decree), and;
- in addition to the above mentioned requirement, the company has appointed an *ad hoc* internal body ("*Organismo di vigilanza*"), for the supervision, the implementation and the updating of the company's compliance program, the individual(s) has committed the crime fraudulently eluding the compliance

program and there has been not omitted or insufficient supervision by the above mentioned internal body, when the crime has been committed by the senior management as described by Article 5, paragraph 1 (a) (Article 6 of the Decree).

In any case, the criminal responsibility of legal entities foresees a connection between the offence committed by the physical person and the legal entity: in this sense, it is required that the illicit fact is ascribable to the legal entity from both an objective and a subjective point of view.

In particular, the objective criterion represents the link through which an illicit fact can be attributed to a juridical person, whereas the subjective criterion ties the responsibility of the entity to a particular type of *mens rea* (called "statutory *mens rea*"), consisting in the breach by the entity of relevant dispositions apt to prevent the commission of the criminal offence.

The present contribution intends to analyze the above mentioned objective criterion that is outlined in Article 5 of the Decree, with particular reference to the criteria requiring that the entity is liable for criminal offences committed in its "interest" or to its "advantage". The said disposition provides for the interpreter with the guidelines through which to establish in which cases a criminal activity, perpetrated by agents acting on behalf of the company, entails the responsibility of the legal entity.

2 The "Interest and the Advantage Test" and Unintentional Criminal Offences

As said, the "interest" and the "advantage" represent the link between the criminal offence and the entity and have to be understood, according to an applicable executive brief, as two different concepts: in particular, it is possible to distinguish the occurrence of an interest in the absence of any achieved enrichment, from the situation in which an advantage has been objectively achieved, even when not expected or planned for *ex ante*.[1]

Both instances show how the interest and the advantage are distinct and mutually autonomous requirements that may or may not concur.[2] In fact, the "interest" of the company, concurrent with that of the author of the criminal offence, characterizes the conduct in a markedly subjective way, and therefore needs to be assessed from an *ex ante* perspective; on the contrary, the "advantage" has an objective connotation which requires an *ex post* examination. The "advantage" refers to the actual economical gain enjoyed by the legal entity, while an "interest" only entails the aiming of the criminal offence towards a hypothetical advantageous purpose.[3]

[1] Relazione Governativa al d.lgs. 8 giugno 2001 n. 231 2001, p. 16.

[2] Astrologo (2003), p. 656; Di Giovine (2005), p. 69.

[3] Pecorella (2002), p. 83.

Some have considered how, from a systematic reading of the law, the statute's phrasing "in its interest and to its advantage", is a linguistic overlap and that the essential parameter is that of the "interest", to be interpreted as an activity planned in view of a corporate benefit.[4] This interpretation, is claimed, would better explain the letter of Article 5, Paragraph 2 of the Decree, which states that the entity is not liable if the agents who committed the criminal offence acted in their own exclusive interest or in the interest of third parties unrelated to the company. The "interest" and "advantage" couple therefore would state a unique concept: the idea that the illicit offence is the product of an activity which, regardless of what the agent may have personally foreseen, has produced a utility for the entity that was objectively foreseeable on the basis of the agent's conduct.

On the other side, the difference between the two figures is given relevance by the letter of the Decree's Article 12, Paragraph 1, where the legislator disciplines the mitigating circumstances. In the latter it is stated that the sanctions are susceptible of being reduced: when the damage is particularly low [Article 12, Paragraph 1 (b)] or where the author of the criminal offence has acted in his own or a third party's prevalent interest and the legal entity gained no or little advantage as a consequence of the agent's actions (Article 12, Paragraph 1 (a)]. Form this provision it emerges that "interest" and "advantage" are not, from the lawmaker point of view, the same thing.[5]

However, the latter case shows how the fact that the "advantage" criterion tends to dissolve in favour of the "interest" should not be disregarded. In fact, in the case outlined by Article 12, Paragraph 1 (a), the entity's liability can be affirmed, notwithstanding the "advantage" for the company is missing, on the base of the proof that the legal entity had an "interest" of its own, though minimal, in the pursuit of the advantages aimed at by the agent.[6]

There would be no entity's liability in a reversed scenario, that is, when advantage for the legal entity results from a conduct but no interest on its behalf subsists. Typically in other words, a fortuitous advantage, arisen from the illicit activity of any of the agents of the predicate offence, does not entail the entity's responsibility.

Given the ambiguity of the statutory expressions under analysis, it should be noted that the interpretation of the "interest and advantage test" becomes particularly problematic with reference to the criminal offences requiring negligence or recklessness ("*reati colposi*"). Clearly, the "interest" and "advantage" criteria can work with reference to intentional crimes but it poses serious difficulties of interpretation in respect of unintentional offences such as manslaughter or environmental crimes (introduced in 2011 among the criminal offences of the Decree).

In fact, although it has been claimed that the lawmaker foresaw, in 2000, the introduction of both intentional and unintentional criminal offences, the fact that

[4] De Maglie (2002), p. 331.

[5] For a more detailed analysis see: De Simone (2005), p. 657; Selvaggi (2006), p. 23.

[6] Vinciguerra et al. (2004), p. 37.

the Decree did not itself introduce any offence by negligence or recklessness ("*reati colposi*") among the list of its predicate offences should also be noted. It would be hard to claim that the responsibility scheme outlined in the Decree was given birth with an eye to unintentional crimes.

The initial exclusion of the measures regarding "manslaughter and personal injuries with violation of health and safety at work" from the Decree's own list of offences long represented a gap in the aforementioned statute, especially given that the omission left most white collar crimes outside the scope of the corporate criminal liability discipline.[7]

The parliamentary *iter* that led to the addition of the health and safety at work criminal offences' in the structure of the Decree may be briefly summarized: Article 9 of regulation no. 123 of the 3rd of August 2007 added to the Decree Article 25 *septies*, through which juridical persons are given accountability for cases of manslaughter and serious and very serious bodily injuries committed in violation of safety regulation on the protection of health and safety at work; later, said Article 25 *septies* was modified substantially by Article 300 of Legislative Decree no. 81/2008 (a.k.a. the "Safety Regulation Code for the Protection of Health and Safety on the Workplace"), a law containing a variety of provisions also regulating the aforementioned Compliance Program (Article 30, Legislative Decree no. 81/2008); the entry into force of the Legislative Decree no. 106/2009, introducing complementary and amending measures to the abovementioned Code further affected the corporate liability premises bringing further changes on the Compliance Programs discipline[8] and altering some provisions to whom Article 25 *septies* refers (Article 55, Legislative Decree no. 81/2008).[9]

However, Law no. 123/2007, which introduced for the first time the offences of manslaughter and grievous personal injuries with violation of "health and safety at work", failed to intervene on the "interest and advantage test" by amending the inefficiencies that resulted from the introduction of unintentional criminal offences.

The main critical aspect regarding the application of "the interest and advantage test" as outlined by Article 5 of the Decree to unintentional crimes as the ones provided for in Article 25 *septies* is the lack of the creation of a connected system of dispositions between the Decree and the criminal provisions in the domain of workplace health and safety.

The challenging coordination between the new wording of Article 25 *septies* and the objective criteria of attribution of *actus reus* through the "interest and advantage test" is a hotly topic debated both in jurisprudence and legal theory.

[7] Such a gap has been filled, at least with reference to unintentional offences, thanks to the subsequent statutory amendments, made directly and indirectly in 2007–2009, see Santoriello (2008), p. 160.

[8] Through the introduction of: Paragraph 5 bis in Article 30, amendment of Paragraph 3 and introduction of Paragraph 3 bis by Article 16 of Legislative Decree no. 81/2008.

[9] Castronuovo (2009), p. 312.

The fact remains that, it is difficult to imagine how a wrongdoing resulted from a negligent conduct could be committed in the legal entity's "interest": either the illicit conduct is perpetrated with intent, that is with the aim of creating a benefit for the legal entity, or the conduct is unintentional, that is without the possibility to find the interest outside a benefit fortuitously generated for the entity.[10]

To begin with, two distinct questions should be addressed. First of all, the statutory wording of Article 5 would seem to refer to the purpose of the agent's behaviour in a way that is inconsistent with the lack of intention, typical of the unintentional offences. The category of unintentional offences is therefore at odds with a system—the one shaped by the Decree—that seems "*modelled on a form of individual and intentional liability*".[11] Secondly, given that the "interest" and "advantage" elements must refer to the consequence of crime, it might be problematic, when the criminal offences as the ones foreseen by Article 25 *septies* result in death or injuries, envisaging the damage to the physical integrity or the life of an employee as a benefit for the legal entity. The "interest and advantage" criteria appears for these reasons once again unsuitable with respect to the particular case of manslaughter and personal injuries, as the events foreseen in such offences "*far from determining a capital gain for the entity or a saving in terms of costs, generate a different type of damage*".[12]

With reference to the two points, it should be remarked that the problem arises whenever a criminal offence (whether or not intentional) entailing corporate liability requires the verification of an outcome that is not of economic nature (and therefore is not susceptible to evaluation in terms of benefits for the legal entity). An issue related to the suitability of the "interest and advantage test", set out by Article 5 of the Decree, therefore arises for any criminal offence (whether intentional or unintentional) that is not directly ascribable to a profit-making purpose. For example, in the case of criminal offences related to the environment (foreseen by Article 25 *undecies* of the Decree), neither the interest nor the advantage relate to the detriment of the environmental health but instead have to be evaluated in relation to savings on waste processing costs. Similarly, with reference to the offences of manslaughter and work related injuries and diseases, eminent legal doctrine has stated that "*the entity's interest and advantage, which cannot be referred to the damaging outcome of the offence, will have to be interpreted with reference to the illicit conduct (*'actus reus'*)*" and "*it could consists in a saving of costs on safety measures*".[13]

In fact, the bill in parliament presented by the Commission led by Prof. Grosso provided for different criteria for intentional and unintentional crimes, respectively:

[10] Astrologo (2003), p. 656.

[11] Yet, before the introduction of Article 25 septies, Mereu (2006), p. 60.

[12] Dovere (2008), p. 332 where the author highlights the absurd statement for which the outcome of the criminal offence as death or personal injuries may be seen as an advantage or be of any interest for the company.

[13] Pulitanò (2013), p. 635; Rossi and Gerino (2009), p. 22.

the "interest" criterion for the sole intentional crimes and the criterion of the perpetration of the criminal offences while carrying out entity's activities with breach of the relevant dispositions, for unintentional crimes.[14] In the first draft of the Decree (that of the 3rd of March, 2001), also, the interest and advantage were not linked to the criminal offence but rather to the broader activity within which the illicit conduct was perpetrated; the norm literally read "*the entity is liable for those criminal offences which are perpetrated while carrying out activities that are in its interest or to its advantage*".[15] Certainly, one of these liability structures would have been more suitable in respect of unintentional crimes and, moreover, in line with the liability structure given in other countries for unintentional offences as manslaughter. For instance, for the Corporate Manslaughter and Corporate Homicide Act 2007, enforced in England and Wales, the company is liable "*if the way in which its activities are managed or organised (a) causes a person's death, and; (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased*" (Section 1, Paragraph 1),[16] a totally different liability structure to compare with the *alter ego doctrine* applicable to other type of offences.[17] Different criteria of attribution of corporate liability depending on the types of criminal offences are also foreseen by the German and Austrian laws.[18]

However, the bill in parliament of the Grosso Commission was not approved and the first version of the Decree was amended by the present text of Article 5, Paragraph 1, thus suggesting that the lawmaker in fact meant precisely to refer the interest/advantage figure to the criminal offence in itself (made by both the conduct and the consequence of crime) and not, instead, to the activity in the wider context of which the criminal offence occurred.

The possibility to refer the interest/advantage to the activity of the legal entity, it has been claimed, may go beyond "*the mere broad interpretation of the law to result in an* 'analogia *in malam partem*'",[19] which is against the principle of legality, affirmed in the Constitution with reference to criminal law (for somebody here applicable for the claimed "criminal nature" of the corporate liability outlined in the Decree), and, in any case, foreseen by Article 2 of the Decree. Moreover, it has been noted, following such line of reasoning, the entity would be considered liable because the agent violated a relevant preventive rule instead of being responsible for the damaging consequence of the offence, thus giving to Article 5 a different content from the one devised by the lawmaker.[20] Also, this interpretation would bring the risk of finding the corporation liable even when the offence is the result of an agent's mere sloppiness (and not instead of an intentional violation

[14] Article 121, Paragraph 1 (b). See De Simone (2012), p. 42.

[15] Article 5, Paragraph 1, first Draft of the Decree of 3rd March, 2001.

[16] Wells (2011), p. 91.

[17] Wells (2001), p. 93.

[18] De Simone (2012), p. 33.

[19] Aldovrandi (2007), p. 574.

[20] Aldovrandi (2007), p. 575.

of the preventive rules applicable to the sector concerned, aiming at favouring the entity by, for instance, reducing costs) not generating any advantage nor being of any interest for the legal entity.[21] In the academic world it has also been underlined the risk to come to an interpretation establishing an automatism between the violation of the preventive measures and corporate liability, since in most cases it is possible to find an advantage for the legal entity as a consequence of the violation of preventive measures, in the form of saving costs for the company (the interest and the advantage, in other words, risks to be found *in re ipsa*, that is in the failing or the inadequate arrangement of the preventive measure).[22]

As a consequence, some have urged the lawmaker to re-draft the criteria for attributing the responsibility to legal entities foreseen by Article 5 of the Decree.[23]

Yet others have suggested interpreting the criteria of Article 5 (thanks also to the broad margin allowed for by its generic wording) so to render it adaptable to the unintentional nature of the newly introduced offences: in order to render "the interest and advantage test" adaptable to unintentional offences, two different interpretations have been suggested.[24] The first interpretative solution is to intend the requirement of the "interest" as marking the agent's conduct in a strictly subjective sense and therefore to apply to unintentional crimes one sole requirement: that of the "advantage", to be interpreted objectively and *ex post*. Another possible interpretation is to intend the "interest" requirement in an objective sense, as the conduct's ability to produce a benefit for the entity, with, as a consequence, no problem of compatibility with the unintentional nature of criminal offences.[25]

Regarding the latter formulation, shared by the jurisprudence, it has to be pointed out that for criminal offences of an unintentional kind the non-intention of the conduct is their very structural element; in this case, it will not be possible to claim that the author of the offence acted in the interest of the entity, nor will it be

[21] Aldovrandi (2008), p. 488.

[22] Dovere (2008), p. 332. To such remark it has been objected that the automatism (violation of the precautionary rules = interest/advantage for the entity) would not work in case of expensive precautionary system although totally inefficient in its preventive capacity.

[23] They suggest to rethink the criteria of the interest/advantage; Vitarelli (2009), p. 708 says that "it appears urgent and imperative an amendment of Article 5, so that to render suitable the objective criterion of attribution of the criminal offence to the entity for the new disposition". The author suggests two possible routes to take: 1. to rephrase the interest requirement referring it not to the criminal offence as a whole, but to the conduct, more precisely acting against the legal entity when the conduct is able to get a benefit for the latter; 2 or to eliminate it, requiring uniquely that the criminal offence is committed in the exercise of the typical dangerous activity of the entity, and that it has been caused by the non compliance with the preventive measures prescribed by the law regulating that activity.

[24] Ielo (2008), p. 60.

[25] Have a propensity for an objective interpretation of the "interest", to be understood as a "centre of interests" of the legal entity: Rossi and Gerino (2009), p. 21.

possible to claim that he acted in his own exclusive interest or in the exclusive interest of third parties: in effect he did not pursue anybody's interest.[26]

However the majority of jurisprudence seems to have adopted such interpretation with reference to unintentional crimes, considering necessary to articulate criminal offences in two separate parts: the *actus reus* on the one side and its outcome in terms of consequence of crime on the other. In such a way, the evaluation of the entity's interest/advantage, for unintentional offences, is made with reference to the agent's *actus reus* as characterized by the violation of the relevant provisions instead of with reference to the consequence of crime, in the abovementioned objective sense.

3 Case Law Development

Among the first few rulings pronounced by first and second instance courts (no Article 25 *septies* proceedings have so far reached the Italian Supreme Court, or Corte di Cassazione), the first conviction of a company for breach of Article 25 *septies* should be mentioned.

It is interesting to highlight the *iter* of the arguments laid out in such instance by the first instance court of Molfetta, Sez. distaccata di Trani,[27] that in the case stood firmly convinced in relation to the application of Article 5 "interest and advantage test", expressly excluding any obstacle thereto. The court posited in this case that the two figures should be understood as alternative, and not equivalent: this conclusion was drawn from the existence of the conjunction "or" standing between the two as well as from a comparison of the statutory wording at hand with the text of Article 12 of the Decree, that links the mitigation of the applicable sanctions to the circumstance that the author of the criminal offence acted in his own exclusive

[26] Vitarelli (2009), p. 706 for whom there could be a case where the conduct (unintentional) of the physical agent is in effect perpetrated in the interest (in subjective sense) of the entity. This is when the omission of the work-related preventive measure is the outcome of a conscious choice aimed at saving costs for the corporation. It is the case of "colpa cosciente" (literally "conscious unintentional" that is a type of mens rea similar to a certain form of recklessness). However, the distinction between "colpa cosciente" and "colpa inconsciente", if it could seem virtually adequate, it does not appears so in practice as "in case law [...] the hypothesis of "colpa inconsciente" are statistically infrequent; in most cases it is charged the "colpa incosciente", disregarding [...] the reference to the effective mental coefficient". Moreover it is interesting the analysis of Muscatiello (2008) p. 1452, according to whom the conscious choice of adopting a cheaper preventive system it would appear nearer to the "dolo eventuale" than to the "colpa cosciente": more it is underlined the acceptance of risk, more it emerges the voluntary corporate policy based on lack of safety, more the unintentional element of mens rea gets nearer to the intentional element of mens rea ("dolo eventuale"), more the corporate liability vanishes, being limited to unintentional conducts and not extended to intentional ones".

[27] Tribunale di Trani, Sez. distaccata di Molfetta, 26.10.2009 (dep. 11.1.2010), Est. Gadaleta, Imp. Truck Center S.a.s.

interest or in the exclusive interest of third parties, and given that the legal entity gain no or minimal advantage from the criminal offence in question.

It should be added that in this case the interest and advantage, which can be of a non-patrimonial nature, were interpreted by the court as possessing an important objective connotation: the interest was not in fact referred to the author's will and his possible aim, but it was linked to the pursuit of goals set by corporate policies.

That being said, the application of such criteria of attribution of responsibility to the legal entity would not in the judge's opinion bring any problem with reference to unintentional crimes. The court reached this conclusion through the "division" of the offence in two different elements: the conduct on one side, and on the other its outcome—consisting in death or serious and very serious personal injuries. The requirement of the interest or in any case the advantage gained by the legal entity as a result of the illicit conduct has to be linked than only to the agent's unintentional conduct.

In a subsequent ruling,[28] a different court affirmed, in line with the mentioned approach of the court of Molfetta, that is possible to extend the application of Article 5 of the Decree to manslaughter and personal injuries (foreseen by Article 25 *septies* of the same Decree) as the interest and advantage in such cases should not be referred to the criminal outcome but rather to the conduct perpetrated by the agent in violation of those preventive measures that rendered possible the completion of the criminal offence. However, according to the judgment, the interest and advantage cannot be automatically spotted whenever the criminal offence takes place during the execution of the corporate activities, but should always be verified in practice by means of ascertaining the actual subsistence of all ground assumptions supporting it.

A third ruling seemed, at least partially, of a different opinion.[29] In said case, the court declined to proceed against an oil company, by cleverly facing the issue presented by Articles 25 *septies* and 5 of the Decree. The judgment begins by observing that the general structure of the Decree was shaped along the structure of intentional crimes, as is most clear from the text of Article 5, Paragraph 1 and 2, as well as Articles 6 (c) and 12 (a) of the Decree. As a consequence, Article 5, Paragraph 2[30] of the Decree is deemed not applicable to unintentional offences as it is difficult, if not impossible, to prove the agent's exclusive interest or the interest of third parties with reference to an unintentional conduct. Moreover, the judge found it clear, given the use of the adverb "fraudulently" in the text of Article 6, -Section (c) of the Decree that the norm strictly refers to intentional offences. As noted in the ruling: "*willingness to deceive that is difficult to see compatible with*

[28] Tribunale di Novara, 1.10.2010.

[29] Tribunale di Cagliari, Ufficio G.I.P./G.U.P., 4.7.2011, available at http://www.penalecontemporaneo.it/ (12.2.2014).

[30] Article 5, Paragraph 2 of the Decree: "The legal entity is exempted from liability if the agent (s) responsible for the crime acted in his (their) own exclusive interest or in the exclusive interest of third parties unrelated to the company".

unintentional responsibility, is implied".[31] An alternative therefore presents itself between considering inapplicable the exemption condition (the only one applicable to offences committed by individuals occupying senior positions) or to giving Article 5, Paragraph 1, a different content, for instance by imagining that the organization and management model needs to be "*intentionally overstepped by the offender*".[32] The same problem has to be faced in relation to Article 12 (a) of the Decree, so that "*either the applicability of the disposition is to be exclude, or the norm must be adapted arbitrarily, for instance by ignoring the first term (referring to the interest and to the conduct) and applying instead the mitigating circumstance only to cases where the entity has gained a minimum or a null advantage*".[33]

Neither the judge accepted the interpretation given to Article 5 of the Decree in other cases, referring the "interest" criterion not to the consequence of crime but to the illicit conduct which violated the relevant preventive measures, so deeming surmountable the hermeneutical problem.[34] The "advantage" criterion also, has to be referred to the consequence of crime, even when caused by an unintentional conduct. Thus, the issuing judge specified that the interest of the legal entity is to be linked to a conscious and intentional action or omission (excluding the cases of lack of skill) and that the intentional action "*does not have to originate by a simple underestimation of risks or by a wrongful evaluation of the necessary preventive measures, but has to objectively reveal a deliberate attempt to cut the corporation's costs, irrespectively of the fact that such objective can or cannot be effectively reached*".[35]

Moreover, the conflict between the offences listed by Article 25 *septies* and the mentioned dispositions, according to the judge, is by no means suitable to be resolved through mere interpretation, given that any possible result of this operation would be questionable, as these are "*hermeneutical operations having a broad subjectivity margin, so that any result is so questionable to be, more than a point of balance, a walk along a tightrope*".[36] In conclusion, the judge here also expressed serious doubts as to the legitimacy of Article 25 *septies* in light of Article 2, Paragraph 2 of the Italian Constitution, even though he did not address any further such issue. The question therefore remains unanswered.

A later judgment of the court of Turin[37] regarding an industrial accident of a company's employee, acquitted of charge the company on ground of lack of both interest and advantage of the company in the perpetration of the agent's offence.

[31] Tribunale di Cagliari, op. cit., at 122.

[32] Tribunale di Cagliari, op. cit., at 122.

[33] Tribunale di Cagliari, op. cit., at 123.

[34] As, for instance: G.u.p. presso Tribunale di Novara, op. cit.; G.u.p. presso Tribunale di Pinerolo, 23.9.2010.

[35] Tribunale di Cagliari, op. cit., at 120.

[36] Tribunale di Cagliari, op. cit., at 123.

[37] Tribunale di Torino, 10.4.2013 (ud. 10.1.2013), MW Italia s.p.a., available at http://www.penalecontemporaneo.it/ (12.2.2014).

The lack of any company "interest" was found by the judge because the illicit conduct of the supervisor of the line of production was not a deliberate violation of the safety measures aimed at the benefit of the company; the lack of any "advantage" was affirmed as the line of production was in any case at standstill the day of the accident. With this ruling, on the one side, the judge confirmed case law considering that the "interest" and "advantage" criteria have to be considered separately and referred, for unintentional crimes, to the agent's illicit conduct and not to the whole criminal structure (comprising the consequence of crime). On the other side, the judge followed an interpretation of the "interest" as existent whenever it is proved a deliberate effort by the agent to favour the legal entity, on the basis of an *ex-ante* evaluation, that is one carried out at the time of the violation of the applicable preventive measures.

Finally, a recent judgment, the Thyssen-Krupp ruling, warrants particular attention.[38] In such case, Turin's Court of Appeal ultimately held the company liable for the administrative offence listed by Article 25 *septies* aside the conviction for homicide of 7 employees perpetrated through an industrial accident against the management of the company. The judgment, on the point of our interest, besides confirming the interpretation given in the previous case law on the necessity to refer the interest to the sole conduct of the offence and not to its outcome, underlines once again the possibility to refer the "interest" criterion to unintentional offences as manslaughter, linking its inquiry with the aims moving the agent's illicit conduct.

To conclude with, brilliant academics and judges confronted themselves with the hermeneutical problems posed by Article 5 of the Decree with reference to unintentional crimes. However, there is still a fragmented and uncertain application of such criteria for ascribing corporate responsibility and it seems that none hermeneutical solution may solve the problem without forcing the rules of statutory interpretation. Moreover, uncertainty increases costs of litigation and, above all, creates confusion for virtuous companies desiring to be compliant with the Decree. For all these reason our conclusion cannot be different from urging the legislator to redraft the text of Article 5 of the Decree with a separate and specific criteria for ascribing the responsibility to the company in case of unintentional crimes.

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Part III
Corporate Crimes: Corruption, Money Laundering and Beyond

Mitigating the Risks of Corruption Through Collective Action

Gemma Aiolfi

Abstract Corporate anti-corruption compliance programs are usually modified in response to internal and external developments to meet regulatory requirements and to be seen as being 'dynamic', but despite this they have yet to solve some of the more difficult corruption issues that still persist, even after decades of law enforcement. Collective Action provides a means to address the wider context of corruption risks by bringing together competitors as well as other market participants and stakeholders to seek common ground to reduce corruption. Companies should use their anti-corruption risk assessments systematically to identify where multi-stakeholder approaches could be used to tackle corruption risks more comprehensively, because risk assessments involve the business as well as compliance. The outcome would be a shift towards business driven integrity, and away from reactive and imposed anti-corruption compliance programs. Establishing a successful Collective Action takes time, trust and a skilled facilitator to ensure the goals are reached and all stakeholders commit to the agreement and take a long-term view.

1 Introduction

In 2011 and 2012, the US Department of Justice and Securities & Exchange Commission netted over US$780 million in settlements under the FCPA with some 27 different companies. In October 2012, the Director of the UK's Serious Fraud Office (SFO) reiterated that agency's role in prosecuting violations of the Bribery Act and withdrew its previous offer to seek only civil penalties against companies that reported themselves for corruption. Shortly thereafter, in late 2012,

G. Aiolfi (✉)
International Centre for Collective Action, Basel Institute on Governance, Basel, Switzerland
e-mail: gemma.aiolfi@baselgovernance.org

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China's new government announced that it would not tolerate corruption, and followed up with investigations into international pharmaceutical companies' marketing practices and alleged widespread bribery of hospital doctors. Less than six months later, Canada responded to international criticism by announcing amendments to its Corruption of Foreign Public Officials Act. The changes of February 2013 increased the maximum prison sentence from 5 years to 14 years; allowed the prosecution of Canadians and Canadian businesses on the basis of their nationality, added a books and records provision, and removed an exception for facilitation payments, amongst other things.

These few examples indicate the importance accorded to foreign bribery laws by national legislators, regulators, and international companies. Even if a company is not prosecuted, the financial consequences of an enforcement action can be considerable. Responding to allegations is time-consuming, and negative publicity may persist whatever the outcome of an investigation or attempt at reform may be. Thus, transnational bribery laws pose a considerable legal and reputational risk for companies. To address these risks, regulators, business leaders and commentators generally agree that companies must actively channel their efforts to combat bribery and corruption effectively. The reality however, is that most international companies have not yet gone beyond a reactive strategy: they limit themselves to responding to allegations of past wrongdoing and overseeing adjustments to internal compliance systems. They do not generally seek to ameliorate the wider context in which they operate which would involve addressing local or sector-specific corruption risks together with other market participants and stakeholders.

In this chapter, the typical components of an anti-corruption program in an international company are outlined and it is argued they are largely a reactive response to external developments or involve developing measures to address an internal incident. There then follows an analysis of Collective Action together with how these initiatives could be integrated into anti-corruption programs to reinvigorate them, and shift anti-corruption compliance into business driven integrity. Nevertheless, Collective Action is not an easy option and the last section of this chapter sets out an example of a type of Integrity Pact from Argentina, which illustrates some of the issues that need to be taken into account by companies when considering joining or initiating Collective Action.

2 Elements of an Anti-Corruption Compliance Program

For international companies, various sets of guidance documents prescribe the essential components of an anti-corruption compliance program. These include the US Federal Sentencing Guidelines and the Resource Guide on the Foreign Corrupt Practices Act,[1] the OECD Good Practice Guidance[2] and the UK Bribery

[1] United States Sentencing Commission (2012), Chap. 8, Sentencing of Organizations and United States Department of Justice and United States Securities Exchange Commission (2012).

[2] OECD (2010).

Act guidance on adequate procedures.[3] These guidance documents all recommend starting with a risk assessment[4] that is proportionate to the size, structure, and geographic diversity of a company, as well as its business sector. They then set out, in varying degrees of detail, what companies must do to prevent an occurrence of bribery either involving their employees or third parties. Last but not least, they indicate that companies that can demonstrate robust anti-corruption programs to law enforcement authorities will have an improved chance of benefitting from reduced penalties, if the wrongdoing can be attributed to (a) "rogue employee(s)".

Transposing the elements set out in the guidance documents into an anti-corruption compliance program involves procedures, tools and personnel (usually Compliance but also other functions such as Human Resources, Communications, and Corporate Social Responsibility). In practice, where Compliance is the "owner" of anti-corruption this function will develop measures and the overarching strategy to prevent, deter, detect and remediate non-compliance with anti-corruption laws and regulations.

The preventive components of an anti-corruption program embrace policies, procedures, training and raising awareness. The family of anti-corruption policies is often predicated on a Code of Conduct that iterates the ethical standards to which the company subscribes. This may include a "zero tolerance" policy when it comes to bribing; the behaviors and actions expected of the workforce are circumscribed accordingly to ensure that this standard is met globally. The basic range of such policies typically includes: anti-corruption standards, gifts and hospitality, sponsorships and donations, record keeping, financial controls, and whistleblowing. Some of these topics will be combined into a single policy others will be addressed alone. Anti-corruption risks may also be addressed within policies owned by other business functions such as Human Resources or Supply Chain Management. They may check, for example whether a job applicant has been involved in bribery allegations when conducting due diligence during the hiring or re-hiring of an employee, or the Supply Chain Management function when addressing procurement risks. For employees, more detailed procedures and standards will address the specific steps for selecting and appointing third parties, handling petty cash and approval procedures for gifts to government officials.

Monitoring and reviews are used to test the adequacy and effectiveness of an anti-corruption program, and ideally should detect weaknesses before they become problems. Techniques may include internal and or, external audits, compliance reviews, verification and testing of systems and technology, and benchmarking of procedures and policies through external agencies. The results of such tests and audits should feed into reviews of the compliance program so that it can be

[3] United Kingdom Ministry of Justice (2011).

[4] See, for example, Transparency International, UK Chapter with PWC (2013), or A Guide for Anti-Corruption Risk Assessment, UN Global Compact Anti Corruption Working Group, September 2013.

improved appropriately and thus meet the requirements of being a risk oriented and responsive program.

To complete the anti-corruption compliance circle, where procedural weaknesses in the control framework are raised to management's attention, or allegations of improper behavior by employees are made, these need to be assessed and investigated appropriately, and in some instances reported to law enforcement, and or, regulators. Shortcomings in the control framework must be remediated within a reasonable timeframe to prevent further risk exposure.

Anti-corruption programs must take account of relevant developments, such as amendments to bribery laws or new regulations. When the UK Bribery Act came into force many international companies benchmarked their policies and procedures against the new legislation, even when they had already implemented a zero tolerance policy towards bribery. This was a reaction or even an overreaction, to widespread comment that the UK law established a new anti-corruption standard.

Merger and acquisition activity can also affect an anti-corruption program, for example, if the acquired company introduces additional or new risks, or perhaps has a more detailed and well-developed program compared to that of the acquiring company. In such circumstances, the companies involved will have to review and adjust their anti-corruption programs accordingly.

When all these elements (policies, procedures, training etc.) are implemented, a company can claim to have an anti-corruption compliance program. The program is perceived as "dynamic" when it is modified in response to an internal or external imperative. But such changes to anti-corruption programs are essentially inward-looking and reactive. They are inward-looking because they focus on the sphere of control that a company can influence directly, even though this includes their relations to external third parties. This is not an unreasonable stance to take, but it is a limited one. Anti-corruption compliance programs are reactive for various reasons. The US authorities are still the most vigorous prosecutor of all the countries that have adopted laws under the OECD Convention[5] and the vast majority of companies investigated by the US authorities enter into settlement agreements rather than being exposed to the risks and costs of a full trial. Compliance standards or the lack thereof will therefore continue to be addressed in those settlements, giving the authorities the opportunity to raise standards. This creates a fairly steady stream of cases to be studied and interpreted to determine whether or not anti-corruption compliance programs need to adjust, be it ever so slightly. For example, in 2012 when the US authorities declined to prosecute Morgan Stanley for bribery in connection with actions by one of its senior managers in China, it emerged that the employee had been reminded to comply with the US Foreign Corrupt Practices Act some 35 times,[6] but despite this, still made improper payments. It was further revealed that between 2002 and 2008, Asia-based personnel at Morgan Stanley had been trained 54 times on the anti-corruption policy. This was

[5] See Transparency International (2012).

[6] See US Department of Justice (2013).

the first time that the US authorities declined to prosecute a company because it had a robust compliance program, prompting many international companies to review the frequency of their training to personnel in Asia and consider whether they were doing enough to prevent bribery in that region. The investigations by the Chinese authorities into the marketing practices of international pharmaceutical companies is also likely to have a similar influence on companies operating in that country who would be well advised to review their marketing practices and use of local travel agents.[7]

Adhering to the requirements set out in guidance issued by domestic law enforcement agencies and international organizations, and reacting to legal settlements may result in anti-corruption compliance programs being tweaked and even enhanced, but it is an unambitious and passive approach because such changes are orchestrated and driven by compliance. An alternative would be for the business to drive integrity and take the initiative to leverage anti-corruption compliance into a competitive advantage.

3 Business-Driven Integrity Through Collective Action

Collective Action might provide an alternative approach. It has been defined variously as a "catch all term for industry standards, multi-stakeholder initiatives, and public–private partnerships",[8] or it may be a distinct form of interaction: "a collaborative and sustained process of cooperation amongst stakeholders [that] increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors".[9] For the World Bank Institute, Collective Action against corruption can take the form of anti-corruption declarations, principle-based initiatives, business coalitions subject to certification, and integrity pacts.[10] The forms of Collective Action are distinguished from each other by the degree of enforceability of the participants' joint commitments[11] and, perhaps, by the goals of the initiatives.

On any definition, Collective Action is neither a panacea for all corruption problems, nor is it easy to achieve, not least because it demands an active and participatory approach by companies. It could however, help corporate compliance programs pre-empt risk and also help to counter the common lament by employees

[7] See Fox (2013).

[8] Pieth (2007), pp. 81ff.

[9] World Bank Institute (2008).

[10] World Bank Institute (2008).

[11] Design and Enforcement of Voluntary Anti Corruption Agreements in the Private Sector, a study commissioned by the G20 Anti Corruption Working Group and prepared on behalf of the B20 Task Force, Draft 30 May 2013, p. 5 (on file with the author).

in the business; that the competition does not enforce such a rigorous approach to bribery prevention, and that they are operating at a disadvantage in the business environment.

Collective Action is not a new response to transnational regulation,[12] but it is gaining increasing support from a range of international and non-governmental actors as a means to prevent corruption. During the 1990s, Transparency International (TI) developed the integrity pacts to help prevent corruption in public contracting. In July 2009, Siemens AG committed to pay US$100 million over 15 years to the World Bank Group to fight corruption and to promote and engage in collective action as part of the settlement in which the company acknowledged past misconduct and bribe paying in its global business.

The OECD has taken the concept of Collective Action in a slightly different direction. At the October 2012 annual consultation of its Working Group on Bribery, the OECD focused attention on using collective action to combat corruption including through so-called High Level Reporting Mechanisms ("HLRM"). Developed under the auspices of the OECD by the Director of Legal Affairs, the Chairman of the OECD Working Group on Bribery and a member of TI, the HLRM enables companies to report bribery to high government officials. Companies can report extortion by government officials knowing that the complaints will be addressed whilst shielding the company from retribution, and still retaining the possibility for a procurement process to continue. The first such HLRM has been piloted by Colombia in connection with a public procurement for an infrastructure project. Once the results are known, it may serve as an example to other countries interested in such a mechanism. Meanwhile, the OECD may identify further countries that could adopt an HLRM suitable for their political structures and legal systems.

To date, most corporate approaches that utilize Collective Action to prevent corruption usually start by one or more companies identifying issues of common interest and approaching their competitors in a market or country to tackle the issue jointly, with the aim of leveling the competitive playing field. Apart from business competitors, this process may also involve other stakeholders such as civil society or government agencies. To turn this process into a business driven initiative, companies could evaluate the option of Collective Action as a possible means to prevent corruption when appraising the results and findings of their anti-corruption risk assessments, and involve the business in those discussions as they are best placed to understand the mechanisms of how bribes can be paid or how conflicts of interest might arise. This would be the appropriate time to do this, because the process should identify the highest risk areas for the company and involve

[12] The principles set out in the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) (2012) Code of Practice aims to ensure that the same high standards of ethical behavior apply to the promotion of pharmaceutical products in all countries, regardless of the level of development of their economic and health care systems. The IFPMA Code Practice was first adopted as the foundation of a global approach to self-regulation by the pharmaceutical industry in 1981 and has been updated frequently since then.

consideration as to how those risks could be addressed most effectively. For example, where a country poses an increased corruption risk, and the company operating there is in a business sector prone to bribe solicitation, with a state owned entity as the end customer and where tenders are invited through a public bidding process, then a form of integrity pact for the procurement process might be an appropriate way for the affected sector to address the problem. Ideally, such Collective Actions would be replicated in all high-risk countries making bribery prevention through joint approaches the norm, rather than the exception. Where corruption relating to the import and export of goods exists, it may be appropriate to address the issue on a multi-industry basis and involve other actors such as customs brokers and logistics companies.

Using the risk assessment stage to identify areas for Collective Action would enable companies to take a timely, holistic and sustained approach to specific identified risks. Getting competitors and other stakeholders interested in joining a Collective Action requires a certain degree of assertiveness, which would be a new departure for many companies that have not yet considered Collective Action as an additional weapon in their arsenal to combat corruption.

So far, few companies have integrated consideration of Collective Action into their regular tool-kit to address the findings from a corruption risk assessment. Those Collective Action initiatives that have developed are as a result of the efforts of one or two companies and (typically) an external facilitator. Just such an approach developed as a variation on the concept of an Integrity Pact by companies in the energy transmission sector in Argentina: ABB, Alstom Grid, Arteche, Lago Electromécanica, Tubos Transelectric SA and Siemens. Called a Compliance Pact, the agreement includes an obligation to abide by local laws, as well as the principles of the UN Convention Against Corruption and the Inter-American Convention against Corruption. It requires the parties to refrain from paying or accepting any kind of bribe and to avoid bid tampering and political donations. The principles are to be applied to employees and to business partners, and third parties; business relationships with parties who do not abide by its principles are to be avoided. In terms of enforcement, the Compliance Pact also establishes an "Ethics Committee", which is a forum where signatory companies can exchange their experiences of anti-corruption issues and also raise concerns about each other's business practices. The Ethics Committee may apply sanctions to a signatory company that breaches the Compliance Pact. The Center for Governance and Transparency at the IAE Business School in Buenos Aires acts as a facilitator to the group as well as monitoring adherence to the Compliance Pact; it will also encourage additional industry players to join the initiative.[13]

The Argentine Compliance Pact may also be described (at least by those signatory companies that are multi-national subsidiaries) as a "bottom-up" approach to Collective Action. It was initiated at the country level and in a specific

[13] For more detailed references associated with this initiative see Zindera and Forstnig-Errath (2012), p. 185.

market segment. By way of contrast, a "top-down" initiative emanates from a company's headquarters, and may tend to mirror the "tone from the top" and be a set of high-level declaratory principles rather than the more hands-on approach of a local initiative. Whether all the headquarters of the multi-nationals involved were aware of the Argentina Compliance Pact, or endorsed it from the outset, is not known for all the companies involved.

One of the advantages of this "bottom-up" approach is that it also aims to draw in other local companies, either as direct participants to the collective action itself, or as indirectly affected third parties. In both cases, awareness of corruption risks will be raised, and there will be opportunities for the signatories to the Compliance Pact to engage in appropriate anti-bribery training, and to help prevent solicitation of bribes. The Compliance Pact may serve as a model for other collective action initiatives within the country, or wider Latin America region,[14] or, as already mentioned, within the companies themselves. This localized initiative may have, in turn, inspired action at the headquarters of the global players. These companies have separately signed a commitment to engage in collective action (they are also joined in this endeavor by GE), and have expressed an interest in addressing areas of mutual concern in the Energy and Transport sector.[15]

The Argentinean initiative also serves to illustrate some of issues and questions that may arise in connection with Collective Action. As the World Bank rightly notes,[16] and can be attested to by anyone who has ever helped develop an anti-corruption Collective Action, the process of reaching a concrete agreement is often slow and does not always result in the outcome originally foreseen by the founding members.[17] Often it will take time to engender a climate of trust amongst the stakeholders. Creating trust depends on variables such as the nature of the competitive relationships, the relative strength and scope of their respective anti-corruption compliance programs. Where one company has a well-established internal anti-corruption compliance program there may be a perception that it is seeking to impose it on those companies with less developed systems, particularly if there is a marked disparity in the size of the companies participating in the discussions to develop a Collective Action. The personalities of the individuals representing their companies as well as their seniority are factors that can speed up the trust building exercise. In these conditions, the need for attentive facilitators is important so that all stakeholders progress towards the goals in a spirit of consensus and unison. Once an agreement is signed, the trust that has developed needs to be sustained to permit

[14] The Argentina energy transmission sector collective action initiative was presented at the Second Latin American Conference on Ethics, Transparency and Anti-Corruption Compliance held in Buenos Aires on 1–2 August 2013.

[15] See Basel Institute on Governance (2013).

[16] World Bank Institute (2008), slide 58.

[17] See Mark Pieth's remarks on the how the original defense integrity initiative was derailed by the BAE scandal; only to re-emerge as the Defense Industry Initiative on Business Ethics and Conduct: Pieth (2012), p. 11 (with further references).

frank exchanges on compliance issues either bilaterally between the parties or through the forum designated for such exchanges.

The proceedings of such meetings where the parties may raise criticisms of their fellow signatories to an agreement may need a sensitive approach. The challenges should not be underestimated particularly when the participants come from disparate sized companies, are at different stages of implementing their compliance programs, and where conceivably the participants at the meetings may have limited or no previous experience of such types of exchange or interactions. If there is reluctance to use the forum for frank discussions, then the facilitators will need to coax the stakeholders into the process, because to have come so far and then to let the initiative wither for want of a tactful approach, would be a lost opportunity. In such circumstances the facilitators will be required to come up with some imaginative ways to get the parties talking openly and in a constructive manner.

The potential stumbling blocks outlined in the preceding paragraphs do not necessarily apply to the Argentina Compliance Pact; it rather conveniently just provides a springboard for a few thoughts on some of the hurdles that may need to be overcome if stakeholders opt for a similar approach elsewhere.

4 Conclusions

Fighting corruption requires a multiplicity of approaches; Collective Action provides one method that is both economically viable and simple to understand both for sophisticated and complex multinationals and smaller local companies operating within a domestic market. It provides an opportunity for various stakeholders in society to join together to make a tangible difference to prevent bribery within their spheres of influence, it enables the small players to sit down with those that dominate the market and set the conditions for how business is carried out. Collective Action is not an easy option because building the alliances that are required for it to be a success, are not always intuitive or obvious. If however, careful assessments were conducted as part of regular risk reviews by companies in order to ascertain which market players could be interested in creating and contributing to a Collective Action, this process should become easier, and even routine and an integral part of the compliance program.

It is quite feasible that it is only a matter of time before law enforcement goes beyond scrutinizing the due diligence efforts expended on third parties and business partners, and ask what *proactive* efforts did a company undertake to engage with third parties to prevent bribe payments in a particular business, country, market or process. In other words, did the company consider Collective Action, and if not, why not? Creating trust takes time and in the business world time is a scarce commodity. Dealing with competitors and discussing the risks associated with markets or a business sector requires an open mindset and a degree of humility; companies need to move away from propagating the company-centric doctrine about having a ”state of the art compliance program“ and admitting that no

company is completely immune from the risks of corruption anywhere in the world, and looking at other ways of addressing some of the more difficult issues that continue to persist even after decades of anti-corruption law enforcement.

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The New Money Laundering Law in Brazil: Understanding Criminal Compliance Programs

Eduardo Saad-Diniz

Abstract This chapter proposes an ambitious structure and will briefly introduce my observations on both sides of the New Money Laundering Law in Brazil, with theoretical references as well as an analysis of its practical consequences. Firstly, inspired by Klaus Tiedemann's point of view, some comments about the "culture of corporate criminal liability" (*Kultur der Unternehmensstrafbarkeit*) (Tiedemann, Zur Kultur der Unternehmensstrafbarkeit. In: Quelos N (eds) Droit penal et diversités culturelles – Festschrift für José Hurtado Pozo, Schulthess, Basel, pp 495ff., 2012a) will set the stage. It will be followed by an analysis of the international demand for an efficient alignment—in the field of organizational culture—alignment here being understood as international pressure for cooperation in criminal matters [A good example could be the case of Chile and the autonomous corporate criminal liability (*Ley 20.393/2009*), published in the same period that Chile achieved membership of the Organisation for Economic Cooperation and Development (OECD).]. Then, conclusions will be drawn by presenting the relationship between this organizational culture and the so-called "culture of corporate compliance", and how it influenced the Brazilian model of preventing economic crimes. These important topics outline an analysis of the Brazilian anti-money laundering system—in a descriptive way—from the legislative evolution over the New Money Laundering Law in Brazil to the recent jurisprudence of the Brazilian Supreme Court in the so-called Mensalão's Case, AP 470, which concerns a scandal involving members of the parliament during Lula da Silva's Government. Last but not least, the most important problems will be highlighted, including the moral dilemmas that belong to the "incestuous" relationship between corruption and money laundering (Kyriakos-Saad et al., Revue Internationale de Droit Pénal (AIDP) 83:161ff., 2012). Instead of a conclusion in a proper sense, you may then find some sceptical concerns about the future of corporate criminal compliance in Brazil.

E. Saad-Diniz (✉)
Faculty of Law, University of São Paulo, campus Ribeirão Preto, São Paulo, Brazil
e-mail: eduardo@saaddiniz.com.br

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1 The Culture of Corporate Criminal Liability (Klaus Tiedemann)

Klaus Tiedemann analyses the culture of corporate liability as a reception of international regulatory standards: This reception establishes the normative function of integration (*Integrationsfunktion*) into criminal law and allows for arrangements and combinations with other public and private norms.[1] With regard to this, the *droit administratif penal* or *droit administratif repressif* appears as a trend not only in Europe but also in Latin America. Critically, and here with a footnote on Joachim Vogel, Tiedemann mentions the "legal transplantations" that lead us to question the way criminal law intends to adopt social transformations.[2] Furthermore, the way it causes social transformations is affected by these penal norms, as they may intervene in the economic development. For example, they can cause mechanisms that only protect the individuals and the community against the economic power of corporations. In the same manner, they are supposed to be capable to prevent corruption scandals.

We could easily describe this international context referring to the transformations induced by the economic society and inspired by an increasingly high-tech specialization, to the proliferation of risks inherent to large corporate transactions and to the enormous circulation of capital at a global level.[3] After the 1990s, the deregulation of the market imperfections leaded to a scenario of uncertainty: It is far from an ideal fair play setting in order to (1) attract stakeholders or (2) to provide shareholders with strategic information. Thereby, this setting (3) insufficiently protects their investments and thus (4) affects the corporate reputation.

So, in this case, the classical reasoning of criminal law is continuously substituted by new expectations based on corporate economic behaviour. In a simplified modus, economic criminal law has taken on this new *agenda*, giving up the previous strict legality and individualization of punishment model and replacing it with a model of corporate criminal liability which appeals to the compliance culture. This constitutes an unprecedented legal challenge which requires being re-thought, at least.

The *US sentencing guidelines*' influence[4] on the corporate compliance and on the drafting of values, objectives and incentives with the ultimate aim to comply with new standards of risk management, good governance and ethics in business has been affirmed elsewhere.[5] The problem outlined above becomes even more complex if we think of new behaviour standards being adopted, which are oriented

[1] Vogel (2007), pp. 407ff.; Eicker (2010), pp. 168ff.; about the "*Divisionalisierung des Rechts*" in criminal compliance matters, Kuhlen (2013), p. 13; an overview on different types of sanctions, Engelhardt (2012), pp. 563ff.

[2] Tiedemann (2012a), p. 497.

[3] Tiedemann (2012a), pp. 500ff.

[4] Tiedemann (2012a), p. 501.

[5] Sieber (2008), pp. 458, 476ff.

by the prescription to "comply or disclose"—or if we think of new ways of attributing liability, that require a more elaborated organizational culture to comply with duties of loyalty, sincerity and overall due diligence.

In such a manner and to such a degree, the efficacy of market regulation and the role of criminal norms are now gambled with. Is it possible to regulate markets by putting into practice criminal norms? What kind of regulatory impact do they have? Are the increased transactional costs associated with such complex criminal procedures worth their price?

In truth, as mentioned already before, it offers some evidence of an ambiguous function when corporate liability is discussed in the context of criminal law—on the one hand, corporate criminal liability serving to protect individuals and the community against the economic power of corporations, and, on the other hand, corporate criminal liability creating a market with distinct features (*Identität*) enforced by international regulatory standards. Both aspects lead us to a wide discussion between guaranteeing security in commercial relations versus the restriction of free action in the market. The paradox consists in the fact that restricting economic freedom of some economic agents could actually amplify commercial security in such a way that a restriction of one's freedom could generate the amplification of freedom for other economic agents.[6]

2 The Brazilian Anti-Money Laundering System

In order to understand money laundering—an emerging form of crime—and to evaluate both the legal issues and the possible impacts of the new law in Brazil, it is essential to elaborate first on the background on which this new regulatory standard evolved. The Brazilian anti-money laundering system went very clearly through the so called "three generations" of money laundering laws. This refers to the "connecting offences" (*Verknüpfungstat*) and to how each of the legislatives measures brought Brazilian law to a regulatory standard that meets the dynamic demands of a globalized economy.

Just at the beginning, in the "first generation", the protected interests were focused on the combat on drug trafficking, making reference (Decree 154/1991) to the "UN-Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", the Vienna Convention of 1998.[7]

Later, entering the "second generation", Brazil enlarged the catalogue—the *numerous clausus*—of connecting offences (besides drugs traffic, terrorism and its financing, arms trafficking, extortion made by sequestration, offences against the

[6] Saad-Diniz (2013b), pp. 151ff.; Saad-Diniz (2013a), pp. 9f.

[7] It is also remarkable that, in the same year, 1998, Brazil adopted the corporate criminal liability (Law n. 9.613/1998), but strictly limited to environmental crimes (and it still remains the only legal variety of corporate criminal liability in Brazil).

national and international public administration, against the national financial system, and committed by organized crime—art. 1º, Law 9.613/98) and created its Financial Intelligence Unit (FIU), the COAF (Council for Controlling the Economic Activities—art. 14) by Law 9.613/98. Since 1999, efforts on international alignment of the Brazilian anti-money laundering system lead to the adoption of special branches of "mutual cooperation", such as proposed by the Basel Committee, the "Egmont Group", and also the policy-making body GAFI (*Group d'Action Financière*).[8]

Beyond the simple re-acquisition of stolen values, the purpose was not only to recognize the origin and layers of activity, but also to recognize how and in which social context money laundering was integrated, and how it interacts with the formal market.[9] These structural modifications came not without lots of conceptual and procedural problems: For example, what does terrorism and its financing mean to the Brazilian reality? These issues suffer from a lack of regulation, not mentioning that organized crime is still an issue to debate in general. By the way, the FIU created in 1998 now comes back on the table, as it lacks both institutional implementation and it failed to introduce a sufficient monitoring system.

Looking for much more wiggle-room for modification and trying to catch up with the international alignment in terms of cooperation, the New Money Laundering Law in Brazil was enacted in 2012 (Law n. 12.683/2012) and includes two most relevant modifications: on the one hand, the *numerous clausus* of connecting offences was abolished, and, on the other hand, the new law stimulated the substantiation of compliance duties as well as improved the operation of the FIU. With this new law, an improvement in the prevention of economic crimes was naturally expected. The last GAFI-Report 2012 on Brazil is of course laudatory, pointing out as deficiency only the lack of a specific regulation about terrorism and its financing.

However, this report cannot shield some internal contradictions. Just to illustrate, according to this new law, money-laundering related to stealing and robbing are as punishable as related to trafficking in drugs or in the context of organized crime. With the repealing of the old catalogue, the application of the anti-money laundering law was extended to some controversial offences of an administrative level like tax evasion. What would happen to an accusation of money laundering if an administrative procedure does not reach a relevant conclusion in a criminal sense? If we follow this path, we accept an autonomous offence, but also accept a mismatch and a point of failure.

The other modifications mentioned above are centred in the position of a compliance officer. Art. 10, III and IV of the new law recommend the adoption of policies to prevent money-laundering, and art. 11, II and III ascribe responsibility of the head and compliance officers, without determining its limits. Here, also lawyers become vulnerable (Res. COAF n. 24/2013).

[8] Silveira and Saad-Diniz (2013), pp. 157ff.

[9] Tiedemann (2012b), p. 261.

The new law, however, does not give clear criteria (risk consciousness, normative circumstances and material support to the offence)[10] for its application, and it remains very unclear who is in an oversight position. In that sense, it is possible to comprehend Brazil's alignment simply as a "legal transplantation". Besides the repealing of the catalogue of connecting and the modifications relating to the Brazilian FIU, this new law—which is based on international standards—builds the Brazilian anti-money laundering on trust-based prevention policies, on procedural incentives to recuperate the values, and on recent administrative and normative changes. Those changes concern how financial institutions are to manage programs against corporate crimes—i.e. they regulate corporate compliance, especially by means of FIU, COAF, CVM, BACEN (trying to specify and substantiate the obligation to inform suspicious operations).

