Digitization, Investigations & Compliance in Science

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EDITORIAL

DIGITIZATION, INVESTIGATIONS & COMPLIANCE IN SCIENCE

The scientific field of compliance is in a constant state of movement, gaining in complexity and widening its areas of application. We have taken this edition of CEJ as an occasion to pick up the threads of previous issues, to deepen the discussion and to take the thoughts a step further.

Alexandra Jorzig takes up the issue of a digitized health care market from the previous edition in last October in her article as well as Andreas W. Schneider and Raisa S. Pompe do. Jorzig addresses the topic in particular in regards to liability questions of soon-to-be methods of treatment. She does this from a lawyers point of view, whereas Schneider and Pompe analyze the effects of big data on healthcare from the perspective of the medical profession.

The ability to switch between these points of view is fundamental for implementing and enforcing compliance-management systems. This fact has also been determined by the organizers of the Second Congress on Compliance in Healthcare, which took place in Leipzig this year and has been hosted by the university hospital and the faculty of law in a cooperation. Physicians and lawyers had had to recognize they were not communicating in the same language as the university hospitals compliance officer states. More interesting impressions are conveyed by short videos, available on the homepage, where speakers of the congress are interviewed.

These healthcare-related topics are followed by three articles addressing issues of commercial and commercial criminal law. To be even more precise: all three deal with topics becoming relevant only when compliance has failed and the enterprise, its management or employees were not able to abide by the law or where this fact at least is suspected.

Referring to a decision recently handed down by the German Constitutional Court, Jonas Menne and Markus S. Rieder depict the legal situation of Internal Investigations in Germany and compare it to the situation in the US. They close their examination with a call for legislative action in Germany. Measures by the authority to capture financial assets originating from criminal offences are subject to vivid discussions worldwide. Chih-Jen Hsueh takes a close look at the recent reform of asset recovery in Taiwan and draws comparisons to the legal situation in Germany. Florian Follert then takes the penal system in the context of commercial criminal law into account and analyzes it economically.

Challenges and questions of compliance cannot be answered in a solely national context anymore. In a world with fast interconnecting markets and channels of communication such an approach seems narrow-minded and backward looking - Glocality is the keyword. In her article, Mariana Ferreira illustrates the meaning of this term and why glocality is the key to functioning compliance.

Under the heading of "Compliance in Science" we want to tackle an issue on our own behalf. Since its first edition, CEJ has been published as an open-access journal. For us it was always of great importance that the authors aren't charged any publication fee. Instead, only quality of the submitted articles shall be crucial for the publication. Sadly, this approach seems not to be a matter of course as the recent debate on predatory journals shows. A resulting problem is the growing mistrust towards open access-concepts and small unknown journals. In his article, Roger Watson points out the danger posed by predatory journals and provides advices how to avoid them.

We hope you enjoy our spring edition!

With our best regards,

Michele DeStefano & Hendrik Schneider
Founder and Content Curators of CEJ

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LIABILITY RISKS OF THE USE OF DIGITAL TECHNIQUES

Alexandra Jorzig

AUTHOR

Prof. Dr. Alexandra Jorzig is a German lawyer specialized in medical law, especially medical malpractice law, digital health and digitalization in healthcare. She is the founder and owner of the law firm JORZIG Rechtsanwälte with offices in Düsseldorf and Berlin and lecturer at the Dresden International University and the University of Osnabrück. In addition, she was appointed professor at IB Hochschule Berlin in October 2018.

ABSTRACT

New technologies not only present new opportunities but also new legal challenges. However, it could be expected that the use of robotics and AI will steadily increase over the next few years. Liability considerations are therefore urgently required.

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I. INTRODUCTION

In the last few years, the topic of digital technology in medicine and the legal requirements have become increasingly relevant. In particular the keywords Big Data, Artificial Intelligence (AI) or Blockchain have now taken their place in medical everyday life. As the relevance of digital technology increases, technical issues as well as ethical and legal issues arise. The following publication should be devoted exclusively to the liability law aspects.

II. DIGITAL TECHNOLOGY

The possibilities of digital technology are also enormously diverse in the medical field, ranging from health apps to robotics to the use of artificial intelligence (AI). This paper focuses on robotics and artificial intelligence, which are gradually finding their way into everyday clinical practice. The decisive difference between the two manifestations is the ability to learn. While a robot is defined (by one of many definitions) as a "sensorimotor machine for the purpose of expanding the human ability to act consisting of mechatronic components, sensors and computer-based control and control function", there is currently no binding definition for AI.[1] This is probably due to the fact that there are already different views on what is meant by "intelligence".[2]

A. Attacks on the rise

Looking first at robotics as a facet of digital technology in medicine, one realizes that this aspect has already taken its place into everyday clinical practice for many years. For instance, robots are already being used in nursing and for medical treatment. In particular fully automatic laboratories or service robots in maintenance can be mentioned here. These should complete the work by nurses for example by entertaining seniors through guesswork or playing music.[3]

Better known and used in many clinics worldwide is the Da Vinci robot system. It assists the surgeon in the management of minimally invasive instruments, which can compensate for involuntary hand movements like the trembling of hands.[4]

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1 Melinda Florina Müller, *Roboter und Recht*, 5, AKTUELLE JURISTISCHE PRAXIS, 595, 596 (2014).

2 Andreas Wichert, *Künstliche Intelligenz*, (Apr. 02, 2019, 03:48 PM) www.Spektrum.de, https://www.spektrum.de/lexikon/neurowissenschaft/kuenstliche-intelligenz/6810.

3 Barbara Bückmann, *Pflege-Roboter „Pepper" wird in Senioreneinrichtung getestet*, (Apr. 02, 2019, 03:51 PM) https://www.gesundheitsstadt-berlin.de/pflege-roboter-pepper-wird-in-senioreneinrichtung-getestet-12922/.

4 (Apr. 02, 2019, 03:52 PM) https://www.intuitive.com/en-us, https://www.intuitive.com/en-us/products-and-services/da-vinci/instruments.

B. Artificial Intelligence (AI)

As a rule, it is possible to differentiate between weak and strong artificial intelligence. While weak AI is more like the simulation of intelligent human behavior, strong AI is understood to equal or even surpass the intelligent behavior of humans. [5]

1. Weak AI

The functionality of weak AI is essentially based on mathematical methods - especially algorithms - and applications from computer science, which allows the analysis of patterns.[6] Forms of weak AI are fundamentally geared towards solving clearly defined tasks.[7] One example of such a system is the PANTHER system (Patient-oriented Oncological Therapy Assistance).[8] By entering a variety of pre-diagnosed CT images, the system is able to create a pattern. This pattern can then be matched with new CT images. Subsequently the system can detect tumors much earlier than the radiologist.[9]

2. Strong AI

While weak AI requires a certain impulse of an input command, strong AI works on its own initiative.[10] According to the current state of knowledge, however, it has not yet been possible to develop a medical system based on strong AI. However, it is expected that this will be possible in the future. Due to that liability, considerations should be applied today, to not run the risk of the law being overtaken by technical progress.

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5 NILS J. NILSSON, THE QUEST FOR ARTIFICIAL INTELLIGENCE, 649, (Web Version (Print version published by Cambridge University Press), 2009).

6 Jay Tuck, *Künstliche Intelligenz in der Medizin*, (Apr. 02, 2019, 04:15 PM) https://www.pcwelt.de/a/kuenstliche-intelligenz-im-weissen-kittel,3387296.

7 Julian Moeser, *Starke KI, schwache KI – Was kann künstliche Intelligenz?*, (Apr. 02, 2019, 04:17 PM) https://jaai.de/starke-ki-schwache-ki-was-kann-kuenstliche-intelligenz-261/.

8 Fraunhofer Institut, *Früher gegensteuern bei unwirksamen Therapien*, (Apr. 02, 2018), https://www.mevis.fraunhofer.de/de/press-and-scicom/press-release/2018/frueher-gegensteuern-bei-unwirksamen-therapien.html.

9 Jay Tuck, *Künstliche Intelligenz in der Medizin*, (Apr. 02, 2019, 04:15 PM) https://www.pcwelt.de/a/kuenstliche-intelligenz-im-weissen-kittel,3387296.

10 Julian Moeser, *Starke KI, schwache KI – Was kann künstliche Intelligenz?*, (Mar. 11, 2019, 04:25 PM) https://jaai.de/starke-ki-schwache-ki-was-kann-kuenstliche-intelligenz-261/.

III. LIABILITY CONSIDERATIONS

A. Robotics

1. Legal foundations

In Germany, there is currently no codified robotic law, so the liability law assessment is carried out according to existing general legal norms. Robots that are used in medicine fall in Germany and Europe under the medical device law (hereinafter MPG) as a composite of (among others) instruments and software with medical purpose.[11] Since the MPG currently does not contain a liability law standard, the German civil law (hereinafter BGB) and the German product liability law (hereinafter ProdHaftG) must be consulted.

2. Liability of the manufacturer

A patient who suffers damage to property or health through the use of a (treatment) robot initially has the option of taking legal action against the manufacturer of the robot. According to paragraph 1 ProdHaftG the manufacturer of a product is obliged to pay damages. In the context of this paragraph it is problematic which definition of manufacturer should be applied. According to the Medical Devices Act, the manufacturer is responsible for the initial placing on the market. However as per the definition of the ProdHaftG the manufacturer is the entity whose name is placed on a product or who has introduced the product into an economic area. The starting point therefore varies when different definitions of manufacturer are used. Since there is no clear regulation which definition should be used, the legal practice for patients poses the problem of who is liable.

Further requirements for liability are the defectiveness of the product, a damage in the form of a bodily injury or damage to health or damage to property as well as the causality between the product defect and the breach of legal rights.

According to the ProdHaftG, the defectiveness of the product is assumed when the product does not provide the security - including all circumstances, in particular performance, typical use or time of placing on the market - which can legitimately be expected.

3. Liability of the doctor or hospital

Since 2013, the liability relationship between doctor and patient has been based in particular on the regulations of the treatment contract of §§ 630 a ff. BGB. Other basis of claims can arise from the tort law.

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[11] §3 Nr. 1 Medizinproduktgesetz.

a) Contractual liability

As mentioned above, robots in the medical field fall under the MPG. In the case that the use of a robot causes damage to the patient, the doctor (or hospital) will only be liable if this damage is due to a breach in the duty of care. The duty of care requirements is very diverse and arise in particular, but not exclusively, from the MPG and the Regulation about the Construction, Instigation and Use of Medical Devices (MPBetreibV). For example, the doctor's duty of care includes compliance with manufacturer warnings and safety notices, the proper checking of functions, and the observance of shelf life data.

b) Contractual liability

Taking into account the MPG, the doctor is liable under tort law only when the devices used are free of defects and fully functional or then the devices were operated incorrectly.[12]

However, a limitation of this extent of liability results from the requirement of full controllability of the risk. As a rule medical devices are regarded as fully manageable, so the practitioner has the burden of proof that the injury to the patient is not due to a wrongdoing of the physician or staff.[13]

B. AI

The administration of artificial intelligence in medicine is currently fraught with unpredictability. Among other things, the question arises who is liable in the use of artificial intelligence. In German law it is not possible that objects or software can be liable. Therefore, only the manufacturer, the doctor or the hospital can be liable. While the manufacturer could be considered a liable party due to having placed the product on the market or having developed it, the hospital could also be considered liable as the owner of the product, or the doctor as the user.

1. Weak AI

As already indicated above, the operation of weak AI requires an input command. In everyday clinical practice, this input command would be performed by a doctor - similar to the activation of another electronic device (e.g. X-ray machine). The doctor thus controls the use of weak AI and therefore assumes liability. As a consequence, the doctor is a liable party and existing liability regulations are applicable – as was the result with reference to robotics.

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12 RÜDIGER MARTIS & MARTINA MARTIS-WINKHART, ARZTHAFTUNGSRECHT FALLGRUPPENKOMMENTAR, 1524 (5th ed. 2018).

13 RÜDIGER MARTIS & MARTINA MARTIS-WINKHART, ARZTHAFTUNGSRECHT FALLGRUPPENKOMMENTAR, 1525 (5th ed. 2018).

2. Strong AI

In the context of strong AI, the problem arises in particular that there is the possibility of autonomous decision-making, meaning that the "if" and the "how" of the use are applied by the AI-based system and not the doctor. Since according to the current legal situation, however, objects or software cannot be considered as independent liable parties, it is also necessary in the context of strong AI to turn towards the manufacturer or the doctor as liable party.

a) Liability of the manufacturer

i.) Contractual liability

There is no contractual liability of the manufacturer as there is no contractual relationship between the patient and the manufacturer.

ii.) Tortious liability

Artificial intelligence is likely to fall under the MPG because the use of AI is a connection of apparatus, software and other operations which are subjected to a medical purpose. Therefore, the manufacturer is liable for construction errors.[14] Again, the AI's ability to learn could be problematic because it allows procedures to be modified and overwritten so that they no longer correspond to the original programming. So, the liability of the manufacturer is ruled out because the defect did not exist at the time when the product was put on the market.

Moreover, the fact that the manufacturer of a product which works with AI has given it the opportunity to learn by algorithms cannot be used as a suitable starting point, since exactly this possibility of AI is desired and intended.

b) Liability of the doctor or hospital

i.) Contractual liability

Similar to the considerations on the topic robotics, a contractual liability could result from paragraphs 630a et seq. BGB. Although AI is not yet a general form of treatment, in the future it could become the medical standard. Therefore, according to current standards of liability, its application requires careful and conscientious medical consideration of the advantages and disadvantages, considering all circumstances of the individual case

14 RÜDIGER MARTIS & MARTINA MARTIS-WINKHART, ARZTHAFTUNGSRECHT FALLGRUPPENKOMMENTAR, 1525 (5th ed. 2018).

and the well-being of the patient.[15] Furthermore with such a form of treatment, there arises higher requirements in the duty to inform the patient. Thus, the patient must be informed that this is a new method in which unknown risks cannot yet be ruled out.[16]

Mainly, however, problems should arise from who has to assume liability for any damage. In principle, in German law paragraph 280 BGB shows a refutable presumption of fault for the doctor. In a civil law process the doctor would have to prove the lack of liability for a treatment error. The requirement that somebody has to take responsibility for a damage must again conform to the provisions of paragraphs 276 and 278 BGB. According to paragraph 276 part 2 BGB, the doctor is responsible for intent and negligence. The requirements for negligent behavior presuppose that the doctor is not concerned about the objective, usual care and that the doctor could foresee the subsequent damage.[17] However, the foreseeability in particular in the use of artificial intelligence is likely to be doubtful, since strong artificial intelligence is able to learn and decide autonomously. This quality, with the further possibility of its own decision-making, allows us to rule out the foreseeability of the doctor. Therefore, paragraph 276 subparagraph 2 BGB cannot be applied when using strong artificial intelligence.

Equally an attribution of liability according to paragraph 278 BGB is not possible. It would be conceivable to see artificial intelligence as a vicarious agent, under whose operation the doctor would have to accept a fault as his own fault. However, the application of paragraph 278 BGB does not come into consideration for two possible reasons. First, the provision only applies to individuals. Even if one could navigate this problem, however, the following problem arises that paragraph 278 BGB assumes a fault of the vicarious agent. However, a blame can only exist if there is also cognitive faculty, which means the ability to recognize the dangerous nature of actions and to be aware of the responsibility.[18] It is undeniable that artificial intelligence does not possess such an insight.

In summary, it can be seen that contractual liability on the basis of legal regulations is withdrawn when a patient is injured by the use of AI. Of course, a different evaluation should arise when individual contractual arrangements between doctor and patient are made.

ii.) Tortious liability

Suitable infringing action within the meaning of paragraph 823 BGB could be, for instance, the use or the omission of the timely shutdown of a system which features strong

15 BGH (German Federal Supreme Court), VERSICHERUNGSRECHT, 1142,1143 (2017).

16 BGH (German Federal Supreme Court, VERSICHERUNGSRECHT, 1073 (2006).

17 BGH (German Federal Supreme Court), NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGSREPORT, 965 (2006).

18 BGH (German Federal Supreme Court), NEUE JURISTISCHE WOCHENSCHRIFT, 354 (2005).

AI. Problems arise here in the context of causality as to whether the misconduct of AI can be attributed to the doctor. According to the equivalence theory, there would be a context for attribution because the doctor would have contributed to the breach of legal rights through the use of AI. However, the equivalence theory is limited on a second level by the adequacy theory. Assuming that the learning ability of AI systems represents an unpredictability, a context for attribution should not be given, since the adequacy theory excludes completely unlikely causal trajectories.[19] Using teleological considerations, however, this result is likely to be paradoxical, since learning is an essential feature of AI systems.

Under the premise that the context for attribution is broken due to the adequacy theory, there would however be room for an analogous application of paragraph 831 BGB.[20] According to paragraph 831 BGB, the principal is liable for damages that the vicarious agent unlawfully caused in the performance of the action. Since the human agent is characterized by the transfer of instructions as well as by the limits of these instructions,[21] there are definitely starting points for an analogous application. In contrast to paragraph 278 it does not depend on a fault of the agent. Here both the fault of the principal in the selection and monitoring of the agent is supposed as well as the causality for the damage.[22] Thus the doctor is responsible for the proof of exculpatory evidence.

Since the doctor who uses an AI system to help in principle must have to enter into a written liability insurance (as well as all practicing doctors in Germany), on the other hand the patient can neither understand the technical nor medical processes of AI systems so the proof of the exculpatory evidence cannot be offered by him (especially since access to it should be excluded), such a burden of proof should also be appropriate. The presumption of negligence would also mean that the regulatory gap would be closed, since the issue of the autonomy of AI is only relevant in the context of the exculpatory evidence. Similarly, the situation of interests may argue for an analogy because paragraph 831 BGB creates the possibility of confronting the creditor with a liquid debtor.[23] Furthermore, the principal also bears the liability risk for human vicarious agents. Reasons why this distribution of risk should move to the patients' burden when AI was used by a doctor is currently not apparent. At most, an absolute total failure of an AI system with the result of exceeding all programmed technical limits, should omit a context for an attribution to the doctor.[24]

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19 Dr. Christian Grüneberg, Vorbemerkung zu § 249, *in:* Palandt BGB, Rn. 25 (Otto Palandt, 77th ed., 2018).

20 Michael Denga, *Deliktische Haftung für künstliche Intelligenz*, 10, COMPUTER UND RECHT, 69, 75 (2018).

21 Hartwig Sprau, § 831, *in:* Palandt BGB, Rn. 1 (Otto Palandt, 77th ed., 2018).

22 Hartwig Sprau, § 831, *in:* Palandt BGB, Rn. 1 (Otto Palandt, 77th ed., 2018).

23 Prof. Dr. Gerhard Wagner, LL.M., § 831, *in:* Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB Band 5, § 831, Rn. 4, (Franz Jürgen Säcker, 7th ed., 2017)

24 Michael Denga, *Deliktische Haftung für künstliche Intelligenz*, 10, COMPUTER UND RECHT, 69, 75 (2018)

C. Robotics linked to AI

In the future, it should not be rare that robotics and especially strong AI are connected. In this case, due to the ability to learn or the possibility of autonomous decision making by AI, the working method of robotics could be overridden, with the consequence that the liability considerations of AI would be applied.

IV. CONCLUSION

In summary, it should be noted that the liability valuation of medical use robots can be based on general liability standards.
The current legal situation makes it possible to apply existing liability standards in the context of weak AI, because the liability is linked to the doctor who uses AI. In contrast, the use of strong AI currently presents liability problems, because both the liability of the manufacturer is eliminated, as well as the contractual liability of the doctor. Equally the tortious liability of the doctor or hospital is only possible via an analogy of paragraph 831 BGB.
Therefore, it should be necessary in the future to create a codified AI law, also due to the fact that the use of AI is constantly gaining in importance. Our current legal system is not (yet) up to this.

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BIG DATA IS CHANGING MEDICINE

"Health is too precious to be left to the medical profession alone"

Andreas W. Schneider[1] & Raisa S. Pompe[2]

AUTHORS

Doctor A. W. Schneider graduated from medical school in 1980 and started his own urologic joint practice in 1993 after being senior staff member at the department of Urology at the University Hospital Hamburg-Eppendorf. Since 2016, he is head of the Bundesverband der Belegärzte (Federal Association of Affiliated Physicians (BdB)) in Germany. As founder of the Salzhäuser Gespräche, he regularly gives lectures and organizes discussion rounds to improve the integration of out- and inpatient services. In addition to his research interest with numerous national and international publications, he still teaches young doctors to become urological surgeons.

Doctor Raisa S. Pompe is a resident in training at the department of Urology at the University Hospital Hamburg-Eppendorf. She graduated from medical school in 2014 and was a research fellow at the Cancer Prognostics and Health Outcomes Unit at the University of Montreal Health Center from 2016 to 2017. Her research priority is prostate cancer.

ABSTRACT

Within this short essay, we provide an overview of the development of "big data" and its possible influence on medical practice. In particular, we explore the underlying technology and demonstrate with practical examples how big data will sooner or later lead to the dissolution of economic consulting and treatment monopoly of classical medicine.

1 Urologic joint practice, Winsen (Luhe), Germany.

2 Urologic joint practice, Winsen (Luhe), Germany, Department of Urology, University Hospital Hamburg-Eppendorf, Hamburg, Germany.

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I. INTRODUCTION

To understand the extent and importance of global electronic data exchange, as it is termed by "big data", one needs to pay attention to the past and present of the internet. Since the launch of the world-wide web exactly 40 years ago (by linking four military computers in a very spartan network at that time), a development has taken place that equates to the invention of electricity.

Today, more than 340 million domains (addresses in the word-wide net) are available to the user worldwide with more than 500 endings (.com, .de, .info, etc.). The full implications of these developments only become clear by realizing that of the approximately 7.6 billion people worldwide, more than 55% already have access to this information system.[3] Even more impressive is the prevalence of mobile phones with approximately 66% of the global population having access to a cell- or smartphone; trend rising with an average double-digit percentage gain every year. One explanation might be the fact that emerging economies with lacking infrastructure, unlike industrialized countries, often skip household cable connections and directly provide wireless smartphones instead. As a consequence, also in these countries, a permanent availability of people of about 80% can be realized in the up-coming years.

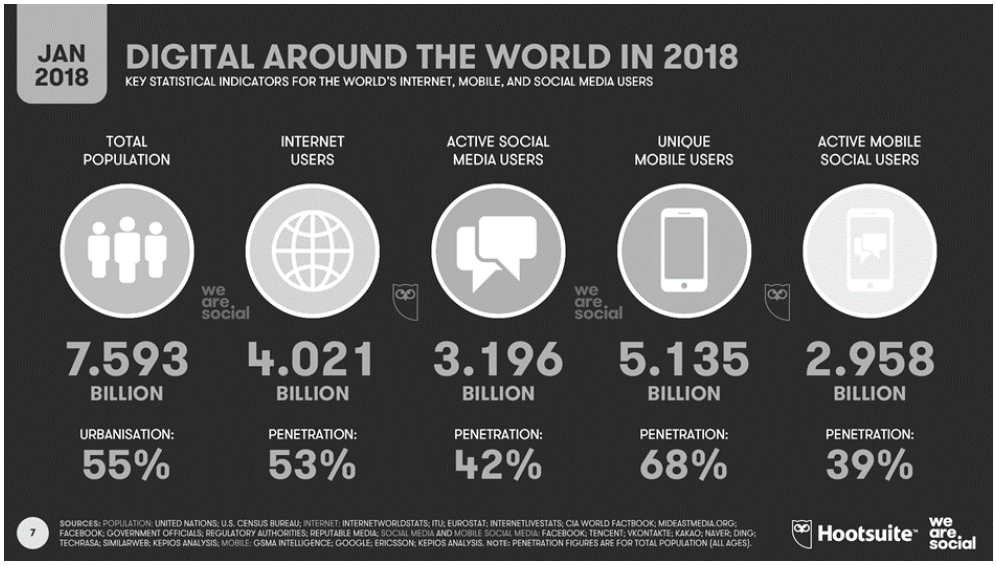

Fig. 1: Digital around the world in 2018[4]

3 WeAreSocial, *Global Digital Report 2018*, (Apr. 19, 2019, 01:00 PM), https://wearesocial.com/blog/2018/01/global-digital-report-2018.

4 WeAreSocial, *Global Digital Report 2018*, (Apr. 19, 2019, 01:00 PM), https://wearesocial.com/blog/2018/01/global-digital-report-2018.

II. DEVELOPMENT OF THE TECHNOLOGY

Precondition for the transmission and processing of relevant amounts of data are fast and inexpensive computers as well as the provision of sufficient storage capacity with fast access times.

