Trend Towards a New Punitivity? - Corporate Criminal Liability in Focus

CEJ
COMPLIANCE ELLIANCE JOURNAL

Content Curators:
Michele DeStefano (University of Miami School of Law)
Dr. Hendrik Schneider (University of Leipzig Faculty of Law)

ISSN 2365-3353
Volume 5 • Number 2
Fall 2019

Compliance Elliance Journal (CEJ)
Volume 5, Number 2, 2019
ISSN: 2365-3353
This version appears in print and online. CEJ is published twice per year, in spring and fall.

Title: Trend towards a New Punitivity? – Corporate Criminal Liability in Focus

Content Curators:
Michele DeStefano, University of Miami School of Law and LawWithoutWalls
Dr. Hendrik Schneider, University of Leipzig Faculty of Law

Technical Support:
Hannah Beusch
Hans-Henning Gonska
Dr. Niels Kaltenhäuser
Jannika Thomas

Website: www.cej-online.com

Email: info@cej-online.com

Address:
Taunusstrasse 7
65183 Wiesbaden, Germany

Telephone: +49 0341 / 97 35 220

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

Trend towards a New Punitivity? – Corporate Criminal Liability in Focus

TABLE OF CONTENTS

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

EDITORIAL

TREND TOWARDS A NEW PUNITIVITY? – CORPORATE CRIMINAL LIABILITY IN FOCUS

This issue focuses on the sanctioning of corporate crime. The reason and background for this is a planned change in the law in Germany, which could have an impact on companies worldwide, if they engage in commercial activities in Germany. This would allow Germany to adapt to a worldwide trend: While corporate criminal law has been established, for example, in the U.S. for more than 100 years, in Europe it was not until the 1980s that corresponding laws were created. In Germany, sanctions against companies were previously only possible below the threshold of criminal law. Despite this fact, fines imposed under German law have already been in line with international standards for comparable offenses.

In this edition, three articles introduce the current discussion in Germany and introduce the draft law. Two further articles report the legal situation in Belgium and Sweden. The review published in this edition, written by two Swiss authors, refers to a paper in the field of health care compliance. Together with his colleague, one of the authors also contributes an article on money laundering. Such acts can also be a connecting point for sanctions against participating companies.

We intend to continue the presentation on current developments in the area of corporate criminal liability, and are interested in articles from all over the world. We eagerly await your respective impulses and hope you enjoy the lecture of this special issue!

With our best regards,

Michele DeStefano & Hendrik Schneider
Founder and Content Curators of CEJ

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

DOES GERMANY NEED A NEW CORPORATE SANCTIONING ACT?

Sebastian Jungermann

AUTHOR

Dr. Sebastian Jungermann is a German lawyer at Arnold & Porter Kaye Scholer in Frankfurt. He specialized in competition law, compliance and internal investigations. Sebastian Jungermann advises clients regarding German and European competition and antitrust laws, including German, EU and multi-jurisdictional merger control proceedings, cartel proceedings, abuse-of-dominance proceedings, litigation, and compliance programs, as well as internal audits and contractual advice. Dr. Jungermann further advises in the fields of corporate law, national security, foreign investments and export control, IP, data protection and privacy (GDPR), outsourcing and other technology-related areas. In addition, he is involved in international litigation, including pre-trial discovery proceedings in support of US litigation.

ABSTRACT

In summer 2019 the German Federal Ministry of Justice has unveiled a draft Corporate Sanctioning Act (Verbandssanktionengesetz) to combat corporate crime. In this article, the author comments on the intended changes and highlights some issues that could be better solved differently in practice.

TABLE OF CONTENTS

I. INTRODUCTION

Early 2018, the political parties leading the new German government proposed far-reaching changes to the criminal law for companies, they have agreed to provide a new system of corporate sanctions. In August 2019, the German Federal Ministry of Justice unveiled a draft Corporate Sanctioning Act (*Verbandssanktionengesetz*) to combat corporate crime. At the time of writing this article, the draft was still under tight wraps. As promised in the German coalition agreement between the Conservatives and the Social Democrats, CDU, CSU, and SPD, dated 2 February 2018 (p. 126), the intention of the political parties was to update the sanctions law for companies, to increase corporate penalties and to provide a new system of corporate sanctions. The new draft bill of a Corporate Sanctioning Act shall now introduce corporate criminal liability for business-related criminal offences, facilitate appropriate punishment of criminal offences related to corporations, promote internal investigations, and shall incentivize investments in compliance.

As of now, applicable German law basically does not provide for criminal liability in the narrower sense of legal persons and associations of persons. This is justified by the (still) predominant opinion that only an individual has the capacity to act (*Handlungsfähigkeit*), can have criminal responsibility (*Schuldfähigkeit*) and can have the ability to be punishable (*Straffähigkeit*). All this does not apply to legal persons, corporations, and associations of persons.

