Chapter 8
Corporate Criminal Liability in Germany

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8.1 Introduction

In general terms, German law recognizes corporate liability as a consequence of legal personality: contract and tort law provide that corporations are liable for the wrongdoing of their representatives or employees,[1] and special concepts of civil liability (e.g., product liability) can result in

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[1] §§ 31, 278, 831 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (Civil Code in the version promulgated on January 2, 2002),

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the liability of corporations as well.[2] A form of corporate liability can also be found in German administrative law, for example, in provisions dealing with the protection of the environment.[3]

By contrast, the German Penal Code does not provide for the imposition of criminal sanctions on corporations. In drafting the code in 1870, the German legislator adhered to a notion of personal guilt that could not be applied to corporations; following the ancient rule, *societas delinquere non potest*, it limited criminal liability to natural persons.[4] The provisions on forfeiture and confiscation are nonetheless applicable to legal entities. According to § 75 Penal Code, assets of a corporation can be confiscated as *instrumenta vel producta sceleris*[5] if the perpetrator committed the crime as a legal representative of the corporation. If the corporation has benefitted from a crime committed by one of its representatives, the court may order the forfeiture of the benefit.[6]

The provisions on forfeiture do not establish the criminal responsibility of corporations under German law, however, since forfeiture cannot not be regarded as a criminal sanction *stricto sensu*: as forfeiture is supposed to ensure that the corporation is deprived of any illicit profit and does not benefit from the offense, it is not generally regarded as requiring personal guilt.[7] The same applies to the confiscation of objects that endanger the general public or that may be used for the commission of unlawful acts[8] since such confiscations are solely preventive.[9]

Bundesgesetzblatt 2002 I 42, 2909; 2003 I 738. See Wagner 2009, para. 378 and paras. 386 et seq.

[2] § 1 Produkthaftungsgesetz vom 15. Dezember 1989 (Product Liability Act of December 15, 1989), Bundesgesetzblatt 1989 I 2198.

[3] Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) VBlBW 1993, 298 (301); see also §§ 1, 2 Umwelthaftungsgesetz vom 10. Dezember 1990 (Environmental Liability Act of December 10, 1990), Bundesgesetzblatt 1990 I 2634 and the Erwägungsgründe des Umweltschadensgesetz (Explanatory Memorandum to the Avoidance and Remediation of Environmental Damages Act), Bundestagsdrucksache 16/3806, 21.

[4] Brender 1989, 29 et seq.; see also the reluctant position of the Reichsgericht (Imperial Court of Justice) RGSt 16, 121 (123); 28, 103 (105); 33, 261 (264); for the origins of the rule *societas delinquere non potest* see Schmitt 1958, 16 et seq.

[5] § 74 Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (Penal Code in the version promulgated on November 13, 1998), Bundesgesetzblatt 1998 I, 3322.

[6] § 73(3) Penal Code.

[7] See Bundesverfassungsgericht (Federal Constitutional Court) BVerfGE 110, 1 (16 et seq.); Bundesgerichtshof (Federal Court of Justice) BGHSt 47, 369 (373).

[8] § 74(2) No. 2 and §74(3) Penal Code.

[9] Schmidt 2008a, para. 7.

The confiscation of other objects[10] is not merely preventative in purpose but is also intended to punish the offender.[11] Consequently, the confiscation of those objects cannot be ordered without guilt.[12] In that regard, the confiscation is a quasi-criminal sanction *(strafähnliche Maßnahme)*. In the view of the legislator, corporations should not be exempted from such confiscation orders (as third parties are); rather, if the perpetrator committed the crime on behalf of the corporation, confiscation may be ordered on similar conditions as apply to natural persons (i.e., the perpetrator him- /herself).[13] Thus, one could say that German criminal law provides for the criminal liability of corporations under § 75 Penal Code, except for the fact that confiscation is not a criminal sentence *stricto sensu*.[14]

In the place of criminal sanctions, the German legislator provided administrative penalties for corporations. This form of corporate responsibility was introduced gradually over the course of the twentieth century in response to the concern about the growing economic influence of legal persons. In 1929, a German court ruled that, in competition law,[15] a regulatory fine *(Ordnungsstrafe)* may be imposed on corporations as well as on human beings.[16] The decision inspired legislation expressly providing for regulatory fines against corporations.[17] In 1949, the legislator replaced the regulatory (criminal) fine with an administrative fine against legal persons out of deference to the traditional objections to corporate criminal liability.[18] To implement this, the legislator adopted a general provision on corporate fines *(Verbandsgeldbuße)* in the *Ordnungswidrigkeitengesetz*

[10] § 74(1), second sentence, Penal Code.

[11] BGHSt 25, 10 (12); Schmidt 2008a, para. 4.

[12] See § 74(3) Penal Code.

[13] Achenbach 1993, 549 et seq.; Schmidt 2008a, para. 1.

[14] Cf. §§ 38 et seq. Penal Code.

[15] § 17 of Verordnung gegen den Missbrauch wirtschaftlicher Machtstellungen vom 3. November 1923 (Regulation Against the Abuse of Economic Power of November 3, 1923), Reichsgesetzblatt 1923 I, 1067.

[16] Kartellgericht (German Cartel Court), (Decision of February 27, 1929, K. 271/28 101.), Kartell-Rundschau 1929, 213 et seq.

[17] See in this regard Brender (1989), 41 et seq.; see also 30 et seq., with regard to the former § 357 Reichsabgabenordnung vom 13. Dezember 1919 (Imperial Fiscal Code of December 13, 1919), Reichsgesetzblatt 1919, 1993.

[18] §§ 23, 24 Wirtschaftsstrafgesetz vom 26. Juli 1949 (Act on Business Crime of July 26, 1949), Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes 1949, 193. The introduction of a system of corporate criminal responsibility was rejected by academics and practitioners in 1953, see Verhandlungen des 40. Deutschen Juristentages, 1953, vol. 2, E 88; see also Heinitz 1953, 90; Engisch 1953, E 7 et seq., E 41; Hartung 1953, E 43 et seq.

(Regulatory Offenses Act) of 1968 (ROA).[19] According to § 30(1) ROA, an administrative fine *(Geldbuße)* may be imposed on a legal person if an organ, a representative, or a person with functions of control within the legal person has committed a criminal or a regulatory offense *(Ordnungswidrigkeit)*. The provision resolved the conflict between those who opposed corporate criminal responsibility on doctrinal grounds and those who saw a practical need for corporate sanctions in responding appropriately to corporate wrongdoing. In contrast to a criminal sentence, an administrative fine does not imply moral blameworthiness; furthermore, the corporate fine was designed as a "collateral consequence" *(Nebenfolge)* of the offense by a natural person. Therefore, the corporate fine was not considered incompatible with the concept of personal guilt.[20]

However, it still seems doubtful that the legislative compromise has addressed the doctrinal objections to corporate criminal responsibility, insofar as the corporate fine establishes the liability of a corporation for the criminal activities of its representatives.[21] When removing the original designation *(Nebenfolge)* in the Second Act on Combating Economic Crime *(Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität)*[22] the legislator acknowledged the corporate fine as a genuine punitive sanction,[23] though it did not change its position on criminally sanctioning corporations. In 1999, the Federal Ministry of Justice appointed a commission of experts from academia and the legal profession to examine the issue of criminal liability of legal persons. In its final report, the commission rejected the introduction of corporate criminal liability.[24] In the view of most commissioners, the administrative fine in § 30 ROA was sufficient, especially since it did not require the identification of a natural person as

[19] Then § 26 of the Ordnungswidrigkeitengesetz, OWiG, vom 24. Mai 1968 (Regulatory Offenses Act, ROA), Bundesgesetzblatt 1968 I, 481.