A. Computer Speed

Precondition for adequate data processing is computer speed, which is measured in terms of the number of floating point operations per second (flops). The first computers started with two operations / second (2 flops) in 1941 (computer Zuse Z3, Germany). However, the current record was achieved by an United States supercomputer "Summit" in the Oak Ridge National Laboratory with an output of 200 petaflops (200 quadrillion calculations / second).[5]

B. Data Storage

In addition to a high computing power for the processing of stored data, affordable storage media is required. While in 2003, a gigabyte of hard drive space was about 1.25 euros, this price has dropped to well below 4 cents per gigabyte today with a further decreasing trend. The way and access have changed dramatically in recent decades. First, the floppy disk with 400 kilobyte memory capability was the measure of all things. However, in later years floppy disks and Magneto-Optical (MO) disks, rotating storage devices, magnetic tapes as well as digital storage media (SSD flash memories) took turns. To what extent mass storage devices might be based on biological foundations (proteins or bacteria) in the future, is the subject of current research.

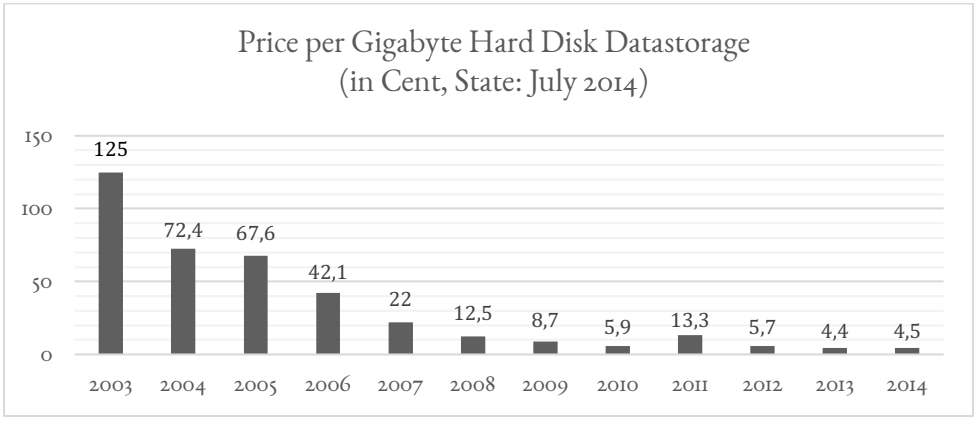

Fig. 2: Dramatic price decline in hard disk storage[6]

5 *Summit - America's newest and smartest computer*, (Apr. 19, 2019, 01:00 PM), https://www.olcf.ornl.gov/summit/.

6 Mathias Brandt, *Dramatischer Preisverfall bei Festplattenspeichern*, STATISTA (Apr. 24, 2019, 11:10 AM), https://de.statista.com/infografik/2544/entwicklung-preis-pro-gigabyte-festplattenspeicher/

C. Transmission Speed

For a save and fast forwarding of data, wireless transmission of information over almost arbitrarily large distances is required. Also here, technology has made great achievements in recent decades: Following the transmission standard for mobile phones 3 G with 100 msec., 4 G with 30 msec., soon there will be a 5 G network with a transmission time of 1 msec., meaning that almost real-time will be reached.[7]
The computing power of the mainframes achieved in recent years, but also the development of smaller powerful computers with increasingly cheaper mass storage, have led to a rapid spread of the Internet and the possible use of smartphones worldwide.

III. E-HEALTH AND CLASSIC MEDICINE

A Measuring instruments for everyone

The ubiquity availability of smartphones, with which one can not only make phone calls, take pictures, play games or watch films, has led to the development of a large number of independent programs on the smartphone. In particular, programs for personal monitoring of body functions - detected by sensors on the back of fitness trackers or wristwatches - are popular. Therefore, a variety of apps, with which data of the own body can be gathered and evaluated, use the smartphone as a temporary storage "of the collected data".[8]

In the small I-cell program, parameters such as pulse rate, body temperature, number of steps, distance traveled, oxygen saturation, skin conductivity, blood pressure, weight, resting periods, sleep / exercise, blood sugar, etc are then available to the user for personal evaluation. Most recently, handy chromatographs, similar to the tricorder ("Bones" from the series "*Starship Enterprise*" already had such a device) show possible ways of further advancement to capture additional data of people.

B Test results for everyone

Besides capturing a variety of data around our body, it would be impressive to be able to extract parameters from our blood and add it to the data potpourri. In this regard, an American company (Theranos) accompanied with an US-department store chain, in fact, had developed a 4-hour analysis service for the most important 20 blood parameters using only one single drop of blood. Results then were made available to the sender via Internet.

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7 Kenichi Yamada & Kim Jaewon, *Fast but patchy: Trying South Korea's new 5G service*, NIKKEI ASIAN REVIEW (2019), (Apr. 24, 2019, 11:23 AM), https://asia.nikkei.com/Spotlight/5G-networks/Fast-but-patchy-Trying-South-Korea-s-new-5G-service.

8 *iHealth*, (Apr. 19, 2019, 01:00 PM), https://ihealthlabs.eu/de/.

Although this service has been withdrawn from the market, it reflects how further analysis- and advisory-offers might be developing.[9]

C. Analysis of genetic material for everyone

Another example represent individual gene analyses, as provided by the company 23 and Me, which make gene analyses available to everyone.[10] Using oral mucosal smear, within 14 days, the company prepares a list for different disease probabilities costing the individual less than $150 – this, of course, works via Internet.

D. Linking of data for everyone

While first, collected data were only available to the individual "smartphone owner", it is now possible to further process individual personal data collected by the smartphone without any problems. Large capacity computers that are able to store large numbers of individual medical histories (for example, the IBM project "Watson", the TK project "Ada", etc.) have been in use for years.

IV. ALL FOR ONE, INSTEAD OF ONE FOR ALL

Until a few years ago, it was common in medical research to conduct experiments and obtain observations from one or few individuals and then to transfer those results to a large group of potential affected people. Not least due to almost infinite storage options and the high computing power, it is now possible to record data of all patients and to generate treatment recommendations that are based on analyses of multiple correspondences of individual patients. This paradigm shift in the diagnosis and treatment of rare diseases is the precondition for so-called “individual tumour therapies” and, at the same time, the basis to develop individual tumour-specific vaccines / therapy options.

V. INDIVIDUAL USE

The importance of data collection for the individual assessment of health risks can be easily demonstrated by examples:

By knowing the weight development of a person within 24 hours, the drinking, sleeping and micturition behaviour, combined with the conductivity of the body surface as well as the body weight, the risk for the diagnosis of diabetes mellitus can be easily "calculated". This example may outline the options for generating specific diagnoses through merging of individual data. The development and practical evaluation of large amounts of collected data will be the subject of modern sales models of international corporations.

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9 Matthew Herper, *From $4.5 Billion To Nothing: Forbes Revises Estimated Net Worth Of Theranos Founder Elizabeth Holmes*, FORBES (June 21, 2016).

10 *23andMe*, (Apr. 19, 2019, 01:00 PM), https://www.23andme.com/.

Latest tests with the movement scanners in smartphones shows the possibility of early detection of Morbus Parkinson by analysing walking characteristics in patients suffering from this disease.
“Big data” as well is able to detect early symptoms of heartbeat problems as an early signal of incoming heart attack using the data of the smartphone...

Another example of new data processing options by "deep learning" with the use of neuronal networks is face recognition, which already is in use and far superior when compared to humans in the quality of results. The further development of "artificial intelligence" via Deep Learning and new technologies such as the use of neuronal networks for data processing will reveal to what extent the trained physician will withstand the attack by big data.

VI. THE MEDICAL MONOPOLY FALLS

The worldwide growing desire for medical care is facing a relative shortage in medical availability. Especially in the so-called "industrial countries", demographic change with an increase of complex diseases due to the aging population leads to a lack - and therefore prize increase - of doctors. As a consequence, the limited medical capacity in the conventional sense has been the driving force for a large amount of developers to identify diseases and to calculate the individual's risk by comparing symptoms and individual parameters within large amounts of data. "Doctor Google" will increasingly take on a serious advisory role and, at best, complement, at worst, replace, the classic domain of the experienced doctor - the differential diagnosis.
With already 10% of the gross national product for the health market, this will create a great impulse to break the medical monopoly:

"Health is too precious to be left to the medical profession alone".

VII. SUMMARY

The collection and linking of medical parameters and their interpretation is a new and prospering economic sector due to multiple options of complex data processing. However, this will sooner or later lead to the dissolution of economic consulting and treatment monopoly of classical medicine.

Using the smartphone as local data storage, the app as a data collector, and communication with large databases and correspondingly available mainframe capacities will result in the provision of complex differential diagnostic tools. Whether medical standards will be improved or only revealed to a broad marketing remains open.

At any rate, big data will significantly change the differential diagnostic practice and have a lasting effect not only on medicine, but will equally change other non-empirical sciences; for example case law.

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INTERNAL INVESTIGATIONS - LEGAL SITUATION, POSSIBLE OPTIONS AND LEGAL-POLITICAL NEED FOR ACTION[1]

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ABSTRACT

In June 2018, the German Constitutional Court decided on the search of a law firm and the securing of documents and data in the firm's premises by the Public Prosecutors' Office. The Court rejected the respective constitutional complaints and regarded the prosecutions' measures as lawful. The Court's orders received immense public attention as the constitutional complaints were filed by Volkswagen AG, Jones Day, and the firm's lawyer in connection with the "diesel emissions scandal". Besides, the orders were discussed intensely among legal experts, as the Court severely limited legal privilege in Germany. This article examines the Court's orders and its consequences, in particular with regard to internal investigations. In addition, the authors draw a comparison with legal privilege under U.S. law and discuss possible options to avoid extensive disclosure of documents and data. Finally, they demand legislative action and request the legislator to provide adequate safeguards for internal investigations.

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1 This article was first published in German in September 2018: Markus S. Rieder and Jonas Menne, *Internal Investigations – Rechtslage, Gestaltungsmöglichkeiten und rechtspolitischer Handlungsbedarf*, CORPORATE COMPLIANCE ZEITSCHRIFT 203 (2018). The authors would like to thank Christoph Saake for his active support in the legal research for the article as well as Brendan Magee and Johanna Bauer for their support with the translation. The article reflects the personal views of the authors.

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I. INTRODUCTION

The decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) on the constitutional complaints of *Volkswagen*[2], *Jones Day*[3] and three of the firm's lawyers[4] received positive feedback in parts of the press: The investigating Public Prosecutor's Offices can continue to evaluate the "seized" and "explosive" internal VW documents that were found during the search of the firm's Munich office in March 2017 with highest judicial blessing.[5] Apart from the fact that, according to the decisions of the Court, documents were not seized but secured in the course of the search, the perspective of the Court on the *Jones Day* case seems to have been a comparable one: With the simple reference to the necessary "effectiveness of criminal prosecution"[6], the Court not only declared the search of a law firm to be legitimate, but at the same time also justified considerable restrictions on the legal privilege. In the context of internal investigations, prohibitions of seizure and further restrictions on the collection of evidence are to apply only to a very limited extent. The Court also questions if such mandates are genuinely traditional lawyers' activities.[7] And to show even more disdain for the lawyers' profession, the Court also stated that *Jones Day*, as an "internationally active law firm"[8], was not a holder of fundamental rights due to its lack of an organizationally independent position and its lack of a domestic center of activity.[9] The firms' lawyers were also denied the right to rely on a violation of their own fundamental rights, since according to the Court the search warrant only affected the firm and not the individual lawyers.[10]

Hard cases make bad law. This article examines the consequences of the Court's decisions and the consequential restrictions on search and seizure bans with regard to lawyers' premises, in particular in the context of internal investigations (II.B.). The legal situation

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2 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17 = BeckRS 2018, 14189.

3 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17 = BeckRS 2018, 14188.

4 BVerfG, Order of June 27, 2018 – 2 BvR 1562/17 = BeckRS 2018, 14190.

5 Cf. only reports by Spiegel Online, (Jul. 27, 2018), www.spiegel.de/wirtschaft/unternehmen/vw-ermittler duerfen-beschlagnahmte-vw-unterlagen-auswerten-a-1216985.html; Welt, (Jul. 27, 2018), https://www.welt.de/print/die_welt/wirtschaft/article178943166/Ermittler-duerfen-VW-Akten-einsehen.html; Manager Magazin, (Jul. 27, 2018), www.manager-magazin.de/unternehmen/autoindustrie/volkswagen-verfassungsbeschwerde-abgeschmettert-a-1216984.html; and Handelsblatt, (Jul. 27, 2018), https://www.handelsblatt.com/unternehmen/industrie/bundesverfassungsgericht-volkswagen-muss-brisante-dokumente-im-dieselskandalherausgeben-/22774332.html?ticket=ST-2500188-4trVmKCvFOR5jMBhzwA9-ap5.

6 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 78.

7 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 110.

8 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17, marginal no. 1.

9 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17, marginal no. 24 et seq.

10 BVerfG, Order of June 27, 2018 – 2 BvR 1562/17, marginal no. 35 et seq.

in Germany is compared with the US legal privilege (II.C.). This is followed by an analysis of the consequences for the responsibilities and duties of managing directors, when conducting internal investigations and cooperating with German and foreign investigating authorities (III.) Finally, the resulting need for legislative action is pointed out (IV.).

II. CURRENT LEGAL SITUATION IN GERMANY (ACCORDING TO THE CONSTITUTIONAL COURT)

A. Scope of Search and Seizure Prohibitions

The Court's decision has limited the scope of legal privilege under German law by severely narrowing the German Code of Criminal Prodecure's restrictions regarding searches and seizures, but at least the decision largely clarified under which conditions investigating authorities are denied to access documents and data in a lawyer's custody under the current law.[11]

To achieve this clarification, the Court had to decide on a dispute persisting since 2008, when § 160a StPO (*Strafprozessordnung* – German Code of Criminal Procedure) was implemented. The dispute concerned the scope of application or rather the relationship of § 160a and § 97 StPO.[12] § 97 StPO stipulates that correspondence between an accused and his lawyer, notes concerning confidential information entrusted to a lawyer by an accused, and other objects which are covered by a lawyer's right not to testify shall not be subject to seizure. According to § 160a (1) sentence 1 StPO, an investigation measure generally is inadmissible, when it is directed against a lawyer and it is expected to produce information in respect of which the lawyer would have the right to refuse to testify. However, § 160a (5) StPO regulates that § 97 StPO shall remain "unaffected". This ambiguous wording was understood by some to mean that § 97 StPO should take precedence over § 160a StPO and therefore limit the broad prohibition on the collection of privileged information stipulated by § 160a StPO in case of a seizure.[13] In contrast, another interpretation concludes that the seizure of client documents within lawyers' premises or within a law firm is inadmissible because § 160a StPO would expand the limited prohibitions in

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11 Differing: Carsten Momsen, *Zur Zukunft strafrechtlicher Vertretung von Unternehmen in Deutschland*, NEUE JURISTISCHE WOCHENSCHRIFT, 1362 (2018), who does not consider the decision a landmark due to the fact that the standard of review is limited to constitutional requirements.

12 For an overview on the views represented in judicial literature, cf. Matthias Dann, *Durchsuchung und Beschlagnahme in der Anwaltskanzlei*, NEUE JURISTISCHE WOCHENSCHRIFT, 2609, 2913 (2015).

13 Cf. LG Stuttgart, Order of March 26, 2018 – 6 Qs 1/18, marginal no. 40 et seq.; LG Bochum, Order of March 16, 2016 – II-6 Qs 1/16, marginal no. 87 et seq. = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 500, 501 et seq. (2016); LG Hamburg, Order of October 15, 2010 – 608 Qs 18/10, marginal no. 87; Bertram Schmitt, *in:* Straf-prozessordnung, § 160a, marginal no. 17 (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Jörn Hauschild, *in*: Münchener Kommentar zur StPO, § 97, marginal no. 64 (Christoph Knauer et al eds., 2014).

§ 97 StPO to further investigation measures including seizures.[14] The Constitutional Court did not agree with the latter and broader interpretation, and referenced the "constitutionally required effectiveness of criminal prosecution"[15] to establish § 97 StPO to be solely decisive for the measure of seizure.[16]

In addition, the Court also excluded the broad protection of legal privilege resulting from § 160a (1) sentence 1 StPO with regard to searches, since otherwise "the possibilities of obtaining evidence permitted under § 97 StPO [...] would be *de facto* impossible".[17] Unfortunately, the Court ignored the fact that the wording of § 160a (1) sentence 1 in connection with § 160a (5) StPO clearly contradicts this due to a lack of reference to provisions covering searches. Moreover, since § 95 StPO provides an obligation to surrender seized objects, authorities would certainly have a different possibility to request objects even without searches.[18]

Consequently, protection against search and seizure only exists if the following conditions are met cumulatively: Firstly, a special client-lawyer relationship is necessary, which requires a relationship of an accused to his lawyer.[19] Companies therefore have to be in a position similar to that of an accused due to an administrative offence or a revocation proceeding, and they must have mandated a lawyer or a law firm in connection with this proceeding. The prohibition of seizure in § 97 StPO only applies with regard to this relationship.[20]

In the *Jones Day* case, the Constitutional Court (and previously the Munich I Regional Court (*LG München I*)) used the lack of such a relationship as main argument to deny the applicability of § 97 StPO. Although the complaining *Volkswagen AG* was involved

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14 See, e.g., Margarete Gräfin v. Galen, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 945 (2011); Frank Peter Schuster, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 26, 30 (2012).

15 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 78.

16 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 73 et seq.

17 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 76.

18 However, the use of coercion against persons entitled to refuse to testify is inadmissible in this context, § 95 (2) sentence 2 StPO; cf. also Jörn Hauschild, *in:* Münchener Kommentar zur StPO, § 95, marginal no. 20 (Christoph Knauer et al eds., 2014).

19 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 88.

20 LG Bochum, Order of March 16, 2016 – II-6 Qs 1/16, marginal no. 68 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 500 (2016); LG Bonn, Order of June 21, 2012 –27 Qs 2/12, marginal no. 42 et seq. = NEUE ZEITSCHRIFT FÜR KARTELLRECHT, 204, 204 et seq. (2013); LG Hamburg, Order of October 15, 2010 – 608 Qs 18/10, marginal no. 70 = NEUE JURISTISCHE WOCHENSCHRIFT, 942, 943 (2011); Bertram Schmitt, *in* Strafprozessordnung, § 97, marginal no. 10 (Lutz Meyer-Goßner & Bertram Schmitt, 2018) with further references; Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 8, 64 (Christoph Knauer et al eds., 2014).

in a preliminary investigation by the Braunschweig Public Prosecutor's Office and had also established a client relationship with *Jones Day*, the proceedings of the Munich Public Prosecutor's Office conducting the search were directed against *Audi*, so that *Volkswagen* did not hold a position similar to that of an accused party in these proceedings. *Audi*, on the other hand, had no mandate relationship with *Jones Day*, so that the prohibition of seizure constituted by § 97 StPO was not applicable with regard to this relationship either.[21]

Secondly, the Constitutional Court specified the requirements for a legal entity to be considered in a position similar to an individual charged with a criminal offence (and therefore be protected from certain investigation measures). As a prerequisite, the entity has to be a possible subject to further investigations, according to objective criteria. This presupposes a "sufficient" ("*hinreichend*") suspicion for a criminal offence or a breach of the duty of supervision committed by an individual person in management (§§ 30, 130 OWiG (*Ordnungswidrigkeitengesetz* – German Act on Regulatory Offences)).[22] According to the Court, legal privilege does not apply if a company is merely concerned about potential future investigations and therefore obtains legal advice or engages a law firm to conduct an internal investigation.[23]

Thus the Court rejected the view expressed by, among others, the Bonn Regional Court (*LG Bonn*) in antitrust proceedings,[24] according to which protection against seizure begins with the initiation of formal proceedings. This would have enabled the investigating authorities to limit the application of the protections against seizure almost arbitrarily by delaying the official opening of criminal proceedings.[25] At the same time, however, the requirements of the Constitutional Court also mean that searches and seizures are now clearly possible until sufficient, objective indications of a future involvement in a criminal case exist.

With regard to the applicability of § 97 StPO, the Court clarified, that the seized documents would have been subject to prohibition and therefore inadmissible in the proceedings against *Volkswagen* – even if only used to substantiate further suspicions –, pursuant to § 160a (1) sentence 2 StPO.[26] However, the Public Prosecutor's Office in Braunschweig had already been conducting proceedings against *Volkswagen* since April 2016, so that

21 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 96 et seq., 102 et seq.

22 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 93.

23 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 94.

24 LG Bonn, Order of June 21, 2012 –27 Qs 2/12, marginal no. 42 et seq. = NEUE ZEITSCHRIFT FÜR KARTELLRECHT, 204, (2013).

25 Cf. Ralf Eschelbach, *in:* Strafprozessordnung, § 97, marginal no. 11 (Helmut Satzger & Wilhelm Schluckebier & Gunter Widmaier, 3rd ed. 2018).

26 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 101.

Volkswagen undoubtedly held a position similar to an individual charged with a criminal offence.[27]

B. Cases of Authorized Searches and Seizures

Since the prohibitions of searches and seizures at the lawyer's premises only apply when the client is in a position similar to that of a person charged with a criminal offense, documents drawn up in an internal investigation during the initial consultation or internal clarification of the facts may regularly be classified as seizable. The same applies to situations in which initially only the misconduct of individuals, especially below management level, is investigated. Even though a possible investigation against the company is already being considered and examined by external lawyers, the Constitutional Court does not regard this to be sufficient to cause protection against search and seizure. Hence, the Court does not follow regional courts' decisions,[28] which had granted such protection for earlier stages of internal investigations.[29]

The Constitutional Court states that the search of law firms and the confiscation of client documents is always possible if the lawyer concerned had no client relationship with the respective defendant. As the decisions show, this occurs in particular with regard to group-wide matters, in which the mandate only relates to one of the group's companies or a subsidiary. According to the Court, the protection against seizure provided by § 97 StPO does not apply to other group companies or to the relationship between parent company and subsidiary within a group, if there is no explicit mandate from the respective group company or its subsidiaries.[30]

The orders of the Constitutional Court give an advantage to investigating authorities, which can "adjust" the proceedings accordingly. Since the Public Prosecutor's Offices decide on the connection and separation of proceedings at their duty-bound discretion,[31] it would be possible to separate the preliminary proceedings against each of a group's companies involved and to conduct searches and seizures at the law firms of the respective other companies. The protection against searches and seizures stipulated in § 97 StPO would not apply, since it requires a position similar to that of a person charged with a

27 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 6 et seq.

28 These decisions, however, concern defense relationships in the meaning of § 148 StPO; cf. LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 1 = NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 37 (2016); LG Gießen, Order of June 25, 2012 – 7 Qs 100/12, marginal no. 11 = BeckRS 2012, 15498.

29 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 95.

30 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 104; differing view: LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 12 et seq. = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 308, 309 (2016).

31 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 97.

criminal offence – which would only exist for each company with regard to the investigation directed against itself. Although the Court points out that the procedural design may not circumvent the protection of § 97 (1) StPO, the recognition of such a constellation seems unlikely due to the discretion granted to the investigating authorities.

With regard to internal investigations, it is repeatedly denied that conducting an investigation qualifies as legal activity in a narrower sense at all.[32] The Munich I Regional Court (*LG München I*) had similar doubts regarding the *Volkswagen* investigation conducted by *Jones Day* on whether the appointment of the law firm was at all to be qualified as a traditional lawyer's mandate – in particular because of the fact that *Volkswagen* was not allowed to influence the investigation in order to comply with the agreements with the Department of Justice.[33] The Constitutional Court used this argument in the context of the principle of proportionality and stated that the client relationship was not characterized by a special relationship of trust, such as is usually inherent in a defense relationship or even the classic attorney-client relationship.[34] The Court did not, however, go so far as to say, mandates from internal investigation generally do not require protection against searches and seizures. Nevertheless, the doubts about the classification as traditional legal activity seem very questionable, especially taking into account that internal investigations often aim to prepare the defense in preliminary proceedings.

The fact that the documents and data in the *Jones Day* case could have been defense documents within the scope of § 148 StPO –with the consequence that they were also protected in the custody of the company - was not considered by the Constitutional Court at all.[35]

C. Legal Comparison with the USA

Contrary to its German equivalent, legal privilege under U.S. law offers extensive protection (even during internal investigations). It is essentially based on two legal institutions, the *attorney-client privilege* and the *work-product doctrine*.

The *attorney-client privilege* extensively protects the communication between a lawyer and his client. The confidentiality guaranteed by the *attorney-client privilege* is intended

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32 Of this opinion, e.g., Renate Wimmer, *in:* Wirtschafts- und Steuerstrafrecht, § 152 StPO, marginal no. 17 (Werner Leitner & Henning Rosenau, 2017).

33 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 55.

34 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 110.