Since the Middle Ages, the question of whether misconduct in a company or association is sufficiently sanctioned and whether Germany needs corporate criminal law has been the subject of controversy. Important discussions have been published by *Malbranc* in 1793 (*Observationes quaedam ad delictas universitatum spectantes*), where he opposes the possibility of attribution of guilt to *universitas*, and the potential criminal liability. Other renowned law scholars, among them *Feuerbach*, joined forces to this view. The fiction theory of *Savigny* was also important, according to which legal entities do not consider their quality as legal entities to be a mere natural person, to thinking, wanting and feeling beings, but a fiction. Such a fiction could be accepted in civil law, but would not be sufficient as a basis for criminal punishment. These opinions have been reflected in the German criminal laws of the 19th century, in particular in the Prussian Criminal Code (*PreußStGB*) of 1851 and the Imperial Criminal Code (*ReichsStGB*) of 1871.

The current discussions have been reinitiated in 2013 with the presentation of the "Draft of a law for the introduction of criminal responsibility of companies and other associations" from North Rhine Westphalia (*NRW*). In 2014, the German Institute for Compliance (*DICO*) submitted a daft "Compliance-Incentive-Act" proposal, suggesting to modify §§ 30 and 130 of the German Regulatory Offences Act (*OWiG*) accordingly. In the same year, also the German Federal Association of Corporate Lawyers (*BUJ*) submitted a "legislative proposal for an amendment to §§ 30, 130 OWiG", which takes a slightly different approach. In December 2017, the University of Cologne then presented the "Cologne Draft of an Association Sanctioning Act" and early September 2019, an alternative

draft to the ministerial draft bill was introduced, the so-called "Munich draft of a Corporate Sanctioning Act".

II. CURRENT GERMAN FRAMEWORK FOR SANCTIONS FOR CORPORATE MISCONDUCT

Under German law, companies are sanctioned de lege lata for misconduct on the part of employees and managers by setting an association fine in accordance with § 30 OWiG. According to this, a fine can be imposed on a company if a manager has committed a criminal offence or an administrative offence, a so-called attachment offence (*Anknüpfungstat*), which has violated the company's association-related obligations. According to § 130 OWiG, the imposition of an association fine may also be linked to the violation of a supervisory duty by the owner of a business or enterprise. Other persons acting on behalf of the holder may also be prosecuted. According to § 47 OWiG, it is the duty of the competent authority to decide whether an association fine will ultimately be imposed; the principle of opportunity applies (*Opportunitätsprinzip*). In 2013, the amount of a fine imposed by an association was increased tenfold to 10 million Euros. In addition to this penalty component, it is also possible to skim off any unlawful profits, whereby this disgorgement may exceed the maximum amount of the fine. As a secondary consequence, the expiration of "the obtained" can be ordered.

III. THE PROPOSED CORPORATE SANCTIONING ACT

As pointed out above, recent discussions in criminal theory and legal policy have brought forward the arguments that current German laws for penalizing company-related criminal offences is insufficient. Politicians and others have proposed the introduction of new statutes for penalizing corporations, in particular for the following reasons and with the following proposals:

A. Principle of Opportunity

The German Regulatory Offences Act (*OWiG*) is subject to the principle of opportunity (*Opportunitätsprinzip*), and thus to discretionary prosecution. Based on that principle, some criminal corporate offences are not being prosecuted at all in practice, while others are. Given the significant difference in funding and support for public prosecutors all over the sixteen German states (*Bundesländer*), there are indeed also regional differences in prosecuting misconduct within corporate structures in practice. This was also raised in the coalition agreement dated February 2018, where the parties formulated: "We want to ensure that companies that profit from the misconduct of their employees are also penalized more severely in the event of white-collar crime. So far, it has been left to the discretion of the competent authority whether the undertaking concerned should also be prosecuted. By moving away from the opportunity principle of the previously relevant regulatory offence law, we are ensuring uniform application of the law throughout Germany." The opportunity principle of the OWiG is indeed applied quite differently by public prosecutors throughout Germany. The intention was a uniform application of the

law. A study carried out in North Rhine-Westphalia (*NRW*) among 45 larger specialist public prosecutors' offices for economic and corruption proceedings has shown that not even in every fifth case a fine was imposed on the company, although this would have been possible. The proposal from NRW envisages integrating the criminal liability of legal entities, associations not having legal capacity and partnerships having legal capacity into the scope of application of the Criminal Code. The principle of legality (*Legalitätsprinzip*), which provides an obligation to prosecute, applies within the Criminal Code.

The Federal Ministry of Justice now seems to implement that principle of legality into its draft Corporate Sanctioning Act. If that proposal will become law, some German states have to invest heavily to increase forces and expertise to reach that obligation. Prosecutors will be obliged to initiate preliminary criminal investigations against a corporation upon sufficient reasonable suspicion that a criminal offence has been committed. Discretionary considerations, such as understaffed authorities or potentially lengthy investigations, which is often the case with international matters, will no longer constitute grounds for waiving criminal investigations. The available options to discontinue investigations on discretionary grounds under the Criminal Code (§§ 153, 153a StPO) will apply by analogy, though. However, the fact that the company has already suffered serious consequences or has conducted an internal investigation, may lead to investigations being abandoned.