[20] See Begründung des Regierungsentwurfes eines Gesetzes über Ordnungswidrigkeiten (Explanatory Memorandum to the Draft of the Federal Government on a Regulatory Offenses Act), Bundestagsdrucksache V/1269, 58 et seq., 61.

[21] See the critical analysis by Ehrhardt 1994, 75 et seq.

[22] Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität (Second Act on Combating Economic Crime), Bundesgesetzblatt 1986 I, 721 (see Begründung zum Zweiten Gesetz zur Bekämpfung der Wirtschaftskriminalität [Explanatory Memorandum to the Second Act on Combating Economic Crime]), Bundestagsdrucksache 10/318, 38 (Bundestag printed paper 10/318, 38).

[23] Ehrhardt 1994, 79 et seq., 82; Tiedemann 1988, 1169, 1171; see also Begründung zur Änderung des § 30 OWiG durch das Zweite Gesetz zur Bekämpfung der Wirtschaftskriminalität (Explanatory Memorandum to the Amendment of § 30 ROA through the Second Act on Combating Economic Crime), Bundestagsdrucksache 10/318, 38 et seq.

[24] See the summary of the final report (Auszug aus dem Abschlussbericht der Kommission: Einführung einer Verbandsstrafe): Heine/König/Möhrenschlag/Möllering/Müller/Spindler 2002, 355.

perpetrator. In addition, corporate criminal liability was deemed incompatible with the concept of personal guilt and the principle *nulla poena sine culpa* since innocent people, such as shareholders, may be forced to suffer the consequences of the corporate penalty along with, or instead of, the persons who were guilty of the offense. Finally, the introduction of corporate criminal liability would have required, in the commission's view, not only the introduction of a new system of substantive criminal law, but also a set of new and different procedural rules.[25] Despite the commission's findings, the debate on corporate criminal liability in Germany continues.[26]

8.2 Responsibility of Corporations (Structural Questions)

Corporate criminal responsibility, as provided for by § 30 ROA, follows the imputation model as the liability of the corporation is based on the criminal conduct of its leading persons, in particular, its legal representatives.[27] In limiting the number of persons whose acts (or omissions) can be attributed to the corporation, as discussed further below, the German approach resembles the identification theory developed in common law jurisdictions such as England and Wales. That said, a corporate fine may be imposed even when the person who committed the offense cannot be identified, provided that it is established that one of the persons representing the corporation has committed the offense.[28]

Furthermore, under § 130 ROA, a corporate fine can be imposed if an ordinary employee has committed an offense on behalf of the legal person and a representative of the corporation has failed to prevent or discourage the commission of that offense through proper supervision. In this scenario, the responsibility of the corporation is based not on the criminal conduct of the employee but on the failure of the representative to comply with his/her duties: since § 130 ROA is an offense that is typically committed by representatives of corporations, it is a provision upon which corporate liability can be based.[29] Thus, according to some authors, a lack of organization and supervision *(Organisationsverschulden)* is the main element of corporate guilt that legitimates a corporate sanction.[30] This does not change the fact

[25] See above n. 24 FOR the summary of the arguments in the final report, 354–355.

[26] Athanassiou 2002; Dannecker 2001, 101 et seq.; Kindler 2007; Kirch-Heim 2007; Mittelsdorf 2007; Quante 2005.

[27] Bohnert 2007, § 30 para. 1; Ehrhardt 1994, 180, 186 et seq.; Ransiek 1996, 111; Rogall 2006, para. 8; Tiedemann 2007, para. 244; for criticism of the imputation model, see Kindler 2007, 154 et seq.

[28] Bundesgerichtshof (Federal Court of Justice), NStZ 1994, 346; Tiedemann 2007, para. 246.

[29] Rogall 2006, para. 75.

[30] Tiedemann 1988, 1172.

that a corporate fine under § 30 ROA may be imposed where there were no defects in corporate organization or supervision.[31] But organizational deficiencies will be more important in determining the amount of the corporate fine in Germany than in systems that adhere to a "pure" imputation model, as the discussion on sanctioning principles shows further below.[32]

8.2.1 Scope of Application

8.2.1.1 Corporations

The corporate fine can be imposed on legal persons,[33] including the stock corporation *(Aktiengesellschaft)*, the limited liability company *(Gesellschaft mit beschränkter Haftung)*, and the incorporated association *(rechtsfähiger Verein)*.[34] According to prevailing academic opinion, § 30 ROA also applies to legal persons established under public law *(Körperschaften des öffentlichen Rechts)*.[35] Further, § 30(1) Nos. 2 and 3 ROA extends corporate criminal liability to entities that do not have full legal personality, such as the non-incorporated association *(nicht rechtsfähiger Verein)*, the commercial company *(Handelsgesellschaft)*, limited partnership *(Kommanditgesellschaft)*, professional partnership *(Partnerschaftsgesellschaft)*, and a company established under the Civil Code *(BGB-Gesellschaft)*.[36] A corporate fine can also be imposed on a company registered in another state if the corporation has an equivalent legal capacity to the German legal persons identified in the § 30 ROA, and a "genuine link" establishes German jurisdiction.[37]

As the catalogue of organizations in § 30(1) shows, § 30 is limited in scope to corporations that enjoy at least partial legal capacity and so can be addressed as entities that are separate from their human representatives. The legislator apparently sought to avoid a conflict with the principle of *nulla poena sine culpa* (no punishment without guilt) since, in the

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[31] Tiedemann 1988, 1173.

[32] Sieber 2008, 467.

[33] § 30(1) No. 1 ROA.

[34] Gürtler 2009c, para. 2; Rogall 2006, para. 31.

[35] Gürtler 2009c, para. 2; Förster 2008, § 30 para. 3; see also Rogall 2006, paras. 32 et seq. (with an exception for the state, i.e., the Federal Republic of Germany and the States of Germany).

[36] Gürtler 2009c, paras. 4 et seq.; Rogall 2006, para. 38.

[37] See, e.g., § 59 Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (Banking Act in the version promulgated on September 9, 1998), Bundesgesetzblatt 1998 I, 2776 with regard to branches of the corporation in Germany. Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2002, 230; Rogall 2006, para. 30.

case of a sole trading enterprise, the imputation model would amount to establishing criminal responsibility of a natural person (the owner of the enterprise) *ex iniuria tertii* (criminal responsibility for acts committed by another person).[38]

8.2.1.2 Offenses

In general, § 30 ROA applies to all kinds of crimes and regulatory offenses *(Ordnungswidrigkeiten)*, including economic offenses,[39] such as the establishment of illegal trusts,[40] and environmental crimes;[41] a corporation may even be held liable for homicide.[42] However, the responsibility of the corporation presupposes that the perpetrator-representative breached one of the corporation's legal obligations or that the corporation was enriched (or should have been enriched) by the offense. These conditions are alternatives; thus, it is not necessary to show that the corporation violated its obligations if one of the other conditions (enrichment or intended enrichment) is met.