35 Regarding the classification of the results of an internal investigation as defense documents *cf*. Jürgen D. Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation" als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO,* NEUE ZEITSCHRIFT FÜR STRAFRECHT, 383 (2016); regarding the protection of defense documents in the custody of the company *cf*. LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 10; Sven Thomas/Simone Kämpfer, *in* Münchener Kommentar zur StPO, § 148, marginal no. 17, 19 (Christoph Knauer et al eds., 2014).

to enable the client to obtain early and comprehensive legal assistance. He should be able to disclose all information relevant for legal assessment to his lawyer without having to fear that this communication is accessed by third parties.[36] The *attorney-client privilege* requires an existing client relationship (or its initiation) as well as confidential communication between client and lawyer aimed at obtaining or providing legal assistance.[37]

The *attorney-client privilege* applies to every lawyer admitted in the U.S. or abroad[38] and does not distinguish – in contrast to German law – between external and in-house counsel. Besides natural persons, the protection applies to legal entities as well. Since the *U.S. Supreme Court's* decision in "*Upjohn Co. v. United States*", the communication of all employees of a legal entity, regardless of their position, can be protected by the *attorney-client privilege*.[39] Interviews with employees conducted by external lawyers are therefore regularly privileged.[40] Communication with in-house counsel is only protected if the predominant purpose of communication is legal advice.[41] The scope of the *attorney-client privilege* extends to both oral and written communication.[42]

In addition to the protection of communication between lawyer and client, the *work-product doctrine* protects the lawyer's work products from access by third parties, as long as they were created in preparation of a current or future legal dispute. This includes documents containing the facts of a case as well as legal assessments and analyses. Work products created within internal investigations may also be protected.[43]

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36 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 270 (2016) with further references; regarding legal privilege cf. also Carsten Momsen & Thomas Grützner, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?,* CORPORATE COMPLIANCE ZEITSCHRIFT, 242, 248 et seq. (2017); Hendrik Schneider, *Das Unternehmen in der Schildkröten-Formation – Der Schutzbereich des Anwaltsprivilegs im deutschen und US-Strafrecht*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 626, 630 (2016).

37 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 117 (2013); SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 313 (2016).

38 On the discussion to what extent foreign attorneys have the right to refuse to testify according to § 53 StPO, cf. Marcus Percic, *in* Münchener Kommentar zur StPO, § 53, marginal no. 2 (Christoph Knauer et al eds., 2014).

39 Upjohn Co. v. U. S., 449 United States, 383 (389 et seq.); Jürgen Wessing*, in* Deutsch-Amerikanische Korruptionsverfahren, § 6 marginal no. 103 et seq. (Jürgen Wessing & Matthias Dann, 2013); on the requirements in detail SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 313 et seq. (2016).

40 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 314 (2016).

41 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 121 (2013) with further references.

42 Cf. MARIUS MANN, ANWALTLICHE VERSCHWIEGENHEIT UND CORPORATE GOVERNANCE, 91 (2009).

43 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 316 et seq. (2016) with further references; HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 120 (2013) with further references.

The legal privilege is accompanied by extensive obligations of disclosure in both civil and criminal proceedings. This is based on the fundamental principles of US procedural law, according to which the parties to the proceedings are obliged to engage in clarifying disputed facts. A similar extent of disclosure does not exist under German law.[44]

Furthermore, the protection of legal privilege no longer applies in case of a waiver. It is considered a waiver when protected communication or legal work products are disclosed to third parties. This has far-reaching consequences: Not only the specific piece of information disclosed, but even all related documents and work products might no longer be considered privileged.[45]

III. CONSEQUENCES FOR MANAGEMENT RESPONSIBILITY IN INTERNAL INVESTIGATIONS

A. Basics

Generally speaking, companies are not obliged to file criminal charges because of internal incidents under corporate law.[46] There is also no general obligation to cooperate with the Public Prosecutor's Office.[47] However, this must be separated from the management's obligations to conduct internal investigations if there are indications of irregularities in order to clarify the facts of the case.

Although there is no general obligation to conduct internal investigations under German corporate law, which might result from the countless possible definitions and constellations of internal investigations, an obligation to conduct an internal investigation may nevertheless arise from general managerial duties.

For German Stock Corporations (*Aktiengesellschaft – AG*), such an obligation is being discussed for the management board and the supervisory board with reference to §§ 76

44 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 114 et seq. (2013).

45 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 319 (2016) with further references.

46 A punishable obligation to report criminal offences exists only for the offences listed in § 138 StGB, which do not usually occur in a company; cf. also Jürgen Wessing, *in* Corporate Compliance, 1510 (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

47 Jürgen Wessing, *in* Corporate Compliance, 1510 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

(1), 93 (1) sentence 1 AktG (*Aktiengesetz* – German Stock Corporation Act), stating a corporate duty of care for managers.[48] This includes the management board's duty to ensure compliance with laws and internal company guidelines. If there are indications of violations, the management board must address those. Pursuant to § 93 (1) sentence 1 AktG, the management board has to exercise the diligence of a prudent and conscientious manager in their conduct of business. Consequently, any indications of violations have to be followed by adequate investigations.[49]

Even the *Business Judgment Rule* does not offer further discretion in this matter. § 93 (1) sentence 2 AktG requires the management board to act on the basis of "appropriate information". Therefore, an entrepreneurial discretion exists solely on "how" to conduct an investigation, not on "whether" to perform it at all.[50] In the *ARAG/Garmenbeck* decision the German Federal Court of Justice (*Bundesgerichtshof – BGH*) correspondingly stated, that while an investigation had to be performed, the extent and general execution remains at the discretion of the management board.[51] Thus, the wide scope of action opened up by the *Business Judgment Rule* is only applicable with regard to the question of how and to what extent the investigation is conducted. The decisive factor then is whether the management board was entitled to assume to act on the basis of appropriate information in the best interest of the company.[52] Whether a reaction is appropriate depends on the circumstances of the individual case, in particular the significance of the possible violation and the expected effort of the investigation.[53]

The supervisory board can also be obliged to conduct an internal investigations. According to § 111 (1) AktG, the supervisory board must monitor the actions of the management board. Again, the required measures vary depending on the individual case. According to the severity of the risk for the company, the supervisory board may either be limited to verifying that the management board has investigated the matter properly and responded appropriately to it, or may be obliged to conduct investigation measures on its own. Similar to the management board's duties, the discretion of the *Business Judgment Rule* does only apply to the operating criteria of an investigation.[54]

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48 In addition, a link between the duty to investigate and the supervisory duty pursuant to § 130 OWiG, the duty to set up a monitoring system pursuant to § 91 (2) AktG or the general compliance responsibility of the management board are discussed; cf. Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 25 et seq. (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

49 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 26 (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

50 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 27 (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

51 BGHZ 135, 244, 254 – *ARAG/Garmenbeck* = NEUE JURISTISCHE WOCHENSCHRIFT, 1926, 1927 et seq. (1997).

52 BGHZ 135, 244, 254 – *ARAG/Garmenbeck* = NEUE JURISTISCHE WOCHENSCHRIFT, 1926, 1927 (1997).

53 Cf. Heiner Hugger, *Unternehmensinterne Untersuchungen – Erfahrungen und Standards der Praxis*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT, 214, 219 et seq. (2015).

54 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 34 et seq. (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

B. Internal Investigations Remain Admissible

Internal investigations remain permissible and necessary – despite the fact that the orders of the Constitutional Court enable the confiscation of work products from the lawyer conducting the investigation. A reason for this is the aforementioned corresponding obligation under corporate law to clarify facts and carry out investigative measures due to certain events. Furthermore, the risk of seizure existed even before the decisions were made, due to the unclear legal situation. Now, based on the decisions of the Constitutional Court, measures can be taken to minimize the risk of searches and seizures of a lawyer's premises. This can be achieved by taking a closer look at the discretion regarding the operating criteria of an internal investigation.

In addition to the existing legal obligation, further good reasons for carrying out internal investigations exist: A comprehensive clarification of facts informs the company of all relevant irregularities and thus enables the management to make informed decisions. Early clarification can also help to influence the interpretation of the facts – in public and medial perception, and through cooperation with investigating authorities.[55]

In cross-border cases, internal investigations are often without alternative anyway. In contrast to German law, U.S. authorities can force companies to fully investigate suspected criminal offences or have them investigated by external lawyers – as in the *Volkswagen*-case.

C. Possible Options

1. Escape into a Voluntary Self-Disclosure?

Since a report to the authorities could result in preliminary proceedings, the self-disclosure of possible violations by a company could indicate a position similar to that of a person charged with a criminal offence and thus justify the applicability of search and seizure prohibitions (II.A.). Companies therefore could increasingly consider the option of self-disclosure, despite there being no legal obligation to do so (III.A.).

This would, however, not only require the suspicion of a criminal offence committed within the company or by company employees, but also the acting person would have to be enumerated in § 30 OWiG, or a supervisory duty within the scope of § 130 OWiG would have to be breached. Furthermore, the resulting suspicion must be considered to be sufficient, measured by objective criteria, as stated in the Constitutional Court's decision.[56]

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55 Jürgen Wessing, *in* Corporate Compliance, 1512 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

56 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 93.

Further reasons indicate that self-disclosure should be considered with caution and only after assessing each case thoroughly:

Firstly, it remains possible that the Public Prosecutor's Office does not assume sufficient suspicion on the basis of the report. A discretion is granted to authorities in proceedings against companies, due to the *opportunity principle* (§ 47 OWiG), while in proceedings against individual persons there is no discretion, based on the applicable *principle of legality*. And since the investigation against a company is at the prosecutions' duty-bound discretion, there are numerous options for them besides initiating preliminary proceedings against the company. Alternatively, the Public Prosecutor's Office could choose initiating proceedings against individual defendants. This approach is demonstrated by the Constitutional Court's decision: *Audi* had also filed a criminal complaint with the Munich Public Prosecutor's Office. The Prosecutor's Office then conducted preliminary investigations and – after being briefed by lawyers from *Jones Day* on the progress of the internal investigations – initially directed its investigation against parties unknown. Only after the search of the offices had taken place – a few days after the initiation of the preliminary proceedings the investigations against identified individuals and against the company began.[57] The Public Prosecutor's Office argued that the suspicion against the company had previously been insufficient to consider *Audi* to be in a position similar to that of a person charged with a criminal offence because the decision-making structures at *Audi* were unknown.[58]

Secondly, even the initiation of preliminary proceedings or the acceptance of sufficient suspicion offers only limited protection against searches and seizures: The respective prohibitions only apply after all requirements of § 97 StPO are met. All documents created earlier are usually not considered privileged:[59] Documents originating from before may only be protected, if they are considered documents of the defense pursuant to § 148 StPO. In case of a defense counsel-client relationship, comprehensive protection is granted as soon as the mandate is initiated.[60] However, this kind of relationship can be difficult to establish. Not every legal activity in an internal investigation qualifies as a traditional activity for the criminal defense (or its preparation). The defense counsel-client relationship is further limited by criminal law and professional law regulations (III.C.2.). Not least, extensive company-related cases regularly require internal investigations before a criminal charge can be filed.

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57 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 8 et seq., 28.

58 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 11.

59 Renate Wimmer, *in* Wirtschafts- und Steuerstrafrecht, § 152 StPO, marginal no. 15 (Werner Leitner & Henning Rosenau, 2017).

60 Cf. OLG München, Order of November 30, 2004 – 3 Ws 720-722/04 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 300, 301 (2006); Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 29 (Christoph Knauer et al eds., 2014); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einem Beschluss des LG Bonn v. 21.06.2012 (27 Qs 2/12; NZWiSt 2013, 21) - Zum kartellrechtlichen Ermittlungsverfahren,* NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 21, 30 (2013).

Thirdly, a criminal charge may oppose the company's interests. If sensitive information is involved, a premature disclosure to the investigating authorities could increase the danger that information could be leaked to the public. A premature involvement may also be counterproductive if the severity of the alleged of misconduct cannot be assessed yet. Even if cooperation with the authorities is sought, it is often advisable to first establish informal contact, ideally avoiding formal investigation proceedings.[61] However, according to the orders of the Constitutional Court, an informal contact to the authorities does generally not raise sufficient suspicion for the application of the prohibitions of searches and seizures.

2. Group-Wide Mandating?

The Constitutional Court has decided that even if all requirements of § 97 StPO are met, the protection granted by § 97 StPO does not extend to several companies within a group or to subsidiaries. Therefore, a group-wide mandating of law firms could be considered to achieve broader protection. This applies in particular if the internal investigations concern the whole group.

However, there is a risk that this could be considered as representation of conflicting interests, prohibited by § 43 a (4) BRAO (*Bundesrechtsanwaltsordnung* – German Federal Lawyers' Act) or a violation of the attorney-client relationship by serving various parties (§ 356 StGB (*Strafgesetzbuch* – German Criminal Code)), especially if separate criminal proceedings are initiated against the groups' companies involved. Moreover, the problem remains that § 97 StPO is only applicable to the respective investigation proceeding.

Additionally, a counsel must not appear for more than one person accused of the same offense (§ 146 StPO). Although a coordinated defense of different companies is generally permissible,[62] the aforementioned problems regarding § 97 StPO persist. Furthermore, not every activity regarding internal investigations can be qualified as a traditional activity of defense, even if it is possible in general to defend a company.[63]

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61 Jürgen Wessing, *in* Corporate Compliance, 1510 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

62 Matthias Dann, *in* Wirtschaftsstrafrecht, § 146 StPO, marginal no. 54 (Robert Esser & Markus Rübenstahl & Frank Saliger & Michael Tsambikakis, 2017); regarding coordinated defense in general Bertram Schmitt, *in* Strafprozessordnung, § 137, marginal no. 11 (Lutz Meyer-Goßner & Bertram Schmitt, 2018).

63 Jürgen Wessing, *in* Beck'scher Online-Kommentar, § 148, marginal no. 2 (Jürgen-Peter Graf, 29th ed. 2018); Jürgen D. Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation" als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO,* NEUE ZEITSCHRIFT FÜR STRAFRECHT, 383 (2016); Matthias Dann, *in* Wirtschaftsstrafrecht, § 148 StPO, marginal no. 29 (Robert Esser & Markus Rübenstahl & Frank Saliger & Michael Tsambikakis, 2017).

3. Restrained Use of Data?

Another option could be to create or save less seizable data, for example by not recording employee interviews or by avoiding a final report of an internal investigation. In addition, data could be stored outside of Germany.

For example, the avoidance of a final report would make it at least more difficult for investigating authorities to reconstruct the results of an internal investigation. However, this would of course affect the client in the same way. Thus, the absence of a final report probably might not always be appreciated – although the argument of avoiding possible seizure should promote acceptance of this approach, especially since a final report is not essential: results can also be presented orally for example. Against the background that § 97 StPO in general is not applicable with regard to documents outside a lawyer's custody, this is recommendable anyway.[64] A similar practice has been established for a long time in the U.S.: U.S. authorities are only presented with oral summaries of reports and interviews (so-called *readouts* and *oral downloads*).[65] However, this practice requires an examination of the individual case in order to determine whether such verbal reporting fulfills the requirements of corporate responsibilites. For example, a written report is necessary in case of the so-called *Expert Reliance Defence*, although exceptions are possible for good reason.[66]

From a lawyer's point of view, however, it seems unpractical not to record employee interviews or other pieces of information or evaluations of individual facts in an internal investigation. In all likelihood, this would also create a significant tension with regard to the responsibilities of the management's duties.

Following the orders of the Court it was assumed, that employees would be even more likely than before to refuse cooperation regarding employee interviews, since the risk of a seizure of these documents was considered legal.[67] However, it has been predominantly considered that there is no protection against seizures of employee interview minutes with regard to the company's lawyer not defending the respective employee. Therefore, it

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64 On the custody requirement of § 97 StPO cf. Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 19 (Christoph Knauer et al eds., 2014).

65 Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt,* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499, 1502 (2017); with regard to this practice, however, a Florida court has recently ruled that the reading of summaries may be a waiver with regard to the underlying interview protocols and summaries, SEC v. Herrera et al., No. 17-20301 (S. D. Fl. Dec. 5, 2017).

66 This has been a requirement since the *Ision*-Decision of the German Federal Court of Justice, cf. BGH, Order of September 20, 2011 – II ZR 234/09 = CORPORATE COMPLIANCE ZEITSCHRIFT, 76, 78 (2012); Barbara Dauner-Lieb, *in* Gesellschaftsrecht, § 93 marginal no. 32a (Martin Henssler & Lutz Strohn, 3rd ed. 2016).

67 Cf. http://blog.wiwo.de/management/2018/07/11/vier-fragen-anwirtschaftsstrafrechtler-juergen-wessing-interne-ermittlungen-nur-noch-mitdeutschen-kanzleien/ (July 27, 2018).

seems unlikely that the practice of conducting employee interviews will change significantly, especially considering the German labor law obligation for employees to cooperate.[68]

An alternative to the complete renunciation of documentation would be to save information digitally on foreign servers. A digital procedure in investigations is probably the standard anyway. If, in the event of a seizure, there is no voluntary disclosure, a formal request for surrender could not be enforced against persons who are entitled to refuse to testify on professional grounds such as lawyers due to § 95 (2) StPO.[69] Nonetheless, the search and seizure of the lawyer's computers and office servers and the authorities' attempt to decrypt the data would have to be endured.[70]

Consequently, it could prove to be advantageous to mandate an international law firm whose servers are located outside Germany. Alternatively, the commissioning of foreign service providers remains possible. This would require that § 43e (4) BRAO is observed, which regulates the use of abroad services and requires a standard of protection comparable to that in Germany.[71] As an example, data stored by *Jones Day* on a server in Belgium, which had been downloaded by the Public Prosecutor's Office during the search of the premises, could not be used because a request for judicial assistance had not been submitted.[72]

Since the possibility remains to submit international letters rogatory, there is no absolute protection for data saved on foreign servers.[73] However, this risk would be manageable for servers of a law firm that are operated inside a jurisdiction with a comprehensive legal privilege. In addition, this way of access by the Public Prosecutor's Office is likely to be considerably more difficult or at least delayed.

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68 Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt,* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499, 1501, 1503 (2017).

69 Bertram Schmitt, *in* Strafprozessordnung, § 95, marginal no. 6 (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Matthias Jahn, *Die Grenzen der Editionspflicht des § 95 StPO – Ein Beitrag zur Systematik der strafprozessualen Vorschriften über die Beschlagnahme*, *in* Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011, 1357, 1362 et seq. (2011); Niklas Auffermann & Sebastian Vogel, *Wider die Betriebsblindheit – Verhalten bei Durchsuchungen in Arztpraxen und Krankenhäusern*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 387, 309 (2016).

70 The review of data carriers in the context of a search, their seizure and - as far as possible - their decoding is covered by §§ 94, 110 StPO; cf. Bertram Schmitt, *in* Strafprozessordnung, § 94, marginal no. 4, 16a et seq., § 110 marginal no. 2a, 6 (Lutz Meyer-Goßner & Bertram Schmitt, 2018).

71 On the provision Thomas Knierim, *in* Gesamtes Strafrecht aktuell, chapter 4, marginal no. 56 et seq. (Thomas Knierim & Anna Oehmichen & Susanne Beck & Claudius Geisler, 2018); for other EU member states, it can generally be assumed that the level of protection of secret information is the same, BT-Drs. 18/11936, p. 35.

72 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 36.

73 Bertram Schmitt, *in* Strafprozessordnung, § 110, marginal no. 7a (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Wolfgang Bär, *Transnationaler Zugriff auf Computerdaten*, 2, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 53, 54 et seq. (2011).

4. Conclusion

As outlined above, the orders of the Constitutional Court leave only limited protection against seizures for lawyers conducting an internal investigation. The most promising course of action seems to be the avoidance of data accumulation – and if this approach is not realizable, at least the data could be saved on foreign servers.

The situation resulting from the Court's orders is dissatisfying, especially when compared with the U.S. (cf. II.C.), where internal investigations are an essential part of the legal practice and the legal privilege therefore is adjusted accordingly. The Court did not use its opportunity to establish comparable principles with regard to German legal practice, although the relevance of internal investigations in Germany continues to grow. Instead, the Court still considers internal investigations to be alien to German law and questions their qualification as a mandate in a traditional sense. Hence, the Constitutional Court counteracts more recent efforts to create incentives for the disclosure of incriminating evidence and to reward companies for transparency and cooperation (cf. IV.). Not least, it seems that the Court has not adequately considered the fact, that its assessment grants a competitive advantage to those foreign law firms with servers located abroad, to which it has denied fundamental rights.

IV. THE NEED FOR LEGISLATIVE ACTION

The orders of the Court clearly demonstrate the need for unambiguous and balanced legal regulations regarding internal investigations. These regulations have to include a practicable protection for lawyers and law firms against searches and seizures. At the beginning of 2018, the German government announced its intention to regulate internal investigations including searches and seizures. These plans explicitly include the creation of legal incentives for the disclosure of information.[74]

A decision of the German Federal Court of Justice in a decision from May 2017 points into the same direction: According to the decision, the establishment of an efficient compliance management system must be taken into account when imposing a corporate fine. The Court further stated that the company's reaction to an infringement has to be considered as well.[75]

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74 Coalition contract between CDU; CSU and SPD, 19th legislative period, dated March 12, 2018, p. 126, (Jul. 27, 2018), https://www.bundesregierung.de/Content/DE/StatischeSeiten/Breg/koalitionsvertrag-inhaltsverzeichnis.html.

75 BGH, Order of May 9, 2017 – 1 StR 265/16, marginal no. 118 = CORPORATE COMPLIANCE ZEITSCHRIFT, 285, (2017).

The regulation of internal investigations and the creation of incentives are already included in various drafts for a corporate criminal law.[76] For example, the Cologne Draft for an Association Sanctions Act (*Kölner Entwurf für das Verbandssanktionengesetz*), inspired by comparison to U.S. law, contains several proposals for procedural regulations for dealing with the findings of internal investigations. The draft includes a right for lawyers (including in-house lawyers) to refuse testimony on results and progress of internal investigations, and it prohibits the seizure of all records regarding such an investigation.[77]

However, if the right to refuse to give evidence and restrictions on seizure depend on the content of the mandate or on the conduct of the internal investigation, the problem of differentiating between normal legal representation and defense may arise.[78] This was, in fact, one of the main reasons why a differentiation between defense lawyers and other lawyers in a previous version of § 160a StPO was abandoned in an amendment from 2011.[79]

As a logical consequence, the legislator should clarify that § 160a (1) StPO offers comprehensive protection for all types of lawyers against investigative measures by the state. It remains incomprehensible why a lawyer may refuse testimony about a mandate while the exact same information may be seized in written form.[80] The attempted justification by merely referencing the constitutionally required "effectiveness of criminal prosecution" is by all means insufficient. The effectiveness of the criminal prosecution is complemented and contrasted by the constitutional requirement for an effective and orderly administration of justice and the requirement of a fair trial. Both demand a corresponding protection of the *attorney-client privilege*. The Constitutional Court also pointed this out

76 On the various drafts Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E)*, CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018); see also propo-sals by Carsten Momsen & Thomas Grützner, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?*, CORPORATE COMPLIANCE ZEITSCHRIFT, 242 (2017).

77 MARTIN HENSSLER & ELISA HOVEN & MICHAEL KUBICIEL & THOMAS WEIGEND, KÖLNER ENTWURF EINES VERBANDSSANKTIONENGESETZES, 10, 24 et seq. (2017); on the draft see also Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E),* CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018). Also in favor of the inclusion of in-house lawyers in the circle of those entitled to refuse testimony Hendrik Schneider, *Das Unternehmen in der Schildkröten-Formation – Der Schutzbereich des Anwaltsprivilegs im deutschen und US-Strafrecht*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 626, 633 et seq. (2016).

78 LG Mannheim, Order of July 3, 2012 – 24 Qs 1, 2/12 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 713, 716 (2012).

79 BT-Drs. 17/2637 (2010), p. 6.

80 Likewise: Margarete Gräfin v. Galen, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 945 (2011).

in numerous decisions.[81] Since the Court apparently did not want to balance these conflicting interests appropriately, it remains the legislator's responsibility to do so.

The repeated allegation by the Constitutional Court and lower courts of a possible abuse of the legal privilege by lawyers demonstrates an unjustified distrust against the advocacy. The assumption that a comprehensive legal privilege would lead to numerous lawyers being used as "safehouses" for incriminating evidence[82] is absurd and completely disregards the impending professional and criminal consequences of such conduct. This risk is already addressed by § 160a (4) StPO and § 97 (2) sentences 2 and 3 StPO.[83] Another effective measure against such a risk, suggested by the Mannheim Regional Court and implementable through amendment, is that the protection of § 160a (1) sentence 1 could be limited in the case of obvious abuse.[84]

In addition, a legal incentive to cooperate with investigation authorities and disclose relevant information is necessary. This would require that companies would be able to rely on their communication with their lawyers to be treated confidentially. It is now up to the legislator to develop the legal framework enabling an appropriate balance of power between law enforcement authorities and those parties affected. According to recent media reports, the Federal Ministry of Justice is currently working on a draft legislation for a corporate criminal law including regulations for internal investigations and plans to publish its draft in summer 2019.[85] It is hoped that the draft addresses the outlined questions regarding legal privilege and achieves legal certainty for all parties involved.

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81 Fundamentally: BVerfG, Orders of March 30, 2004 – 2 BvR 1520/01, 2 BvR 1521/01, marginal no. 100 = NEUE JURISTISCHE WOCHENSCHRIFT, 1305, 1307 (2004); see also BVerfG, Order of January 12, 2016 – 1 BvL 6/13, marginal no. 83 = NEUE JURISTISCHE WOCHENSCHRIFT, 700, 706 (2016); BVerfG, Order of November 6, 2014 – 2 BvR 2928/10, marginal no. 18; BVerfG, Order of March 18, 2009 – 2 BvR 1036/08, marginal no. 64 = NEUE JURISTISCHE WOCHENSCHRIFT, 2518, 2519 (2009); BVerfG, Order of April 12, 2005 – 2 BvR 1027/02, marginal no. 94 = NEUE JURISTISCHE WOCHENSCHRIFT, 1917, 1919 (2005).