B. Financial Penalties, a Formal Warning, a Monitor and the Death-Sentence

The current maximum fine is limited to 10 million Euros under German law (§ 30(2) OWiG). It is argued that this only constitutes a calculable risk for companies. On one side, the range seems to be too low for larger companies and too excessive for smaller companies. Although disgorgement may result in heavy fines, it is not a criminal penalty as such. Penalties for corporations under the German OWiG only may fail to reflect the seriousness of the issue and the damages done to society by corporate misconduct. Criminal law has a stronger deterrent effect than regulatory law. In addition, specific corporate criminal laws have become standard internationally. Not only 21 of the 28 EU-Member States and the United States, but also half of the OECD countries have established rules and legislation targeting corporate criminal activities.

In the coalition agreement from February 2018 the political parties agreed to the following: "We will extend the sanctions instruments: the current maximum fine of up to ten million Euros is too high for smaller companies and too low for large groups. We will ensure that the amount of the fine is geared to the economic strength of the company in the future. For companies with a turnover of more than 100 million Euros, the maximum limit should be 10 % of the turnover. We are also creating further sanction instruments. In addition, we create concrete and comprehensible assessment rules for corporate money sanctions. The sanctions shall be made public by appropriate means." And: "We are also increasing the legal security of the companies concerned through clear procedural rules. At the same time, we will create specific rules on the termination of proceedings in order to give judicial practice the necessary flexibility in prosecution."

It was often criticised, that defence rights under German law in company-related investigations have not been existent and rather inadequate. Defence rights have aimed at the individual, not at an association, and legal certainty is urgently needed here.

The proposed Corporate Sanctioning Act provides for three types of penalties for corporations: (1) a financial penalty relating to the corporation, (2) a warning, reserving the right to impose a financial penalty, and (3) as a final resort, dissolution of the corporation.
In addition and as agreed, financial corporate penalties shall be significantly higher for companies with an annual turnover of more than 100 million Euros. In cases of intent, the penalty will range from a minimum of 10,000 Euros up to 10% of the average annual turnover; in cases of negligence it shall still be 5,000 Euros up to a maximum of 5% of the average annual turnover. The average annual turnover to be set is calculated on the basis of the global turnover of all corporations operating as an economic unit over the last three financial years. The relevant date shall be the date of the sentencing decision.
Similar fines are also available under antitrust law (10 % of the worldwide turnover) and data protection law (4 % of the worldwide turnover), which may lead to disproportionately high penalties. In addition, the new draft Corporate Sanctioning Act also introduces the possibility of confiscation (§ 73 et seq. StPO), which is similar to disgorgement under the German antitrust law (§ 34 GWB).
The timing to calculate the turnover may impose major risks in M&A transactions as well. Concerning a share deal, and in case the target is integrated into the buyers group, which is often the case, the base for the fine may be increased significantly. Similar risks will be seen in case of an asset deal. All this may create the risk of excessive and disproportionate corporate penalties under the new law.

However, mitigation provisions apply if the company has in fact contributed to clarifying the corporate misconduct by conducting an internal investigation and cooperation with the prosecutors. Another option to end the official proceedings under the proposed Corporate Sanctioning Act is the issuing of a formal warning while reserving the right to impose a financial penalty. This warning option may apply where it is expected that (1) a warning suffices to prevent future corporate misconduct, (2) an overall assessment of all circumstances deems the imposition of financial penalties unnecessary, and (3) the maintenance of the legal order does not require penalties.
In such situations, the court may impose conditions and directives for the period of one to five years in which the right to impose a penalty is reserved. In particular, a court may order the implementation of a more efficient and stricter internal compliance system and the appointment of an external expert as compliance monitor to prevent further corporate misconduct. Such warning is somehow similar to the non- and deferred prosecution agreements as known in other jurisdictions, like the U.S., UK, and France. It is proposed to also incorporate such option into German law as an alternative way of ending criminal proceedings. However, in case the requirements mentioned above will not be met, the court may reserve the right to impose up to 50 % of the penalties if this is sufficient to prevent future corporate misconduct. Moreover, the prosecutor may provisionally waive an indictment and impose conditions and issue instructions instead (which is similar to § 153a StPO).

As ultima-ratio, the dissolution of the company is possible in extreme cases, the death-sentence so to speak. For example, when a senior manager "persistently commits serious corporate offences" or when "the continued existence of the corporation increases the risk of serious corporate offences to be committed".

C. Internal Investigations, Sharing Internal Documents and Records

Considering internal investigations, there are currently no statutory provisions under German law on how to conduct such investigations in order to establish the facts and circumstances. There are no standards yet which take into consideration such investigative attempts and cooperative behaviour. Moreover, the German Code of Criminal Procedure (*StPO*) does not touch upon the circumstances in which corporations might have to grant prosecutors and investigative authorities access to their internal investigation records.