A corporation's legal obligations derive from the laws regulating its activities. For instance, a producer of goods is obliged to remove a product from the market if the product can cause harm to consumers,[43] an employer must comply with workplace safety standards to protect the health of his/her employees,[44] and an operator of power stations must comply with environmental standards imposed by law.[45] § 30 ROA has particular application to offenses that may only be committed by a specific class of perpetrators *(Sonderdelikte)* to which the corporation also belongs. In this way, a fine may be imposed on a corporation as an employer (e.g., for withholding of wages or salaries[46] or as an agent for a breach of trust).[47]

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[38] See above n. 23 for the Explanatory Memorandum to the Amendment of § 30 ROA, 39 et seq.

[39] See the Begründung zu § 30 OWiG (Explanatory Memorandum to § 30 ROA), Bundestagsdrucksache V/1269, 60.

[40] § 81(4) and (5) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 15. Juli 2005 (Act against Restraints on Competition in the version promulgated on July 15, 2005), Bundesgesetzblatt 2005 I, 2114; 2009 I, 3850.

[41] Scheidler 2008, 195, 198.

[42] Rogall 2006, para. 76.

[43] BGHSt 37, 106 et seq.; Gürtler 2009c, para. 20; Rogall 2006, para. 76.

[44] See above n. 39 for Explanatory Memorandum to § 30 ROA, 60 et seq.; Gürtler 2009c, para. 20; Rogall 2006, para. 76.

[45] Gürtler 2009c, para. 20; see also Explanatory Memorandum to § 30 ROA, n. 39 above (legal obligations of corporations deriving from administrative law).

[46] § 266a Penal Code.

[47] § 266 Penal Code; see also Rogall 2006, paras. 74, 76.

8.2.2 Imputation (Structural Questions)

8.2.2.1 The Representatives of the Corporation

Corporate responsibility supposes a criminal or regulatory offense was committed by a person representing the corporation. § 30 ROA defines the class of persons who engage corporate responsibility:

- the governing body of a legal person or a member of such a body (§ 30(1) No. 1 ROA);
- the president of an unincorporated association or a member of the executive board of such an association (§ 30(1) No. 2 ROA);
- a partner of a company authorized to represent the company (§ 30(1) No. 3 ROA);
- an authorized representative with full power of attorney or a general agent or authorized representative in a management position with a commercial power of attorney (with respect to legal persons, associations or companies) (§ 30(1) No. 4 ROA); and
- other persons responsible for the management of a business entity or an enterprise of a legal person, association, or company, including persons in charge of supervising the management or other tasks involving the exercise of control in an executive position (§ 30(1) No. 5 ROA).

So, § 30 ROA does not restrict the class of persons who may engage corporate responsibility to those who could be considered the "directing mind" or the "senior manager" of an organization; to the contrary, § 30(1) No. 5 includes managing officers at a lower level. This provision was adopted in 2002[48] to implement the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997.[49] Accordingly, corporate liability can be based on the conduct of leading company officers authorized to exercise control within the corporation, such as persons responsible for internal financial control and auditing or members of a controlling or supervisory body *(Aufsichtsrat)*.[50]

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[48] Gesetz zur Ausführung des Zweiten Protokolls zum Übereinkommen zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften vom 22. August 2002 (Act for the Implementation of the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of August 22, 2002), Bundesgesetzblatt 2002 I, 3387.

[49] Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12.

[50] Gürtler 2009c, para. 14a., Begründung zum Entwurf eines Gesetzes zur Ausführung des Zweiten Protokolls vom 19. Juni 1997 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, der Gemeinsamen Maßnahme betreffend die Bestechung im privaten Sektor vom 22. Dezember 1998 und des

By extending § 30 (1) No. 5 to all persons responsible for the management of the corporation's business or enterprises, the legislator wished to ensure that leading persons were caught by the provision irrespective their formal status within the corporation and, in particular, that corporations could not evade corporate liability by organizational measures.[51]

Further, since the lack of supervision is itself a regulatory offense,[52] "corporate" criminal responsibility may be based (indirectly) on an offense of an employee who is not covered by § 30 (1) ROA but who could have prevented or hindered the commission of the offense through proper supervision.

8.2.2.2 The (Criminal or Regulatory) Offense by the Representative

As mentioned above, the criminal liability of a corporation presupposes that a criminal or regulatory offense was committed by a representative of the corporation. Though § 30 (1) ROA does not require the conviction of that natural person, in principle, the corporate fine is imposed within the framework of the (criminal or administrative) proceedings against the natural person. However, if the competent authorities do not institute or subsequently terminate proceedings with regard to that natural person, the corporation may be fined in a separate procedure.[53] In particular, a corporate fine may be imposed even if the human perpetrator could not be identified, provided that it is established that one of the representatives of the corporation mentioned in § 30 (1) ROA committed the offense.[54]

Rahmenbeschlusses vom 29. Mai 2000 über die Verstärkung des mit strafrechtlichen und anderen Sanktionen bewehrten Schutzes gegen Geldfälschung im Hinblick auf die Einführung des Euro (Explanatory Memorandum to the draft of an act regarding the execution of the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997, the Joint Action on corruption in the private sector of December 22, 1998 and the Council framework Decision of May 29, 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro), Bundestagsdrucksache 14/8998, 10, with reference to the Explanatory Report to the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, OJ No. C91, March 31, 1999, 8, 11, Art. 3 (1).

[51] See above n. 50 for Explanatory Memorandum to the draft of an act regarding the execution of the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997, the Joint Action on corruption in the private sector of December 22, 1998, and the Council framework Decision of May 29, 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, 11.

[52] § 130 ROA.

[53] § 30(4) ROA.

[54] Bundesgerichtshof (Federal Court of Justice), NStZ 1994, 346; Gürtler 2009c, para. 40; Rogall 2006, paras. 102 et seq.; Tiedemann 2007, para. 246.

8.2.2.3 Imputation Criteria (Interest and Obligations of the Corporation)

The corporation is not responsible for just any of its representatives' offenses: a condition for imputation is a specific link between the offense and the corporation. In particular, § 30 ROA requires that the person representing the corporation infringed a legal obligation on the corporation or that the corporation was enriched (or was supposed to have been) enriched by the commission of the offense. These requirements are alternatives, i.e., the offense may be imputed to the corporation by reference to the interest (enrichment or intended enrichment) or by reference to the obligations of the corporation.

These criteria apply in the same way to the question of whether the human perpetrator acted "as" a corporate representative in committing the offense. According to prevailing opinion, the perpetrator must have committed the crime in exercising his/her functions and competences as a representative of the corporation (the so-called "functional approach") and not in his/her capacity as a private person.[55] As a rule, the person acts as a representative if he/she breaches obligations of the corporation in committing the offense.[56] This "functional link" is not necessary if the perpetrator commits the crime in order to enrich the corporation.[57]

Some scholars hold the view that the perpetrator must have committed the crime, at least partially, in the interest of the corporation (the so-called "interest theory").[58] However, this is not a convincing argument with regard to negligent infringements of the corporation's obligations that are committed in the interests neither of the perpetrator nor of the corporation.[59] Therefore, corporate liability should only be excluded when the representative was solely pursuing his/her own (private) interest in committing the offense,[60] particularly if he/she was acting contrary to the corporation's interest.[61] It is submitted that § 30 ROA clearly shows that both facts – corporate interest (enrichment) and the obligations of the

[55] See above n. 39 for Explanatory Memorandum to § 30 ROA; Bundesgerichtshof (Federal Court of Justice), NStZ 1997, 30 et seq. (with regard to § 75 Penal Code); Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2005, 160; Gürtler 2009c, para. 25.

