Corporate Criminal Liability and Conflicts of Jurisdiction

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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.

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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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