In its administrative norms, Brazil experienced a "regulatory activism", trying to enforce the persecution of suspicious actions. Just an example, until the administrative bank norm Circular 3151/2004, there were 43 distinct proscriptions of suspected operations. In 2009, the Circular 3461/2009, were 106 such provisions, more than the double. In 2013 we have two brand new norms regulating the duty to communicate suspicious operations (3.654 and 3.654/2013), and almost 20 new ones are expected to fulfil the demands of Basel III—measures implementing preventive policies and imposing obligations to inform about irregular situations.[11]

What are the consequences following from this analysis? Besides the legality and proportionality issues, we recognize "regulatory activism" which intends to implement the standards outlined by Basel III, but we also have to recognize consequences to the Brazilian constitutional model of social-economic development (protection the social economic order, art. 170, CF).[12]

It is also possible to verify the notion of regulatory activism not only in administrative matters. According to the *Conselho Nacional de Justiça*, the Brazilian Justice System handled altogether 25,799 cases on corruption and money laundering, 1,763 of them just in the year 2012.

According to the AP 470—the so called Mensalão's case (the scandal of Lula da Silva's government),—and I won't polemicize here about the 8,405 pages that the decision contains—, the judgement attributed criminal relevance in financial transactions made by banks, in order to guarantee that some members of the parliament voted supporting the Government agenda. It was decided that these transactions constituted sophisticated financial engineering by manipulating suspicious information and by establishing connections with off-shore institutions. The results of their actions lead to several social harms; moreover, the case manifested high levels of moral hazard. The populists calls on condemnations can be heard in doubtful decisions on "multiple violation of obligations" or "general infractions of duties", or, as we can see on page 1187, in generic affirmations: "compliance reports

[10] In a similar way, Abanto Vásquez (2008), pp. 03ff.; Abanto Vásquez (2010), pp. 3ff.

[11] Silveira and Saad-Diniz (2012), pp. 308f.

[12] Sarcedo (2012), p. 218.

containing various irregularities", or even on page 1196 and 1198: "the reports about internal control and compliance were concealed".

In other words, the condemnations were justified in a very simple form and with uncompleted arguments, so that an omission on complying with an administrative obligation was sufficient to set the stage for a criminal approach. At page 3009 we find: "the financial institution systematically and negligently has not complied with the norms that regulate this subject, with omission in its duty to communicate the facts or not properly identifying the beneficiaries or the one who draws out". In other words: A simple omission on complying with obligations sets the stage for criminal condemnation, in terms of the administrative duty of art. 12, Law 9.613/98. And here it has to be emphasized that the administrative obligations founded not only a repressive sense; it was also the case of absolutions, as the issues discussed duties that must not be claimed during the facts (for example at page 5,455).

These few words on substance, the lack of specific information and the shallow data-analysis in this Judgement mean that compliance programs in the financial field—which are, at first sight, very positive—become an inefficient measure, and, what is worse, cannot be recommended in terms of legal certainty. Generically speaking, a situation where the regulation of market information aims at preventing economic crimes actually converts itself into a repressive measure,—an authentic inversion—verified in the praxis.

An imprecise combination of norms of administrative nature seems to deteriorate the preventive character of criminal compliance in Brazil. If this preventive character was already difficult to check empirically before, this decision makes it possible to recognize a "renaissance" of retributive theories.[13] As a consequence, I am quite sure that even any advantage these condemnations may have will not prove to be worthwhile to the Brazilian criminal system of Justice as a whole. This precedent, setting equivalent a violation of an administrative duty to a criminal liability, can stimulate a system of delegation of responsibilities inside the corporation, or even worse, it can stimulate the so-called "organized irresponsibility". That makes employees even more vulnerable.

Thus, observing the Brazilian case, the legal practice of criminal compliance in the Supreme Court brought consequences on two levels, macro and micro: on the macro level, it was transformed into a model of compliance "*ex post*", not interested in the prevention and instead focused on guaranteeing a criminal reaction after the scandal. The Supreme Court intended to also play a part in the governance structure by aligning the Brazilian system to the international standards. Finally, the organizational culture in Brazil seems to adopt an austere (severe) model of criminal regulation of the market.[14]

On the micro level, the function of information in the corporate field amplifies the criminal liability caused by a simple omission on due diligence. Consequently,

[13] For a critical reference, Pawlik (2012), pp. 82f.

[14] *Idem* note 6.

the transactional costs have increased and corporations have started to restructure the methods of organization and internal control.

3 Imposing Limits: Why Do We Need Criminal Compliance?

So, my presentation has just highlighted the legal issues, the evolution of the Brazilian anti-money laundering system including the evolution of the legislation on this matter, and some arguments on the possible application of criminal compliance programs. Observing the Brazilian case, it is perhaps too early to take part in the efforts of regulating anti-money laundering at any cost. Why do we need it? The fact is that in Brazil we are not yet able to fulfil a precondition, namely defining a sufficient standard of obligations to comply with.

Some limits, however, should be implemented for this "efficient control of information in the corporate field". Are we prepared for such austerity in the behaviour of corporations; do we have a sufficient organizational culture? Rigid patterns to attribute liability would expand the role of criminal law[15] and could be a doubtful promise to solve the prevention of economic crimes.[16] More than that, the moral dilemma[17] involving economic development, bureaucratic corruption and ethics in the corporate field are still open questions.[18] Regulatory activism, condemnations at any cost, new standards of criminal regulations, all lead to the question of which "preferences" are to be followed? Who decides about what constitutes ethical behaviour? Who is going to control the controllers (*quis custodiet ipsos custodes*), and what kind of ethics are we looking for?

Instead of following this path, economic criminal law could work out in more details the juridical tools to protect the employees instead of perverting systems delegating liability to employees. It was my main interest to discuss here my own doubts. By which measure this new compliance standard could be appropriate to the Brazilian organizational culture,[19] stimulating economic growth? It is a pleasant idea to define the features, the identity of an international market more specifically, or, as Tiedemann said, "the integrative function of criminal law". We must face courageously the moral dilemma—and the controversial issue—that exactly the

[15] Critical remarks in Silva Sánchez (1999), pp. 20f.

[16] Analyzing the Brazilian case, Silveira (2011), p. 423.

[17] The economic impact of moral dilemmas is nevertheless contingent, Schramm (2005), pp. 85ff.

[18] Leff (2009), pp. 307ff.; in a realistic way, Rose-Ackermann (1997), pp. 31ff. In further details, considering the ways in which the damaging consequences of corruption operate in the economy, and also keeping a distinction between "immoral" and "corrupt" transactions, Bardhan (1997), pp. 1320ff.; "corrupt income may also induce a misallocation of resources", Lambsdorf (2005), p. 14; with an international perspective about the "anti-corruption culture" and the role of the criminal law, Abanto Vásquez (2004), pp. 278ff.

[19] Discussing the organization culture in a Latin-American context, Rodríguez (2012), pp. 126f.

same "incestuous" relationship between corruption and money laundering is behind the new international stage of the Brazilian economy.

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The Concept of Defining and Combating Market Manipulation in Existing and Proposed EU Legislation

Anna Blachnio-Parzych

Abstract Market Manipulation is sometimes labeled as a "virtual term of art". This expression shows how difficult it is to define what kind of market practices are market manipulation. This difficulty is strictly connected with the issue of legislative decisions what behavior should be treated as manipulation. The problem derives from the thin border between aggressive but legal behavior and market manipulation. To determine the border one should not forget that the essence of functioning of capital markets is speculation, which I understand as a rational behavior of market participants.

One aim of this contribution is to show how the EU legislator coped with the challenge in the Directive 2003/6/EC on insider dealing and market manipulation. The EU legislator assumed that the most effective way to combat market manipulation was to define it in an objective way. It raises the question whether it is possible to define manipulation this way—and whether the EU legislator succeeded.

The second section of this chapter focuses on current draft EU regulations against market manipulation. The EU Commission, after public consultation on the review of the Market Abuse Directive (MAD) (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L96/16), tabled evaluations of contemporary regulations against market manipulation. The lack of clarity and thus legal certainty was pointed as one of the main disadvantages of the existing framework. Therefore, this warrants the question whether the EU commission proposals for a new framework solve the problem of legal clarity and legal certainty.

A. Blachnio-Parzych (✉)
Institute of Law Studies, Polish Academy of Science, Warsaw, Poland
e-mail: anna.blachnio-parzych@adwokatura.pl

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1 Market Manipulation: A Threat for Capital Markets

Market manipulation is treated as one of two main threats for proper functioning of capital markets. Manipulation leads to financial losses suffered by investors. They carry out their transactions being not aware that the actual situation of the market is a result of manipulation. In consequence, investors run the risk of loss by buying overvalued and selling undervalued instruments. Other victims of manipulation are issuers whose shares are subject to manipulation. If negative false information is disseminated during the public offering, it reduces the chances of the issuers to realize their financial plan. Furthermore, when market manipulation leads to falling stock prices, the issuer may run the risk of a takeover.

Market manipulation is also detrimental to the public interest. This is a threat for all functions of the stock exchange, especially for the mechanism of market price quotation. It stops being an indicator of the state of companies which are listed on the stock exchange. The stock quotes cease to be the criterion of valuation of other assets. The market abuse causes the loss of confidence in the quality of the market valuation. According to the public opinion, the stock exchange starts being treated as a casino, where you can very quickly make money, but can also lose it just as quickly. This is especially true when investors observe abrupt changes in stock prices without any reflection in information about factors that may affect the real, factual condition of the company. Therefore, irregularities of financial markets have importance not only for some narrow group of financiers or investors, but for the society as a whole.

When looking for the reasons why market manipulation is blameworthy, it is important to realize that in the capital market competition is taking place on many levels. There is competition not just between the issuers, but also among investors and among dealers. Such competition is positive if it occurs under certain conditions. Manipulation and other forms of market abuse constitute a breach of the rules. Another perspective is to perceive the capital market, especially stock exchange, as a highly formalized game. Investors' confidence in the stock market depends on how much they believe that this game is being played by fair rules which are followed also by other market participants. The behavior which constitutes market manipulation is the breach of the game's rules. The market participants who infringe these rules gain an unfair advantage over others.

The above mentioned facts lead to the conclusion that manipulation should be forbidden and penalized. Nevertheless, this is not an easy challenge. Therefore, market manipulation is called a "virtual term of art"[1]: there are problems with describing the offense, with formulating the prohibition and with the execution of regulations against market manipulation. The problems derive from the thin border between behaviors which may be perceived as aggressive, but are instead inseparable connected with and necessary for the functioning of market, and the kinds of behavior which are market manipulation. The first kind of market activity shall be called as speculation. It is a behavior of seeking to make a profit in accordance with

[1] Avgouleas (2005), p. 104.

the principle of "buy low, sell high", and it is rational economic behavior. Because of these speculative transactions capital markets are more efficient. Recognizing the fact that the market price of financial instruments is undervalued, a speculator buys them and when they are overvalued—he sells them. His activity may constitute a signal that the financial instrument is worth more than the market price shows, or that is worth less. The speculator's action may cause the market price to rise, but it is not the purpose of speculator's action. Indeed, such changes in the market price are the reason why speculation leads to market efficiency. Therefore, even though the term "speculation" is sometimes used to describe market manipulation, it has to be pointed out clearly that there is a distinction between speculative and manipulative transactions. Otherwise, the decision of the legislator to combat market manipulation may be directed against the core of market trading. This causes uncertainty for investors whether their transactions may be treated as manipulation.

Back to the mainstream of this contribution, the decision on where to draw the border—that is, to deciding which behaviors are forbidden as market manipulation—has to be made very cautiously. Even if we make this first decision, a second one remains: how to formulate the prohibition of market manipulation. These two decisions made by legislator are strictly connected and the obstacles of the second derive from the problems regarding the first.

2 The Market Abuse Directive

2.1 Introduction

Aforementioned problems had to be taken into consideration by the EU legislator when it drafted the MAD. The reason for enacting the MAD was further integration of financial markets in the EU and for stronger protection of investors and to increase their confidence. To establish a single market and to protect it in an effective way, there was a need to enact a common legal and regulatory framework. Nevertheless, the endeavor to approximate national regulations met resistance, because of wide differences between the EU countries of how their capital markets functioned, for example the way financial services contracts were formed, or the way national rules on the conduct of business regulated the relationship between financial services intermediaries and their clients.[2] Although some directives harmonizing national legislation in the area of capital market (for example Capital Adequacy Directive,[3] Public Offer Prospectus Directive,[4] Insider Dealing

[2] Avgouleas (2005), p. 244.

[3] Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions, OJ L126/1.

[4] Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, OJ L124/8.

Directive[5]) were adopted, the pace of market integration was slow. That was the reason for implementation the Financial Services Action Plan (FSAP) announced in 1999. The Plan noted imperfections of the EU financial market legislation and the challenges created by the development of the modern market.[6] One of them was the possibility of cross-border activity of investors by means of the Internet, which caused many problems that needed to be solved by uniform market conduct rules. The rules should also apply to the definition, prohibition, sanctioning and legal cooperation concerning behavior which is treated as market abuse, because it undermines investors' confidence in capital markets. Moreover, it was also the time of big financial scandals—the cases of Enron and WorldCom. Furthermore, knowing the borders of permissible activity and thus legal certainty is also very important for investors and other market participants. These circumstances explain why the integration of capital markets in the EU countries required uniform rules on the fight against market manipulation and insider trading. Therefore, one of the aims of the FSAP was to adopt a directive—the aforementioned MAD—which would encompass regulations on insider trading and market manipulation—two most dangerous threats for capital market.

2.2 The Prohibition and the Definition of Market Manipulation

The Directive defined the main issues concerning insider trading and market manipulation, but the point of my interest will be only market manipulation. The obligation of member states to prohibit any person from engaging in market manipulation is expressed in Art. 5 MAD. The meaning of the term "market manipulation" is defined in Art. 1 (2) MAD.

According to Art. 1 (2) MAD, there are three main kinds of behaviors which should be treated as market manipulation: price manipulation, fictitious transactions and information-based manipulation. In reality, the behavior of persons who manipulate markets very often consists of different kinds of manipulation stipulated in Art. 1 (2) MAD. The manipulating strategies, in other words—the schemes which are characterized by some specific combination of behaviors—have even distinct names. "Pump and dump" is aiming at raising the price of the financial instruments by disseminating false or misleading information and by systematic buying of the instruments. When the price reaches the intended level, the manipulator starts selling the assets. The other example is "scalping" which is described as purchasing financial instruments briefly before publishing a recommendation advising others to buy the instruments. When the price of the assets rises—as more

[5] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L334/30.

[6] Maloney (2003), pp. 811ff.

investors are interested in the instrument because of the recommendation—the manipulator sells them.[7]

Before I will examine the definition of market manipulation it should be noticed that according to Art. 14 (1) MAD, when deciding on the kind of the responsibility for infringement of prohibition of manipulation, the domestic legislator shall take into consideration whether the character and severity of the sanction is proportionate and of an effective and dissuasive character. According to Art. 14 (1) MAD, the obligation was imposed "without prejudice to the right to impose criminal sanctions".

2.2.1 Price Manipulation

The first kind of behavior, called price manipulation, is defined as transactions or orders to trade which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level (Art. 1(2)(a) MAD). It is not manipulation, however, if the person who entered into the transactions or issued the orders to trade establishes that his reasons are legitimate and that these transactions or orders conform to accepted market practices on the regulated market. The term "accepted market practices" is defined in Art. 1 (5) MAD. They shall mean practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission.[8] Unfortunately, the EU legislator did not include a definition of the aforementioned term "legitimate reasons".

The essence of the aforementioned kind of manipulation is expressed as a "direct assault on the integrity of market's price formation (discovery) mechanism".[9] As an example of price manipulation, "control over the market" may be presented. Gaining a dominant position and using its impact on the price of a financial instrument are generally not a result of one transaction, but the result of a number of activities, both in the cash and the futures market. The important element of this kind of manipulation is refraining from activity in certain situations. It means that an investor maintains the position achieved for some time. He also makes an effort

[7] Salinger (2005), pp. 725ff.; Wójcik (1998), pp. 162ff.; Romanowski (1999), pp. 875ff.; Kuciński (2000), pp. 127ff.

[8] Factors which shall be taken into account by competent authorities of member states when assessing whether they can accept a particular market practice are stipulated in Art. 2 of the Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ L 162/70).

[9] Avgouleas (2005), p. 131.

to hide the fact that certain transactions are concluded by him or other parties associated with him in a formal or an informal way.[10] Gaining a dominant position is relatively easy when it comes to the so-called "penny stocks". These are companies with a relatively small capitalization, and thus the achievement of this position does not require large amounts of money, as would be the case in other companies.

Gaining a dominant position in the market of a specific financial instrument cannot be defined as exercising the "control over the market". The control is a specific way to use this domination. The use of significant market power may also occur due to the number of sales transactions in financial instruments. The investor can lead to a decline in the price of an asset by one transaction involving a significant amount of financial instruments. However, these behaviors do not constitute the use of the control over the market, because the perpetrator cannot be certain about the price effect of his behaviors. The change of price of some financial instrument caused by such behaviors may be kept in a very short time. Such a situation is described as the use of market control.[11]

Other examples of price manipulation are misleading orders or transactions. The perpetrator of this kind of manipulation does not act in concert with others who are buying or selling the same assets which are selling or buying by him. In this kind of manipulation, the cooperation may exist only on one side, what means that the cooperation between perpetrators may rely only on applying orders to sell or only orders to buy. The aim of the orders or transactions is to mislead other participants of the market. Although according to the assumption called *homo economicus* human beings act rationally, the research of D. Kahnemann and A. Tversky showed that the assumption is not true.[12] Investors are using simplified forms of concluding which constitute the base for making decision. The reasons of their faults are fear, overconfidence, or imitating others. Therefore investors miscalculate the assets and perpetrators of the aforementioned kind of manipulation pursue misleading them.

Prohibiting this kind of behavior as market manipulation is very controversial.[13] It may be generalized that, regarding the misleading orders and transactions, the costs of applying the responsibility for infringement of the prohibition are higher than profits. According to D.R. Fischel and D.J. Ross, this kind of manipulation is very rarely successful. On the other hand, it is extremely difficult to prove that the orders or transactions were made in the aim to mislead others.[14]

The aforementioned kinds of manipulation may be defined in different ways. The shape of the definition enacted by the EU legislator is an example of an objective approach. The core of the definition is the term "price at an abnormal or artificial level", or in other words, an "artificial price". Looking for the meaning of

[10] More about the control over the market see: Blachnio-Parzych (2011), pp. 122ff.

[11] See also: Friedman (1990), pp. 34ff.; McBride Johnson (1981), pp. 730f.

[12] Tversky and Kahneman (1974), pp. 1124ff.

[13] Fischel and Ross (1991), pp. 503ff.

[14] Fischel and Ross (1991), pp. 510, 516ff.

the term, it can be said that it is a price not created by natural change, which is under the influence of supply and demand. Therefore, an artificial price does not reflect the relation between supply and demand.[15] Taking into consideration the mechanism of quotation, according to this definition of "artificial price", it should be an assault on the mechanism—but, in fact, it is not. Every price which is presented in quotation is an effect of the relation between supply and demand, because this relation is inherently associated with the mechanism of quotation. From the perspective of the mechanism, the motivation of the market participants who make orders has no meaning.[16]

The "artificial price" is often defined by referring to illegal practices.[17] However, not all behaviors treated as manipulation constitute themselves illegal practices. It is very important to mention this in relation to price manipulation, which is very difficult to define, especially when it comes to define "misleading orders or transactions". In the literature, other proposals to define "artificial price" are presented. One of them is the lack of conformity with the price being the effect of other kinds of valuation than market valuation leading to a quotation. This position was taken by F.H. Easterbrook.[18] In his opinion, to reveal if the price is an artificial one, it is necessary to test how much it is different than the appropriate level of the price.[19] However, the difference may not be an effect of manipulation. Sometimes the reasons underlying the situation are overreactions of market participants, their excessive optimism or pessimism. This leads to the conclusion that even an order or transaction made as an effect of excessive optimism could be qualified as manipulation.

Sometimes manipulative transactions are defined as transactions which influence the price. According to this position, an artificial price is a price which is different than the price which would be present without the influence of the analyzed transaction.[20] However, whether a transaction influences the price cannot be treated as the element which determines whether the transaction constitutes manipulation. Without this kind of influence, any changes of market prices would be impossible. Such influence is inherently connected with the nature of stock exchange instead.[21]

Therefore, the term "artificial price" cannot be defined in an objective way, based on the effect of transactions, as the reasons for a market distraction may also be found in legitimate behavior of market participants—such as faulty decisions or decisions taken under influence of excessive optimism or pessimism. The risk of

[15] Kuciński (2000), p. 122; Zawłocki (2002), p. 99; Budzeń (1996), p. 5.

[16] More attempts to define the term artificial price are resented in Avgouleas (2005), pp. 108ff; Blachnio-Parzych (2011), pp. 203ff.

[17] Romanowski (1999), p. 873.

[18] Easterbrook (1986), p. 118.

[19] Easterbrook (1986), p. 118; Cox et al. (1997), p. 656; Rider et al. (2009), pp. 101f.

[20] United States Court of Appeals, 7th Cir, judgment of 14 Jan 1953, Great Western Food Distributors, Inc. v. Brannan, 201 F 2.d 476.

[21] Siems (2007), pp. 19ff.

fault is an inherent element of market activity and it could be curios (to put it mildly) to punish people for faulty investment decisions. Instead, manipulation is to be treated differently because of the intent of the perpetrator. Therefore, "artificial price" is in fact a subjective element of the definition of market manipulation.

The attempts of the EU legislator to define market manipulation in an objective way using the term "artificial price" was doomed to fail. The definition of price manipulation in Art. 1 (2) (a) MAD is very ambitious, because it encompasses a number of activities. Only the correct way of understanding the term "artificial price" as connected with an obligation to prove the intent of the perpetrator may lead to rational conclusions. Otherwise, many orders or transactions which are the effect of a faulty valuation of market, but not intended to shape or to create an artificial price, may be called manipulation. On the other hand, the clause included in Art. 1 (2) (a) MAD, according to which the responsibility is excluded if the orders or transactions stipulated in the article are done for legitimate reasons, may be treated as a clause which allows to take into consideration the intent of the perpetrator.[22] This clause reverses the burden of proof. Because of the clause, there is a possibility to take into consideration the subjective element of the behavior. This solution resembles the construction of a kind of responsibility known in common law systems—strict liability. It is the responsibility which is not formally accepted in continental systems of law, because it is inconsistent with the principle *nulla poena sine culpa*.[23] On the other hand, it has to be underlined that the solution connected with a reversal of the burden of proof has positive influence on the effectiveness of proceedings.

2.2.2 Fictitious Transactions

Fictitious transactions are the kind of manipulation which are the most known, the oldest and the most dangerous.[24] They are defined in Art. 1 (2) (b) MAD as transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance. This kind of manipulation may be also called "direct manipulation" because the transactions of the perpetrator or the perpetrators have direct impact on prices of financial instruments. Their behavior may have an influence on transactions of other investors, but the aim of them is to create or maintain the price on some specific level, as the effect of their transaction.

This is possible because of the perpetrators' knowledge of the mechanism of how transactions are concluded. They may be sure that orders of selling or buying

[22] Staikouras (2008), p. 803.

[23] Nevertheless, some continental legal systems implemented Art. 1 (2) (a) MAD into domestic law and penalized it as a crime. See Art. 39 (2) (1) and (2) Act on Trading in Financial Instruments of 29 July 2005, unofficial translation: http://www.knf.gov.pl/en/regulations/Capital_Market/index.html/ (12.2.2014).

[24] Avgouleas (2005), p. 130.

which do not differ in the aspect of the price and in the volume of the financial instruments, or differ to a little degree, lead to the conclusion of the transaction. Two kinds of fictitious transactions are distinguished: "wash sales" and "matched orders".[25] "Wash sales" occur when the perpetrator of the manipulation enters both a buy and a sell order for the same financial instrument. "Matched orders" consists of activities of two parties. The first one enters a buy order with the knowledge that the second one enters an identical or very similar sell order. The effect of the fictitious transactions may sometimes be very short-lived, but it may be long enough for the manipulator to exploit. The period may depend on the amount of fictitious transactions and the liquidity of the market.

2.2.3 Information-Based Manipulation

According to Art. 1 (2)(c) MAD, market manipulation may also be committed by dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumors and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. In respect of journalists acting in their professional capacity, such dissemination of information is to be assessed, without prejudice to Art. 11 MAD, by taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.[26]

The protection of the truth and the access to information plays an important role for capital markets. Information is the knowledge about new technologies, about needs of the market and about the good or poor condition of other market participants—and information is essential for investors. The accuracy of their decisions on buying or selling financial instruments depends on the knowledge on the condition of a company, its plans, and reached or terminated contracts.[27] Therefore, one of the main principles of capital markets is the transparency of the market.[28] It has two dimensions. On the one hand, it concerns the equal access to information; on the other hand, it concerns the obligation to disclose some information in a specific way. Information transparency is the main condition for fair play of supply and demand in the capital market.[29]

[25] Avgouleas (2005), p. 129.

[26] Aforementioned Art. 11 MAD states that each member state shall designate a single administrative authority competent in supervising the adoption of the Directive and other regulations and shall establish effective consultative arrangements and procedures concerning possible changes in national legislation. These arrangements may include consultative committees, the membership of which should reflect the diversity of market participants.

[27] Majewski (2001), p. 20.

[28] Hałady (2008), p. 121.

[29] Hałady (2008), p. 121.

The EU legislator presented also some examples of behaviors which are encompassed by the general definition of the three kinds of market manipulation. One of them was "control over the market" which was described before, the second one is the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices. This kind of manipulation constitutes an example of price manipulation. The last example presented in the Directive is taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issuer) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

The regulation of information-based manipulation is connected with the provisions concerning recommendations. According to Art. 6 (5) MAD, member states shall enact appropriate regulations to ensure that persons who produce or disseminate research concerning financial instruments or issuers and persons who produce or disseminate other information recommending or suggesting investment strategy, intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly presented and that their interests or indicate conflicts of interest concerning financial instruments to which that information relates are disclosed. The technical arrangements concerning this issue can be found in the Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.[30]

3 Proposals of New Regulation to Combat Market Manipulation

The EU Commission prepared a report on the evaluation of contemporary regulations against market manipulation, after public consultation on the review of the Market Abuse Directive.[31] The results of the review pointed out that the main disadvantages of the Directive are gaps in regulation of new markets, regulator's lack of power to detect market abuses and lack of clarity and legal certainty. To solve the problems, the EU Commission put forward two proposals: a Draft Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) and a Draft Directive of the European

[30] OJ L 339/73.

[31] Commission Staff Working Paper: Executive summary of the impact assessment, Brussels 20 October 2011, http://ec.europa.eu/internal_market/securities/docs/abuse/SEC_2011_1218_en.pdf (12.2.2014).

Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation.[32] The Regulation, once adopted, would be directly applicable in domestic law. It concerns administrative measures against manipulation and insider trading. According to Art. 26 of the draft Regulation, competent authorities shall, in conformity with national law, have the power to impose at least administrative measures and sanctions stipulated in the Article. They have a very diverse character, and administrative pecuniary sanctions are only one of them.

Besides, the aforementioned proposal of the Directive would require domestic legislators to impose criminal sanctions for market manipulation. The legal basis for the obligation is Art. 83 (2) TFEU.[33] According to this provision, directives may establish minimum rules with regard to criminal law (the definition of criminal offences and sanctions) in the area which is the subject to harmonization measures. This possibility may be used when approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area.

The EU legislator has generally focused on the kind of sanctions which would meet the perpetrator of market manipulation in new legislation. The definition of the market abuse has still objective character. The artificial price remains the core of the definition of price manipulation. Furthermore, the new regulation does not include a clause which makes it possible to exclude legitimate market practices from the scope of manipulation,[34] and which—in the MAD—made it possible to take into consideration the motivation of the perpetrator, and allowed him to prove his legitimate reasons. In consequence, the definition of price manipulation in the proposed legislation is even more objective.

However, some positive changes have also been included in the drafts. As an example, one may point to the definition of the second type of manipulation mentioned above—fictitious transactions. The responsibility will depend on the effect of the behavior. According to Art. 8 (1) (b) of the draft Regulation, only behavior employing a fictitious device or any other form of deception or contrivance affecting the price would be considered to constitute manipulation. This is a good proposal which is changing the shape of definition of the kind of manipulation to combat only behavior which has negative impact on prices. In relation to the definition of the third kind of manipulation—manipulation based on dissemination of information—some positive changes have to be noticed in the draft Directive. The EU legislator decided only behavior where the perpetrator draws benefits should be treated as a crime. This condition was not provided in the description

[32] On 25 July 2012 the EU Commission adopted amended proposals for the Drafts.

[33] Treaty on the Functioning of the European Union, amended by the Lisbon Treaty.

[34] The clause in Art. 1(2) a MAD which states: "(...) unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned".

of the conduct in the draft Regulation. Therefore, drawing benefits from the dissemination of information had only meaning for the responsibility of journalists.

4 Conclusions

Generally, the idea of protecting financial markets at the EU level has to be assessed positive. The Market Abuse Directive is a response to the increasing threats for the markets deriving from their developments and deriving from technological progress. The harmonization of the definition of market manipulation in EU countries was a good step on the way to ensure the security of financial markets and their credibility. The problem, however, is the way of how market abuse is defined. The objectivity of the definition of market manipulation in Market Abuse Directive aims at the effectiveness of protecting the markets. It does not require to examine the intention of the market participant, but only the effect of his behavior. The aim of my contribution was to prove that when analyzing the effect as an element of the definition of market manipulation, also subjective elements have to be taken into consideration. Otherwise, the application of the legislation may lead to the irrational results. Therefore, the proposals of new EU legislation on market abuse should focus on the way the forbidden behavior is described. If it remains objective, the legislator should focus on describing it by stipulation concrete kinds of behavior—for example some investment techniques. In other words: the objective definition of market manipulation is possible, but it has to be narrowed down. In my opinion, the responsibility for the offence described in an objective way, should be an administrative one. On the other hand, if the legislator does not decide to step back from a broad prohibition, he shall supplement it with subjective elements. Otherwise, it will be pretended that it is possible to cope with market manipulation defined in a broad objective way without interfering with market behavior which is strictly connected with the nature of financial markets (speculation) or which is just the effect of faults derived from the irrationality of investors.

The new proposed EU legislative measures do not assure an effective counteraction of market manipulation. They contain some positive aspects, for example stronger protection of over-the counter-market (OTC) and other new platforms of trading, and provisions concerning more effective investigations conducted by regulators. On the other hand, they have a tendency to overestimate the use of criminal law in counteracting market abuses. The EU legislator presumes that the more restrictive the kind of responsibility, the higher the effectiveness of the prohibition is. It has to be emphasized that the members of society, the general public get to know about the law, the kind of penalties, its amount, not from reading the acts, but mainly from experiencing the law in action. The "law in action" is the source of how potential perpetrators become aware of the inevitability of a criminal sanction—and the effectiveness of law in action depends on many factors, primarily on the clarity of the description of the forbidden behavior: whether it is easy to state that a behavior constitutes a crime, or not.

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Market Manipulation and Compliance

Axel-Dirk Blumenberg

Abstract Criminal conduct related to financial markets is one of the key issues of modern business crime. Market manipulation is paradigmatic for a new regulatory model that challenges the frontiers of Criminal Law. Compliance in banks and finance offers a detailed and highly regulated organizational model that can be used as an example for compliance programs in general. Financial intermediaries face obligations to report transactions of their clients that are suspicious of market manipulation. These obligations of private entities to collaborate with public authorities in order to fight financial crime show the risks of the privatization of criminal proceedings.

1 Introduction

1.1 Challenges for Criminal Law

The financial crisis has shown the importance of the integrity of financial markets. Recent scandals like the LIBOR manipulation have focused public attention on market manipulation and its implications to our economy. These cases are paradigmatic for the challenges of white collar crime in a transnational context, as Professor Dr. *Vogel* described it.[1] The regulation of financial markets, including the prohibition of market manipulation has to keep pace with fast developing

[1] Vogel (2007), p. 731. Professor Vogel has been, without doubt, one of the most outstanding experts on criminal law related to financial markets. His scientific contributions have deeply influenced the perception of market manipulation.

A.-D. Blumenberg (✉)
Molins & Silva, Madrid, Spain
e-mail: ablumenberg@molins-silva.com

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technical and financial innovations, for example computer based trading and new financial products.[2] Financial regulation highlights general tendencies of new regulatory mechanisms based on self-regulatory approaches.[3] The regulatory environment of financial markets is continuously changing at a much faster rate than other regulatory environments.[4] This development also raises fundamental questions on Compliance and Criminal Law.[5] The quality of the regulatory environment will decide if investments are made in one financial market or another. As a consequence, the possibility to adapt the regulatory environment of the markets turns out to be a key factor. Developments in financial markets in the US shape developments in European financial markets, and for European companies. One of the most recent examples is the Dodd-Frank Act, aimed to improve financial integrity.[6]

In order to create a legislative procedure at the EU level which is capable to adjust dynamically to the needs of financial regulation there has been set up the so-called *Lamfalussy* process.[7] This process consists of a separation of basic decisions on the first and second level—which are taken by the European Parliament and the Council—and technical regulations taken on a third level by experts, in this case the European Securities Markets Authority.[8] This regulatory model has proven so effective that it has been adapted to the banking, the insurance and the occupational pensions sector.

2 Market Abuse

2.1 Financial Markets and Investor Confidence

A famous quote of the U.S. Court of Appeals for the Eighth Circuit says "The methods and techniques of manipulation are limited only by the ingenuity of man."[9]

[2] See Wymeersch (2001), pp. 189ff.

[3] Nieto (2008b), pp. 485ff.; Nieto (2013a, b), pp. 11ff.; Sieber (2008), pp. 475ff.

[4] For more information, please see Blachnio-Parzych, in this volume, pp. 145ff.; Ayres and Braithwaite (1992). See also Sieber (2010), pp. 1ff.

[5] See Kuhlen (2013), pp. 1ff.; Nieto (2013a), p. 27.

[6] See Schemmel et al. (2012), pp. 183ff.

[7] This proceeding has been named after the chairman of the Commission of wise men in charge of making the European financial markets more competitive, Baron Alexandre de Lamfalussy. For more details see, for example, Avgouleas (2005), p. 246.

[8] One of the achievements of the reformation of the institutional framework of the European Union on Financial Supervision has been the fact that the decisions taken by the European Securities Markets Authorities are binding compared to the non- binding character of its antecessor the Commission of European Securities Regulators. For a detailed overview see Ferran (2006), pp. 579ff.

[9] See, for example, Mock et al. (2007), § 20a at 5.

But the understanding of market manipulation goes further than stock prices. It focuses on the protection on financial markets integrity.

The financial crisis has shown the importance of protecting the integrity of financial markets. The systemic failures of the financial markets and the enormous efforts to avoid a complete collapse of the financial markets have led to increased attention to the importance of integer securities markets. Market manipulation puts at risk market integrity and investor confidence. Investor confidence is an important asset for private pension schemes, which gain importance as public support for pensions is decreasing continuously.[10]

Financial markets are based on anonymity and a high velocity of transaction rates. Both have economic advantages, but complicate the prevention and detection of market manipulation. The international expansion of financial markets makes addressing financial crimes even more difficult, as market manipulation in one country's market can have a strong impact on another country's market. The strong internationalization and high speed technical and financial development require a strong and coherent supervisory answer. National approaches—coordinated formerly at the EU level by the *Committee of European Securities Regulators* (CESR)—have proven to be insufficient to avoid the systemic failure of the financial markets, as they still allowed for diverging national regulations and supervision practices. For this reason, the European supervisory framework has been changed radically, and the European Systemic Risk Board has been installed.[11] This supervisory body centers on the European Securities Markets Authority (ESMA) responsible for the financial markets and therefore for the supervision of market manipulation, the European Supervisory Authorities competent in the field of banking (EBA), and insurance and occupational pensions (EIOPA).[12]

The field of securities regulation is changing in a fast way; new regulatory approaches face developments like *high frequency*- and *algotrading,* which implies computer based trading.[13] The organizational requirements for compliance in banks consider the risks of algotrading facilities for market manipulation.

Market manipulation is a key issue for corporate criminal liability and compliance. These crimes can be committed in companies, for example by false or misleading ad-hoc- releases in order to influence the company's stock price. In the context of corporate crime and corporate criminal liability, we face one of the

[10] Schröder (2010), p. 373.

[11] Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24/11/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

[12] http://www.esma.europa.eu/page/esma-short (12.2.2014).

[13] See the alternative market IEX that offers equal opportunities to all investors. http://www.iextrading.com (11.5.2014).

few cases where we can find a perfectly codified model for compliance organization that could give orientation for the design of other compliance programs.[14] Therefore, compliance in banks and financial institutions has some kind of a role model character. While the compliance discussion in criminal law—at least in the German debate—is a quite recent development,[15] the compliance-debate in banks and financial Institutions dates back almost 30 years now. From the 1990s, banks were looking at self-regulation and industry standards that later on have been detailed, for example, by the *Basel Committee on Banking Supervision*;[16] other important aspects such as internal investigations have been pushed forward by the SEC in the financial sector in the early 1960.[17]

Banks and intermediaries face the obligation to implement organizational measures in order to comply with financial and stock market regulations and therefore as well as with the prohibition of market abuse due to organizational requirements of banking and securities laws. Banks and intermediaries also face obligations to report suspicious transactions and are therefore a key element in the fight against economic crime. The increasing importance of market manipulation is reflected in increasing enforcement, for example in Germany: the financial supervisory authority BaFin reported on an increasing number of cases of market manipulation compared to investigations of insider trading.[18]

Market manipulation is an important issue for corporate criminal liability. Companies face risks of trade-based manipulation and information-based manipulation in their day to day business. Many jurisdictions include market manipulation in their lists of corporate crime. One recent example is the Spanish Criminal Code.[19] Market abuse is considered by Art. 284, 288, 31 bis y and can lead to a criminal conviction against a company in case of market manipulation in benefit of the company.

2.2 Challenges of International Criminal Law

Market manipulation is paradigmatic for white collar crime: It is a fast developing crime; financial markets and transactions have lost all national boundaries and

[14] See for example the requirements defined by Chapter §8B2.1. of the US Sentencing Guidelines Manual.

[15] See Selvaggi (2012), pp. 601ff.; for a comparative study between Germany and the US, see Engelhart (2012), pp. 522ff.

[16] See Basel Committee on Banking Supervision (2005).

[17] See Nestler (2013), Chap. 1 at 5.

[18] Szesny (2013), Chap. 30 at 148.

[19] For details about criminal liability of legal entities in Spain, see Nieto (2012), pp. 181ff.

can be committed from almost any geographic point across different markets. Classical regulatory approaches face their limits as well.[20] Legislation procedures have to be able to adapt to fast-changing requirements of financial markets. Once the state was in charge to regulate financial markets, in nowadays it seems almost that financial markets control single state, for example in relation to public debt.

Financial markets face new regulatory requirement. The EU is currently changing the landmarks of financial markets with regulatory approaches like EMIR, MiFIR and MiFIDII. In addition, there are new requirements for banks and financial institutions defined in Basel III or CRD IV and in regulatory approaches like the US Dodd-Frank-Act. Tougher regulation and a more proactive criminal law seem like the only alternative in recent criminal policy. The consequences are increasing compliance efforts—and costs![21]—for companies, and correspondingly increasing risks.

Criminal law related to capital markets is—as professor *Vogel* pointed out brilliantly—is one of the most exciting and interesting areas of economic criminal law.[22] It is influenced by an Anglo-Saxon understanding of Criminal law—utilitarism and pragmatism—and by an economic theory of law.[23]

2.3 The "Mechanics" of Market Manipulation

But what is market manipulation?[24] Market manipulation constitutes, together with the abuse of insider trading, the concept of market abuse. While the prohibition of insider trading focuses on the prohibition of an informational advantage—for example anticipating the impact of an ad-hoc release by buying shares before the information gets public to the markets—, market manipulation influences the price building mechanism in financial markets directly.[25] Market manipulation is possible because of an asymmetric distribution of information.[26] Even though information is transmitted within the markets in microseconds and market participants react immediately, not all investors have access to the same information. Manipulators are using these information asymmetries in order to influence stock-prices.

[20] Fundamental Ayres and Braithwaite (1992).

[21] For an analysis of economic costs of compliance programs in Germany see Görtz and Roßkopf (2010).

[22] Vogel (2007), p. 731.

[23] Vogel (2007), p. 731.

[24] The expression "mechanics" is used in this context by Thel (1994) and Avgouleas (2005).

[25] See Aggarwal and Wu (2006); Allen and Gale (1992); Hazen (2009), pp. 432ff.; Loss and Seligman (2004), pp. 1119ff.; Thel (1994).

[26] Fama (1970) and Fama (1998). See also Gilson and Kraakman (2006), pp. 29ff.

Market manipulation and insider-trading do not exclude each other, but in many cases do occur jointly.[27]

The economic theory divides market manipulation into three categories[28]: trade-based, information-based and action-based. The clearest example is an information-based manipulation, like rumors on the Internet in order to influence a company's stock price. Trade-based manipulation can reach a higher degree of complexity but, in general it is about transactions in financial markets without economic purposes, put only in order to mislead other investors. An example for trade-based manipulation are *circular trading* where different market participants buy and sell securities among themselves in order to drive up stock prices, or *marking the close* where the manipulator places an order near market close in order to manipulate reference prices. Action based market manipulation involve cases like poisoning products of a food company in order to drive down the company's stock price. Market manipulation schemes can be enhanced by the use of financial instruments, for example stock options. A derivate has a leverage effect and retraces small price movements of the underlying financial asset disproportionately.

Market manipulation does not only affect stock exchanges, but also alternative markets (e.g. Multilateral Trading Facilities), energy markets or even indices (e.g. LIBOR). The regulation of market manipulation is a challenge to criminal law. As investments are changing globally in no time, national approaches to regulate market manipulation face technical and geographical limits, and new supranational regulatory approaches and agencies like the European Securities and Markets Authority enter. Nevertheless, market manipulation is not at all a new invention: As soon as the first stock exchange opened in Amsterdam, clever brokers found out that they could manipulate stock-prices by using false rumors and collusive trading techniques.[29]

3 Compliance

3.1 Compliance in Banks & Financial Institutions

In the context of market manipulation, compliance in banks and financial intermediaries are a key question, because they enable the access of their customers to financial markets and therefore face specific duties to collaborate with market authorities. Banks and financial institutions offer also a highly regulated compliance model that can serve as orientation for compliance programs in general.[30]

[27] Fuchs (2009), Vor §20a at 8, 10. The Spanish Criminal Code prohibits in art. 284.3 trade based manipulation *using* insider information.

[28] Allen and Gale (1992), pp. 503ff.

[29] See De la Vega (1688).

[30] See Basel Committee on Banking Supervision (2005). For the German regulation see Blumenberg, A.D. (2014), p. 85ff.

These institutions play a key role in the fight against market manipulation. Banks and financial institutions have to detect suspicious transactions of their customers and report them to market authorities, (see for example Sec. 10 of the German Securities Act). These obligations of private companies to report their clients to authorities are rare exceptions in Criminal Law.[31]

From a technical point of view, most cases of market manipulation leave a special "fingerprint", a specific transactional profile. Market manipulation can be detected by specific indicators that show an abnormal transaction, for example an unusual amount of transactions or transactions near to specific moments, for example market close, that are susceptible for market manipulation.

The Committee of European Securities Regulators—now the European Securities Markets Authority—has given a list of indicators for market manipulation.[32] Banks and other financial intermediaries have to monitor their clients' transaction and report suspicious transaction to the authorities. Suspicious transactions include insider trading, market abuse but also short selling.

Banks and financial intermediaries have to complete a report form and submit data about the person responsible for the transaction, the transaction and the reasons for the suspicion. Financial intermediaries that do not comply with those obligations can be highly fined. Usually, the compliance department is in charge of the suspicious transaction reports, and it uses special methods of analysis of the transaction that shows control mechanism are comparable to anti-money laundering compliance.

Suspicious transactions reports can lead to a criminal prosecution, because financial supervisors have to inform state prosecution authorities about criminal conduct like market manipulation. The obligation to report suspicious transactions does not only affect banks and other financial institutions, but also the market supervision unit of financial markets. By that means, market manipulation schemes—for example to influence the offer on one market in order to manipulate stock prices on another—can be detected.

This is one of the few examples where corporations are held responsible for duties of crime prevention that originally are public duties.[33]

In banks and financial institutions there exists a clearly defined profile of the compliance officer, see Sec. 33 German Securities Exchange Act. In addition to the law, the German Financial Supervisor *BaFin* published guidelines on minimal requirements on compliance. These guidelines define the status of the compliance officer in banks and other financial institutions. There are detailed provisions on the organization of the compliance function.[34] These provisions consider the

[31] Vogel (2012), § 10 nm 7.

[32] For an overview, please see http://www.esma.europa.eu/page/Market-abuse (12.2.2014).

[33] Vogel (2007), p. 742.

[34] See Engelhart (2010), pp. 1832ff; Blumenberg (2014), p. 93–99.

organization of the compliance function. There are similar provision for risk management in banks and finance (MaRisk), and there will be a criminal sanction introduced for failures in risk management.[35] In these areas, self-regulation has been changed to very detailed and comprehensive legal requirements. These organizational requirements on banks and financial institutions can be transferred to other business areas, and provide a model for the organization of compliance functions in companies.

3.2 Compliance in Companies

Companies listed in stock markets have to comply with numerous legal obligations. Compliance with all regulatory requirements includes, of course, the prohibition of market manipulation. Market manipulation and compliance is also an important issue for companies, especially as many jurisdictions have corporate criminal liability for economic crimes. A recent example is the Spanish legislation that has introduced corporate criminal liability with the law 05/2010 which also applies in case of market manipulation.[36]

As companies can be held liable for market manipulation, for listed companies the risks for market manipulation arise mainly in two areas: Ad-hoc releases and financial information as well as stabilisation and share buyback measures. False or misleading ad-hoc-releases are a prototypic case of information-based market manipulation. In many cases, companies use false ad-hoc releases to avoiding price-drops. The cases are combined usually with top-management insider trading, as shows the following example: A listed companies faces harsh economic problems in one of its branches abroad. In an ad-hoc release the company publishes the statement that the problems of this branch are less than reported by media and that there are no existential problems. This false ad-hoc release enables the stock price to maintain an artificial level, while top management sells its own shares, committing insider trading. A short time later, the real situation is known, and the stock price drops.

Another important issue is stabilization and share buyback measures.[37] These measures are allowed exceptions from the prohibition of market manipulation. Therefore, it is important to comply with all requirements and to avoid, for example, buy-back prices that largely exceed market prices or the execution of stabilization measures near to market close.

Prevention and detection of market manipulation are a core issue of compliance programs. In order to create an effective company- or group-wide compliance

[35] See Richter, in this volume, pp. 321ff.

[36] The Spanish system is about to be reformed during 2014. The proposal includes a detailed regulation of organizational requirements for compliance programs.

[37] Vogel (2003), pp. 2437ff.

program, prevention and detection of market manipulation has to be integrated in a coherent and broad Compliance system. Compliance systems are based on a series of core elements, for example[38]:

- Tone from the top
- Code of conduct
- Procedures
- Controls
- Whistleblowing
- Training
- Monitoring & Review

In order to prevent and detect risks of market manipulation, these general principles are completed with specific elements, for example a Code of Conduct related to financial markets or specific controls, for example to guarantee the integrity of information made public. Another specific aspect is management compensation.[39] For example, a compensation scheme based on options bears the risk that managers manipulate company results in order to achieve a higher stock price—and therefore a higher compensation. This example shows that in many cases market manipulation in companies is linked to other economic crimes like fraudulent financial reporting.

As market manipulation is in many cases information-based, information management inside the company is a key issue to prevent and detect risks of market manipulation. In order to comply with duties related to ad-hoc releases, companies use information management systems in order to identify all relevant information that could require an ad-hoc release.[40]

Measures to prevent and to detect market abuse in companies should be integrated into the compliance program. The company's Code of Ethics should include the prohibition of market manipulation, for example integrated with mentioning the company's integrity related to financial markets. The general Code of Ethics is usually supplemented by provisions of a special code of conduct related to capital markets. These provisions include detailed rules on the prohibition of use of insider information, but also provisions concerning market abuse, for example price limits in order to not exceed average market prices beyond reasonable limits, or rules prohibiting day trading.

Another key element of the prevention of market abuse is training for personnel in order to comply with the prohibition of market abuse. Training should focus on legal requirements, case studies about frequent cases of market manipulation and how to react in case of possible compliance risks. Training measures should focus

[38] For more details, see Nieto (2008a), pp. 215ff.; Sieber (2008), pp. 458ff. Fundamentally Moosmayer (2012).

[39] On this aspect, see Lehmann (2012), pp. 55ff.

[40] See Schröder (2010), p. 181ff, 389–391, for risks related to Roadshows or Investor Relations, p. 400–401.

especially on persons that have access to relevant information—for example due to ad-hoc releases—or buy back measures. From an institutional point of view, it is important to bundle all company units that could be in touch with possible compliance and regulatory risks, for example legal, internal audit, communication but also specific units like investor relations.

4 Conclusions

One important issue is the regulatory and supervisory aspects of financial markets integrity. As the financial crisis has shown, the system of supervision has failed to detect systemic failures of the financial system. As an answer to this, the supervision of the financial markets has been reformed and a new administrative structure has been implemented with the European Systemic Risk Board and the European Securities Markets Authority.

Compliance in banks and financial institutions offer, as we have seen, a highly regulated compliance model that can serve as orientation for compliance programs in general, but banks and financial intermediaries play a key role in the fight against market manipulation, for example by suspicious transactions reports to financial supervisors.

The context of market manipulation shows the tendencies of the actual developments of criminal policy: The privatization of the state-own duties of criminal prevention in order to control the untamed financial markets,[41] and the expansion of criminal law. As penalists we have to give answers to the challenges of globalization. But we have to be aware of the risks for the core principles of criminal law!

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[41] See Vogel (2012), § 10 at 5ff. with additional references.

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Towards an EU Strategy to Combat Trafficking and Labor Exploitation in the Supply Chain. Connecting Corporate Criminal Liability and State-Imposed Self-Regulation Through Due Diligence?

Yasmin Van Damme and Gert Vermeulen

Abstract The distinction between voluntary and coerced labor has never been more blurred than today, with the supply of willing workers that find themselves in a grey zone between the choice for certain work and the borderline-coercive reliance on malafide employers, traffickers or the like. Policy makers are desperately seeking new ways to eradicate trafficking for labor exploitation. A shift in focus is currently happening, towards the demand-side of exploitative labor. This chapter examines approaches of dealing with the responsibility of the private sector for trafficking and labor exploitation in their supply chains. The issue is currently being dealt with in a variety of ways, such as through labor law, civil law, criminal law and through self-regulation of companies, be it sate-induced or fully voluntary. This chapter focuses on severe cases of trafficking or labor exploitation, committed by a subcontractor of a company bearing guilty knowledge of the exploitation. It will be examined in this chapter how the EU can take legislative action in the sphere of criminal law, to deal with the issue. Two possible approaches will be discussed: the creation of a new crime of "knowingly using the services of victims of trafficking" or the adoption of a European concept of participation in crime, specifically for trafficking and labor exploitation. It will become clear from this analysis that doing business with due diligence plays a crucial role for the conclusion to corporate criminal liability, as it is a vital aspect of concluding to guilty knowledge by companies, or the lack there-of, of malafide practices in the supply chain.

Y. Van Damme (✉)
Faculty of Law, The Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium
e-mail: Yasmin.VanDamme@Ugent.be

G. Vermeulen
Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium

Maastricht University, Maastricht, The Netherlands
e-mail: Gert.Vermeulen@UGent.be

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1 Introduction

With the EU's *Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*,[1] the European Commission seeks to focus on concrete measures that will support the transposition and implementation of the 2011 Trafficking Directive. Focus is being put on stepping up the prevention of trafficking in human beings. A preventative measure that is increasingly being put forward as a powerful tool in the fight against trafficking is the reduction of demand for services by victims of trafficking in human beings. The *Strategy* emphasizes the important role of the private sector and even announces the planned establishment of a European Business Coalition against trafficking in human beings for the improvement of cooperation between stakeholders and companies.[2] An important joint future goal identified for this Coalition is the development of models and guidelines on reducing the demand for services provided by victims of trafficking in human beings, in particular in high-risk areas. Another priority identified is increasing knowledge of and effective responding to emerging concerns related to all forms of trafficking in human beings, with a special focus on trafficking for labor exploitation. The Strategy mentions the differences in approaches of Member States when addressing trafficking for labor exploitation, hampering international cooperation. More future goals are being put forward relating to better cooperation of the Commission with for example social, labor, health and safety inspectors in the fight against trafficking for labor exploitation. From these and other elements of the *Strategy,* a change in attitude in the context of trafficking for labor exploitation can be derived. It seems that it is now being acknowledged how multi-disciplinary of a problem trafficking for labor exploitation is, and that the fight against it entails a lot more than the national criminal law of member states. The role of the private sector is being emphasized, together with solutions from other spheres of the law such as social and labor law. The relevance of these focuses is undeniable in the light of well-known cases of large multinationals appearing in headlines for practices of labor exploitation in their supply chains. Large brands like Zara and Apple have received especially bad press for being "involved" in (trafficking for) labor

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016. Brussels, 19.6.2012, COM(2012) 286.

[2] For a broad overview of general mechanisms for creating corporate social responsibilities: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. Report of the Special Representative of the UN Secretary-General on business & human rights*, UN Doc. A/HRC/4/035 (United Nations Human Rights Council, 9 February 2007); OECD guidelines for multinational enterprises: Text, Guidelines, Commentary, DAFFE/IMZ/WPG (2000) 15final; Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO 16 November 1978 and amended in November 2000, *Official Bulletin* 1978, vol LXI, Series An, no 1 and *Official Bulletin* 2000, vol LXXXIII, series A, no. 3 and the UN Global Compact; ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, June 1998.

exploitation[3] due to its presence in their supply chains. The collapse in May 2013 of the Bangladeshi Rana Plaza building, resulting in the death of over a thousand textile workers, yielded bad publicity for clothing chains such as Primark and Mango for having suppliers that were exploiting their workers in this unsafe building. The broad *rationale* behind targeting the demand-side is to be put in the light of supply and demand: If companies risk some sort of penalties or loss for their involvement in exploitative labor practices, they will become extra cautious as to who they do business with, therefore the demand for unusually cheap service-provision will drop. As logical and straightforward a reasoning this may seem, putting it into practice poses several serious problems, which will be the center of attention in this contribution. On a European level, a suggestion was made, first on the level of the Council of Europe[4] and later on the level of the EU,[5] for Member States to consider criminalizing those that knowingly make use of the services of victims of trafficking in human beings. From the explanatory reports[6] of these pieces of legislation it seems that not only clients of prostitution are envisaged with this suggestion, but also businesses who knew or should have known that they were using the services of victims of trafficking for labor exploitation somewhere in their production process. Furthermore, the legal construct of participation in crime will be discussed, and it will be shown how this approach may be the preferable option over the creation of a new crime. This contribution thus attempts to assess the role that criminal law can play in the issue of "user"-accountability.[7] Special focus will be placed on the perks and pitfalls of self-regulation by companies against labor exploitation in their supply chains. It will be shown how doing business with due

[3] For the purpose of this chapter, all forms of labor exploitation are considered relevant, even those forms that may not entail a clear-cut trafficking in human beings-element. As will be clear from the analysis made in this contribution, the envisaged end-goal of exploring the possibilities of user-accountability should be the possibility of tackling labor exploitation, by making it more attractive for users to choose for clear-cut voluntary labor provision. Whether or not a certain exploitative situation is 100 % sure to be a trafficking case, is less relevant for the purpose of this particular analysis because we are analysing the accountability of those at the receiving end of the exploitative labor circumstances that are not directly involved in the exploitation or trafficking-crimes. What is relevant for this analysis is the final stage of trafficking, being the labor exploitation-phase. This is why the prefix of "trafficking in human beings for the purpose of" labor exploitation was put between brackets in the entire contribution.