82 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 91.

83 According to those regulations, restrictions on searches and seizures shall not apply if certain facts sub-stantiate the suspicion that a lawyer participated in the criminal offence investigated by the prosecu-tion.

84 LG Mannheim, Order of July 3, 2012 – 24 Qs 1, 2/12 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 713, 716 (2012).

85 Cf. reports by Handelsblatt, (Mar. 7, 2019), https://www.handelsblatt.com/politik/deutschland/sanktionsrecht-wie-katarina-barley-interne-firmenermittlungen-regulieren-moechte/24071464.html?ticket=ST-2075041-WFSQyFwOzyMtwDEEjJyc-ap4; and JUVE, (Mar. 7, 2019), https://www.juve.de/nachrichten/namenundnachrichten/2019/03/neues-unternehmensstrafrecht-zaehes-ringen-um-die-interne-ermittlung.

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THE REFORM OF CRIMINAL ASSET CONFISCATION IN TAIWAN: AN OVERVIEW

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ABSTRACT

In the end of 2015, the legislative yuan of Taiwan reformed the criminal confiscatory system in a significant way. The core idea of the new provision is to abolish the quality of subordinate sentence of criminal confiscation and make it an independent effect different from penalty and rehabilitative measure. The most important reforms are types the confiscation of criminal benefits a balanced measure quasi-unjustified enrichment, adds provisions about confiscating criminal incomes of third-party, and judges can announce confiscation independently, which are based on the spirit of depriving criminal benefits as far as possible. Besides, legislators also proclaimed the retroactive effect of the new provision. Nevertheless, this article will point out that the new provision promotes the modernization of criminal confiscatory system, but in some places violates the constitutional law.

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I. INTRODUCTION

Asset confiscation in criminal proceedings involves the confiscation of proceeds for or from criminal offences from offenders or third parties. It is true that, in addition to punishment, asset confiscation is regarded above all as an effective means of combating economic crime, drug-related crime and organized crime, protecting the legal interests of the general public. However, the levying of assets with the aim of over-coming difficulties of proof in the levying of assets under certain circumstances also represents an intensive encroachment on the property right of the person concerned, which quickly threatens to go beyond the constitutional limits of proportionality. In addition, a complete absorption of assets by the state would threaten the realization of claims for damages by the victims of the crime. However, taking into account the fundamental rights of the person concerned and the interests of victims in the process of asset recovery often leads to complex and difficult to manage legislation on asset recovery, making it difficult to fight crime effectively. Against this background, one of the most difficult tasks for the legislator in each state is to design the instrument of criminal property confiscation in such a way that the effectiveness of the fight against crime as well as property rights of the individual and the interests of the victims are optimally realized.

Asset confiscation was first introduced into law with the entry into force of the Taiwanese Penal Code in 1935. However, its importance for the fight against crime was so neglected that, despite the major changes in the manifestations of crime, the concept and content of the regulations on asset confiscation remained almost unchanged until 2015. Until then, the legislator had mainly used the means of advancing punishability and tightening penalties in order to ensure the protection of society against crime. It was only through a few cases of spectacular economic crimes that the inadequate regulatory structure and the difficulties in applying criminal asset confiscation have attracted attention in literature and practice since 2006. There was agreement that the previous law on criminal asset confiscation was so outdated and incomplete that an immediate re-form of criminal law by the legislator was required.

The reform of the criminal asset confiscation in Taiwan was finally implemented in 2015 and 2016 and consisted of the following three amendments to the law. First, the Criminal Code was extensively amended on 17 December 2015. The main objective of the legislator was to fill the gaps in the asset confiscation of the legislation in force until that point. The rules on confiscation of the instrumentalities, the product of the crime and the profit from the crime have therefore been largely revised. Secondly, the Code of Criminal Procedure was reformed on 27 May 2016. This has extended the powers of seizure to ensure the enforceability of confiscation. In addition, any third parties whose property or other rights are subject to confiscation were granted their own rights in the confiscation procedure. The two new laws entered into force on 1 July 2016. They have already been in use for two years. Thirdly, the extended confiscation of the proceeds from the crime was introduced by the amendment of the Anti-Money Laundering Act on 30 December 2016. This is a legal consequence specifically regulated for money laundering.

A complete representation of all law changes is not possible for space reasons at this place for me. What is more decisive is that the legislator has based the reformed law on a new concept of asset absorption, which had been developed based on German criminal law prior to the asset absorption reform of 2017. Therefore, this introductory contribution is limited to presenting[1] the background (under II.) and the main features of the newly conceived asset confiscation in substantive law (under III.). Finally, I will outline my own evaluation (under IV.).

II. THE INCOMPLETE ASSET CONFISCATION UNDER THE OLD LAW

A. Asset confiscation as secondary penalty

As indicated above, the main objective of the criminal law reform was to fill the gaps in the existing legislation on asset confiscation. It is therefore necessary to first provide an overview of the old legal position of the Criminal Code in this regard to clarify the situation.

In Taiwan, criminal sanctions are divided into three categories: Main penalties, secondary penalties and measures of improvement and security. The additional penalties included the loss of official capacity and the right to stand as a candidate (§ 36 tStGB), the confiscation of the instrumentalities, product and profit of the crime (§ 38 tStGB old version), as well as the confiscation of compensation (§ 40-1 tStGB old version). While the original confiscation applied to all offences, the confiscation of compensation was only applicable to certain offences regulated in the Secondary Criminal Law.

Since confiscation was assigned to the category of *secondary penalty*, the court order for confiscation generally presupposed the existence of a conviction of the offender. In practice, therefore, the principle of the so-called accessoriness of confiscation was developed, which, despite justified criticism from literature, always played a decisive role in the application of the law. Accordingly, the court was not allowed to order an asset confiscation from the accused if he had died after the crime or had eluded criminal proceedings because in these cases a conviction would not have been possible. In addition, the evaluation of confiscation as a secondary penalty consequently led to the fact that, in principle, only objects belonging to one of the offenders could be confiscated.

The independent ordering of confiscation and the confiscation of third parties were only possible if it was exceptionally permitted by law. The legislator made an exception to this generally for illegal objects, e.g. drugs and weapons (cf. § 40 I tStGB old version). On the other hand, there were very few special provisions on the independent ordering of confiscation and third party confiscation for instrumentalities, crime products and crime gains (e.g. § 200 tStGB for counterfeit money).

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1 Detailed information on the reform of the Code of Criminal Procedure: Chih-Jen Hsueh, *Procedural Law of Confiscation, the Right of Accessing to the Case Files in Detention Procedure and Evidential Rules*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAl, Vol. 46 Special Issue, November 2017, pp. 1495-1512.

The fact that the legislator used the confiscation of assets as a means of punishment is not only expressed in the confiscation of the capital gain as a kind of secondary penalty. It can be recognized even more clearly in the fact that the court may impose the fine up to the height of the attained profit according to § 58 tStGB. In addition, the level of the offender's criminal gain is highlighted in[2] some secondary penal laws as a punishment-increasing characteristic. The perpetrator of certain offences is therefore punished with a very high fine in addition to imprisonment. The rules on confiscation of the proceeds of the crime continued to apply in such cases. It is obvious that the[3] accused's criminal gain was thus un-justifiably and twice revoked by the state.

B. The gaps in the absorption of assets using the example of two spectacular cases

The fact that the confiscation of the capital gain was classified as a secondary penalty and could therefore only be ordered against the convicted offender resulted in gaps in the confiscation of assets. Surprisingly, however, these gaps were only noticed by criminal lawyers, practitioners and the public a few years ago. Among other things, two spectacular cases played a role, which should not go unmentioned here.

The first is the case of the *La Fayette class frigate*. In this case the naval officer Li-Heng KUO and the arms broker Andrew WANG had received the kick back of approx. 34 million US dollars from the French company Thomson in 1993 on the occasion of the procurement of French frigates of the La Fayette class by the state. Years later KUO had been convicted of corruption. However, WANG could not be convicted, first because of his flight abroad and later because of his death. For this reason, the kickback that had been paid into the accounts of WANG and his family at a Swiss bank could not be confiscated.

The second case, which is considered the incentive for the reform of the Criminal Code at the end of 2015, is the *oil scandal of the company Tatung* from 2013, in which the company had produced and marketed "extra virgin olive oil" under the leadership of the managing director. These "olive oils" were actually mixed with either sunflower seed oil or cottonseed oil. The managing director was therefore sentenced, and fines were also imposed on the company. However, the court had not declared confiscation of the profits that had

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2 A representative example of this is SECTION 171 OF THE SECURITIES TRADING ACT: Whoever commits one of the listed crimes, e.g. insider trading and market manipulation, can be sentenced to 3 to 10 years imprisonment and a fine of 10 to 200 million NT dollars (para. 1). In addition, the fine may be imposed up to the amount corresponding to the value of the capital gain; if, in addition, the stability of the capital market was jeopardized by the offence, the fine must be increased by half again (para. 6). If the value of the capital gain is more than 100 million NT dollars, the penalty shall be a prison sentence of at least 7 years and a fine of 25 to 500 million NT dollars (para. 2).

3 Following the introduction of the new law on asset absorption, the fine should no longer be assigned the function of asset absorption. Legal policy considerations in this regard: Chih-Jen Hsueh, *Discussions on Reform of Fine Punishment in Taiwan*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAL, 47(2), June 2018, pp. 761-838.

demonstrably accrued to the company. The court put forward two arguments in support of its action: First, the company is not a party to the offence within the meaning of the StGB because it did not commit the offence but is punished only for the offence committed by its managing director. On the other hand, the asset confiscation would affect[4] the numerous victims in the realization of their compensation claims against the company.

The two cases make very clear the gaps in the regulations at that time regarding the confiscation of assets. In the case of the *frigate of the La Fayette class*, the crime gains had not been confiscated solely because the accused could not be convicted due to his death and the independent order to confiscate the crime gains was impossible due to the lack of exceptions. In the case of the *oil scandal*, the profits remained with the company mainly because it was regarded as a third party not involved in the crime and there was no possibility of the profits being confiscated from third parties. The gaps in the absorption of assets under the old law thus resulted from the fact that the StGB lacked the possibility of an in-dependent ordering of confiscation and third party confiscation for the capital gains. Why were they missing? The reason for this was the basic decision of the legislator to assign confiscation to *secondary penalties*.

III. PRINCIPLES OF THE NEW CONFISCATION RIGHT OF THE STGB

The classification of confiscation as a secondary penalty and the resulting gaps in the confiscation of assets under the old law have prompted the legislature to thoroughly reform the entirety of confiscation laws of the StGB. In the reform of the StGB, the legislator started from the idea that crimes must not be worthwhile so that crime can be com-bated effectively. The purpose of confiscating the proceeds of the crime is not to punish the offender, but to restore the lawful property order disturbed by an unlawful act. In this respect, the confiscation of the proceeds of the crime is by its very nature not a punishment, but a quasi-conditional compensatory measure, outlining the basic idea of the legislator. Following the course of the legislative process, it cannot be denied that this idea has been adopted from German criminal law by some renowned criminal lawyers, although the differences between the two legal systems are obvious.

This basic idea was implemented in several steps in the new StGB. As a first step, the legislator has summarized all forms of confiscation in a separate section "Confiscation". Confiscation is thus excluded from the category of secondary punishment and qualified as a so-called "*legal consequence of its own kind*", which is neither part of the punishment nor part of the measures of rectification and safeguarding. Such a "*re-labelling*" by the new law does not only mean the renunciation of the accessoriness of confiscation to convict the accused. According to pre-vailing opinion, it strongly indicates the will of the legislator that confiscation of any form does not exhibit a punitive character anymore.

4 Decision of the Changhwa District Court, 103 Zu-Shang-Zhi No. 2.

Since this deprives confiscation of its punitive character, the next logical step was to introduce *third-party confiscation*. According to § 38 III tStGB n. F., the court may order the confiscation of the means or products belonging to a third party if the third party has received them without justifiable reasons from or acquired them from a party involved in the offence. Pursuant to § 38 a II tStGB n. F. (new version of the German tStGB), the gains accruing to a third party are subject to confiscation, but only under the following conditions: the third party has acquired them in the knowledge that the gains result from an unlawful act; it has acquired them free of charge or in return for a disproportionately low consideration; it has acquired them through an unlawful act which the person involved in the act has committed for it.

The fact that confiscation is no longer classified as a secondary penalty has the further consequence that the possibility of *ordering confiscation independently* has been extended in such a way that its application is no longer limited to the offence selected. Pursuant to § 40 III tStGB n. F., the court may order the confiscation of instrumentalities, products of the crime and profits from the crime even if the person involved in the crime cannot be prosecuted or sentenced for factual or legal reasons.

The legislator has also reformulated the conditions for the confiscation of the capital gain. For the confiscation of the capital gain, an *unlawful* commission of an offence is now sufficient (§ 38 a IV tStGB n. F.). The extent of the confiscation is explicitly determined by the *gross principle* according to the explanatory memorandum. If the confiscation of the original capital gain is either wholly or partly impossible or inappropriate, the *compensation* is to be confiscated (§ 38 a III tStGB n. F.). In order to overcome the difficulties in determining the scope and value of the benefit of the offence, the court is granted the power to make an *estimate* (§ 38 b I tStGB n. F.). A *hardness regulation* was also introduced. Accordingly, confiscation may be waived in whole or in part if it represents an unreasonable hardship for the person concerned or jeopardizes his or her livelihood, or if it appears insignificant under criminal law or if the value of the capital gain is very low (§ 38 b II tStGB n. F.). The legislator thus wishes to implement the principle of proportionality in confiscation and promote process economy[5].

It is noteworthy that the legislator has also taken into account and resolved the conflict between the confiscation of the proceeds from the crime and the victim's claim to compensation. He assumes that the victim's compensation claim takes precedence over confiscation. A kind of *compensation model* was chosen to resolve this conflict: The court must first refrain from confiscation to the extent that the victim has actually been compensated by the person involved in the offence or a third party (§ 38 a V tStGB n. F.). However, the legal existence of the victim's claim as such does not prevent confiscation. In this case, the victim of the crime can turn to the public prosecutor's office within one year of the judgment coming into legal effect in order to be compensated from the confiscated property (§ 473 I tStPO n. F.).

5 For further criticism see Chih-Jen Hsueh, *Review on the Hardness Regulation in the Criminal Law of Confiscation*, THE TAIWAN LAW REVIEW, No. 252, May 2016, pp. 63-83.

Finally, it remains to be shown what the final consequence of the "re-labelling" of confiscation is. Because according to § 2 II tStGB n. F. is to be decided over the confiscation after the law, which applies at the time of the decision. No ifs or buts! The prohibition of retroactive effect under criminal law shall be suspended in this respect.

Art. 307 of the German EGStGB is used as comparative legal evidence for this purpose, which can, however, be criticized as obviously false[6]. The legislator argues in the explanatory memorandum that confiscation is not a punishment, but a legal consequence of its own kind. Consequently, the absolute prohibition of retroactivity under criminal law does not apply to confiscation. In addition, it argues that the benefit of the offence does not fall within the scope of protection of the property guarantee. In any case, the public interest in fighting crime by skimming off property outweighs the right of the person concerned to his or her property, which he or she has acquired through an unlawful act. Nor is the principle of the protection of legitimate expectations infringed in that regard. Ultimately, the encroachment on the property of the person affected by the retroactive effect of the law was also appropriate, because the application of the hardship provision in individual cases could lead to a waiver or mitigation of confiscation.

This is the overview of the new collection right of the reformed tStGB. The instrument of asset absorption has been considerably ex-tended in terms of content, personnel and time. However, the legislator did not want to leave the matter at that. Following the entry into force of the new tStGB, it has ensured or at least planned to further facilitate or expand the confiscation of assets.

Initially, the reform of the Anti-Money Laundering Act introduced *extended confiscation of the proceeds of crime*. Where money laundering has been committed in a gang or habitual manner, the court shall order the confiscation of the offender's property if circumstances indicate that such property has been obtained for or from unlawful acts. Admittedly, the wording of the provision requires the court to be convinced that the objects originate from criminal offences. However, the explanatory memorandum to the provision states that it is sufficient for the extended confiscation if the court considers it much more likely that the objects originate from criminal offences than from another activity. Reference is made explicitly to Directive 2014/42/EU[7].

Furthermore, in March 2017, the Ministry of Justice proposed in a government draft amendment to the Criminal Code the independent ordering of confiscation in cases where it is established that there are still objects to be confiscated after the judgment has

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6 Chih-Jen Hsueh, *The Modernization of Criminal Confiscatory System: The LegislativeIssues about Substantive Law of Confiscation in 2015*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAL, 47(3), September 2018, p. 1101-1103; Chih-Wei Chang, *Constitutional Issues Related to the Retroactive Effect of Confiscation of Proceeds in the Criminal Law*, THE LAW MONTHLY, 68(6), June 2017, p. 122-123.

7 Analysis and criticism Chih-Jen Hsueh, in: *On the Problem of Confiscation of Money Laundering*, Verbrechen, Finanzierung und Geldwäsche: Wie kann Kriminalität effektiv verfolgt werden? p. 309 ff. (Jiuan-Yih Wu ed., 1st ed. 2017).

taken legal effect. The public prosecutor's office may subsequently request the competent court to order confiscation in order to make up for the lack of confiscation.

IV. OWN EVALUATION

A. Positive Ratings

This was the presentation of the main features of the new confiscation laws of the StGB in Taiwan. It cannot be denied that the legislator has worked very hard to modernize the long outdated recovery system. The modernization of the collection laws of the tStGB is often praised in the literature and compared to the update of a computer system from DOS to WINDOWS[8].

In my opinion, the StGB's new right of confiscation deserves approval in many places. Above all, the characterization of confiscation as a legal *consequence of its own kind* is to be welcomed to the extent that confiscation no longer has to be linked to the conviction and the imposition of the main penalty by the offender. This takes account of the autonomous function of confiscation in relation to the main penalty. Furthermore, the categorization of confiscation as a legal consequence of its own kind removes the obvious contradiction of the previous law, ac-cording to which the simple confiscation of the unlawful object also counted as an additional penalty for averting danger (confiscation by way of security).

In addition, the legislator rightly structured the confiscation of the capital gain as an *independent institution*. They shall no longer be subject to the same order requirements as the confiscation of the instrument and product. The conditions for the ordering have been redesigned according to the purpose of the asset absorption. In material terms, confiscation extends to all economic benefits, uses and surrogates directly obtained through the act. To the extent that the confiscation of the original object is impossible, the confiscation of the value compensation shall be considered in principle for all offences. From a personnel point of view, the third party involved in the action is also recognized as the addressee of the confiscation under certain conditions. All these amendments to the law remove the inappropriate restrictions on the existing right to confiscate property.
The merit of the new StGB undoubtedly lies in the creation of the substantive legal basis for a more effective asset absorption, although the necessary safeguards are not yet sufficiently available to the law enforcement authorities.

8 Cf. Yu-Hsiung Lin, *Examination and Application of the New Provisions of Criminal Proceeds Confiscation*, THE TAIWAN LAW REVIEW, No. 251, April 2016, p. 6-34.

B. Neglect of the similarity of confiscation penalties

In my opinion, however, the StGB's new right of confiscation also casts a big shadow. Its lack consists above all in the fact that the re-labelling prematurely rejects a punitive character or a similarity in punishment of the individual forms of confiscation as a legal consequence of its own kind. The significance of re-labelling by the legislator is indeed limited to recognizing the ambivalence of the legal nature of confiscation, without necessarily rejecting its punitive nature. The premature rejection of the similarity of penalties in the various forms of confiscation means that the validity of the principles of legality and guilt for confiscation are easily circumvented.

My criticism is based on the following considerations: It can be assumed that the legal nature of a sanction does not depend on its technical legal classification, but on its effect and objective. The legal nature of the individual forms of confiscation may therefore not be concluded directly from the fact that they are now regulated in a separate section. This applies all the more if the legislator does not clarify the exact content of the so-called "legal consequences of its own kind".

On this basis, the order to confiscate the instrument and product of the offence against the offender clearly constitutes a sanction similar to a criminal offence, because it affects the offender in addition to the main penalty as an evil against property. Furthermore, confiscation does not presuppose that the object has the quality of being generally dangerous, nor that there is a risk that it will serve the commission of unlawful acts. A security character of the collection is thus excluded.

It is questionable and controversial whether the confiscation of the proceeds from the crime through the gross principle has a punitive character. In the explanatory memorandum to the Act, the confiscation of the capital gain is described as a quasi-conditional compensatory measure. The ruling doctrine shares this view. In doing so, it refers decisively to the decisions of the German Federal Court of Justice[9] and the Federal Constitutional Court[10] without even dealing with the criticism of German doctrine.[11] I, on the other hand, am of the opinion that the gross principle declares not only the profits but also the "defective" property of the perpetrator to be confiscated. The real reason for the addition of evil by the gross principle lies in the fact that the state has issued a blame for the fact that the accused has invested his own assets in committing the offence. This leaves the area of mere compensation measures. Confiscation ac-quires an evil character that is valid in deed and is therefore transformed into a punitive measure[12].

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9 BGHSt 40, 371; 47, 369.

10 BVerfGE 110, 1.

11 Cf. Albin Eser, in: Schönke/Schröder, Strafgesetzbuch Kommentar, 29th edition, 2014, Vorbem. §§ 73 ff. Rn. 14 ff.

12 Hsueh, (footnote 5), pp. 1065-1069; Hsueh, (footnote 6), pp. 328-336.

From this one may conclude that with the new confiscation laws of the StGB the constitutional borders of the penal legislation are exceeded. Three unconstitutional points can be identified. First, it is contrary to the *principle of guilt* that the confiscation of the proceeds from the offender does not presuppose the culpable commission of an offence. In order to comply with the principle of guilt, a constitutional interpretation must be adopted de lege lata to the effect that, instead of the gross principle, the net principle must be applied to the levying of assets on innocent offenders and third parties[13]. Secondly, it is contrary to the *prohibition of retroactivity* that confiscation is to be decided in accordance with the law in force at the time of the decision. § 2 II tStGB n. F. must in this respect be declared unconstitutional by the Constitutional Court[14]. Thirdly, the ex-tended confiscation of the proceeds of the crime under the Anti-Money Laundering Act violates the principle of the presumption of innocence. According to the applicable law, the court may order the extended confiscation of the proceeds of the crime only after it has satisfied itself that the assets derive froma catalogue crime[15]. From a legal policy point of view, however, further alternative regulatory models must be examined in order to overcome the difficulties of proof in the case of asset absorption[16].

It has therefore been established that, apart from confiscation of the unlawful object, confiscations of the instrumentalities, the product and the proceeds of the crime are still penalties of punitive character. The similarity in punishment of confiscation has thus been prematurely re-jected or grossly neglected by the prevailing view. The question arises as to what drove the legislature to prematurely reject the similarity of con-fiscation to punishment and thus violate constitutional boundaries. This cannot be explained by the fact that asset confiscation has already proved to be an effective means of combating crime. The effectiveness of asset skimming has not yet been confirmed by criminologists. Nor can it be justified solely on the grounds that the outdated recovery system of the StGB urgently needed to be modernized. The modernization of the laws of confiscation could also have taken place within the limits of the con-stitution and could only have been directed towards the future. In my opinion, the real reason for this is that the legislator wanted to close the gaps in the system of asset absorption specifically for the two spectacular cases mentioned above. In order to allow confiscation in the case of the La Fayette frigate, the legislature has not only created the provision for the independent order of

13 Hsueh, (footnote 5), pp. 1085-1086.

14 Hsueh, (footnote 5), pp. 1103-1110.

15 Hsueh, (footnote 6), p. 335-336.

16 Following American law, it is often demanded that the civil procedural "preponderance of evidence" should apply to the existence of the benefit from the offence. Accordingly, confiscation of the capital gain would also be permissible if the connection between the unlawful act and the pecuniary benefit could not undoubtedly be established. From a constitutional point of view, the legality of this facilitation of evidence depends on whether the encroachment on the property thereby made is still proportionate. This question can probably be answered in the affirmative if one advocates the net principle, because the confiscation of the capital gain is, by its legal nature, a quasi-conditional compensatory measure. If the gross principle is advocated, the facilitation of evidence only appears to be constitutional if it applies to those offences which are typically difficult to prove and particularly dangerous to the general public, such as organized crime and drug-related crime.

confiscation of the capital gain, but has also allowed the retroactive effect of the new confiscation provisions. In order to make confiscation possible in the event of an oil scandal, the Ministry of Justice, in its government draft of the Criminal Code, has again at-tempted to introduce the subsequent order of confiscation. The fact that the legislator deliberately passed the law with the intention of solving two spectacular economic crimes is unworthy of a constitutional state.