In the coalition agreement dated February 2018 the political parties agreed: "In order to create legal certainty for all parties involved, we will create legal requirements for internal investigations, in particular with regard to confiscated documents and search possibilities. We will provide legal incentives for internal investigations to provide clarification assistance and for the subsequent disclosure of the findings."
There is great legal uncertainty as to whether and how the protection against seizure of legal opinions, interview records and other documents within the framework of internal investigations should be designed. Also the German case law is quite contradictory. The introduction of clear rules on the prohibition of seizure and exploitation in the sense of a "legal privilege" would be a sensible approach and urgently required. The German Constitutional Court (*Bundesverfassungsgericht*) decided in July 2018 on the searches of Volkswagen's law firm in the diesel affair and ruled, that the seizure of internal documents and reports during a law firm raid in March 2017 was in line with German Constitutional law. The analysis of these rulings has been quite contradictory as well, and legal certainty is still urgently required.
Today, a complete and sincere cooperation can often lead to a suspension of proceedings or milder sanctions. However, these decisions are largely at the discretion of the authorities. In May 2017, the Federal Court of Justice (*Bundesgerichtshof*) mitigated the impact of compliance efforts. Clear rules on the benefits of cooperation and disclosure of any findings would be welcome.

The new draft Corporate Sanctioning Act allows for a reduction in penalties imposed on corporations in the event that internal investigations are conducted, if the following requirements have been met: (1) the internal investigations must be independent and not conducted by the corporation's defence counsel, and it must provide a material contribution to clarifying the corporate misconduct, (2) the corporation must cooperate continuously and unrestrictedly with the prosecutors, and the results of the internal investigations, the relevant and essential documents and the final report on the internal investigations must be disclosed to the prosecutors, and internal investigations must be conducted in compliance with fair trial principles. The latter requires, that employees must be in-

formed that the information they provide may be used against them in criminal proceedings, prior to the interview, interviewees must be given the possibility to retain their own lawyer or have a member of the works council present during the interview, and interviewees must have the right to refuse giving testimony if the response to such questions would otherwise expose him or her or any of their relatives to prosecution for a criminal or regulatory offence, and the internal investigations must be conducted in compliance with the applicable laws and documented appropriately. The requirements for such internal investigations seem to be quite high and it remains to be seen, how parties will deal with such requirements if enacted. However, such approach indeed provides a first framework for conducting internal investigations under German law, and if companies comply with the requirements mentioned above for internal investigations and cooperation, they do have a chance that prosecutors may refrain entirely from prosecuting the corporation until the internal investigation is completed.

However, the proposed amendment of the protection from seizure (§ 97(1) No. 3 StPO) may be cause for serious concern. The legal privilege and protection from seizure under German law will be limited even further. The draft Corporate Sanctioning Act proposes that all records and documents in the custody of lawyers may be seized unless the client in question is formally a defendant in criminal proceedings. For such relationship, a "relationship of trust" must exists concerning the documents. It is also not clear, whether and to what extent attorney work products prepared in the context of an internal investigation, like interview minutes, draft and final reports and presentations, shall be protected from seizure. It is also unclear, what kind of rights the defendant may have and how the legal privilege shall work, in case the internal investigation runs parallel to criminal proceedings, and how to deal with the separation between internal investigators and corporate counsel. It may be appropriate to make clear that a "relationship of trust" exists regardless of any formal position as internal investigator or defence counsel, and the German legal privilege and protection from seizure should cover all attorney work products of an internal investigation, at least when the investigation runs parallel to the criminal proceedings. One major problem under German law is the approach, that if an internal investigation is conducted prior to criminal proceedings, and before the corporation has been formally deemed a defendant, it seems that such documents are not protected from seizure and no legal privilege exists because the corporation is not yet a defendant. The proposed approach would constitute major issues and may lead to an unacceptable weakening of the rights of companies to defend themselves.

D. Corporate Penalty-Register

The draft Corporate Sanctioning Act also provides for a register, to be organized by Germany's Federal Ministry of Justice. Final decisions on imposing penalties or fines on corporations shall be entered into this register, together with data required to identify the corporation, the criminal or administrative offence in question and the applied provisions. However, only prosecutors, public authorities and courts may receive unlimited access to the new register, and only upon express request.

E. Incentives to Invest in Compliance

Finally, the draft Corporate Sanctioning Act also provides for certain incentives for investments in compliance programmes. First, existing compliance measures can initially be taken into consideration when assessing the amount of a penalty. Thus, the draft Corporate Sanctioning Act takes the ruling of the Federal Court of Justice (*Bundesgerichtshof*) dated 9 May 2017 into consideration. The compliance set-up of a company may be decisive for choosing the type of sanction to be imposed, and the court may also order to instruct an external compliance monitor, as described above. The compliance monitor should be selected and must be paid by the corporation, while the engagement is subject to the court's approval. And it is expected that the compliance monitor shall prepare reports and expert opinions for the court.

IV. OUTLOOK AND REMARKS

The German Corporate Sanctioning Act is to enter into force two years after its promulgation, which shall give companies sufficient time to check their internal processes and to implement additional compliance measures if necessary.

However, if judging the arguments, one must simply state that there is no legally compelling necessity for the introduction of Corporate Sanctioning Act. But there is also no doubt that the procedure for sanctioning corporations needs improvement. This need cannot necessarily be satisfied by means of criminal law. From a political point of view, however, the time is evidently ripe for a corporate criminal law also in Germany. Too many jurisdictions with similar legal traditions have moved on into such direction. A genuine corporate criminal law like the new draft Corporate Sanctioning Act does not seem to be advisable, because for reasons set out above, such approach is quite far away from the German legal culture. But even though there are many good arguments to keep the current system and to empower the current criminal and regulatory sanctions law with more life, for example by investing into manpower and expertise in many German states, it appears the time has come for moving on. The coalition's demands perfectly fit into the political climate.