[4] Article 19 of the Council of Europe Convention against Trafficking in Human Beings, ETS no. 119, 03.05.2005.

[5] Article 18.4 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and replacing Council Framework Decision 2002/629/JHA, O.J. L. 101/1, 15.04.2011.

[6] Explanatory report to the Council of Europe Convention against Trafficking in Human Beings, ETS no. 119, 03.05.2005, Point 229–236.

[7] The term "users" is used, as the accountability of those who knowingly "use" the services of victims of labor exploitation is explored. With "users", all companies from large multinationals to small corporations (even to one-man businesses) are meant, that are not the direct employers of victims of labor exploitation but that do business with these employers somewhere in their supply chain.

diligence is a vital factor for the conclusion to guilty knowledge of users of trafficking in human beings by their subcontractors.

2 Criminal Accountability of Companies for a Separate Crime of Knowingly Using Trafficking Victims

2.1 Introduction

The issue of user-accountability is not an untouched one. In different spheres of the law, examples of ways of dealing with this form of demand-reduction can be found. Existing approaches for user-accountability could be discussed along the lines of the following structure: for severe cases of labor exploitation, with proven knowledge of the "user", criminal law should be able to play its part. For cases of violations of labor standards, however not amounting to slavery-like conditions, social law comes in play.[8] Lastly, there is also a role for the non-interference of the law, when discussing due diligence and self-regulation of companies to keep their supply chains exploitation-free. The focus of this contribution will be put on cases of severe exploitation, spurring the interference of criminal law and the role that self-regulation can play for the determination of guilty knowledge of users. In other words, cases of violations of labor standards which can better be placed in the sphere of labor law will not be discussed here. On EU level, a general legal basis for criminalizing users can be found in current anti-trafficking instruments prescribing that countries must adopt provisions for "discouraging demand" for trafficking in human beings.[9] Such a measure is criminalizing users who knowingly make use of the services of victims of trafficking in human beings, which was for the first time recommended in the 2005 Council of Europe anti-trafficking Convention[10] and later repeated in EU-anti-trafficking instruments. The 2011 EU Trafficking Directive states in its article 18.4 that

> In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2.[11]

[8] See also Skrivankova (2010).

[9] The most recent EU-anti-trafficking instrument, the 2011 Trafficking Directive, prescribes in its article 18 that *Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.*

[10] Council of Europe Convention against Trafficking in Human Beings, ETS no. 119 and its explanatory report, 03.05.2005; see Gallagher (2006).

[11] Article 2 being the definition of trafficking in human beings.

The explanatory report of the Council of Europe Trafficking Convention offers a basis for better understanding of the idea and the motivation behind the adoption of this provision today.[12] The explanatory report emphasizes that the main consideration for the adoption of such a provision was the desire to discourage the demand for exploitable people that drives trafficking in human beings.[13] The report further explains who should be perceived as "a user" and offers the example of a business owner who knew or should have known that he or she was working with trafficked people. The report underlines that in such a case the user could not be treated as criminally liable as a trafficker because he or she has not him/herself recruited the victims of the trafficking nor has he or she used any of the means referred to in the definition of trafficking. The user would however be guilty of a separate criminal offence.[14]

2.2 Discussion

The practical problems for Member States to answer to this solution are manifold: First, as mentioned above, how are they to define "knowingly"? How will authorities prove that users knew full well that they were dealing with exploited victims in their supply chain? Also, in today's globalized world, the distinction between forced, exploitative and free labor is not so clear-cut, making it even harder for users to decide on the *bonafide* character of their partners.

2.2.1 The Difficult Distinction Between Voluntary and Forced Labor

A significant issue to preliminarily discuss is the difficult distinction between voluntary and coerced or exploited labor on today's market. It is not so self-evident for which market segment the EU suggests to consider criminalizing "users". More than a decade after the Palermo Protocol,[15] we have learned a lot on the actual face of trafficking in human beings for labor exploitation. We have gained insights into migrant workers traveling to another country searching for a better life, well-aware of the line of work they will end up in and even possibly aware of the fact that they will earn less than the legal minimum wage and enjoy less rights than what they are legally entitled to. Sometimes however, they are surprised by the conditions of work, the level of control by their employers, or the

[12] Point 229–236.

[13] Point 230.

[14] Van Damme and Vermeulen (2012), pp. 205ff.

[15] The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime.

small share of pay they get to keep.[16] Even if no actual use of force or threat there-of is used, the fact that workers have no viable alternative than to accept certain bad conditions may be enough to conclude to (psychological) coercion. Also, ambiguous cases are being treated as trafficking-cases, where workers voluntarily work under the set labor standards of a country but still under humane conditions, but who do not consider themselves victims at all as they are able to provide for their families, and as they are generally a lot "better off" than at home. The question that has already been asked in a vast amount of (academic) research[17] is where voluntariness ends and coercion begins? It is important to contextualize the free choice for exploitative work when faced with broader social, economic, political and ideological conditions that workers have not chosen.[18] Besides some vague "indicators of likely exploitation" neither the academic world nor the policy makers seem to have a waterproof approach for making a clear-cut differentiation between voluntary and forced labor. How then would main contractors be able to make a difference between good or bad subcontractors' behavior? It seems rather unfair and even unacceptable that a user would be criminalized for making use of the services of a victim of (trafficking for) labor exploitation, if for example the worker does not even consider herself or himself to be a victim or if the situation is unclear even to authorities. When examining user-accountability in the criminal law-sphere, it must first be determined that a case actually entails clear-cut, severe labor exploitation. After establishing this, the second step is to demonstrate the guilty knowledge of the user.[19] This two-step-procedure is the only manner in which criminalization of users should pass the test of proportionality, legality and the presumption of innocence. But how then to conclude to clear-cut exploitation? Only focusing on "worst forms" of labor exploitation for certain policy purposes, is not a novelty. The ILO Worst Forms of Child Labor Convention of 1999, is a good example of this.[20] This convention describes four types of child labor that it considers a priority on the international agenda to tackle. This also means that certain forms of child labor that are not listed, even though child labor should be prohibited in any case, are deemed less of a priority than the "worst forms". For the topic of this contribution and the suggested two-step procedure, namely that first a clear-cut, worst form of labor exploitation must be established before investigating

[16] Vermeulen (2005).

[17] Vermeulen (2005), Smit and Boot (2007), Council of Europe (2007), Munro (2008), Brooks-Gordon (2010), Davidson (2010), and Skrivankova (2010).

[18] Phoenix (2009), p. 6.

[19] It is important to stress that it is not automatically so that a client's guilty knowledge is certain simply because of the fact that exploitation has taken place. It may be so that despite exploitation, the client could in no way have been aware of it. Therefore the guilty knowledge must be examined separately after demonstrating exploitation, before concluding to criminal accountability of the client.

[20] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Entry into force: 19.11.2000) Adoption: Geneva, 87th ILC session, 17.06.1999.

a user's (possible) knowledge there-of, the "worst form"-notion is particularly relevant. Not all cases of labor exploitation should be labeled a "worst form"-case. Also, certain cases may start off as clearly being a case where only a small level of coercion is being imposed, to later develop into a case of severe exploitation. Skrivankova[21] argues that in order to understand situations of coercion into a certain form of work,[22] these need be understood through the lens of what she calls a *continuum of exploitation*. She justly argues that the absence of a clear definition of exploitation in anti-trafficking and forced labor-instruments makes it difficult to draw the line between exploitation in terms of violation of certain labor rights and extreme exploitation amounting to forced labor. The continuum of exploitation is a concept that enables the identification of a remedy for any situation in which someone might find himself or herself that differs from what she calls "decent work".[23] She notes that labor exploitation entails a continuum ranging from the positive extreme of "decent work" to the negative extreme of forced labor. Skrivankova further notes that while the continuum should not be perceived as a replacement for the definition of exploitation, it is a *proxy relevant to all possible modes of exploitation. Using the continuum in practice means that all situations that are not decent work are redressed, contributing to the heightening of standards and eliminating the environment conducive to forced labor*.[24] Different responses, going from criminal justice responses for the worst forms of exploitation to labor law responses for mere violations of labor standards, fit different stages of the continuum. This could mean that criminal justice responses should be reserved for the negative extreme of forced labor. Inspired by the ILO's Worst Forms of Child Labour Convention, we can conclude that the negative extreme of the continuum can be defined as "all forms of slavery or practices similar to slavery, such as the sale and trafficking of workers, debt bondage and serfdom and forced or compulsory labor". Applied to the topic of this contribution, the criminalization of users is an example of a criminal justice response that should be reserved for the worst forms of exploitation, and moreover it should only be used in certain cases of demonstrable knowledge of the user of this exploitation, representing the two-step-procedure as mentioned earlier. As difficult a policy option this suggestion may be, as will become more clear from the other obstacles identified below, it is more than reasonable and justifiable to severely penalize companies that knowingly did business with suppliers that exploit workers in the worst conditions as defined above. Focusing on the worst forms of labor exploitation is a recommendation for a solution for the first problem with this approach, being the difficult distinction between voluntary and forced labor. It however does not solve the two other major challenges of this approach which will be discussed below.

[21] Skrivankova (2010).

[22] The study mainly focuses on labor exploitation but is nonetheless interesting and useful for sexual exploitation as well.

[23] Skrivankova (2010), p. 16.

[24] Skrivankova (2010), p. 18.

2.2.2 The Difficult Establishment or Proof of Guilty Knowledge of Companies

Known cases contextualize the question of guilty knowledge of users. A good example is the 2011 spate of suicides of Chinese workers producing Apple iPads under exploitative working conditions at the Foxconn factory in Shenzhen, China, despite Apple's public commitment to fair labor in their entire supply chain.[25] Apple suffered considerable reputation-damage, even amounting to attempted boycotts, while continuously claiming that they were not aware of the working conditions in far-away subcontracting-factories. The best recent example of questionable user-accountability is of course the Bangladesh-tragedy of May 2013, where over a 1,000 textile workers were killed after an unsafe building collapsed, that housed a number of textile factories, some of which were supplying well-known Western retailers. Supply chain-"contamination" obviously doesn't only happen with large, multinational and well-known brands. In March 2013 a case of exploitation of Romanian construction workers in Germany was publicized, in which 50 Romanian workers were promised a good salary and all social rights by a Romanian employment agency, ending up in empty apartments, with no significant salary or any other remuneration. The construction consortium that was the main contractor of the project, denied all responsibility for the workers, claiming to be able to demonstrate no delays in the payments of their subcontractors nor any other irregularities in their contracts. Countless other similar cases exist and they all document the difficulty of determining the extent to which those in another than the direct employer-node of the production process were aware, should have been aware, or could have been aware of exploitative circumstances in their supply chain.[26] In today's economy subcontracting- or supply chains are becoming larger and larger, increasing the distance to the main contractors, in turn making it easier for them to claim being horrified by exploitation scandals while denying all responsibility. An important question when addressing the possible added value of user-criminalization is what moral and ethical restraints exist with users resulting in not wanting to engage in exploitative contracts. Is there such a thing as an inherent moral restraint within the minds of companies, offering a worthy counter-balance for the purely economic assessment of a purchase?[27] If inherent moral restraint to be an actor on a criminal market is not present or insufficiently present due to the overweight of the pursuit of "profit" in the form of the best service for the least amount of money, resulting in willingly "turning a blind eye", an external drive to refrain from contributing to these processes may be in order. This external drive could be an increased risk of criminal liability and subsequent

[25] Foxconn suicides highlight China's sweatshop Conditions, John Chan (2010), http://www.wsws.org/ (9.4.2013).

[26] Romanian workers deceived and exploited at Bostalsee construction site, International Trade Union Confederation, http://www.ituc-csi.org/ (9.4.2013).

[27] Haynes (2009).

sanctioning.[28] If such an external drive exists, choosing the "lawful" option becomes more attractive.[29] This reasoning obviously goes back to the (deterring) function of criminal law and the rational choice theory. However, if we are considering criminalizing them, we must know how to prove that they knew or should/could have known what was going on in their supply chain. Some sort of punishment or sanctioning of users that gain considerable profit from doing business with partners of whom they know, or could have had a logical suspicion due to certain circumstances, that they are *malafide*, seems more than just. Users that could in no way have known about exploitative circumstances, despite their best efforts to keep their supply chains clean, should in no way be held criminally liable due to a lack of a constitutive element for a crime to take place.[30] We have already established above that guilty knowledge should be proven after the first step of determining a "worst form" of exploitation is fulfilled. The question remains: how? The drafters of the user-criminalization-approach have left this difficult issue open. In the explanatory report of the 2005 Trafficking Convention,[31] a practical solution for the issue of proving guilty knowledge is left open in such a way by stating that

> Proving knowledge may be a difficult matter for the prosecution authorities. Similar difficulty arises with various other types of criminal law provision requiring evidence of some non-material ingredient of an offence. However, the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence.[32]

The issue of proving guilty knowledge of a subcontractor's "worst form of exploitation" could be solved by existing alternatives for clear-cut *mens rea*. Examples are: the legal construct of *negligence*—a failure to take reasonable precautions against foreseeable harm in violation of a duty of care—resulting in criminal liability. Or should the issue of guilty knowledge be solved by inferring the perpetrator's intention from the factual circumstances, as is offered as a solution by the explanatory report of the 2005 Trafficking Convention?[33] Or should liability

[28] This is not the place to elaborate substantially on types of sanctions that can be imposed on legal persons (see extensively Vermeulen et al. 2012). However, it must be noted that administrative sanctions against legal persons, that know many different legal frameworks throughout the EU, should definitely not be forgotten when speaking of effective sanctions against legal persons, as they can also, as can criminal sanctions, consist of high pecuniary fines that can impact severely on the company.

[29] Van Damme and Vermeulen (2012).

[30] Which does not mean that they should not in any other way be held liable.

[31] Point 234.

[32] In point 236, the explanatory report states that the difficulty of collecting evidence is the reason why the measure was formulated as a recommendation without making it a binding provision.

[33] In point 235. For instance, Article 6(2)(c) of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No.141) states that "knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances". Similarly Article 6(2)(f), on criminalizing the laundering of the proceeds of crime, of the *United Nations Convention against Transnational Organized Crime* states: "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances".

be construed through more general notions like *drawing profit from* or *inducing* the human rights violation?[34] This is not the place for a thorough analysis for all legal instruments or alternatives for *mens rea*. In the following sections of this contribution however, solutions for the difficult issue of proof of guilty knowledge will be offered.

3 Criminal Accountability for Participation in the Crime of Trafficking in Human Beings

Another way, besides considering it as a separate crime, of perceiving the role of a knowing user and his or her subsequent criminal liability, is through participation in crime. Indeed, if a company knew about the illicit activities of a subcontractor, but still chose to uphold the business relation, it is relevant to ask whether the company is not simply an accomplice to the criminal subcontractor. The solution of "participation in crime" should be further examined in this context. An example to introduce participation of crime in the context of the topic of this contribution, can be found in Belgium. In the Carestel case,[35] Belgium convicted a large roadside-restaurant chain for being accomplices to trafficking in human beings due to a contract with a German cleaning company-subcontractor that exploited its personnel in Carestel restrooms, after their knowledge thereof was considered proven from factual circumstances. In other words, Carestel was not convicted for a separate crime, as suggested by the EU, but directly for complicity to trafficking. The Belgian criminal law[36] does not require for an accomplice to have the specific intent which is required for the crime he is involved in. What is required, is that he knowingly grants assistance to the crime the actual perpetrator commits. In other words, the intent of the accomplice, in this case of the user, can be isolated from the required intent as a constitutive element of the main crime, *in casu* trafficking in human beings.[37] To conclude that an accomplice had the intent to participate in a crime it is required that the accomplice knew what he was participating in. This requirement does not differ much from the creation of a new crime-approach, where it is also required that a user *knowingly* made use of a victim of trafficking. However, applied to the Belgian legal construct of the accomplice, this knowledge means being criminally liable for the same crime as the actual perpetrator, instead

[34] Van Hoek (2008).

[35] https://www.law.kuleuven.be/arbeidsrecht/pdf_documenten/nieuwsbrieven2012/def-carestel-kronos.pdf (12.2.2014).

[36] Article 66.

[37] For Belgian jurisprudence in this regard see for example Cass 9 oktober 1990, Arr. Cass. 1990–1991, nr. 69; Cass. 13 mei 1998, Arr. Cass. 1999, nr. 248; Cass. 22 juni 2004, Arr. Cass. 2004, nr. 344; Cass. 26 februari 2008, Arr. Cass. 2008, nr. 128.

of a separate crime.[38] Moreover, and even more interestingly for the topic of this contribution, in Belgian criminal law the required intent or moral element of a crime is also concluded to when the perpetrator knowingly behaves in a certain way without intending to participate in a certain crime with this behavior, but however being aware of the risk that this behavior could contribute to a crime and when he accepts this risk.[39] Specifically for the Carestel case, the company had been informed of a previous investigation against the German subcontractor for violations of labor standards, which was enough for the court to conclude that Carestel was aware of the risk but chose to accept it, as they did not act on this information but still chose to continue the contract. Furthermore, there was other factual evidence to conclude to the "knowledge" of Carestel, such as the extraordinarily low cost of the contract which did not fit Belgian wage norms, email-traffic of Carestel management indicating a certain worry of the company with regards to the subcontractor, etc. In other words, participation in crime, to a certain extent, solves the issues of the creation of a new crime-approach and attains its goal in its own manner, as it criminalizes those who knew, should, or could have known that they were doing business with *malafide* subcontractors.[40] It is interesting to ask if this is not a more logical, easy and problem-solving solution than creating a new crime, as the EU suggests member states to do? On EU-level, generally speaking, Union law leaves the definition of modes of participation to a crime to the member states.[41] The landscape in the EU with regards to participation to a crime is scattered, and it is not so that all member states would be able to treat such cases like Belgium can.[42] In other words, it is certainly not so that we can conclude that the creation of a new crime-suggestion and the whole discussion are obsolete as the issue can easily be solved by member states' national criminal law due to the legal construct of participation. The question at hand is thus: instead of suggesting the creation of a new crime, would it not be more useful for the EU to create a new provision of substantive criminal law, in that it harmonizes member states' provisions on participation in crime, subsequently having a meaningful impact on the issue of criminal accountability of "knowing users"? As Keiler duly notes after researching the different models for participation in member states of the EU: *the approaches taken regarding participation in crime in different Member States are diverse and can lead to varying scopes of liability, a situation which is undesirable in a*

[38] It is necessary to add that Belgium knows two kinds of accomplices (art. 65&66): one that has provided essential assistance to the perpetrator and who is considered on the exact same level as the actual perpetrator, and one that has provided secondary, non-essential, assistance who is still prosecuted for the same crime but as an accomplice, resulting in lower sentencing. In this case, Carestel was prosecuted as an accomplice of the first kind thus on the same level as the trafficker.

[39] Vanheule (2009).

[40] It is important to stress that this conclusion only concerns trafficking for labor exploitation, this does not mean that the analysis made automatically concerns other forms of trafficking, such as for sexual exploitation, which is also envisaged in the EU suggestion of the creation of a new crime.

[41] Klip (2009), p. 206.

[42] Keiler (2013).

"Common Area of Freedom, Security and Justice".[43] However different, Keiler has extracted one clear paradigm shift towards what he calls a normative concept of participation, meaning that to conclude to participation, across the EU it must be somehow investigated if the "participator" had a duty to control or prevent a potentially criminal conduct. In other words, commitment of crime is not viewed as restrictive anymore, however, the notion of participation is increasingly interpreted normatively in order to respond to contemporary challenges in criminal law, such as organized and white collar crime.[44] This tendency coincides with what has already been discussed for Belgian criminal law. Considering the potential of "participation in crime" for the problem at hand, it is at the very least as interesting to look at the potential of a European concept of participation in crime as a solution for the matter, as it is to analyze the potential of the creation of a new crime. Even though the EU, in its instruments, does not explicitly regulate participation in a consistent manner, some traces there-of can still be found.[45] It is, for example, interesting to note that the EU Court of Justice, in its case law on competition law and the prohibition to form cartels, takes a stance on "intent" when it comes to participation that is highly similar to the Belgian example. According to the Court, to conclude to the intent to participate in certain prohibited behavior, in this case anti-competitive conduct, it is necessary to establish that the undertaking intended to contribute through its own conduct to the common objectives of the cartel and that it was aware of the anti-competitive conduct of the other participants, or could reasonably have foreseen that conduct and was ready to accept that risk.[46] From the tendency in national criminal laws and European tendencies such as the one in competition law, preliminary suggestions can be made when discussing the possibility of establishing a European framework of participation in crime, which, when adopted, could be applied as a solution for user's criminal accountability for knowingly making use of the services of victims of (worst forms) of trafficking for labor exploitation. Briefly put, criminal liability should be imposed when there is a link between a certain criminal outcome and an actor, and this should be the case in any member state. The question remains, especially when applied to the topic of this contribution: is there a clear enough link between the criminal outcome of labor exploitation on the one hand, and the knowing user in the broadest sense, on the other hand? The European Court of Human Rights' case law should be born in mind in this regard too. In the 2005 Göktepe-case,[47] for example, the Court considered it to be a violation of the right to a fair trial that aggravated

[43] Keiler (2013), p. 296.

[44] Keiler (2013), p. 311.

[45] See extensively Keiler (2013).

[46] 8 September 2010, Case T-29/05, *Deltafi na SpA v European Commission*, [2010] not yet reported, para 62. See also: 7 January 2004, Joined Cases C-2004 P, C-205/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aaborg Portland and others v Commission of the European Communities*, [2004] ECR I-00123, para 83 (Keiler 2013).

[47] Goktepe v. Belgium (no. 50372/99).

circumstances to a certain crime were attributed to all participators of the crime, irrespective of the participator's direct involvement in the acts that constituted aggravating circumstances. The Court found that for a court not to take into account arguments on a vital issue that entailed severe consequences was incompatible with adversarial process and therefore contrary to the notion of a fair trial. Keiler justly notes that the link between a criminal outcome and its author(s) *must be established by analysing the behaviour of every participant in the context of the realisation of a criminal wrong in a co-operative manner. If such a connection can be established, the person arguably bears substantial responsibility for the criminal outcome and imposing liability as a principal seems justified*.[48] Social norms and reasonable expectations are important concepts to establish this link, which is why Keiler speaks of "the social theory of conduct".[49] In other words, this stance clarifies or even solves both the obstacle of the material and the moral element of the crime of (trafficking for) labor exploitation, when speaking of the commitment of this crime by the user. It is in a way a contra-solution for the creation of a new crime, in that in this approach, the user does not commit trafficking in human beings, be it as an accomplice, while the starting point of the creation of a new crime-approach is exactly that the user does not commit trafficking and therefore there is a need for the creation of a separate crime. The question is, is this necessary? Is it not easier and more of an attainable goal to solve the issue through participation in crime? In general, when asking the question of the usefulness of a European concept of participation in crime in this kind of broad, normative sense, one must recall the general focus of European criminal law on crimes such as trafficking in human beings, organized crime in general, corruption, money laundering, etc. It is rare that these prioritized crimes are committed by one single actor, rather they are committed in a complex framework of multiple actors, all bearing a different level of responsibility for the criminal outcome but often however knowing a direct link there-to. This is why EU harmonization instruments such as the EU's Trafficking Directive usually hold provisions regarding participation. Article 3 of the Trafficking Directive proscribes that *Member States shall take the necessary measures to ensure that inciting, aiding and abetting or attempting to commit an offence referred to in Article 2 is punishable*. Of course, this provision is rather vague and leaves it up to the member states to decide how this "aiding and abetting" is defined and made punishable in practice. Should the EU not create a substantive norm of European criminal law for participation in crime, adopted according to the normative approach? As has been stated above, this would be more than justified as it more than fits the goals of European criminal law, especially in the context of the crimes the EU is focusing on the most such as organized crime. The question is if the EU has the competence, according to its own Union law, to clearly decide on the framework of participation, instead of formulating vague provisions and leaving it up to the member states? This is not an easy matter, as in fact this is quite the

[48] Keiler (2013), p. 313.

[49] Weiner (1995).

EU-intrusion on the national criminal law of its members. Article 2 of the Treaty on the functioning of the European Union sets out the Union competence in general, while article 4(j) specifically states that matters of security and justice, under which criminal law should be perceived, are a shared competence of the EU and its member states. Furthermore, to clarify this shared competence, we need to turn to article 5 of the Treaty on the European Union (TEU) which proscribes the principles of proportionality and subsidiarity for EU-interference. Article 5.3 and 5.4 TEU states that in non-exclusive competence matters, such as criminal law as this is a shared matter, the EU should only act if the EU is better placed than the member state to take certain action and achieve the goals of the envisaged actions. Stating that on the basis of these articles, the EU would have the competence to give substance for all member states to a general principle of criminal law such as "participation in crime", would be taking it a step too far. However, the EU giving substance to general principles of criminal law in a certain matter or in a certain instrument is not completely unseen. In the Trafficking Directive for example, the EU has intervened in the matter of jurisdiction, which can also be seen as a general principle.[50] It would therefore be anything but unthinkable that the EU would adopt a provision in the EU Trafficking Directive, as it has for jurisdiction, which sets out the specific and clear rules for participation in crime, along the lines of what has been discussed above. This is especially so because of the potential of the use of participation in crime for the specific issue of this article. However, it must also be noted that this attribution of criminal liability to participators must not be without limitations, to not pose procedural rights-problems. Keiler notes that a limitation can be found in the harm principle, in that the distance between the occurrence of harm and the conduct of the actor cannot be too big.[51] A second limitation in the context of the principle of legality should be found in the principle of guilt, in that only freely and intentionally chosen harmful conduct must give rise to criminal liability. Thirdly, the concept of foreseeability plays its part, in that the consequences of the harmful conduct of the participant must have been reasonably foreseeable. Lastly, an important tool for this safeguarding, must be the concept of due diligence, which will be discussed further on in this contribution. For a user to be considered a participator to the crime of (trafficking for the purpose of) labor exploitation, or for any serious crime, it must be proven beyond reasonable doubt that he did not do anything in his power to prevent his participation.[52] This is where the link between criminal law and self-regulation becomes apparent. All of these general principles of law must guarantee that the decision on collective wrongdoing is kept within reasonable boundaries, no matter which broad national or European provision on participation in crime is maintained. As enough has been written on the principle of legality in general, and to remain on topic, the focus of this contribution will now turn to the concept of due diligence as a limitation to the

[50] Preamble point (16) and article 10 of the 2011 Trafficking Directive.
[51] Keiler (2013), p. 505.
[52] Gritter (2007) and Keupink (2011).

proof of "knowledge" of the user of doing business with traffickers or exploiters. This issue plays an important role both in the suggestion of the creation of a new crime, as in the better option to harmonize the rules on participation in crime for trafficking in human beings.

4 Due Diligence

This section will deal with due diligence, or "the duty of care", which should first be seen as a tool for companies to prevent (trafficking for) labor exploitation in their supply chains in general, as without a "user" for his victims, the criminal market becomes a lot less attractive for traffickers and exploiters that cannot directly exploit them themselves. Companies often adopt certain company strategies, adhere to certain standards and even employ certain "compliance officers" to make sure that suppliers and their products keep the company's supply chain "clean", without this necessarily being induced by fear of prosecution. However, and more importantly in the light of the topic of this contribution, due diligence can also be seen as a means for users to avoid accountability in the sense of the discussion above. Concepts such as corporate governance, due diligence, corporate social responsibility, social compliance programs etc., fall under this larger scope of self-regulation, as they all entail some sort of voluntary commitment by companies to abide by certain standards.[53] These actions, in the context of labor rights-safeguarding in subcontracting chains, can be seen as a voluntary commitment by contractors to manage their relationships with subcontractors in a responsible way.[54] After the legal analysis made above and especially, after the problems detected for the fight against (trafficking for) labor exploitation resulting in the preliminary conclusion that demand-reduction is all but easy, we should explore if and how self-regulation can be useful tool, both in general and as a tool to decide on the actual liability of a user, for a new crime or as a participator. Much has been written on corporate social responsibility, corporate codes of conduct and subsequent compliance programs.[55] In the following paragraphs, self-regulation as a voluntary commitment by companies is discussed for its pro's and con's in the fight

[53] Self-regulation and quality labelling, in brief, means that actors on a market commit and organise themselves to abide by certain sector-specific good standards, and for doing so they can obtain and portray a form of certificate showing to others that they abide by these standards of for example quality, safety and reliability (Vermeulen 2007, 2008).

[54] Jorens et al. (2012). It must be emphasised that this section will only deal with self-regulation in the context of subcontracting schemes, and not with self-regulation of companies to themselves abide by certain standards regarding the respect for laborers rights, which would lead us to far away from the core topic of this article.

[55] See, for example, Jenkins and Unies (2001); Kolk and Van Tulder (2002); Tanger (2006); Du et al. (2007); Chesterman (2008); Grieser (2008), pp. 285 ff.; Reuland (2010); Vogel (2010); Konov (2011); Pierce (2011); Todres (2012).

against (trafficking for) labor exploitation. Then, self-regulation that is somehow demanded in national and international legislation will be discussed, again for its advantages and challenges. Finally, the question will be put in the context of self-regulation or "due diligence" serving as a tool for escaping criminal accountability for knowingly using the services of victims of severe cases of trafficking in human beings, or precisely, when lacking, to conclude to it.

4.1 Voluntary Self-Regulation

As business and its effects have greater global impact, corporations are expected to bear greater responsibility for the consequences.[56] Corporate codes of conduct are individual company policy statements that define a company's own ethical standards.[57] This is not the place to offer a complete theoretical framework on all kinds of self-regulation by corporations, but in brief, there can also be codes of conduct established on a sectorial level, by non-governmental organizations, between two key market players, etc. Indeed, due to its voluntary nature, it can take any form. Of particular interest in the context of the recent disaster in Bangladesh, are industry-specific codes of conduct. Good examples in the garment-industry are the Fair Labor Association (FLA), initiated by (mostly) major clothing firms in response to rising concerns about sweatshop scandals, and the Clean Clothes Initiative which was one of the driving forces behind signing of the Accord on Fire and Building Safety[58] in Bangladesh after the disaster took place. This Accord is a binding contract between 70 apparel brands and retailers, international and local trade unions and NGOs. Its aim is to ensure sustainable improvements to working conditions in the Bangladesh garment industry.[59] More and more, (mostly) large transnational companies choose to abide by certain standards and seek to transpose their own codes of conduct to their suppliers. Larger multinationals sometimes (claim to) go further than simply stating that they themselves abide by certain

[56] International Labor Organization, Corporate Codes of Conduct, http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm#New%20social%20responsibilities%20for%20liberalized%20global%20business/ (9.7.2013).

[57] See extensively Raiborn and Payne (1990); Kolk et al. (1999); Blackett (2000); Jenkins and Unies (2001); O'Rourke (2003), pp.10ff.; Grieser (2008), pp. 285ff.

[58] http://www.laborrights.org/creating-a-sweatfreeworld/resources/bangladesh-fire-and-building-safety-agreement/ (12.7.2013).

[59] http://www.cleanclothes.org/about/principles/ (12.2.2014). A said uniqueness of the Act is that it is a legally binding contract, in contrast to mostly voluntary adherences to certain codes of conduct. Section 5 of the Accord explicitly outlines the process of dispute resolution, in which the outcomes can be reinforced in the court of law. However, in essence the Accord's legal obligations do not differ that much from other business contracts that companies routinely close. Business contracts commonly include provisions proscribing that a supplier's violation of certain standards constitutes a material breach of the contract, resulting in the power of the main contractor to merely terminate the contract.

standards, but they develop sophisticated compliance programs and hire specialized compliance officers overseeing the program within the company itself and sometimes even with far-away suppliers. This requires a huge commitment from companies, especially in huge global supply chains. Smaller-scale companies lack the resources and power to self-regulate in such a way, while all together of equal impact on labor exploitation as the few large multinationals that take meaningful action in this regard. Other question marks should be put with purely voluntary self-regulation as a meaningful demand-reduction-tool in the fight against labor exploitation in global supply chains. Firstly, there is the question of legitimacy: have all key players such as the trade union been included in the determination of the standards? Secondly, does the company code meet international and local legal standards? Thirdly and of utmost importance in the light of the topic of this contribution, who is accountable if a standard is violated by the company itself or a supplier, and is the code being monitored in an independent and transparent manner?[60] Lastly, especially in cross-border subcontracting situations, are the standards at all attainable by suppliers in possibly less-developed countries and who meaningfully checks up on this before closing contracts? Also, it is mostly merely the case that there is a clause in the contract between the main contractor and his subcontractor stating that the contract will be terminated if the subcontractor proves to breach certain standards: first, how will these breaches be detected and secondly, will the termination of the contract result in anything good for the workers? It is safe to say that demand-reduction and user-accountability as a tool in the fight against (trafficking for) labor exploitation is too high of a "good" to be fully left dependent on the goodwill of a handful of large multinational and powerful companies. Smaller-scale companies lack the knowledge, power and resources to have a meaningful impact on global supply chains as they cannot do much more than merely expressing that they abide by certain standards. Also, the "reputational drive" behind self-regulation may have only limited importance for smaller firms and middle-men because they are less brand-dependent.[61] Furthermore, joining certain larger-scale initiatives such as the Fair Labor Organisation that does much of the work *for* its members, is of course a good alternative when lacking resources but as meaningful these initiatives and organisations may be, questions of independent monitoring and accountability in the case of violations remain. The picture should however not be painted as a completely negative story. Certain self-regulation initiatives do work well, especially when external monitoring is involved, such as the ISO international standards system.[62] It must also be noted that the main question of this contribution is: what to do with those users that knowingly do business with *malafide* market players? These users themselves can thus themselves be deemed *malafide* to some extent, placing them outside the playing field of those *bonafide* companies that choose to spend time, effort and

[60] O'Rourke (2003).

[61] Grieser (2008).

[62] See extensively on http://www.iso.org/iso/home/standards.htm/ (12.2.2014).

resources on self-regulation. The only link with the fully voluntary system of self-regulation is that certain companies may abuse the system for their own benefit. In other words, users may claim to self-regulate while in fact they only say so for reputational reasons, which is perfectly plausible in a fully voluntary system. The question thus surfaces: should the government play a role in all of this? Should self-regulation to abide by certain standards and choose suppliers that equally abide by these rules be made obligatory and enforceable for all companies? Most importantly: should the government control this and hold companies accountable for not self-regulating or acting with due diligence? In the following section, a more specific focus will be put on self-regulation-provisions *in* legal instruments.

4.2 State-Imposed Self-Regulation

Corporations may often be more capable and better fit than governments to well-organize their own activities and have an impact on labor exploitation. However, as discussed above, they are often not willing to do so as this entails time, effort, and specially: money. Braitwaithe, already in 1982, proposed a model of enforced self-regulation where a compliance manager would be criminally liable if he or she did not report an overruling of compliance standards. Furthermore, he suggested that companies that regularly disregarded compliance directives would have to be the main focus of the government, in that the government would have to turn its prosecution resources towards these companies.[63] Examples can be found of current traces of self-regulation, specifically in the context of labor exploitation that is somehow being enforced in the law, therefore bearing similarities to the system that Braitwaithe suggested. Even though the concept of due diligence is anything but a straightforward concept, it has been attributed special value in relevant supra-national legislation. On a general level, amongst many others such as on UN- and ILO-level, the OECD Guidelines for Multinational Enterprises require companies to show responsible business conduct and governance and requires them to carry out risk-based due diligence when selecting subcontractors. The obligation for companies to act with due diligence can also be found in specific EU instruments. A good example is the Posting Directive,[64] where it is provided that certain main contractors[65] should not be held jointly and severally liable if they have acted with "due diligence" in a situation where without this due diligence, the main contractor would be jointly and severally liable for his subcontractor's

[63] Braithwaite (1982). This approach was also suggested by Van Damme and Vermeulen (2014) for self-regulation of the sex industry and consequent diverted prosecutorial attention to unwilling sex establishments.

[64] Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services.

[65] See extensively Jorens et al. (2012).

disregard for certain labor rights of posted workers. Another example is the EU's Sanctions Directive,[66] where a similar provision is adopted. Other examples of instruments that foresee a great role for acting with due diligence can be found in the context of public procurement. Directive 2004/18/EC[67] and Directive 2004/17/EC as well as Convention No. 94 of the International Labor Organization (ILO) on labor clauses in public contracts[68] require provisions in government procurement contracts to ensure the compliance of subcontractors with labor standards. The goal is to ensure that competitive conditions imposed by public authorities in their role as clients-main contractors, such as low pricing policies or tight deadlines, do not undermine the capacity of subcontractors to comply with relevant labor and social standards.[69] On a national level, numerous traces of obligations to self-regulate can be found. The Finnish Liability's Act[70] is a good example. According to the Act, the client has an obligation to gather certain evidence proving the reliability of a candidate (sub)contractor or temporary work agency before concluding a contract with them. However, "reliability" is mainly assessed on the basis of social security and fiscal law-issues. When it comes to checking labor conditions, it is enough to merely gather some information on generally applicable collective agreement of the sector or profession or the principal conditions of work. The violation of this so-called "evidence-obligation" is sanctioned with a "negligence fee".[71] Many other examples of this kind exist, such as in the Irish Construction REA (collective agreement), according to which principal contractors must ensure that their

[66] Directive 2009/52/EC of the European Parliament and of the Council of 18.06. 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ L* 168, 30.6.2009.

[67] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ L* 134, 30.4.2004; Directive 2004/17/EC of the European Parliament and of the Council of 31.03.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors *OJ L* 134, 30.4.2004.

[68] ILO Convention nr 94 concerning Labor Clauses in Public Contracts, Geneva, 32nd ILC session, 29.06.1949, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312239/ (12.7.2013).

[69] Jorens et al. (2012), p. 11.

[70] Act of the Contractor's Obligations and Liability when Work is Contracted Out, (1233/2006), 3.2007.

[71] Section 9 of the Finnish Liability Act states that clients shall be obliged to pay a negligence fee if the client has:

1) neglected the obligation to check referred to in Sect. 5; or
2) concluded a contract on work referred to in this Act with a trader who has been barred from conducting business under the Act on Business Injunctions (*Laki liiketoimintakiellosta* No. 1059/1985) or with an enterprise in which a partner, a member of the Board of Directors, the Managing Director, or another person in a comparable position has been barred from conducting business; or
3) has concluded a contract as referred to in paragraph 2, despite the fact that he must have known that the other contracting partner had no intention of discharging their statutory obligations as a contracting partner and as an employer. (see extensively Jorens et al. (2012), p. 90).

'approved' subcontractors, abide for example by certain social welfare legislation. However, the REA does not mention how confirmation that a subcontractor is 'approved' is to be demonstrated.[72] In brief, "enforceable" self-regulation in supra-national and national legislation is anything but an unknown concept. However, due to a lack of a clear or harmonized idea of what actually constitutes due diligence, the practical applicability of these provisions is deemed difficult.[73] Specifically in the context of this contribution, a system of government enforced self-regulation should also be discussed as a possibly useful strategy. In brief, the suggestion under scrutiny would be the already mentioned two-step procedure when deciding on user-accountability: first it should be established if it really concerns a case of severe, slavery-like exploitation. If not, other solutions such as the application of labor law must come in play. If yes, criminal law must come in play in that it must penalize guilty knowledge, in one of the two manners discussed, be it in the form of a new crime or in the form of participation in crime. To conclude to guilty knowledge, proof of a lack of due diligence by the user in doing business with a certain subcontractor/supplier, must be delivered, however all principles of law but most importantly the principle of legality must be respected. Differently put, for this issue, in some way self-regulation would enforced by criminal law. At the same time, self-regulation can play a vital part for criminal law as well. In other words, for the issue of guilty knowledge of users of the worst forms of (trafficking for) labor exploitation by their business partners, an interplay between criminal law and self-regulation must be suggested.

5 Conclusion: A two-Step Procedure with an Interplay Between Criminalization and Self-Regulation

From what is written in all previous sections of this chapter, it can be concluded that there is a need for the following solutions for the problems identified in- and outside the scope of the law regarding user-accountability. A tool is needed to establish guilty knowledge of the worst forms of labor exploitation by a subcontractor, and this tool could very well be proven by an obvious lack of due diligence by a user, such as in the Carestel case. Diverted attention in prosecution or inspection priorities of law enforcement to *malafide* market players or, as Braitwaithe suggested, to market players that are known to disregard certain compliance standards, is necessary for the promotion of the *bonafide* market. Abiding by quality standards must become the most lucrative and competitive option for all players on the market. This brings us back to the above-mentioned two-step-procedure suggestion: first, a worst form of labor exploitation needs to be established and only after this has been proven beyond reasonable doubt, guilty knowledge of users should be assessed. If

[72] Jorens et al. (2012).

[73] See also Jorens et al. (2012).

these two steps have successfully been concluded, users should be criminalized, either separately through a separate crime, either through participation. The EU must indeed take firm legislative action. One option is obliging Member States to criminalize knowingly using victims of severe trafficking in human beings-cases. However, the participation in crime-option may be a goal that is easier to attain, as there are clear parallel tendencies across the EU in this regard,[74] which may not be the case for a specific new criminalization. This is also the better option considering the relatively unproblematic competence the EU would hold in this matter. Guilty knowledge can, however with respect for the rule of law, be assessed along the lines of due diligence in business conduct of the user. This solves several of the detected issues mentioned above. This however must not be misunderstood: it is merely suggested that if after investigation, a worst form of labor-exploitation is clearly proven, it can be taken into account if the company could have known, amongst other factors due to the lack of due diligence, that the service might have been problematic, when deciding on guilty knowledge. This less definitive approach can thus solve some of the above-mentioned procedural rights-issues. The self-regulation system with fitting governmental responses in the sense that in severe cases, a user's criminal accountability can be on the line, does hold the power of promoting *bonafide* service provision, as users will specifically look for "un-risky" partners. This will even more be so if law enforcement attention is diverted to the segment that is known for risky behavior, in accordance with Braitwaithe's suggestion. Also, as we have clearly indicated that only for the worst forms the investigation into a user's criminal accountability is justified, considering the grey zone between voluntary and forced exploitative work. At the very least, the proposed "two-step-procedure" should work well enough to target those suppliers that are involved in slavery, forced labor, and other "worst forms" of labor exploitation, without this meaning that all forms of labor standards violations can be targeted with this approach. In time, the impact of the two-step procedure could indeed be noticeable in that users, or "main contractors", become more careful as to who they do business with, resulting in the overall better position of *bonafide* market players in terms of profit and competitiveness. Especially the combination between EU-action with regards to participation in crime, specifically for trafficking in human beings, combined with (state-induced) due diligence as the proposed tool for shedding a clearer light on guilty knowledge of "participators", can constitute a meaningful attack on the *malafide* segment of the market as in this system, being a *bonafide* market player is made a lot more attractive. This way, private power is, in the end, used for public good.

[74] Keiler (2013).

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Part IV
Corporate Criminal Procedure and Criminal Compliance

Corporate Criminal Liability: Tool or Obstacle to Prosecution?

Ana María Neira Pena

Abstract White-Collar crimes are especially difficult to investigate. In the United States, prosecutors, whose conduct is guided by the principle of opportunity, have a great discretion in order to force corporations to cooperate; moreover, corporations do not enjoy the same procedural rights as individuals. By contrast, in many European countries the principle of legality prevents prosecutors to negotiate agreements about bringing charges, and corporations are granted with the same procedural rights as indicted individuals. Consequently, substantial differences between the U.S. and European procedural systems may mean that corporate criminal liability, which is a useful tool in the United States, instead becomes an obstacle for criminal investigation in Europe.

1 Corporate Criminal Liability as a Prosecution Instrument

In the U.S., corporations can be criminally convicted for crimes committed by individual directors, managers and low-level employees. The possibility that legal persons can be held criminally liable has existed for over a 100 years.[1] This eventuality takes place in a corporative context where investigations are particularly complex and certain procedural guarantees further compound the difficulties of prosecution. Moreover, U.S. prosecutors, whose conduct is guided by the principle of opportunity, can decide whether to bring charges or not, which charges

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[1] It is noteworthy the Supreme Court's landmark 1909 decision in *New York Central & Hudson River Railroad v. United States,* 212 U.S. 481(1909).

A.M. Neira Pena (✉)
Department of Public Law, Procedural Law, University of A Coruña, A Coruña, Spain
e-mail: ana.neira@udc.es

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to bring, and whether to negotiate plea bargains. All these circumstances lead U.S. prosecutors to use their powers to force corporations to cooperate in determining, prosecuting and convicting individual responsible persons. In return for this forced cooperation, corporations, almost always, are rewarded with a favorable deal—often a deferred prosecution agreement (DPA), which contains a promise to defer any prosecution as long as corporations comply with the terms of the agreement, and even a non-prosecution agreement (NPA), which drops charges.

Traditionally, in civil law countries the possibility that legal persons can be held criminally liable has been denied. But currently, systems of corporate criminal liability are spreading throughout Europe and some Latin American countries. The problem is that these countries have a different legal context. Prosecutions usually follow the principle of legality, according to which all crimes must be prosecuted and punished. Consequently, prosecutors do not have the power to negotiate and decide on bringing charges, which can lead to devastating consequences for a legal person that is submitted to public trial. In addition, when a legal person is accused, contrary to what happens in the U.S., investigation becomes more difficult. The reason for this difficulty lays in the recognition of certain procedural rights also for legal persons—such as the privilege against self-incrimination or the right against unreasonable searches and seizures—which they did not enjoy previously or whose protection was weaker.

Ultimately, specificities of corporate crime demand specialties in the prosecution of such offenses, but they should never justify violations of procedural rights. Therefore it is necessary to find a balance between impunity of the company and individual wrongdoers acting within it on the one hand, and respect for peoples' procedural fundamental rights on the other hand. To deal with this dilemma, it must be taken into account that a corporation it is not the same as an individual at all, but wrongdoers acting within a corporation must enjoy the same rights as any other defendant.

The aim of this contribution is to draw attention to the differences between the systems of corporate criminal procedure in Europe and in the U.S, and above all how these systems work in practice against corporations. To this end, firstly I discuss some particularities of corporate crimes and how these particularities could justify some specialties of the U.S. way of prosecuting corporations. Secondly, I will comment on the implications of the investigative powers of European authorities handed to them when introducing corporate criminal liability systems. And finally, I will try to convey some conclusions about what I believe a balanced solution between both systems should be like.

2 Specialties of Prosecuting Corporate Crimes

As a general rule, detecting and proving crimes committed within corporations is more difficult than in common crimes. Crimes committed in a business environment often do not relate to an isolated criminal behavior of a single person; rather

they are usually the result of a combination of numerous acts or omissions attributable to different people. This is a consequence of the division of labour and of decentralizing the decision-making process. Both circumstances make identifying individual wrongdoers and proving which individuals are responsible for the facts more difficult.

In this sense, the legal person promotes the *concealment of individuals responsible for criminal acts*. When individuals act on behalf of the corporation, many times the legal cover serves to hide individual wrongdoers. In this context, establishing the "law of silence" as company policy can turn a corporation impenetrable for the state.

Moreover, white-collar crimes are difficult to detect because tracks left, usually documents, are held by the criminals, which hinders the criminal investigation. In common crimes as murders or rapes, evidence is generally easier to obtain because it is not under control of the criminal. In contrast, corporative wrongdoers usually posses or keep *documents and others evidences* under control.

In addition, it must be taken into account that the *economic power* of corporations is usually greater than individuals. As a reflection of this unequal economic power, in the U.S. many companies have established by contract to advance attorneys' fees for individual employees. Large companies can afford long trials and the best teams of lawyers which put them in a leading position to negotiate agreements. Besides, investigating some corporate criminal cases costs millions of dollars due to the technical complexity and long duration; therefore it is helpful to encourage corporations to cooperate.

Furthermore, companies rely on the *support of lawyers*, not only during criminal proceedings, but also before initiating criminal actions. These professionals sometimes cooperate in crimes, and at other times advise their clients how to commit crimes with impunity. While in other types of criminality the relationship between the defendant and the lawyer is always subsequent to the crime, in corporate crimes it is often simultaneous. Transactional lawyers paid by and working for the firm, supply *ex ante* legal assistance to actors contemplating whether to engage in a particular action or activity.[2] The firms' lawyers take part in the riskiest business activities and provide advice focused on legal risk assessment. As a consequence, companies are in a greater position to avoid criminal actions. At the same time, lawyers become knowledgeable of relevant and confidential information; therefore, in this context the protection of attorney-client and work product privileges covers a substantially broader scope.

These features may justify certain procedural specialties, but there is also a need to always respect the boundary marked by the due process of law. Corporate criminal liability in the U.S. is used to combat the particular obstacles of criminal investigation within firms. The state faces unique obstacles to the detection and to proving wrongdoing when it occurs within legal entities.[3] "These difficulties (...)

[2] Buell (2007), p. 1658.

[3] Buell (2007), p. 1616.

are only exacerbated in the context of white-collar criminal proceedings, in which the underlying facts are likely to be particularly complex, the investigations particularly time consuming, and the defense counsel particularly skilled".[4]

3 On the Situation in the U.S.: Criticism to the Misuse of Prosecutorial Power

Corporate criminal liability is criticized in the U.S. for its conceptualization as a tool used by prosecutors to manipulate certain aspects of the U.S. criminal procedure.[5] Three specific procedural practices have been described as objectionable: employers coercing employees to waive the right not to testify and, above all, the state using the fruits of such waiver; the state pressuring corporations to cease to indemnify their agents for litigation costs; and the state negotiating with corporations on the waiver of their attorney-client and work product privileges.[6]

3.1 Privilege Against Self-Incrimination

In 1906, the Supreme Court held in Hale *v*. Henkel[7] that a corporation does not enjoy the Fifth Amendment privilege against self-incrimination because the right applies to natural persons and not to corporations.[8] At the same time, the Court permitted corporations to challenge the governments' seizure of corporate records on Fourth Amendment grounds.[9] To explain this different treatment, the Court acknowledged that the breadth of the organizations' rights is not as great as that recognized for individuals, because it rejected to anthropomorphize the corporation. The determination of whether a constitutional right should apply to a corporate criminal defendant and how broad this protection should be depends on two factors. It is necessary to weight up the possibility of power abuses by the government absent the constitutional protection on the one hand with the effect of permitting a corporation to assert the right on the governments' ability to enforce the law effectively[10] on the other hand.

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[4] Diskant (2008), p. 131.

[5] Diskant (2008), p. 132.

[6] Buell (2007), p. 1616.

[7] 201 U.S. 43 (1906).

[8] Id. at 75–76; see Braswell *v*. United States, 487 U.S. 99, 108–109 (1988) (explaining that the Fifth Amendment privilege does not apply to "collective entities").

[9] Id. at 76.

[10] This is the approach adopted in Hale *v*. Henkel. And it is also adopted and deeply explained in Henning (1996), especially pp. 795ff.

3.2 Facilitating Employee Cooperation

With regard to statements of employees, a corporation is expected to facilitate employee cooperation with the ongoing investigation.[11] In order to comply with the conditions to be considered cooperative, corporations must use their best efforts to make employees available to the government—one requirement usually included in NPAs and DPAs.[12] Corporations threaten employees with losing their jobs if they refuse to testify or to be questioned, in order to comply with the requirements of prosecutors and in order to enjoy the advantages of "cooperatives corporations".

But the problem is that employees, who are given the choice of either speaking with corporate investigators or losing their jobs, often are not provided an own counsel to discuss that choice; in fact, they do not have a free choice: In Garrity *v.* New York, the Supreme Court held that such a choice to lose ones' means of livelihood or to abide the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.[13] From the perspective of due process of law this is a really worrying situation. The actions of private employers induce employees to provide incriminating evidence against themselves, but their actions are planned and enforced by the government, so they may be fairly attributable to the government within the meaning of the Fifth Amendment.[14]

3.3 Employees' Right Not to Testify

Regarding the employees' right not to testify, should they know that the information they provide may be used against them in criminal proceedings and they might refuse to testify in order to prevent the risk of self-incrimination. In fact, although mediated by the employer, to coerce employees to provide evidence would be considered a state action. Actually, when the government has provided the employer with significant encouragement to force their employees to cooperate, this coercion on employees should be attributed to the state.[15] "Coercing a waiver of the right to silence through a delegated threat of termination is just such a bypass and public constitutional norms should prevent it despite the formalism of the state action requirements".[16]

This does not mean that the employer cannot terminate an employee who refuses to cooperate in an investigation, e.g. if it was previously set as company policy, or,

[11] Bohrer and Trencher (2007), p. 1481.

[12] Bohrer and Trencher (2007), p. 1488.

[13] 385 U.S. 493, 500 (1967).

[14] See United States *v.* Stein (Stein II), 440 F. Supp. 2d, 315, 334–335, 337 (2006); Griffin (2007), p. 365; Bohrer and Trencher (2007), p. 1489.

[15] Griffin (2007), pp. 365ff.

[16] Griffin (2007), p. 364.

above all, in relation with staff in positions of trust, whose dismissal does not require a specific reason. What is not permissible is that the statements made by employees under threat of dismissal may be used in criminal proceedings whenever such a threat was relayed by the employer, but originally stems from the government, given that, the employer can be considered the executive arm of government in such a case.[17] The Fifth Amendment does not protect employees from an unfair dismissal; it protects them from having coerced statements being used in criminal proceedings against them.

The right of defense along with other more specific rights—as the advice of an attorney, the right against self-incrimination and the attorney-client privilege—are fundamental rights of individuals in the U.S. The waiver of such rights should be entirely voluntary, done by the natural owner of the right. In internal investigations of corporate crimes, however, most of times the employees' waivers are done under threat.

3.4 Employees' Legal Expenses

Companies advancing or paying attorneys' fees for their employees may be also considered an indication of non-cooperative behavior. The threat of cutting off payment of legal expenses of any employees who refused to talk to the government or who invoked the Fifth Amendment privilege against self-incrimination was considered by Judge Kapland to be out of bounds of appropriate government action.[18]

In my opinion, if the company is committed to its employees to pay these expenses, it is contrary to good faith to stop paying in order to put pressure on them. However, bearing the costs of litigation for employees could be an incentive to crime. That may show that the company is not a good corporate citizen. However, this should be assessed from an *ex ante* perspective. If it is provided *ex ante* that the company will pay his litigation costs unless the employee commits a crime against compliance rules, this foresight would have a positive effect in order

[17] Griffin (2007), p. 360.