V. CONCLUDING REMARK

Overall, the legislative reforms have modernized the law on criminal asset confiscation, but in some places they have violated constitutional law. The modernization of asset confiscation has been carried out at the expense of the rule of law by prematurely ignoring the criminal nature of asset confiscation and overestimating its effectiveness in combating white-collar crime. The deficits identified should be eliminated by the legislator as soon as possible. So after the reform, we are already back on the road to reform.

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ON THE PUNISHMENT OF WHITE-COLLAR AND TAX CRIME: AN ECONOMIC ANALYSIS

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ABSTRACT

Economic and tax crimes account for a significant proportion of criminal activity and result in considerable economic damage. In Germany, two of the most prominent offenders in this area in recent years were Thomas Middelhoff and Uli Hoeneß, both of whom served jail sentences. Taking advantage of the widespread media coverage of both cases, the following paper draws on economic theory to compare prison terms with fines. It argues that fines are preferred from an economic perspective and can therefore be considered a useful first-choice punishment in cases involving white-collar and tax crimes. The paper sees itself in this regard as a plea.

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I. IMPORTANCE ATTACHED TO WHITE-COLLAR AND TAX CRIMES

The Sarbanes-Oxley Act of 2002, which was adopted following numerous corporate scandals,[1] marked a turning point in international commercial criminal law. On the basis of the adopted regulations, a "new hardship" was established against white-collar criminals. This is illustrated, for example, by the sentencing of the US financial fraudster Bernard Madoff to 150 years imprisonment. The multitude of criminal law norms is astonishing in this context, as it leads to increased complexity and ignores the recognition that criminal law as a control instrument has not been a resounding success.[2]

The tendency of many courts is to sentence white-collar and tax criminals to imprisonment. Typically, the convicts are middle-aged[3] and their social standing cannot be compared with that of other criminals. The question therefore arises whether the judicial system is sufficiently prepared for this "new hardship", or whether it contains weaknesses that make other levels of punishment appear preferable. In particular, the interpretation of economic criminal law by the courts must be critically examined to the effect that it is developing into a brake on the economy as a result of anti-market economic tendencies.[4]

The former CEO of Arcandor AG Thomas Middelhoff recently published a book about his experiences with the German prison system. In his book, Middelhoff, who served a three-year sentence for infidelity at the Essen Penitentiary, describes particularly negative conditions during his imprisonment:[5] In particular, he discusses an autoimmune disease that he had developed during his prison stay and criticizes the conditions at the Essen Penitentiary as unacceptable, especially the constant suicide monitoring during the first six weeks. This monitoring entailed Middelhoff being woken up every fifteen minutes during the night, forcing him to experience sleep deprivation. This in turn led to the former top manager developing an incurable autoimmune disease that involved weight loss and swollen feet; the treatment, Middelhoff writes in his book, also left much to be desired. Middelhoff even compares the prison conditions he experienced with those found at Guantanamo, the US-run prison for terrorists. His book represents a judgment with the German judiciary. Middelhoff writes about his very small single cell, about questionable sanitary facilities, and about cold, frosty nights in his cell. Since the book, *A115 – Der Sturz*, now ranks at the top of the German book trade's sales lists, it cannot be ruled out—irrespective of the justified criticism of Middelhoff's behavior and the judicially clarified

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1 See e.g. John C. Coates, *The Goals and Promise of the Sarbanes-Oxley Act*, 21(1), JOURNAL OF ECONOMIC PERSPECTIVES, 91-116 (2007).

2 See HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT, § 1 no. 65 (2nd ed.2018).

3 See Hendrik Schneider & Dieter John, *Der Wirtschaftsstraftäter in seinen sozialen Bezügen. Empirische Befunde und Konsequenzen für die Unternehmenspraxis, in* Wirtschaftskriminalität, 161-162 (Britta Bannenberg & Jörg-Martin Jehle, 2010).

4 See Hendrik Schneider, *Wachstumsbremse Wirtschaftsstrafrecht*, NEUE KRIMINALPOLITIK 24, 30–37.

5 See also in the following: THOMAS MIDDELHOFF, A115 – DER STURZ (2017).

question of guilt—that the German prison system has not suffered a loss of reputation. In addition to the health consequences, Middelhoff has also had to file for private insolvency.

The chairman of the Supervisory Board of FC Bayern Munich AG, Uli Hoeneß, also has had to serve a prison sentence; in his case, at Landsberg Prison for tax evasion. German society attaches great importance to economic and tax crimes as illustrated by the following three figures. Fig. 1 shows the development of cases of white-collar crime in Germany between 2006 and 2016:

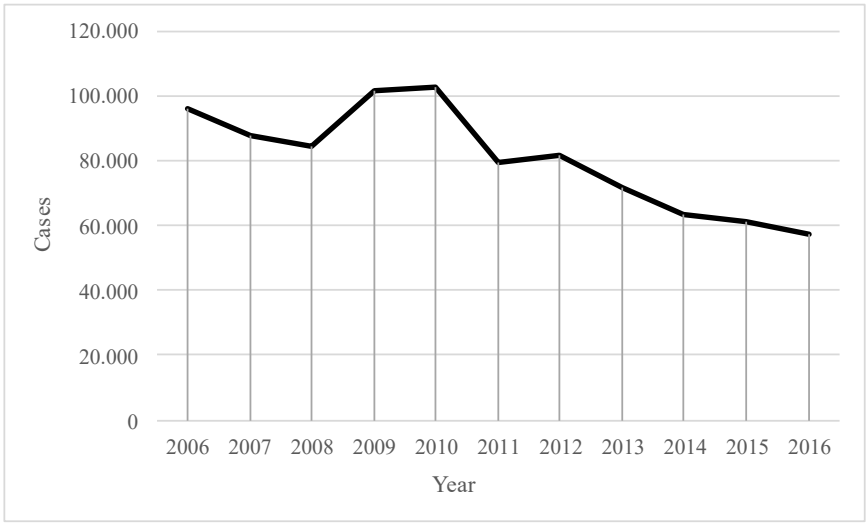

Fig. 1: Cases of white-collar crime in Germany (source: Federal Criminal Police Office of Germany, 2017)

In the area of tax criminal law, cases are also on a comparable scale (fig. 2). This underlines their importance in the context of criminal prosecution:

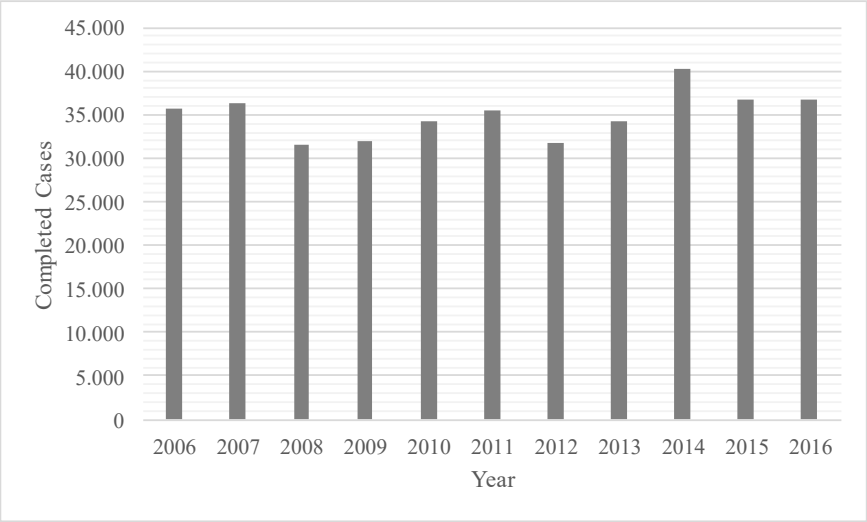

Fig. 2: Number of completed tax investigations in Germany (source: Federal Ministry of Finance of Germany, 2017)[6]

This results in economic losses running into billions (fig. 3), so that an economic analysis of the associated penalties appears justified:

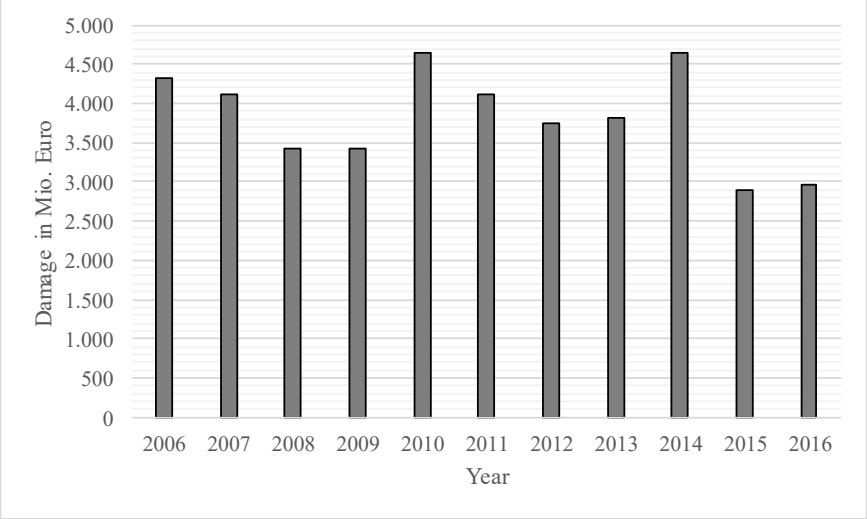

Fig. 3: Damage from white-collar crime in Germany (source: Federal Criminal Police Office 2017)

6 Of course, the number of undetected tax offenses should not be underestimated.

In this context, the question of the costs and benefits of imprisonment for tax and economic offenses arises. An analysis of punitive measures from an economic perspective is an obvious option, as it focuses in particular on costs and benefits.[7] On the basis of such an economic analysis of economic and tax crimes and the criminal law associated with them, it is questionable whether prison sentences for economic and tax offenses can meet the efficiency standard at the center of the economic analysis of law in general and criminal law in particular. From an economic point of view,[8] an optimal penalty (P) is found if the marginal costs of the penalty (MC(P)) equals the marginal utility (MU(P)):

$$MC(P)=MU(P)$$

Therefore, penalty shall be imposed as long as:

$$MU(P)>MC(P)$$

Admittedly, an economic analysis of the law must not be interpreted as representing the ideal path. Under certain circumstances, economic considerations may have to be put aside in favor of legal and political evaluations; however, economic considerations can provide an initial indication of efficiency aspects in order to discuss the impact of legal norms and judicial decisions.[9]

The following paper would therefore like to take the Middelhoff and Hoeneß cases as an opportunity to carry out an analysis of prison sentences for such offenses on the basis of the economic theory of crime and criminal law that can be traced back in particular to Gary S. Becker[10] and to critically assess the economic efficiency of prison sentences for economic and tax offenses. In performing a cost-benefit analysis, the paper focuses on the economics of happiness, which can also be applied to the punishment of criminal individuals.[11]

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7 For a cost-benefit analysis: Jacques Stohler, *Zur Methode und Technik der Cost-Benefit-Analyse*, 20(2), KYKLOS, 218–245(1967).

8 See Bruno S. Frey & Angel Serna, *Recht und Wirtschaft: Bemerkungen zu einem interdisziplinären Forschungsprogramm*, 2(4), STAATSWISSENSCHAFT UND STAATSPRAXIS, 534–547, 537 f. (1991); Roland Kirstein & Dieter Schmidtchen, *Ökonomische Analyse des Rechts*, 4, CSLE DISCUSSION PAPER SERIES (2003).

9 See Florian Follert, *Kriminalität und Strafrecht aus ökonomischer Sicht*, 130(2), ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 420–437, 423 (2018).

10 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217 (1968).

11 It should be noted that only offenses committed by natural persons are considered.

An exact definition of white-collar crime does not exist in the literature.[12] Fraud, breach of trust, accounting crimes, corruption, and bribery are often subsumed under the label of white-collar crime. In this contribution, economic and tax crimes are to be understood simply as illegal behavior that serves the goal of improving one's own financial position. This enrichment takes place at the expense of private entities (mostly enterprises) as well as at the expense of the state and thus indirectly also at the expense of the general public.[13]

II. THE ECONOMICS OF WHITE-COLLAR AND TAX CRIME

Why do individuals evade taxes or commit white-collar crimes? The economic theory of crime provides an analytical framework for explaining illegal actions and is by no means limited to white-collar crime.[14] The economics of crime, which Becker (1968) decisively determined, interprets a criminal act as the result of a rational weighing process. Criminal action is therefore not the result of a particular personality, but rather should be interpreted as rational behavior.[15] Becker assumes that after weighing the (expected) costs and benefits, people rationally decide for or against taking criminal action:

> "Some persons become 'criminals' . . . not because their basic motivation differs from that of other persons, but because their benefits and costs differ."[16]

This idea is based on the homo oeconomicus model[17] according to which an individual commits an action when the expected benefit exceeds the predicted costs, including opportunity costs.[18] The economic theory of crime assumes a negative price elasticity of the demand for crime, which means demand decreases when crimes become more expensive.[19] If the economic theory of crime can be applied to every category of crime, it is not far off to apply it to economic and tax crimes as well. The utility of such a crime can be defined

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12 See also in the following, Karl-Dieter Bussmann, *Kriminalitätsprävention durch Business Ethics*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND UNTERNEHMENSETHIK, 35–50 (2004).

13 However, there are also approaches that consider a minimum level of corruption through the "lubricant money in the sense of bureaucratic landscape management" (Eike Emrich & Christian Pierdzioch, *Theoretische Rahmung. in:* Falsches Spiel Im Sport, 15–44, 41 (Eike Emrich, Christian Pierdzioch & Werner Pitsch, 2015) as a decision accelerator. See for example: Nathaniel H. Leff, *Economic Developments Through Bureaucratic Corruption*, 8(3), AMERICAN BEHAVIORAL SCIENTIST, 8–14, 11 (1964), who speaks of "hedge against bad policy."

14 See Bruno S. Frey & Karl-Dieter Opp, *Anomie, Nutzen und Kosten: Eine Konfrontation der Anomietheorie mit ökonomischen Hypothesen*, 30, SOZIALE WELT, 275–294, 281 (1979).

15 See Bruno S. Frey & Karl-Dieter Opp, *Nutzen und Kosten: Eine Konfrontation der Anomietheorie mit ökonomischen Hypothesen*, 30, SOZIALE WELT, 275–294, 282 (1979).

16 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2), JOURNAL OF POLITICAL ECONOMY, 176 (1968).

17 See GEBHARD KIRCHGÄSSNER, HOMO OECONOMICUS (4th ed., 2013).

18 Of course, pure acts of affect are not considered within the framework of the model.

19 See Bruno S. Frey & Karl-Dieter Opp, *Nutzen und Kosten: Eine Konfrontation der Anomietheorie mit ökonomischen Hypothesen*, 30, SOZIALE WELT, 275–294, 282 f. (1979).

as the value gained from the crime, less the product of the expected penalty and the likelihood of being sentenced:

$$U(x)=E-p*P$$

With:
E = enrichment
p = probability of discovery
P = penalty

The higher the expected costs (p*P) of an economic crime, the more likely a potential offender will decide against the act.[20] Legislation, prosecution, and justice thus provide various parameters to influence the decision calculation of a potential economic offender.[21] In particular, the nature of the penalty (P), the probability of detection, the probability of conviction (p), and the ethical-moral values within a society influence the calculation of the potential economic criminal in such a way that the (expected) costs of the action exceed the (expected) benefit, and the individual decides on legal activity because criminal action is too expensive. Special importance is attached to the probability of detection, which Pitsch, Frenger, and Emrich show using the example of doping.[22] Accordingly, the probability of detection is the decisive component and has a greater influence on the decision of the potential offender than the level of penalty. Moral or moral ideas can also be easily integrated into the basic model of homo oeconomicus.[23]

Becker's findings were transferred to the area of tax evasion by Allingham and Sandmo.[24] According to this model, the value of tax evasion results from the higher disposable income, since in this case the tax liability is not paid. Disposable income is reduced by penalties combined with the likelihood of being discovered and convicted.

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20 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 176 (1968); Bruno S. Frey, *Plädoyer für eine positive Ökonomik, in* Perspektiven der Wirtschaftspolitik: Festschrift zum 65. Geburtstag von Prof. Dr. René L. Frey, 759–766, 761 (Christoph A. Schaltegger and Stefan C. Schaltegger,2004).

21 See Florian Follert, *Kriminalität und Strafrecht aus ökonomischer Sicht*, 130(2), ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 420–437, 433–436 (2018).

22 See Werner Pitsch, Monika Frenger, & Eike Emrich, *The impact of anti-doping legislation in Europe—outlines for the development of model-based hypotheses, in* Sport and Doping. The Analysis of an Antagonistic Symbiosis, 71–100 (Eike Emrich and Werner Pitsch, 2011).

23 See Dieter Schmidtchen, *Homo oeconomicus und das Recht*, CSLE DISCUSSION PAPER 2000–03, 6 (2000).

24 See Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 (3-4)JOURNAL OF PUBLIC ECONOMICS, 232–238 (1972).

This model, based on deterrence and negative incentives, has been criticized by some authors.[25] Critics consider it problematic that the economic theory of crime in general and tax evasion in particular puts the focus on the cost side of the decision calculation and therefore increasingly sees itself as a *negative* economy. As an alternative,[26] the concept of tax morality was developed. It assumes the deterrent effect of the expected penalty has only a minor influence on the willingness to pay taxes[27] and that the decision to pay or avoid taxes is determined by the relationship between citizens and the state[28] as represented by politicians.[29] It can be seen that the willingness to pay taxes is influenced to a considerable extent by the tax compliance of society as a whole.[30] This is why Frey's analysis,[31] which is often carried out from the point of view of deterrence, should give way to a *positive* economy. According to this view, potential criminals should be given positive incentives that motivate them to become legally active. In criminological literature, the deterrent effect is also by no means undisputed. Entorf,[32] Levitt,[33] and Entorf and Spengler[34] confirm the deterrence hypothesis, while Myers,[35] Blumstein and Wallman,[36] and

25 See, e.g., Michael J. Graetz & Louis L., The Economic of Tax Compliance: Fact and Fantasy, 38(3), NATIONAL TAX JOURNAL, 355–363 (1985); James Alm, Gary H. McClelland & William D. Schulze, Why do people pay taxes?, 48(1), JOURNAL OF PUBLIC ECONOMICS 48, 21–38 (1992).

26 See Bruno S. Frey, *Plädoyer für eine positive Ökonomik, in* Perspektiven der Wirtschaftspolitik: Festschrift zum 65. Geburtstag von Prof. Dr. René L. Frey, 759–766, 761 f. (Christoph A. Schaltegger and Stefan C. Schaltegger, 2004).

27 See the studies by Lars P. Feld & Bruno S. Frey, Trust breeds trust: How taxpayers are treated, 3, ECONOMICS OF GOVERNANCE, 87–99(2002); Bruno S. Frey & Benno Torgler, *Tax morale and conditional cooperation*, 35(1), JOURNAL OF COMPARATIVE ECONOMICS, 136–159 (2007).

28 See Florian Follert's contribution to this, Florian Follert, *Die Bürger-Politiker-Beziehung im Lichte der Neuen Politischen Ökonomie: Ein Diskussionsbeitrag*, 11, DER MODERNE STAAT – ZEITSCHRIFT FÜR PUBLIC POLICY, RECHT UND MANAGEMENT, 233–255 (2018).

29 See Bruno S. Frey, *Plädoyer für eine positive Ökonomik, in* Perspektiven der Wirtschaftspolitik: Festschrift zum 65. Geburtstag von Prof. Dr. René L. Frey, 759–766, 762 f. (Christoph A. Schaltegger and Stefan C. Schaltegger, 2004).

30 See Bruno S. Frey & Benno Torgler, *Tax morale and conditional cooperation*, 35(1), JOURNAL OF COMPARATIVE ECONOMICS, 136–159 (2007).

31 See Bruno S. Frey, *Plädoyer für eine positive Ökonomik, in* Perspektiven der Wirtschaftspolitik: Festschrift zum 65. Geburtstag von Prof. Dr. René L. Frey, 759–766 (Christoph A. Schaltegger and Stefan C. Schaltegger, 2004).

32 See Horst Entorf, *Kriminalität und Ökonomie: Übersicht und neue Evidenz*, 116(3), ZEITSCHRIFT FÜR WIRTSCHAFTS- UND SOZIALWISSENSCHAFTEN, 417–450 (1996).

33 See Steven D. Levitt, *Why do increased arrest rates appear to reduce crime: Deterrence, incapacitation, or measurement error?*, 36(3), ECONOMIC INQUIRY, 353–372 (1998).

34 See Horst Entorf & Hannes Spengler, *Socioeconomic and demographic factors of crime in Germany*, 20(1), INTER-NATIONAL REVIEW OF LAW AND ECONOMICS, 75–106 (2000).

35 See Samuel L. Myers, *Estimating the economic model of crime: Employment versus punishment effects*, 98(1), QUARTERLY JOURNAL OF ECONOMICS, 157–166 (1983).

36 See ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA (2000).

Cherry and List,[37] for example, have no deterrent effects.[38]

In the following, we assume a deterrent effect in the context of modeling. However, the focus of this analysis is not on an a priori assessment of the decision calculation of a potential offender. Rather, it asks the question: What are the implications of economics when the state and the offender meet in court? If an individual violates the legal norms of a society, it endangers the stability of the system[39] from which punishment should follow in order to stabilize the norm and in the sense of the atoning function of punishment. However, it is questionable which type of penalty should be applied in the specific case. The form of preferred sanction must be determined by carefully weighing the benefits and costs of enforcement.

III. COSTS AND BENEFITS OF PRISON SENTENCES

In general, there are various ways to punish an economic criminal for his or her actions. Money, probation, and prison sentences or combinations thereof are possible.[40] As of March 31, 2017, more than 7,000 people were imprisoned for economic crimes in Germany.[41] The penalty preferred from an economic perspective can be assessed by weighing costs and benefits.[42] The analysis of costs and benefits can be carried out both at the individual level of the offender and at the macroeconomic level. It is obvious that a prison sentence causes costs in the offender's calculation. Frey and Ulbrich[43] transfer the results of empirical happiness research for the first time to the field of jurisprudence, but focus on civil law—here, in particular, compensation for damages—as well as state organizational law. The aim of this paper is to attempt to extend the findings of the economics of happiness to criminal law and to discuss how this can influence the view of the costs and benefits of a particular type of penalty.

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37 See Todd Cherry & John List, *Aggregation bias in the economic model of crime*, 75(1), ECONOMICS LETTERS, 81–86 (2002).

38 On the validity of the deterrence hypothesis, see also Jürgen Antony and Horst Entorf's Meta-Study, On the validity of deterrence in the sense of the economic theory of crime, 116, DARMSTADT DISCUSSION PAPERS IN ECONOMICS, 2002.

39 See Toby Jackson, *Is Punishment Necessary?*, 55(3), THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE, 332–337 (1964).

40 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 193 (1968); Florian Follert, *Kriminalität und Strafrecht aus ökonomischer Sicht*, 130(2), ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 420–437, 434 (2018).

41 Of which 5,972 prisoners for fraud and breach of trust, 1,001 prisoners for forgery of documents, and 279 individual for other offenses against property (source: Federal Statistical Office 2017).

42 See Horst Entorf & Susanne Meyer, *Costs and Benefits of the Prison System: Fundamentals in the Framework of a Rational Criminal Policy*, 129, DARMSTADT DISCUSSION PAPERS IN ECONOMICS (2004).

43 See Bruno S. Frey & Christian Ulbrich, *Zur Bedeutung der empirischen Lebenszufriedenheitsforschung für die Rechtswissenschaft*, 218(1), ARCHIV FUER DIE CIVILISTISCHE PRAXIS, 32–66 (2018).

Modern economic happiness research has shown that the freedom of an individual as well as the possibility of flexible action and autonomous development determine the personal level of satisfaction to a high degree.[44] If an individual is detained for a longer period of time, he or she must renounce this freedom, which naturally reduces the individual's level of satisfaction. Furthermore, it is obvious that a prison sentence would break up social relationships, which would also have a high influence on subjective life satisfaction. This effect can be described as the cost of imprisonment to the offender. These costs are variable as they increase with the duration of detention. In addition, the offender must give up part of his or her income while serving the prison sentence because the offender is restricted in his or her choice of profession, which in turn limits the individual's earning potential. These opportunity costs must also be taken into account in the offender's cost function and can be described as lost wages. Furthermore, a criminal who serves a prison sentence incurs reputation costs, for example in the context of future business initiations (known as a "stigma effect").[45]

It becomes clear that the cost function to a large extent consists of variable costs, since they do not arise once, but rather depend on the duration of the prison stay. It can be argued, however, that the predominance of costs at the level of the offender also corresponds to the sense and purpose of a prison sentence. That is not to be contradicted. The problem with prison sentences, however, is that they also entail costs at the level of society.[46] However, a prison sentence can only be regarded as meaningful from a macroeconomic point of view as long as the social benefit exceeds the costs incurred by society.