[56] Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2005, 160; Gürtler 2009c, para. 25; Ransiek 1996, 114.

[57] Gürtler 2009c, para. 27; Rogall 2006, para. 93.

[58] Brender 1989, 128; Rogall 2006, para. 94.

[59] Ehrhardt 1994, 234; Müller 1985, 78 and Queck 2005, 35.

[60] See above n. 39 for Explanatory Memorandum to § 30 ROA; Bundesgerichtshof (Federal Court of Justice), NStZ 1997, 30 et seq. (with regard to § 75 Penal Code); Gürtler 2009c, para. 24; Müller 1985, 78.

[61] Müller 1985, 77; Rogall 2006, para. 95.

corporation and their violation – are capable of triggering corporate responsibility. Thus, corporate liability may be based on the violation of a corporation's duties even if the perpetrator acted contrary to the corporate interest.[62]

8.3 Sanctions and Sanctioning Principles

8.3.1 Sanctions

8.3.1.1 Financial Sanctions

The main sanction for corporations is the administrative fine, the *Geldbuße* under § 30 ROA. The fine shall amount to no more than €1 million for an intentional crime and no more than €500 000 for an offense of negligence.[63] As to regulatory offenses, the maximum amount of the correspondent offense provision applies.[64] If the regulatory offense does not differentiate between intentional and negligent conduct, the amount of the fine for negligent conduct must not exceed half of the maximum provided in the offense provision itself.[65]

According to the third sentence of § 30(2) ROA, if the conduct attributed to the corporation fulfills the criteria of both a criminal and a regulatory offense, the highest maximum amount applies. This provision was adopted to deal with improper agreements to restrict competition in response to invitations to tender. Such agreements are criminalized under § 298 Penal Code and they are also covered by the general regulatory offense in § 81(1) No. 1 and (2) No. 1 Act against Restraints on Competition (ARC).[66] According to § 81(4), second sentence, No. 1 ARC, the fine against an enterprise or an association of enterprises[67] may exceed the general maximum amount of €1 million[68] but is capped at 10% of the corporation's total turnover for the preceding business year. The provision follows the sanctioning scheme of Art. 23(2), second sentence, Council Regulation (EC) No. 1/2003.[69] It has

[62] Förster 2008, § 30 para. 34.

[63] Per § 30(2) No. 1 ROA.

[64] § 30(2), second sentence, ROA.

[65] § 17(2) ROA.

[66] Achenbach 2008a, 10.

[67] The fine is imposed on the corporation (the legal person) that runs the enterprise, since the European concept of responsibility of economic entities without legal personality is incompatible with the principles of the ROA, see Achenbach 2008b, 175.

[68] § 81(4), first sentence, ARC.

[69] Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ No. L1, January 4, 2003, 1. See Bundestagsdrucksache 15/5049, 50.

been subject to heavy criticism with regard to the principle *nulla poena sine lege* since it does not fix an absolute maximum for the fine.[70]

Furthermore, the maximum amount of the fine may increase taking into account the illicit profits of the corporation. Since the fine must exceed the benefits the corporation has obtained by committing the offense,[71] it may be necessary to impose a fine beyond the regular limit.[72] By depriving the corporation of illicit profits, the fine absorbs the function of forfeiture;[73] consequently, forfeiture may not be ordered if the corporation has already been fined.[74] Thus, with respect to the corporate fine, forfeiture is a subsidiary sanction.[75] By contrast, with regard to competition offenses,[76] the imposition of a fine does not preclude an order of forfeiture[77] or the siphoning off of illicit profits in administrative law.[78]

The forfeiture of illicit profits is supposed to ensure that the company does not benefit from the offense; it is not a punitive sanction and does not require personal guilt.[79] Thus, the conditions of corporate liability for forfeiture in relation to criminal offenses[80] and regulatory offenses[81] are less strict than those in § 30 ROA. An order of forfeiture may be directed at a corporation if the perpetrator acted "for" the corporation and the latter acquired something thereby.[82] On the better view, the forfeiture provision does not demand that an offender represented the corporation within the meaning of § 30(1) ROA; it is sufficient that a natural person (even a lower-ranking employee or third party) acted in the de facto or de jure interests of the corporation.[83] That said, some authors argue that only offenders within the "sphere" (of influence) of the corporation (in particular, employees) may trigger the provision.[84]

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[70] Brettel/Thomas 2009, 29 et seq.; for the contrary view, see Vollmer 2007, 170 et seq.

[71] § 30(3), § 17(4), first sentence, ROA.

[72] § 30(3), § 17(4), second sentence, ROA. See also § 81(5) ARC.

[73] §§ 73, 73a Penal Code; § 29a ROA.

[74] § 30(5) ROA.

[75] Achenbach 2008a, 14; Rogall 2006, para. 106.

[76] § 81(5) ARC.

[77] § 29a ROA.

[78] § 34 ARC. See the Begründung zu § 81 Abs. 5 GWB (Explanatory Memorandum to § 81(5) ARC), Bundestagsdrucksache 15/3640, 42.

[79] BVerfGE 110, 1, (16 et seq.); BGHSt 47, 369 (373).

[80] § 73 Penal Code.

[81] § 29a ROA.

[82] § 73(3) Penal Code; § 29a ROA.

[83] BGHSt 45, 235 (237 et seq., 246); Achenbach 2008a, 14; Gürtler 2009b, para. 21; Rogall 2006, para. 107.

[84] Eser 2006b, para. 37; Ransiek 1996, 123.

Once forfeiture is ordered, it extends to all objects and benefits and surrogate objects the corporation has obtained;[85] if necessary, the object can be replaced by an amount of money corresponding to its value.[86] In case of regulatory offenses, the forfeiture of the value is generally required (§ 29a(1) ROA); however, forfeiture may not be ordered to the extent that a victim of a crime[87] or regulatory offense[88] has claimed compensation. The corporation's costs and expenditures in committing the offense are not detracted from the value of the acquired assets since the gross value is regarded as subject to forfeiture *(Bruttoprinzip)*.[89] As this interpretation has transformed forfeiture from a means to deprive persons of illicit profits into a criminal sanction,[90] it is submitted that the forfeiture of the gross value is to be subject to the same conditions as the corporate fine.[91]

In addition to the provisions on forfeiture,[92] § 34 ARC establishes the competence of the court, in public law, to deprive corporations of illicit profits. In contrast to fines or forfeiture orders, the deprivation of illicit profits can be enforced by private parties.[93] A similar provision is contained in § 10 of the Act against Unfair Competition *(Gesetz gegen den unlauteren Wettbewerb)*.

Finally, a confiscation of the *instrumenta vel producta sceleris* is worth mentioning. Such confiscation order can be directed at a corporation if one of its representatives has committed a crime,[94] the considerations mentioned with regard to § 30 ROA applying accordingly.

8.3.1.2 Non-financial Sanctions

Neither the Penal Code nor the ROA provides for non-financial corporate sanctions, such as supervision orders, probation orders, or orders for the appointment of compliance monitors. However, in certain cases, state

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[85] § 73(1), second sentence, Penal Code.

[86] § 73a Penal Code.

[87] § 73(1), second sentence, Penal Code.

[88] Mitsch 2006b, para. 46, with reference to § 99(2) ROA that hinders the execution of a forfeiture order that disregards a final judicial decision ordering the compensation of the victim.

