Regulating Corporate Criminal Liability: An Introduction

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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

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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.

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