The following table shows the economic burden in terms of current prison expenditure for a prisoner in 2011:

Federal state	Prison charges per prisoner (in EUR)
Hamburg	59,800
Brandenburg	52,500
Rhineland-Palatinate	48,100
Berlin	47,000
Schleswig-Holstein	45,700
Mecklenburg–Western Pomerania	45,000

44 See Bruno S. Frey & Claudia Frey Marti, *Glück – Die Sicht der Ökonomie*, 90(7), WIRTSCHAFTSDIENST, 461 (2010).

45 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2014), 269. This effect can even affect the offender's family, especially the children, cf. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37(1), CRIME AND JUSTICE, 133–206 (2008). This effect can be described in terms of reputation costs. The loss of reputation is assumed here to be a fixed cost, since it can be argued that the social stigma of imprisonment is attached to the prisoner regardless of the length of the detention. On the other hand, it could also be argued that a short prison sentence is more likely to be concealed from the public than several years' imprisonment.

46 See Susanne Meyer, *Die Tageshaftkosten der deutschen Strafvollzugsanstalte: Ein Überblick*, 121, DARMSTADT DISCUSSION PAPERS IN ECONOMICS (2003).

Saxony-Anhalt	44,200
Lower Saxony	43,400
Saarland	41,800
Hesse	41,400
North Rhine–Westphalia	40,700
Thuringia	38,500
Bremen	36,000
Baden-Württemberg	33,900
Saxony	31,300
Bavaria	29,600
Average for Germany	39,500

Tab. 1: Prison charges per prisoner, 2011 (source: Federal Statistical Office of Germany, 2015)

The imprisonment of a tax evader costs taxpayers considerable resources over many years, from daily meals to the costs for guards to the costs of resocialization[47] after the prison sentence ends.[48] The accommodation costs are variable costs, since they increase with the output quantity, i.e., the period of liability.[49] Fixed costs are represented by the maintenance of the penitentiary, which are incurred regardless of the period of imprisonment of the individual offender. It is assumed that the costs of resocialization increase with the length of the prison sentence. This is obvious, since an individual who cannot participate in everyday social life for a long period of time will be more difficult to resocialize than an inmate who is only imprisoned for a few weeks. These costs are also largely variable and therefore increase with the duration of detention. In addition, society does not allow the offender to contribute to economic value creation through work. The lost value added contribution is also to be allocated to variable costs, as it is incurred for each day of detention. Although the prisoner will also regularly pursue an activity in the correctional facility, this is often not likely to correspond to the potential of the prisoner. In addition, the state loses tax revenues that would have to be paid with a higher income earned from a professional activity performed outside of prison. This component of the cost function also increases with the length of detention. Due to the structure of the cost function, short durations, if any, would be preferable, as the variable costs lead to an increase in total costs over time.

As already mentioned, from an economic perspective a prison sentence only makes sense if the costs are offset by a benefit that more than compensates for them. The benefits of

47 Although these are probably smaller with a tax or economic criminal than, for example, with a violent criminal.

48 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 193 ff.

49 See Horst Entorf & Susanne Meyer, *Kosten und Nutzen des Strafvollzuges: Grundlagen im Rahmen einer rationalen Kriminalpolitik*, 129, DARMSTADT DISCUSSION PAPERS IN ECONOMICS (2004), Here it must be taken into account that this is a delta view. If fewer criminals were sentenced to prison, c.p. fewer prisons would be needed.

imprisonment for economic and tax offenses can be seen in particular in imprisonment's deterrent effect. Costs at the level of the offender, according to the deterrent hypothesis, increase the price of a crime and thus create an incentive to turn to a legal act. It is conceivable, for example, that the perception of prison sentences and the associated costs of deprivation of liberty in the case of such offenses may have a behavioral effect on potential offenders.[50] This view is aimed at *general prevention* within the framework of the legal-theoretical justification of criminal law.[51] At the level of society as a whole, the benefit of the prison sentence is the gain in confidence (*positive general prevention*) in the legal system and the deterrent effect.

IV. A PLEA FOR FINES

After comparing the costs and benefits of a custodial sentence, this paper will present fines as a more efficient alternative from an economic perspective. Becker (1968) already decidedly worked out why fines should be preferred if possible. However, Becker generally pleads for fines, which could possibly be viewed critically. While the application of fines, for example in the case of murderers, is not intuitively obvious, an economic or tax offense appears to be predestined to punish the offender in monetary terms because there is no immediate physical or psychological danger for an individual.

If the fine is analyzed from an economic point of view, the costs of an economic or tax offense for the offender result from the loss of a share of his or her assets. With regard to the analysis of these costs, empirical happiness research can make a contribution to the (criminal) legal discourse.[52] Psychological research has shown that the individual life satisfaction of a subject can be used as an approximation to the benefit concept.[53] Conversely, if the benefit can be measured by subjective satisfaction, this means that costs can be interpreted as decreasing satisfaction. The economic analysis of happiness has shown that financial resources have an influence on subjective well-being.[54] Poor people are therefore more unhappy than people without money worries, although the increase in wealth above a certain level has less influence on life satisfaction. This finding can theoretically be justified by the fact that individuals with greater financial resources are more likely to

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50 See Horst Entorf & Susanne Meyer, *Kosten und Nutzen des Strafvollzuges: Grundlagen im Rahmen einer rationalen Kriminalpolitik*, 129, DARMSTADT DISCUSSION PAPERS IN ECONOMICS, 4 (2004).

51 See DIETHELM KLESCZEWSKI, STRAFRECHT: ALLGEMEINER TEIL, DAS EXAMENSRELEVANTE GRUNDWISSEN, § 1 no. 20 f. (2017).

52 See the contribution by Bruno S. Frey & Christian Ulbrich, *Zur Bedeutung der empirischen Lebenszufriedenheitsforschung für die Rechtswissenschaft*, 218(1), ARCHIV FUER DIE CIVILISTISCHE PRAXIS, 32–66 (2018).

53 See in particular the overview article by Daniel Kahneman & Alan B. Krueger, *Developments in the measurement of subjective well-being*, 20(1), JOURNAL OF ECONOMIC PERSPECTIVES, 3–24 (2006).

54 See. Bruno S. Frey & Alois Stutzer, *Measuring Preferences by Subjective Well-Being*, 155(4), JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS, 755–778, 765 ff. (1999); Bruno S. Frey & Alois Stutzer, *Ökonomische Analyse des Glücks: Inspirationen und Herausforderungen*, 63(3), DIE UNTERNEHMUNG, 263–282, 269 f (2009).

be able to purchase goods and services that meet their needs than poorer people. If, on the[55] other hand, an individual loses large parts of his or her wealth, it is not unlikely that this will reduce this person's subjective life satisfaction.

In particular, if (significant) parts of the property have to be paid as a penalty, welfare losses will be experienced by the offender that could result in costs similar to the temporary renunciation of freedom, especially for persons who are accustomed to a high standard of living. Modern happiness research has also shown that the subjective level of satisfaction is always subject to a comparison with the social environment.[56] In the field of economic and tax crimes, it is not unlikely that criminals sentenced to heavy fines will lose their connections to their social peer groups after losing (large) portions of their assets. Accordingly, the penalty to be paid initially represents fixed costs for the offender. Similar to the prison sentence, a loss of reputation can occur that influences the social life of the convicted offender. However, it can be assumed that this is lower than in the case of imprisonment, since it is easier to conceal a fine, and the person concerned is not torn out of his or her social environment. If opportunity costs are also considered, the cost function can be extended to include lost interest income or other consumption satisfactions.

The amount of the penalty must be set in relation to the total assets of the offender, which can be regarded as meaningful against the background of the results of empirical happiness research. A nonlinear correlation is therefore assumed, so that the costs increase proportionally more strongly the larger the share of the penalty in the total assets of the offender becomes. It should be borne in mind that in the best case the fine should be calculated in relation to the total assets. A fixed fine that, first, is not based on the chances and the amount of the profit of the criminal act and, second, is not based on the financial circumstances of the offender, is perceived as unfair and inappropriate.[57] The question arises as to the benefits of these costs.

From a macroeconomic perspective, it is easy to see that the welfare of the population increases as a result of fines, as they do not incur any initial costs. Fines are rather transfer payments from the offender to society.[58] To substantiate the significant financial benefits of monetary sanctions, it can be determined that 2012 revenues of €564 million were generated by this type of penalty (Federal Statistical Office of Germany, 2015). If one compares these revenues with the detention costs presented in the previous chapter, it becomes clear once again why a fine appears to be preferable from an economic perspective.

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55 See Bruno S. Frey & Alois Stutzer, *Ökonomische Analyse des Glücks: Inspirationen und Herausforderungen*, 63(3), DIE UNTERNEHMUNG, 263–282, 270 (2009).

56 See Bruno S. Frey & Claudia Frey Marti, *Glück – Die Sicht der Ökonomie*, 90(7), WIRTSCHAFTSDIENST, 458 (2010).

57 See already JEREMY BENTHAM, THEORY OF LEGISLATION, chapter ix. (1931).

58 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 193 - 195 (1968).

Also from an economic perspective, it is incomprehensible why, for example, a tax evader who withholds tax revenues from the state should incur additional costs for the state as a result of a prison sentence.

In addition, this type of punishment can be seen as compensation for the victims, as both the amount of the damage and any additional fines are returned to the injured parties.[59] Becker and Becker[60] plead for the amount of the penalty to be calculated on the basis of the total damage incurred. With regard to the benefit of the fine, it can be stated for both sides that no additional costintensive rehabilitation measures are necessary, since the payment of the fine can be assumed to have a deterrent effect on the offender and society cannot expect any further wishes for retaliation from the compensation payment.[61] Another practical advantage of the fine is that it can be increased almost free of charge, while an increase in the prison sentence entails significant economic costs.[62]

In the sense of *general prevention*, it could now be argued that the costs presented for potential offenders were too low due to the envisaged fine compared with a prison sentence. However, the deterrent effect of the penalty could be considered as effective for a fine as for a prison sentence in the case of economic or fiscal crime. Especially for individuals who seem to attach a high value to financial prosperity, a fine that deprives them of much of their financial resources could be an effective deterrent if the fine leads to a drop in the level of satisfaction. For the courts that determine the level of penalties, this leads to the conclusion that a fine is most effective when it is sufficiently high in relation to the offender's financial situation.

Critics of a fine could also argue that a criminal could buy his or her way out of debt against payment of a certain price (the fine). However, this argument applies in the same way to all other types of penalties, since the guilt is deemed to have been paid after the respective penalty has been served. The only difference is the unit of measurement of the price, which differs between the types of penalties.[63] Another argument in favor of fines, particularly for tax offenses, is that they are proportionate to other offenses. The use of multiple years' imprisonment for tax evasion could lead to a reduction in the sense of

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59 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 194 (1968).

60 See GARY S. BECKER & GUITY NASHAT BECKER, THE ECONOMICS OF LIFE. FROM BASEBALL TO AFFIRMATIVE ACTION TO IMMIGRATION, HOW REAL-WORLD ISSUES AFFECT OUR EVERYDAY LIFE, 139 – 141 (1997).

61 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 194 (1968).

62 See Richard A. Posner, A*n Economic Theory of the Criminal Law*, 85, COLUMBIA LAW REVIEW, 1193–1231, 1206–1207(1985).

63 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 195 (1968).

justice within the population. Especially in comparison with violent crimes, the impression could arise that the courts weight monetary aspects similarly or even more strongly than physical offenses. Against this background, it is quite conceivable that a long prison sentence for a tax offense in relation to a suspended sentence for a violent crime is perceived as a draconian sentence. From the point of view of citizens, it could therefore be perceived as fairer if an offense aimed at money were also punishable by a fine, freely in accordance with the biblical legal principle of "an eye for an eye, a tooth for a tooth," which aims to exclude disproportionate penalties.[64]

Those in favor of imprisonment will argue that imprisoning one offender will protect society from further crimes. In principle, the first question that arises here is whether detentions result in a decrease in the number of criminal offenses. Kury and Scherr believe that the majority of prisoners could be released without compromising the safety of the population.[65] The example of Finland clearly shows that "less imprisonment does not necessarily lead to more crime."[66] This certainly does not apply to dangerous, violent, and sex offenders[67] or terrorists,[68] but they do not make up the majority of prison inmates.

If, however, one wishes to stick to this argument, it can be argued in the light of chapter two that, assuming that a crime is a rational act, no automatism can be assumed with regard to further crimes. A potential offender always newly assesses the costs and benefits of a future decision, so that it is hardly possible to draw conclusions about the future from the past. The state has enough adjustment tools that can influence the calculation of a potential economic or tax criminal for the future.[69] If, for example, the investigative behavior of the tax investigator changes, this has a direct effect on the probability of detection, so that further tax offenses can possibly be prevented. While violent offenders and sex offenders in particular often have personality disorders[70] that could be cited as a counter-argument to the rational choice theory, it is much more probable that a potential offender consciously weighs costs and benefits in economic and tax crimes so that the action can be influenced by government action and there is no inevitable potential for repetition. On the other hand, a prison sentence only protects society for a certain period of time against offenses committed explicitly by the offender. However, if intermediaries are

64 See Dennis Bock, STRAFRECHT ALLGEMEINER TEIL (2018).

65 See Helmut Kury & Albert Scherr, *Kritik des Strafgedankens – abschließende Thesen*, 24(1), SOZIALE PROBLEME, 164–173 (2013).

66 See Helmut Kury & Albert Scherr, *Kritik des Strafgedankens – abschließende Thesen*, 24(1), SOZIALE PROBLEME, 164–173, 168 (2013).

67 See Klaus M. Böhm, *Opferschutz und Strafvollzug: Neue Wege zum Schutz vor gefährlichen Gewalt und Sexualstraftätern*, 40(2), ZEITSCHRIFT FÜR RECHTSPOLITIK, 41–72 (2007).

68 See Christin Armenat & Sebastian Kretzschmann, *Die Ausweitung des Maßregelrechts – Ein probates Mittel zur Verhinderung terroristischer Straftaten?*,, 54(1), RECHT UND POLITIK, 22–35 (2018).

69 See Florian Follert, *Kriminalität und Strafrecht aus ökonomischer Sicht*, 130(2), ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 420–437, 433–436 (2018).

70 See Klaus M. Böhm, *Opferschutz und Strafvollzug: Neue Wege zum Schutz vor gefährlichen Gewalt und Sexualstraftätern*, 40(2), ZEITSCHRIFT FÜR RECHTSPOLITIK, 41–72, 41 (2007).

commissioned to carry out further tax evasions, they cannot be prevented by a prison stay. It could also be argued that contact with criminals in a prison could tend to increase the prevalence of other crimes. If one assumes—contrary to the approach advocated in economic theory—that economic and tax crimes are not rational behavior, then one will have to admit that the probability of recidivism of an economic or tax criminal is most likely to be assessed differently than, for example, a violent criminal who is based on a personality disorder, which is why for this reason alone one would have to plead against imprisonment.

However, with regard to the implications of this analysis, it must be mentioned that the fine can in practice cause implementation problems. For example, it is conceivable that an offender may not be able to pay an ordered fine due to pennilessness or the early transfer of assets to related persons. However, this does not alter the fact that the fine—at least from an ex post perspective—is preferable to imprisonment from an economic point of view. In addition, it would be conceivable that the offender would repay his or her liability to the state by paying the attachable portion of his or her future income over a longer period of time.[71] Here the legislator would have to create appropriate regulations, which do not make it possible for an economic or tax criminal to get rid of the fine all too easily. If a fine is not an option, the judiciary could resort to imprisonment as a last resort.

IIV. CONCLUDING REMARKS

Economic and tax offenses result in considerable economic damage, which is why the topic is open to economic analysis. Starting with Becker (1968), numerous theoretical and econometric studies look at the decision calculus of a potential economic or tax criminal and work out how the (rational) decision can be influenced by the state and society, while the present article takes an ex post view. It analyzed which type of punishment proves to be efficient from an economic perspective in order to punish an economic or tax criminal. While in judicial practice a prison sentence is often pronounced—the most prominent cases in Germany in the recent past were Middelhoff and Hoeneß—the present article argues that the imprisonment of a criminal in the area of economic and tax crime should be rejected from an economic point of view. A benefit of imprisonment could at best be seen in the deterrent effect, since the renunciation of freedom will result in a lowering of the level of satisfaction and a loss of reputation. If a deterrent effect is generally assumed, this could possibly also be achieved by a fine, as wealthy offenders in particular attach a high value to financial prosperity. The great advantage of a fine can also be seen in the fact that, from a macroeconomic perspective, a transfer payment flows, which results in a benefit, while tax-financed resources flow away within the framework of a prison sentence. While Becker (1968) generally pleads for fines, this article takes a differentiated look at economic and tax crimes, which, in particular, affects material goods, and other acts that impair the welfare of individuals. In particular because there is no need for special physical

71 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) JOURNAL OF POLITICAL ECONOMY, 169–217, 196 f. (1968), already pleaded for instalment payments.

protection of the population against tax and economic criminals—this is certainly not the case with violent criminals—the fine can be applied as a punishment when cost-benefit aspects are considered.

Future research in this area should address the question of what level of penalty for a fine can be considered efficient in an economic sense. It certainly makes sense to start from relative values that are oriented to the individual financial situation of the offender. Within the framework of such considerations, the interlinking of economic happiness research and (criminal law) economic analysis should also be further promoted.

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LEADERSHIP GLOCALITY: THE ALGORITHM TO COMPLIANCE GLOCALIZATION

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ABSTRACT

How do multinationals create a glocal identity of compliance? This article focuses on putting this quest to an end, dissecting multidisciplinary approaches to solve the compliance glocalization problematics. It starts with the saga of the glocalization neologism, followed by the philosophical- and psychodynamics of compliance and its moral foundations in Kantianism, the development of integrity into actual business ethics and the vehemence of cross-cultural awareness and management when doing business internationally. Finally, it establishes the Three Stages Theory and the EMB Guidelines for the glocalization of leadership, as the ordinary solution to compliance glocalization.

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I. INTRODUCTION

As the spread of global brands continues to disrupt digitalization and legal challenges across borders, local becomes compulsory in the multinational enterprises' scenario. What was once controversial to growth emerges as imperative. Alongside growth, local is imperative. Global corporations all over the world are facing the glocalization odyssey as the world economy endures to merge into a single, interconnected market.

This phenomenon has become increasingly salient in a broad variety of academic and practical business endeavors, resulting in considerable amounts of uncharted challenges worldwide in various professional areas. Glocalization has been disrupting compliance industry ruthlessly, leaving professionals in the field, by all means, with a rather remarkable quest: "how to create a glocal identity of compliance?"

Aiming to obviate this matter and to emphasize the cruciality of multidisciplinarity to compliance efficiency, multidisciplinary approaches were taken in order to holistically address the compliance glocalization problematics.

This article first starts with the primary conception of the term glocalization and the role it plays in sociology and economics from a business perspective, followed by the philosophical- and psychodynamics of compliance in traditional philosophy, psychology and metaphysics, giving emphasis to the moral foundations of compliance in Kantianism and the development of integrity into actual business ethics.

Furthermore, it delves into the helm of culture, revealing cross-cultural disparities when doing business internationally, culminating in the development of a three stages theory and guidelines for the glocalization of leadership, as an ordinary solution to compliance glocalization.

II. THE GLOCALIZATION NEOLOGISM

According to The Oxford Dictionary of New Words (1991) cited by Robertson (1995) on his piece "Glocalization: Time-Space and Homogeneity-Heterogeneity"[1], "the term 'glocal' and the process noun 'glocalization' are 'formed by telescoping *global* and *local* to make a blend." Also according to the *Dictionary*, "in business jargon: simultaneously *global* and *local*; taking a global view of the market, but adjusted to local considerations." The neologism glocalization has its background related to the Japanese business thinking back in the early eighties and due to the successful endeavor of Japanese enterprises in glocalizing their businesses – verbal form of organizing "one's business on a global scale

[1] Roland Robertson, *Glocalization: time-space and homogeneity-heterogeneity*, *in*: Theory, Culture & Society: Global modernities 25-44 (M. Featherstone S. Lash & R. Robertson Eds., 1995).

while taking account of local considerations and conditions"[2], western corporations started to adopt their methodology. It was first called *dochakuka*, deriving from the Japanese word *dochaku* 'living in one's land', originally referred to a way of adapting farming techniques to local conditions. In the late eighties, *dochakuka* evolved into business strategies when Japanese economists started writing articles for the Harvard Business Review[3] and became, thereafter, called as *global localization*. The term was soon conjoined to *glocalization*, proving to be "one of the main marketing buzzwords of the beginning of the nineties."[4]

Roland Robertson (1992), sociologist and pioneer of globalization studies, conceptualized glocalization as "the universalization of particularization and the particularization of universalism"[5], originating the term's popularity at a conference on "Globalization and Indigenous Culture" in 1997.

Businesswise, to simplify the complexity of the glocalization terminology, Roland Robertson (1995) states that:

> *The idea of glocalization in its business sense is closely related to what in some contexts is called, in more straightforwardly economic terms, micromarketing: the tailoring and advertising of goods and services on a global or near-global basis to increasingly differentiated local and particular markets.*[6]

In other words, a narrow business approach combined with marketing strategy targeted on a small-scale group of highly-selected consumers. Needless to say, that it represents a crucial element for businesses operating in a competitive, most likely in an economy of scale environment – our mainly postmodernist environment, where growth is imperative and sold in the form of a leading consultancy firm's slogan[7] to multinational corporations (henceforth MNCs) worldwide.
It is a tailored strategy to augment brand awareness, sales and profits *per se*.

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2 Oxford Dictionary of New Words, compiled by Sara Tulloch (1991). Oxford: Oxford University Press.

3 Chanchal Kumar Sharma, *Emerging Dimensions of Decentralisation Debate in the Age of Globalisation,* 1, INDIAN JOURNAL OF FEDERAL STUDIES 47-65 (2009).

4 Roland Robertson, *Glocalization: time-space and homogeneity-heterogeneity*, *in*: Theory, Culture & Society: Global modernities 25-44 (M. Featherstone S. Lash & R. Robertson Eds., 1995).

5 ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992).

6 Roland Robertson, *Glocalization: time-space and homogeneity-heterogeneity*, *in*: Theory, Culture & Society: Global modernities 25-44 (M. Featherstone S. Lash & R. Robertson Eds., 1995).

7 As for instance, the Boston Consulting Group (BCG) that offers organizations worldwide tailored strategies to drive profitable growth and true value-creation.

Businesses, nowadays, are capable of creating a more personalized marketing schemes to each individual in its target pool, as opposed to a large group of its target audience simultaneously, where economic capital operates alongside with social capital[8], forging a valuable mechanism in economic growth. This institutes a core side of our fast-paced digitalized, interconnected and capitalistic manufacturing world, which grows smaller by the minute, as corporations rely extensively on social capital *a fortiori*[9] to drive business worldwide.

I certainly do not want to fall into political system victimhood or the ineffectiveness of its results, neither discourse about actual business and marketing terminology, however, the ideology of capitalism and glocalization are incontestably homogeneous. One does not exist without the other and conjointly, like Robertson (1997) analogously stated when conceptualizing glocalization, there is no universalism without particularism and vice versa.

III. ETHICS BEFORE A GLOBALIZED WORLD: THE PHILOSOPHICAL- AND PSYCHODYNAMICS OF COMPLIANCE

To illustrate the previous idea of the conceptualization of glocalization and furthermore, the glocalization of compliance that will be addressed here in turn, one must exhume into the foundations of morality. Initially here, into moral particularism and moral universalism.

Empiric social science studies have been conducted since Aristotle, forming a concept among philosophers, that moral particularism is vital to interpreting social behaviors of individuals and entire societies.[10] Characterized as the "forefather" of particularism, on his work "Nicomachean Ethics", Aristotle emphasizes that ethical inquiry is mistaken if it aims for "a degree of exactness" too great for its subject matter, and added that moral generalizations can hold only "for the most part"[11]. Furthermore, he also emphasizes that ethics ultimately concerns particular cases, that no theory can fully address them all, and that "judgment depends on perception" (NE, 1109b)[12].

It makes me emphasize, in a more contemporaneous manner, that each and every one of us have our own vision, perception of the world. This perception is ignited from the depths of the society *and culture* that we are raised immersed in. It initially forges our

8 Social capital is defined by the OECD as "networks together with shared norms, values and understandings that facilitate co-operation within or among groups".

9 *A fortiori* meaning on the Oxford Dictionary appears as "used to express a conclusion for which there is stronger evidence than for a previously accepted one." That is; *more than ever*.

10 Guido de Blasio, Diego Scalise & Paolo Sestito, *Universalism vs. Particularism: A Round Trip from Sociology to Economics,* No. 212, BANK OF ITALY OCCASIONAL PAPER (January 24, 2014).

11 ARISTOTLE, THE NICOMACHEAN ETHICS (trans. by David Ross, eds. by Lesley Brown, 1925).

12 ARISTOTLE, THE NICOMACHEAN ETHICS (trans. by David Ross, eds. by Lesley Brown, 1925).

values, conceptions and characters, in conjunction with our ordinary human capital development and level of ideology *critique*.