[89] BGHSt 47, 260 (265); 47, 369, 370 et seq.

[90] Eser 2006a, para. 19; Herzog 2005, paras. 13 et seq.; Ransiek 1996, 122 et seq.

[91] Achenbach 2008a, 16; Eser 2006b, paras. 17a, 37; Mitsch 2006b, para. 45; Rogall 2006, para. 108.

[92] See also §§ 8, 10(2) Wirtschaftsstrafgesetz in der Fassung der Bekanntmachung vom 3. Juni 1975, Bundesgesetzblatt 1975 I (Act on Business Crime of June 3, 1975), 1313. The requirements correspond to those of § 73 Penal Code and § 29a ROA, see Rogall 2006, para. 109. In legal practice, these provisions are not relevant, see Ehrhardt 1994, 37.

[93] § 34a ARC.

[94] § 75 Penal Code; § 29 ROA.

agencies may adopt administrative measures to prevent illegal conduct or social harm. For instance, the federal Financial Services Authority may demand the dismissal of managers responsible for persistent violations of the Banking Act and confer the competences of a corporation's governing body on a state commissioner.[95]

A legal person can be deregistered or dissolved if it engages in illegal conduct that endangers public welfare,[96] though these provisions are so little used as to be almost irrelevant.[97] Since 1945, only one limited liability company has been deregistered pursuant to these provisions and no such case has been reported with regard to stock corporations.[98] The explanation is the principle of proportionality in German law, which requires the executive to impose the mildest remedy to address the risk of future illegal conduct; the imposition of a fine is regarded as sufficiently effective.[99]

In general, German law does not recognize exclusions from public contracting processes as a corporate sanction. Nevertheless, public contracts shall be awarded to reliable enterprises.[100] Therefore, a corporation could be excluded from public tenders if its illegal conduct casts doubt on its reliability.[101] In addition, a corporation must be excluded from public contracts if one of its legal representative has committed an offense related to illegal employment.[102] The prospect of exclusion has a deterrent effect on corporations. However, the exclusion itself is a consequence of the corporation's lack of reliability; thus, it is not a criminal sanction but a preventive measure[103] and does not require a conviction.[104] A similarly preventative initiative for a federal register of corruption offenses has not yet been

[95] § 36 Banking Act.

[96] See, e.g., § 396 Aktiengesetz vom 6. September 1965 (Stock Corporation Act of September 6, 1965), Bundesgesetzblatt 1965 I, 1089; § 62 GmbH-Gesetz vom 20. April 1892, Reichsgesetzblatt 1892, 477, zuletzt geändert durch Art. 5 G vom 31. Juli 2009 (Limited Liability Companies Act of April 20, 1892, Imperial Law Gazette 1892, 477, last amended by Art. 5 G of July 31, 2009) Bundesgesetzblatt 2009 I, 2509, 2511; § 43 Civil Code. The liquidation can also be a consequence of the revocation of a license, see § 38(1) Banking Act.

[97] Rogall 2006, para. 111.

[98] Kirch-Heim 2007, 28; Erhardt 1994, 40.

[99] Hüffer 2008, § 396 para. 5; see also Rogall 2006, para. 111.

[100] § 97(4), first sentence, ARC.

[101] Kirch-Heim 2007, 28 et seq.

[102] § 21 Schwarzarbeitsbekämpfungsgesetz vom 23. Juli 2004 (Act on Combating Illegal Employment of July 23, 2004), Bundesgesetzblatt 2004 I, 1842; § 6 Arbeitnehmer-Entsendegesetz vom 20. April 2009 (Overseas Secondees Act of April 20, 2009), Bundesgesetzblatt 2009 I, 799.

[103] Berwanger 2006, para. 5; Kirch-Heim 2007, 31 et seq.

[104] § 21(1), sentence 2, Act on Combating Illegal Employment.

adopted[105] but several states *(Bundesländer)* have established corruption registers, which help their competent authorities to assess the reliability of the corporations tendering for contracts.[106] In the state of North Rhine-Westphalia,[107] the offenses covered by the register are: the corruption of state officials,[108] money laundering,[109] fraud,[110] subsidy and credit fraud,[111] the breach of trust,[112] the conclusion of agreements restricting competition,[113] private corruption,[114] and tax fraud.[115]

8.3.2 Sanctioning Principles

The amount of the fine is determined according to the general principles that apply to the imposition of an administrative fine.[116] In keeping with its functions, the fine is composed of two elements: punishment (the punitive element) and siphoning off of illegal profits (the profit element).[117]

With regard to the profit element, the fine has the same function as the forfeiture order; however, according to the prevailing view, the economic benefit *(wirtschaftlicher Vorteil)* is calculated by deducting costs and expenditures from the profit that has been earned by committing the offense (net profit principle) *(Nettoprinzip)*.[118] It is therefore different to the acquired object and its value. The application of the *Bruttoprinzip*

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[105] See the draft of the Korruptionsregister-Gesetz (Corruption Register Act), Bundestagsdrucksache 16/9780.

[106] See, e.g., Korruptionsbekämpfungsgesetz des Landes Nordrhein-Westfalen vom 16. Dezember 2004 (Act on Combating Corruption of the State of North Rhine-Westphalia), Gesetz- und Verordnungsblatt des Landes Nordrhein-Westfalen 2005, No. 1; for further acts see Kirch-Heim 2007, 31.

[107] § 5(1) Act on Combating Corruption of the State of North Rhine-Westphalia.

[108] §§ 331 et seq. Penal Code.

[109] § 261 Penal Code.

[110] § 263 Penal Code.

[111] §§ 264, 265b Penal Code.

[112] § 266 Penal Code.

[113] § 298 Penal Code; § 81 ROA.

[114] § 299 Penal Code.

[115] § 370 Abgabenordnung in der Fassung der Bekanntmachung vom 1. Oktober 2002 (Fiscal Code of October 1, 2002), Bundesgesetzblatt 2002 I 3866; 2003 I, 61.

[116] § 17(3) and (4) ROA. See further Rogall 2006, para. 115; Wegner 2000a, 362; without reference to § 17 (3) ROA: Gürtler 2009c, para. 36a.

[117] § 17(4) ROA; Rogall 2006, para. 121.

[118] §§ 73, 73a Penal Code; § 29a ROA. See Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), wistra 1995, 75 (76); Mitsch 2006a, para. 119; Förster 2008, § 17 para. 50; Rogall 2006, para. 122; Wegner 2001, 1982; for the contrary view see Brenner 2004, 259; Gürtler 2009a, para. 38a.

would imply a punitive function which is subject to the second element of the fine.[119] If the authority or the court cannot ascertain the precise amount of illegal profits, then the amount may be estimated.[120] Notably, most commentators are also of the opinion that compensation claims must be considered in imposing fines.[121]

As to the punitive element, the gravity of the offense, the guilt attaching to the offender, and his/her economic situation are all to be taken into account.[122] By extension, the financial situation of the corporation must be considered,[123] and, importantly, the fine should not be such as to put the existence of the corporation at risk.[124] With regard to competition offenses, the fine is related to the annual turnover of the corporation[125] and the Federal Cartel Office has adopted guidelines on the setting of fines[126] that follow the sanctioning scheme of the European Commission: the basic amount of the fine is calculated on the basis of the infringement-related turnover and increased or decreased with regard to aggravating or mitigating factors and the deterrence factor.[127]

Further, in line with the logic of the imputation model, the determination of the corporate fine depends on the offense of its representative; with regard to regulatory offenses the same penalty level correspondingly applies.[128] The gravity of the offense depends, inter alia, on the importance of the protected legal interest, the degree of damage or risk, the duration of the offense,[129] the consequences of the offense, and the manner of its execution.[130]

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[119] Bohnert 2007, para. 42; Rogall 2006, 122.