Very often the accusation that criminal law *de lege lata* does not have sufficient preventive effects and that large companies take calculable risks, does not seem to be right. Already today the costs for internal investigations, fines and civil law consequences are very high and represent large burdens and risks. The allegation that cases of "organised irresponsibility" give rise to unacceptable gaps in criminal liability is also exaggerated. Even in the case of complex organisational corporate structures, the individual perpetrators must generally be identified, so that culpable failure of corresponding supervisory structures can be prosecuted. All it needs is a system with sufficient resources at the levels of the prosecutors and the courts.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

DISCIPLINE AND PUNISH

The Draft of the Act on Combating Corporate Crime

Prof. Dr. Hendrik Schneider

AUTHORS

Hendrik Schneider, Founder and Content Curator of CEJ, is presently the head of the department of Criminal Law, Criminal Procedure, Criminology, Juvenile Law, and Sentencing at the University of Leipzig, Faculty of Law. His current practice includes serving as legal counsel on corporate- and medical- criminal cases and advising on criminal matters surrounding issues of economic transactions and forensic investigations. Additionally, he acts as a compliance consultant with particular emphasis on the healthcare industry, including risk analysis, development and implementation of internal guidelines, change management, employee training, and sustainable protection.

ABSTRACT

In August 2019, the Federal Ministry of Justice submitted a draft for a corporate crime act. This draft will end a decade-long debate on the criminal liability of legal persons and profoundly change the criminal prosecution in the area of economic criminal law. The article classifies the legislative project in the current discourse on criminal policy, reports on the content of the draft and gives a critical commentary on individual points.

TABLE OF CONTENTS

I. PROSECUTION OF CORPORATE CRIME IN GERMANY *DE LEGE LATA* AND *DE LEGE FERENDA*

In August 2019, the Federal Ministry of Justice, headed by Christine Lambrecht (SPD, Social Democratic Party of Germany), presented a draft Act on Combating Corporate Crime (hereinafter referred to as the "Draft Act"). The implementation of the project in the legislative procedure is expected, subject to possible changes in the details. The Act will fundamentally change the prosecution and defense of associations (that is, legal entities under public or private law, associations without legal capacity and partnerships with legal capacity[1]). Knowledge of the new legal material is relevant to economic players around the world, to the extent that they establish or operate subsidiaries in Germany or are active abroad on behalf of German companies.

According to current German law, companies can already be held liable if, for example, the executive board or another management body of the company has committed a criminal offense that enriched the company or resulted in a breach of the company's duties[2]. Since 1968, the statutory provision has been found in § 30 of the Administrative Offenses Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG").[3] The OWiG is regarded as the "little brother" of criminal law. To be sure, the procedure is modeled on criminal proceedings, but the fines do not constitute criminal penalties. The imposition of penalties is reserved for the judge. By contrast, fines on the basis of the OWiG are imposed by the administrative authorities responsible for punishing administrative offenses. Recourse to the courts against this is possible.

Through the 8th Act amending the Act against Restraints of Competition (*8. Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*) of June 26, 2013, the fine framework of § 30 OWiG was increased from 1 million euros to 10 million euros. This framework may be exceeded if the economic return of the act exceeds the statutory fine limit (§ 17 (4) OWiG). The fine of the association to be assessed by the court must include a "punishment share" and a "confiscation share." For years, fines in the hundreds of millions have thus been established (Siemens - 201 million euros, 2007[4]; Audi - 800 million

1 See § 1 (1)(1) VerSanG-E.

2 More specifically: Imme Roxin, *Compliance-Maßnahmen und Unternehmenssanktionierung de lege lata*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 341 et seq. (2018).

3 For historical development see: HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT, §1 Rn.45. (2nd ed., 2018).

4 LG München I, Beschluss vom 04.10.2007- 5 KLs 563 Js 45994/07, (Oct. 15, 2019, 02:33 PM), https://openjur.de/u/748600.html.

euros, 2018[5]). In the VW case, the fine in the "Dieselgate" scandal amounts to 1 billion euros[6].

The introduction of corporate criminal law was already being discussed in the 1950s[7]. Proposals in this regard were not acceptable to the majority. In particular, German criminal law scholars saw the principle of guilt as an insurmountable bulwark against the imposition of criminal penalties on companies.[8] Moreover, they are only capable of acting through their governing bodies, and the social and ethical condemnation found in punishment is meaningless for companies [9]. Policy ultimately followed suit.[10]

The internationally relevant scandals regarding the exhaust gas manipulations of well-known German automobile manufacturers, which lend emphasis to demands for a tougher approach and make it acceptable to the majority, are certainly responsible for today's change of opinion[11]. Reference should also be made to the political framework con-

---

5 Staatsanwaltschaft II München, *Ermittlungsverfahren gegen Verantwortliche der AUDI AG - Bußgeldbescheid gegen die AUDI AG*, Pressemitteilung 7 vom 16.10.2018 (Oct. 15, 2019, 02:33 PM), https://www.justiz.bayern.de/gerichte-und-behoerden/staatsanwaltschaft/muenchen-2/presse/2018/13.php.