Ideology, that I will phrase in a rather dramatic and provocative manner as the worth resembling Slavoj Žižek's *critique* of ideology, as a silent and invisible force, embodied in all layers of our society as a whole, taking many socio- and cultural forms, tangibly and intangibly. On his piece "The Pervert's Guide to Ideology" (2012), the Slovenian contemporaneous philosopher and critical theorist analyses John Carpenter's science-fiction pseudo-comedy movie *They Live* (1988) masterpieceness. In the movie, the drifter construction worker John Nada, as Žižek (2012) also ascertain to emphasize "Spanish [also Portuguese] word for nothing"[13] – criticism of the status quo of our being in this ideological world, – accidentally discovers several hidden boxes of sunglasses while investigating an odd church at a Los Angeles shantytown. When wearing the sunglasses for the first time, Nada starts seeing the world through its reality's lenses, witnessing the so far "unseen" subjective messages behind the system's manipulation: publicity billboards now display phrases like "Obey", "Marry and Reproduce", "Stay Asleep" and dollar bills bear the words "This is your God"[14].

This parasitic near-alienistic role of ideology, fruit of our mainly capitalistic glocalized world, convey a nature of implicit injunction[15] and is part of our daily lives – from a simple morning tabloids' capital letters headlines and anti-aging cosmetics to retail bio t-shirts and political populist electoral campaigns. But what is the message behind the postmodernist omnipresent socio-economic consumerism and political cannibalism? Žižek (2012) demonstrates ideology's utopia:

> *Then there is, of course, the beautifully-naive mise-en-scène[16] of ideology: through the critico-ideological glasses, we directly see the Master-Signifier beneath the chain of knowledge: we learn to see dictatorship in democracy.*[17]

"Dictatorship *in* democracy". An intriguing and rather provocative quote that reaches the bottom of most of our stomachs, instigating denial as our first instinct as human beings. But make no mistake, it *is* unquestionably part of our daily reality and to exemplify this veracity, nothing better than bringing our contemporaneous global political scenario into light.

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13 Slavoj Žižek, *Denial: The Liberal Utopia* (2012), (Mar. 31, 2018, 12:37 PM) http://www.lacan.com/essays/?page_id=397.

14 Ibid.

15 In psychology, the perception of whether a behavior will be approved or disapproved by a given group. A "what ought to be".

16 *Mise-en-scène* meaning on the Oxford Learner's Dictionaries appears as "(formal) the place or scene where an event takes place". As if a stage setting.

17 Slavoj Žižek, *Denial: The Liberal Utopia* (2012), (Mar. 31, 2018, 12:37 PM) http://www.lacan.com/essays/?page_id=397.

One can state that we are experiencing the world's two largest economies sliding everlastingly towards confrontation and the actual establishment of global populism. Multiple ideology conflicts sliding into worldwide protectionism. Both, Donald Trump and Xi Jinping are ideologists. They are both nationalists. And one might argue that the only difference in how they perceive dictatorship is that the story in the west unfolds into populism – or democracy's crises of confidence, or better, dictatorship in democracy and in the east it tends to unfold autocracy *into* dictatorship.

Geopolitical and ideological conflicts leading a trade war that The Economist would simplify as "How the West got China wrong"[18]. Furthermore, by stating that "the emergence of leaders such as Mr. Trump and Mr. Xi is a reflection of broader ideological shifts in both countries"[19], The Financial Times emphasizes the vehemence of being aware of the role ideology plays in society and our actual global political scenario.
Immanuel Kant, in his "Perpetual Peace: A Philosophical Sketch" (1795), attempted, on Žižek's words, "to undermine the very possibility of such unwritten obscene rules"[20]. He asserts, of course setting aside everything empirical in the concept of civil or international law, that "all actions relating to the right of other men are unjust if their maxim[21] is not consistent with publicity", introducing, therefore, what he denominates the "Transcendental Formula of Public Law".

This publicity formula represents Kant's belief that undisclosed legislative acts performed by the State towards its subjects in the form of an unknown law that would constitute the legitimation of the arbitrary despotism of those in political power who exercise it:

> *A maxim which I cannot divulge without defeating my own purpose must be kept secret if it is to succeed; and, if I cannot publicly avow it without inevitably exciting universal opposition to my project, the necessary and universal opposition which can be foreseen a priori is due only to the injustice with which the maxim threatens everyone.*[22]

Kant (1795), also emphasizes that this publicity faculty, as I shall call it, is to be regarded not merely as ethical precept, belonging to the virtue's doctrine but also as a juridical one, concerning to the rights of man. When put in practice, as an "experiment of pure reason" by the agent of public law, one should question the, of course, morality behind one's conduct criteria of righteousness, as for instance; could I evade the consequences of my action and will for performing the same if my deed were publicly known? The assumption of the answer would, obviously, imply negativity as it only assists to the acknowledgement

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18 *How the West got China wrong*, THE ECONOMIST - March 3rd 2018, (Mar. 31, 2018, 12:37 PM) https://www.economist.com/leaders/2018/03/01/how-the-west-got-china-wrong.

19 Gideon Rachman, *America vs China: How trade wars become real wars* , THE FINANCIAL TIMES - March 12, 2018, (Oct.. 17, 2018, 10:27 PM) https://www.ft.com/content/5a93b060-25d3-11e8-b27e-cc62a39d57a0

20 Slavoj Žižek, *Denial: The Liberal Utopia* (2012), (Mar. 31, 2018, 12:37 PM) http://www.lacan.com/essays/?page_id=397.

21 The rule or principle on which you act; e.g. I might make unconditional justice to my maxim.

22 IMMANUEL KANT & TED HUMPHREY, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (2003).

of what is not just to the others.

In this sense, Kant's antique technique aforementioned has transcended the limits of philosophy and theory into the crucial kern of the existence of compliance in all its spheres and nuances, domestically and internationally. The negative answer to one's moral conduct question is a fundamental asset for the assessment of a minimum moral standard for businesses worldwide, especially for MNCs that must nowadays assess it glocally. As particularism would not exist without universalism, nor would global without local reciprocally.

The crucial point is that, due to evolutionary shifting of the world into its very present form, dichotomies grew coexistent. Again, one does not exist without the other. To be a great *global* company, an MNC has to be a great *local* company. The dichotomy is not counterpoised. Quite to the contrary, the local is essentially inherent within the global and the principal target of this micromarketing strategy is, nothing more and nothing less than people. People must be in all manners reached and touched where they live, and therefore, also their faculties.

As stated by Friedrich Nietzsche (1886) on his masterpiece "Beyond Good and Evil"[23], Kant on his brilliancy, summarized one's human nature as "by virtue of a faculty". That is, to dissect, that humans are driven by the virtue of a faculty, they seek for faculties *in perpetuum* and delve into synthetic judgments[24] *a priori* everlastingly as a meaning of existence. "I think, therefore I am"[25] Descartes' (1641) old knowledge philosophic dilemma that Nietzsche (1886) would call as "immediate certainties" such as "I think" and "I know".

These "immediate certainties" are, in conjunction with analytic and synthetic judgments, the *animus nocendi*[26] of unethical perpetrations, provoking breaches of business ethics and integrity standards. They are apparently innocent and intentional wills hidden behind the immense complexity of the humanitarian faculties that trigger the occurrence of the villain of the compliance machinery: the misconduct. Nietzsche (1886) states:

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23 FRIEDRICH W. NIETZSCHE & WALTER KAUFMANN, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (1989).

24 Synthetic judgments, are those whose predicates are wholly distinct from their subjects, to which they must be shown to relate because of some real connection external to the concepts themselves. Hence, synthetic judgments are genuinely informative but require justification by reference to some outside principle.

25 RENÉ DESCARTES & DONALD A. CRESS, MEDITATIONS ON FIRST PHILOSOPHY (3rd. ed. 1993).

26 In jurisprudence, the subjective state of mind of the author of a crime, with reference to the exact knowledge of illegal content of his behavior, and of its possible consequences.

> *But I will say this a hundred times: "immediate certainty", like "absolute knowledge" and the "thing in itself" contains a* contradictio in adjecto[27].[28]

Contradiction in terms [of judgements *a priori*], that in Nietzscheism are not to be believed in and impossible, since such judgements must be manufactured true for the purpose of preserving beings of our kind, which is why they should obviously, nonetheless be false.[29] 'It is only the belief in their truth that is necessary as a foreground belief and piece of visual evidence, belonging to the perspectival optics of life.'[30] Older similar words to Žižek's (2012) *critique* of ideology.

To do justice to Robertson's (1992) dichotomous conceptualization of glocalization and to pierce now the exposure of universalism, ethical Kantianism allures us this time into morality. As a matter of fact, what is a human being without its moral faculty and what is compliance without its core moral aspect or even better, the lack of it? Again, with our own spectacles!

Through the Kantian (1785) spectacles, universalism is perceived as common sense morality, where moral thoughts are the protagonists of universality comprehension – naturally, *a priori*. Kant believed in the prohibition and inadmissibility of misconducts – such as lying (hence perjury), torts, theft and murder and so on, alongside other types of actions. He believed that there was a supreme principle of morality that he entitled on his first formulation, "The Formula of Universal Law", as "The Categorical Imperative" – an imperative whose rational authority of actions does not depend on the agent's contingent ends but on whether they fulfill our [moral] duty. *The Formula of Universal Law* detains that one must unconditionally act according to one's maxim by which one could at the same time desire that it should become a universal law [of nature].[31] In humble words, something is only acceptable if it could become a universal legislation.

Kant is unquestionably, a major defender of ethical duties towards others and has vigorously defended "truth telling", claiming that lying was always wrong. He trusted that we should treat each human being as an end in itself[32], and never as a mere means. On his timeless, influential work in moral philosophy the "Groundwork of the Metaphysics of Morals" (1998), he states that one should "seek out" the foundational principle of a "metaphysics of morals", which he understands as a system of *a priori* moral principles that

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27 Contradiction in terms.

28 FRIEDRICH W. NIETZSCHE & WALTER KAUFMANN, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (1989).

29 Ibid.

30 Ibid.

31 IMMANUEL KANT & MARY GREGOR, GROUNDWORK OF THE METAPHYSICS OF MORALS (1998).

32 As people, we have an inherent worth, value that must not depend on anything else or other means. As an end in itself meaning on the Merriam-Webster dictionary appears as "something that one does because one wants to and not because it will help achieve or accomplish something else".

apply the categorical imperative to human persons in all times and cultures.[33]

This illustrates pure Kantian capitalism, that according to Norman E. Bowie (1998), 'if properly adopted could provide a moral minimum for business, ensure that employees are treated with respect, structure firms as moral communities, and help establish a more cosmopolitan and peaceful world, contributing greatly to business ethics.'[34]

For sharing the same line of thought, I drafted the two questions Kant's Moral Algorithm based on Kant's "Transcendental Formula of Public law" – or publicity faculty and "The Formula of Universal Law" – faculty of international legislation that will be presented and applied here in turn, on the EMB Guidelines chapter as a practical approach for identifying ethical conflicts abroad.

As shown from the beginning of this chapter, ethical and moral values have been steering societies *in all times and cultures* towards what through generations has taken the form of universal law as people desire a reliable existence system of no discontent. Utopic, as deception and the good and evil dilemma are inherent to humankind, but it gives life to our eternal *virtue of a faculty*. It also introduces the motion behind businesses' ethics and integrity *prima facie* faculties and obligations, which are themes of our next topic.

Therefore, my purpose of delving into old philosophic and psychological culture is to emphasize, that the clash of all evolutionary aspects of human life and existence conditions, directly and indirectly, has crystallized the form of the contemporary world as we know today. One cannot dissect compliance without its moral foundations, hence the holders of moral or any other cognitions; us reasoning beings. I want to demonstrate, vehemently, that it has been always about people and I would say, nevertheless in any event, that it is *all* about people.

For this reason, – be it with critico-ideological glasses or not – I would, of course, refuse the idea of the not inherency of philosophical- and psychodynamics in all spheres of compliance as it has sufficient analytic-interpretative leverage of intrinsic nature, especially relating to the ethics of businesses.

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33 Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta (ed.), Spring ed. 2018).

34 Norman E Bowie, *A Kantian Theory of Capitalism*, 1, THE RUFFIN SERIES OF THE SOCIETY FOR BUSINESS ETHICS 37-60 (1998).

IV. CROSS-CULTURAL BUSINESS ETHICS IN COMPLIANCE AND LEADERSHIP GLOCALIZATION

One should not be too literal when it comes to the analogy of corporate personhood. Corporations are endowed of their own personality, identity, culture, language, values, operational characteristics, particular rights protected by laws and so on, being therefore, also bodies capable of actions just like people and "qualify as moral agents, at least in the minimal sense that they and their actions may sometimes be characterized by moral concepts."[35] They are juridical persons constituted by natural ones. Although, with distinguished responsibilities from those of its creators.

Corporations have *prima facie* faculties and obligations that encompass several global values, especially integrity, that according to Joan Dubinsky (2009), United Nations Chief Ethics Officer, 'can be found in all religions, texts on more philosophy down through the ages, – [as just demonstrated in the last chapter] – and in the UN Universal Declaration of Human Rights and all resulting rights-related conventions and principles.' Furthermore, on her Global Ethics & Integrity Benchmarks, she asserts that:

> *Though there is significant 'play' in how global values (such integrity) can be defined and their scope of application, there is little doubt that what unites us as human beings is this ethical dimension. Different cultures, nations, and societies may differ about how to prioritize specific moral values. Nevertheless, all human societies accept that a set of global values exists and that these values tend to unite – rather than divide – us.*[36]

This "ethical dimension" of universal common sense values together with last chapter's compilation of morality principles, rectify the fundamentals of MNCs' minimum business ethics, or as one would say, the moral foundations of multinationals, that transcend national boundaries and legal systems. Companies invent in one territory and produce in another, due to, for instance, alluring business atmosphere created by governments' innovation and investment incentives such as IP-related tax benefits and tax holidays. In some cases, they have different places of production for the same or diverse goods and a distribution centre or permanent establishment in another country. Living aside, online sales worldwide, delivery interconnectedness and so on.

Be they for international tax planning or business strategy purposes, the global trade systematics is immersed in legal pluralism and postmodernism, "where the law has become an amorphous and entropic system, where one is often hit by its force by pure happenstance"[37]. All of this due to globalization, therefore colliding with cross-cultural mores

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35 THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (1989).

36 JOAN E. DUBINSKY & ALAN RICHTER, THE GLOBAL ETHICS & INTEGRITY BENCHMARKS (March, 2009).

37 Peter Kurer, *Legal and Compliance Risk in a Global World: Nemesis or Catharsis?*, COMPLIANCE ELLIANCE JOURNAL, 4 - 15 (Vol. 1 No. 1 2015).

and intersecting frequently with matters of moral relevance.

My deliberations in this article will now turn to the fact that the globalization "dialectical phenomenon" – Giddens (1991) perspective of globalization 'in which events at one pole of a dissociated relation often produce divergent or even contrary occurrences at another' – requires the linkage of localities worldwide, be they at major or small *poleis*[38]. For the global scenario to happen, localities have, undoubtedly to be linked, illustrating once more Robertson's (1992) conceptualization of glocalization. Consequently, cross-cultural interaction and communication are commonplace and an everyday challenge to MNCs worldwide.

Business internationalization interconnectedness demands; cross-cultural management, the studies of the behavior of people provenient from different cultural backgrounds interacting within and among distinguished or the same organizations working environments across the globe, comparing and assessing their *organizational behavior* itself; and organizational behavior, the studies of "cross-cultural similarities and differences in processes and behavior at work and the dynamics of cross-cultural interfaces in multicultural domestic and international contexts. It encompasses how culture is related to *micro organizational phenomena*, motives, cognitions, emotions; *meso organizational phenomena*, teams, leadership, and negotiation; *macro organizational phenomena*, organizational culture, structure and the interrelationships among these levels."[39]

Management, of any kind, requires excellence in order to provide responsible, profitable and competitive growth. It is the heart of the corporate body, pumping results – be they positive or negative – through divergent courses, from and to all areas of the same, granting its functionality or none. Consequently, the excellence of management relies upon the characteristics of the people to be managed besides, of course, distinct managerial expertise and human capital. Nevertheless, different outcomes torrent from global management practices of excellence applied by MNCs in diverse countries. Some nations show excelling management than the others. But how can an entire nation generate a superior management than another nation? The explanation of this incongruence lies within the realm of culture.

Culture acts at several levels of analysis in innumerous areas of studies and has been defined throughout the decades in various manners by academics in the fields of sociology, psychology and anthropology (Herkovits, 1955; Triandis, 1972 and 1994; Kraut, 1975; Shweder & LeVine, 1984; Hofstede, 1991 and so on).

38 Poleis, plural of polis, that means city in archaic Greek.

39 Michele J Gelfand, Miriam Erez & Aycan, Zeynep, *Cross-Cultural Organizational Behavior*, Vol. 58, ANNUAL REVIEW OF PSYCHOLOGY 479-514 (2007).

Geert Hofstede (1980), Dutch social psychologist and developer of the groundbreaking Cultural Dimensions Theory, on his leading work "Culture's consequences: International differences in work-related values"[40] asserts culture definition as:

> *The collective programming of the mind that distinguishes the members of one category of people from those of another, ... the interactive aggregate of common characteristics that influence a human group's response to its environment. (...) Culture is not a characteristic of the individual; it encompasses a number of people who were conditioned by the same education and life experience. When we speak of the culture of a group, a tribe, a geographical region, a national minority, or a nation, culture refers to the collective mental programming that these people have in common; the programming that is different from that of other groups, tribes, regions, minorities, or nations.*

With the idea to bridge cultural differences, Hofstede initiated in 1970 an ample survey study within the IBM organization among 56 countries. After more than 1.000 interviews from a wide range of distinctive angles, he developed the Hofstede Cultural Dimensions framework. The framework compels six dimensions of national culture spectrums; *power distance*, egalitarianism vs. hierarchism scales; *individualism vs. collectivism*, "the degree to which people in a society are integrated into groups"; *uncertainty avoidance*, "a society's tolerance for ambiguity" or unexpected happenstances from the status quo; *masculinity vs. femininity*, preferable materialism, assertiveness and heroism in a society rather than modesty, sensitiveness, caring and quality of life respectively; *long-term orientation vs. short-term orientation*, to what extent a society attain to traditionalism – past, present or future level of focus and *indulgence vs. restraint*, allowance of a relatively free gratification of basic and natural human drives related to enjoying life and having fun versus a suppressed gratification of needs, regulated by means of strict social norms.

Furthermore, Harry C. Triandis (1994), international and social psychologist, falls to the concept that the great majority of scholars allot, believing that culture is shared, is adaptive or has been adaptive at some point in the past, and is transmitted across time and generations.[41]

However, as much as my reckoning unquestionably abides to the same line of thought, it is of vehement importance to our dissertation and of my own constant personal experience to additionally expose that cultural inheritances do not attain merely to subjects of the same nationality. They can be acquired directly by subjects of different cultures living foreignly, among cultures contrasting their own or for somehow experiencing a foreign culture indirectly – as for instance by working in parity or circumstantially interacting with international corporations or persons from distinct national backgrounds.

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40 Geert Hofstede, *Culture's consequences*, Vol. 5, INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1980).

41 HARRY C. TRIANDIS, CULTURE AND SOCIAL BEHAVIOR (1994).

Hofstede and Bond (1988) in their article "The Confucius connection: From cultural roots to economic growth"[42] analogously phrase that 'cultural inheritances are not genetically transferred; they can in principle be acquired by any human being who is at the right place at the right time. We begin to acquire the mental programming we call culture from the day we are born, and the process continues throughout our lives in a particular society.'
Insofar as we regard the idea of the understanding and the definition of culture and having vastly connoted its role in glocal business beyond the local-global problematic interrelatedness within the glocalization context, I will leave the mere vicious mania of "how to" literature intellect, – in this case; cultural disparities and countervailing forces of homogenization – and start entering a more practical approach. Cross-cultural relativity has transcended into international business ethical values in the corporate scenario and demands practical endeavors rather than simply intellectuality.

Business ethics, more precisely here; international business ethics, is a basic requirement for an effective and stark corporate compliance program. In fact, business ethics is the very fundamental part of the compliance program's pillar or element, where the formalization of the program is represented by codes of business conducts, ethics and policies. Such bylaws are developed in accordance to the company's *modus operandi*[43], industry, stakeholders and geographical position necessities, being therefore, the foundation of an "effective compliance program".

To enlighten, these "effective" compliance program's pillars or essential elements, vary from each area of compliance to another, literally in numbers, particular predilection or company culture. Due to the ever-changing number of compliance requirements, or more straightforwardly, global legislation that seem to multiply on a daily basis, – from the good and old U.S. Sentencing Guidelines to the FCPA, UK Bribery Act, OECD "best practices" and the ultimate EU General Data Protection Regulation (GDPR) – MNCs incorporate from five to even ten pillars or essential elements into their tailored compliance program.

Although, the quantity of these or their nomenclature is irrelevant to a compliance program effectiveness. What determinates its effectiveness is the covering of all applicable global legislation and guidelines and the quality of its ongoing management. In fact, compliance is only effective if it is able to fulfil its dual function. "That means safeguarding the company's reputation as a good corporate citizen, complying with regulation to avoid costly investigations and fines, and defending IP and customer data", states Jo Ludlam (2019), partner and co-chair of the global compliance & investigations group at Baker

42 Geert Hofstede & Michael H. Bond, *The Confucius Connection: From Cultural Roots to Economic Growth*, Vol. 16 Issue 4, ORGANIZATIONAL DYNAMICS, 5-21 (1988).

43 The way in which something functions, operates or works.

McKenzie.[44] In other words, protect and drive business value by responding to emerging risks.[45]

The ethics of international business conjointly with global management creates the motion behind the glocalization of legislation in the industry of compliance. The compliance industry operates in a holistic multicultural environment of ideological diversity that in this transformative age of contemporary discontent taking many forms, is under ongoing pressure to create a glocal identity of compliance in order to facilitate tradeoffs between conflicting norms in home and host countries.

The aforementioned corporate policies are the hub of conflicts among subsidiaries and their headquarters internationally. Policy conflicts are the perfect exemplars for cultural disparity within multinational corporate bodies and the main cause of the lack of synergy in global management. Especially between western and eastern countries.

Hofstede and Bond (1988), in the above-named Confucius Connection article, portray this situation perfectly:

> *In one U.S. corporation we know, the head of the headquarters staff department complained bitterly to the president about the noncompliance with certain rules by the East Asian regional manager, who was an expatriate American. "I fully agree", said the president. "His behavior is stupid and against company policy. I have only one question. From the time he worked in headquarters, I have known Mr. X to be an intelligent man. How can a man be so intelligent in Los Angeles and so stupid in Hong Kong?"*

No further comments needed, that the noncompliance from the western manager acting in the southeastern subsidiary of the same MNC was incontestably related to cultural differences rather than his intelligence quotient. An issue that has driven leading roles, lay subjects in the matter, to unfairly oust good professionals from their duties. It is, therefore, a theme of important situational awareness when exerting leadership.

Pragmatic organizational behavior studies are still in progress in an attempt to tackle cross-cultural management disparity in the quest for global management synergy. The previously detailed Hofstede *Cultural Dimensions* are the most influential and inescapable essential work developed in the area, followed by the work of Professor Robert J. House and his colleagues in their GLOBE (Global Leadership and Organizational Behavior Effectiveness) study of 62 societies.

Professionals of compliance, from the very bottom as interns or audit assistants – or whatever title they may attribute to any regulatory position in its complexity – to the very top as chief compliance officers or global heads of compliance, have multidisciplinarity as

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44 Baker McKenzie, *Connected Compliance: The global Case for Integration* (2019), (Apr. 8, 2019) https://www.bakermckenzie.com/en/insight/publications/2019/01/connected-compliance.

45 Ibid.

their main prerequisite. They must be aware of these culture-related issues happenstances besides world economics and the philosophical- and psychodynamics behind compliance in order to integrate a holistic approach to a glocal compliance identity. As there is no place in the corporate world for companies inattentive to corporate and regulatory compliance, such management challenges can equally no longer be afforded by MNCs. From the top down of all managing positions existent in a company, be they in the compliance sphere or not, – from the CEO or CCO to the facilities manager or junior compliance administrator – these challenges must be tackled.

These difficulties are unavoidable even for the best-prepared, best-intentioned and most experienced managers and executives, which must always rethink their business practices in foreign settings. As seen before, what is effective in a company's home country, is in many cases doomed to failure in the host country due to different standards of ethical conduct. Many business practices that are considered unethical in one setting may be ethical in another – of course, when observed the minimum standards of human values or rights. Needless to say that, for instance, modern slavery is unbearable anywhere in the globe and inadequate pollutants discharge is an equal intolerable violation of these cores values. Consequently, this cultural disparity awareness serves as a moral compass for business practices not only abroad, but also domestically.