[18] Judge Lewis A. Kaplan has issued two opinions finding rights violations based on governmental coercion of KPMG. See United States *v*. Stein (Stein I), 435 F. Supp. 2d 330 (S.D.N.Y. 2006); United States *v*. Stein (Stein II), 440 F. Supp. 2d 315 (S.D.N.Y. 2006). In the first ("Stein I"), the court held that the Thompson Memorandum's suggestion—followed by prosecutors in the case—that cooperation could be judged by the corporation's decision whether to pay the attorneys' fees of its potentially culpable officers and employees improperly interfered with those targets' Fifth Amendment right to due process and Sixth Amendment right to counsel. In the second opinion ("Stein II"), the court held that two of the proffering employees who had been threatened with termination of their jobs and payment of their legal fees if they did not make a statement to the government, made their statements under coercion attributable to the government, and their Fifth Amendment rights against self-incrimination were violated. See Bharara (2007), pp. 24ff., especially p. 24.

to prevent criminal risks because it would increase risk aversion. I believe that government could assess positively this type of forethought, but it should not force companies to stop paying and breaching earlier agreements with employees.

3.5 *Attorney-Client and Work Product Privilege*

Regarding the attorney-client and work product privilege, its scope in the U.S. is too broad and perhaps it should be reduced, but again: its waiver should not be forced at all. In my opinion, the problem is that the U.S. understanding of attorney-client privilege is excessively broad and this trouble is compounded by the special role of lawyers in corporate crimes. One possibility may be to reduce the breadth of this privilege by limiting this protection to documents produced in the preparation of the defense by the outside counsel. In this regard, the Court of Justice of the European Union has distinguished between internal and external counsel. Only the external one is protected by the right to professional secrecy, while an in-house lawyer is not, because he cannot enjoy the same degree of independence. This lack of independence links him to the strategies of the company[19] rather than the defense strategy that is worth protecting.

The negotiations on these issues, which affect individual rights, are possible because of the great prosecutorial power. Some authors justify these prosecutorial powers by the unique perils of U.S. criminal procedure.[20] From this point of view the adversarial system recognizes defensive rights and privileges so broadly that they may be abused by corporation. In return of this situation U.S. prosecutors possess powers that are being misused.[21] Other authors justify these prosecutorial powers by the peculiarities of corporate crime.[22] And some of them criticize this situation because it undermines rights, privileges and the adversarial system taken as a whole.[23]

3.6 *The Necessity of Limiting Prosecutorial Power*

In 2006, the approval of the McNulty Memorandum[24] limited the prosecutors' power to qualify companies as cooperatives. According to this Memo, it is not enough to indict the company and to deny it DPAs that it continues to pay attorney

[19] C-550/07 P—Akzo Nobel Chemicals and Akcros Chemicals *v*. Commission.

[20] Diskant (2008), p. 150.

[21] Diskant (2008), p. 175.

[22] Buell (2007), pp. 1622ff. The author explains this "distinctive setting of the firm".

[23] Silber and Joannou (2006), p. 1240.

[24] Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecutions of Business

fees of its agents[25] or it does not waive the attorney-client privilege.[26] In order to assess such behavior as non-cooperative, additional negative requirements are needed, for example a specific aim of hindering the investigation that legitimates the need for the waiver. Despite of those theoretical limitations, corporations under investigation must still offer complete and genuine cooperation in order to escape an indictment[27] that could mean their death. And, "since an indictment firm is a dead firm, a decision to defend an indictment is a suicide".[28]

In light of the potentially devastating impact an indictment may have on the business continuity, corporations are under incredible pressure to avoid that result. With the Department of Justice looking for "authentic" cooperation, which means the corporation must become the "agent" of the government in helping to "catch the crooks", i. e. the investigative arm of the government, "it is not surprising that waivers of the attorney client privilege and work product privilege are becoming more frequent and more complete".[29]

The U.S., system of corporate crime could have a procedural justification.[30] In this sense, some authors maintain that this type of liability is regulated by the U.S. law in order for not being applied. And it is understood that the reason for regulating corporate criminal liability is to facilitate the criminal investigation by forcing corporations to cooperate. In fact, virtually in all cases against corporations the process ends up without a trial against the corporation, and even without bringing charges.

Prosecutors have the duty to address both corporate and individual wrongdoing; moreover, corporate liability is too broad because of the *respondeat superior* theory. In addition, DPAs and NPAs are conditioned to the depth and sincerity of the corporations' cooperation[31] and prosecutors have tremendous discretion to plea bargain cases. All these circumstances, together with the devastating consequences of an indictment for a corporation, make it essential for a corporation to cooperate, in order to ensure its survival. Corporations cooperate fully by waiving their rights, and not only their own rights but also the rights of their employees, and they conduct internal investigations that cost millions of dollars in order to avoid being indicted. It must be taken into account that an indictment could mean the

Organizations (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (12.2.2014).

[25] Id. § VII (B) (3) at 11–12.

[26] Id. § VII (B) (2) at 10.

[27] Bohrer and Trencher (2007), p. 1488.

[28] Oesterle (2004), p. 476.

[29] Silber and Joannou (2006), p. 1230.

[30] Diskant (2008), p. 141. The author explain the role that entity criminal liability plays: "by charging both the corporation and the individuals, U.S. prosecutors rather artificially create codefendants, and as is so often the case in the U.S. system, one defendant can then be compelled to plead guilty and cooperate in the prosecution of a codefendant".

[31] Bohrer and Trencher (2007), p. 1481.

corporations' death. Therefore, it can be stated that corporations do not cooperate voluntarily but under enormous pressure.

4 The Different Situation in Continental Countries: With Special Reference to the Spanish Case

The situation in continental countries is very different for two main reasons. Firstly, the *principle of legality* prevents prosecutors from not bringing charges when a crime has been committed. Therefore, the power to negotiate agreements is more reduced, at least in theory. Secondly, introducing corporate criminal liability actually *turns* corporations *into a new and strengthened rights holder*.

4.1 A Different Approach

Most of the European and especially the Spanish doctrine understand that the broader—and even coextensive with the individuals—recognition of rights and guarantees to legal persons is the unavoidable counterpart of introducing corporate criminal liability in our law.[32] They base this assertion on an *anthropomorphic conception* of the legal person. This also involves a conception of procedural rights and guarantees based on protecting the indicted from abuses of power, rather than on human dignity.

Following this approach *strictu sensu*, legal persons could also enjoy other rights they lack in the U.S., such as free legal aid, the right to the presumption of innocence, the right to self-defense through a representative, the right not to incriminate themselves, or the right against unreasonable searches and seizures, including the inviolability of the domicile. All of them reinforce the entity's right of defense but the problem is that sometimes it overly hinders criminal investigations.

4.2 Right Against Self-Incrimination

In Spain, the subjective scope of the right not to incriminate oneself has been expanded by law in order to include legal persons.[33] This right is recognized in general for all defendants in criminal proceedings. Before corporate criminal liability was introduced, only individuals could be charged. Nowadays, legal

[32] Gascón Inchausti (2012), p. 66, who asserts that legal person may be imputed or charged means it has to have all the rights that the law links to this procedural positions. See also Brodowski, in this volume, pp. 211ff.

[33] Bajo Fernández and Gómez-Jara Díez (2012), p. 283, the Spanish legislator has chosen to equate the procedural status of the individual accused and the legal person accused.

persons can also be a defendant in a criminal process, hence any natural or juristic person has the right not to incriminate themselves in order to avoid becoming charged and eventually convicted.

Most authors deny the possibility of applying the rules of civil law to criminal procedures, because in criminal proceedings special guarantees must be respected without exceptions. For example, the right not to incriminate themselves precludes the application of a rule of civil procedure that allows to draw negative conclusions from inconclusive or evasive answers of the defendant or to force the representative of the legal person in the process to identify who personally intervened in the facts in dispute.[34]

Taking as an example the Spanish regulation, it is observed that the introduction of criminal liability of legal persons has strengthened their right not to incriminate themselves. By means of the new regulation of corporate criminal liability, *the representative who acts on behalf of corporation in a criminal proceeding has the right not to testify* (art. 409 bis LECrim[35]).[36] According to this, it could happen that a potential witness—with knowledge of the facts but not personally implicated in the facts under investigation—might be appointed as representative and therefore protected by the right not to testify, although Spanish Criminal Procedure Act attempts to avoid this situation establishing an incompatibility between being witness and representative of the corporation (art. 786 bis 1. II LECrim). On the other hand, scientific doctrine discusses if employees, officers, board members or other members of the organization would also have the right not to testify when they act on behalf of the legal person charged.[37]

Before corporate criminal liability was introduced, the Spanish Constitutional Court pronounced two decisions[38] in which it stated that coercive requirements to legal persons to produce incriminatory documents and later use of these documents against administrators was constitutionally legitimate. The courts' argument was that the documentary requirement had been adressed to the corporation itself. Therefore, the defendant, a natural person, had not been personally coerced or required to submit such documents, so his right not to testify had not been violated. What would happen today with the new legal regulation of corporate criminal liability? Probably, evidence obtained from corporations by coercive requests would be void, for they were obtained by violating the fundamental right not to incriminate itself. As a result, they could not be used to condemn the entity and possibly neither to condemn the individual wrongdoer. This is because evidence obtained in this way is legally null and void therefore may not be used.

[34] Del Moral García (2010), pp. 758f.; in this sense see also De Aranda y Antón (2010), p. 17.

[35] Royal Decree of September 14, 1882, approving the Spanish Criminal Procedure Act.

[36] Bajo Fernández and Gómez-Jara Díez (2012), pp. 283ff. In this point the wording of the law is clear. So, it does not give room for restrictive interpretation.

[37] Del Moral García (2010), pp. 739ff.

[38] Rulings of Spanish Constitutional Court 18/2005, February 1st and 68/2006, March 13th.

4.3 Consequences Beyond Criminal Proceedings

Under the new legal regulation, it will not be possible to use documents or other evidence coercively obtained in an administrative disciplinary proceeding any more.[39] This is because the protection of the right of defense, including the right not to incriminate itself, is much stronger in criminal proceedings than in administrative disciplinary proceedings.[40]

Ultimately, since legal persons are liable to be charged, all its collaborative obligations decay and the entity may reject requests for information, should it fear that it could be used in a future criminal proceeding against it. It is understood that the absence of an obligation to provide documents is offset by considering cooperation under the attenuating factors of criminal responsibility, foreshadowing a greater difficulty in the investigation of the cases due to the exercise of the right to remain silent.[41] But it must be taken into account that the cooperation of the entity has to be voluntary, without coercion, and evidence of guilt cannot be derived from the lack of cooperation.[42]

4.4 Inviolability of the Home

Another right that is strengthened by means of this new regulation is the inviolability of the domicile, as searches and seizures of offices or operational headquarters are equated by law to searches and seizures of private homes. When the Spanish law on criminal procedure was modified in order to allow the intervention of legal persons in criminal proceedings, a new concept of domicile was settled.[43] The space defined on the law, that includes headquarters and other offices or establishments protected from third parties' gaze, cannot be searched without consent of the owner or the representative of the company. In the absence of consent, a judicial search warrant is necessary. With this legislative reform, the level of protection of private homes, registered offices and operational headquarters is equated by law. Namely corporations have the right to be free from unreasonable searches and seizures and the protection of this right is coextensive with the security afforded the

[39] In this sense see Funke *v*. France (Case A/256-A) European Court of Human Rights [1993] 1 CMLR 897 25 February 1993.

[40] Del Moral García (2010), p. 741.

[41] Maza Martín (2010), p. 8.

[42] Many European constitutional Courts and the European Court of Human Rights has said that you cannot appreciate the lack of cooperation as evidence of guilt, because the opposite would render meaningless the right not to testify.

[43] Article 554.4º LECrim—the Spanish Criminal Procedure Act—defines the domicile of legal entities as the physical space that constitutes the direction center, whether headquarter or dependent establishments, or such other places where may be found documents or other means of your daily life that are reserved to the knowledge of third parties.

individual. Before the reform, protection for legal persons was lower because judges had more discretion to assess the circumstances of each particular case.

4.5 Attorney-Client Privilege

With regard to the attorney-client privilege,[44] Spanish law protects the information and communications with defense counsel as part of the general right to counsel. The right to professional secrecy or confidentiality is narrower than in the U.S. because it only protects legal advice associated with the procedural defense of the parties, which may include pre-trial or extra-procedural advice. But confidentiality does not protect the work product or communications related to financial services, agency services—as tax consulting, financial accounting or payroll services—or property management services.

Actually, the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[45] establishes obligations for reporting suspicions of money laundering or terrorist financing with some exceptions for lawyers, but only when they are in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings (Art. 9.5).

In short, as secrecy is conditional upon the advice being related to current or future legal proceedings, the possibility for legal person to become a defendant in a criminal trial means greater protection for them. In the current situation, companies are more likely to refuse to provide certain information protected by right to professional secrecy in order to prepare its defense, or in order to avoid criminal proceedings altogether.

5 Conclusions: Learning from the Mistakes of Others

In short, in the U.S. attempts have been made to adapt the procedural system of guarantees to the specialties of corporate criminal liability. By contrast, in Spain, and in general in other continental countries, the option has been for a full alignment with individual, natural persons charged. *The argument is simple and even simplistic: corporations can become charged as individuals, so they should have the same procedural rights*. But full equality between natural and legal

[44] A further study can be seen in Bajo Fernández and Gómez-Jara Díez (2012), pp. 294ff.

[45] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJEU 25.11.2005, L 309/15.

persons is not appropriate for several reasons. First of all, this equalization overly hinders investigation and prosecution. And above all, it should not be forgotten that corporations and individuals have an entirely different nature, among other things because corporations lack human dignity. Corporations and individuals are not the same at all!

Despite the problems of the U.S. system, full equality between natural and legal persons is not appropriate because it overly hinders research in a field in which it is inherently difficult to investigate. It is necessary to consider whether an accountability system, which hinders the investigation of white collar crimes, is convenient. In this sense, one of the criticisms of the Law and Economics school, which has developed the theory of optimal sanctions against corporate criminal liability, is that criminal process increases costs more than civil process because it implies greater guarantees for the defendant.[46]

In Europe, it would be advisable to standardize the system of guarantees for legal persons, to reject anthropomorphism and to grant corporations just the rights which are in accordance with its special nature. In addition, it would be convenient to establish certain duties for companies, for example documenting their actions and providing them periodically to public authorities. Besides, it would be recommendable to expand the possibilities of reaching NPAs or DPAs, which may include fines, but which also allows to avoid public trials and thus limits collateral damages for stakeholders.

In the U.S., the system of corporate criminal liability should be narrowed down in order to avoid power abuses from prosecutors. For the same purpose, prosecutorial negotiations and agreements should be standardized and their judicial control should be strengthened. In any case, prosecutors should prevent the investigation from finishing falsely, reaching agreements which contain mechanisms for sliding accountability at lower levels. Shifting risks toward the lower echelons of the corporate hierarchy,[47] which has been called reverse whistle-blowing,[48] is unacceptable from the point of view of the procedural guarantees of the indicted employees. And, it is also truly unfair because those who benefit the most from corporate crimes are normally those in control of the organization.

In my opinion, some continental countries imported the U.S. system thoughtlessly. In the U.S., with certain limitations, such as those marked by due process of law, the regime of corporate criminal liability can be useful to facilitate the investigation of corporate crimes and bringing legal entities to justice. On the contrary, in Europe, the equalization between firms and individuals overly hinders investigation and prosecution, and the strict principle of legality prevents negotiating with companies and makes it difficult to keep legal proceedings secret.

[46] Gómez-Jara Díez (2010), pp. 264f.

[47] Guidelines introduce strong incentives for managers to shift risks toward the lower echelons of the corporate hierarchy and leaders of the company with the company counsels' aid denouncing employees just to save the corporation, Nieto Martín (2008), p. 207.

[48] Laufer (2006), pp. 137ff.

Moreover, specifically in Spain, private individuals can initiate criminal actions that could mean the ruin of a corporation that has not committed any crime but just is indicted.

Consequently, substantial differences between European and the U.S. procedural systems may cause corporate criminal liability to change from a useful tool in the U.S. into an obstacle to criminal investigations in Europe.

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Minimum Procedural Rights for Corporations in Corporate Criminal Procedure

Dominik Brodowski

Abstract Criminal trials are special, as various procedural guarantees are only available if someone is charged with a criminal offense—but not in administrative or civil proceedings. These guarantees special to criminal justice range from the presumption of innocence over the privilege against self-incrimination (nemo tenetur se ipsum accusare) to the high standard of proof required for a criminal conviction. Whether and to which extent these guarantees apply in criminal proceedings against legal persons is primarily a question of criminal policy. There are, however limits enshrined in constitutional and human rights law, which also protect legal persons (1). If the legal consequences a legal person faces are limited to incapacitation and restitution, the constitutional and human rights guarantees special to criminal proceedings are inapplicable. They must be adhered to only if the legal consequences include genuine punishment (2). In such cases, the right to a fair trial as well as other, more specific procedural guarantees are to be upheld similarly—but not necessarily equivalent—to criminal proceedings against natural persons, as the principle of individual guilt is limping and the core of the criminal law is not affected. Nemo tenetur and ne bis in idem protection may be enjoyed by the owners, but not necessarily by the legal representatives of a corporation (3). Finally, special care must be taken in order to avoid collateral damage to the criminal justice system overall and to the individual rights of innocent stakeholders in the legal entity. Instead, the trust in the criminal justice system should be strengthened by providing more guarantees—even if they are not constitutionally required (4).

D. Brodowski (✉)
Chair for Criminal Law, Criminal Procedure and Economic Crimes (Prof. Dr. Joachim Vogel), University of Munich, Munich, Germany
e-mail: law@dominikbrodowski.net

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1 Constitutional Law and Human Rights as Boundaries to Policy Options

1.1 Introduction

The different choices taken worldwide in the fight against corporate crimes show that it is primarily a question of criminal policy whether to introduce a genuinely criminal liability against corporations[1] into criminal codes.[2] Furthermore, there is—*de lege lata*—no requirement of European primary or secondary law to introduce corporate criminal liability, even though many EU secondary law provisions call for "effective" and "dissuasive" sanctions.[3] On the other hand, I do not see a prohibition to introduce some concept of genuine criminal liability for legal persons in Germany—neither a prohibition stemming from constitutional law, nor from logic,[4] nor from dogmatics.

However, the legislator is not free to introduce just any regulatory model that comes to his mind. In those countries where the legislator is bound by constitutional law—that is when there is some form of entrenchment clause and constitutional codification—such higher-ranking norms provide "crash barriers" to the legislative when enacting statutes on corporate criminal liability and to the judiciary when they implement these statutes.[5] Moreover, most states have agreed to oblige to global (UN International Covenant on Civil and Political Rights—ICCPR) and/or regional (such as the European Convention on Human Rights, as amended—ECHR) human rights instruments. It is a much more blurred picture to what extend these instruments contain normative and factual obligations to the legislative and to the judiciary. At minimum, they contain "traffic lines" which legislators tend not to cross; at maximum, there is a primacy of the international instrument leading to violating statues being derogated or being inapplicable.[6]

[1] Other legal entities—such as political parties, welfare organizations, or terrorist groups—which may or may not fall under a criminal liability of legal persons, depending on the policy choices of the legislature, are excluded from this analysis.

[2] See, inter alia, Tiedemann, in this volume, pp. 11ff.; Vogel (2012).

[3] See, inter alia, Tiedemann, in this volume, pp. 11ff.; Engelhart, in this volume, pp. 53ff.

[4] Schünemann (2013), p. 200 argues against naming it "criminal punishment" (*Strafe*) for the fear of masking differences between criminal liability of legal and of natural persons. This can be mitigated, though, by Tiedemann's proposal (in this volume, pp. 11ff) to use a distinct denomination for a third track of criminal justice. Moreover, the same denomination—"*Geldbuße*"—is currently used for the sanction imposed for menial infractions by natural persons and for all kinds of infractions by legal persons!

[5] Moreover, according to the so-called Radbruch's formula (1946), there is an intrinsic "crash barrier" to law so that evidently unjust provisions cannot be considered law.

[6] Grabenwarter and Pabel (2012), § 3 II.

But do these "crash barriers" or "traffic lines" actually apply to laws governing corporations? The picture in Germany—which shall serve as an example in the following discussion—is mixed.

1.2 German Constitutional Law

In Germany, Art. 19 III GG[7] stipulates that the fundamental rights also apply "to domestic artificial persons to the extent that the nature of such rights permits". Three aspects are important here: First of all, the level of protection differs from natural persons, depending on the "nature" of the fundamental rights. Secondly, only some legal persons enjoy explicit protection by fundamental rights—only domestic and, by reasons of EU law, EU legal persons, but not foreign legal persons. Thirdly, it is argued that this provision only applies to the fundamental rights enshrined in Art. 1 to Art. 18 GG, such as the right to property (Art. 14 GG) and to occupational freedom (Art. 12 GG). In contrast, the other, (few) procedural and criminal justice guarantees, such as the specific provisions on *nulla poena sine lege* (Art. 103 II GG), *ne bis in idem* (Art. 103 III GG) and especially to a right to a hearing in court (Art. 103 I GG), are considered to be applicable to all judicial persons, domestic and foreign, as long as they are capable of being party to a legal proceeding in Germany.[8] The extent of this procedural protection, however, may still be reduced as compared to natural persons.[9]

1.3 ECHR

The ECHR draws a somewhat clearer picture: The jurisdiction *ratione personae* of the ECtHR extends to "any person, non-governmental organisation or group of individuals"—therefore also to legal persons—"claiming to be the victim of a violation … of the rights set forth in the Convention or the protocols thereto" (Art. 34 ECHR). Moreover, the Charter does not distinguish between foreign or domestic legal entities.[10] Regarding *ratione materiae,* one provision specifically mentions that "every natural *or legal person*" is entitled to a specific right (Art. 1 I ECHR-Protocol No. 1). For other provisions—such as the right to a fair trial (Art. 6 ECHR)—the jurisprudence of the ECtHR tends to extend the protection to legal

[7] Grundgesetz—German Basic Law, as amended. Translation by Tomuschat and Currie, available at http://www.gesetze-im-internet.de/englisch_gg/index.html (12.2.2014).

[8] BVerfGE 12, 6 (8); most recently BVerfG NVwZ 2008, 670 (670); for the similar discussions in Spain and the consequences for corporate criminal procedure see Gómez Colomer (2013).

[9] Jarass (2012), Art. 19 para. 15; Arzt (2003), pp. 456 f.

[10] ECtHR, judgement of 13.12.2007, application 40998/98, §§ 81, 82.

persons again depending on the "nature" of the fundamental right.[11] Again, the level of protection may differ between natural and legal persons.[12]

1.4 CFR

The Charter of Fundamental Rights of the European Union (CFR) is less explicit on this matter. Following from its roots—especially the ECHR and the jurisprudence by the ECtHR—the CFR is interpreted to also extend its protection to legal persons whenever the "nature" of the fundamental right fits also to them.[13] More problematic and beyond the scope of this contribution, though, is the question whether the CFR is applicable to criminal proceedings and to national criminal policy decisions.

1.5 ICCPR

In contrast, the ICCPR completely excludes legal persons from its system of protecting fundamental rights, as they lack standing under the ICCPR and the Optional Protocol to bring forward complaints that their rights have been infringed.[14] According to the Human Rights Committee (HRC), this procedural finding also means that the ICCPR does not contain *material* protection to legal persons.[15] With the position of the HRC being clear on this matter, I will exclude the ICCPR from the following analysis.

2 Whether a Criminal Procedure Is Required Depends on the Legal Consequences

These barriers to policy decisions exist not only regarding criminalization—that is, the question of whether some behavior by a corporation is a crime and may be sanctioned—but also regarding the procedure leading to the legal consequence. Therefore, a fundamental question needs to be addressed first, before tackling specific criminal procedure guarantees: Does the imposition of a legal consequence

[11] Grabenwarter and Pabel (2012), § 17 para. 5; Van Kempen (2010), p. 3.
[12] Van Kempen (2010), p. 3.
[13] Borowsky (2011), Art. 51 para. 35.
[14] Van Kempen (2010), p. 2.
[15] Cf. Van Kempen (2010), p. 3.

against a corporation actually need to occur in a criminal proceeding?[16] This question depends—at least from a constitutional and human rights perspective—on the kind of legal consequence to be imposed.

2.1 Incapacitation

In regard to natural persons, incapacitation—that is the prevention of future offending by the same offender—is most prominently achieved by incarceration or by death penalty. Both options are obviously not applicable to legal persons. In the economic area, however, other incapacitation means are readily available and utilized, such as decisions disqualifying someone to run a business or dissolving a legal person—i.e. winding it up—or forfeiting contraband and tools of crime.

2.1.1 Incapacitation by Disqualification to Run a Business, by Winding Up the Entity or by Supervision

In Germany, but also in other countries, businesses may be closed or business licenses be withheld if the entrepreneur is not "reliable" (e.g. § 35 GewO) or "suitable"[17]; alternatively, businesses may have to be handed over to an agent who is reliable (e.g. § 35 II GewO).[18] These are preventive measures *par excellence,* which aim at whether the entrepreneur will in future act in accordance with the laws and minimum business standards. When trying to predict the future, one aspect taken into account regularly is past or present business-related criminal behavior, such as tax evasion or social security fraud.[19] Even if the entrepreneur was not culpable for these crimes, he may be found "unreliable" to conduct business in future.[20] All these—extensive—provisions apply to natural and legal persons alike.[21] Therefore, the special provisions on the dissolution of legal persons (e.g. § 62 GmbHG, § 38 KWG, §§ 7, 17 VereinsG) have hardly any relevance in practice.

From a constitutional and human rights perspective, such measures do not infringe in property but only in business expectations. Therefore, such actions are

[16] It should be noted that sanctioning corporations—and therefore legal proceedings against them—may be the rather the exception than the rule, as the mere threat of criminal sanctions intends to pressure corporations to enforce criminal compliance etc.

[17] So in Sweden regarding the license to sell alcoholic beverages, cf. ECtHR, judgment of 07.07.1989, application 10873/84; § 28.

[18] On this basis, administrative authorities may already impose a model of supervision ("*Unternehmens-Kuratel*") as suggested by Schünemann, most recently 2013, p. 200.

[19] See, inter alia, Ennuschat (2011), §§ 37–58 with many further references.

[20] Ennuschat (2011), § 37.

[21] Cf. Ennuschat (2011), §§ 94–98 with further references.

to be reviewed on the basis on the right to occupational freedom (Art. 12 GG).[22] In contrast, while Art. 1 I ECHR-Protocol No. 1 "does not guarantee the right to acquire [more] possessions",[23] it considers business licenses to be a possession in the meaning of this provision.[24]

Even though a disqualification to run a business is a very severe legal consequence, the proceedings leading to such a decision are *not* considered to be criminal.[25] The decision may be made by administrative authorities, to whom a broad margin of appreciation is given to pursue the "general interest of the community".[26] However, § 35 III GewO stipulates that *if* a criminal proceeding was completed beforehand[27] and *if* a criminal court speaks on the facts or the prognosis of future crimes in its decision, the authorities are bound by this decision. In general, though, all that is procedurally required from the perspective of German and European human rights law is the right to legal review in a fair trial (Art. 19 IV GG, Art. 6 ECHR).

2.1.2 Incapacitation by Forfeiture of Contraband

A different measure directed at incapacitation is forfeiture of contraband (e.g. § 75 StGB). This is considered to be a "non-punitive preventive measure, regardless of culpability and ownership" and aiming at "restor[ing] legality".[28] As dangerous, harmful or otherwise illegal property is affected, owners enjoy less protection under constitutional and human rights law. Therefore, forfeiture of contraband is rightly seen as "a natural candidate for a 'police' or 'administrative forfeiture' [where only] judicial review must be guaranteed – but not necessarily in criminal courts and in criminal procedures."[29]

2.2 Monetary Restitution of Victims and Forfeiture of Proceeds of Crime

As far as someone enjoyed unjust enrichment to the detriment of another, it is a common principle to hold them liable to restitution. While this is a classic aspect of

[22] See, inter alia, BVerwG, judgment of 16.03.1982—1C 124/80.

[23] ECtHR, judgment of 13.06.1979, application 6833/74, § 50.

[24] ECtHR, judgment of 07.07.1989, application 10873/84, § 53; and elsewhere.

[25] See, inter alia, ECtHR, judgment of 07.07.1989, application 10873/84, § 46.

[26] See, inter alia, ECtHR, judgment of 07.07.1989, application 10873/84, §§ 59, 62 f.

[27] BVerwG GewA 1964, 247, p. 248; VG Stuttgart GewA 2011, 443. However, if administrative authorities act quickly enough, they are not bound by the findings of criminal proceedings, even if the administrative decision is later on challenged in court (cf. Ennuschat 2011, § 188).

[28] Vogel (2014).

[29] Vogel (2014).

private law, authorities more and more step into this area (§ 111b V StPO; § 73 III StGB): On the one hand, they freeze or forfeit property with the aim to alleviate the restitution of victims. On the other hand, any unjust enrichment not claimed by victims remains unjust—and it is therefore "at least a matter of equity that the property-holder is not entitled to retain ill-gotten gains." Because of this civil law background, the "constitutional regime which governs proceeds forfeiture is shaped by the constitutional protection of property".[30] Therefore, in principle, only the procedural guarantees known from civil proceedings apply, most importantly the right to a fair trial (Art. 6 ECHR).

2.3 Punishment

Leaving aside the minefield of cases where incapacitation measures are intertwined with punitive elements, I will now address legal consequences which may constitute punishment from the German and from the ECHR perspective; regarding the latter, we need to take the *Engel* criteria[31] of the ECtHR into account.

2.3.1 Forfeiture of Instrumentalities or Tools of Crime

Forfeiture of instrumentalities or "neutral" tools of crime cannot fully be justified by incapacitation or by unjust enrichment.[32] That by itself does not make forfeiture unconstitutional or incompatible with human rights, but it "must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right".[33]

From a procedural perspective, it is clear that at least civil justice procedural protections—including the right to judicial review and to a fair trial—apply in these cases,[34] but the protections actually need to be elevated to the level of criminal justice: One weak indication is whether the national legislature chose to consider forfeiture of instrumentalities to be criminal punishment.[35] Regarding the second *Engel* criterion—the nature of the offense—the ECtHR looks at whether the measure is targeted at someone suspect of wrongdoing, as only then the measure can punish and deter.[36] In regard to the third *Engel* criterion, which considers the

[30] Vogel (2014).

[31] ECtHR, judgment of 08.06.1986, application 5100/71 et al., § 82.

[32] Vogel (2014).

[33] ECtHR, judgment of 05.05.1995, application 18465/91, § 36.

[34] ECtHR, judgment of 05.05.1995, application 18465/91, § 52; ECtHR, judgment of 24.10.1986, application 9118/80, § 65.

[35] ECtHR, judgment of 04.11.2008, application 72596/01, § 60 (at end).

[36] See, inter alia, ECtHR, judgment of 21.02.1984, application 8544/79 et al., § 53.

"degree of severity of the penalty that the person concerned risks incurring [, the] ... seriousness of what is at stake",[37] the ECtHR regularly refers to the risk of imprisonment[38]—which is, however, not present in case of forfeiture proceedings against innocent third parties.

What follows from this? According to the ECtHR, those *innocent* of a crime may enjoy less protection in forfeiture proceedings—a highly questionable outcome. Instead, it would be much more consistent to apply the same guarantees to *all* forfeiture proceedings.[39]

2.3.2 Fines

A much clearer picture relates to non-minor pecuniary sanctions; independent of how they are named ("Geldbuße", "Verbandsgeldstrafe", etc.). When taking a constitutional and human rights perspective, such sanctions only infringe the property directly.[40] However, as fines are imposed without a direct link to incapacitation, without a direct link to forfeiture of contraband, instrumentalities or other proceeds of crime, and without any other legitimacy as to regulate behavior by punishing and by deterring, such fines *always* constitute a criminal sanction. Therefore, in proceedings leading to criminal fines, criminal procedure guarantees must be applied.

2.4 Conclusion

From a constitutional law perspective, the legislature has the choice: If it decides to limit the liability of legal persons for criminal behavior to incapacitation and restitution—which is enough in order to achieve the goal that "crime must not pay"[41]—no criminal proceedings and no criminal procedure guarantees are required. As these legal consequences may also be very severe, however, there is a strict constitutional and human rights requirement to legal review including a fair trial (Art. 19 IV GG, Art. 6 ECHR). Moreover, legislators are free—and, as we will see below, wise—to grant more procedural guarantees also in cases where there is no strict constitutional or human rights requirement to do so.

[37] ECtHR, judgment of 08.06.1986, application 5100/71 et al., § 82.

[38] See, inter alia, ECtHR, judgment of 08.06.1986, application 5100/71 et al., § 85; ECtHR, judgment of 04.11.2008, application 72596/01, § 60.

[39] Vogel (2014).

[40] Indirectly, both the threat of punishment and the actual verdict may also infringe other constitutional guarantees.

[41] Vogel (2014).

If, instead, the legislature decides to introduce also a punishing element—as is the case in many modern criminal justice systems, including the German *lex lata*—criminal procedure guarantees are applicable, also when these legal consequences are targeted at legal persons.

3 Procedural Rights for Corporations

3.1 No Equal Protection of Legal Persons

In the next step, the extent of criminal procedure protection needs to be determined. Before addressing a few, selected individual guarantees below, general principles of German constitutional and European human rights law show that corporations do not necessarily enjoy the same level of protection as natural persons, even if criminal procedure guarantees are applicable.

3.1.1 Influence of Art. 5 ECHR and the "Hard Core of Criminal Law"

When discussing the severity of infringements to the criminal procedure guarantees enshrined in Art. 6 ECHR, the ECtHR regularly takes into account the risk of imprisonment and the interrelation with Art. 5 ECHR.[42] In other words: the protections offered by Art. 6 ECHR are regularly amplified by Art. 5 ECHR in "normal" criminal procedure law, where the liberty and freedom of natural persons are at stake. In contrast, sanctions against legal persons directly relate to occupational freedom and to property only. In a similar context—where only a criminal tax-surcharge penalty against a natural person was at stake—the ECtHR held that such a proceeding and that such penalties "differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency".[43] Due to the missing amplification of Art. 6 ECHR by Art. 5 ECHR, the same holds true in criminal cases against corporations.[44]

3.1.2 Limping Principle of Individual Guilt

The German Constitution does not contain explicit references to several classic guarantees of criminal procedure. Instead, the German Constitutional Court and legal scholars regularly refer to other basic rights and especially to a constitutional

[42] See already above at footnote 38.
[43] ECtHR, judgment of 23.11.2006, application 73053/01, § 43.
[44] Similarly Van Kempen (2010), p. 3.

"principle of individual guilt" (*nulla poena sine culpa*; *Schuldprinzip*). According to the German Constitutional Court, this "principle is anchored in the guarantee of human dignity and personal responsibility . . . as well as in the principle of the rule of law".[45] While the rule of law, as an objective standard, applies to all proceedings against natural and legal persons alike,[46] human dignity and personal responsibility is deeply linked to human beings and, seemingly, unavailable to legal persons.[47]

However, legal persons are merely fictional constructs, and behind each legal person's veil there are natural persons,[48] namely the owners. For their assets and their property are inherently linked to the value of their corporations: If the corporation faces 1,000,000 EUR in punishment, the company is 1,000,000 EUR less worth, and because of that the owners themselves own (approximately[49]) 1,000,000 EUR less as well. These owners—and their rights to human dignity—therefore also need to be taken into account.[50] This means that the principle of individual guilt may also be based on the protection of the human dignity and personal responsibility when a legal person faces punishment; as this line of reasoning is an indirect one, though, it can validly be stated that the "principle of individual guilt" is limping in corporate criminal liability. Therefore, criminal procedure guarantees do not necessarily apply with their full stringency.

But what about other stakeholders in a company besides the owners, such as the legal representatives, or innocent employees of the company? Detriments to innocent third parties are, in principle, no reason against criminal liability or against criminal punishment: If someone is guilty of manslaughter and faces 10 years of imprisonment, he is sent to prison even if his children will then have to depend on social security. However, these detriments may and must influence the sentencing phase. Therefore, to stay with the same example, alimony obligations are deducted when the amount of a fine is calculated in Germany.[51] In a corporate criminal legal context, this means that effects to innocent third parties—such as employees of a legal person—must be taken into account in the sentencing phase, but they have no

[45] German Constitutional Court, judgment of 19.03.2013—2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11—and accompanying English press release.

[46] See, *inter alia*, in reference to *nulla poena sine culpa* and legal persons, BVerfGE 20, 323.

[47] Cf. BVerfGE 95, 220 (242); BVerfGE 118, 168 (203).

[48] Van Kempen (2010), pp. 7 ff.; see also Dürig, cited in Remmert (2013), Art. 19 GG at 113: Protecting the human rights of legal persons "is not done for the 'fictions' sake [but . . .] 'for the humans' sake'".

[49] The shareholder value, as determined by the stock market, takes a future perspective and may price-in looming financial penalties in advance.

[50] The jurisprudence by the ECtHR on the procedural standing of individuals in light of Art. 34 ECHR ("victim") to bring forward claims on the corporations behalf—which it only accepted for sole owners or two brothers as owners, cf. ECtHR, judgment of 28.03.1990, application 10890/84,§ 49; ECtHR, judgment of 15.11.2007, application 72118/01, §§ 125–126—does not preclude the *material* position taken here.

[51] Häger (2006), Vor §§ 40 bis 43 para. 43; § 40 para. 54 ff.

influence on the question of whether criminal liability exists and on criminal procedure guarantees to be granted to the suspect.[52]

3.1.3 Conclusion

While corporations enjoy criminal procedure guarantees in criminal procedure in principle, the level of protection may be lower than what natural persons enjoy, as the "hard core of criminal law" is unaffected, imprisonment is not at stake and human dignity is only affected when the veil behind a legal person is lifted. Inasmuch human dignity and personal responsibility are affected, it are the owners—and neither the legal representatives nor the employees—who enjoy the protection of criminal procedure guarantees.

3.2 Standard and Burden of Proof

The presumption of innocence enshrined in Art. 6 II ECHR—which is one of the ECHR provisions only applicable in a criminal justice context—also contains a guarantee that "the burden of proof is on the prosecution, and any doubt should benefit the accused".[53] The German constitution does not contain an explicit reference to a presumption of innocence; instead, it is considered to be an essential part of the aforementioned principle of individual guilt.[54] However, neither European nor German law consider this to be an absolute right, especially if only pecuniary penalties are at stake and as long as the shifts in the burden of proof remain "reasonable".[55] Contrary to Drope,[56] these requirements may more easily be met in the context of corporate criminal liability.

3.3 Right Against Self-Incrimination (Nemo Tenetur)

The right against self-incrimination is not considered to be a fundamental right applicable to legal person in the jurisprudence of the German Constitutional Court,

[52] Similarly, ECtHR, decision of 14.02.2006, application 23055/03, held that a company's director and employee of a corporation who "was not its owner" had no standing regarding an alleged fair trial violation affecting the corporation.

[53] ECtHR, judgment of 6.12.1988, application 10590/83, § 77; regarding the applicability of Art. 6 II ECHR to corporations cf. the jurisprudence cited by Van Kempen (2010), p. 15 footnote 70.

[54] BVerfGE 9, 167 (170).

[55] Cf. BVerfGE 9, 167 (170); BVerfGE 56, 37 (49–59); ECtHR, judgment of 11.07.2006, application 54810/00, § 117; Grabenwarter and Pabel (2012), § 24 para. 126.

[56] Drope (2002), pp. 305 ff.

as it considers its basis to be the human dignity of the accused.[57] As regards the ECHR, no clear view regarding *nemo tenetur* protection for legal persons has emerged yet.[58] However, the ECHR seems less strict in the application of this guarantee overall, as the ECtHR takes into account "the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put".[59] Considering that corporate criminal liability is not at the core of criminal justice and that the liberty of a person is not at stake, I disagree with *van Kempen*[60] and do not consider legal persons to enjoy the same level of *nemo tenetur* protection as natural persons under the ECHR.

The legal person cannot disclose information itself anyway, but can only act through natural persons. Therefore, the main question on *nemo tenetur* is who individually enjoys the protection: Usually, the legal representatives are mentioned in this context.[61] However, it was shown above that the human dignity implications are linked to the *owners* instead, as any punishment to the corporation directly passes through as detrimental to their property.[62] The following example may underline my argument why we must not focus on the legal representatives: Let us assume A is employed by shopkeeper B as his right hand. A watches B bribing officials. In such a case, A has no right to remain silent regarding B's misdeeds, even if B's conviction will lead to his unemployment. Now, let us assume that B transforms his business to a Ltd., and continues to bribe officials. The economically motivated, fictitious creation of a legal person cannot change the picture in terms of human rights protection: If B or the legal entity B owns faces criminal punishment; A has no fundamental right to remain silent,[63] unless he himself has to fear individual criminal sanctioning.

But does every shareholder in a company enjoy full *nemo tenetur* protection—and usually members of the board, legal representatives and even many employees hold stocks in the company they work for—? First of all, the principle of individual

[57] BVerfGE 95, 220 (242); BVerfGE 118, 168 (203); this jurisprudence is criticised, inter alia, by Weiß (1998). See also Böse (2002) and Drope (2002), pp. 179 ff. on the constitutional basis of nemo tenetur.

[58] Van Kempen (2010), pp. 15 f. Contrary to Engelhart (2012), p. 475, this does not follow from ECtHR, judgment of 27.10.1993, NJW 1995, 1413, as this judgment only concerns the right to be heard.

[59] ECtHR, judgment of 11.07.2006, application 54810/00, § 117.

[60] Van Kempen (2010), p. 16.

[61] See, inter alia, Engelhart (2012), p. 476 with extensive references.

[62] Similarly, Minoggio (2003), pp. 128 f extensively refers to the detrimental effects to owners, while still maintaining the legal representatives (and additional high-ranking employees) may remain silent.

[63] Contrary to Weiß (1998), p. 296, there is no (valid) moral conflict *within* a legal representative of a corporation, as it is not his company—but only his employer—which faces punishment. See also Arzt (2003), pp. 457 f., Ransiek (1996), pp. 357 ff.

guilt is limping in corporate criminal liability. Therefore, *nemo tenetur* is open to exceptions in this context. If the implications to him personally are minimal, there seems to be a valid ground for an exception to *nemo tenetur*.

3.4 Ne Bis In Idem

In a similar vein, the *ne bis in idem* protection must be viewed: If a legal representative or an employee, who does not own any shares in the company, faces individual criminal liability in addition to the company facing criminal liability, the punishment is addressed at two different "hats" and therefore does not constitute double jeopardy. In contrast, if someone owning a company is fined individually 1,000,000 EUR and his company faces the same penalty, his wealth is reduced by 2,000,000 EUR, which evidently causes *ne bis in idem* implications. As this guarantee is not absolute even when it relates to natural persons, there is, however, no general obstacle to prosecute both the corporation and its owners. However, when sentencing the owner for his individual participation in a crime, the punishment he already had to bear because of the detrimental effects to the shareholder value needs to be taken into account.[64]

4 Side-Effects, Spill-Overs and Collateral Damage to the Criminal Justice System

As we have seen, corporations do enjoy some level of protection in terms of criminal procedural rights—but not necessarily the same level of protection. The legislator, however, is free to grant legal persons a higher standard of protection than what is required constitutionally. In this conclusion, I will briefly explain why granting corporations a higher level of protection is actually a wise choice.

First of all, punishment of legal persons causes severe side-effects to innocent stakeholders in the company—this is well known. A distinct danger, though, lies in the erosion of common standards in criminal justice systems: At minimum, differences in the level of human right protection and procedural guarantees create a higher burden to give sound reasons on why they are necessary in one context but not another. Additionally, one has to worry that any deviation in one area of the criminal justice system—proceedings against corporations—may create normative and factual pressure to lower the standards also in other areas—in proceedings against natural persons.[65]

[64] Similarly Engelhart (2012), pp. 458 f. with extensive references.

[65] Schünemann's (2013), p. 200 criticism targets a similar aspect.

Secondly, corporate criminal liability may call to mind the severe effects incapacitation and even incapacitation without detention can cause. If all assets of a person are frozen or if all his employment opportunities are gone, the situation may well be much worse for the offender than if he had to pay some small criminal fine. Therefore, corporate criminal liability—which mainly affects, as we have seen, property and occupational freedom—will hopefully cause "spill-overs" and lead to better procedural protections for natural persons facing preventive measures such as being listed for "targeted sanctions".

Finally, there are reasons of why there is a call for criminal punishment against corporations—and these reasons are not necessarily only rational. Instead, it is also a matter of emotion and attribution of what is meant by "criminal" in the term "criminal sanction". One aspect deeply and emotionally embedded in many legal cultures worldwide is a high respect in criminal decisions, their accuracy and their moral integrity—at least whenever such decisions are handed down after fair and balanced proceedings. Some legal systems even provide a *normative* assumption that criminal judgments are of higher factual accuracy. The criminal justice systems must stand up to these expectations, to the factual and normative trust vested in them. As has been shown elsewhere, extensive procedural guarantees are a key cornerstone to provide the moral high ground, and to provide a high quality and factual accuracy in the decisions.[66] Therefore, one can validly say that criminal trials are meant to be difficult for the prosecution when criminal trials are to achieve all aims of *criminal* justice beyond pure crime control.[67] If societies choose willingly to regulate corporate behavior by the difficult path of *criminal* justice instead of administrative or civil justice, they also willingly choose *criminal* trials against corporations "not because they are easy, but because they are hard".[68]

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[66] Brodowski (2012), pp. 115 f.

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Compliance Programs as Evidence in Criminal Cases

Jordi Gimeno Beviá

Abstract Nowadays, everybody knows that compliance programs are a very important element for corporations to avoid corporate criminal liability. The traditional view that compliance programs are "legally irrelevant" has been widely overcome. On the other hand, a "full due diligence defense", based on the mere existence of a compliance program (even if it is a "window dressing" program), would make it impossible to convict a corporation because if it proves that it has met the minimum requirements for an "effective" compliance program (in the U.S., the requirements of the U.S.S.G), under this approach, the corporation could not be criminally liable. So, once both proposals have been rejected, it is necessary to decide how courts should evaluate compliance programs. Section 1 of this research discusses the admission of compliance programs as relevant proof on criminal procedure and the burden and the standard of proof. Section 2 analyzes how through compliance programs, courts can determine corporate criminal liability when the employee acted "with an intent to benefit the corporation" or if he acted "within the scope of employment".

1 The Admission of Compliance Programs as Relevant Evidence

One of the most common problems in corporate criminal liability is to determine whether the employee was acting on behalf (on the scope of his authority) or with the intent to benefit the corporation. This decision is crucial because if the court

J. Gimeno Beviá (✉)
Universidad de Castilla-La Mancha, Toledo, Spain
e-mail: jordi.gimeno@uclm.es

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considers one or both of these elements of the criminal offense to be fulfilled, the company itself has a good chance to be held criminally liable.

To verify the existence of these elements, as well as to determine whether the corporation has acted with "due diligence", the court should deeply check all the requirements of the compliance program of the corporation, and if that program is truly effective and has been successfully applied.

For this purpose, the court must be allowed to consider all evidence that is relevant to the question of whether to impute the actions of the employee to the corporation. It should freely asses all the elements and circumstances of the criminal offense and the requirements of the compliance program. It is not appropriate that the lawmaker gives a strict regulation for assessing evidence.

In accordance with the "Relevant Factor Approach" (a theory that was developed by Professor Huff), the court must be allowed to consider the compliance program together with the other criminal evidence. Compliance is useful and relevant because through it, the court can consider whether the employee acted within the scope of his authority; and whether the employee acted with the intent to benefit the corporation.[1]

However, these elements of the criminal offense should be narrowly interpreted by jurisprudence, in order to avoid problems of interpretation, which would be caused by a too wide understanding of the concept.

Obviously, if the corporation does not have a compliance program, it will be very difficult to check the concurrence of these elements of the criminal offense. So, first of all, the corporation must show that its compliance meets legal requirements (for example, in the United States, the U.S.S.G). If the court notes that the requirements have not been met, the compliance program will not be considered as useful evidence that helps the corporation to avoid criminal liability.[2]

Moreover, whenever the crime has been committed by corporate management or high-level personnel it is easy to conclude that the compliance program is non-effective and most probably the corporation will be held criminally liable.[3]

1.1 The Burden and the Standard of Proof

In the first instance, it is logical to think that the burden of the proof should rest with the corporation because it is primarily responsible for the program and, "*a priori*", it is in a better position to produce exculpatory evidence. Nevertheless, this possibility would be contrary to the presumption of innocence because, in criminal procedure, the burden of proof rests on the prosecutor not on the defendant, ergo, "*Ei*

[1] Huff (1996), p. 1284.

[2] Saltzburg (1991), p. 434.

[3] *Continental Banking Co. v. United States, 281F.2d 137, p. 149 (6th Cir. 1960).*

incumbit probatio qui dicit, non qui negat" (the burden of proof lies with who declares, not who denies).

However, this is a problematic issue, since in comparative law there are two different systems about on whom the burden of proof should rest:

1.1.1 The Burden of the Proof Lies on the Prosecutor: American Model

The U.S. experience shows, unlike civil proceedings in which the plaintiff does not have any discovery available, that in criminal procedure the prosecutor has access to information and evidence, including the compliance program of the corporation, by two different ways:

a) In the U.S., if a corporation decides to cooperate with the government's investigation it can avoid prosecution and indictment.[4] Therefore, most corporations provide relevant information and evidence in order to reach a Deferred Prosecution or Non Prosecution Agreement (DPA or NPA) with the prosecutor. If the corporation fulfills the agreement, it will not be prosecuted; if it fails instead, the prosecutor will be able to use all the information and evidence provided by the corporation against it.
b) If the corporation refuses to cooperate with the government's investigation, the prosecutor can request through the grand jury the disclosure of any and all corporate records related to the corporate compliance program. The corporation must produce all the documents and evidence required by the grand jury (under *subpoena duces tecum*) because, if it fails to comply with the grand jury, it can face contempt of court charges. In practice, the government has had no problems in obtaining enough evidence to charge the corporations. Even in *Arthur Andersen, LLP v. United States*, one of the most important cases on corporate crime, "the government amassed ample evidence regarding the company's failed compliance program".[5]

In our opinion, this model is very difficult to export to Spain and other countries under civil law. Firstly, as cooperation with the authorities is just a mitigating factor in Spain, and does not grant immunity, it offers a poor incentive to corporations.[6] Secondly, in Spain, a corporation which refuses disclosure is not committing a criminal contempt of court, inasmuch as, unlike the American legal system, the corporate defendant has the right against self-incrimination and the right not to provide evidence.

[4] See the "Principles of Federal Business Organizations" 9-28.700 "The value of cooperation". In Spain, cooperation is just a mitigating factor under the art. 31 bis.4 CP.

[5] Weissman and Newman (2007), p. 450.

[6] This is because in Europe governs the principle of mandatory prosecution and in the U.S. governs the principle of discretionary prosecution.

It is important to comment that in the U.S. 95 % of cases are solved in pre-trial stage, often by plea agreements or DPAs and NPAs.[7] Hence, the burden of proof, which is a capital issue in our legal system, is not the key in corporate crime cases.

1.1.2 The Burden of Proof Lies (Sometimes) on the Corporation: Italian Model

Focusing on civil law systems, we will discuss the Italian model. While corporate liability in Italy is only of an administrative character, it must be proved by the process denoted by criminal procedure.[8] Italy, in cases of corporate crime, changes the burden of proof when the crime is committed by corporate management, but not when it is committed by their employees. Therefore, in some cases the burden of the proof rests on the corporation, so there is a "partial" change in the traditional principle "*ei incumbit probatio qui dicit, non qui negat*".

This change is notorious at the beginning of the art. 6 Dlgs. 231/2001 that says "the corporation is not liable if it proves. . ." ("*l'ente non risponde se prova. . .*"). So, when the prosecutor considers that the crime has been committed by upper level management, the burden of the proof rests on the corporation, which, first, should prove that it has implemented an effective policy to deter and detect criminal misconduct, in practice a compliance program ("*Modelli di organizzazione*").[9]

This change on the burden of proof might damage the presumption of innocence, a fundamental principle also recognized in the art. 27 of the Italian Constitution. However, the Supreme Court ("*Tribunal Supremo*") of Italy considers that it does not violate the equality principle and the right to an effective defense.[10] It also considers that, in fact, there is not any change on the burden of proof because foremost it is the prosecutor who must prove that the crime the corporation has been charged with was committed by high-level personnel.[11]

But, why does this change on the burden of proof only happen when the crime is committed by upper management? Why does this model not apply when the crime is committed by other employees? In reality, the answer is pretty logical. Depending on whether (1) the offense is committed by upper level management or (2) by a regular employee, the offense differs from a structural point of view, as discussed below:

a) In the first case, the compliance program seems a mere excuse, just a "window dressing" program. It is reasonable to think that, when the offense is committed by upper level management, there is not any compliance program or it is non

[7] See the Statistics of United States Sentencing Commission.

[8] It is like a criminal "hidden" liability. Some Italian authors consider that this model means a "label fraud" ("*frode delle etichette*").

[9] See also Cerqua et al. (2010), p. 137.

[10] See *Cass. Pen., sez. VI, 18 febbraio 2010, n. 27735*.

[11] Agnese (2010).

effective.[12] So, the burden of proof rests on the corporation, because the lack or ineffectiveness of the program is assumed and the corporation must prove the opposite.

b) In the second case, the lack of control is an essential factor of the offense attributed to the corporation so the prosecutor should prove that lack of control.[13] As in this case there is not any presumption about the absence of a compliance program, the burden of the proof does not change, so it lies on the prosecutor.[14]

As can be seen, the Italian model is more compatible with the Spanish criminal procedure. So, in brief, the corporation just should simply prove that it has a compliance program, but the effectiveness or ineffectiveness should be proven by the prosecutor as everyone is entitled to the presumption of innocence, no one can be forced to a "*probatio diabolica*" of the negative facts.

In another vein, the standard of proof must clearly overcome the presumption of innocence. In the United States, in criminal proceedings, the prosecution must prove its case beyond a reasonable doubt to obtain conviction, so there is a higher standard of proof. The reason is that the social cost of a false conviction exceeds the cost of a false acquittal.[15] If the culpability of the corporation is unclear, the Court must acquit the corporation applying the "*in dubio pro reo*" principle.