6 Staatsanwaltschaft Braunschweig, *VW muss Bußgeld zahlen*, Pressmitteilung vom 13.06.2018 (Oct. 15, 2019, 02:35 PM), https://staatsanwaltschaft-braunschweig.niedersachsen.de/startseite/aktuelles/presseinformationen/vw-muss-bugeld-zahlen-174880.html.

7 See Ernst Heinitz, *Empfiehlt es sich, die Strafbarkeit der jursitischen Person gesetzlich vorzusehen?, in:* Verhandlungen des 40. Deutschen Justistentages Band I, 84ff (ed Ständige Deputation des Deutschen Juristentages, 1953); Karl Engisch, *Empfiehlt es sich, die Strafbarkeit der jursitischen Person gesetzlich vorzusehen?, in:* Verhandlungen des 40. Deutschen Juristentages Band II, E. 22 et seq. (ed. Ständige Deputation des Deutschen Juristentages, 1953); overview by Bernd Schünemann, *Der Kampf ums Verbandsstrafrecht in dritter Neuauflage, der „Kölner Entwurf eines Verbandssanktionsgesetzes" und die Verwandlung von Kuratoren in Monitore – much ado about something*, 8, STRAFVERTEIDIGER FORUM, 317 et seq. (2018)

8 Bernd Schünemann, *Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie*, 1, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 1 et seq. (2014); Günther Jakobs, *Strafbarkeit juristischer Personen?, in:* Festschrift für Klaus Lüderssen : zum 70. Geburtstag, 559 et seq.(ed. Prittwitz, 2002) Klaus Leipold, *Unternehmensstrafrecht – Eine rechtspolitische Notwendigkeit?*, 2, ZEITSCHRIFT FÜR RECHTSPOLITIK, 34 et seq. (2013).

9 HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHT - ALLGEMEINER TEIL, p. 227 (1995).

10 In 1999, a Hessian legislative initiative to introduce responsibility under criminal law for legal persons and associations of persons in the Bundesrat (BR-Drs. 690/98) was withdrawn again (BR-Drs. 385/99); this was followed by a rejection of the introduction of criminal liability for companies by the Commission for the Reform of the Criminal Sanction System in Germany in 2000; finally, in 2013, at the suggestion of the Ministry of Justice of the State of North Rhine-Westphalia, a draft act of the 84th Conference of Ministers of Justice of the Länder followed, which, however, also failed; for details, see Matthias Jahn, *"There is no such thing as too big to jail" – regarding the constitutional objections to an association criminal code under the Basic Law, in*: Corporate criminal law and its alternatives, 8 *et seq.* (eds. - Matthias Jahn, Charlotte Schmitt-Leonardy, Christian Schoop, 2015).

11 As such, it comprises symbolic ad hoc legislation, which often represents the engine of a tightening of criminal law, see HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT, §1 Rn.69 et seq. (2end ed., 2018); along with Mohamad El-Ghazi, *Das schweizerische Unternehmensstrafrecht – Lehren für ein mögliches*

ditions (see II). Furthermore, there is a lack of fundamental resistance on the part of criminal science today[12]. Rather, the concerns regarding corporate criminal law resulting from the basic principles of criminal law are being suborned in favor of pragmatism in terms of criminal policy[13]. Traditional European principles are no longer perceived as contemporary[14]. "Modern criminal law" should be elastic, effective and not limited to "minimally invasive" interventions [15]. As a whole, it has become obvious that the days when progress in criminal law was seen in its abolition[16] or at least in decriminalization[17] are over.

II. POLITICAL BACKGROUND OF THE DRAFT ACT ON COMBATING CORPORATE CRIME

Since 2013, Germany has been governed by a "grand coalition" of the CDU/CSU (union of Christian democratic parties) and the SPD. Angela Merkel, who has been Chancellor of the Federal Republic of Germany without interruption since Nov. 22, 2005, likewise governed in the 16th legislative period with a grand coalition and in the following official phase with a Black-Yellow coalition together with the FDP (Free Democratic Party, the liberal political party in Germany).

After the federal elections in 2013, the Black-Yellow coalition of the 17th legislative period was not able to continue, because the FDP was no longer represented in the Bundestag. For the first time since the founding of the Federal Republic of Germany in 1949, the party had not passed the so-called "5-percent hurdle." The CDU/CSU (Christian Democratic Union) had just missed an absolute majority.

Subsequently, the CDU/CSU and SPD, which had already put into effect some topics of criminal policy from the spectrum of economic criminal law, formed a government. Such

---

deutsches Verbandsstrafrecht, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 1, 254 (2018) on the introduction of corporate criminal law in Switzerland in 2003. The discussion regarding the necessity of corporate criminal law was triggered by a major fire near Sandoz, during which fire-fighting water contaminated with pesticides reached the Rhine and caused the death of fish.

