

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

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 corporations¹ 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 extent 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 statutes 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 GG⁷ 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 Schönemann, 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 beforehand²⁷ 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* criteria³¹ 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 imprisonment³⁸—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 (approximately⁴⁹) 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.

⁶⁷ Cf. Packer (1964).

⁶⁸ Kennedy, cited in Sorensen (1965), p. 528, on the “moon race”.

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