2 The Compliance Program as a Key to Determine Corporate Criminal Liability

2.1 "With an Intent to Benefit the Corporation"

To check whether the employee's intention is to benefit the corporation, it will be necessary to compare the acts of the employee with the acts of the corporation.[16] The result of that comparison is obtained by checking the compliance program. If the compliance program provides evidence that the employee acted contrary to the corporation policies, and that his action should be punished by the corporation through disciplinary sanctions, the court must conclude that the employee did not act with intent to benefit the corporation.

[12] They are the last responsible for implementing and developing it.

[13] In Spain, art. 31 bis. 4 of the Penal Code, the lack of control is an element of the offense. Also in Italy, art. 7.1 Dlgs 231/ 2001.

[14] Ambrosetti et al. (2009), p. 48.

[15] Khanna (1996), p. 1513.

[16] See *Standard Oil Co. v. United States, 307F.2d 120, 128 (5th Cir 1962).*

The corporation should not be liable for the offences committed by the employee if his intention is not to "serve the master" and neither when the corporation has not been benefited by that act.[17]

To analyze the factor "with an intent to benefit the corporation", the court should therefore consider two core issues:

a) There exists "intent to benefit" when the employee tried, directly or indirectly, to benefit the corporation, even when initially the action was just motivated by his own benefit.[18] So it is enough that the employee intends to provide some benefit to the corporation; it is not necessary that the benefit has been really obtained. In most cases, the employees are looking for their own benefit that casually may also benefit the corporation, although it is not their aim.[19]
b) To check that the employee's intent was to benefit the corporation, the court should find some nexus between the criminal actions of the employee and corporate policies. Through this nexus, the court can determine whether the employee has acted as an individual ("*motu propio*") or as a corporate agent.[20] Therefore, the court should look at the corporate policies (usually included in the compliance program) to verify whether the offense committed by the employee is in accordance to them.

For the rest, the "intent to benefit" is also considered when the offense is committed by the recklessness of the employee, if the corporate lack of control has been deliberate to obtain some benefit.[21]

2.2 "Within the Scope of Employment"

When the offense has been committed by upper-level management, it will be very difficult for the corporation to avoid criminal liability, except for the case in which the corporation proves that he has acted on his own, taking on functions outside his mandate. Additionally, the corporation must show that it has tried to detect and deter that conduct by all available means.

But if the offense has been committed by an employee, the compliance program will be useful to find out if the offense has been committed under the authority that the corporation has given to him or if the employee acted in a different way as established in corporate policies.

[17] Huff (1996), p. 1288.

[18] See *United States v. Gold, 743F.2d 800, 823 (11th Cir. 1984), United States v. Cincotta, 689F.2d 238, 242 (1st Cir.).*

[19] Arlen (1994), p. 834.

[20] Huff (1996), p. 1289.

[21] González-Cuéllar Serrano and Juanes Peces (2010), p. 4.

The delegation of authority on the employee, directly affects the principle of vicarious liability, because the corporation is allowing the employee to act on its behalf, so it is also responsible for the acts that he carry out under that authorization.[22]

In this case, also the factor "within the scope of employment" should be narrowly interpreted by court in relation to compliance programs:

a) Through analyzing compliance programs, the court may verify the level of authority that the corporation has initially delegated on the employee. For this purpose, the court should look at the position of the employee in the corporation and the functions assigned to that position at the moment when the offense was committed. If there is not any high level personnel involved in the offense, and the compliance program seems to be effective, this is a first indication that the employee was not allowed to act that way. It is clear that acting in contravention to corporate policies is totally outside his authority,[23] so it is easy to conclude that he has not acted on behalf of the corporation.
b) Compliance programs are also relevant to determine if the means chosen by the employee to develop his duties are like those allowed by the corporation; so the court should verify whether the action executed by the employee has been different from nature, place, time or embodiment of the action authorized by corporation.

In accordance with the Second Restatement of Agency from the USA, when the employee is allowed to carry out just some acts, it is considered that all those which differ are done outside his scope of employment.[24]

To identify whether the unauthorized act seems like these authorized within the scope of the employment, the court should check various elements: previous relationships between corporation-employee, whether the manager has a reason to expect the action carried out by his employee, the degree of departure from the normal practices and methods to accomplish the job, etc.[25]

These factors and others listed in the Second Restatement of Agency (228–230) are a relevant help to find out whether the employee was authorized to carry out that action or if instead he took on duties of his own accord.

[22] Laufer (1994), p. 654.

[23] *Restatement (Second) of Agency*, year 1985, 230.

[24] *Restatement Second of Agency 228 (2).*

[25] *Restatement Second of Agency* 229(2)(2).

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Part V
Transnational Enforcement of Corporate Criminal Liability

On Law Enforcement Through Agreements Between the US Regulatory Authorities and Foreign Corporations

Yurika Ishii

Abstract This chapter is concerned with agreements concluded between the regulatory authorities of the United States (the US) and non-US corporations for the purpose of obliging the latter corporations to comply with the US law. The major instruments are grouped into (1) plea agreements, and (2) deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs). While they are frequently used by the US authorities these days, they may conflict with the principle of territorial sovereignty, in particular when the law enforcement coerces the corporation to act in violation of the law of the local state. Moreover, such unilateral law enforcement may be regarded as a circumvention of a judicial assistance treaty between the US and the local state, if there is any. This contribution explores relevant scholarly works and cases, including the BAE case and the UBS case, in order to ascertain the justification of these legal instruments. It concludes that they could be best characterized as a supplemental network underlying the current mutual legal assistance regimes. At the same time, unless its law enforcement is supported by legitimacy and transparency, it will be difficult for the US to smoothly enforce its domestic law across the border.

1 Introduction: The Issue of Indirect Law Enforcement

This chapter is concerned with agreements concluded between the regulatory authorities of the United States (the US) and non-US corporations for the purpose of obliging the latter corporations to comply with the US law. Comparable attempts by other states are out of the scope of the present discussion. The major instruments are grouped into (1) plea agreements, and (2) deferred prosecution agreements

Y. Ishii (✉)
National Defense Academy of Japan, Kanagawa, Japan
e-mail: eureka@nda.ac.jp; eureka428@gmail.com

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(DPAs) or non-prosecution agreements (NPAs). These agreements are used as law enforcement tools, which is a matter of the US domestic policy. However, when it involves a foreign corporation, a rule under public international law in relation to which no serious controversy exists comes into play: a state may not exercise its jurisdiction in the territory of another state.[1] While there is a room for states' extending their reach of functional jurisdiction as long as it does not infringe sovereignty of the other states,[2] the use of these new devices appears to be a borderline case.

It seems necessary at this stage to review the essential characteristics of each agreement.

A plea agreement is concluded between the prosecutor and a criminal defendant whereby the defendant pleads guilty to the offense in exchange for some concession by the prosecutor.[3] The agreement in general includes the defendant's obligation to cooperate in the investigation. When a corporation enters into the bargain, it is usually accompanied by criminal fines, assets forfeiture as well as the maintenance of a compliance and ethics program. It is frequently used for cases of natural persons as it allows the parties to avoid a lengthy trial process. However, corporations are reluctant to enter into this agreement because it entails criminal conviction, which goes along with reputational risk, debarment and delisting from the stock exchange.[4]

Instead, the prosecutors have been making use of DPAs more actively in recent years.[5] A DPA is also a negotiated agreement, whereby the prosecutor defers the prosecution in exchange for a corporation's actions described below. Criminal charges are filed to the court, but they are to be subsequently dismissed when the corporation fulfills its obligation under the agreement.[6] In the case of NPAs, no criminal charges are filed,[7] of which the difference is not significant for the purpose of this contribution. This pre-trial diversion is authorized under the Speedy Trial Act of 1974[8] and the Department of Justice (DOJ) has officially encouraged the use of it through a series of General Attorney's memos.[9] To note, DPAs do not preclude

[1] "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", Res. 2625, Annex, United Nations General Assembly Official Record, Vol. 25 Supp. (No. 28), U.N. Doc. A/5217, 121 (1970), preamble, para (c).

[2] Mann (1964), p. 126; Akehurst (1972), p. 145; Brownlie and Crawford (2012), p. 478.

[3] Federal Rules of Criminal Procedure, Rule 11; see Samaha (2010), p. 461.

[4] Moohr (2004), p. 165; Garrett (2011), p. 1776.

[5] Nanda (2011), p. 71; Garrett (2007), p. 888.

[6] US DOJ Office of the Deputy Attorney General, "Memorandum from Mark Filip: Principles of Federal Prosecution of Business Organizations", 28 August 2008.

[7] Ibid.

[8] Speedy Trial Act of 1974, 18 USC § 3161 (h)(2).

[9] US DOJ Office of the Deputy Attorney General, "Memorandum from Eric Holder: Bringing Criminal Charges against Corporations", 16 June 1999; ibid, "Memorandum from Larry D. Thompson: Principles of Federal Prosecution of Business Organization", 20 January 2003;

criminal prosecutions against the senior officers or the employee of the corporation who is responsible for the offense.

While the terms and conditions of DPAs and NPAs vary based on the nature of the offense or the culture or the size of the corporation, it generally requires the corporation to admit the wrongful act in a written statement, which is to be published on the internet. It accompanies the payment of restitution, which is as expensive as an ordinary criminal fine.[10] In addition, the corporation is obliged to cooperate with the authority's investigation. It may involve providing documents and inquiry to its employee as the evidence of its wrongdoing.

Most importantly, by the terms of the agreements, the corporation is obliged to make reform according to the instruction of the regulatory authority. It must submit a reform plan and put in place an independent monitor to oversee compliance for a certain period of time.[11] His appointment is in general subject to the consent of the authority, and the corporation has to pay his wage.[12] The monitor reviews and evaluates the effectiveness of the company's internal controls, record keeping and policies or procedures as they relate to compliance, and submits periodic reports to the DOJ. The report may be a trigger to restart the investigation process if the DOJ determines that the corporation fails to fulfill its obligation, and it may also be used as criminal evidence in the future if the corporation conducts another offense.

When any of the above described agreements impose a foreign corporation a certain obligation under the US law, its implementation may be characterized as "indirect law enforcement". Fredrick Alexander Mann defined this term as "a state's enforcing its rights in its own territory exclusively or primarily for the purpose of bringing about an act or omission in foreign territory, in order indirectly to enforce its jurisdiction abroad".[13] Indirect law enforcement is allowed in a number of occasions as a regulation of multinational corporations under the theory of the unity of enterprise.[14] It is not difficult to ascertain, however, that it may conflict with the fundamental principle of territorial sovereignty, in particular when the law enforcement coerces the person or corporation to act in violation of the law of the local state, which is the state where the corporation is incorporated.

ibid, "Memorandum from Paul J. McNulty: Principles of Federal Prosecution of Business Organization", 12 December 2006; ibid, "Memorandum from Mark Filip: Principles of Federal Prosecution of Business Organizations", 28 August 2008. See also Nanda (2011), p. 80.

[10] Finder et al. (2009), p. 16; Podgor (2009), p. 1524; Nanda (2011), p. 80.

[11] US DOJ Office of the Deputy Attorney General, "Memorandum from Craig S. Morford: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations", March 7, 2008.

[12] Ibid.

[13] Mann (1984), p. 47; Mann (1964), p. 131.

[14] See Hedlund and Dunning (1993), p. 52.

Moreover, unilateral law enforcement may be regarded as a circumvention of a judicial assistance treaty between the US and the local state, if there is any. In general, when one state wants to acquire evidence located in another state, the former needs to make a request to the latter to the effect.[15] If there is no treaty for judicial assistance, the requested state has no legal obligation to respond. If there is one, a judicial review process takes place within the court of the requested state. Under most of the treaties, it may deny assistance to the extent that execution of the request is contrary to the public interest of the requested state. The use of these agreements *de facto* allows the requesting state to skip these formal processes.

In this regards, two situations should be distinguished. The first one is a situation where the agreements play an important role in the exercise of jurisdiction. For example, they could be indispensable for collecting information on what happened and who is responsible. The factual situation of a corporation crime is quite complex so that, but for the compliance of the company to the agreement, the authorities would not have been able to undertake the investigation. In this case however, the implementation of the agreements is not deemed as a part of law enforcement.

The second one is a situation where the implementation of the agreements itself, such as obliging the corporation to submit documents to the US authorities, is tantamount to law enforcement. Some consider the agreements to be "civil" in nature and do not consider these practices as law enforcement activities. However, the present author considers that this label is not accurate if one defines "civil" as "relating to private rights". Plea agreements are by definition a part of the criminal procedure. DPAs form a sanction in a broad sense against the corporation for its criminally liable conduct. The implementation of these agreements is an act of *jus imperii*, which only a state may be entitled to undertake.

In practice, territorial sovereignty does not become an issue when the authorities of the local state supervise the conclusion of the agreements, because such supervision constitutes the consent of the territorial state. The issue of rights of the corporation remains because such supervision may be tantamount to a circumvention of the judicial review within the local state. In addition, such opportunity of the local state's supervision is not always guaranteed, in particular when the corporation is directly subjected to the jurisdiction of the US court based on a broad prescriptive jurisdiction such as the "doing business" nexus or the doctrine of the conspiracy, which is not known in most of the states. The issue of the enforcement jurisdiction therefore still remains. This contribution explores whether and to what extent the state's use of agreements is legitimate.

[15] McClean (2012), p. 169.

2 Indirect Law Enforcement through the Courts of the United States

2.1 The Same Old Story of Judicial Conflicts

In the first situation, where the agreements themselves do not constitute the coercive law enforcement, the present topic is only a continuance of a long standing discussion on judicial conflict (or "Justizkonflikt") starting as early as during the 1950s, when the activities of multinational corporations expanded. At that time, the controversies were over cross-border injunction, discovery and other attempts made through the US courts to obtain documents and records located in a foreign territory.[16] The courts have continued to issue discovery orders despite the contradictory foreign laws, forcing the parties to choose whether or not to comply with the court order and get fined or to violate foreign nondisclosure laws (*Societe Internationale v. Rogers*, 357 U.S. 197 [1958]). The governments of the local states asserted that such "exorbitant jurisdiction" infringes upon their sovereignty, and some of them have enacted blocking statutes to thwart such court orders.[17] The US court orders later started to involve coercive measures, imposing contempt sanctions for non-compliance, regardless of the fact that the documents or materials were located in a foreign territory. Some compelled the parties to violate the law of the local state, even when the person is not a party to the procedure (*US v. Bank of Nova Scotia*, 691 F.2d 1384 [1982]; 487 U.S. 250 [1988]).

The US court has consistently relied upon the balancing approach, under which the court should take account of several factors, such as "the importance to the investigation of the documents or other information requested" and "the extent to which noncompliance with the request would undermine important interests of the US, or compliance with the request would undermine important interests of the state where the information is located".[18] It is not surprising that in most cases the court favors the interest of the forum state. In fact, it is consistent in the US courts' perception that "the inevitability of conflict between laws of different countries does not excuse one who chooses transnational commercial operations from compliance with US law" (*US v. Hayes*, 722 F.2d 723 [1984]). The issue of the other state's right does not appear in front of the court because the question at state is whether the court has an authority to issue such an order under the US law.

The scholarly opinions have been varied. Some argue that there is no rule in public international law which limits the authority of national courts and agencies to require a foreign private party in the process and to impose sanctions for refusals in so far as the same can be done to a domestic party. Peter Schlosser argues that the

[16] Mann (1984), p. 47; Lowenfeld (1996), p. i.

[17] Lowe (1981), p. 257; Herzog (1981), p. 381; Névot (1981), p. 421.

[18] *See* American Law Institute (1987), Sec 442(1)(c).

parties are obliged to follow the US court's instruction regardless of the location of the parties, as long as the case is within the reach of the court's jurisdiction.[19]

However, others have been critical in particular when a cross-border order contradicts with the public policy such as banking secrecy or attorney-client privilege of the local state. They argue that the purpose of such systems should be respected, such as protecting the assets from the state and thereby promoting economic activities, only to be ignored by the state practices. Dieter Leipold tried to consolidate the value of "lex-fori-Regel" (the laws of the regulating forum) and the principle of territoriality in order to improve transparency in the discovery process.[20]

There is also an issue as to whether such unilateral law enforcement is allowed when there is a judicial cooperation treaty between the states. In most states, the existence of a treaty requires the court to defer the process to the treaty under the doctrine of comity.[21] On the contrary, the US takes a position that a treaty is one of the options to enforce its laws. It is rejected under the US case law that the US Government should first rely upon the judicial assistance of the forum state, stating that such a procedure is contrary to the interest of the US and outweighs the interest of the forum state "because of the cost in time and money and the uncertain likelihood of success in obtaining the order" (*US v. Bank of Nova Scotia* 691 F.2d 1384 [1982]).

Scholars criticized such a practice as a circumvention of the treaty.[22] The Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning in their context and in the light of its object and purpose.[23] They argue that a unilateral action will hamper the object and purpose of the judicial assistance treaty, which is to promote the cooperation between the states and to preserve the territorial sovereignty of the local state.

There are views that strictly deny the justification of the US's unilateral actions. For example, Astrid Stadler argued that both regulatory authorities' requiring private individuals to cooperate with the investigation and the court's coercing the individuals to comply with the court order are tantamount to infringement of sovereignty of the local state.[24] In the same vein, Rolf Stürner questioned the investigation based on the "voluntary will" of the parties.[25] While he concedes that such a voluntary discovery is not prohibited in continental Europe, because the result of the investigation could be used in a formal judicial process, it is hard to

[19] Schlosser (1985), p. 42; Schlosser (2000), p. 89, p. 113.

[20] Leipold (1989), p. 28, p. 34.

[21] Stürner (1986), p. 31.

[22] Ibid.

[23] Vienna Convention on the Law of Treaties of 1969, *adopted on* 23 May 1969, *entered into force on* 27 January 1980, United Nations Treaty Series 1155: p. 331.

[24] Stadler (1989), p. 1; Stiefel et al. (1991), p. 779.

[25] Stürner (1982), p. 159.

characterize the act as not an act of *jus imperii*. He argues against these practices because "the actual and purported infringement of sovereignty" is not allowed.[26]

Criticisms arise partly from the underlying differences in domestic legal systems.[27] For example, in most of the states, there are privacy laws which prohibit state authorities to collect private information except for stated purposes. The US lacks such protection so that "if authorities want an employee's e-mail, for example, a cooperating company may produce that e-mail without any subpoena and without providing any notice to the employee".[28] The US is also flexible in cooperating with private individual, such as attorneys or corporate monitors, at the stage of a criminal or administrative investigation. Most of the states are not familiar with such measures, in particular where an inquisitorial model is adopted.

2.2 *The New Features of Transnational Law Enforcement Against Corporations*

On the other hand, the environment surrounding the US's transnational law enforcement activities has changed in the last three decades. The idea of corporate social responsibility has been widely shared in each domestic society. Both academia and practitioners pay more attention to the notion of fairness and justice of the global market. In addition, there has been a general recognition that the complexity of corporate crimes requires new tools to enable prosecutors to take smoother and more effective action against legal entities.[29]

The second situation, where the use of the agreements is deemed as law enforcement, should be placed in this context. Although some criticize their lack of transparency and legitimacy, they are justified because the authorities can no longer afford to rely on the traditional law enforcement considering the complexity of the corporations' activities. In addition, these new tools are a part of the US effort to proliferate its own standard in corporate governance, which is even stricter than the OECD guidelines. Its aim is to let corporations enhance their level of compliance by themselves. The Federal Sentencing Guidelines Manual thus provides that the existence of an effective compliance and ethics program is one of the mitigating factors in corporate punishment.[30]

An important development is seen in economic criminal laws in each state, in particular after the end of the Cold War. States started to criminalize such infringements because the social impact of corporations' activities has become immense.

[26] Ibid.

[27] Report of the U.S. Delegation to the Eleventh Session of the Hague Conference on Private International Law (1969), International Legal Materials 8: p. 785.

[28] Smith and Parling (2012), p. 245.

[29] Laufer (2006), p. 5.

[30] 2011 Federal Sentencing Guidelines Manual §8B2.1.

The necessity in dealing with transnational crimes came to be recognized so that the US had led other states in establishing international frameworks dealing with transnational corporate crimes.[31] Primary examples are the international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention),[32] which criminalizes foreign bribery and the United Nations Convention on Transnational Organized Crime (UNTOC)[33] which criminalizes corruption and money laundering among others. Networks of double tax avoidance agreements and the Convention on Mutual Administrative Assistance in Tax Matters were established to promote information exchange both on civil and criminal matters.[34] The OECD had adopted guidelines for multinational enterprises on corporate social responsibilities and governance.[35] These movements created international pressure against states to regulate unlawful economic activities.

It is not that these treaties, regulations and standards justify the indirect law enforcement activities which are otherwise not supported by public international law. Rather, it serves as an objective guideline as to the extent states engage in judicial cooperation. On one hand, a state may be able to pursue criminal investigations notwithstanding the legal difference between each jurisdiction. It is often the case that the conventions require state parties to harmonize their domestic laws. In the various OECD instruments as well as in most of the bilateral treaties, it is often provided that banking secrecy does not hinder the gathering of documentary evidence from banks or the forwarding of such information to the competent authority of the other state in case of certain crimes. Such international cooperation mechanisms prevent states from enacting an equivalent of the blocking statutes of anti-trust laws. On the other hand, the requested state may decline the assistance on the ground that the request is not in accordance with the treaty. For example, it is allowed for the state not to cooperate with a so-called "fishing expedition" because the request has to be specific and the information required shall be relevant at least to a certain extent.[36]

Because of these severe regulations and the foreseeability of their investigation and punishment, corporations which are subject to US law have a strong incentive to establish compliance programs, even if the corporation is a foreign one and located abroad. The plea agreements and DPAs thus meet the need of corporations.

[31] Zagaris (2010), p. 1; Boister (2012), p. 112.

[32] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 21 November 1997.

[33] United Nations Convention on Transnational Organized Crime adopted on 15 November 2000, entry into force on 29 September 2003, United Nations Treaty Series, vol. 2225, p. 209.

[34] Convention on Mutual Administrative Assistance in Tax Matters, adopted on 25 January 1988.

[35] See OECD Guidelines for Multinational Enterprises, 2011 Update, 25 May 2011.

[36] See for example, United States Model Income Tax Convention, 15 November 2006, Article 26, available at http://www.irs.gov/pub/irs-trty/model006.pdf (20.11.2013).

Nonetheless, when the local state claims there is excessive law enforcement by the US, the arguments still center upon the issue of sovereignty. This observation was confirmed in the UBS Case, which lasted from 2008 to 2010. UBS, the largest bank in Switzerland, entered into a DPA as the DOJ started criminal investigation on the ground that UBS assisted illegal tax evasion of US citizens. In the written statement, UBS admitted its participation in a scheme to defraud the US and Internal Revenue Service (IRS), by actively assisting or facilitating a number of US individual taxpayers in establishing accounts at UBS in a manner designed to conceal the US taxpayer's ownership or beneficial interest in these accounts.[37] The bank agreed to provide to the US Government the identities and account information of certain US clients under supervision of the Financial Market Supervisory Authority (FINMA) of Switzerland.[38]

However, the IRS found it insufficient to investigate the unlawful tax practices through the bank. Therefore, it went to the Federal District Court and obtained a subpoena to enforce its John Doe summons (namely, summons sought while the IRS does not know the identity of the person being investigated). In the end, it demanded the disclosure of the identity of the US account holders who did not comply with certain procedures, which turned out to be more than 52,000 individuals. The facts which justified the summons were obtained by the DPA. The arguments submitted before the court by DOJ and the Swiss Government mirrors the discussion described in the previous section.[39] It is notable that the DOJ's argument not only relies on the balancing approach as usual but also underscores the fact that the UBS committed the wrongdoing on the US soil. Another characteristic of this case is that there has been cooperation between the governments of the US and Switzerland. Notwithstanding the federal court's decision that the disclosure of the banking information in this situation is unconstitutional, Switzerland eventually handed over nearly 4,500 clients' dossiers.[40]

Another new feature of the US's practice is that it may serve as a supplement when the local state is unwilling to pursue the case. In the field of gross human rights violation, such supplemental law enforcement is well known and has played an important role in the development of international criminal law.[41] It is however relatively new in the field of white collar crimes because they are characterized as domestic crimes. In such a case, the enforcement tools play a role as a buffer to avoid potential conflicts.

One of such instances is the BAE Systems Case.[42] BAE Systems, a defense contractor with its headquarters in the UK, was accused of obtaining the deals of

[37] US v. UBS AG, Deferred Prosecution Agreement, Case 0:09-cr-60033-JIC Document 20 Entered on FLSD Docket, February 18, 2009.

[38] Ibid, para 6.

[39] See "Amicus Brief of Government of Switzerland", filed on April 30, 2009; US DOJ, "Memorandum of Law in Support of Petition to Enforce "John Doe" Summons," June 30, 2009.

[40] Nanda (2011), p. 83; Garrett (2011), p. 1815.

[41] Bassiouni (2012), p. 27.

[42] Smith and Parling (2012), p. 245; Garrett (2011), p. 1840.

fighter jets and ground attack aircrafts with the Kingdom of Saudi Arabia (KSA) since 1980s in exchange for massive bribes to the Saudi royal families and false accounting. Foreign bribery became a crime in the UK in 2002.[43] Although the Serious Fraud Office (SFO) started an investigation in 2004, it eventually dropped the case in 2006 as KSA suggested withdrawal from diplomatic cooperation with the UK on security and intelligence.[44] NGOs in the UK brought a claim before the court that SFO acted in contradiction with the OECD Bribery Convention as well as the principle of the rule of law. The High Court decided that the Director of the SFO acted unlawfully when he stopped the investigation.[45] However, the judgment was overturned by the House of Lords.[46]

In 2007, the US began to investigate the case without the assistance of the UK government. The DOJ alleged that certain payments served as the factual predicate for the conspiracy charge, such as defrauding the US, making false statements to the US and violating Arms Export Control Act and International Traffic Arms Regulations.[47] It obtained information from the CEO, directors and through a number of additional subpoenas addressed at US employees of BAE systems. In 2010, BAE entered into a plea agreement, admitting it conspired to defraud the US by making false statements about its FCPA compliance program and paid a vast amount as fine.[48] In order to ensure the implementation of an effective system of compliance, it has agreed that a UK citizen, acceptable to BAE and the DOJ and approved by the UK government, will serve as an independent monitor.[49] However, it was not debarred from future international deals because it was not convicted of bribery.

In April 2010, the UK enacted the Bribery Act and the SFO adopted a guideline for corporate prosecution similar to that of DOJ. Brandon Garrett comments that "it is less likely that the same tensions would exist today now that the US and UK share a similar approach".[50] However, the real issue in the BAE case was not the lack of substantive law in the UK. It was the discretion left to the UK government to let its major firm to continue its business and to handle the diplomatic relationship with KSA. The US action showed that the scope of such allowance has been narrowed down. The enforcement tool played an important role because, but for the plea agreement, the corporation could have failed and the unilateral law enforcement against the corporation might have invited political controversy between the relevant states.

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[43] Anti-terrorism, Crime and Security Act 2001 c.24, Sec 107.

[44] Garrett (2011), p. 1840; Smith and Parling (2012), p. 245.

[45] High Court of Justice [2008] EWHC 714 (Admin), Case No: CO/1567/2007, 10 April 2008.

[46] House of Lords [2008] UKHL 60.

[47] US v. BAE Systems plc, "United States Sentencing Memorandum", Case 1:10-cr-00035-JDB, Filed on February 22, 2010, p. 2.

[48] US DOJ, Plea Agreement "Re: United States v. BAE Systems plc", February 4, 2010, available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html (12.2.2014).

[49] Ibid, para 12.

[50] Garrett (2011), p. 1842.

3 Concluding Remarks

In conclusion, these agreements could be best characterized as a supplemental network underlying the current mutual legal assistance regimes. They do not contradict with or make any change to the principles derived from territorial sovereignty of each state. Nonetheless, they may serve as a shock absorber in the scene of unilateral law enforcement. The corporations and the local states are more likely to comply with the US law when these tools are used.

It is noteworthy that the agreements between the authorities and the foreign corporations are used as enforcement tools in other fields than criminal law. An important example is foreign financial institution agreements (FFI agreements) under the Foreign Account Tax Compliance Act (FACTA). Plea agreements and DPAs are in a broad sense a part of the sanction for what the corporation did. In contrast, the primary purpose of FFI agreements is to prevent and detect the occurrence of tax offenses.[51] It is an agreement whereby an FFI reports to the IRS information about financial accounts held by US taxpayers, or by foreign entities in which US taxpayers hold a substantial ownership interest.

There are appraisals and oppositions with regards to the implementation of FACTA. If there is an intergovernmental agreement between the US and the local state, the issue of sovereignty would not arise. However, banks have argued that the enforcement of the regulation will be expensive and it is too broad in particular with regards to cross-border payments on swaps and other derivatives.[52] There are also feelings of unfairness that the US has been pushing to impose its tax laws on the rest of the states.

It is certain that the US will move towards more active use of these agreements. Unless its law enforcement is supported by legitimacy and transparency, however, it will be difficult for the US to obtain cooperation from the local state. It will require further adjustments between the US, corporations and the local states in order to achieve a smooth enforcement of transnational criminal law.

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[51] Foreign Account Tax Compliance Act, 26 USC §§ 1471–1474, 26 USC § 6038D.

[52] Jolly (2013).

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Corporate Criminal Liability and Conflicts of Jurisdiction

Anne Schneider

Abstract In our globalized world, conflicts of jurisdiction have become more and more common. This problem is especially pressing for companies, as large companies usually operate on a multinational scale and are thus in touch with several different jurisdictions. Focussing on the principle of active and passive personality and the principle of territoriality, this chapter will explain how jurisdictional rules are applied in cases of corporate criminal liability. It will show that corporate nationality ought to be determined by referring to the place of registration and that a company's place of action is determined by its "centre of main interest" in holistic models of corporate criminal liability.

1 Terminology

In order to discuss conflicts of jurisdiction, it is first necessary to clarify the terms which will be referred to. When talking about jurisdiction, one has to differentiate between three main modes of jurisdiction: jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate.[1] The first one is the authority of a state to make its criminal laws applicable to persons or activities, whereas the second one is the authority of a state to use the resources of government to induce or compel compliance with its criminal laws and the third one the authority to subject a person or a thing to its judicial process.[2] As all types of jurisdiction usually overlap in

[1] See Jeßberger (2011), pp. 9ff.

[2] American Law Institute (1987), part IV introductory notes, p. 231.

A. Schneider (✉)
Department of Criminal Law, Criminal Procedure and International and European Criminal Law, University of Bonn, Bonn, Germany
e-mail: anne.schneider@uni-bonn.de

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criminal law—jurisdiction to enforce following jurisdiction to adjudicate following jurisdiction to prescribe[3]—there is no need to distinguish between them for the purpose of this contribution. When the term "jurisdiction" is used in the following discussion, it is to be understood to primarily refer to jurisdiction to prescribe.

Moreover, this chapter will take the term "corporate criminal liability" literally and focus on corporations (or companies), i.e. organisations in the private sector which have legal personality.[4] The reason for this is that this form of legal entity generally needs to be registered in order to receive legal personality, and—as we will see—registration must be taken into account for determining jurisdiction. This does not mean that conflicts of jurisdiction do not arise in cases of corporate criminal liability of other legal persons, but only that it is easiest to focus on companies. For the sake of simplicity, the special problems attached to groups of companies will also be left out.[5]

2 The Jurisdictional Principles

Criminal jurisdiction is governed by several principles, the major ones being the principle of territoriality, the flag principle, the principle of active personality, the principle of passive personality, the principle of protection, the principle of universality and the principle of representational jurisdiction.[6] These principles can be linked to general concepts of international law. This is necessary, as criminal jurisdiction must only be exercised by a state if a genuine link to this state exists.[7]

Most jurisdictional rules are the same for corporate criminal liability as for natural persons. The flag principle is closely related to the principle of territoriality, so that the same rules apply.[8] The principle of protection and the principle of universality are both based on the idea of protecting specific interests, in the first case those which are crucial to the state's existence, in the second case those that are common to all states. This means that both principles typically apply for a catalogue of offences. Whether or not these offences can be committed by companies depends on the respective national legal order, but is not a question of how criminal liability is construed.

This is even more true for the principle of representational jurisdiction. The focus of this principle is not on exercising genuine criminal jurisdiction, but

[3] See Böse et al. (2013), pp. 425ff.; Sinn (2012), p. 532. However, Jeßberger points out that jurisdiction to enforce can differ, Jeßberger (2011), p. 10.

[4] See also Schneider (2009), p. 22f.

[5] On this de Schutter (2006), pp. 30ff.

[6] These principles are generally accepted, see e.g. NK/Böse (2013), vor § 3 para 15f.; Jeßberger (2011), pp. 220ff.; Schneider (2011), pp. 113ff.

[7] General opinion, see e.g. Jeßberger (2011), pp. 203ff.; Boister (2012), p. 136f.

[8] Schneider (2011), p. 117; Boister (2012), p. 139.

derivative jurisdiction. This means that in applying the principle of representational jurisdiction, the state exercises jurisdiction on behalf of another state. As the principle of representational jurisdiction does not refer to original interests of the state, it is accessory to the other state's law. Jurisdiction in cases of corporate crime is therefore dependent on the other state's view on corporate criminal liability. Accordingly, this contribution will only focus on the territoriality and personality principles.

3 The Principles of Active and Passive Personality

Both the principle of active and passive personality are based on the idea that a state has sovereignty over its citizens. According to the principle of active personality, a state can apply its criminal law to crimes committed by its citizens, while the principle of passive personality allows for jurisdiction over crimes which are directed against the state's own citizens.[9] Most states accept jurisdiction based on active personality in principle, even if additional criteria need to be fulfilled in order to apply national criminal law.[10] The principle of passive personality is less widely accepted, but can at least be found in the majority of states.[11]

However, if a state accepts corporate criminal liability and bases jurisdiction—at least in part—on personality, the question arises under which circumstances a company can be regarded as having the state's nationality. There are two possible solutions to this problem: either a company's nationality can be based on its place of registration or on the place where it carries out its activities.[12]

These two criteria were extensively discussed in international company law a couple of years ago.[13] This was because it was unclear at that time which law applied to a company which was registered in one state, but solely operated in another (so-called letterbox companies). However, the ECJ decided the matter in a number of cases[14]: The freedom of establishment (Art. 49 TFEU) forbids the discrimination of companies which have been registered under foreign law. In

[9] For all: Jeßberger (2011), pp. 239ff.

[10] See the comparative overview in Böse et al. (2013), pp. 415ff.; Sinn (2012), pp. 520ff. See also the information about foreign legal orders by various authors in Sieber and Cornils (2008), pp. 151ff.

[11] Böse et al. (2013), pp. 418ff.; Sinn (2012), p. 522f.

[12] Jeßberger (2011), p. 249; Wolswijk (2013), p. 341. See also Gerritsen (1997), p. 60; de Schutter (2006), p. 31.

[13] See in detail MüKo BGB/Kindler (2010), Commentary on International Commercial and Company Law paras. 351.

[14] ECJ, Judgment of 9 March 1999, C-212/97, ECR I-01459—"*Centros*"; ECJ, Judgment of 5 November 2002, C-208/00, ECR I-09919—"*Überseering*"; ECJ, Judgment of 30 December 2003, C-167/01, ECR I-10155—"*Inspire Art*".

other words, it must in principle be possible for a company to relocate to a state where it was not registered without (unjustified) legal impediments.[15]

This reasoning also applies in criminal law, especially in cases where the corporate structure of a company does play a role.[16] And the same is true for the personality principle. If, for example, a state bases the application of its criminal law on the principle of active personality, this means that it applies its criminal law to companies which have its nationality. If the state would base "corporate nationality" on the place where the main activities are carried out, this would mean that a company which was registered in a foreign country could be held criminally liable under the principle of active personality if it had its main activities on the state's territory. This risk of criminal liability is an impediment to the freedom of establishment and, as thus, would interfere with Art. 49 TFEU.[17] Therefore, EU member states must determine corporate nationality by means of the place of registration where active personality is concerned.

Things are slightly different for the principle of passive personality. As this principle is used in order to protect a state's nationals, it is advantageous for companies to fall within the scope of this principle. If a state would base corporate nationality on the place where it carries out its activities, this means that it would even protect companies which were registered under foreign law, if they carry out their activities on the state's territory. Accordingly, foreign companies would benefit from this rule. Therefore, it could not be seen as an infringement of the freedom of establishment of these foreign companies.

In contrast, companies which were registered in the state claiming criminal jurisdiction, but do not carry out their activities in this state, would not enjoy the state's protection. Does this constitute a breach of the freedom of establishment? On the one hand, one could say that this is a wholly internal situation in which EU law does not apply.[18] A state has the right to discriminate its own national subjects. On the other hand, this would effectively mean that a company can only form its main establishment in another country if it gives up rights provided by its country of registration. This could be regarded as an impediment to the freedom of establishment.

These questions were addressed by the ECJ in its *Cartesio* decision.[19] Cartesio was a Hungarian company which planned to move its seat to Italy. According to Hungarian law, this was only possible if the company dissolved itself and was reincorporated in Italy. The ECJ upheld the Hungarian rule and stated that the freedom of establishment does not preclude legislation which demands a change of status of incorporation in case of a transfer of the seat.[20] Although the *Cartesio* case

[15] Horn (2004), p. 895f.

[16] See e.g. Schlösser (2006), pp. 81ff.

[17] Such interference could be justified, but only for compelling reasons.

[18] Cf. Muir and van der Mei (2013), pp. 129ff. on the freedom of movement for natural persons.

[19] ECJ, Judgement of 16 December 2008—C 210/06, ECR I-0964—"*Cartesio*".

[20] ECJ, Judgement of 16 December 2008—C 210/06, ECR I-0964—"*Cartesio*", para. 124.

does not refer to criminal law, its rationale can be applied: If it is even possible to demand a dissolution of the company in case of an establishment in a foreign country, it must certainly be possible not to protect this company by the state's own criminal law. Therefore, the freedom of establishment does not oblige states to refer to the place of registration in the case of passive personality.

Nonetheless, it would be inconsistent to refer to the place of registration when applying the principle of active personality, but not when applying the principle of passive personality. If a legal order accepts both principles, it should therefore—for the sake of clarity of law—determine corporate nationality by means of the place of registration. Only if a state rejected the principle of active personality and accepted the principle of passive personality,[21] it could be feasible to refer to the place where the activities are carried out in the context of the personality principle.

4 The Principle of Territoriality

The principle of territoriality seems to be accepted by all countries as a major jurisdictional principle.[22] In some, it even takes precedence over other principles.[23] This is because it is founded on territorial sovereignty, which is one of the key factors for defining the identity of a state.[24] Moreover, quite often practical (e.g. evidential) reasons can be invoked in favour of territorial jurisdiction.[25]

According to the principle of territoriality, a state's criminal law applies to all crimes which were committed on its territory. Although there seems to be unanimous acceptance of this doctrine, details are less clear. When exactly is a crime committed on a state's territory? The notion of "territory" itself is by now well-defined in international law, so the problem is not to determine where a state's territory begins, but rather, when a crime was committed on this territory.[26] Most countries follow the so-called theory of ubiquity.[27] This means that either the place of conduct or the place where the result occurred can trigger territorial jurisdiction. English and Welsh law had traditionally only put emphasis on the result, but jurisprudence has recently come to acknowledge jurisdiction in cases where the result occurred abroad but relevant acts were committed on English territory.[28] The

[21] No such state was reported in recent comparative projects, cf. Böse et al. (2013), pp. 415ff.; Sinn (2012), p. 520f.

[22] Böse et al. (2013), p. 412; Sinn (2012), p. 515; Sieber and Cornils (2008), pp. 151ff.

[23] E.g. in Russia, Jalinski and Dubovik (2012), p. 395. See also Böse et al. (2013), p. 412.

[24] Böse et al. (2013), p. 412.

[25] Boister (2012), p. 138; Böse et al. (2013), p. 412.

[26] Böse et al. (2013), p. 412.

[27] Böse et al. (2013), p. 412; Sinn (2012), p. 515.

[28] *R v Smith* (*Wallace Duncan*) (*No. 1*) [1996] 2 Cr App R 1; *R v Smith* (*Wallace Duncan*) (*No. 4*) [2004] QB 418, in Hirst (2013), p. 31. Also Huber (2012), pp. 271ff.; Forster (2008), p. 188f.

theory of ubiquity will therefore play a key role in applying the principle of territoriality to companies.

4.1 Result Occurring on the State's Territory

Cases where jurisdiction is based on the result (or effect) of a conduct occurring on the state's territory do not provide specific problems for corporate criminal liability. This does not mean that there is no quarrel about the interpretation of this rule. On the contrary, a lot of questions are discussed controversially and a common doctrine is not yet in existence. For example, while it is more or less accepted that a result of an act which completes a crime can trigger jurisdiction, it is unclear how far this applies to inchoate offences, abstract and concrete endangerment offences or objective preconditions of liability.[29]

Nevertheless, as the result is only dependent on the offence that has been committed and not on the question of who acted, this rule works as well for companies as for natural persons. The only difference is that there might be offences which solely apply to companies[30] or solely to natural persons,[31] so that certain effects can only be regarded as "results" for one group or the other. But even in those cases, the basic rule stays the same.

4.2 Conduct Occurring on the State's Territory

Jurisdiction can also be established on a territorial basis if the conduct which constitutes the offence occurs in the territory of the state that wishes to establish jurisdiction. The use of the word "conduct" illustrates that not only actions, but also omissions can establish territorial jurisdiction.[32] Leaving that aside, the rule is simple: a state has jurisdiction over actions (or omissions) that occurred on its territory.

In cases of corporate criminal liability, this means that it is necessary to determine by which conduct the company committed the offence. However, as companies are (legal) constructions, they lack the ability to act themselves, but naturally need natural person's actions to be attributed to them.[33] The question of

[29] Böse et al. (2013), p. 413; Boister (2012), p. 141f.

[30] Such as the British offence of Corporate Manslaughter, see Section 18 of the Corporate Manslaughter and Corporate Homicide Act 2007 c. 19.

[31] This can happen if the nature of the offence precludes its application to companies, e.g. in the case of rape.

[32] Böse et al. (2013), p. 413.

[33] Achenbach (2012), p. 273.

whose actions can be attributed to the company is a major point of discussion among those favouring corporate criminal liability.

4.2.1 Models for Attributing Actions to Companies

Although a wide variety of models of corporate criminal liability is discussed,[34] there are essentially two models for attributing actions (or any form of conduct) to companies, an imputative model and a holistic one.[35]

Imputative corporate criminal liability means that criminal liability of a company is determined by imputing the actions of a natural person.[36] It is necessary to find an individual who has committed an offence in order to hold the company liable. Whether this individual can be any employee or whether it must be someone "[...] entrusted with the exercise of the powers of the company [...]"[37] is not important for the determination of jurisdiction and shall therefore not be discussed further.

The other option is not to look for a single individual's fault, but to determine corporate criminal liability by means of organizational failure.[38] Such a failure could be constituted by a single individual's act, especially if this person has an important function, but it could also be the result of several persons' negligence.[39] This means that a company could be held criminally liable without having recourse to an individual's actions. Because of that, this model has been called "holistic".[40]

4.2.2 The Determination of the Place of Action

If corporate criminal liability is derivative, i.e. dependent on one individual's action, it is easy to determine the place of action: The place of action is simply the one where the individual acted. The same problems arise and the same rules apply as with criminal liability of natural persons.[41]

If, however, corporate criminal liability is based on an organizational failure, things get more complicated. Such a failure is typically based on mismanagement on the part of several people.[42] How is the place of action, i.e. of the organizational failure to be determined? *Wolswijk*, who has discussed this problem from the Dutch

[34] See the overview in Thurner (2012), pp. 252ff.

[35] See Beckemper (2012), pp. 278ff.; Rödiger (2012), p. 91; Pieth and Ivory (2011), p. 6f.

[36] See Mugnai and Gobert (2002), p. 619f.

[37] *Tesco Supermarkets Ltd. v Nattrass* [1972] A.C. 153, p. 200. This is the rule under English law.

[38] Mugnai and Gobert (2002), p. 620; Thurner (2012), pp. 258ff.

[39] Cf. Schneider (2009), p. 30f.

[40] Pieth and Ivory (2011), p. 6.

[41] See Böse et al. (2013), p. 414.

[42] Cf. the exemplary cases in Schneider (2009), p. 30f.

point of view, identifies two possible solutions: either the places of action of all persons involved in the failure could, at least in principle, be relevant, or it should be referred to the place of registration.[43]

Places of Action of Involved Persons

Taking into account the places of action of all persons involved in the organizational failure has its charms because it is similar to the determination of the place of action of natural persons. However, this so-called aggregative approach[44] encounters several problems.

First, it would need to be considered whether any act of any person involved in the failure could trigger jurisdiction according to this principle, or whether only a major involvement would have this consequence.[45] This question is similar to the problem of how a case is treated when only part of the act occurred on the state's territory.[46] The rule governing this problem should subsequently also apply to companies in this context.

Secondly, the benefit of the basement of corporate criminal liability on an organizational failure is precisely that "corporate guilt" can thus be determined independently from the acts of individuals.[47] It is often regarded as a major problem in cases of possible corporate liability that it is difficult to identify individual acts and their authors in large companies.[48] If the concept of organizational failure as basis for corporate criminal liability has been chosen in order to avoid these problems, it would be counterproductive to base jurisdiction on a rule which needs this to be clarified. Accordingly, jurisdiction should not be based on natural persons' acts in cases of corporate criminal liability by organizational failure.

Place of Registration

Wolswijk's alternative suggestion was to refer to the place of registration of the company.[49] However, he himself admits that there is no connection between the *locus delicti* and the place of registration.[50] More to the point, the place of

[43] Wolswijk (2013), p. 333.

[44] Pieth and Ivory (2011), p. 7.

[45] Wolswijk (2013), p. 333.

[46] Wolswijk (2013), p. 335f. See on this subject Satzger (2013), § 5 para. 21.

[47] Thurner (2012), p. 262ff.

[48] See Thurner (2012), p. 263; Clarkson (1996), p. 561. An example for this is the British case of the *Herald of Free Enterprise*, *R v P & O European Ferries* (*Dover*) *Ltd.* [1991] 93 Cr. App. R., pp. 72ff.

[49] Wolswijk (2013), p. 333.

[50] Wolswijk (2013), p. 333.

registration plays a key role in determining a legal person's nationality and is thus important for the personality principle. If the place of registration was to determine the place of action for companies, this could "[. . .] render the active nationality principle superfluous for legal persons [. . .]".[51] Therefore, the place of registration is not a convincing criterion.

Place of Organization

Although *Wolswijk's* suggestion of the place of registration as criterion for determining legal persons' place of action is not persuasive, his general idea is correct. It is necessary to determine the place of the organizational failure without having recourse to individual actions. The problem with the place of registration is that it does not need to have anything to do with the actual organization of a company. For example, there are numerous private limited companies, registered in Britain, which operate exclusively in Germany.[52] Why should such letterbox companies be considered to have "acted" in Britain if their complete organization and accordingly any organizational failure occurred in Germany? It makes much more sense to refer to the place of organization, i.e. the place where the company's main activities are carried out.

But how is the place of organization of a company to be determined? Most cases are not as easy as the one of a one-person letterbox private limited company operating in Germany, but concern large corporations with numerous locations. Even if it were possible to find out where exactly relevant organizational decisions were taken, this course of action would effectively lead to a dependence on natural persons' actions and thus undermine the general idea of organizational failure. Therefore, another method of identifying the centre of a company's organization is needed.

Such a criterion could be found in another area of law, namely in insolvency law. If a multinational company goes bankrupt, the question is where the insolvency proceedings are to be opened. Art. 3 s. 1 of Regulation No. 1346/2000 of May 29 2000 on insolvency proceedings[53] states that proceedings shall be opened in the state where the debtor's centre of main interest lies. The term "centre of main interest" (short: COMI) is further defined in recital 13 of the Regulation:

> The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

This definition fits very well with the idea of identifying the centre of a company's organisation. The "heart" of a company should be the place where it

[51] Wolswijk (2013), p. 334.
[52] See also Weiß (2009), p. 21.
[53] OJ L 160/1.

conducts the administration of its interests. Art. 3 s. 1 Regulation No. 1346/2000 even says that, in the case of a company, "[...] the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary [...]", thus building a bridge to *Wolswijk's* suggestion. In contrast to his idea, the use of the COMI criterion allows for proof to the contrary and thus avoids the problem of letterbox companies.[54]

The reference to the notion of COMI has the further advantage that it would be possible to make use of the extensive literature and jurisprudence that has been developed in order to describe this criterion. The European Commission has recently proposed an amendment to Regulation No. 1346/2000 which will include the more or less agreed definition of COMI.[55] It suggests among other things the inclusion of the new recital 13a[56]:

> The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties.

If these rules were applied to the determination of the place of action of a company when corporate criminal liability is based on an organizational failure, they would certainly lead to sensible results.

Nevertheless, one should not forget that COMI is a notion of insolvency law and has, at first glance, nothing to do with criminal jurisdiction. It is true that the regulation is not in itself applicable in criminal law.[57] However, it would be wrong to say that there are no similarities: First, the COMI criterion refers to the courts' jurisdiction in insolvency proceedings, jurisdiction to adjudicate. As we have seen, jurisdiction to adjudicate is parallel to jurisdiction to prescribe in criminal law cases. So, both Art. 3 Regulation No. 1346/2000 and the principle of territoriality are concerned with the jurisdiction of the courts. As the applicable insolvency law is usually the *lex fori*, Art. 3 determines in fact whether or not national law applies.[58] Secondly, the COMI criterion already serves as a factor in deciding criminal liability, namely in cases where the filing for insolvency is delayed. In German law, this is a crime under § 15a s. 4, 5 InsO. As § 15a InsO is generally qualified as an insolvency law, it can only be applied if the COMI of a

[54] MüKo BGB/Kindler (2010), VO (EG) 1346/2000 Art. 3 para. 24.

[55] COM (2012) 744 final.

[56] COM (2012) 744 final, p. 16.

[57] Cf. Art. 1 of the Regulation (EC) 1346/2000.

[58] Haß and Herweg (2005), VO (EG) 1346/2000 Art. 3 para. 1.

company is in Germany.[59] This is even true if the rules on criminal jurisdiction (§§ 3 et seq. Criminal Code) would grant the German state jurisdiction.

It is not possible to discuss the application of the COMI criterion to the principle of territoriality further in this contribution. Nevertheless, it seems to be a practical way for determining the place of action of a company in cases where there is no individual whose action is relied upon. With an increase in corporate crime, this issue will undoubtedly need to be addressed in the foreseeable future.

5 Conclusion

The results can be summarised as follows: If jurisdiction is based on the principle of active personality, the nationality of a company must be determined by referring to the place of registration. In contrast, this is not mandatory where the principle of passive personality is concerned. In the case of the principle of territoriality, problems mainly arise in determining the place of action of a company. If corporate criminal liability is based on an imputation model, the place of action of the natural person determines the company's place of action. If corporate criminal liability is based on a holistic model, the place of action of the company is the place where its COMI lies.

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[59] MüKo StGB/Kiethe and Hohmann (2010), § 15a InsO para. 29.

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Transnational "Ne Bis In Idem" Principle and European Competition Law with Regard to the Different Approaches to Corporate Criminal Liability Among EU Member States

Aikaterini Tzouma

Abstract In the following contribution three issues are discussed. First of all, this chapter discusses the meaning and the scope of the transnational "ne bis in idem" principle in the European Union law. The second issue deals with the applicability of this principle in European competition law in particular. Last but not least, this contribution focuses on the question if and to what extent the different approaches to corporate criminal liability among the EU Member States could influence the implementation of the "ne bis in idem" principle and lead to its breach.

1 Introduction

The transnational "ne bis in idem" among the EU Member States raises several questions regarding its application and scope. These questions become particularly acute when it comes to European competition law. Although natural persons are rarely affected by the EU anti-trust legislation, the heavy fines imposed by the European Commission and the National Competition Authorities (NCAs) against companies make essential that the principle's applicability in this area is well defined.[1]

[1] The Commission is able to impose fines of up to 10 % of an undertaking's total turnover in the preceding business year (Article 23 of Regulation 1/2003). See Harding and Joshua (2010), p. 321.

A. Tzouma (✉)
University of Munich, Munich, Germany
e-mail: tzoumakaterina@yahoo.gr

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2 The Transnational Dimension of the "Ne Bis In Idem" Principle in the Legal Order of the European Union

The "ne bis in idem" principle (literally "not twice in the same [thing]") is the continental law's equivalent to "double jeopardy" and means that no one may be prosecuted, tried or convicted twice for the same criminal offence. As it also prohibits a second prosecution and trial, its full meaning extends over the mere accounting principle.[2] The internal function of the principle, i.e. the prohibition of a double prosecution, trial or conviction within a certain national legal system, is set forth in all national legislations of the EU Member States and in many of them it is even enshrined as a constitutional right. Thus, it belongs to the general principles of EU law, according to Art. 6 of the Treaty on European Union (TEU). Art. 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR) constitutes its most significant supranational source. The principle is also enshrined in the International Covenant on Civil and Political Rights.

Contrary to the above mentioned comprehensive protection of the principle's internal function, its transnational application in the EU fell for a long time far behind that level and was only subject to international treaties between the EU Member States.[3] The most important legal source of transnational "ne bis in idem"[4] was established in Art. 54 of the Convention Implementing the Schengen Agreement (CISA),[5] which reads as follows:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

The wording of Art. 54 CISA has been interpreted so far by the ECJ in a broad manner, in order to ensure the maximum protection with regard to the free movement of persons within the EU ("effet utile" principle).[6] Therefore according to the ECJ's case-law the criterion of the "same acts" is fulfilled when "the material acts at issue constitute a set of facts which are inextricably linked together in time, in space

[2] See Vervaele (2005), p. 102. The accounting principle requires that previous penalties must be taken into account when a subsequent penalty is imposed.

[3] See also Greece's Initiative for a Framework Decision concerning the application of 'ne bis in idem', OJ 2003, C 100/24.

[4] The transnational 'ne bis in idem' principle is also laid down in the Convention on the Financial Protection of the European Communities and the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.

[5] The Schengen Provisions had been signed as a multilateral agreement outside the European Union framework, but by virtue of the Treaty of Amsterdam they were integrated into the European Union *acquis*. Since then, the European Court of Justice has the authority of their interpretation. See Protocol No. 2 to the Amsterdam Treaty.

[6] See Satzger (2012), § 8 paras. 71ff.

and by their subject matter".[7] The trial is furthermore considered to be "finally disposed of" also in case of an acquittal for lack of evidence and in case of discontinuance of the procedure by the Public Prosecutor without the involvement of a court, provided that "the accused has fulfilled certain obligations"[8] with a "penalising effect"[9] and a "further prosecution is barred".[10] The Charter of Fundamental Rights of the EU, which became binding with the entry into force of the Lisbon Treaty and was granted the legal value of the EU Treaties, provides also in Art. 50 for the transnational "ne bis in idem" within the European legal order.[11]

3 The Fining System of EU Competition Law

In respect to the applicability of the "ne bis in idem" principle on the fining system of the European antitrust enforcement in particular, it is necessary to make two preliminary remarks, first on the European competition law's system after the reform brought about by Regulation 1/2003, and second on the criminal nature of the fines imposed for anti-trust conduct.