12 Criticism is mainly limited to individual specific points and does not consist of fundamental criticism, see for example: Alexander Baur, *Kommt jetzt das "Unternehmensstrafrecht"?*, DIE AKTIENGESELLSCHAFT, 13-14, 2018, 457 et seq. (2018).; Katharina Beckemper, *Der Kölner Entwurf eines Verbandssanktionengesetzes – Sanktionen und Einstellungsmöglichkeiten*, 10, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 420 et seq. (2018).

13 Similarly: Urs Kindhäuser, *Straf-Recht und ultima-ratio-Prinzip*, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT,129 382 (385) (2017)

14 For example: Michael Kubiciel, *Kriminalpolitik und Strafrechtswissenschaft*, JURISTENZEITUNG, 4, 171 (176) (2018).

15 Michael Kubiciel &Elisa Hoven*, Gründe für die Reform des Verbandssanktionenrechts*, JURISPR-STRFR, 23, 2017, Anm. 1 (2017).

16 ARNO PLACK, PLÄDOYER FÜR DIE ABSCHAFFUNG DES STRAFRECHTS (1974).

17 Hendrik Schneider, *Vom bösen Täter zum kranken System. Perspektivenwechsel in der Kriminologie am Beispiel von Psychoanalyse und Kriminalsoziologie, in:* Recht und Justiz im gesellschaftlichen Aufbruch (1960-1975). Bundesrepublik Deutschland, Italien und Frankreich im Vergleich, (ed. Jörg Requate) 275-293 (2003).

topics include a tightening of the offenses of "passive and active corruption in the course of business" by the second "Act on Combating Corruption," which entered into force on November 26, 2015, the "Act on Combating Corruption in Health Care" of June 4, 2016[18], and the "Act on Reform of Asset Skimming under Criminal Law" of July 1, 2017. The latter is continuing the trend towards a "fiscalization of criminal law"[19] with impressive clarity, as the metaphor of "skimming off" simply shows. Whereas, in everyday life, this term refers, for example, to the delightful process of removing cream from milk or spooning milk froth from cappuccinos, the skimming of assets as early as the preliminary proceedings (that is, prior to conviction) makes it possible to seize assets according to the so-called "gross value principle."[20]. This means that not only the profit from the act, but also the entire amount obtained, without any deduction of expenses, is subject to recovery in favor of the state treasury[21]. If the measure is directed against individuals or smaller companies, this creates a perfect situation at an early stage of the proceedings, because the coercive measures on the part of the state often lead to insolvency and bankruptcy. In accordance with applicable law, the relevant proceedings are already directed against a company if the financial advantages of the illegal transaction did not arise for the perpetrator, but for the company. This is intended to achieve preventive successes according to the credo "crime may not pay."[22]

Moreover, in the current 19th legislative period, after a lengthy struggle and weighing of various alternatives for forming a government, a coalition agreement was concluded between the CDU/CSU and the SPD, which is also picking up measures from the spectrum

---

18 See Hendrik Schneider & Claudia Reich, *Honorarkooperationsarztverträge im Spagat zwischen Korruptionsstrafrecht, Arbeits- und Sozialversicherungsrecht*, MEDSTRA, 1, 11 *et seq.* (2019); Hendrik Schneider & Thorsten Ebermann, *Der Begriff der Zuführung von Patienten in den Tatbeständen Bestechlichkeit und Bestechung im Gesundheitswesen*, MEDSTRA, 2, 76 *et seq.* (2018); Hendrik Schneider, *Das Gesetz zur Bekämpfung der Korruption im Gesundheitswesen und die Angemessenheit der Vergütung von HCP*, MEDSTRA, 4, 195-203 (2016).

19 On the subject of fiscalization, see Monika Frommel, *Im ideologischen Labyrinth. Was erwarten Demonstrantinnen, wenn sie "Weg mit dem Werbeverbot für Schwangerschaftsabbrüche" rufen?,* NEUE KRIMINALPOLITIK, 300 *et seq* (2018).

20 Regarding the overview of the reform of asset skimming under criminal law: Gerson Trüg, *Die Reform der strafrechtlichen Vermögensabschöpfung*, NEUE JURISTISCHE WOCHENSCHRIFT, 1913 *et seq* (2017).

21 According to Jürgen Taschke, *Neue Entwicklungen im Wirtschaftsstrafrecht*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 274 *et seq.* (2017), such measures are sufficient to combat corporate crime and the sanctions imposed under German law are no less intrusive than the legal consequences imposed in countries with corporate criminal law: "In the major corruption criminal proceedings against leading industrial companies and automobile manufacturers, sanctions and – economically even more significant – profit skims have been imposed at levels unknown up to now. German sanctions law in no way lagged behind American sanctions, which are generally regarded as extremely strict – the criminal sanctions imposed on the industrial company Siemens in Germany, for example, were higher than those imposed in the U.S."

22 See speech by Bundestag parliamentarian Luczak (CDU): https://www.cducsu.de/themen/innen-recht-sport-und-ehrenamt/verbrechen-darf-sich-nicht-lohnen (Nov. 18, 2019, 02:26 PM)..

of economic crime policy. The CDU/CSU had recorded considerable losses of votes. Although the FDP is once again represented in the Bundestag,[23], it refused, after failed coalition negotiations, to participate in a government with the party Alliance 90 / The Greens (the largest green party in Germany) within the framework of a so-called "traffic light coalition.".