To illustrate these cultural differences problematics and emphasize the western and eastern long-dated society's discrepancies, back in the late nineties on his article "Values in Tension: Ethics Away from Home", Thomas Donaldson (1996) stated that managers in Hong Kong had a higher tolerance for some forms of bribery than their western counterparts.[46] An analogous research from Laura L. Whitcomb et al. shows in a vignette case study of 1998 that the Chinese managers were more propitious to abide to a payment of $500 thousand dollars to a foreign middleman in order to gain access to his country's market than their American counterparts:

> *In explaining their reasoning, Chinese respondents overwhelmingly indicated that this was "not unethical, just the price paid to do business" (59%). Among the responses choosing "other", 28 (15% of the total sample) wrote that they were not really against paying, but were concerned about the credibility of the middleman. Five (3%) simply said it was a good business deal. Only one respondent (0,55%) thought it was a "bribe and unethical". The Americans, on the other hand, were more apt to conclude that the transaction was a "bribe and unethical" (24%) or was "illegal" (9%). "The price paid to do business" was still selected by 22% of the sample. Another 17% justified their decision by saying this was an acceptable practice in other countries.*[47]

46 Thomas Donaldson, *Values in Tension: Ethics Away from Home*, September-October Issue, HARVARD BUSINESS REVIEW (1996).

47 Laura L. Whitcomb, Carolyn B. Erdener & Cheng Li, *Business Ethical Values in China and the U.S.*, Vol. 17 Issue 8, JOURNAL OF BUSINESS ETHICS, 839-852 (1998).

This "price paid to do business" culture was in fact widely accepted in China as a part of regular business deals or marketing strategies until the presidency of Xi Jinping took place in 2012. Mr. Xi's fervent anti-corruption campaign cracked down government corruption and commercial bribery practices by MNCs in the country.

In 2013, the British pharmaceutical giant GlaxoSmithKline (GSK) has pled guilty to the involvement of their executives in a bribery scheme worth $489 million dollars in their Chinese subsidiary. In consequence, they were convicted of bribery and corruption for breaking the Chinese laws and fined $491 million dollars, the approximate same amount of bribes that have been paid by GSK China. The fine was the largest ever levied on a western company for bribery and corruption in the People's Republic.[48]

However, despite the fact that Mr. Xi's widely known campaign against corruption indicates an increase in transparency in China, it also carries some downsides. According to Ge Chen, an expert on China's judicial system and legal policies at the Mercator Institute for China Studies in Berlin, it is 'generally criticized for its lack of genuine "checks and balances" on power'. Furthermore, he states that it undermines China's legislature machinery; 'the Standing Committee of the National People's Congress received a remarkable number of more than 11,000 suggestions for revision within three weeks after publishing the bill' and constitution; 'by banning lawyers from representing those under investigation, the draft law fails to subject such investigations to China's criminal procedural law'.[49]

I would also emphasize, in any event, that it undermines the rule of law, which is essential for a sustained economic growth and thereby trade and investment stability and sustainable development in the globalization happenstance.

There is, of course, a moral grey zone in between these western and eastern ideological problematics – actually everywhere in the globe. As a mere well-known illustration of this scenario, the Chinese and the Japanese people often exchange gifts while doing business as a millennial tradition that can signify respect, friendship and gratitude, among other good faith meanings. The European and the North American people when started doing business with eastern countries, first felt this tradition as an attitude of potential bribery or favoritism, until certain tolerance for such cultural difference was developed and therefore, also some limits for corporate gift giving.

The giving and receiving of gifts, courtesies, entertainment and hospitality in the corporate context are nowadays globally regulated by Acts in various distinct jurisdictions and a mandatory part of the compliance policies of any organization worldwide. When the

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48 Thomas Fox, *GSK in Cina: A New Dawn in the International Fight Against Corruption,* COMPLIANCE ELLIANCE JOURNAL, 29 - 61 (Vol. 1 No. 1 2015).

49 Ge Chen, *China's Anti-Corruption Bill Exposes the Achilles' Heel of Xi's Legal Reforms*, YALEGLOBAL ONLINE 19th December 2017, (Aug. 2, 2018, 09:25 AM) https://yaleglobal.yale.edu/content/chinas-anti-corruption-bill-exposes-achilles-heel-xis-legal-reforms.

limits of this grey zone are transgressed, that is to say in this case, the limits of its scope and intentions, the inappropriate practice of corporate gift exchange is punishable by global anti-bribery and corruption regulations. Individuals are subjects to imprisonment – up to ten years in the UK or China and fourteen in Mexico – and corporations are subjects to tremendous fines – up to 20% of the gross revenue from the previous year in Brazil and unlimited amounts in Canada or again in the UK.

But how can compliance management develop a top-notch cross-cultural guidance for policy making or identify the limits of this cultural moral grey zone, as even the most robust codes of conduct and upstanding company's core values may not always provide isolated answers to the business ethics problematics? The answer, I would say, lies in a three stages process, by (i) identifying ethical conflicts in the host country, (ii) glocalizing solutions, and (iii) onboarding, ongoing management training and assessment, forming therefore, a three stages theory.

V. THE THREE STAGES THEORY AND THE EMB GUIDELINES

For the purpose of addressing the needs of compliance management concerning the cross-cultural business ethics problematics, I have developed a Three Stages Theory, as well as a ten preliminary *Guidelines* as an attempt to provide a holistic approach to the matter. The *Theory* – or the algorithm to compliance glocalization – functions as it follows:

A. Identifying ethical conflicts in the host country

Straightforwardly, cross-cultural ethical conflicts encompass cognitive psychology manifestly, more specifically in the realm of judgment and decision-making that when inconsistently dealt with could cause a multitude of cognitive dissonance. It triggers the irrationality of these judgments and decision-makings as a person ventures to reconcile his conflicting beliefs.

Pilot studies and practices have been conducted by scholars and management practitioners in order to diligently assess the best ethical methodology for decision-making in an international context. Numerous theoretical frameworks were developed to enforce a more efficient approach to cross-cultural management decision processes.

Donaldson (1996) presented a two types of conflicts model based on the minimum human values standards founded on the host countries' different levels of; *economic development*, as for instance "developing countries may accept wage rates that seem inhumane to more advanced countries in order to attract investment" and *cultural tradition*, Saudi Arabia's example of prohibiting women of occupying corporate managing positions – a prohibition that "stems from strongly held religious and cultural beliefs; any increase in the country's level of economic development, which is already quite high, is not likely to

change the rules."[50]

Furthermore, Donaldson and Dunfee (1994, 1999), in the line of social contacts theorists and political philosophers such as Hobbes (1651), Locke (1689) and Rousseau (1762), introduced the Integrative Social Contracts Theory (ISCT) as an attempt to bind universal core human values or "hypernorms", such as the right of individuals to freedom of speech and association. It originates from a minimum sense of tacit agreement that allows individuals to live as a society.

DeGeorge (1993) developed specific guidelines grounded on principles such as that "MNCs should produce more good than bad for the host country" or "should do no harm". Hamilton, Knouse and Hill (2009) proposed the HKH decision model, a set of six heuristics questions decision tree or "management decision process" to MNCs' managers aimed on the discussion of "how to apply their corporation's values to resolve conflicts with host country business practices"[51].

Although all these frameworks are useful tools in general, they are not essentially reliable. For a holistic approach to identifying ethical conflicts in the host country and delivering decision-making solutions to occur, a combination of various aspects of social psychology and behavioral economics is required. I personally like to compile such frameworks rather than refute them, as an attempt to assess the glocalization of compliance initial process.

In order to identify ethical conflicts in the host country, I have designed a compilation of the aforementioned frameworks conjointly with the compliance systematics within businesses. Assuming that the governance value of any business is, of course nowadays, law and integrity compliant oriented, I created what I call the *Ethics Malpractice Barometer* or the EMB Guidelines, containing ten embryonic enquiries to designate and address ethical conflicts across borders:

1. Identify Questionable Practice (henceforth QP):

   What is the salient ethical issue of the business practice in the host country?

2. Categorize QP:

   Is it a cultural difference, conflict of relative development or ethics problematics?

   a. Cultural difference – stablish grey zone limits in its scope and intentions, identify and apply met enforced law.

50 Thomas Donaldson, *Values in Tension: Ethics Away from Home*, September-October Issue, HARVARD BUSINESS REVIEW (1996).

51 J. Brooke Hamilton, Stephan B. Knouse & Vanessa Hill, *Google in China: A Manager-Friendly Heuristic Model for Resolving Cross-Cultural Ethical Conflicts*, Vol. 68 Issue 2, JOURNAL OF BUSINESS ETHICS, 143-157 (2009).

   b. Conflict of relative development – if so, would the QP be acceptable at home country if it was in a similar stage of economic development?

   c. Ethics problematics – apply met enforced or non-enforced law, address and remediate.

3. Apply Kant's Moral Algorithm:

   Publicity Faculty = could I evade the consequences of my action and will for performing the same if my deed were publicly known?

   Faculty of Universal Legislation = could it become an universal law?

4. Does the QP violate any (enforced or/and non-enforced) core human values?

5. Does the QP violate any (internationally and domestically) enforced laws?

6. Does the QP violate any core values or principles of the firm?

7. Does the QP violate the firm's or any (internationally and domestically) industry code of conduct?

8. Does the QP involve third party engagements?

9. Will the subsidiary leverage industry practice and/or development in the host country if the firm follows its own practices in the home country rather than the QP in the host one?

10. If the home country's QP is law and integrity compliant, will it bring more responsible benefits than shortcomings when applied in the host country?

The EMB Guidelines are based on a simplified yes or no quotient to all enquiries, in which its positive outcome implies *in "yes" – identify and apply met enforced and/or not enforced laws, address due diligently the salient issues and remediate the consequences and "no" – meet remaining enquiries.*

I must clarify, of course, that indubitably providing *yes or no* answers is insufficient for professionals of compliance to holistically assess any imminent situation, project, idea or issue that an employer might have. The agenda following of a compliance program is much more complex than a binary action and its enforcement is far beyond simplified questioning.

Nevertheless, by applying the *Guidelines* one should have in hands any embryonic inconvenience tackled and prepared for the further undertaking of due diligence measures in order to address and remediate the consequences that any red flag might possess. It is basically a preliminary awareness instrument for compliance due diligence and risk management assessment.

B. Glocalizing solutions

It is of extreme vehemence in this context, to glocalize compliance management solutions transnationally. A glocal approach of allowing foreign business units management to interpret cultural and ethical discrepancies and therefore develop further standards in order to adhere their own suggestions founded on their individual glocal experience to the customary set of corporate ethical principles of the home country, is fundamental for the tailoring of a glocalized compliance solution and identity.

The giant semiconductors company Texas Instruments Inc., for instance, has created the Global Business Practices Council, an international business ethics board designed for managers operating in the MNC's foreign units to solve ethical conflicts. "Global ethics strategy, locally deployed". With their responsible global business strategy, the company was awarded as a 2018 World's Most Ethical Companies ® Honoree List by the Ethisphere Institute – a global leader in defining and advancing the standards of ethical business practices – for the twelfth consecutive year and ranked second on the Forbes "The Just 100: America's Best Corporate Citizens" 2018, among others[52].

Another approach is the outsourcing of such glocalized solutions. It has naturally become part of big consultancy firms' spectrum of services. A.T. Kearney for instance, offers a strategic service within their group denominated the Global Business Policy Council; "a specialized foresight and strategic analysis unit". The council's services collaborate with private and public sector clients, being "dedicated to providing immediate impact and growing advantage by helping CEOs and government leaders anticipate and plan for the future".

Be it by internal or external means – or perhaps even both – cross-cultural compliance management cannot, in no event, afford to be negligent in glocalizing solutions. In a recent participation of mine at the annual event of the Lateinamerika Verein e.V. in Hamburg, the 69th Latin America Day 2018, when attending the forum "Business Culture & Leadership", business leaders from distinct MNCs in Europe and Latin America discoursed about their experiences in doing business across both continents.

Among thrilling, and sometimes rather amusing cross-cultural stories of business conduction in Peru, Brazil, Mexico, Germany and Austria, the outcome was fairly unanimous. A board member of the German intralogistics giant Jungheinrich stated that "headquarters management will fail" when chosen to manage business overseas. "Local people know local business" and the best approach to deal with such problems is "to glocalize [solutions]", reaffirming my thesis.

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52 Ge Chen, *China's Anti-Corruption Bill Exposes the Achilles' Heel of Xi's Legal Reforms*, YALEGLOBAL ONLINE 19th December 2017, (Aug. 2, 2018, 09:25 AM) https://yaleglobal.yale.edu/content/chinas-anti-corruption-bill-exposes-achilles-heel-xis-legal-reforms.

C Onboarding, ongoing management training and assessment

For the three stages theory attain a holistic approach in addressing the transnational business ethics problematics, dexterous onboarding, management training and ongoing assessment must take place. The selected human capital must be embraced by a specialized cultural differences based company onboarding program, leading the new hire or relocated employee through a roadmap other than the standard one, but to cultural awareness enhancement orientation.
The resilience of management training and assessment is equally crucial. The on boarded personnel must be immersed in, again, a culture-oriented tailored program of ultimate effectiveness and high managerial impact that must be assessed itself everlastingly. The ongoingness of management training and assessment is crucial for the efficiency of the entire stages theory, ensuring compliant and diligent functionality to its purposes.

This way, a holistic approach can be taken when addressing the cross-cultural business problematics, granting a minimum standard of efficacy.

VI. CONCLUSION

In a world filled with diversity and international business interconnectedness, ethical decision making and values-based management perspectives are mandatory and a good starting point. There is more to compliance than a bare wave of worldwide regulations. Its machinery is complex and people are the very soul of it. People's nuances are even more elaborate than its entanglement. Aspects related to human faculties, societies, and economics must be equally taken into account. In order to address the complexity of compliance, the awareness of multidisciplinarity is vital to its efficiency, especially when it comes to the creation of a glocal identity of compliance. People think glocal and therefore must be touched where they live. Once more, to be a great global company, an MNC must be a great local company. Leadership glocalization is the solution for solving MNCs' compliance disparities across borders and the Three Stages Theory conjointly with the EMB Guidelines are the primary assets to bringing the "how to create a glocal identity of compliance" speculation to an end, conceiving, therefore, an algorithm to compliance glocalization.

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EVOLVING TRENDS IN OPEN ACCESS

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ABSTRACT

With the growth of open access publishing there has been a concomitant growth in the number of predatory publishers. This article considers why open access has arisen and the various models under which it operates before considering the nature of predatory publishers and what can be done to stop them.

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I. BACKGROUND

Academic publishing used to be relatively simple. Scholars submitted manuscripts to a limited range of journals. If they were published, other interested scholars could read the work by visiting their university library and obtaining a copy which was paid for by the library. If a copy was not available, for a nominal fee, they could obtain the article from another library. Some academics subscribed to their own copy of a journal or obtain regular copies as members of academic societies or as editors and editorial board members. This model of publishing did not have a name as it was the only model that existed. Some journals charged a fee to authors to submit their work, but these were rare, and the fee was for processing the article; libraries still had to subscribe to these journals. This was the predominant model of academic publishing until well into the present century. The model is now referred to as 'pay to view' – albeit that it is rarely the reader who is paying directly to view the article

It is hard to pinpoint exactly when, but around 2000 the concept of 'open access' arose, and this referred to journals which made their content available free to the reader and to libraries; no subscriptions were required. There may always have been some journals operating like this model but no systematic study exists to support this. Since around 2010, open access journals have become very common and they operate under a range of models, to be described. Due to pressure from various sources, open access has become a genuine competitor to the 'pay to view' model, and for scholars wishing to publish their work, open access is now a major consideration.

II. WHAT OPEN ACCESS MEANS

Open access means that anyone can read a published article free of charge. The article becomes available as such because the publisher has sold the copyright on the article to the author. Therefore, open access can be expensive because the publisher is waiving—or should be waiving—the right to generate any further income from articles that are available open access.

Around the open access industry, a system of licensing to enable sharing but to offer some protection for authors and publishers has been developed known as CCLs (creative commons licences)[1] and this also applies to other aspects of intellectual property such as art and photographic images. The CCL system operates at several levels but publishers using the open access route will normally specify which type of CCL they use to derive agreement with authors.

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1 Creative Commons, *The state of the commons 2016*, (Sep. 28, 2017) https://creativecommons.org/.

III. WHY OPEN ACCESS

The pressure for open access publishing and the 'industry' that has evolved around it comes from several sources, some laudable and some misguided. I consider the 'misguided' to be those who see the rise of the open access movement as a protest against—and an alternative to—the 'mainstream' publishers who they inevitably claim are making 'excessive' profits[2]. The extent of 'excessive' is never defined; the fact that open access suites such as Biomed Central (BMC) and Public Library of Science (PLOS) charge large amounts of money for their services is never considered. Nevertheless, the pressure on academics, universities and journals in Europe and Australia—not yet strongly visible in North America—to publish open access is extreme. Indeed, research councils and charities funding research in the UK make open access publication a requirement for outputs from projects they support. More formally, the Higher Education Funding Council for England (now Research England), and equivalent bodies in the remainder of the United Kingdom, make open access compulsory for research outputs submitted for the Research Excellence Framework[3] —the mechanism whereby universities in the United Kingdom receive research infrastructure funding.

Otherwise, the pressure to publish research outputs open access comes from the general public, at least via pressure groups, on the basis that they largely fund the research that universities carry out and, therefore, it should be available—free—for them to read. Another 'pressure point' for open access comes from some academics and some universities—some of whom have broken ranks and made their publications available for anyone to read—who not only believe that their research should be thus made available but who often also cite 'excessive profits' by the major publishing houses responsible for producing the majority of academic journals. The exact nature and extent of these excess profits is not specified and the fact that, certainly in the United Kingdom, the academic publishing industry is a hugely successful export industry with sales in 2016 of £1.1 billion[4] employing thousands of people[5] is ignored. Producing journals, by any means, is not cost neutral and open access fees, called APCs (article processing charges), are charged—once only—to the author as opposed to recurring annual fees to readers (via library bundles) to offset the loss of income for pay to view.

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2 Roger Watson, *Ethics and open access*, 2(2), NURSING OPEN, 47-48 (2015).

3 Higher Education Funding Council for England, *Policy for open access in Research Excellence Framework 2021*, HEFCE (2016).

4 The Publishers Association, *Strong year for UK publishing industry as it grows to £4.4bn*, 2016, May 13, 2016, (Sep. 28, 2017) https://www.publishers.org.uk/media-centre/news-releases/2016/strong-year-for-uk-publishing-industry-as-it-grows-to-44bn/.

5 Creative Industries, *Publishing facts and figures*, 2017, (Sep. 28, 2017) http://www.thecreativeindustries.co.uk/industries/publishing/publishing-facts-and-figures#.

IV. OPEN ACCESS MODELS

Open access is available in three ways, referred to as 'gold', 'green' and 'diamond'. Gold open access is where the author covers the cost of publishing. This is also known as 'pay to publish', as opposed to the traditional 'pay to view'. The cost, in reputable journals, can be considerable (several thousand US dollars) and journals should, strictly speaking, make no further money from sales of the published article. However, below I will consider the concept of 'double-dipping'. The green model of open access is one whereby the content of published articles can be made available but rarely in the final published format and normally only after a period of embargo (between 6-24 months depending on the field of study and the publisher). Under the green open access model, the final accepted versions of manuscripts may be made available to read free of charge and this is increasingly being done via university or research funding body repositories. The diamond model of open access—also referred to as the 'platinum' model—is one where no money changes hands either to publish or to read. There are currently very few journals operating this model for obvious reasons.

V. FUNDING MODELS

From the funding perspective, journals can be described in three ways. Some remain totally dependent on pay to view, although few academic journals maintain this model and a comprehensive list is not available. But it does still appear to be an issue[6]. Others are now completely open access, and this mainly applies to new journals developed specifically to be open access and to be funded by APCs. Notable amongst these and early adopters are the BMC and PLOS suites of journals. However, many journals, once considered to be 'traditional' journals—ie pay to view—have incorporated open access as part of their funding model and these are described as 'hybrid' journals. They publish a combination of pay to view and pay to publish articles. In the process of submitting a manuscript an author can indicate their preference and pay an APC. The APC should be paid once the article has been accepted and should not influence the editorial decisions about the manuscript. This is referred to as the gold route to open access.

The practice of 'double-dipping'[7], whereby publishers were receiving income for open access and pay to view for the same copy has largely been addressed. To provide value for money, publishers are annually adding copy to their journals equivalent to that paid for by open access. This means that pay to view customers receive the same number of articles. Therefore, very quickly, many in the academic publishing industry have responded

6 University of Western Australia, *Open access toolkit: open v closed access journals*, 2018 (Jan. 20, 2019) https://guides.library.uwa.edu.au/c.php?g=325342&p=2178784.

7 Research Libraries UK, *The cost of double-dipping*, 2017 (Sep. 28, 2017) http://www.rluk.ac.uk/about-us/blog/the-costs-of-double-dipping/.

as well as they can without incurring significant loss of income and the inevitable redundancies and closures of journals that this would necessitate. They have not responded, by making their copy instantly available open access. Largely, they have responded by allowing their copy to be available after an embargo period and only then in the final accepted copy. To facilitate the demand for open access publication there has been a concomitant growth in the number and the size of university online repositories to accommodate the volume of publications. This is referred to as the green route to open access.

VI. PREDATORY PUBLISHERS

On the back of all these changes in academic publishers we have seen the rise of the so-called predatory publishers. The rise in the number of publishers and journals has been remarkable from 18 publishers in 2011 to 923 in 2016 according to Beall's list (no longer available in its original form) of predatory publishers and a more recent estimate puts this figure conservatively at 10,000[8] (Watson 2019). The definition of a predatory publisher used by Beall was[9]:

> *'In academic publishing, predatory open access publishing is an exploitative open-access publishing business model that involves charging publication fees to authors without providing the editorial and publishing services associated with legitimate journals (open access or not).'*

The combined pressure to publish *per se*, the acceptance of online publishing and the pressure for open access publishing has provided a fertile environment for the rapid growth in predatory publishers.

Predatory publishers operate by issuing a continuous stream of invitations by email to academic staff inviting them to publish in one of their journals. Emails invariably open up with inane 'greetings', an aspiration about how good your day is or about your health and happiness and then the invitation. The invitations to publish vary from simply wanting an article to inviting you to edit a special issue or consider being an editor or editorial board member – something to which I will return. As if the wording and the nature of these emails was not enough to warn you of their intentions then there are other obvious points, for example, they normally offer speedy peer review. This means, essentially, no peer review because it is impossible to make the peer review process, if it is operated properly, speedy. The top journals from the best publishing companies struggle to offer a speedy peer review process by which I mean one that does not take months. Finding

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8 Roger Watson, *Predatory publishing continues*, 6(1), NURSING OPEN, 4-4. (2018), https://doi.org/10.1002/nop2.226.

9 Wikipedia, *Predatory open access publishing*, (Sep. 28, 2018) https://en.wikipedia.org/wiki/Predatory_open_access_publishing.

ways to accelerate the peer review process has eluded us and it is only possible by the predators if they are not doing it properly. There is a classic example of a paper with an obscene title and the obscenity repeated throughout that was published by a predatory publisher thereby demonstrating that they neither reviewed the paper nor read it[10]; presumably those operating the publishing system do not speak English and the nature of the emails and bizarre responses also suggests this. The predatory journals are invariably online and open access and they offer ridiculously low APCs or sometime charge no APC. Some predatory journals advertise impressive 'impact factors' – but these are undoubtedly fabricated[11].

An additional twist to the predatory journals is their invitation to edit special issues – which is just a way of getting you to do their work – and to join editorial boards. When the invitation to join a board does not work, there have been reported cases where they add your name anyway and it can be hard to have your name removed.

VII. AVOIDING THE PREDATORS

The best defence by academics in avoiding predatory publishers is the application of common sense: if in doubt; don't. Never respond to emails of invitation to publish in a journal. If you want to publish, you select the journal.

Universities could do more to protect their staff and to help starve the predatory publishing industry of funds. Universities could lever this in two ways: providing information; and censuring staff who do publish in predatory journals[12]. Information should be both general and specific; generally, staff induction and continuing professional development should include training in good publishing practices. Beyond that, universities could oblige subject areas to draw up regular lists of acceptable journals. These need not all be high impact factor journals; nevertheless, the Thomson Reuters impact factor list and the emerging sources index would be good starting points, merely because of the quality indicators and good practice that must be evident before inclusion.

Beyond universities, research councils and university funding bodies – especially in Australia, Hong Kong and the UK where research assessment exercises are conducted – could discount any outputs appearing in predatory journals from eligibility, and international bodies such as *Times Higher Education* which rank universities could ask for evidence of policies related to predatory journals.

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10 David Mazières & Eddie Kohler, *Get me off your fucking mailing list*, INTERNATIONAL JOURNAL OF ADVANCED COMPUTER TECHNOLOGY, (Feb. 10, 2017) http://www.scs.stanford.edu/~dm/home/papers/remove.pdf.

11 Mehrdad Jalalian, *The story of fake impact factor companies and how we detected them*, 7(2), ELECTRONIC PHYSICIAN, 1069–1072 (2015).

12 Roger Watson, *Beall's list of predatory open access journals: RIP*, 4 (2), NURSING OPEN, 60 (2017).

These measures may seem extreme, possibly unworkable and harsh on individuals. It is impossible to know what the profits of the predatory publishers are; they are 'hydra-headed' monsters. However, any amount of money spent on them and any extent to which the reputation of an individual or an institution is debased is too much; something must be done.