[120] BGH, NStZ-RR 2008, 13; Gürtler 2009a, para. 45; BVerfGE 81, 228 (242).

[121] For further details and different opinions, see Rogall 2006, paras. 126 et seq.

[122] § 17(3) ROA.

[123] Rogall 2006, para. 119; see also the Bußgeldleitlinien des Bundeskartellamts über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 GWB (Guidelines of the Federal Cartel Office on imposing fines according to § 81(4), second sentence, ARC), Bekanntmachung Nr. 38/2006 vom 15. September 2006., No. 24.

[124] Dannecker/Biermann 2007, para. 393.

[125] § 81(4), second sentence, ARC.

[126] See above n. 123 for Guidelines of the Federal Cartel Office.

[127] For further details see Vollmer 2007, 168 et seq.

[128] § 31(2), second sentence, ROA. See Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43; Rogall 2006, para. 115 et seq.

[129] § 81(4), sixth sentence, ARC.

[130] BGH wistra 1991, 268 (269); Bohnert 2007, para. 41; Dannecker/Biermann 2007 paras. 371 et seq.; Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43; Rogall 2006, para. 117.

In principle, the guilt of the corporation is based on the conduct of its representative. Therefore, serious forms of deliberate intent and gross negligence are aggravating factors.[131] However, the guilt attaching to the corporation is different from the personal guilt of the offender.[132] According to the imputation model, the conduct of the representative must be considered as an emanation of the collective will of the corporation.[133] So, the guilt will be particularly great if the offense was an expression of a general criminal attitude prevailing within the corporation.[134] By contrast, the fine will be lower if the offense of the representative is not in line with the company's general business policy.[135] Correspondingly, a lack of supervision will increase the guilt of the corporation since the responsibility of the corporation is based, not only on the offense committed, but also on the failure of leading persons to carry out their supervisory functions.[136] The same holds true for the concept of corporate guilt that focuses on organizational deficiencies:[137] systematic disorganization is an aggravating factor.[138] For similar reasons, a corporation that repeatedly infringes the law will be sanctioned with a higher fine because it failed to adopt adequate preventive measures as a consequence of its prior conviction(s).[139]

On the other hand, an adequate compliance system should be considered a mitigating factor because the organizational *sufficiencies* mean that the corporation's guilt is less.[140] This approach could be contested on the basis that guilt, in the imputation model, is solely based on the conduct of the representative; in that regard, the institution of a compliance program is irrelevant.[141] However, what this argument does not consider, is that the guilt attaching to the corporation depends on the extent to which the corporation as a whole has infringed its legal obligations. In other words, even

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[131] See above n. 123 for Guidelines of the Federal Cartel Office, No. 16; see, in general, Mitsch 2006a, paras. 60, 82.

[132] For criticism of the inherent contradiction in a concept of corporate guilt founded on two concepts (the wrongdoing of the representative and the corporation itself), see Kindler 2007, 154 et seq.; Mittelsdorf 2007, 198.

[133] Rogall 2006, paras. 116, 118.

[134] Müller 1985, 82; Rogall 2006, para. 118.

[135] Rogall 2006, para. 118.

[136] § 130 ROA. Bohnert 2007, para. 41; Rogall 2006, paras. 115, 118.

[137] Tiedemann 1988, 1172; Sieber 2008, 468.

[138] Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43.

[139] See above n. 123 for Guidelines of the Federal Cartel Office, No. 16; see, in general, Mitsch 2006a, para. 76; Wegner 2000b, 93.

[140] Sieber 2008, 465; Wegner 2000a, 363.

[141] Pampel 2007, 1639; see also Sieber 2008, 472.

applying the imputation model, the conduct of representatives exercising their duties must be taken into account.[142] By setting up a compliance program, a corporation expresses its general will to prevent offenses and to comply with its obligations under § 130 ROA; (effective) compliance programs must therefore be considered mitigating factors.[143]

On general principles, post-offense conduct may also result in the mitigation of the fine.[144] For instance, the payment of compensation to third parties for their financial losses is considered a mitigating factor,[145] as is the voluntary termination of the illegal conduct and cooperation with the competent authority.[146] In particular, cooperation in uncovering the offense can lead to a reduction of the fine or even to immunity in cartel cases.[147]

Finally, the fine must be high enough to deter the corporation from committing future offenses *(Spezialprävention)*.[148] Under the guidelines of the Federal Cartel Office, the amount of the fine can thus be increased with regard to a "deterrent factor."[149] That said, post-offense conduct of the corporation intended to prevent its representatives from committing similar offenses, such as the introduction or revision of compliance programs, may reduce the need for specific deterrence and, with that, the potential fine.[150]

Finally, it is said that the court should take into account any serious and inappropriate consequences, which the corporate fine might have for shareholders, associates, or partners in the enterprise who did not participate in the offense.[151] At the same time, it must also be considered that corporate fines fulfill a preventive function by making such law-abiding shareholders, associates, and partners police and change the corporation's behavior.[152]

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[142] Böse 2007, 22 et seq.

[143] Bosch/Colbus/Harbusch 2009, 748.

[144] Cf. § 46(1) Penal Code. See further Mitsch 2006a, para. 66.

[145] See above n. 123 for Guidelines of the Federal Cartel Office, No. 17.

[146] Dannecker/Biermann 2007, para. 381.

[147] On the leniency program of the Federal Cartel Office, see Bekanntmachung über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung (Notice on immunity from and reduction of fines in cartel cases – leniency notice), Bekanntmachung Nr. 9/2006 vom 7. März 2006; for further details: Dannecker/Biermann 2007, paras. 416 et seq.

[148] Mitsch 2006a, para. 47; see also BVerfGE 27, 18 (33).

[149] See above n. 123 for Guidelines of the Federal Cartel Office, No. 15; see Vollmer 2007, 178.

[150] Förster 2008, § 30 para. 43.

[151] Förster 2008, § 30 para. 43; Rogall 2006, para. 120.

[152] Dannecker/Biermann 2007, para. 394; Müller 1985, 83; Rogall 2006, para. 120.

8.4 Procedural Issues

8.4.1 Prosecutorial Discretion

A corporation "can" be fined for an offense committed by one of its representatives.[153] Thus, §30 ROA incorporates the "opportunity principle" *(Opportunitätsprinzip)*[154] by which the competent authority has discretion whether or not to impose a corporate fine.[155] For regulatory offenses and their sanction (the administrative fine), this discretion flows from the general rule in § 47 ROA. With regard to the corporate fine under § 30 ROA, the discretion shall enable the authority to take into account the sanction imposed on the natural persons acting on behalf of the corporation and to avoid disproportionate effects of cumulative sanctions against the corporation and its representative.[156] However, this objective can also be achieved by proper adjustments to the different fines.[157]

Since criminal offenses committed by natural persons must be prosecuted in accordance with the legality principle *(Legalitätsprinzip)*,[158] critics argue that there should be an equivalent obligation with regard to corporations that are responsible for crimes.[159] As a consequence of prosecutorial discretion, they say, corporations are rarely fined for crimes.[160]

8.4.2 Jurisdiction

The ROA is limited to offenses committed in German territory.[161] Therefore, German courts have no power to fine German corporations for offenses committed abroad based upon the "active personality" principle. Furthermore, the principle of (passive) personality does not cover legal persons, even in criminal law.[162]

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[153] § 30(1) ROA.