3.1 The Reform of European Competition Law After Regulation 1/2003

The EU competition law experienced a complete reform by virtue of Regulation 1/2003,[12] which in a few words led to a centralization of the substantive law and a decentralization of the implementation of anti-trust enforcement.[13] The same Regulation established a system of cooperation among the European Commission and the national competition authorities (NCAs), also known as the European Competition Network (ECN).[14]

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[7] Case C-436/04 "van Esbroeck" ECR 2006, I-2333, paras. 36–38.

[8] Joined cases C-385/01 "Gözütok" and C-187/01 "Brügge" ECR 2003, I-1345.

[9] Satzger (2012), § 8 para. 72.

[10] Joined cases C-385/01 "Gözütok" and C-187/01 "Brügge" ECR 2003, I-1345. On this see also Klip (2012), pp. 253ff.

[11] Still Art. 54 CISA including the prerequisite of penalty's enforcement remains the relevant provision for transnational 'ne bis in idem' in EU. On this opinion see Satzger (2012), § 8 para. 68; Burchard and Brodowski (2010), pp. 179ff.

[12] See the retrospective by Wils (2013), pp. 293ff.

[13] Cf. Mikroulea (2010), pp. 55ff.

[14] See Recital 15 of Regulation 1/2003 and Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Doc 15435/02 ADD 1 RC 22. For more information about the ECN visit: http://ec.europa.eu/competition/ecn/index_en.html (12.2.2014).

It is worth noting for the purposes of the present discussion that Regulation 1/2003 granted the national competition authorities with the right and the obligation to apply EU competition law,[15] i.e. the Articles 81 and 82 EC,[16] including the imposition of fines, when a certain antitrust agreement or practice affects the trade between the Member States (see Art. 3 and 5). While Art. 11 para. 6 of Regulation 1/2003 stipulates that the initiation of proceedings by the Commission shall relieve the national authorities of their competence to apply the above mentioned articles, consecutive proceedings are not excluded (see Art. 16 of Regulation). Furthermore there is no provision on the allocation of competences among the NCAs at the horizontal level. Art. 13 of Regulation empowers the ECN's Members to suspend a proceeding or reject a complaint, when the Commission or a NCA already deals with the case. This provision however does not oblige the ECN Members to do so. As a result, any infringement concerning the trade between the Member States can release concurrent or consecutive proceedings before several NCAs, even before all of them.[17] This unclear multi-jurisdictional system does not only multiply the work and costs for the parties involved. It also causes an inherent hazard of contradictory decisions and dual punishment.[18]

3.2 The Criminal Nature of the Imposed Fines

Since the "ne bis in idem" principle refers to criminal proceedings, one could doubt that it is applicable to European competition law. In fact, pursuant to Article 23 (5) of Regulation 1/2003, decisions by which the Commission imposes fines on undertakings under this article:

> shall not be of a criminal law nature.[19]

However according to the jurisprudence of the ECtHR on the concept of "*criminal charge*" under the Article 6 ECHR, the term "*criminal*" within the meaning of Article 6 is autonomous and "suffices that the offence in question should by its nature be 'criminal'", [20] because it relates to a "general rule, whose purpose is both deterrent and punitive [...] or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the "criminal" sphere".[21]

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[15] For this possibility under the prior Regulation, see Rosiak (2012), p. 123; Wils (2005), p. 13.

[16] These correspond to Articles 101 and 102 of the Treaty on the Functioning of the European Union after the Treaty of Lisbon.

[17] Cf. Wils (2005), para. 425.

[18] Mikroulea (2010).

[19] Cf. Article 15 (4) of Regulation No. 17, OJ 013, 21/02/1962 P. 0204–0211.

[20] *Lutz v. Germany*, Judgment of 25 August 1987, Series A no. 123, p. 23, § 55. The so-called "Engel criteria" were first established in the judgment *Engel and Others* of 8 June 1976, Series A no. 22, pp. 34f., § 82.

[21] *Lutz v. Germany*, ibid.

It is generally accepted that procedures conducted by the Commission and the NCAs for anti-trust behaviors fulfill these criteria[22] and, therefore, are considered as "criminal" within the meaning of Art. 6 ECHR and are subject i.a. to the "ne bis in idem" principle. This interpretation has also been confirmed by the case-law of the ECJ and the GC in decisions relating to fines imposed for infringements of EU competition law.[23]

4 The Implementation of the "Ne Bis In Idem" Principle in EU Competition Law

4.1 Consecutive Proceedings Initiated by the Commission

The "ne bis in idem" principle, as a general principle of European Law and a fundamental right according to Art. 50 CFR, is also binding for the Commission itself,[24] as this has been long stated by the ECJ.[25] Consequently, the Commission is prevented from prosecuting or sanctioning an undertaking twice for the same anti-competitive conduct, even if the first decision led to an acquittal due to lack of evidence.[26] By contrast, the reinitiation of proceedings and the adoption of a new decision by the Commission on the same anti-trust offence is not precluded, when the first decision has been annulled by the Court due to procedural reasons, since in that case the annulment decision does not amount to an "acquittal" from a criminal law perspective because "the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them".[27]

[22] Jones and Sufrin (2011), p. 1041.

[23] Judgment of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij* (*LVM*) *and Others v Commission* [2002] ECR I-8616, paras. 61 and 62. See also Opinion of Advocate General E. Sharpston of 10 February 2011, in the case C-272/09 P K*ME Germany AG and others v Commission*, para. 64.

[24] See Art. 51 CFR. It must be stressed that Art. 54 CISA doesn't apply at this level, since the EU itself is not a Convention Party.

[25] See only Judgment of 13 February 1969 in Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 3, paras. 3 and 11.

[26] Argument derived from the Judgment (see the note 28), also cited as "PVC II", paras. 68 and 69. For the limitation of the principle pursuant to Article 4(2) Protocol 7 ECHR in case of 'new or newly discovered facts', see Wils (2005), para. 413ff.

[27] Judgment of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij* (*LVM*) *and Others v Commission* [2002] ECR I-8616, paras. 61 and 62.

4.2 Consecutive Proceedings Run by the Commission and a Member State (Vertical Level)

Before the entry into force of Regulation 1/2003, the ECJ held in *Wilhelm v. Bundeskartellamt* that double prosecution, once by the Commission and once by the national authorities, was in line with the previous regulation and did not violate the "ne bis in idem" principle, because the scope of the European rules and the national rules differed.[28,29] Under Regulation 1/2003, which does not exclude the possibility of overlapping decisions (see Art. 16), this argumentation lacks a legal foundation, at least as far as both the Commission and the Member States rule on violations of articles 101 and 102 TFEU.[30]

The European Court of Justice in principle recognizes the prohibition of double punishment within the ECN under three conditions: (a) identity of the facts; (b) unity of offender; and (c) unity of the legal interest protected; so that "the same person cannot be sanctioned more than once for the same unlawful course of conduct designed to protect the same legal asset".[31] In the case *Italcementi*, the Court, however, denied the existence of "identity of the facts", because the Italian competition authority had dealt merely with the antitrust agreements in its domestic territory, whereas the object of the Commission's decision concerned the part of the agreement between the Italian companies "which sought to prevent imports of cement from Greece" and thus affected the trade between the EU Members.[32]

The Commission in its official position also limits the "ne bis in idem" principle to the prohibition of double punishment and merely applies the accounting principle, in order to prevent under-punishment.[33]

The ECJ's and the Commission's statements are neither in line with the "ne bis in idem" principle within the meaning of Art. 50 CFR, nor can they be based on an

[28] Judgment of 13 February 1969 in Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 3. The Court stated however that according to 'a general requirement of natural justice' 'any previous decision must be taken into account in determining any sanction which is to be imposed', see para. 1"1. This corresponds to the so-called 'accounting principle' (in German: "Anrechnungsprinzip"). See note 1.

[29] However this decision is considered to be in contrast to the meaning of the principle given by ECtHR, since European Competition Law's provisions have the same 'essential elements' [*Franz Fischer v Austria* of 29 May 2001, Series A no. 312 (C)] with the national competition law's provisions. On this see Wils (2005), para. 419ff.

[30] Cf. Satzger (2012), § 8, para. 63; For the case that a NCAs applies exclusively its national competition law cf. Streinz (2009), p. 418.

[31] Judgment of the Court of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, ECR [2004] I-123, para. 338.

[32] Judgment of the Court of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, ECR [2004] I-123, paras. 339f. Cf. Court of Justice 14 February 2012, Case C-17/10, Toshiba Corporation et al. v Urad pro ochranu hospodarské souteze [2012] ECR I-000, paras. 93ff.

[33] See Soltész (2005), pp. 622ff. with references.

admissible restriction according to art. 52 (1) CFR.[34] The unconditional applicability of "ne bis in idem" has been thus strongly argued for by many authors. This point of view relies furthermore on the power of each ECN Member under the Regulation 1/2003 to take into account the effects of the infringement in the whole EU territory while ruling on the issue pursuant to Art. 101 and 102 TFEU.[35] According to the economical analysis of European antitrust law the strict adherence to the prohibition of double prosecution and double punishment, even in cases of under-punishment, would provide incentives for a more effective cooperation within the ECN and would encourage the harmonization of national competition laws.[36]

4.3 Consecutive Proceedings Run by Two or More Member States (Horizontal Level)

The analysis above may apply at the horizontal level within the ECN as well. This means that the final ruling on an issue by a certain NCA should preclude any further prosecution or imposition of fines by other NCAs, irrespective of whether the first prosecuting Member State took into account all the effects of the infringement on the European territory or not.[37]

5 Different Approaches to Corporate Criminal Liability and Its Consequences for the Principle's Application in European Competition Law

5.1 Corporate Criminal Liability and Cumulative Imposition of Penal Sanctions and Administrative Fines in the National Legal Orders

As other authors in this book already pointed out, the recognition of criminal liability for corporations is fraught with problems of double punishment within the same legal order. However, the risk of double punishment is inherent,[38] when certain conducts, e.g. anti-trust infringements, entail both penal as well as

[34] Cf. Wils (2005), paras. 429ff.

[35] Soltész (2005), p. 623; Böse (2007), p. 207.

[36] For this view see Wils (2003), pp. 19ff.; Wils (2005), paras. 433. For the risks of 'preemptive prosecutions and forum shopping' and their possible disposal, see Wils (2005), para. 434.

[37] See Klees (2006), p. 1230; Soltész (2005), pp. 622ff. with further references.

[38] See Harding and Joshua (2010), p. 349.

administrative proceedings against individuals and/or undertakings, irrespectively of whether the NCA's national legislation recognizes corporate liability or not.[39]

In a recent judgment the ECJ held that the "ne bis in idem" principle as laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance, obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.[40] However such "internal" matters are of little concern for the present discussion.

5.2 *Restrictions of the "Ne Bis In Idem" Principle Within the ECN due to Different Approaches on Corporate Criminal Liability?*

The specific question concerning the consequences of the different approaches to the corporate criminal liability among the EU Member States for the transnational "ne bis in idem" principle has not been raised until now before the European Court of Justice. Pursuant to Article 5 of Regulation 1/2003 the Member States while applying Articles 101 and 102 TFEU:

> may take the following decisions: [. . .] – imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Discrepancies could probably arise if the first prosecuting State imposes criminal sanctions on undertakings and the following state imposes administrative fines or vice versa.[41] As already mentioned, proceedings for such anti-trust violations fall however under the term 'criminal' regardless of their nominal classification, in conformity with the jurisprudence of the ECtHR, which has been endorsed by the ECJ.[42] Hence, the different approaches to corporate criminal liability should by no means influence or reduce the scope of applicability of the principle, as this has been defined above.

[39] For an overview, see Harding and Joshua (2010), pp. 290ff., 330ff. For this possibility under the German law, see Streinz (2009), p. 415.

[40] Judgment of the Court of 26 February 2013 *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10.

[41] For an overview of national cartel criminalization within the EU Member States, see Harding and Joshua (2010), p. 342ff.

[42] See above in this chapter, Sect. 3.2; see also Harding and Joshua (2010), p. 321.

6 Conclusion

Among the several points discussed above, one should focus on the inadequate implementation of a transnational "ne bis in idem" principle within the European Competition Network. The urgent need for a comprehensive regulation of "ne bis in idem" in this field follows not only from the heavy fines imposed for violation of antitrust rules,[43] but also more importantly, from the fact, that this defective protection affects the fundamental liberties of the EU legal order. Furthermore, the unconditional and complete protection of this fundamental principle is important for serving the aim of the ECN, which consists in the enforcement of European competition law through close cooperation.[44]

Therefore, no further restriction may take place as a consequence of the different approaches on corporate criminal liability among the Members of ECN.

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Part VI
International Corporate Criminal Liability

The Fifth Crime Under International Criminal Law: Ecocide?

Jacqueline Hellman

Abstract Environmental crimes are a serious and growing international concern as they cause significant harm to the environment and human health. Establishing environmental offences as international crimes would be a way to end with impunity as no country, no company and no individual would easily be able to escape from international criminal justice. As environmental offences do not yet fall under the scope of crimes against humanity, a new "core crime"—ecocide—should be introduced into the Rome Statute of the International Criminal Court. This hypothetical scenario will have an important repercussion: individuals in a position of superior or command responsibility, such as CEOs, will be criminally liable if they carry out an activity that harms the environment.

1 Environmental Crimes Against Humanity?

Environmental crimes are a serious and growing international concern as they cause significant harm to the environment and human health. When environmental damages take place, governments are reluctant to adopt measures that will prevent those environmental disasters from happening again, as their strategy is designed, in most cases, to increase the GDP. In fact, powerful governments and companies will put pressure on authorities in order to protect their financial interests, forcing local people to accept minimal compensation. Furthermore, a hard lesson learned in environmental law enforcement is that individuals and companies traditionally have faced minor sanctions when committing crimes against the environment. Additionally, in some countries, which have recently established criminal sanctions

J. Hellman (✉)
Instituto de Empresa University, Madrid, Spain
e-mail: jhellman@faculty.ie.edu

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for perpetrating environmental offenses and which emphasize criminal prosecution,[1] companies have decided that it is more advantageous to violate the law and support payment obligations rather than implementing appropriate measures to avoid ecological damages. They, indeed, prefer to absorb certain penalties as a cost of doing business, especially in not so powerful nations, where companies are bigger and stronger than governments. However, we have also seen cases where high fines have been imposed to important corporations regarding, for example, the massive oil spills provoked by Shell, the Anglo-Dutch multinational oil and gas company, in Nigeria.[2] This is a unique case where the company has strongly been condemned in its home country for environmental damage caused abroad. Thus, establishing environmental crimes as a crime against peace would be not only more effective, but it will also potentially have positive outcomes, as no country, no company and no individual in a leading position will be able to easily escape from international criminal justice. Having a solid international environmental regulation will mean that few individuals will adopt risky strategies that could lead them to face consequences under international law. In other words, having international norms instead of corporate or criminal domestic ones will assure that deliberate or intentional misconduct, noncompliance, falsification of information and records on this topic, etc., would be avoided.

Regarding the above, *is it possible to consider a crime against the environment to be an international crime*? *In other words*, *can it be catalogued as a crime against peace*? Furthermore, *does such criminal behaviour already fall within the scope of existing international crimes*, *in particular within the scope of crimes against humanity*? *Or should ecocide become a fifth crime*, *alongside with genocide*, *war crimes*, *crime of aggression and*, *of course*, *crimes against humanity*?

In order to answer to these questions, it is, first of all, crucial to highlight the meaning of "crime against humanity". According to what it is stated in article 7 of the Rome Statute of the International Criminal Court, it is an act "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". An illustrative list is given in the abovementioned legal provision where you can find examples of illegal acts that can be recognized as crimes against humanity. Those are, among others, the following ones: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental

[1] Brazil has established regulations in order to make environmental enforcement more effective. The Brazilian Federal Constitution establishes three kinds of liabilities for environmental violations: *administrative*, *civil and criminal*. The Brazilian environmental regulation is known as one of the most complete legislations in the world regarding this important topic.

[2] Shell was sentenced in the Netherlands to pay a bill of hundreds of millions dollars after accepting full liability for two massive oil spills occurred in Nigeria. Cf. http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria (12.2.2014).

Another recent environmental disaster took place in the United States of America. In April 2010, 200 million gallons of black crude oil were spilled into the Gulf of Mexico, affecting hundreds of miles of coastline and killing thousands of animals. The US Department of Justice settled federal criminal charges against British Petroleum, which had pleaded guilty to 14 federal charges.

rules of international law, etc. Accordingly, the existence of an attack addressed to civilian population is a key element. Furthermore, paragraph 2 of the aforementioned article clarifies what we should understand by this core element: "attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organizational policy to commit such attack*".

Consequently, after reading with detail the abovementioned legal provision, can it be applied to environmental crimes? No, as these crimes do not constitute an attack but mainly refer to a large-scale destruction of the environment (*i.e.* mass deforestation or a large oil spill).[3] *Ergo*, article 7 could hardly be applied. However, exploring this article can lead us to a few important reflections not strictly related to the object of the present study but, nevertheless, useful when drafting a new international crime that may share similar features with other existing ones. For this reason, it is crucial to analyse the prior mentioned legal provision. In this sense, can we conclude that any systematic or widespread attack perpetrated against civilian population supported by a *State* or by an *organization* is a crime against humanity? Or should we think that any widespread or systematic attack committed against civilians has to be considered as a crime against humanity? For some, the commitment of a crime against humanity requires the presence of a State or organization policy that sponsors, in one way or another, the execution of such heinous behaviour. According to them, this allows us to distinguish between a common crime that does not fall within international jurisdiction and a crime against humanity. Therefore, an "attack"—which, as we have seen, is one of the most important requirements in order to accomplish the perpetration of this particular crime—cannot be the result of random acts performed by individuals acting in their own initiative; those acts have to be encouraged by a powerful State source in order to duly consider that an "attack" submitted to international regulation has taken place.[4] Others argue that only by identifying an attack against civilians we

[3] According to the Environmental Investigation Agency, an international environmental crime "can be defined across five broad areas of offences which have been recognised by bodies such as the G8, Interpol, EU, UN Environment programme and the UN Interregional Crime and Justice Research Institute: illegal trade in wildlife in contravention to the 1973 Washington Convention on International Trade in Endangered Species of fauna and Flora; illegal trade in ozone-depleting substances in contravention to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; dumping and illegal transport of various kinds of hazardous waste in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal; illegal, unregulated and unreported fishing in contravention to controls imposed by various regional fisheries management organisations; illegal logging and trade in timber when timber is harvested, transported, bought or sold in violation of national laws". See http://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf (12.2.2014).

[4] Nevertheless, in the *Kupreškić case* the Court stated that crimes against humanity do not need the participation of the State although its toleration is vital. Regarding the organizational policy, the Court concluded that the accomplishment of this requirement would be duly fulfilled if in the commitment of such important crime any kind of entity—capable of committing acts of large-scale violence—is involved.

can say that an international crime covered by international regulation has been executed. Hence, the discussed illicit behaviour is subject to considerable controversy.[5] Therefore, by analysing the case law we can determine how the core elements of the discussed crime have to be interpreted.[6] Anyway, after realizing that the mentioned offence is not able to cover environmental violations we need to create one—*ex profeso*—in order to sanction the damage and destruction of the environment on the international level.

2 Ecocide as the Fifth Crime Under International Criminal Law?

Knowing that the commitment of environmental illicit behaviour may cause a long-term and severe damage to the environment, it seems necessary to negotiate, implement and enforce international environmental regulation in order to legally categorize them. Furthermore, as these deeds imperil the natural environment,

[5] Article 7 of the Rome Statute refers to a policy requirement in order to identify crimes against humanity. However, paragraph 2 of the mentioned legal provision expressly talks about a State or an organization that has to be involved in its commitment. As Jalloh (2013), p. 409 has highlighted, this article "(. . .) reveals the schizophrenia of the definition that at once nods to both the mass crime and the predatory State rationales for the offense". Hence, is the perpetration of an attack against civilians that leads to the commitment of a crime covered by international regulations? Or is it mandatory the participation of the State or organization in perpetrating or condoning the underlying heinous acts? The above mentioned author says that maybe the combination of the mentioned factors are relevant to consider that one illicit behaviour falls within the scope of article 7. See Jalloh (2013), p. 385.

[6] It is useful to point out the *Kenya Decision of March 2010*, which was issued by the International Criminal Court Pre-Trail Chamber regarding the violence that occurred after the presidential elections of December 27, 2007. The facts alleged in Kenya were, summing up, that a political party enrolling a criminal organization attacked rival supporters with the connivance of the police. In this case, the dissent opinion stated that a "State like" organization has to be involved in the performance of a crime against humanity. *Judge Kaul's*, the dissenter, clearly argued that the group involved in the commitment of a crime against humanity requires having State-like characteristics. Accordingly, not any organization can participate in the infliction of the mentioned crime; it is important to identify an important one that possesses State-like qualities. Under the same perspective, the drafters of the Rome Statute have declared that the organizational policy requirement was introduced in order to include different organs of the State (police, military, intelligence, etc.). Notwithstanding, the majority of the judges concluded that: "Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values". Therefore, *Jalloh* points out "(. . .) this approach tends to view customary international law as evolving to allow the ICC's [International Criminal Court] jurisdiction to cover an expanding category of mass crimes that perhaps could eventually include even purely private organizations". As Kress (2010), p. 873 says, in this case one important question emerges: is the international regulation going forward to protect States and their population from internal and external risk coming from private persons?

human health, etc., creating supranational environmental norms must be a priority of the international community. Hence, it is perfectly appropriate the proposal made by Poly Higgins to the United Nations by which *a fifth crime should be created under International Criminal Law in order to duly pursue and sanction these situations*: *ecocide*.[7] As the Environmental Investigation Agency declares: "it is time for the international community to wake-up to the menace of environmental crime and show the necessary political will to tackle the criminal gangs plundering our planet for a quick profit".[8]

Before discussing this proposal, it is important to highlight that a future international environment regulation, which should encompass ecocide, has to deal with several and important issues. First of all, environmental problems are mostly caused by strategies or activities carried out by private companies, rather than by actions of governments. In the light of the above, corporations usually put pressure on public authorities to protect their interests and—unfortunately—in many cases the former receive support from the latter, as they don't want to harm their GDP levels. Second, in order to have a strong environmental regulation it is important to be aware that environmental problems typically exceed jurisdictional boundaries. This means that if only few States make the commitment of assuring the application of sanctions when identifying environmental crimes, these norms can be, to a certain extent, useless. Therefore, not only there is a need of gathering together in this new and *uncertain* path, but also there is a need of cooperation; this cooperation has to develop between countries, even between industrialized and developing countries despite the fact that questions of equity and capacity might arise. Third, we have to consider new technology, future needs, new scientific understanding of environmental problems, etc., as it leads us to the following idea: international environmental law will operate under conditions of uncertainty and, thus, it must be adaptable to changing needs or knowledge.[9] Finally, behaviour that is putting at risk the very survival of life is truly affecting future generations. Therefore, present and future interests have to be taken into account when prohibiting and prosecuting those activities. For this reason, environmental international regulation has to examine acts from the perspective of what repercussion those will have in the future for human population, natural environment, ecosystems, etc.—which, of course, is not easy to determine. However, all these *obstacles* or *impediments* should not be conquered by the darkness. On the contrary, they should be considered as spring elements, which have to be taken into account necessarily when

[7] When talking about ecocide, Polly Higgins makes a division between ascertain and non-ascertainable crimes. The formers refer to crimes committed by individuals and, also, as a consequence of corporate activity, whereas the latters refer to catastrophic events that take place as a *force majeure* (floods, earthquake, tsunamis, etc.). From now onwards, the present contribution strictly refers to the first category of the discussed illicit behaviour.

[8] See supra footnote 3.

[9] Abbas declares the following: "environmental problems characteristically require expedition and flexible solutions, subject to current updating and amendments—to meet rapidly changing situation and scientific-technology progress". *Cf.* Abbas (2012), p. 611.

trying to solve all these challenges, giving concrete form to a strong and powerful international environmental regulation.

Coming back to the previous proposal it is important to stress that a definition has been provided regarding the term of "ecocide": *the mass damage*, *destruction to or loss of ecosystems of a given territory*, *whether by human agency or by other causes*, *to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished*. This project calls for an amendment of the Rome Statute.[10] In October 2012, legal experts from around the world discussed several problems related with the existing environmental law, developing as well an action plan for the future[11] that may lead to the inclusion of environmental crimes under the scope of application of the Rome Statute. Indeed, ecocide has been recognized as a crime that concerns the international community and many countries are willing to finally include it within the above-mentioned international regulation. In this sense, it is important to highlight that ecocide was listed as a Crime Against Peace in the draft Code of Crimes Against the Peace and Security of Mankind (antecedent of the Rome Statute) although it was excluded from the final document.[12] Likewise, in many countries, domestic regulation has been adopted in order to protect the environment.[13] Hence, "maybe now is the time to include what has been missing all along. That crime is ecocide".[14]

3 The Consequences of Having "Ecocide" as a Crime Against Peace

Introducing ecocide as a crime against peace will mean that individuals in a position of superior or command responsibility will be criminally liable if they carry out an activity covered by such a provision, disregarding knowledge or intent. Of course,

[10] It is important to highlight that the Rome Statute—article 8.2.b (iv)—includes a crime that harms the environment during war time: "*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread*, *long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*".

[11] This study will be done by the United Nations Environment Programme and the United Nations Interregional Crime and Justice Research Institute, which considers that environmental crime is "a serious and growing danger for development, global stability and international security", as well as "an emerging form of transnational organized crime requiring more in-depth analysis and better-coordinated responses at national, regional and international levels". See http://www.unicri.it/topics/environmental/ (12.2.2014).

[12] Only three countries are on record as having opposed to the inclusion of environmental crimes under international regulation: The Netherlands, United Kingdom and the United States of America.

[13] Among other countries, Vietnam in the decade of the 1990s introduced the crimes of ecocide, Ukraine in 2001, as well as the Republic of Moldova 1 year later.

[14] See Human Rights Consortium, School of Advanced Study, University of London 2012.

including the abovementioned illicit behaviour will mainly affect industries, which are usually blamed for widespread damage to the environment like fossil fuels, mining, agriculture, chemicals and forestry. In other words, embracing such crime under the applicative scope of the Rome Statute will primarily concern companies. Hence, this could mean that CEOs, directors, partners or any other person having superior responsibility in a corporation could be held responsible for ecological damages perpetrated under his/her authority[15]; they could be held accountable for not preventing or encouraging ecocide, without the necessity to prove *mens rea*.[16] Furthermore, drafting and approving international law on ecocide would affect also heads of States. Also, it has to be pointed out that accepting ecocide as an international crime will lead not only to the prohibition of causing environmental damage, but also to the appearance of an obligation related with the protection of the environment. This obligation would have to be followed by companies and governments in order to assist individuals that have suffered or are at risk of ecocide. Taking into account what has been previously said, the international community should consider ecocide as a crime against peace as soon as possible.

However, negative arguments have also been raised. Mainly, opponents think that this could potentially criminalize the whole humanity. Additionally, this measure is feared to encourage anti development. On the contrary, supporters of criminalizing ecocide claim that more than ever we need to have strong environmental regulation with the goal of stopping the flow of destruction of the ecosystems, to halt environmental mass damage, etc. Only then, CEOs, heads of States and heads of financial institutions will assume a preventive legal duty of care, especially if we take into account the legal doctrine of superior responsibility. Like Polly Higgins argues, it is "no longer … acceptable to pursue profit without consequence".[17]

Criminalizing ecocide is related with the protection and the defence of human rights; therefore, it is linked with human beings and not with corporations. In this way, the Rome Statute of the International Criminal Court has to be amended in order to prevent ecological damages and to provide a legal mechanism for the people to ask for relief, obtain remedy and to improve their life quality. This last statement is related with the Preamble of the Charter of the United Nations that declares the following: "We the peoples of the United Nations determined (. . .) to

[15] This can be linked with another important doctrine: the *vicarious liability*. According to this doctrine, employers can be held accountable for negligent acts or omissions caused by their employees within their employment tasks or functions.

[16] It can be useful to take a look to the Ecocide Act—proposed by Polly Higgins—which is a clear example of how the Rome Statute can govern all these issues: http://eradicatingecocide.com/overview/ecocide-act/ (12.2.2014).

The preamble of the Ecocide Act declares that: All Heads of state, Ministers, CEO's, Directors and any person(s) who exercise rights, implicit or explicit, over a given territory have an explicit responsibility under the principle of superior responsibility that applies to the whole of this Act.

[17] See http://www.guardian.co.uk/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court/ (12.2.2014).

promote social progress and better standards of life in larger freedom." Thus, *why should we waste more time for the international criminalization of ecocide*? Despite the fact that corporate criminal liability at the national level is a useful tool, neither this nor administrative sanctions systems are dissuasive enough in order to deterrence companies to commit environmental crimes as they are happening today. Furthermore, the protection of the environment affect us all, hence, international norms—which embrace universal and core values—are needed.

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Corporate Involvement in International Crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons

Lynn Verrydt

Abstract This chapter provides the reader with a substantiated assessment of the possibilities for and implications of a hypothetical extension of the International Criminal Court's jurisdiction to include legal persons. Currently, article 25 of the Rome Statute limits the Court's competence to natural persons. In the following pages, an analysis of the desirability and feasibility of the concept is made. Consequently, this chapter focusses on offering a solution for one of the major obstacles preventing an extension of article 25 to include legal persons, namely the identification of a model which provides adequate propriety for attributing *mens rea* to corporations on an international level.

1 Desirability

In the upcoming paragraphs the desirability of the concept will be illustrated, firstly, by providing the reader with examples of corporations involved in international crimes. In further substantiating the need for an international forum, attention is paid to the advantages an overarching mandate offers in comparison to existing liability regimes, more specifically in comparison to national court systems.

L. Verrydt (✉)
Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium
e-mail: lynnverrydt@gmail.com

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1.1 Examples

Numerous examples of corporate involvement in international crimes anchor this perhaps somewhat academic subject into reality. One prominent example dates back to the cradle of international criminal law, the Nuremberg Tribunal. Here, in the I.G. Farben-,[1] Krupp-[2] and Flick-[3] trials, German industrialists were prosecuted for the severe harm they, through the vehicle of their corporate entity, had inflicted. These cases, directed against the corporate officers of these three major corporations, provided charges for war crimes and crimes against humanity, including enslavement of civilians out of occupied territory and those imprisoned in concentration camps,[4] deportation[5] and coercing Jewish plant owners into giving up their property.[6] The I.G. Farben–case additionally and noteworthily included charges for the supply of poisonous gas for the extermination of, and drugs for medical experiments on, those enslaved and imprisoned in the concentration camps.[7]

Some more modern examples can be found in cases tried under the Alien Torts Claims Act. This act is reflected in the U.S. Code provision that allows for district courts to hear civil claims of an alien "for a tort only, committed in violation of the law of nations. . ."[8] One well-known example here is the case which resulted out of Shell's alleged involvement in crimes against humanity in Nigeria.[9]

Shell, which began extracting oil in the Niger Delta in the 1950s, met with peaceful yet increasing resistance from the Ogoni, a tribe of indigenous people. In 1990, the non-governmental organization "Movement for the Survival of the Ogoni People" was founded.[10] Under the leadership of writer Ken Saro-Wiwa, they protested the numerous oil-spills and gas flares, polluting their land, water and air. As resistance grew, Shell was accused of conspiring with Nigeria's dictatorial military regime to assure the movement would be silenced. With the coming into power of president Abacha a specific military task force, the Rover State Internal Security Task Force, was established exclusively to deal with the MOSOP and allegedly engaged in numerous human rights violations, varying from unlawful

[1] UN War Crimes Commission Vol. X (1949a).

[2] UN War Crimes Commission Vol. X (1949a).

[3] UN War Crimes Commission Vol. IX (1949b), pp. 1ff.

[4] UN War Crimes Commission Vol. IX (1949b), p. 2; UN War Crimes Commission Vol. X (1949a), pp. 4f. Count III and pp. 69f.

[5] UN War Crimes Commission Vol. IX (1949b), p. 2.

[6] UN War Crimes Commission Vol. IX (1949b), p. 2; UN War Crimes Commission Vol. X (1949a), p. 4 Count II.

[7] UN War Crimes Commission Vol. X (1949a), pp. 4f. Count III.

[8] 28 United States Code Sec. 1350.

[9] United States District Court, Southern District of New York, case 1:01-cv-01909-KMW-HBP Wiwa, et al. v. Anderson, et al.; and case 1:96-cv-08386-KMW-HBP Wiwa, et al. v. Royal Dutch, et al.

[10] Hereinafter referred to as 'MOSOP'.

detention to execution.[11] Besides frequent violent outbursts of the Nigerian military against protesting civilians, this led to the execution of the 'Ogoni Nine'. After a mock trial before a special military tribunal, which set into motion a wave of international outrage, Ken Saro-Wiwa and eight other Ogoni-men were executed by hanging on November 10th, 1995.[12]

1.2 Advantages in Comparison to National Criminal Liability

A number of States have incorporated international crimes into their domestic criminal legislation. Often, these criminal codes apply to legal persons as well as to natural persons and, in a minority of cases, states even endow themselves with universal jurisdiction.[13] So, is an international forum truly necessary?

In most cases, two sets of legal systems could address corporate involvement in international crimes, namely that of the host state and that of the home state. The "host state" is often a third-world country, which hosts production or extraction by companies incorporated in the Western "home state".[14] The following paragraphs will contain an analysis of why states that are endowed with the necessary jurisdiction to prosecute, refrain from utilizing it.

The host state is often either unable or unwilling to act. Inability can stem from an underdeveloped legal system, implying that corporate conduct does not constitute a criminal offence under the domestic law of the State where it is committed. Alternatively, an underdeveloped court system may not be able to provide the means necessary for prosecution. Lastly, one must not lose sight of the issue of severe corruption often crippling the judicial systems of these conflict zones. These elements, either individually or combined, have the power to render the host state unable to prosecute.

Even more staggering are the numerous cases in which the state is unwilling to take action against corporate criminal activity. When confronted with a choice between protecting the human rights of its citizens and increasing economic activity through much-needed foreign investment, many host states choose the latter.[15] However, the state can even be more than a silent bystander and either act alongside the corporation as an accomplice[16] or render the corporation an accomplice, the state itself being the primary perpetrator.

Companies engaging in criminal activity mostly have their seats in states with developed legal systems, referred to as the 'home state'. International law indicates

[11] Manby (2000), pp. 5f.

[12] Manby (2000), p. 1.

[13] E.g. United Kingdom, Norway, Canada and France.

[14] Haigh (2008), p. 200.

[15] Kremnitzer (2010), p. 916.

[16] Kremnitzer (2010), p. 917.

that a state has a duty to protect against human rights violations by third party non-state actors, including corporations.[17] However, there exists debate as to whether this obligation also applies to extraterritorial human rights abuses by domestic corporations. Here, the greater consensus lies with the idea that states are "not prohibited from doing so".[18]

However, the fact that it is "not prohibited" hardly equals an obligation and most home states demonstrate a sense of detachment, appearing most reluctant to exercise this right.[19] In other words, the inability or unwillingness of the host state, combined with the reluctance of the developed home state creates a legal vacuum in which these corporations operate freely, without the threat of indictment.

It is for all these reasons that national criminal corporate liability cannot cure the lack of an international forum. In the current framework, those who are able to prosecute lack either the will or the possibility to do so. In the scenarios set out above, international criminal liability offers the option of indictment before the International Criminal Court and thus helps end the current state of impunity.

2 Feasibility of Extending the International Criminal Court's Mandate to Include Corporations

During the Rome Conference, predating the Rome Statute, delegates identified several specific obstacles which would hinder the inclusion of legal persons in the Statute.

2.1 Sanctions

The first obstacle set forth was a lack of appropriate sanctions. Indeed, the only sanction currently offered by article 77 of the Rome Statute which could apply to legal persons is that of a monetary fine, which gives rise to several counter-arguments, the most important one being its minor deterrent effect on corporations due to the inclusion in the corporation's prior cost-benefit analysis.[20] However, this obstacle is hardly insurmountable. A number of possible sanctions, which provide a greater propriety in relation to legal persons, could be incorporated into the Statute. These include restraints, structural injunctions, adverse publicity, the more controversial issuance of equity shares and dissolution. Although political compromise is of the essence with regard to an amendment of the Rome Statute, consideration

[17] Ruggie (2008), para. 18.
[18] Ruggie (2008), para. 19.
[19] Haigh (2008), p. 200.
[20] Kristian Fauchald and Stigen (2009), p. 1042.

must be given to the gravity of the offences at hand and to whether the exceptionally serious and grave nature of these crimes would not justify the application of the full range of available sanctions.

2.2 *Lack of an International Standard*

A second obstacle identified at the Rome Conference concerns the lack of an international standard in relation to corporate criminal liability. States Parties are divided between those that do not recognize the concept of corporate criminal liability in their national legal systems and those that do. Amongst States Parties that recognize the concept, there is a further subdivision, as different models of attribution are utilized by different states. The final part of this chapter is aimed at unveiling a solution to the challenge posed by this latter category. The challenge posed by the first category is twofold.

Firstly, there is the (perhaps more theoretical) objection, often come across in doctrine,[21] of the complementary principle. Article 17 § 1 (a) of the Rome Statute provides competence for the Court in cases where the States Parties are unable or unwilling to prosecute. The complementary objection holds, *in casu*, that if the Court's jurisdiction were to be expanded to include legal persons, this would cause those States that are unfamiliar with the concept of corporate criminal liability to be deemed "unable or unwilling" in the sense of article 17. As such, the Court would be endowed with "automatic" jurisdiction for all cases in which the defendant is a legal person, which goes against the complementary nature of the Court.[22]

However, the most prominent hurdle presented by the absence of an international standard is linked to the two-thirds majority vote required to amend the Rome Statute.[23] States Parties that are not familiar with the concept of corporate criminal liability are unlikely to vote in favor of or ratify an amendment to the Statute to that accord. Due to the absence of large-scale studies on this subject, the exact status of corporate criminal liability in each of the States Parties' domestic law regimes is unknown and as such no definite conclusion can be presented as to the probability of a two-thirds majority vote in favor of an amendment of the Statute. However, given the fact that a number of States Parties to the Rome Conference have underdeveloped legal systems, it is not unreasonable to assume that these would not apply criminal liability to legal persons. Hence, despite the limited information available, it is unlikely that an amendment of the Court's Statute to include legal persons is practically achievable at this time.

In conclusion, the lack of an international standard concerning corporate criminal liability remains the first and foremost obstacle preventing the extension of the

[21] Kyriakakis (2008), p. 117; Ambos (1999), p. 7; Frulli (2002), pp. 532f.; Eser (2002), p. 779.
[22] Haigh (2008), p. 204.
[23] Article 121 § 3 Rome Statute.

Court's jurisdiction to legal persons. At this time, an amendment of the Rome Statute in order to extend the Court's jurisdiction does not seem feasible. Regardless of this negative conclusion, the upcoming section of this contribution will focus on providing an answer to the last fundamental hurdle set forth during the Rome conference, namely providing a workable model of attribution, which is politically acceptable for all States Parties.

3 The Identification Approach as the Appropriate Model of Attribution

The objective of the current submission is to tackle a fundamental obstacle, which hindered the inclusion of legal persons in the Court's jurisdiction at the Rome Conference, namely how the attribution of the mental element of an international crime to a legal person is to take place. In the following paragraphs, an extensive analysis of the identification approach as the most suitable model of attribution is set forth. The model's propriety for the international level, in comparison to three other leading attribution models, namely the vicarious liability approach, the aggregation model and the self-identity model, will be substantiated through both legal argumentation and considerations in relation to the political feasibility of the concept.

3.1 Legal Arguments

From a legal perspective, the advantages presented by the identification model are threefold. Firstly, the assimilation of the individual perpetrator and the legal person provides for the more appropriate context for *mens rea* offences. Secondly, the identification model seems to find alignment with the possibilities for perpetration provided in article 25 § 3 (a) of the Rome Statute and thirdly and lastly, it is an expression of a clearly distinguishable tendency in international criminal law towards applying a top-down approach. Each of these three arguments will be explored in more detail in the upcoming paragraphs.

3.1.1 The Implications of the Different Attribution Models for *Mens Rea* Offences

The identification model offers a number of favorable elements in relation to the question of attributing the mental element of an offence to a corporation. In comparison to the vicarious liability approach and the aggregation model, its

advantage lies in the assimilation[24] of the individual perpetrator and the corporation, rather than the attribution[25] of the former's conduct to the latter.

Through this assimilation, the mental element exists in respect of the corporation itself, a quality that is particularly preferable for *mens rea* offences.[26] The vicarious liability approach as well as the aggregation model, which utilizes vicarious liability-techniques, attributes the culpability of the corporate agent to corporation, thus representing a form of strict liability. Strict liability does not offer a suitable context for *mens rea* offences in general and least of all for core crimes such as genocide, crimes against humanity and war crimes.

The self-identity model does not pose these problems with regard to attribution, as this model implies that corporate liability is incurred as a result of the internal structures and policies of the corporation, the "corporate culture", rather than the actions of its human agents.[27] As such the self-identity model implies a primary, rather than a derivative form of liability.[28] However, the mental element provided by the self-identity model only provides the rational element of knowledge,[29] whilst article 30 of the Rome Statute requires both knowledge and intent.

The foregoing shows that only the identification model will allow for both the required knowledge and intent to exist in respect of the corporation itself, rather than be imputed to it on the basis of the criminal conduct of another.

3.1.2 The Identification Model and Article 25 of the Rome Statute

In cases of corporate involvement in international crimes, often times the offence is split. The physical exercise of the offence will most likely be carried out by "foot soldiers", lower ranking employees who may or may not be aware of the illegality of their actions,[30] whilst the criminal intent behind those actions is likely to reside with corporate organs. Article 25 of the Rome Statute aims to capture responsibility for "acts committed in a collective context and systematic manner"[31] and as such

[24] Vermeulen et al. (2012), p. 57.

[25] Wells (2000), p. 652f.

[26] Vermeulen et al. (2012), p. 57.

[27] Allens (2008), p. 4.

[28] Allens (2008), p. 1.

[29] Lederman (2000), p. 692.

[30] Knowledgeable of the fact that the following certainly does not apply to all cases, there are scenarios conceivable where especially the mental element is more likely to be located in the higher-ranking corporate officers than in agents of a lower rank. For instance, an employee endowed with the task of transporting a number of people to a different location may very well not know that this concerns forcible transfer. He may very well be clueless as to the fact that his action is part of a widespread and systematic attack and thus have no intention whatsoever to further such attack.

[31] Ambos (2008), para. 3.

introduces different and extended forms of perpetration of and participation in these crimes.

Remarkably, alignments of the identification model with one of the possibilities for perpetration provided in article 25 § 3 (a) and (b) appears evident. More specifically, the former paragraph provides the possibility of liability for what is known as 'perpetration by means', pertaining to the commission of a crime "through another person".[32] The concept differentiates between the direct perpetrator, in our case the lower-ranking agent physically committing the crime and an indirect perpetrator, *in casu* a high-ranking corporate officer. In the corporate context, the control of the latter over the former can be derived from a "hierarchical organizational structure".[33] The same concept, linked to the dominance of one person over another, is expressed in the liability provided in article 25 § 3 (b) for the person ordering the crime, which is also a form of perpetration (by means), rather than participation.[34] This form of liability is highly reminiscent of the superior responsibility principle, provided by article 28 of the Rome Statute, which implies liability of civilian superiors for crimes committed by their subordinates, given that these were committed within the superior's control.[35] However, rather than identical, the two concepts are complementary. A position of superiority can bring about liability through article 25 § 3 (a) and (b) as a result of a positive act, e.g. coercion practically materialized in an order, whilst article 28 implies liability when the superior was unable to prevent, due to "failure to exercise control",[36] the criminal act of a subordinate. As such, the articles cover the complementary loads of commission and omission.[37]

In conclusion, the concept of 'perpetration by means', included in article 25 § 3 (a) and (b) provides the legal basis that is required for international criminal liability for corporate officers for the perpetration of international crimes by means of their corporate subordinates. The identification approach provides assimilation between the high-ranking corporate officer and the legal person at the moment of the crime. As such, the missing element required for the international criminal liability for the corporate entity itself, appears limited to the inclusion of legal persons in article 25 § 1 of the Rome Statute.

[32] Art 35 § 3 (a) Rome Statute.

[33] Ambos (2008), para. 9.

[34] Ambos (2008), para. 12.

[35] Article 28 (b) (ii) Rome Statute.

[36] Article 28 (b) Rome Statute.

[37] Ambos (2008), para. 12.

3.1.3 International Criminal Law's Tendency Towards Prosecution of High-Ranking Figures

The last legal argument reflects on the observation that, out of the four attribution models at hand, the identification approach is most in line with a tendency detected in international criminal law practice. In the past, the Statutes of the Tribunals have shown a clear preference for targeting those at the top of the pyramid and tend to show less interest in foot soldiers.

This is reflected in Rule 11bis of the Rules of Evidence and Procedure of the ICTY, which pertains to referral of the indictment to another court. The article introduces the concept of a 'referral bench', with the competence to refer certain cases to domestic Courts. Paragraph C specifically calls to take into consideration in determining this referral "the level of responsibility of the accused".[38] Additionally, article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea refers to the need to bring the senior leaders, those who are most responsible, to trial.[39]

This preference for the leaders rather than mere executors is undoubtedly best reflected in the identification model, as it implies corporate criminal liability for the criminal actions of the higher management.[40] In comparison, the vicarious liability approach and aggregation model imply the possibility of corporate criminal liability for the criminal actions of all employees, regardless of their rank in the corporate hierarchy.[41] This is equally true for the self-identity model, provided the criminal conduct was tolerated or encouraged by the corporate culture.

3.2 Political Acceptability: Aspiring to a Future Amendment of the Statute

Although an extension of the Court's Statute to include legal persons may currently not be feasible, political acceptability must still be taken into consideration when pinpointing a particular attribution model, as not to thwart the possibility of future developments. In a way, this represents the practical side of the equation. An amendment of the Court's Statute will require a two-thirds majority vote.[42] As such, one must remain cognizant of the fact that the identification model offers a wide consensus as to its form and content and would inspire the least amount of controversy out of the four models. The upcoming paragraphs will offer a

[38] Rule 11bis § c, Rules of Procedure and Evidence of the ICTY.

[39] Article 1 Law on the Establishment of ECCC.

[40] Lederman (2000), p. 659.

[41] Lederman (2000), p. 654 and pp. 662f.

[42] Article 121 §3 Rome Statute.

comparison of the identification model to the three remaining models in order to substantiate this claim.

3.2.1 In Comparison to the Vicarious Liability Approach and Aggregation Model

When comparing the scope of the identification model with that of the vicarious liability approach, it is clear that the former is the more narrow option. As was stated earlier, the vicarious liability approach attributes to the corporation all misconduct by all employees, whilst the identification approach is limited to the criminal actions of high-ranking corporate officers. Thus, those who trigger corporate liability under the identification doctrine, are equally included under the vicarious liability approach. In other words, states that engage the vicarious liability approach can provide corporate criminal liability in response to criminal conduct by high-ranking corporate officers, whilst states engaging the identification model cannot provide corporate criminal liability for the criminal acts of low-ranking corporate agents. The aggregation model only broadens the scope of the vicarious liability approach, allowing for the fracturing of the criminal elements of *mens rea* and *actus reus* amongst multiple corporate agents, provided they are united within one corporation.[43] Hence, the identification model represents the greatest common divisor, rendering it the most likely to be deemed politically acceptable for States Parties.

However, it must be noted that the theoretical legal difference that exists between these models, namely that of attribution versus assimilation, prevents a description of the identification model as a genuine and complete intersection of these three models. This could possibly be an issue for certain States Parties, engaging a form vicarious liability. Whether or not this would be a justified objection, is left to the reader's discretion.

3.2.2 In Comparison to Self-Identity Model

The self-identity model offers a new approach to the concept of corporate criminal liability. However, it embodies a dual obstacle with regard to its political feasibility. Firstly, what is provided for the vicarious liability approach and aggregation model is equally true for the self-identity model, as the scope of the latter model encompasses all three previous models,[44] seeing how through application of the self-identity model the corporation can incur criminal liability for the actions of any employee or for a fractured criminal act, which is the result of the aggregation of

[43] Slye (2008), p. 968; Lederman (2000), p. 663.

[44] Weinstein and Ball (1994), p. 67; Lederman (2000), p. 681 and pp. 695f.

different components divided amongst several employees, provided the criminal conduct was tolerated or encouraged by the corporation's policies.

Once again, the identification model appears to offer the greatest common divisor. In addition to this broad scope, another counterargument is found in the seeming lack of consensus surrounding this model. As opposed to the identification model, the self-identity model does not represent an all-round accepted approach to attributing criminal conduct to corporations. This is illustrated by the fact that doctrine is divided between advocates and opponents.[45] Scholars differ on its complex relation to the former three models[46] and different versions of the model provide different parameters in relation to determining the corporate culture.[47] This lack of consensus translates to a limited inclusion of the self-identity model in domestic legal systems.[48]

In conclusion, the propriety of the identification model over the model of self-identity in light of the possibilities for an amendment of the Rome Statute is substantiated by the former's stability, reflected in its numerous applications in the domestic legal systems of the States Parties. The identification model can offer the required all-round acceptance and stability, which is most likely to allow for incorporation in the Rome Statute.

3.2.3 An Affirmation of the Identification Model's Propriety Through EU Council Framework Decisions

The interpretation of the identification model as the most politically acceptable model appears to find affirmation in an attribution model set forth in a number of EU Council Framework Decisions[49] and nowadays also in EU Directives[50]

[45] Vermeulen et al. (2012), p. 59.

[46] Lederman (2000), p. 681.

[47] Lederman (2000), p. 693.

[48] Australia: Part 2.5 Section 12.3 (1) Criminal Code Act; United States: Guidelines Manual United States Sentencing Commission 2011.

[49] E.g. Article 8 para. 1 Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, as amended, CONSLEG 2000 F0383 of 13.12.2001; Article 7 para. 1 Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ 2001 L 149 of 01.05.2001, p. 1; Article 7 para. 1 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, as amended, CONSLEG 2002 F0475 of 08.12.2008; Article 5 para. 1 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003, p. 54; Article 8 para. 1 Council Framework Decision 2005/222/JHA of 21 February 2005 on attacks against information systems, OJ L 69 of 16.3.2005, p. 67; Article 5 para.1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008, p. 42.

[50] Art. 5 para. 1 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and

concerning offences ranging from corruption to child pornography. With just minor linguistic variations, each of the Council Framework Decisions and Directives holds that "[e]ach Member State shall take the necessary measures to ensure that legal persons can be held liable" for the relevant criminal conduct. It then introduces the identification model, stating the criminal act must be committed for the benefit of the legal person by a person . . .

> acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
> (a) a power of representation of the legal person;
> (b) an authority to take decisions on behalf of the legal person; or
> (c) an authority to exercise control within the legal person.

Additionally, corporate responsibility is incurred in case of "lack of supervision or control" by the natural person in a leading position. This obligation of supervision represents an expansion of the pure form of the identification approach, which—logically—is often come across in continental Europe.[51]

The *ratio legis* behind the Council's option for the identification model is difficult to demystify. However, what is known is that the Council Framework Decisions—and now also the EU Directives—set forth a certain result, which Member States, through the means of their own choice and liking, must reach. In this respect, the assumption that the Council has opted for a model that is achievable and acceptable for all Member States is reasonable and resonates within the identification model.

4 Conclusion

A three-part conclusion arises. Firstly, through the means of an enumeration of examples (limited by the scope of this contribution) and an exemplification of the advantages an international forum offers compared to the existing national liability possibilities, the necessity of an extension of the Court's competence was illustrated. Secondly, the dubious nature of the concept's current feasibility is substantiated, most importantly due to the lack of an international standard with regard to corporate criminal liability in the Member States' national legal systems. Such is

replacing Council Framework Decision 2002/629/JHA, OJ L 101 of 04.05.2011, p. 1; Art. 12 para. 1Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011, p.1; Art. 11 para. 1 Draft Directive of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, PE-CONS 38/13; Art. 6 para. 1 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Council Document 10729/13 of 10.06.2013.

[51] Allens (2008), p. 4.

not only incompatible with the principle of complementarity, but moreover thwarts the two-thirds majority vote required to amend the Statute. However, the focus of this contribution comprises overcoming a fundamental, practical hurdle with regard to including legal persons in article 25 of the Rome Statute, namely the attribution of *mens rea* to corporations involved in international crimes. Here, an analysis of the four major attribution models sets forth the identification approach as the most suitable for the international level. Such analysis was extensively substantiated through both legal and political argumentation.

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Part VII
Sanctioning Corporations: Looking Beyond Fines

Equal Treatment and Corporate Criminal Liability: Need for EU Intervention in Public Procurement?

Wendy De Bondt

Abstract A comparison of the different EU criminal justice systems reveals a significant diversity in the legal frameworks surrounding corporate criminal liability. There are differences in the typology of legal persons that can be held reliable, differences in the attribution mechanisms and differences in the offences in general and more specifically the offences legal persons can be held criminally liable for. Academic debate on this diversity is far from new.

The novelty of this contribution consists of the combination of two totally different branches of law; it combines corporate criminal liability with the functioning of the EU's internal market. Using the equal treatment requirement in public procurement procedures as a case study, it is demonstrated that diversity in the legal frameworks surrounding corporate criminal liability is not a mere theoretical and practical obstacle, but gives way for profound and complex legal questions. It is unclear whether—in light of the diversity in corporate criminal liability—it is feasible to ensure equal treatment of all participating procurement candidates.

This contribution elaborates on possible interpretations of "equal treatment" in light if the principles underlying the proper functioning of the internal market and more specifically the functioning of public procurement given the diversity in the legal framework surrounding corporate criminal liability to substantiate the need for EU intervention.

