Corporate Criminal Liability as a Third Track

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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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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.