[154] § 47 ROA.

[155] Gürtler 2009c, para. 35; Förster 2008, § 30 para. 42.

[156] Gürtler 2009c, para. 35; Förster 2008, § 30 para. 42; see also Rogall 2006, para. 39.

[157] Kirch-Heim 2007, 93.

[158] § 152(2) CCP.

[159] Kirch-Heim 2007, 94.

[160] Kirch-Heim 2007, 94, see also 244. According to statistical data collected from seventy-four of the 116 public prosecutor's offices (*Staatsanwaltschaften*), an average of seventy-four cases of corporate fines are reported annually.

[161] § 5 ROA.

[162] See with regard to § 7(1) Penal Code: Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart), NStZ 2004, 402 et seq.; Ambos 2003, para. 23.

8.4.3 Procedural Rights of the Corporation

In principle, the sanction on the natural person and the corporate fine shall be imposed in one and the same proceeding.[163] However, if no proceedings against the natural person are instituted, or if those proceedings are terminated, the corporation may be fined in independent proceedings.[164] In cartel cases, the federal or regional cartel office is exclusively competent to impose a corporate fine even if a criminal (rather than a regulatory) offense has been committed.[165] As a consequence, the corporation and the natural person are prosecuted in separate proceedings.

According to the Code of Criminal Procedure (CCP) the provisions on the legal status of a person whose assets shall be confiscated shall apply *mutatis mutandis* to a corporation that is to be fined for a crime;[166] the same applies to corporations held responsible for regulatory offenses.[167] The reference to the provisions on confiscation is explained by the fact that the corporate fine was previously thought to be a collateral consequence of the individual's conviction *(Nebenfolge)*: once the legislator removed this designation, the punitive character of the corporate fine was beyond doubt and the prevailing academic opinion held that the corporation must be awarded the procedural rights of a defendant in criminal proceedings.[168]

Accordingly, the corporation has a right to be heard[169] and must be summoned to the main hearing;[170] further, the corporation may apply for the taking of evidence.[171] The legal status of the corporation under these provisions does not fully correspond with that of a human defendant in criminal proceedings,[172] however (the right to apply for the taking evidence, for instance, is subject to restrictions).[173] Similar problems arise with regard to the privilege against self-incrimination *(nemo tenetur se ipsum accusare)*. According to the Federal Constitutional Court, this principle is inapplicable to corporations because it is an emanation of the guarantee of human dignity under art. 1(1) of the Constitution (*Grundgesetz*, literally Basic Law). Furthermore, the corporate fine differs from a criminal sentence because

[163] § 444(1) CCP; § 88(1) ROA.
[164] § 30(4), first sentence, ROA; § 444(3) CCP; § 88(2) ROA.
[165] § 82 ARC.
[166] §§ 431 et seq. CCP; § 444(1), second sentence, CCP; § 444(2), second sentence, CCP.
[167] § 88(3) ROA; see also § 46(1) ROA.
[168] Biermann/Dannecker 2007, para. 218; Queck 2005, 234; Rogall 2006, para. 175.
[169] § 432(2) CCP.
[170] § 444(2), first sentence, CCP.
[171] § 436(2) CCP.
[172] BGHSt 46, 207 (211).
[173] § 436, second sentence, CCP.

it is intended to skim off illegal profits and does not imply ethical disapproval.[174] This judgment has been heavily criticized as incompatible with the punitive function of the corporate fine and as insufficiently sensitive to the need for basic guarantees in proceedings against natural and legal persons.[175] In any case, legislation now provides the privilege against self-incrimination to corporations as well.[176]

Pursuant to the general rules on representation, the corporation exercises its procedural rights through its legal representatives, in particular, the members of its governing body.[177] Of course, to avoid a conflict of interests, legal representatives charged with the offense for which the corporation is to be fined are excluded from the pool of possible representatives.[178]

The natural persons representing the corporation have the legal status of a defendant if he/she is charged with a criminal or regulatory offense and the corporation is supposed to be fined for that offense in that same proceeding. So, they cannot be summoned and examined as witnesses against themselves or against the company.

A natural person who has not been charged is generally treated as a witness, though the legal status of the corporation must also be taken into account in determining such an individual's status in the proceeding. Since the corporation exercises its procedural rights (in particular, the right to remain silent) through its legal representatives, they cannot be regarded as witnesses against the company.[179] This applies to the governing body and its members, such as the executive director *(Geschäftsführer)*, members of the executive board *(Vorstandsmitglieder)*, and partners of a company authorized to represent that company.[180] By contrast, ordinary employees and other persons representing the company, such as the general agents or authorized representatives referred to in § 30(1) No. 4 ROA, are witnesses.[181] The same applies to former legal

[174] BVerfGE 95, 220 (242).

[175] Böse 2005, 196 et seq.; Dannecker 1999, 285 et seq.; Queck 2005, 214 et seq.; Weiß 1998, 294 et seq.

[176] § 444(2), second sentence, CCP; § 433(2) CCP; § 433(1), first sentence, CCP; § 163a(4), second sentence, CCP; § 136(1), second sentence, CCP; § 243(4), first sentence, CCP. See further Rogall 2006, para. 188.

[177] Rogall 2006, paras. 177 et seq.

[178] Drope 2002, 135; Rogall 2006, para. 179; Schmidt 2008b, para. 7.

[179] BGHSt 9, 250 (251); Müller 1985, 107; Queck 2005, 237 et seq.; Rogall 2006, para. 188; Schlüter 2000, 219 et seq.; Schmidt 2008b, para. 7; Weßlau 2007, para. 8; see also BVerfG BB 1975, 1315.

[180] BGHSt 9, 250 (251); Queck 2005, 238; Schlüter 2000, 219 et seq.

[181] Oberlandesgericht Frankfurt a.M. (Higher Regional Court, Frankfurt a.M.), GA 1969, 124; Queck 2005, 239 et seq.; Schlüter 2000, 228; Schmidt 2008b, para. 7; Weßlau 2007, para. 12.

representatives[182] (except lawyers, see below at 8.4.4) and partners who were not authorized to represent the company.[183] During cross-examination, however, these individuals may refuse to answer questions if their replies would expose them to prosecution for a criminal or regulatory offense.[184] It has been suggested that any person capable of engaging corporate responsibility cannot be a witness.[185] However, others reject such an extensive reading of the provision on the basis that the corporation's capacity to exercise its procedural rights is ensured by its legal representatives.[186] Accordingly, members of the supervisory board[187] are witnesses as well.

8.4.4 Investigation and Evidence

The imposition of a corporate fine follows general procedural rules under German law. As a consequence, there are no special rules for (documentary) evidence and the burden of proof is on the state not the corporation.[188] Further, in principle, all the provisions on coercive measures (e.g., search and seizure and surveillance of telecommunications) apply to corporations, provided that they are not inherently limited to natural persons (e.g., arrest).[189] Also, the investigative powers of the prosecutor or the administrative agency prosecuting the regulatory offense are limited by professional privileges in §§ 53, 53a, 97, 160a CCP, with the result that defense counsel, attorneys, auditors, tax consultants, physicians, pharmacists, and journalists are not required to disclose certain types of information obtained by them in their professional capacities. These provisions also apply to a corporation that exercises one of these professional functions (e.g., by operating a hospital or publishing business. A professional privilege for bankers does not exist in the German law on criminal procedure.[190]) These restrictions do not apply to persons charged with a

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[182] BVerfG BB 1975, 1315; Rogall 2006, para. 189.