W. De Bondt (✉)
Faculty of Law, Institute for International Research on Criminal Policy (IRCP), Ghent University, Ghent, Belgium
e-mail: Wendy.DeBondt@UGent.be

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1 Introduction

1.1 Corporate Criminal Liability Diversity

Discussions on whether and to what extent it should be possible to hold legal persons criminally liable for offences, are far from new. Based on an extensive empirical analysis, it was already argued elsewhere that the position of legal persons in the criminal justice systems continues to vary widely across EU Member States and three main differences can be identified.[1] Firstly, differences remain in the acceptance of a legal person as a legal construct and whether or not a distinction should be made between public and private legal persons when looking into their criminal liability.[2] Secondly, differences remain in the attribution mechanisms and the theory underlying the liability for offences.[3] Thirdly, linked thereto, differences remain in the offences that are singled out and identified as offences legal persons can commit. Some Member States have made an explicit selection whereas other Member States have opted for a system where *in theory* legal persons can commit any of the offences natural persons can commit.[4]

From an academic and theoretical perspective, the question often arises what "the most suitable model" is in an ever evolving and integrating European Union. It is said that the absence of a common understanding about the position of legal persons in criminal law, is EU-unworthy. However, establishing a difference does not suffice to justify EU intervention. Pursuant to Art. 5 TEU, it is necessary to be able to demonstrate a need thereto, a need for EU intervention that goes beyond mere pragmatic and/or theoretical considerations. Only an established need can support possible legal initiatives to further harmonise corporate criminal liability in the EU and evolve towards a more uniform approach. Therefore, the question arises to what extent the diversity in corporate criminal liability gives rise to profound legal problems that demonstrate a need and therefore justify a more harmonised approach and/or finding a legally sound way of dealing with the consequences of the diversity.

1.2 Distorting the Internal Market

A need for intervention might be found in the potential distorting effect the diversity in corporate criminal liability may have on the functioning of the internal market. Diversity in corporate criminal liability is sometimes perceived as giving

[1] Vermeulen et al. (2010).

[2] Dewey (1926) pp. 655, Colvin (1995) pp. 1, Pacquee (2008), pp. 477.

[3] Frisse and Braithwaithe (1993), Lederman (2000), Sepinwall (2011).

[4] Vermeulen et al. (2010), p. 79.

way for "the unequal treatment" of corporations having a seat in different Member States and in doing so distorting the functioning of the internal market. The *Hansen and Søn* case is a good example thereof. That Danish transport and logistics company was being prosecuted in Denmark in its capacity as the employer of a driver on the grounds that the latter had infringed certain provisions with respect to the maximum daily driving period and the compulsory daily rest period. Hansen and Søn argued in front of the European Court of Justice that the introduction in Denmark of a system of strict liability when implementing an EU Regulation, had significantly increased the risk for undertakings in that Member State of being penalised compared to the risk in other Member States. It argued that therefore the Danish implementation caused for a distortion of the competition within the internal market.[5] The ECJ argued that the introduction of a system of strict liability "*in itself*" does not involve a distortion of the conditions of competition and therefore the implementation was not problematic.[6] How "*in itself*" should be interpreted was not clarified in the decision. As a result, in literature, this judgement has been criticized for not being more specific as to what could involve a distortion of the conditions of competition and what could give way for an unequal treatment of legal persons.[7] In his opinion, Advocate General *Van Gerven* does not provide a clear answer either. He argued that comparative legal analysis on the implementation of the involved legal instrument could not support the argument that the criminal law provisions in Denmark were more or less severe than the mirroring provisions in other Member States.[8] The key aspects that lead to the rejection of *Hanson and Søn*'s claim were (1) the existence of a harmonizing legal instrument, (2) the commonality between the legal systems in the Member States and (3) the absence of a positive obligation for Member States to implement the provisions of the EU Regulation in a way that would ensure equal "punishability risks" for legal persons in different Member States. Quite to the contrary, Member States have retained their discretion to punish the identified offences with effective, dissuasive and proportionate sanctions.

1.3 Public Procurement Case Study

From that case law it becomes clear that a successful legal argumentation to support the problematic character of the corporate criminal liability diversity should not start from the diversity in the way (quasi) criminal law provisions have been implemented into national law. There is no positive obligation to introduce uniform criminal law provisions in the national criminal codes and ensure equality between

[5] ECJ, Case C-326/88 Hansen & Søn, 10 July 1990 at §13.

[6] ECJ, Case C-326/88 Hansen & Søn, 10 July 1990 at §15 *in fine*.

[7] Klip (2009), p. 92; De Bondt (2012), p. 149.

[8] ECJ, Case C-326/88 Hansen & Søn, opinion, I-2925.

the different criminal justice systems. Indeed, the respect for the diversity in the criminal justice systems is repeated regularly. Alternatively, an argumentation should start from the principles underlying the proper functioning of the internal market and should look into the existence of scenarios that do hold a positive obligation to ensure equality.

Interestingly, one of the fundamental principles underlying the proper functioning of the internal market is the equal treatment between all players, regardless of their nationality or background. Undoubtedly one of the internal market policies where equal treatment is most prominent, is the European public procurement policy. For that reason public procurement is selected as a case study and assessed to what extent equal treatment requirements in a public procurement context would give way for profound legal problems; legal problems that could establish a need for EU intervention.

The central research hypothesis underlying this contribution reads: "*Given the corporate criminal liability diversity in the Member States and the vast involvement of legal persons in public procurement procedures*, *the EU needs to clarify the meaning of equal treatment of candidates in a public procurement context*."

That hypothesis will be substantiated by elaborating not only on the importance of equal treatment in a public procurement context, but also on the effect of the corporate criminal liability diversity on the application of the conviction related exclusion grounds.

2 Equal Treatment: Crap or Trap?

2.1 Equal Treatment in a Public Procurement Context

To substantiate the problematic character of the corporate criminal liability diversity, the concepts of equal treatment and public procurement need to be linked.

Public procurement refers to the government's activity of setting up public procedures for the purchasing of the services, goods and/or work which it needs to carry out its functions.[9] When a government seeks to renovate a building with a view to house an administrative department, the purchasing of *services* may refer to the architectural advice preceding the renovation, the purchasing of *goods* may refer to the building materials necessary for the renovation and the purchasing of *work* to the actual man-hours to complete the renovation. The public procedure aims at ensuring that the best available product is purchased at the best available price.

[9] Arrowsmith (1998).

Equal treatment in its turn, is a basic principle in EU law.[10] Equal treatment requires that equal situations are treated in an equal manner and different situations are treated in a different manner.[11]

The importance of equal treatment in the context of public procurement is recognised by its explicit inclusion in Article 2 Procurement Directive, and additionally the ECJ has clarified that even where it is not explicitly included in the body of the text, the principle is so fundamental, that procurement cannot function without it. In the *Storebælt* case the ECJ had to judge a Danish call for tender with respect to the construction of a bridge, which required all candidates to use as much as possible Danish resources. One of the candidates took this matter to court arguing that such a requirement would result in the unequal treatment of foreign candidates. It was argued that Danish resources are better known and more accessible for Danish candidates. The requirement to use Danish resources was said to constitute a disadvantage for foreign candidates. With the *Storebælt* case, the ECJ clarified that even where directives do not expressly mention *in casu* the principle of equal treatment of candidates, the duty to observe that principle lies at the very heart of the directive purpose of which it is to ensure the development of effective competition in the field of public contracts and which lays down criteria for selection and for award of the contracts by means of which such competition is to be ensured.[12] The principle requires an objective comparison of the tenders submitted by the various candidates.[13] The same reasoning can also be found in several other cases.[14] Undeniably, equal treatment is a fundamental principle in a public procurement context and the interpretation and application of procurement legislation should be done with respect for the equal treatment principle.[15]

2.2 Exclusion Grounds in Public Procurement Law

Though equal treatment might seem self-evident as a baseline, the application thereof in practice is far from self-evident. The reason why public procurement is singled out as a case study in this analysis can be found in the mandatory exclusion grounds that are inserted in the current legal framework. Member States are to

[10] McCrudden (2009), pp. 271ff.; Drijber and Stergiou (2009), p. 805.

[11] See e.g. ECJ, Joint cases C-21/03 and C-34/03 Fabricom, 3 March 2005, at §27; ECJ, Case C-434/02 Arnold André, 14 December 2004, at §68, Case C-210/03 Swedish Match, 14 December 2004, at §70.

[12] ECJ, Case C-243/89 Storebælt, 22 June 1993, at §33.

[13] ECJ, Case C-243/89 Storebælt, 22 June 1993, at §37. *In casu* the ECJ decided that the requirement to use domestic resources would amount to an unequal treatment of the foreign candidates.

[14] See e.g. ECJ, Case C-13/63 Italy v. Commission, 17 July 1963; ECJ, Case C-304/01 Spain v. Commission, 9 September 2004; ECJ, Case C-210/03, Swedish Match, 14 December 2004.

[15] De Bondt (2012), p. 147.

legislate that candidates convicted for any of the listed offences are disqualified from participating in public procurement procedures. Those exclusion grounds are inherently linked to the corporate criminal liability diversity in the Member States because procurement candidates are often legal persons. Those disqualifying exclusion grounds that prevent convicted candidates from participating in the public procurement procedure are subject to analysis in this case study. The current Procurement Directive[16] stipulates that (emphasis added):

> *Article 45*
>
> ***Personal situation of the candidate or tenderer***
>
> *1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below* ***shall be excluded*** *from participation in a public contract*:
>
> (*a*) ***participation in a criminal organisation***, *as defined in Article 2*(*1*) *of Council Joint Action 98/733/JHA*;
>
> (*b*) ***corruption***, *as defined in Article 3 of the Council Act of 26 May 1997 and Article 3* (*1*) *of Council Joint Action 98/742/JHA respectively*;
>
> (*c*) ***fraud*** *within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities*;
>
> (*d*) ***money laundering***, *as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*.
>
> *Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.*
>
> *They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.*

In the preamble to the current Procurement Directive it is clarified that it should be avoided to award public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering.[17] The exclusion grounds are clearly meant to be "specific" in that not just any conviction should lead to exclusion. The ratio legis behind the introduction of those exclusion grounds relates firstly to protecting the procuring governments from contracting with an unreliable candidate and secondly to adding weight to the criminal policies with respect to those specific offences increasing the deterred effect by adding an additional "sanction".

The combination of the exclusion grounds and the known corporate criminal liability diversity raises questions as to what equal treatment of candidates means in practice and how it will be guaranteed.

[16] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30.4.2004.

[17] Rec. 43 Procurement Directive.

2.3 Equal Treatment and Exclusion Grounds

The feeling of unfair treatment originates from the fact that candidates are seemingly not treated equally because they could not have been convicted equally for the same behaviour or unequal information on their convictions is available. Most of the differences in corporate criminal liability identified during the 2010 empirical study[18] can be referred to here. Either criminal liability for legal persons does not exist altogether, or the specific form of the legal person falls outside of the scope of the criminal liability provisions, or the offence was not listed amongst the offences that can be committed by legal persons, or behaviour criminalised in one Member State is not criminalised in another member state, or the attribution mechanisms differ. The following set of questions can be raised:

Are you treating candidates equally, if you exclude one legal persons for having been convicted for corruption, where the other candidate may have presented the exact same behaviour but

(1) could not have been convicted because

a. it operates in a member state that does not recognise corporate criminal liability?
b. it operates in a member state that does not include its type of legal person within the scope of the national corporate criminal liability provisions?
c. it operates in a member state that has a more narrow attribution mechanism?
d. it operates in a member state that has not listed that behaviour amongst the offences that can be committed by a legal person?
e. it operates in a member state where the behaviour involved is not criminalised altogether?

(2) no information on the conviction is available because

a. it operates in a member state that does not keep criminal records for legal persons?
b. it operates in a member state that has already expunged the conviction from the criminal record?

Given the explicit focus on equal treatment in a public procurement context and the importance of allowing all competing candidates an equal opportunity to get selected and given the potential impact of the corporate criminal liability diversity, the question arises how "equal treatment" should be interpreted. Different lines of legal argumentation are possible and therefore different future policy options can be explored.

No unequal treatment. The first line of legal argumentation leads to the conclusion that the corporate criminal liability diversity does not lead to unequal treatment and therefore no EU intervention is needed. It can be argued that equal treatment only requires equal situations to be treated in an equal manner and that candidates operating under different (criminal) justice systems do not find themselves in an equal situation. Hence the *perceived* inequality is not a *legal* inequality. Especially in a European Union where there is free movement of services and free establishment, a legal person is free to choose the member state where it wishes to locate its main seat as well as the member state where it wishes to be operational. As a result

[18] Vermeulen et al. (2010).

thereof, a legal person can make an informed decision about the economic advantages and disadvantages of a specific legal system, including its corporate criminal liability regime.

Temporal equality. The second line of legal argumentation leads to the conclusion that exclusion based on convictions should take account of the shortest expunge regulations.

One of the differences identified when comparing the criminal justice systems of the Member States, is the duration with which information on prior convictions appears on the transcript of a (legal) person's extract from the criminal record. In some Member States convictions are mentioned indefinitely; in other Member States convictions are only mentioned for 5 years. It can be argued that equal treatment of candidates in a procurement procedure requires that the duration with which convictions have an excluding effect is equalised. Ultimately, convicted candidates are excluded because they have lost their "reliability" and governments need to be protected from concluding contracts with unreliable candidates. From that perspective, it would be illogical to argue that one candidate has "regained" its reliability when 5 years have passed since the conviction, where another candidate only regains its reliability after 10 years have passed, or is not able to regain that reliability altogether if no expunge mechanism exists. Based on that line of argumentation, it can be argued that at least "temporal equality" should be guaranteed by introducing a temporal limitation to taking account of prior convictions. This would mean that convictions can only lead to exclusion within the time span for which there is a legal guarantee that information will be equally included in extract from the criminal record each of the Member States provides. The faster and more lenient expunge mechanism will have to overrule more strict mechanisms.

Interestingly, in the original version of the provision detailing the conviction based exclusion grounds, a temporal limitation was included. The Proposal for a Procurement Directive stipulated that only convictions handed down "at any time during a five-year period preceding the start of the contract award procedure" would lead to exclusion.[19] Given the clear impact of the legislative diversity in the Member States on the opportunity of a legal person to participate in a public procurement procedure, it is unclear why that sentence has not made it into the final version of the Directive.[20] Additionally, if its current provisions are kept as they are, there will be no such provision encompassing a temporal limitation in the new Directive.[21] Based on this line of argumentation it can be recommended to add a clause, limiting the excluding effect in light of the shortest, most lenient expunge provisions. Temporal equality is relatively easy to achieve.

[19] Article 46 Proposal for a Directive of the European Parliament and of the Council on the Co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, OJ C 29 of 30.1.2001.

[20] Williams (2006), p. 711.

[21] Article 55 Proposal for a Directive of the European Parliament and of the Council on Public Procurement, COM(2011) 896 final of 20.12.2011.

Behavioural equality. The third line of legal argumentation leads to the conclusion that only convictions based on behaviour that falls within the scope of the largest common denominator amongst criminalizations, can be used as a basis for exclusion.

This line of argumentation starts from the idea that the same behaviour should have the same excluding effect. It starts from the idea that excluding one candidate and accepting another despite the fact that both have conducted the exact same behaviour, is not only an example of inconsistent decision making, but is also a clear denial of their right to be treated equally. Even though the EU Treaties call to respect the diversity in the national criminal justice systems and the ECJ has ruled it acceptable that criminal law differs amongst Member States (and thus that some Member States have a more stringent corporate criminal liability system), it can be argued that it is inacceptable that those differences affect later opportunities in a context where equal treatment is an explicit and fundamental requirement.

This line of argumentation links in with the ECJs decision that differences "in itself" are not a problem,[22] allowing for an interpretation in which differences become a problem when the effect thereof appears in a procedure that requires equal treatment. Based on this line of argumentation, equal treatment in a public procurement context requires that diversity in the criminal justice systems of the Member States is neutralised to ensure that competition is not distorted. Furthermore, in doing so, it accommodates two sources of potential unequal treatment, being the fact that there may be differences in the offences that can be committed by legal persons as well as differences in criminalisation of behaviour altogether. Equal treatment in its purest form requires that the differences between the criminal justice situations of the Member States are neutralized and account is taken of the "behaviour" that has been presented by the candidates. The implementation thereof means that convictions can only be taken into account to the extent that they relate to behaviour that would equally constitute an offence in each of the jurisdictions in which the other competing actors operate. To facilitate the practical application of this line of argumentation, it can be recommended to limit the scope of the exclusion grounds to the offences that have been subject to approximation and are therefore known to represent the largest common denominator amongst the criminalizations for which a legal basis exists in the EU. If a legal instrument exists in which EU Member States have committed themselves to ensure that certain behaviour is considered to be a criminal offence in their jurisdictions, that behaviour is known to be criminal throughout the EU. Subsequently, exclusion of a procurement candidate for being convicted for that behaviour will not give rise to any form of behavioural inequality.

The current provision of the Procurement Directive seemingly calls for exclusion legislation that is compatible with this line of reasoning. The scope of the offences that should lead to exclusion is defined referring to the existing approximation acquis and therefore relates to behaviour that is known to be criminalised in

[22] See above, ECJ, Case C-326/88 Hansen & Søn, 10 July 1990 at §15 *in fine*.

all Member States.[23] However, given that provision encompasses only a minimum requirement, it allows Member States to introduce other and more extensive conviction based exclusion grounds into their national legal provisions. The scope of the exclusion grounds as included in the Procurement Directive is not limiting in any way. Comparative analysis of the procurement provisions of the then 27 EU Member States has revealed considerable diversity in the implementation provisions.[24] Although a strong legal argumentation can be built in favour of it, behavioural equality is not pursued in the current procurement practice in the Member States.

In theory, should the EU policy maker want to do so, behavioural equality can be achieved fairly easy. It can be achieved by clarifying the binding character of the scope limitation of the exclusion grounds in the EU Directive and explicitly stipulate the unacceptability of more wide national provisions. In practice however, it will be very difficult for national contracting authorities to apply such a provision correctly for it requires that prior conviction information is sufficiently detailed to be able to determine whether or not the behaviour underlying the conviction falls within the scope of the limited exclusion ground. That is the reason why it has been argued several times that it would be more than useful to register the behaviour underlying convictions in a detailed fashion and include an indication in the criminal records system as to whether or not the behaviour underlying the conviction falls within scope of the EU wide approximation acquis[25] and thus also within the scope of the limited exclusion grounds.

It is clear that this line of argumentation is not followed in the current proposal for a new Procurement Directive. Whereas in the current applicable instrument reference is made solely to the EU approximation instruments to define the scope of the exclusion grounds (and it is advised to stipulate that the scope entails a binding limitation), the current proposal for a new article extends the scope of the exclusion grounds in light of the way the offences are defined in the national laws of either the contracting authority or the economic operator. Article 55.1(b) of the Proposal for a new Procurement Directive now stipulates that corruption should be defined as found in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2 of Council Framework Decision 2003/568/JHA "*as well as corruption as defined in the national law of the contracting authority*

[23] It should be noted that this provision has been criticized for not accurately reflecting the then approximation acquis. The references to the Council Joint Action 98/33/JHA on participation in a criminal organisation to delineate the scope of participation in a criminal organisation and the Council Joint Action 98/742/JHA on corruption in the private sector to delineate the scope of corruption are outdated and conflicting definitions exist with respect to money laundering. De Bondt (2012), pp 129.

[24] De Bondt (2012), pp. 144.

[25] See more in detail on the added value of introducing the EU Level Offence Classification System: Vermeulen and De Bondt (2009).

or the economic operator." With a view to achieving behavioural equality, the introduction of that clause cannot be supported.

Attribution equality. The fourth line of legal argumentation leads to the conclusion that convictions of the company directors or any other persons having powers of representation, decision or control in respect of the candidate, should also be taken into account.

As argued by various other contributors,[26] there is a wide diversity in the ways offences are attributed to a legal person. Whereas the European Union in its instruments uses the identification theory in which only managers and employees with a certain responsibility may cause criminal liability for the legal person,[27] other theories can be found in the legal systems of the Member States. Amongst others, the vicarious liability theory accepts responsibility for any misconduct by the legal persons' employees.[28] Comparative legal research has led to the conclusion that the identification theory used in the EU legal instruments is the model that best represents the largest common denominator amongst attribution mechanisms.[29] However, limiting the scope of the exclusion grounds to those convictions that are based on the application of the identification theory, will not do away with the inequality that originates from the more fundamental concern that in some Member States no criminal liability is introduced for legal persons altogether. To overcome the inequality that originates from that diversity, it should be recommended that the scope of the exclusion ground is not limited to convictions handed down against the legal person for the criminal behaviour of its company directors or any other person having power of representation, decision or control, but also includes convictions handed down against those natural persons themselves.

The exclusion grounds in the currently applicable directive make no mention of those latter convictions. However, when looking at the current proposal for a new Procurement Directive, it is commendable that the scope of the exclusion grounds is extended in that precise manner.[30] Admittedly, widening the scope of the exclusion mechanism in that way will not do away with the fact that company directors or any other any persons having powers of representation, decision or control can be fairly easy replaced and therefore their convictions can be fairly easy made to disappear.

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[26] Valenzano, in this volume, pp. 95ff.; Lehner, in this volume, pp. 79ff.; Cravetto and Zanalda, in this volume, pp. 109ff.; De Bock, in this volume, pp. 87ff.

[27] See e.g. Article 7 Framework decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002, Article 5 Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003.

[28] Leigh (1982).

[29] Vermeulen et al. (2010), p. 50.

[30] Article 55.1 *in fine* Proposal for a Procurement Directive (2011)—the obligation to exclude a candidate or tenderer from participation in a public contract shall also apply where the conviction by final judgment has condemned company directors or any other any persons having powers of representation, decision or control in respect of the candidate or tenderer.

3 Conclusion

The (in)existence of and diversity amongst corporate criminal liability regimes in the EU Member States is far from a new topic in academic discussions. The Member States have all gone through different evolutions accepting the legal construct of a legal person and (be it or not) introducing criminal liability for its behaviour, as a result of which the landscape in the EU is a complex maze. Though it is interesting to look into the question so as to what extent it is desirable—taking account of the evolving character of the EU—to gradually evolve towards a common understanding with respect to the position of legal persons in criminal law from a pragmatic or theoretical perspective, the relevance of the discussion becomes more pressing when pointing to fundamental legal questions that arise combining the corporate criminal liability diversity with equal treatment.

Even though the ECJ clarified that the mere diversity in criminal law and the mere increased risk of being penalised does not give way for unequal treatment or a distortion of the functioning of the internal market, it is highly questionable—given the above lines of argumentation—whether the court would repeat that reasoning if the equal treatment requirement as found in the public procurement context is added to the equation.

This contribution has demonstrated that there are various ways of interpreting the equal treatment requirement found in public procurement provisions. In doing so it has substantiated the hypothesis that the EU needs to clarify the meaning of equal treatment of candidates in a public procurement context given the corporate criminal liability diversity in the Member States. To date, there is no clear policy position, let alone legal position or case law interpretation that can be used as a baseline to determine to what extent temporal, behavioural and/or attribution equality should be included in the considerations of a contracting authority when applying its national exclusion provisions. Even though the changes found in the current proposal for a new Procurement Directive modify the relevant provisions, the explanatory memorandum nor discussions held at the European Commission, the European Parliament or the Council (and their respective preparatory bodies) consider the impact corporate criminal liability diversity could potentially have on equal treatment, let alone to what extent that diversity should be neutralised when excluding candidates. Given that the current proposal is still under discussion, it should be advised that equal treatment concerns are included in the debate with a view to fine tuning the provisions and first and foremost making the position on the interpretation of the equal treatment requirement explicit.

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Are There Any Suitable Sanctions for New Forms of Corporate Offences?

Devrim Aydın

Abstract It is a fact that a corporation lacks mental and moral capacity to engage in wrongful conduct or to suffer punishment but on the other hand, corporations have legal capacity in the majority of areas of law. It is acknowledged today that apart from their legal, financial and administrative liabilities, corporations can also bear liability in terms of criminal law. A corporation facing criminal liability does not mean that corporations can be punished like natural persons. It is possible to subject a corporation to criminal sanctions which are suitable for the nature of the corporations. The aim of this contribution is to discuss the responsibility of corporations and suitable sanctions for corporal crimes.

1 Introduction

Corporate criminal liability is one of the most debated topics of criminal law. There has been an ongoing debate among jurists who argue that corporations can bear criminal liability as well as individuals and those who do not find this right.[1] According to those who support possibility of holding corporations liable within the scope of criminal law, criminal sanctions against corporations are in compliance with the nature and aims of criminal law. For those who argue that corporations cannot have criminal liability, deterrence, prevention, reproach and rehabilitation—which are traditional aims of substantive criminal law—can only be possible for natural persons.

[1] See Brickey (1982), pp. 393ff. See also Diskant (2008), pp. 134ff.

D. Aydın (✉)
Faculty of Political Science, Ankara University, Ankara, Turkey
e-mail: daydin@politics.ankara.edu.tr

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Alterations in socio-economic life, social relations and law cause amendments in criminal law and criminal sanctions. The fact that corporations are more influential and determinative in economic and social life rather than humans and the fact that there are legal persons which exist for longer periods of time than natural persons enabled the idea that corporations can and should also be subject to criminal sanctions. Extensive environmental catastrophes, worker deaths, bribery and tender frauds caused by activities of corporations strengthened the idea that they should also be liable in terms of criminal law. The view that apart from their executives, the corporations themselves can be punished with some criminal sanctions which are suitable for their legal nature is not utopic anymore.

Corporations have emerged due to various necessities in legal and economic life. A natural result of this development has been the acknowledgement of some rights and liabilities of corporations. Today, there is no doubt as to the fact that corporations which are recognized as legal person by law, possess the capacity to have rights. As much as they are capable of acquiring rights and undertaking debts, corporations have legal capacity in the majority of areas of law, they own real property and goods and they have their own rights and obligations. However, corporations are not capable of acquiring some rights such as marriage and divorce, which are only peculiar to natural persons. Corporations' capacity to have rights and to act is confined to the purpose stated in their establishment status such as its by-laws, partnership contract and articles of foundation. This means that for a procedure conducted on a matter which is not mentioned in the status of a corporation, the corporation will be deemed incapable and this procedure will not bind the corporation. Organs of the corporation are the natural person or groups of people entitled to perform functions of the corporation in accordance with the law and its establishment status.

Corporations are divided into two main categories as "public law corporations" and "private law corporations" depending on the law they are subjected to and their functions.[2] Public corporations draw their existence and organization from state sovereignty. Public corporations operate in line with rules of public law and their liabilities are within the scope of state sovereignty and state responsibility. On the other hand, private law corporations are those that are established in accordance with rules of private law and those that do not represent public authority. Depending on the aims they pursue, private law corporations are divided into two main groups as commercial corporations and non-commercial corporations. Commercial corporations aim to share gains and generate monetary profit while non-commercial corporations do not. Especially holding-companies and joint venture companies carry out extensive economic activities. The intense competition among them sometimes cause illegal procedures to emerge in such fields as intellectual and industrial rights, brand and patent rights and business secrets.

It is seen that corporations are liable for private law, and sometimes also in terms of administrative and financial legislation. In this case, no doubt exists as to a

[2] Quaid (1988), p. 75.

liability of the corporation to compensate the damage they created. For example, a company engaged in mining has to pay compensation due to worker deaths and to environmental damage resulting from the failure to take the necessary measures.[3]

2 Debates on Criminal Liability of Corporations

The principle of individual criminal responsibility was adopted with the French revolution.[4] The concept of this principle is that only the individual committing the crime may be punished therefore communities and corporations may not be punished. As a result of the increasing role corporations play in social and economic life, some started to argue in the twentieth century that for the purposes of controlling misconduct of corporations they can and should bear liability in terms of penal law apart from any compensation liability in terms of private law.[5] However pondering to introduce a criminal liability of corporations—besides their legal and financial liabilities—leads to debates due to concerns that it contradicts some fundamental principles of criminal law.[6] Those who argue that crime can only be committed by natural persons and that corporations cannot commit crime suggest that only individuals are capable of forming criminal ability such as *mens rea* and the will to act in *propria persona* which are required to crime.[7]

It is a fundamental rule of criminal law that a person committing a crime must act negligently or intentionally, i.e. that a psychological bond should exist between the act and the perpetrator. However, it is not possible for corporations to think and act like a human and therefore to act negligently or intentionally. According to those scholars who suggest that corporations cannot face criminal liability, innocent stakeholders who are not related to the crime will be affected by punishment of the corporation.[8] Although according to the "*reality theory*" of corporate personality, corporations have different personalities and a different will than the natural persons that form them.[9] According to this theory, corporations, which have the capacity to have rights and to act and which are liable for their illegal acts in terms of private law, can be perpetrators of a set of crimes that comply with their nature.

There are three different systems of how to determine for which crimes a corporation can be held liable for.[10] Under the general liability or plenary liability system adopted by England, Netherlands, Belgium, Canada, and Australia, the legal

[3] See Brickey (1987), p. 616.

[4] See Stessens (1994), pp. 493f.

[5] See Weissmann (2007), pp. 1319ff. See also, Stessens (1994), p. 494.

[6] See Weigend (2008), pp. 927ff.

[7] Weigend (2008), pp. 936ff.

[8] Quaid (1988), pp. 82ff.

[9] See Stern (1987), p. 676.

[10] De Maglie (2005), p. 552.

persons' liability is similar to that of individuals; therefore corporations are considered capable of committing any crime. The second system, implemented in France, requires that the legislator should mention for each crime whether corporate criminal liability is possible.[11] The third system consists of listing all crimes for which collective entities can be held liable. This system which is reflected in American law is much more logical because it is not possible to hold corporations responsible for any crime.[12] A part of the crimes contained in criminal codes can only be committed by natural persons. It is also not possible for crimes of such nature to be committed within the scope of the activities of a corporation or to the benefits of a corporation.[13] Crimes such as rape, homicide, injury, perjury and looting are of such nature. On the other hand, such crimes as those against the environment, human trafficking, bribery and fraud can be committed within the scope of activities of a corporation.[14] Some of the crimes that can be committed in favour of a corporation are white collar crimes while some others are new types of crimes such as money laundry, stock exchange speculation and market manipulation, fraudulent bankruptcy, drug trafficking, financing of terrorism, and environmental crimes.

3 Suitable Sanctions for the Legal Nature of Corporations

The problem of what kind of sanctions could be applied to corporations for a crime has constituted the basis of rejecting criminal liability of corporations; additionally it has caused many legal debates.[15] The fact that crime and punishment are built on human character lies underneath the opinion held by some that corporations cannot be punished at all. For example, it was argued that in the event that a fine is imposed on a corporation, all innocent partners are affected by it, in violation of the principle of individuality of punishments. On the other hand, when a person is punished, the punishment can also create social effects on other people even if it is directly oriented at the perpetrator of the crime. When a father, who provides for his family and is a successful surgeon, is convicted of homicide, he will not be able to provide for his family any longer; his children will be away from him for a long time and perhaps treatment of the surgeon's patients will be prolonged for this reason. His punishment is not annulled because of its economic and social effects on innocent children or because his patients' treatment will be delayed. The criminal law policy determines the punishment by taking into consideration its direct effects on the

[11] See Deekert (2011), pp. 147ff.
[12] See Nanda (2011), pp. 63ff.
[13] See Harlow (2011), pp. 123ff.
[14] De Maglie (2005), p. 547.
[15] See Jefferson (2001), pp. 235ff. See also, de Maglie (2005), p. 553.

perpetrator and does not drop the punishment because of its indirect effects on people other than the perpetrator.

In the event that a crime is committed in favour of a corporation or within the scope of activities of a corporation, sanctions suitable to the nature of a corporation should also be considered.[16] The sanctions that can be imposed in these cases have a different nature than traditional punishments. In the event that a crime is committed to the benefit of a corporation, the most important sanction to be imposed on the corporation is a fine.[17] Fines are the only common sanction that can be applied to people and corporations. In addition to this, there are also sanctions which can be applied as security measures on corporations. However, application conditions of each of these sanctions and the problems they can create are different from each other.

4 Punishments for Assets of Corporations

4.1 Fines

Punishments such as capital punishment and banishment are not contained in modern criminal law. The most fundamental punishments are imprisonment and fines; these are directed at freedom and asset values of individuals. Implementation of imprisonment on a corporation is impossible. While imprisonment, which deprives them of freedom, is the most important punishment for people, fines are the most effective punishment that can be imposed on a corporation.[18] In legal systems that embrace a criminal liability of corporations, fines are the punishment which is applied most commonly to corporations. As the pecuniary sanction has the advantages of directly affecting the corporation but as it will also affect the reputation of the corporation in the society, the corporation will be encouraged to behave move respectfully towards the laws. Fines can be imposed on many corporations, but it will have its best impact on commercial companies. This sanction can be executed in a short time with minimum costs.

There are various applications in determining the amount of the fine. While the maximum amount that can be imposed on corporations is specified by laws in some countries, this authority is granted to courts in some others. It could be right to leave the designation of the amount to the court handling the case. However, a very high

[16] Stessens (1994), p. 493.

[17] If a crime is committed in favour of a corporation, the sanctions to be imposed on the corporation will be determined by the criminal court. However, as is the case in Germany, administrative authorities can also decide on imposing sanctions on corporations in case of activities that are in violation of administrative penal law. See Weigend (2008), pp. 930ff. See also Diskant (2008), p.142.

[18] Drew and Kyle (2005), p. 293. See also Gobert (1998), p. 3.

fine can lead to economical hardships or perhaps bankruptcy on the side of the corporation, on the other hand, a very low fine may not have any effect.[19] When implementing fines as a sanction for corporate crimes, care should be taken that corporations should not make customers to pay for the fine, and should not use the fine paid as a reason for tax reduction.

4.2 Confiscation

Whether confiscation of the fruits of a crime is a punishment or a security measure has been debated among jurists. However, despite this debate, one of the most effective sanctions that can be imposed on corporations is confiscation. The purpose of imposing this sanction is passing the ownership of a property and profit gained in the crime to the public.

Confiscation also aims to take over ownership of harmful or hazardous property kept without permission or obtained by crime. For example, unpermitted explosives and drugs owned by corporations can be confiscated. On the other hand, a ship owned by a corporation and used in migrant smuggling and human trafficking activities can be confiscated as it is a property used in crime. Therefore, deprivation of the proceeds of the crime is imposed by different systems as a punishment or as a security measure.

5 Punishments for Activities of Corporations

5.1 Suspension or Retraction of Licenses

This sanction consist in restraining the corporation from the performance of some activities, by denial, suspension or retraction of licenses, by loss of rights like tax breaks, by prohibition of advertising or selling on specific markets, etc.[20] When the activities of a corporation are restrained, the entity is forbidden to carry out such kinds of activities despite maintaining its legal existence. In this case, the prohibited operations can both be any of its commercial operations or its operations directly related to a crime. For example, according to French Penal Law, operations that are related to crime can be prohibited. The operations prohibited can be old activities related to the crime or they can be future oriented (new ones that may not be undertaken). Prohibition to operate can be temporary or permanent. For example the operation permission of a mining company that caused large damage to the

[19] Drew and Kyle (2005), p. 295. See also Gobert (1998), p. 6.
[20] Gobert (1998), pp. 10f.

environment can be ceased or cancelled. Instead of imposing fine, ceasing broadcasts of a media company that incites violence by spreading hatred, racism and ethnic discrimination would be more logical and effective. Moreover prohibition to operate is directed at corporations; in contrast the prohibition cannot be applied to the managers, stakeholders or to the members of the corporation. If these people have not been convicted of their personal offenses, they can establish a different corporation engaged in the same activity.

5.2 Suspension of Corporate Activities

When the corporation is suspended, the corporation maintains its legal existence but one or more facilities that belong to the corporation will be suspended. The purpose of this sanction is to end crime-related operations of a corporation that operate in more than one field. However, this sanction can only be justified for serious violations of labor or environmental laws or for international crimes. For example, if a corporation which operates in the fields of trade, tourism and shipment carries out migrant smuggling in disguise of tourism and finances some terrorist groups, it is possible to suspend its hotels or facilities that organize boat trips. This sanction could be permanent or continuous. If the corporation is suspended, its managers and members can continue to work within the body of another corporation that carries out these activities, if they have not been convicted of personal offenses.

5.3 Operation Under Judicial Supervision

This sanction, which is contained in French Penal Law, aims to ensure that operations of a corporation continue under the supervision of a third person or body which is a guardian for a certain period of time. Term of office and authorities of this guardian should be specified by the court presiding over the criminal procedures and renderings a verdict on the crime. The wage of the guardian should be paid by the corporation. By its nature, this sanction can only be imposed on profit-oriented corporations that carry out commercial activities. This sanction cannot be imposed on public law corporations, unions or political parties.

5.4 Exclusion from Public Contracts

In this type of sanction, corporations are kept outside of public contracts. In this way, they are prevented from providing goods and services to the public or carrying out public works for a certain period of time. Being banned from public contracts will lead to the inability to sign contracts with local administrations, other public bodies, and the state. While one of the purposes of this sanction is to punish the

corporation, the other purpose is to restore reputation of public works and public contracts that provide public service.

6 Punishments Directed at the Existence of the Corporation

Dissolution is considered as capital punishment for corporations. In case of dissolution, the legal existence of the corporation will be terminated. The sanction of dissolution should be applied only when the corporation committed very serious crimes, or when the corporation was created for illegal purposes.[21] As it is the heaviest penalty, there are two important conditions in rendering a verdict of termination: The first condition is that operations of the corporation should be directed at committing the crime. The second condition is that operations of the corporation should deviate from purpose of establishment. The most significant result of termination punishment is that directors, partners and employees of the corporation terminated lose their functions. On the other hand, termination of a corporation which has large amounts of turnover will obviously lead to both economic consequences and tax loss. However, as this sanction is also directed at the corporation, directors and partners not convicted of a personal offense can continue to work by establishing another corporation.

7 Punishments Directed at the Reputation of the Corporation

Publication of the sentence may also be an effective sanction for corporate criminal activities.[22] In this type of sanction, the conviction imposed on the corporation is spread to the public through the media. The declaration and broadcast can include all or a part of the verdict. Declaration and broadcast expenditure will be borne by the corporation. This sanction only has a complementary function and thus is supplemental to the other sanctions described above.

8 Conclusion

Although there are different theoretical approaches about the legal nature of corporations, they are considered as a legal union today. It is acknowledged today that apart from their legal, financial and administrative liabilities, corporations can

[21] Gobert (1998), p. 11.

[22] Gobert (1998), p. 9.

also bear liability in terms of criminal law. International conventions also acknowledge that corporations can have liabilities primarily directed at the prevention of terrorism, money laundry and corruption. Undoubtedly, corporations facing criminal liability does not mean that corporations can be punished like natural persons and are affected by punishment like people. For example, a corporation which has rights and liabilities cannot get married and divorced like an individual, but can only invest and engage in purchasing, sale and trade like a person. A corporation cannot claim the right to education, but it can claim the right to work and to set up businesses like a person. For this reason, a corporation cannot be punished like any individual. Instead, criminal sanctions that are suitable for the nature of corporations must be in question. Primary among these are fines, limitations of operations or even the termination of the corporation. However, implementation conditions, advantages and disadvantages of each punishment are different.

Although systems that recognize administrative liability of corporations instead of criminal liabilities are wide-spread, systems that acknowledge corporate criminal liability are also available. However, legal, administrative and financial sanctions demonstrate many common features with sanctions of criminal law. In terms of a general theory of law, a fundamental feature of sanction is to force—or at least to encourage—someone who has behaved against the law to obey the law. Then it is possible to subject a corporation to criminal sanctions which are suitable for the nature of the corporations. Opinions that corporations cannot have criminal liabilities are based on penal law dogma, while the opposite views are based on pragmatism. In this case, criminal liability of corporations can be solved by harmonizing dogmatism with pragmatism. This can be possible if corporations are held liable for some crimes that are suitable for their legal nature. It is therefore advantageous if the crimes for which corporations can be liable are listed clearly in the law.

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The New German Ringfencing Act Establishing Criminal Liability of Banking and Insurance Executives for Failures in Risk Management: A Step Towards Corporate Criminal Liability?

Thomas Richter

Abstract In May 2013, the German parliament approved a new law regarding individual criminal liability of banking and insurance executives, which has come into effect as of January 2014. Under the so called 'Ringfencing Act' (*Trennbankengesetz*), specific duties and responsibilities for risk management will be imposed on these executives. Failure to comply with these duties will be punishable by a maximum of 5 years imprisonment if it causes a threat to the viability as a going concern of a bank, or insolvency or over-indebtedness of an insurance company. Although the new law satisfies populist calls for harsher punishment of unscrupulous bankers, it blurs fundamental doctrines of German criminal law and raises open questions regarding concepts such as guilt, foreseeability and individual responsibility. This chapter provides a description of the risk management duties and the corresponding criminal penalties. It also discusses the regulatory background and provides an initial assessment of the likely implications for risk management at German financial institutions. The wider implications of the new law on the development of corporate criminal liability will also be addressed.

1 Introduction

Just as in many other countries, the global financial crisis has led to several German state prosecutors initiating investigations against bank executives whose banks had to be rescued by massive government bail-out programmes. During these investigations, however, it turned out that the threshold for obtaining criminal convictions

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T. Richter (✉)
HammPartner, Frankfurt am Main, Germany
e-mail: thomas.richter@hammpartner.de

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under current German criminal law is not as low as the general public and some politicians would like. Germany was not the only country making this discovery. For example, countries that recognise corporate criminal responsibility (such as the US) have been hearing the '*too big to fail*' mantra, which, according to some observers, prohibits tangible sanctions against large banks; whereas in countries that recognise a concept of individual criminal responsibility (such as Germany), it has often been difficult to connect failures lower down in the bank to those running it. Furthermore, in Germany, and probably in most other countries, it is generally not a crime to run a bank into the ground merely through incompetence. Therefore, despite the German prosecutors having '*taken a more muscular approach*' in the aftermath of the financial crisis than the British and American authorities (according to a recent comparison by *The Economist*[1]), the German Federal Government concluded that '*there are insufficient means to hold senior managers of banks, financial services institutions and insurance companies criminally accountable if the institution or the insurance company suffers a crisis due to mismanagement*'.[2]

Due to these perceived shortcomings in the current criminal law and the widely-held view that more bankers should be put behind bars for their role in the financial crisis, the Federal Government came forward with a draft bill in February 2013 that was aimed at lowering the requirements for individual criminal liability of banking and insurance executives. The draft bill was introduced into the German parliament (*Bundestag*) in March 2013, and the bill was adopted on 17th May, 2013. After also having passed the German *Bundesrat* in June 2013, the new law has taken effect in January 2014 after the coming into force of German legislation to implement the EU's CRD IV directive.

2 Overview of the New Law

In Germany, the primary legal basis for the supervision of banks and financial services institutions is the Banking Act (*Kreditwesengesetz* [KWG]), and supervision of insurance undertakings is based on the Insurance Supervision Act (*Versicherungsaufsichtsgesetz* [VAG]). The new law provides for amendments of both acts, as it intends to create criminal liability for both banking and insurance executives.[3]

The new law has two basic aspects. In the first place, comprehensive risk management duties are included in the KWG and the VAG, under which '*senior*

[1] The Economist (2013) (4th May).

[2] See: reasons for the draft bill of the Federal Government, Bundestag Drucksache 17/12601, p. 2. The law that was finally adopted (BGBl 2013 Vol. I, p. 3090) can be accessed at http://www.bgbl.de/ (12.2.2014).

[3] See Articles 3 and 4 of the Ringfencing Act. Arts. 1 and 2 do not concern matters of criminal law.

managers' must make sure that certain '*strategies, processes, procedures, functions and concepts*' relating to risk management are implemented in their companies.[4] In a second step, the failure by '*senior managers*' to comply with these risk management duties will constitute a criminal offence, punishable with a maximum of 5 years' imprisonment if the failure '*threatens the bank's viability as a going concern*' (Section 54a KWG), or causes insolvency or over-indebtedness of an insurance company (Section 142 VAG).

After its publication in February 2013, the draft bill was initially seen as a mere symbolic election issue in light of the federal elections in September 2013. When it turned out, however, that the government coalition was seriously pressing the draft bill forward, the draft bill was strongly rejected by criminal lawyers and the banking and insurance community for constitutional and practical reasons that will be explained in more detail below.[5]

In response to this criticism, the Bundestag introduced a last minute change to the draft bill only a few days before taking its final vote. Under the revised bill, senior managers will face criminal liability only if they contravene a specific order issued by the Federal Financial Supervisory Authority (*BaFin*), the German banking and insurance regulator, to remedy insufficient risk management mechanisms. While this amendment has eased the worst fears of the banking and insurance industry with respect to an unpredictable danger of criminal sanctions, it still poses a number of inconsistencies and unresolved follow-on questions.

2.1 Regulatory Background

In Germany and elsewhere, risk management has attracted considerable interest in the discussion about the lessons to be learned from the financial crisis. Failures in risk management uncovered in connection with the crisis include (among many): focus on measuring instead of identifying risks; failures to realise risks associated with certain structured products such as ABSs and CDOs; silo structures; stress-tests based on past events instead of new risks and possible new scenarios; reliance on quantitative risk models without recognition of the 'big' risks; and even failure to understand the company's current risk position compared with its appetite for risk.[6]

Despite the sometimes disastrous consequences in the long term, such failures in risk management do not in themselves constitute a criminal offence under current German law. There are, of course, several rules and guidelines which mandate sophisticated risk management precautions for the German banking and insurance industry. However, the compulsory nature of these requirements has only existed at

[4] See Section 25c subsection (4a) and (4b) KWG and Section 64a subsection (7) VAG.

[5] Hamm and Richter (2013), p. 870; Deutscher Anwaltverein (2013).

[6] Mülbert (2010), p. 28.

the regulatory level, but not at the level of criminal law. This is especially the case with the so called 'minimum requirements for risk management' (*Mindestanforderungen an das Risikomanagement—MaRisk*) for the banking and the insurance industry established by BaFin.

The MaRisk provide a general framework for risk management of financial institutions with numerous detailed provisions covering approximately 60 pages for banks, and approximately 40 pages for insurance companies. In order to ensure that institutions of all sizes can comply with the requirements in a flexible manner, the MaRisk follow the principle of proportionality and contain numerous opening clauses.[7] Although in practice the MaRisk are *de facto* binding for all banks and insurance companies subject to supervision by BaFin, they are technically not a 'formal' parliamentary statute; rather, the MaRisk are administrative circulars that are, strictly speaking, binding only for BaFin and its staff ('soft law'). According to the German constitution (*Grundgesetz*), however, '*an act may be punished only if it was defined by a law as a criminal offence*' and any imprisonment must be based on a '*formal law*', i.e. the law must have been formally adopted by the parliament.[8] Failure to comply with the MaRisk cannot therefore constitute a criminal offence because the MaRisk are not formal law. Against this background, the Federal Government reverted to the simple technique of essentially 'copying and pasting' selected MaRisk requirements into the new law, which elevates these selected duties from mere administrative circulars to formal law.

2.2 Statutory Risk Management Duties Under the New Law

Under the new law, '*senior managers*' must ensure that their bank or insurance company has in place several *'strategies, processes, procedures, functions and concepts'* to ensure an appropriate risk management. At this point, it should be noted that the new law does not mirror the complete MaRisk, but only some selected core duties. To provide a better understanding of what MaRisk duties have actually become part of the new law, the following risk management precautions for single banks have been included in Section 25c subsection (4a) KWG, with subsection (4b) containing similar provisions at level of a corporate group:

> Section 25c subsection (4a) KWG:
>
> As part of their overall responsibility for the proper business organization of the institution according to Section 25a subsection (1) sentence 2, the senior managers of an

[7] For English translations of the MaRisk, see http://www.bafin.de/SharedDocs/Downloads/EN/Rundschreiben/dl_rs_0915_ba_marisk.pdf (12.2.2014) (banks) and http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Rundschreiben/rs_0903_va_marisk_en_va.html/ (12.2.2014) (insurance companies). Unfortunately, these translations are to some extent outdated and do not reflect the latest amendments and revisions.

[8] See Article 103 subsection (2) and Article 104 subsection (1) of the German Basic Law (*Grundgesetz*).

institution must ensure that the institution has in place the following strategies, processes, procedures, functions and concepts:

1. a business strategy aimed at the sustainable development of the institution and a consistent risk strategy as well as processes for the planning, implementation, review and adjustment of the strategies pursuant to Section 25a subsection (1) sentence 3 number 1, as a minimum the senior managers must ensure that

a) the overall objective, the objectives of the institution for each material business activity as well as the measures for implementing such objectives are documented at all times;

b) the risk strategy at all times takes into account the objectives of risk management with regard to the material business activities as well as the measures for implementing such objectives;

2. procedures for determining and ensuring the risk-bearing capacity pursuant to Section 25a subsection (1) sentence 3 number 2, as a minimum the senior managers must ensure that

a) the material risks of the institution, in particular counterparty, market price, liquidity and operational risks are identified and defined at regular intervals and on an event driven basis (overall risk profile);

b) as part of the risk inventory, risk concentrations are taken into account and potential material impairments of the asset, revenue or liquidity status are examined;

3. internal control procedures with an internal control system and an internal audit pursuant to Section 25a subsection (1) sentence 3 number 3 letter a through c, as a minimum the senior managers must ensure that

a) as part of the organizational and operational arrangements, responsibilities are clearly segregated, in the context of which material processes and related tasks, competencies, responsibilities, controls and communication channels have to be clearly defined and it has to be ensured that employees do not perform incompatible activities;

b) a general separation is kept between the unit which initiates lending transactions and has a vote in the lending decisions (front office) as well as the trading unit on the one hand, and the unit which has an additional vote on lending decisions (back office) and those functions which serve the risk controlling and the settlement and control of trading transactions on the other hand;

c) the internal control system comprises risk management and risk controlling processes for identifying, assessing, treating, monitoring and reporting the material risks and risk concentrations related thereto, as well as a risk control function and a compliance function;

d) reports on the risk situation including an assessment of the risks are submitted to senior management at appropriate intervals, as a minimum, however, quarterly;

e) reports on the risk situation including an assessment of the risks are submitted by senior management to the administrative or supervisory body at appropriate intervals, as a minimum, however, quarterly;

f) appropriate stress tests for the material risks of the institution and the overall risk profile are carried out regularly and potential need for action is examined based on the results;

g) internal audit reports are submitted to senior management and to the supervisory or administrative body at appropriate intervals, as a minimum, however, quarterly;

4. appropriate staffing levels and technical and organizational resources of the institution pursuant to Section 25a subsection (1) sentence 3 number 4, as a minimum the senior managers must ensure that the quantitative and qualitative staffing and the scope and quality of technical-organizational facilities take into account the internal needs, the business activities and the risk situation;

5. appropriate contingency plans for emergencies relating to time-critical activities and processes pursuant to Section 25a subsection (1) sentence 3 number 5, as a minimum the senior managers must ensure that contingency tests are carried out regularly for

reviewing the adequacy and effectiveness of the contingency plan and the results are reported to the respective responsible persons;
6. in case of outsourcing of activities and processes to another enterprise pursuant to Section 25b subsection (1) sentence 1 at least appropriate procedures and concepts in order to avoid incurring excessive additional risks and an impairment of the properness of the businesses, services and the business organization within the meaning of Section 25a subsection (1).

The risk management duties for insurance companies under Section 64a subsection (7) VAG are to a certain extent similar to those for banks. However, the wording also reveals a number of clear differences that address specific risks in the insurance industry. Furthermore, after the last-minute amendment resolved on by the Bundestag, Section 25c subsection (4c) KWG and Section 64a subsection (8) VAG provide that:

> if BaFin finds that the [bank or the insurance company] do not have in place the strategies, processes, procedures, functions and concepts [. . .] BaFin can, without prejudice to other measures according to this Act, order that appropriate measures be taken to remedy the deficiencies within an appropriate period.

2.3 Criminal Liability for Failure to Comply with Risk Management Duties

Failures to comply with the risk management duties are the basis for the criminal offences according to Section 54a KWG and Section 142 VAG. Section 54a KWG, which applies to senior managers of banks and financial services institutions, reads as follows:

(1) Whosoever fails to ensure, contrary to Section 25c subsection (4a) or Section 25c subsection (4b) sentence 2, that an institution or a group set out therein has in place a strategy set out therein, a process set out therein, a procedure set out therein, a function set out therein or a concept set out therein and hereby causes a threat to the viability as a going concern of the institution, the superordinated enterprise or an institution belonging to the group, shall be liable to imprisonment for a term not exceeding five years or to a criminal fine.
(2) Whosoever in cases under subsection (1) causes the danger negligently shall be liable to imprisonment for a term not exceeding two years or to a criminal fine.

Section 142 VAG has essentially the same wording for insurance companies as Section 54a KWG. The only material exception is that instead of requiring a '*threat to the viability as a going concern*', Section 142 VAG requires '*insolvency or over-indebtedness*'.

After the last-minute change in response to the widespread criticism directed at the initial draft bill, Sections 54a subsection (3) KWG and 142 subsections (3) and (4) VAG now provide that '*the offence shall only entail liability if BaFin has ordered the offender [. . .] to remedy the violation [. . .] the offender contravenes such enforceable order and thereby has caused*' the threat to the viability as a going

concern of the bank (in case of Section 54a KWG) or insolvency or over-indebtedness of the insurance company (in case of Section 142 VAG).

2.4 *Threat to Viability as a Going Concern (Bestandsgefährdung)*

A particular detail of the new law worth some attention is the 'threat to the institution's viability as a going concern' (*Bestandsgefährdung*), which is mentioned in Section 54a KWG. According to the reasons for the draft bill, the criterion of a '*threat to the viability as a going concern*' refers to an '*established regulatory*' concept as laid down in Section 48b KWG.[9] Although Section 48b subsection (1) KWG defines a '*threat to the viability as a going concern*' as '*the risk of a collapse of the credit institution due to insolvency in the absence of corrective actions*', this concept was only recently introduced into the KWG by the German Restructuring Act (*Restrukturierungsgesetz*) of 2010. The Federal Government's portrayal of it as an established concept therefore seems euphemistic at best. Prosecution agencies and criminal courts have absolutely no experience with this concept to date.

Furthermore, while a '*threat to the viability as a going concern*' would have to be positively proven before a criminal court under fundamental principles of criminal procedure (for example, by means of an expert opinion), Section 48b KWG provides that such threat must be *presumed* if the bank's own funds (*Kernkapital*), modified available own resources (*modifizierte verfügbare Eigenmittel*) or liquidity have fallen below 90 % of the applicable thresholds, or if there are reasons to believe that such a situation will occur. Although this legal presumption seems practical for regulatory purposes, it poses a number of unresolved questions in the context of a criminal investigation. In particular, applying this presumption to the detriment of anyone accused of a criminal offence would violate the basic principle of the presumption of innocence. However, the reasons for the draft bill do not address this apparent inconsistency.

3 Assessment of Risk Management Duties

According to the reasons published with the draft bill, the new law is not intended to expand the scope of risk-management requirements beyond those currently set forth in the MaRisk of banks and insurance companies. Instead, the Government initially argued that they are merely a condensed summary of *'the most important risk management duties of senior management'* under the existing MaRisk rules, a

[9] See Bundestag Drucksache 17/12601, p. 44.

'*violation of which indicates serious weaknesses in the risk management*'.[10] During the legislative consultations, however, some further requirements have been added into the new law which go beyond the current requirements of the MaRisk. For example, regular stress tests must also extend to the *overall risk profile* according to Section 25c subsection (4a) no. 3 (f) KWG, and internal audit reports must not only be submitted to the senior management, but also to the supervisory body at quarterly intervals according to Section 25c subsection (4a) no. 3 (g) KWG.

Apart from these few additional duties, the risk management requirements under the new law have indeed been copied, more or less literally, from the respective MaRisk rules. Nevertheless, the fact that these risk-management requirements—which were initially established by the regulator for internal purposes only—should now become the foundation for a criminal offence renders the proposed rules highly questionable. In particular, the respective provisions are phrased very broadly and contain countless general legal terms. From a purely regulatory perspective, such broad wording provides a great deal of flexibility and is therefore useful for purposes of supervision. However, such broad wording is incompatible with the constitutional principle of legal certainty in criminal law.[11]

Another remarkable and worrying feature of the risk-management duties is the almost complete absence of any minimum standards, binding guidelines or other safe harbour rules for the necessary quality and substantive content of the various '*strategies, processes, procedures, functions and concepts*' that banks and insurance companies must have in place. For example, the new law expects senior managers to devise a business strategy but remains silent on the actual substance of the strategy. This may expose senior managers to considerable risks of liability, in particular because failures in risk management will often not become apparent immediately but with a few years' delay when the enterprise is actually experiencing financial distress (and perhaps long after the old board members have been replaced). Even if the strategy is sophisticated and in line with best practice when it is implemented, a prosecutor could still argue much later, with the benefit of hindsight, that the strategy lacked a certain crucial feature and that this endangered the bank.

To ease these fundamental concerns, the Bundestag introduced the last minute amendment according to which senior managers will face criminal liability only if they contravene a specific order issued by BaFin to remedy insufficient risk-management mechanisms.[12] The necessary degree of certainty that such binding order must entail is still unclear. It would certainly not be sufficient for BaFin merely to send general red-letter warnings, which only contain general objections.

[10] See Bundestag Drucksache 17/12601, p. 44.

[11] Hamm and Richter (2013), p. 870; Kasiske (2013), pp. 261ff.

[12] Contrary to the reasons for the amendment (Bundestag Drucksache 17/13539, p. 14), under German criminal law this requirement is no exemption from punishment (*Strafausschließungsgrund*). Instead, it has elements of a condition for criminal liability (*Strafbarkeitsbedingung*) and of a part of the offence description (*Tatbestandsmerkmal*). For further discussion, see Kubiciel (2013).

Instead, according to general principles of German administrative law, such order must be sufficiently clearly defined in content (see Section 37 subsection (1) of the German Administrative Procedure Act—*Verwaltungsverfahrensgesetz, VwVfG*). Furthermore, such order would have to be accompanied by a statement of grounds, which must not only indicate the chief material and legal grounds, but also the points of view that BaFin considered while exercising its powers of discretion.

4 Scope of Application

According to the reasons published together with the draft bill, the new criminal provisions of the Ringfencing Act are intended to secure the stability of the financial system and prevent harm to the overall economy, as well as threats to the stability of markets caused by grievances in the banking and insurance industry.[13] In light of this, it seems quite remarkable that the scope of the new law is not limited to large 'systemically important' banks. The new law covers instead all '*institutions*' within the meaning of Section 1 subsection (1b) KWG (i.e. banks and financial services institutions) without regard to their size, commercial relevance or geographic territory in which they are active. To illustrate the potential scope of application, BaFin currently supervises more than 1,800 banks (including commercial banks, savings banks and credit cooperatives of all sizes) and 1,300 financial services institutions. Only a very small percentage of these institutions is large enough potentially to trigger the market disorder which the new law is intended to prevent. Therefore, the broad scope of the criminal provisions at first glance seems disproportionate, although some experts pointed out during the legislative consultations that in certain countries smaller banks have also had their share in the financial meltdown, such as the local Spanish savings banks.

The new law likewise applies to all '*insurance undertakings*' within the meaning of Section 1 subsection (1) VAG. BaFin supervises several hundred primary insurance companies and reinsurance companies. In addition, almost 1,000 insurance companies, most of them relatively small, regional mutual insurance associations, are supervised by the supervisory authorities of the German Federal States (*Bundesländer*).[14] The new criminal provisions will, in principle,[15] apply to all of them. Pension funds will also be covered, although only to a lesser extent.

Given the broad scope of application of the new law, it seems obvious that from a practical standpoint a one-size-fits-all approach cannot be applied to a small

[13] See Bundestag Drucksache 17/12601, p. 28.

[14] This shared competence poses practical questions regarding Section 64a subsection (8) VAG, because this provision only mentions a competence of BaFin, but not of the supervisory authorities of the German Federal States, to issue an order to remedy insufficient risk management.

[15] According to Section 64a subsection (5) VAG, the duties set out in Section 64a subsection (7) first sentence no. 3 d and no. 4 will not apply to small insurance undertakings.

savings bank and a large banking group. It is still unclear, however, if and how the BaFin and the Bundesbank will take into consideration size differences between smaller and larger banks and insurance companies. Generally, it seems likely that risk-management standards will increase rather than decline, with the larger banks setting the standards that the smaller banks will ultimately have to follow and adopt. While it may be hoped that this will lead to a more effective risk management throughout the overall banking and insurance landscape, there is a certain risk that smaller banks and insurance companies may concentrate their efforts on procedures and form rather than on substance. The potential additional costs for smaller banks and institutions cannot yet be seriously estimated.

At the personal level, the criminal sanctions apply only to senior managers. '*Senior managers*' (*Geschäftsleiter*) are those natural persons who are responsible under the law or the articles of association for managing the business and representing the bank or insurance company.[16] For example, members of the management board (*Vorstand*) of a German stock corporation are considered to be senior managers, while employees below the board level are normally not classified as senior managers. Second or lower-tier managers and other employees below the board level cannot be perpetrators under the criminal provisions, but they could be charged with providing intentional assistance (aiding and abetting) to the senior managers under general principles of German criminal law. However, as long as BaFin has not issued an order to remedy insufficient risk management according to Section 25c subsection (4c) KWG and Section 64a subsection (8) VAG, these employees do not face a risk of criminal liability either.[17]

5 Legislative Action in Other Countries

In comparison with the rest of Europe, the German legislative approach does not seem to have any equivalent, except probably in Norway. Although Norwegian law does not provide for criminal sanctions specifically designed to persecute banks' managing directors for failures in risk management, a managing director may be punished with fines, or, in the event of aggravating circumstances, imprisonment up to 1 year, for wilfully or negligently contravening the provisions of the Norwegian Financial Institutions Act or provisions or orders issued pursuant thereto (see Section 5-1 of the Financial Institutions Act).[18] One such provision may be Section 4 of the Regulations of 22nd September, 2008 no. 1080 (*Forskrift om risikostyring og internkontroll*), which stipulates that the managing director of a

[16] See Section 1 subsection (2) KWG and Section 7a subsection (1) VAG.

[17] See Cichy et al. (2013), p. 849, for a more detailed discussion.

[18] http://www.finanstilsynet.no/Global/English/Laws_and_regulations/Laws/Financial_Institutions_Act.pdf (12.2.2014). The author is indebted to Dr. Mathias Hanten of DLA Piper (Frankfurt) for making him aware of this provision.

financial institution shall ensure responsible risk management and internal control. Thus, Norwegian law contains a general penal provision that may in principle be applied against managing directors who do not comply with risk management rules.

Apart from that, other countries are currently considering introducing tighter criminal sanctions, although these do not seem to be specifically built around failures in risk management. In the UK, for example, where until recently not one senior banker has faced criminal charges relating to the failure of his institution, last year HM Treasury published a consultation paper on '*Sanctions for the directors of failed banks*', which scrutinised a possible legislative approach based on the concepts of (1) strict liability, (2) negligence, (3) incompetence or (4) recklessness.[19] The Parliamentary Commission on Banking Standards considered these proposals and various comments and published its Final Report '*Changing banking for good*' on 19th June, 2013. It has concluded that there is a '*strong case*' to introduce a new criminal offence based on reckless misconduct in the management of a bank. According to the Final Report, '*a risk of a criminal conviction and a prison sentence would give pause for thought to the senior officers of UK banks.*'[20] The Commission expects this potential reckless misconduct-offence '*to be pursued in cases involving only the most serious of failings, such as where a bank failed with substantial costs to the taxpayer, lasting consequences for the financial system, or serious harm to customers.*'[21] While the Commission did not propose any specific wording of the new criminal offence, it seems likely that the government will come forward with a proposal in due time.

6 Practical Implications

From a practical angle, the risk of criminal liability under the Ringfencing Act has become more predictable thanks to the last-minute amendment requiring a BaFin order to remedy an insufficient risk management as a precondition for criminal liability. While this amendment has been welcomed by practitioners, it has been bluntly rejected by some critical observers as a protection mechanism that would render the new criminal sanctions entirely 'symbolic' and 'useless'. Indeed, it seems rather unlikely that many bankers will deliberately refuse to comply with a BaFin order when the personal consequences could be a prison sentence. Therefore, the Ringfencing Act will probably not lead to a dramatic increase in criminal convictions of bankers. It should be considered, however, that the primary aim of (German) criminal law has never been to produce a certain minimum number of convictions. Instead, criminal law also aims to deter and prevent future crime and, more specifically in the case of the criminal law provisions in the KWG and VAG,

[19] HM Treasury (2012).

[20] Parliamentary Commission on Banking Standards (2013), para 1174ff.

[21] Parliamentary Commission on Banking Standards (2013), para 1183.

effectively to improve risk management. The new law seems suitable for achieving this goal, because senior managers are likely to intensify and improve their risk management efforts in order to reduce the risk of criminal liability.

Furthermore, the risk management duties set forth in Sections 25c KWG and 64a VAG may still play an important role in criminal law, because a failure to comply with these duties may give rise, under certain circumstances, to criminal liability for breach of trust (*Untreue*) under Section 266 of the German Criminal Code (*Strafgesetzbuch*).

As an immediate result of the new law, documentation of risk management procedures is likely to increase in order to provide senior managers with a line of defence that they have installed proper risk management. In particular, this may be the case for smaller banks and insurance companies that do not yet have in place comprehensive risk management manuals. Furthermore, the new law may trigger a substantial increase in preventive risk management audits and peer group comparisons in order to improve existing risk management standards. None of these preventive actions, however, will guarantee an effective limitation of the risk of criminal liability. In particular, German prosecution agencies are independent of BaFin and sometimes take a different stance than BaFin or the Bundesbank, in particular with the benefit of judgement in hindsight.

Supervision and monitoring by BaFin and (as far as banks are concerned) the Bundesbank is likely to intensify, as BaFin may feel some pressure to pass the buck for bank failures by issuing preventive orders to improve risk management standards. In this context, a leading Bundesbank representative has expressed discomfort with the new law, as the regulatory dialogue between banks and insurance companies on the one hand, and BaFin and Bundesbank on the other hand, may be compromised by the threat of criminal sanctions. Whereas the practical application of the new law will certainly be challenging enough for BaFin and Bundesbank, it is yet another unresolved question if and how the Ringfencing Act will be applied towards German banks by the European Central Bank once it has assumed its new supervisory responsibilities under the Single Supervisory Mechanism from 2014 onwards. Therefore, the practical application of the new law should be closely watched.

7 A Step Towards Corporate Criminal Liability?

The initial draft bill blurred essential principles of German criminal law and raised a number of fundamental questions involving concepts such as personal guilt, foreseeability and individual responsibility. According to the draft bill, senior managers would have been at risk of criminal prosecution for offences that involve no immediately tangible actual harm or malicious intent, especially because the risk management requirements differ from an intuitive sense of what 'ought' to be legal or illegal. Even though the risk of criminal liability has become more predictable thanks to the last-minute amendment requiring a BaFin order to remedy an

insufficient risk management as a precondition for criminal liability, the Ringfencing Act nevertheless constitutes a major step in the worrying trend of the German law maker from a 'de-personalisation' of individual actions and guilt in favour of a 'proceduralisation' of criminal law.[22] The Ringfencing Act also underlines the trend towards the 'privatisation' of German criminal law, because the risk of criminal liability will largely be determined by the individual risk management programme that each bank must develop ('*regulated self-regulation*').[23] While these features are not sufficient to categorize the Ringfencing Act as a corporate crime, the Ringfencing Act nevertheless contributes to a further dilution of the clear line between the concept of individual and corporate criminal liability which may exist in theory.

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[22] Hamm and Richter (2013), p. 870.

[23] Engelhart (2013), p. 210 in Fn. 2.

Part VIII
The Future of Corporate Criminal Liability

Rethinking Corporate Criminal Liability

Joachim Vogel*

Abstract In this chapter, Joachim Vogel reflects on open questions and future research topics in the field of corporate criminal liability. In his view, four areas materialized in which future research on corporate criminal liability might be promising: empirical studies, criminal policy studies, constitutional law studies, and legal studies both in the field of substantive corporate criminal liability and of criminal proceedings against corporate bodies.

1 Introduction

The Third AIDP Symposium for Young Penalists on Corporate Criminal Liability has certainly been a success. Once more, I would like to thank the organizers *Dominik Brodowski* and *Manuel Espinoza* and all the others who contributed to the success.

We have heard many, and manifold, rich and deep contributions which mirror the complexity of the issues at stake here. It is a sheer impossibility to do justice to these contributions in my short concluding remarks. What I would like to do instead is to look at open questions, at future research topics in the field of corporate criminal liability. Indeed, I feel that a major result of our work has been to identify these questions and topics and start the discussion about them.

In my view, four areas materialized in which future research on corporate criminal liability might be promising:

– empirical studies;
– criminal policy studies;
– constitutional law studies; and

*Author was deceased at the time of publication.

J. Vogel (✉)
University of Munich, Munich, Germany

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– legal studies both in the field of substantive corporate criminal liability and of criminal proceedings against corporate bodies.

2 Empiricism

Notwithstanding around 70 years of empirical and theoretical research in white collar, corporate and/or occupational crime, it has become clear that we still lack data on corporate criminality as such—in the sense of criminality attributed to corporations: How many corporations are reported with how many offences? Which is the level of crime in which branches of the economy? How many corporations are indicted, convicted, acquitted, sentenced, and which is the rate of settlements or agreements? Which are the typical or predominant offences? Are there certain types of corporations—young or old, small or big, successful or failing—which are more prone to offending than others? Which is the rate of reoffending? Which are the dark figures? Indeed, these are very basic questions very well established in the criminology of individual crime, and we have ample statistical material in the crime and sentencing statistics for individuals. It seems that comparable statistics for corporations do not yet exist, at least not across all countries which recognize corporate criminal liability.

As we have seen this very morning, we are better off with theoretical insights in deviant behavior of and in organizations. The keywords "organizational structure", "organizational culture" have been discussed, and we have also had eye-opening insights into the psychology and economic analysis of corporate criminal liability. These theoretical insights should guide a rational and evidence-based criminal policy.

3 Criminal Policy

Again and again, we have touched the criminal policy question which should be the public policy or rationale behind corporate criminal liability, particularly in comparison with civil and/or administrative corporate liability on the one hand and managers' or employees' individual criminal liability on the other hand. I do not feel that we have already achieved a comprehensive or systematic analysis of public policy. It might be useful to start on settled ground, that is to say the general rational discussion on retribution ("just desert"), rehabilitation, incapacitation etc. Indeed, what we see is a focus on rehabilitation—therefore compliance is such a big topic here, as we have seen yesterday afternoon. But we should also investigate if, how far and why retribution and incapacitation might guide a rational and evidence-based criminal policy concerning corporate criminal liability. Of course, we must keep in mind that criminal policy in that field is inherently intertwined with economic and financial policy—no rational legislator would accept a criminal policy which would destroy, or severely damage, or which would even offend corporations on a large scale. Again, the tendency towards lenient sentences and

settlements or agreements is not irrational. Rather, the keyword "regulated self-regulation", which has often been mentioned, might well be a key towards a sound criminal policy analysis.

Criminal policy questions of a particular nature arise in the context of international criminal law: Should corporations that aid and abet international crimes be held criminally liable under international criminal law and before the International Criminal Court, and should we recognize "ecocide"—a crime often committed by transnational corporations exploiting natural resources and causing widespread and/or systematic damage to the environment and, consequently, to civil populations—as a fifth international crime? Here, the peculiar features and exigencies of international criminal justice dominate the answer, in particular the everlasting battle between realism and idealism in international law.

4 Constitutional Law

Constitutional law limits criminal justice, and basic principles and guarantees of criminal law and criminal procedure have constitutional and even human rights status. It is very clear that human rights *sensu strictu* do not apply to corporations as such, as they are not human beings but legally recognized entities. Nevertheless, fundamental rights may well apply to corporations if the nature of the respective right allows for that. The tension between non-application of human rights and application of fundamental rights determines the possibility and shape of corporate criminal liability. German constitutional fundamentalists argue that it would violate human dignity to punish without proof of personal guilt which does not exist in a corporation—and therefore they argue that corporate criminal liability would be unconstitutional in Germany. It is the other way round: Because corporations cannot invoke human dignity, it is possible to punish them for attributed or organizational culpability—which would not be possible in human beings. However, basic guarantees such as the principle *nullum crimen, nulla poena sine lege*, the presumption of innocence, the right to a fair and speedy trial and perhaps also the privilege against self-incrimination do apply to corporations—in principle. However, *Dominik Brodowski* has—in my view correctly—pointed out that such guarantees might be modified insofar corporations are concerned because corporate criminal liability is not "core criminal law" but—as Professor *Tiedemann* called it—a "third track" (individual punishment being the "first track" and "core" of criminal law, measures of rehabilitation and incapacitation the "second track").

5 Criminal Law Proper, and Criminal Procedure

I believe that our symposium has brought to light three basic methodological insights which should lie at the base of future research about corporate criminal liability: Firstly, corporate criminal liability is a new or third track of criminal law

which does not necessarily follow the rules we have developed for the other tracks. Secondly, we should be well aware that the law in the books and the law in practice might largely differ. I believe that Dr. *Moosmayer's* presentation made it very clear that although the German law in the books does not recognize corporate criminal liability, the German law in practice has long passed the threshold towards such a liability. Thirdly, we should keep in mind the interaction between substantive and procedural law, in particular evidence law because the substantive rules of attribution of offences to a corporation may well be influenced by evidentiary standards, and *vice versa*.

As to substantive law, we have seen the major regulatory options but not all of them—so let me shortly recapitulate:

- It is an open and tricky question which entities should be criminally liable, and how we can cope with the question of insolvency, bankruptcy, mergers and acquisitions and other legal successions.
- We have seen the options concerning the question which offences should trigger corporate criminal liability. The rational answer might be: Except offences against the corporation, any offence might qualify if and insofar a compliance responsibility of the corporation can be justified.
- We have also seen the options concerning the question which individuals' criminal conduct should trigger corporate criminal liability. The solutions range from very restrictive ones—only top management qualifies—to very extensive ones—any person acting for the corporation (including third parties) qualifies. However, we have also seen that the problem is deeply interwoven with the question if, and to which extent, we should recognize a compliance defense.
- We have not spoken much about defenses, in particular Dr. *Moosmayer's* proposal to have some sort of "crown-witness rule" under which a corporation that voluntarily comes forward with criminal misconduct will be spared criminal prosecution.
- In the area of sanctions or—speaking more generally—legal consequences, we have seen the tendency to complement traditional financial sanctions (fines) with confiscation, rehabilitation and incapacitation measures—which raises questions of coordination, proportionality and sentencing guidelines. Indeed, a modern and comprehensive set of legal consequences enables us to strive for consensual solutions, settlements or agreements where compliance organization plays an overwhelming role.

As to procedural law, we have discussed the question of a public trial against corporations and, to some extent, the privilege against self-incrimination. Indeed, criminal proceedings against corporations are, as a rule, regrettably under-regulated, also concerning the vital question of evidence transfer between individual and corporate proceedings. I repeat it again: It's procedure, stupid! A possible follow-up to this symposium might focus on proceedings against corporations. And we might take up what has been rightly said concerning transnational investigations and prosecutions against corporations.

Biography

Professor Dr. Joachim Vogel, Professor of Criminal Law, Criminal Procedure and Economic Crimes, University of Munich, Judge at the Higher Regional Court of Appeal Munich (1963–2013). Joachim Vogel died in August 2013 before having the chance to revise the manuscript of his oral presentation on the last day of the Third AIDP Symposium for Young Penalists; therefore, his manuscript is printed here as is.

Part IX
Third AIDP Symposium for Young Penalists

Third AIDP Symposium for Young Penalists

Stijn Lamberigts

Abstract The Third AIDP YP Symposium was dedicated to corporate criminal liability from an international and problem oriented perspective. This chapter contains the minutes of the Symposium as redacted by Stijn Lamberigts.

1 Introduction

The Third AIDP YP Symposium was dedicated to corporate criminal liability (CCL) from an international and problem oriented perspective. It was hosted jointly by the Chair for Criminal Law, Criminal Procedure and Economic Crimes at the University of Munich (*Prof. Dr. Joachim Vogel*) and by the German National Group of the AIDP. It was organized by *Dominik Brodowski* and *Manuel Espinoza de los Monteros de la Parra* and supported by Roxin Alliance. The symposium was composed of six panels addressing the following topics: Regulatory Options in CCL, Attributing Criminal Liability to Corporations, Corporate Crimes, Criminal Compliance and Corporate Criminal Procedure, Transnational CCL and Psychology, Sociology and Economics of CCL. 30 speakers from 15 countries contributed to the symposium. By selecting both the topics and referents the symposium responded to the call made by *Prof. Dr. Joachim Vogel* (Germany) in his welcoming words to view CCL as only one option among several options to suppress criminal behaviour in the economic sphere. Thereby *Vogel* made particular reference to the German situation, where a model that he referred to as a hybrid system is in place. Although for corporations the sanctions are administrative, *Vogel* stressed that on the procedural level a lot of elements of criminal proceedings can be found.

S. Lamberigts (✉)
European Criminal Law, University of Luxembourg, Luxembourg, Luxembourg
e-mail: stijn.lamberigts@uni.lu

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Indeed, the topic of the Symposium was of particular importance for Germany. As *Prof. Dr. Stefan Korioth* (Germany) stressed in his welcoming words, at the time of the symposium the Federal Minister of Justice and the 16 Ministers of Justice of the *Länder* were discussing a draft statute on the topic of CCL that could end *societas delinquere non potest* in Germany.

2 Keynote Speech

Indeed, in the era of globalised economies not only individual actors (natural persons) but also corporations must face criminal liability for the harm they cause to internationally recognized legal interests. *Prof. Dr. Dr. h.c. mult. Klaus Tiedemann* (Germany) emphasized in his keynote speech[1] that the idea of CCL is not new, already a large number of EU Member States have introduced CCL into their criminal justice systems.

Tiedemann started with a historical overview, indicating that historically administrative sanctions were mostly used in central Europe and their root is to be found in police fines, already known in the nineteenth century, notably for tax violations. The second track to punishment in criminal law is incapacitation of offenders who are not capable of contracting guilt. He then referred to incapacitation for offenders who are not capable of contracting guilt, including confiscation of proceeds of crime which has been seen as an appropriate tool in the fight against corporate crime since the AIDP conference in Bucharest in 1929. He went on by highlighting the importance of administrative sanctions in the twentieth century, their development into a *droit administratif pénal* which is meanwhile recognized by the ECtHR as punishment at least in a broader sense. Numerous European countries have gone much further over the last two decades and introduced a genuine criminal liability for legal persons.

Tiedemann pointed out that it is primarily a criminal policy choice whether sanctions similar to criminal punishment suffice or whether the legislator decides for introducing proper criminal punishment against corporations. In that context, the EU policy requires proportionate, effective and dissuasive sanctions. According to *Tiedemann* CCL proper is to be regarded as more effective compared to administrative fines, if there are also explicit provisions as to the proceedings against legal persons. *Tiedemann* highlighted that as long as empirical evidence is missing, an effective system of administrative non-criminal sanctions cannot be considered as in violation of EU law. He stressed that proceedings or at least the final sentence are to be public.

Tiedemann extensively addressed the capacity of legal persons to act and the principle of guilt as well as the different models that are used. For the German criminal law reform, he proposed a mixed approach which should aim at

[1] Tiedemann, in this volume, pp. 11ff.

introducing criminal liability of corporations. Such liability should be based on vicarious liability by attributing acts and *mens rea* of bodies and legal representatives of corporations. Crimes committed by other employees may be attributed to the corporation based on the collective element of insufficient organization or oversight. However, this attribution should end when a corporation has taken all necessary and reasonable measures to prevent crime.

2.1 Discussion

The subsequent discussion focused on the question whether proceedings against corporations should be public, a strategy defended by *Tiedemann*. *Dr. Klaus Moosmayer* (Germany) confirmed that he would not be against a unified system of publication at a central level. He stressed the importance of a fair trial and he also defended the concept of self-cleaning, which allows from delisting a company whose name has been published, after it has taken the right compliance measures. *Vogel* then questioned *Tiedemann* about the public nature of trials for corporations. *Tiedemann* agreed on a central system of publication and a fair approach. He then stressed that he indeed wants a public trial, at least for severe cases. Questioned again by *Vogel* on his view on the public character of the proceedings themselves and not merely on the publication system, *Moosmayer* elaborated on a case where proceedings against natural persons were combined with administrative fines for a corporation. He pointed to the fact that individuals involved in white collar crime often aim at an out of court settlement with the authorities. He had difficulties accepting that individuals on the one hand would make a deal and avoid a public trial, whereas corporations would face a public trial. *Tiedemann* then added that he wants both parties, natural and legal persons, to be treated equally. A question was then addressed to *Tiedemann* on the effects of the economic crisis on the introduction of CCL. According to him, the issue of the economic crisis falls outside the scope of the general picture that he elaborated on. Banks would be included in his model, but there are some additional aspects. He referred to the Austrian law which holds provisions on banks that require help from the state.

3 Regulatory Options in CCL

The first panel dealt with the different options available for the regulation of CCL and was chaired by *Alexander Schemmel* (Germany). *Dr. Marc Engelhart* (Germany) elaborated on the different models that can be used to regulate CCL.[2] He started off with a brief overview of the different instruments that have played a

[2] See also Engelhart, in this volume, pp. 53ff.

role in the field of CCL and the increasing number of states in Europe that have implemented it since the beginning of the 1990s, stressing the importance of the Second Protocol to the PIF-Convention[3] and its attention to leading positions within the legal person. Next, he elaborated on problems that have to be addressed in general, such as, for example, the element of striking deals with the prosecuting authorities, and the topic of compliance and its effect on liability, sanctions and proceedings against corporations, using the example of the UK Bribery Act which provides that companies are not liable when adequate procedures exist to prevent employees from bribing. He concluded with new perspectives in regulation, such as the interplay between states and companies in this regard. *Dr. Devrim Aydın* (Turkey) then addressed the question whether there are suitable sanctions for new forms of corporate offences.[4] He recalled the main arguments against CCL, such as the idea that they cannot have *mens rea*. He went on by addressing the use of fines, thereby referring to the German system of administrative fines. *Aydın* then highlighted the risks of the use of fines and stressed the importance of proportionality, in order to avoid making unnecessary victims such as loss of employment within the companies due to the fines. He then addressed the other sanctions available, such as withdrawing licenses and confiscation. The panel topic was then approached from a practical point of view by *Dr. Wendy De Bondt* (Belgium), who dealt with public procurement and exclusion grounds related to prior convictions and more particularly those related to prior convictions of the candidate for participation in a criminal organization, fraud, corruption or money laundering.[5] She referred to the different techniques which are being used in the field, public procurement law on the one hand and criminal law on the other hand, as well as to the diversity that exists throughout the different states with regard to the behaviour that is criminalized. *Thomas Richter* (Germany) examined the importance of the new German law on criminal liability of banking and insurance executives for the topic of CCL.[6] His contribution showed the impact of events such as the recent economic crisis on economic and financial criminal law. In the aftermath of the saving of several banks, the government considered the current legislation to be insufficient in regard to mismanagement by bank executives. The initial draft contained provisions on management duties, combined with criminal sanctions for senior managers who fail to comply with these duties if the bank's viability would be endangered. Due to extensive criticism, for example on the vagueness of the draft, it has been amended before being adopted and the possibility that managers will face criminal liability has been reduced. One of the relevant elements of this act for the issue of CCL was, according to *Richter*, the criminal liability for mismanagement which shows a tendency towards strict criminal liability. Lastly

[3] Second Protocol to the Convention on the protection of the European Communities' financial interests, [1997] OJ C 221/12.

[4] See also Aydın, in this volume, pp. 311ff.

[5] See also De Bondt, in this volume, pp. 297ff.

[6] See also Richter, in this volume, pp. 321ff.

the topic was approached by *Yasmin Van Damme* (Belgium), who dealt with human trafficking and labour exploitations.[7] She emphasised the importance of globalization and the means that are being used in the field, including demand reduction. She mainly dealt with the criminal law approach, although she indicated that other means such as joint liability and self-regulation are available options, too. The EU suggestion to establish as an offence the use of services which are objects of exploitation and the problems that come with this approach, in particular the grey zone that exists between what is voluntary and coerced, and the issue of *mens rea*. Then she went on by stressing the scattered landscape that exists with regard to CCL and the fact that the Member States are left free to use a criminal, administrative and or civil liability. A crucial mechanism that had to be found, is how to distinguish *bonafide* and *malafide* subcontractors as well as how to establish guilty knowledge.

3.1 Discussion

The debate after the session was opened by *Tiedemann* who asked *Richter* to comment on the statement that no banker will go to jail on the basis of the new German law. *Tiedemann* described it as symbolic law-making. According to *Richter*, it makes a huge difference who is liable, a corporation or an individual. There is a big difference between someone facing the risk of going to jail, or a corporation which risks losing some money. *Richter* then agreed with *Tiedemann* that it is symbolic law-making, highlighting as well that the prosecutors and judges are not able to deal with the management duties. He then continued stating that he thinks the law will be effective since there is the prospect of someone who could go to jail.

Vogel then asked *Engelhart* to elaborate on the criminal practice in the European Union and the German practice with regard to corporations. *Engelhart* admitted that the comparative studies are limited in this regard. According to them, there are some small puzzle pieces available, which are not so representative, since they are often highly symbolic, such as the UK case on the Herald of Free Enterprise. In practice he thinks that prosecutors often prefer to focus on individuals instead of corporations. *Tiedemann* then added that in Sweden there have been a lot of prosecutions against corporations, and in France there have been 8–10 convictions over the last decade.

Then the question was raised whether—given the limited results of the requirement of effective, proportionate and dissuasive sanctions—it is reasonable to try it with criminal sanctions. *Engelhart* considered these vague terms not appropriate. According to him, the term "criminal" might lose importance, whereas the procedure and the protecting mechanisms will gain importance.

[7] See also Van Damme and Vermeulen, in this volume, pp. 171ff.

Aydın was then asked to give his view on whether he finds it reasonable to say that depending on your concept of guilt you might be able to fit legal persons in. According to *Aydın*, crimes can be committed to the benefit of a corporation, or a corporation might be used for committing offences. He further focused on corporations being used as an instrument to commit offences.

The following question dealt with the situation in Spain where currently dozens of bankers are facing criminal sanctions in the aftermath of the financial crisis, often on the basis of breach of fiduciary duties. *Richter* recalled that the previous legislation was insufficient since the management duties were not enshrined in a formal law, but merely in regulatory guidelines which did not suffice to convict someone on the basis of "*Untreue*".

De Bondt was then asked how the information exchange takes place in practice. She admitted that this is an important issue. The documents that are provided are often too vague, since they do not provide information on the exact content of the underlying offence. An EU wide system is currently lacking.

4 Invited Lecture

Dr. Klaus Moosmayer (Germany) addressed the topic of CCL from a practitioner's point and elaborated on the Siemens case. The crucial importance of a good reputation for companies was stressed throughout the lecture, as well as the impact of investigations on the corporations and its stakeholders. *Moosmayer* explained the new internal control system used by Siemens. This new system, applied by 550 full time compliance officers, consists of three steps: prevent, detect and respond. Having an effective control system has the consequence that people who are very successful in the company may be fired if they violated compliance rules. One of the challenges of that system is compliance fatigue, which means that at some point people have had it with compliance. Siemens uses four questions that should help employees in their daily activities as far as compliance is concerned: Is it the right thing for Siemens? Is it consistent with Siemens' and my core values? Is it legal? And is it something I am willing to be held accountable for? Some interesting suggestions were launched, such as unified legal standards that incentivize companies to implement and maintain effective compliance systems should be envisaged and corporate leniency regulations should be extended beyond antitrust cases to, for example, cases of detected corruption where it is voluntarily disclosed.

4.1 Discussion

The first question during the debate was whether companies that have adopted an extensive range of measures to prevent crime in the corporation should still be prosecuted in the case of wrongdoing at the highest level. According to *Tiedemann*,

prosecution should not be excluded in those cases. He was supported by *Vogel* on this point. Asked for his opinion on the introduction of CCL in Germany by *Vogel*, *Moosmayer* answered that he thought that it is coming and he added that the importance of incentives should be taken into account. In response to an additional question, *Moosmayer* admitted that the current system in Germany is indeed no longer adequate. *Moosmayer* made it very clear in his answer on whistle-blowers that he is against the idea of giving them bounties, although he recognized that whistle-blowers are needed. *Engelhart* then asked *Moosmayer* how effectiveness is measured at Siemens with regard to compliance. In his answer, *Moosmayer* emphasised the importance of input of the employees in this regard. Therefore the input of every employee is asked twice a year. The final question that was addressed to *Moosmayer* dealt with the impact of local regulations on Siemens' compliance system. *Moosmayer* explained that Siemens aims at global standards, but where necessary, local elements are taken into account.

5 Attributing Criminal Liability to Corporations

The first session on Thursday, chaired by *Prof. Dr. Holger Matt*, dealt with the attribution of CCL to corporations. *Dr. Anna Salvina Valenzano* offered a comparative view on the triggering persons, thereby distinguishing three groups of persons.[8] The first system is the one that focuses on the notion of the "leading position". Then she elaborated on the two-tier system, which includes both the offences committed by persons in a leading position as well as those offences committed by a subordinate, provided that there is a breach of the duties of supervision by a person in a leading position. The second approach can in principle be considered as an EU statutory model. The last approach which was distinguished also includes those offences committed by third persons who are outside of the organizational structure of the legal person. She concluded by presenting a model that incorporates the three different approaches. *Andrea Lehner* (Austria) dealt with the Austrian model of attributing criminal liability to legal entities,[9] which is the implementation of EU instruments such as the Second Protocol to the PIF Convention.[10] The Austrian model was considered to combine elements of both an attribution model and direct liability. The distinction made between decision-makers and staff members can be traced back to the Second Protocol. Then the legal framework of CCL in Italy, in particular with regard to the issue of unintentional crime was addressed by *Camilla Cravetto* and *Emanuele Zanalda* (Italy) who considered that introduction of corporate manslaughter poses particular problems

[8] See Valenzano, in this volume, pp. 95ff.

[9] See also Lehner, in this volume, pp. 79ff.

[10] Second Protocol to the Convention on the protection of the European Communities' financial interests, [1997] OJ C 221/12.

with the interest or advantage test that is used in Italy.[11] One can only conclude that several questions still remain unanswered, including questions of a constitutional nature. *Emmanuelle De Bock* (Belgium) dealt with specific elements of the Belgian approach to CCL and she started off by giving a short historic overview of the Belgian approach towards CCL, which was introduced in 1999. She then described the very broad field of application of Article 5 of the Belgian Criminal Code which stipulates CCL. This approach is not restricted to certain offences and it is, according to *De Bock*, an autonomous criminal liability. The main element of her contribution was the Belgian "décumul" rule which states that whenever a crime is committed by a corporation together with an identified natural person, only one entity can be held criminally responsible, namely the one whose fault is the most serious. The exception to this rule is that where the natural person commits the offence willingly and knowingly, the "décumul" cannot be applied. She then considered that besides the lack of rationale behind this "décumul" rule, determining the most serious fault in practices is hard.[12] *Danielle Soares Delgado Campos* (Germany) gave an overview of CCL in Brazil, which is non-existent, apart from some exceptions. *Campos* assessed the prosecution of corporations, as well as the sanctions imposed on them to be rare. She also compared the diverging approaches of the Superior Court of Justice which unlike the Supreme Federal Court solely accepts criminal liability of companies for environmental crimes insofar as the criminal liability of the individual is at stake as well.

5.1 Discussion

The discussion was opened by *Richter* who inquired to what extent the Krupp case concerned also the criminal liability of individuals. *Zanalda* confirmed that a manager was indeed sentenced to 11 years of imprisonment, even if the court of appeal considered that there was no intention but negligence. *Cravetto* stressed the political importance of this case. *Dr. Avital Mentovich* (USA) then inquired what punishments are available for corporations. *Lehner* explained that in Austria the available sanctions are fines of a maximum of 1.8 million Euro. *Valenzano* mentioned that in Italy the available sanctions are interdictions and fines. According to her, in particular the interdictions that can be of a temporary or final nature are crucial. In the latter case, this can be considered as a death sentence. *Campos* stated that Brazil has several sanctions available such as fines, interdictions, exclusion from government contracts and exclusion from government grants. *De Bock* referred to article 7 *bis* of the Belgian Criminal Code which has an extensive range of sanctions such as fines, limitation of corporate activities, publicity sanctions and sanctions terminating the legal personality. *Vogel* then expressed his

[11] See also Cravetto and Zanalda, in this volume, pp. 109ff.

[12] See also De Bock, in this volume, pp. 87ff.

concern about attribution of criminal liability to corporations where no individual perpetrator can be found. He inquired how offences that take place within the company such as mobbing or sexual harassment should be dealt with, and asked whether they could be used as triggering offences. *De Bock* mentioned that the problem is shifted in Belgium and a lot of work is left to the judges. As for the second aspect, she recalled that Belgium has no limitation with regard to the triggering offences. *Lehner* recalled that in Austria the identification of a specific individual is not always required, but there is still an ongoing discussion on that topic. As for the second element she mentioned that a conviction of the corporation is not excluded. *Valenzano* considered that with regard to the second issue that if the offence is committed in the exclusive interest of the natural person, then the corporation cannot be held liable. *Cravetto* mentioned that with regard to certain employees, there is a reversed burden of proof, and that the closed list system that Italy uses does not allow for liability of corporations for the two offences mentioned by *Vogel*.

6 Corporate Crimes

Vogel, as chairman, opened this session by giving an overview of the offences that are likely to be committed by corporations, such as tax fraud, illegal employment and market rigging. He emphasized that a lot of research must be done in this field since there is a lack of data on the topic of CCL. *Dr. Anna Błachino-Parzych* (Poland) dealt with market manipulation recalling its risks for the capital markets and the market participants. Capital markets were compared with a game and she stressed the importance of confidence in the markets of the market participants. An overview of the relevant provisions of the Market Abuse Directive (MAD) was then given. The concept of the "artificial price", which is the core element of price manipulation, was treated in particular detail. A more subjective approach to that concept instead of the objective approach in the MAD was proposed. She elaborated on the new proposals that have been launched by the European Union, the regulation on insider dealing and market manipulation and the directive on criminal sanctions.[13] *Axel-Dirk Blumenberg* (Germany) also looked into market manipulation. He recalled that market manipulation is not only about stock prices, but even more importantly about market integrity and investor confidence. He emphasized that it is a challenge to keep up with new technologies, such as computer orders of stock. He then distinguished three types of manipulation: trade based, information based and action based manipulation. The Libor scandal has shown that indices can be manipulated as well. In his conclusion he mentioned the failure of the previous supervision system and the need to take the core principles of criminal law into account. *Prof. Dr. Eduardo Saad-Diniz* (Brazil) discussed the new Brazilian

[13] See also Blachnio-Parzych, in this volume, pp. 145ff.

legislation on money laundering.[14] He first made some remarks about the culture of CCL, including the international pressure for cooperation in criminal matters. His contribution provided insight in the different stages of Brazilian money laundering legislation and its relation to connected offences. The first stage dealt with the fight against narcotics. This scope was widened in the second phase and included, for example, arms trafficking. The third generation suppressed the catalogue approach. *Patricio Nicolas Sabadini* (Argentina) gave a critical overview of the progress and the regressions that have been made in the field of money laundering in Argentina. *Sabadini's* contribution made it clear that the influence of international bodies such as FATF-GAFI and the threat of an international sanction against Argentina should not be underestimated. *Dr. Jacqueline Hellman* (Spain) defended the introduction of ecocide as an offence in international criminal justice.[15] According to her, after damage has been done to the environment—for example by an oil spill—governments often neglect to take the necessary action, driven by economic motives. *Hellman* considered the introduction of this offence as a good instrument to prevent companies from escaping so easily. Given the power of certain multinational companies, she deemed cooperation between as many states as possible necessary.

6.1 Discussion

Before opening the debate, *Vogel* pointed out that international criminal law was traditionally of a customary nature. The first question on the interests protected by ecocide was addressed to *Hellman*. Along with this question *Hellman* was also asked whether criminal law is the way to be followed, also taking into account the very limited number of ICC judgments. *Hellman* considered that the interests of the people living in the region that was harmed are also covered. So, it is about protecting the environment and the rights of the people who are living there. With regard to the second question, she considered criminal law to be much more effective. *Lynn Verrydt* (Belgium) then addressed the concept "unable or unwilling" in international criminal law and its impact on the number of national cases. She assumed that no national court would like to be considered to be unable or unwilling to handle ecocide cases. *Hellman* agreed that countries will indeed be encouraged to deal with the issue. Another question was then addressed to *Hellman* how it will be implemented in practice, since it seems that states are reluctant to introduce new crimes in international criminal law. *Hellman* agreed that there is indeed reluctance to deal with ecocide in international criminal law. She mentioned that the UN has in 2012 encouraged states to have meetings on this topic.

[14] See also Saad-Diniz, in this volume, pp. 135ff.

[15] See also Hellman, in this volume, pp. 273ff.

7 Criminal Compliance and Corporate Criminal Procedure

The session on Criminal Compliance and Corporate Criminal Procedure was chaired by *Prof. Dr. Petra Wittig* (Germany). *Dr. Radha Ivory* (Switzerland) presented collective action as a new way to address CCL. In her opinion, many states have nowadays a sort of liability for corporations, either criminal or administrative. *Ivory* considered these rules to converge around due diligence, a notion which she described as: companies should only be held liable for crimes that they failed to prevent by taking reasonable steps to prevent. She presented collective action as a form of self-regulation by using the prisoner's dilemma. Due to an increased level of information between competitors it is aimed at reducing the opportunities and incentives for individual wrongdoing. Some issues that pose a threat to the use of collective action are antitrust law and the risk that people who are not part of collective action undermine it. *Dr. Nicola Selvaggi* (Italy) shed light on compliance and its adequacy from a comparative point of view. *Selvaggi* considered it necessary to avoid a *probatio diabolica* with regard to the adequacy of compliance programs. Among the elements that he considered to be relevant for the evaluation of a program's adequacy are risk assessment, finding a way to manage financial resources in order to prevent the commission of crimes and the introduction of a disciplinary system adequate to sanction the violations of compliance rules. *Jordi Gimeno Beviá* (Spain) treated compliance programs as evidence in the framework of criminal cases.[16] *Gimeno Beviá* described the situation in the US, where most cases are concluded prior to a trial through plea bargaining. He then compared the US and the European approach towards the burden of proof, including the risk of contempt of court. *Prof. Ana María Neira Pena* (Spain) addressed the question whether CCL is a tool or an obstacle to prosecution.[17] The first part of her contribution addressed the difficulties of corporate prosecutions. These difficulties include the economic power of the companies and the fact that concealment of individual responsibility is facilitated by legal persons. She compared some elements of the approaches adopted in the US and in Europe. She defended both guarantees for legal persons and the expansion of the possibilities to reach agreed solutions. She concluded that substantial differences between the European and the American procedural systems may cause CCL to become an obstacle for criminal investigations in Europe. *Dominik Brodowski* (Germany) presented the topic of procedural rights for corporations in criminal trials, taking into account constitutional law and human rights law and the limitations they pose.[18] *Brodowski* continued by examining the necessity of criminal trials. He concluded that it all depends on the aim and it is in those cases where the behaviour has to be regulated

[16] See also Gimeno Beviá, in this volume, pp. 227ff.

[17] See also Neira Pena, in this volume, pp. 197ff.

[18] See also Brodowski, in this volume, pp. 211ff.

and where deterrence is needed that criminal trials become involved. Forfeiture and incapacitation can be achieved by different means. *Brodowski* considered that two elements distinguish the procedural rights of corporations from the ones of individuals: the fact that they are not amplified by article 5 ECHR and second, a 2006 ECtHR case (73053/01) that dealt with tax surcharges, which seemed to allow for less stringent standards where the hard core of criminal law is not involved. *Brodowski* raised the question for whom the procedural rights are and who is protected. He also presented several reasons why more procedural rights are better. One of them is the argument that more limited rights for corporations might in the end lead to a reduction of the rights of natural persons afterwards.

7.1 Discussion

In the subsequent debate, *Richter* considered that more rights for companies might lead to less rights for individuals, therefore disagreeing with *Brodowski*'*s* argument. He inquired which rights *Brodowski* had in mind. According to *Brodowski* it could work both ways and he considered a full protection desirable, although he seemed to be less sure with regard to *nemo tenetur*, as he also considered that *nemo tenetur* is not absolute. He further added that procedural rights also have to be provided in civil and administrative proceedings. *Ivory* then received a question on the prisoner's dilemma and incentives. She made it clear that incentives, just like enforcement and punishment come in various forms. On a question about empirical evidence, she admitted that this was limited.

8 Transnational CCL

The session on transnational CCL was chaired by *Prof. Dr. Helmut Satzger*. *Prof. Dr. Yurika Ishii* (Japan) elaborated on the enforcement of a financial crime in a foreign country.[19] She dealt with Deferred Prosecution Agreements, which, according to her, raise issues of transparency and legitimacy as well as they create a risk for international conflicts if used excessively. This topic is, according to her, influenced by the rule that a state may not exercise its sovereign rights in another state's territory without the latter consenting. *Dr. Anne Schneider* (Germany) dealt with CCL and conflicts of jurisdiction.[20] She distinguished the jurisdiction to enforce, to prescribe and to adjudicate. She also examined the different principles used in the European Union. *Aikaterini Tzouma* (Germany) presented the topic of *ne bis in idem*. After a general explanation of the principle, she looked into the

[19] See also Ishii, in this volume, pp. 237ff.

[20] See also Schneider, in this volume, pp. 249ff.

different relevant instruments, such as Article 54 CISA, Article 50 of the Charter of Fundamental Rights and the 7th protocol to the ECHR. Subsequently she dealt with the application of the principle in EU competition law after the 2003 reform.[21] *Verrydt* presented her point of view on the question whether the ICC's mandate should be extended to include legal persons.[22] This would be desirable, according to her, because of the numerous cases where corporations were involved, and because of its advantages compared to existing liability regimes. The host state—where the offence takes place—has, according to *Verrydt*, often an underdeveloped legal system, and the home state will not always intervene when extra-territorial human rights abuses by domestic corporations are concerned. She concluded that an amendment of the ICC's Statute is currently not feasible because of a lack of an international standard. *Dr. Ahmed Khalifa* (Egypt) shared his thoughts on criminal responsibility of corporations for international crimes. For him one of the leading contemporary examples of this issue are private security companies. Indirect involvement is according to *Khalifa* an important issue. He admitted that in international criminal law there is no CCL. He stressed that corporations have been prosecuted sometimes in national courts. Customary status is however still lacking. The main track that should be followed now is national prosecution, according to *Khalifa*.

8.1 Discussion

The first question addressed to *Schneider* dealt with the centre of main interest. The problem, according to her, is particularly strong in the case of letterbox companies. *Schneider* was also asked how to deal with situations where offences were committed in one state and the state where the company is registered would be competent as well on state of the active personality. She would in such cases prefer to have the case dealt with by the country where the wrongful conduct took place. Then *Khalifa* was asked for his opinion on human rights violations by companies. A line has to be drawn between human rights violations which can be very serious and whether it can be qualified as international crimes, which will not necessarily be the case. He added that a national interest to prosecute will not always be present to prosecute the case. *Verrydt* added that qualifying it as a crime against humanity will often be difficult because of the requirement of a widespread attack. The following question dealt with the desire for more enforcement in the field of international criminal law. *Khalifa* stated that the element of interest of the state is crucial in this regard and the importance of patience.

[21] See also Tzouma, in this volume, pp. 261ff.

[22] See also Verrydt, in this volume, pp. 281ff.

9 Psychology, Sociology and Economics of CCL

The final session on Psychology, Sociology and Economics of CCL was chaired by *Prof. Dr. William S. Laufer*. *Jamie-Lee Campbell's* (Germany) and *Anja S. Göritz'* (Germany) contribution dealt with corruption as a matter of organizational culture. According to them, an organizational culture which is corrupt helps employees to rationalize and explain their criminal behaviour and consider it as good behaviour. The organizational culture did indeed have an influence on the amount of corruption. *Dr. Avital Mentovich* (USA) elaborated on punishing collective entities.[23] She recalled that corporations are seen as separate legal entities at various levels: at first with regard to limited financial liability, later also from the point of view of constitutional rights and now often also with regard to criminal liability. She then made it clear that attributing intent to corporations is rather difficult. According to her, less punishment is given to corporations in the end. *Mentovich* considered that people are less offended when the rights of corporations are violated than when an individual's rights are violated. She supported changing the burden of proof on the topic of intent. *Mark Hornman* (The Netherlands) dealt with the question whether an organization's structure should influence corporate and individual criminal liability. In the first part of his presentation he gave a brief overview of CCL and criminal liability of leading officials in the Dutch legal framework. He linked the aforementioned question to Mintzberg's typologies and he presented three basic forms: the simple structure, the machine bureaucracy and the professional bureaucracy. He concluded that those typologies could be useful in fine-tuning individual and corporate criminal liability. This should lead to a more tailor-made approach. *Patrick Bernau* (Germany) approached CCL from an economic perspective. A substantial part of his presentation dealt with the process of how decisions are made. *Bernau* presented the principal agent model in which three elements are crucial: the principal, the agent and the own motivation. He stressed that employees have their own motivation and often they commit wrongdoings for their own benefit and not for the benefit of the company. He cited the Kerviel case in France to support this. He also elaborated on the incidence of costs and he made it clear that attention should be paid to who is paying in the end for the wrongdoing.[24] *Sherbir Panag* (India) presented a comparative analysis of administrative sanctions as a tool to fight corruption, and more specifically blacklisting and debarment. He distinguished pre-trial and post-conviction use of these instruments. He stressed the importance of the principle of proportionality and the need to look into it.

[23] See also Mentovich and Cerf, in this volume, pp. 33ff.

[24] See also Bernau, in this volume, pp. 47ff.

9.1 Discussion

Laufer asked *Campbell* for her view on blameworthiness. She answered that people who work in an organizational structure which is not corrupt are more blameworthy if they give bribes than those who do it and work in a corrupt structure. *Laufer* wanted to know whether *Hornman* was suggesting that small businesses get trials and bigger ones do not. *Hornman* confirmed that particularly small businesses get convicted. *Laufer* stressed the cost of criminal law and the lack of attention that is spent on analysing who is harmed by the application of criminal law.

10 Concluding Remarks

In his concluding remarks, *Vogel* looked into the questions that are still open for future research. He identified four types of studies that should be conducted in the future: empirical studies, criminal policy studies, constitutional law studies and studies about CCL.

With regard to empirical studies, he stressed the lack of data on corporate crime: How many offences are reported? How many per cent of a sector is criminal? What are the typical criminal corporations (big ones? Small ones? Old ones or new ones?)? In relation to criminal policy, he highlighted that we should realize the link between criminal and economic and financial policy. According to him, no government will agree to use a criminal policy that can destroy its economy. Further he recalled the questions of international criminal law that still remain open: Should it be possible to hold corporations responsible in international criminal law? Should ecocide be recognized? He emphasised the role played by realism and idealism in this field. Constitutional law is, according to *Vogel*, at the basis of criminal justice. Human rights *sensu strcitu* do not apply to corporations. Conversely, it is very clear, according to *Vogel*, that certain fundamental rights might well apply to corporations. Corporations cannot invoke human dignity, according to him. *Nullum crimen*, *nullum poena*, fair and speedy trial, a sort of presumption of innocence and a partial right against self-incrimination should apply. As *Brodowski* highlighted, there is a core and a non-core area of criminal law. He thinks that CCL is the third track. Lastly, he stressed that substantive law and procedure in the field of CCL are linked, for example with regard to evidentiary standards. Proceedings against corporations could be the topic of a future conference. In relation to the sanctions used against corporations, *Vogel* noticed a trend to use other elements than fines, such as confiscation.

Finally, *Prof. Peter Wilkitzki* (Germany) concluded the symposium; his words—which he himself characterized as some aphoristic footnotes as opposed to a thorough synopsis of the rich variety of contributions—shall be reproduced here in full:

First of all, in my quality as President of the German AIDP Group I would like to congratulate our Young Penalists for this fabulous Symposium which added another highlight to the abundant array of activities they performed during the last years and which again shows that the scientific (and the social) life of our Group would be much poorer without them.

Second remark, now speaking as former Head of the Department of Criminal Law at the Federal Ministry of Justice: I must admit that never in these years I succeeded in fully attaching myself to either those German academics who, following our grand master Jescheck, still stick to the strict principle of "*societas delinquere non potest*", nor to those who hold that a modern criminal law needs to deviate from the old "Germanic" doctrine, and that I always felt quite uneasy in this, as Klaus Tiedemann so nicely put it, "war of religion". I remember how we suffered in the Ministry when we had to position ourselves for another International Colloquium in 1998 devoted to the topic "Criminal Responsibility of Legal and Collective Entities", organized in Berlin by the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg – by the way, under active participation of many young and old AIDP penalists. Not being willing nor able to take a firm stand for one or the other side, we took refuge with one of these Solomonic solutions for which political bodies are (in)famous, namely to send three representatives: one for defending the chemically clean German Dogmatism, one for advocating the New Pragmatism and one (me) for the mission impossible to mediate between these two. Without really showing a personal preference, I then dared the forecast that the new Global Player which had meanwhile appeared on the scene – the European Union – would sooner or later barricade the seemingly comfortable emergency exit used by German lawmakers in order to avoid real changes, namely retreating to the multi-use weapon of German "*Ordnungswidrigkeiten*" which can be inflicted also on legal persons. Today the danger – or the chance – that this avenue will be blocked up is even more imminent than it was fifteen years ago.

Let me finish with a commercial for our "international" AIDP. As one of the AIDP Vice-Presidents I am happy to convey to you the best greetings of the AIDP board, in particular of its President, Professor José-Luis de la Cuesta who would really have liked to join us but unfortunately could not make it. As you know, the AIDP is the oldest Criminal Law Association worldwide, and as early as at its IInd international Congress in Bucharest 1929 it devoted one of its four Sections to the topic "*La responsabilité des personnes morales*" – is it not amazing to see how the Association always has its finger on the pulse of current affairs? So, to conclude, let me raise an imaginary glass on our Good Old Lady AIDP – *vivat*, *crescat*, *floreat*!