[183] Oberlandesgericht Frankfurt a.M. (Higher Regional Court, Frankfurt a.M.), GA 1969, 124; Drope 2002, 145; Schlüter 2000, 229.

[184] § 55 CCP; § 46(1) ROA. Rogall 2006, para. 189; Schmidt 2008b, para. 7; Weßlau 2007, para. 12.

[185] § 75(1) Nos. 1–5 Penal Code; § 30(1) Nos. 1–5 ROA. See further Minoggio 2003, 121, 129; see also Schlüter 2000, 227, with regard to persons representing a separated unit of the corporation (e.g., a branch).

[186] Drope 2002, 145; Queck 2005, 238.

[187] § 30(1)–(5) ROA.

[188] See the suggestions of Heine 1995a, 653 et seq. and the critical remarks of Drope 2002, 334 et seq.

[189] Drope 2002, 269 et seq., 278 et seq.

[190] Meyer-Goßner 2009, § 53 para. 3, § 54 para. 10; Senge 2008, para. 8.

criminal or regulatory offense, however.[191] Nevertheless, a coercive measure may violate the principle of proportionality if it strongly affects the professional activity and the interests of clients, patients, and other third parties.[192]

8.5 Recommendations

The corporate fine under § 30 ROA resulted from the long-standing conflict between supporters and opponents of corporate criminal responsibility. As a compromise, it cannot satisfy both nor can it be regarded as a coherent provision on corporate responsibility in its own right.

On the one hand, an administrative sanction is imposed on the corporation irrespective of the quality of the offense, i.e., the same sanction applies to crimes and regulatory offenses. On the other hand, the sanction (the administrative fine or *Geldbuße*) also applies to natural persons. So, the law neglects the fundamental difference between corporations and individuals and the reason of the latter's capacity for criminal responsibility: a self-conscious mind, which enables the human being to reflect on his/her conduct and to realize his/her fault.[193] This difference notwithstanding, the punitive sanctions against corporations have the same communicative function as criminal sentences against individuals, i.e., condemning the breach of law committed by the offender (the corporation) and reconstituting the binding force of the violated norm *(positive Generalprävention)*.[194]

Thus, the current system does not properly reflect the differences between corporate and individual wrongdoing and criminal sentencing. On the basis of this conclusion, the following remedies should be considered:

First, corporate sanctions should be strictly distinguished from sanctions that are applicable to individuals.[195] Creating a genuinely "corporate" sanction would allow the peculiarity of legal persons to be taken into account, especially with regard to the prerequisites for corporate responsibility (the imputation of wrongful conduct of representatives and organizational failures). At the same time, a specific corporate sanctioning scheme could also avoid negatively affecting the conditions of criminal responsibility for

[191] Meyer-Goßner 2009, § 97 para. 4; Nack 2008, para. 1. See also, with regard to suspected persons, § 97(1), sentences 2, 3, 5, CCP; § 160a(4) CCP.

[192] BVerfGE 117, 244 (262, 265); BVerfG NJW 2008, 2422 (2423). See also, with regard to the freedom of the press, § 97(5), second sentence, CCP.

[193] See Engisch 1953, E 24–25; v. Freier 1998, 179 et seq.

[194] Böse 2007, 16; see also, with regard to the guardianship (*Unternehmenskuratel*) as a preventive measure: Schünemann 2008, 446 et seq.

[195] See, e.g., Kirch-Heim 2007, 197 et seq. (*Sanktionsgeld* instead of *Geldstrafe* or *Geldbuße*, as the case may be).

natural persons,[196] in particular, those which relate to the principle *nulla poena sine culpa.*[197]

Second, different sanctions should be imposed on corporations for criminal and regulatory offenses.[198] A sanction establishing corporate responsibility for a crime might have additional preventive effects in that it would stigmatize the corporation as "criminal".[199] The imposition of such a sanction should not depend on the discretion of the prosecuting authority, however.

Third, the punitive function of sanctions should be clearly distinguished from the objective of siphoning off illegal profits. In that regard, the imposition of two separate sanctions (fine and forfeiture) subject to different conditions seems preferable to the "bifunctional" corporate fine provided for by § 30 ROA; a solely punitive fine, such as exists under § 81(5), second sentence, ARC, facilitates coordination between administrative or civil law measures.[200] Forfeiture should, however, be strictly limited to depriving the offender (or third parties) of illegal profits; in other words, as regards the calculation of profits, the *Nettoprinzip* should be preferred to the *Bruttoprinzip*.

Fourth, the sanctioning scheme for corporations should not be limited to financial sanctions but should also include measures to prevent the corporation from committing crimes in the future.[201] In this regard, it has been suggested that the legal person should be able to be subject to guardianship, i.e., the law amended so that a guardian could be appointed to supervise the corporation's activities.[202] In addition, instructions (e.g., to institute a compliance program) should be considered as suitable preventive sanctions.[203]

However, it has to be stressed that adequate measures against corporate crime can and must also be taken outside the ambit of criminal law and the criminal justice system. Administrative law provides for measures to prevent corporations from engaging in illegal conduct, in particular, the

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[196] See the concerns of König 2002, 65; Weigend 2008, 944.

[197] This applies, in particular, to proposals to establish a corporate responsibility without any kind of corporate "guilt", i.e., strict corporate criminal liability, see Kirch-Heim 2007, 193 et seq. (*schuldgelöste repressive Unternehmenssanktionen*). Heine 1995b, 269.

[198] According to Korte 1991, 220 et seq. the actual provision is incompatible with the fundamental right of equality before the law: art. 3(1) Basic Law.

[199] Ehrhardt 1994, 172; sceptical Kirch-Heim 2007, 73.

[200] §§ 34, 34a ARC.

[201] See, for natural persons the measures of reform and prevention, §§ 61 et seq. Penal Code.

[202] Schmitt 1958, 207 et seq.; Schünemann 1979, 123 et seq.; Schünemann 1999, 296 et seq. These proposals were suggested as alternatives to criminal sanctions but could be introduced as supplementary measures as well: see Kirch-Heim 2007, 213 et seq.

[203] Kirch-Heim 2007, 218 et seq.

exclusion from public contracts, the dismissal of managers, and the appointment of a state commissioner (supervisor). Special attention should be paid to private enforcement mechanisms based on compensation and restitution claims.[204]

These new instruments have been introduced in competition law[205] but have not yet had a significant effect;[206] nonetheless, they could contribute to the prevention of corporate crime if the necessary amendments were adopted.[207]

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[204] In tort law, the victim should have a choice between compensation and deprivation of the illegal profits: see Wagner 2006, A 83 et seq. (*de lege lata* and *de lege ferenda*).

[205] § 10 Act against Unfair Competition and § 34a ARC.

[206] According to Sieme 2009, 915, only eight cases were reported. For the shortcomings of the provisions, see Emmerich 2007, paras. 4, 6; Wagner 2006, A 111 et seq.

[207] See the proposals of Wagner 2006, A 115 et seq.

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