Under the heading "Pact for the Rule of Law" and amid a commitment to a "strong state"[24] and a "modern law,"[25] the CDU/CSU and SPD have formulated the political goal of reforming the "sanctions law for companies"[26] as follows:

> "We want to ensure that economic crime is effectively prosecuted and adequately punished. For this reason, we are reorganizing the law regarding sanctions for companies. We shall ensure that, in principle, companies that benefit from the misconduct of their employees are also subject to stronger sanctions in the event of economic crime. [...] By means of clear procedural rules, we shall also increase the legal certainty of the companies concerned. At the same time, we shall establish specific rules on the suspension of proceedings in order to give the judiciary the necessary flexibility in prosecution. We shall expand the range of sanctions available - the current maximum fine of up to ten million euros is too high for smaller companies and too low for large corporations. We shall ensure that, in the future, the amount of the fine is based on the economic strength of the company. For companies with a turnover of more than 100 million euros, the maximum limit is to be ten percent of turnover. We shall also create additional sanction instruments. In addition, we shall create concrete and comprehensible assessment rules for monetary sanctions for companies. The sanctions are to be made public by appropriate means. In order to create legal certainty for all parties involved, we shall create legal requirements for internal investigations, especially with regard to seized documents and options for engaging in searches. We shall create legal incentives for clarification assistance

23 The FDP received 10.7% of the votes cast.

24 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode p. 123; available at: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 02:28 PM).

25 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode S. 130; abrufbar unter: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 05:21 PM).

26 Further legal policy background to the Coalition Agreement, Emanuel Ballo & Marcus Reischl, *Der Koalitionsvertrag 2018 – Neue Impulse für die Reform des Sanktionsrechts für Unternehmen*, COMBLIANCE BERATER, 189 *et seq* (2018).

> by means of 'internal investigations' and subsequent disclosure of the findings made."[27]

The bill now presented by the office of Justice Minister Christine Lambrecht (SPD) is continuing the criminal policy line of the SPD. The invented word "*Verbandssanktionengesetz*" (Associations Sanctions Act), with which the draft of the Act on Combating Corporate Crime was overwritten, is merely an attempt at verbal appeasement[28]. It disguises the fact that this comprises criminal sanctions and criminal proceedings against companies.[29]

In the last elections to the Bundestag in 2017, the SPD achieved its worst result in a Bundestag election (with 20.5 percent of the votes cast) and since that time has been anxious about its status as the people's party. The question of whether another grand coalition led by the CDU/CSU should be formed was controversial within the party. The demand for a tough crackdown on economic crime represents an attempt to occupy a topic relevant to voters and to make visible the influence of the SPD on the policies of the federal government. Traditionally, there have been relevant differences between the parties in terms of criminal policy positions. While left-wing parties demand a sense of proportion in the prosecution of criminality based on misery, street crime and juvenile delinquency and advocate subject-specific (for example, fare evasion, shoplifting or drug-related crime) alternatives to criminal law and decriminalization , they see a need to catch up in the fight against crime by persons with high status and the prosecution of companies, and put more emphasis on prosecution and sanctioning. The opposite is true for conservative parties. These follow the maxim "tough on crime" with "crimes in the streets." On the other hand, with the pursuit of "white-collar-crime," greater restraint is touted. The pivot of the CDU/CSU to the criminal policy line of the SPD[30] is explained as a concession to the coalition partners and as a bow to the zeitgeist. The concern is to show the muscles of a strong state and a powerful judiciary in the face of general social insecurity.[31]

---

27 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode p. 126; available at: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 05:23 PM).

28 Similarly, Ralf Kölbel, *Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 407 (411) *et seq.* (2018), regarding a Cologne draft of an association sanctions law submitted by criminal law scholars: " terminologische Kaschierung"; Elisa Hoven & Thomas Weigend justify the wording in the Cologne draft with "the fact that the less controversial term is expected to be more accepted in legal policy regards," in: Elisa Hoven & Thomas Weigend, *Der Kölner Entwurf eines Verbandssanktionengesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 30 (31) (2018).

29 The draft sees itself as a "third lane" between criminal and administrative offenses law, see Draft Act, p. 56, 70, see also Alexander Baur & Philipp Maximilian Holle, *Entwurf eines Verbandssanktionengesetzes – Eine erste Einordnung*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 186, 189f. (2019).

30 See the 2013 draft from North Rhine-Westphalia under Justice Minister Kutschaty (SPD).

31 More specifically on this: TOBIAS SINGELNSTEIN & PEER STOLLE, DIE SICHERHEITSGESELLSCHAFT: SOZIALE KONTROLLE IM 21. JAHRHUNDERT (3rd end. 2012); ORTWIN RENN, GEFÜHLTE WAHRHEITEN. ORIENTIERUNG IN ZEITEN POSTFAKTISCHER VERUNSICHERUNG (1st end. 2019).

III. CONTENT OF THE DRAFT ACT

A. Expansion of German Corporate Criminal Law in Foreign Matters

In 69 paragraphs, the draft contains provisions in the areas of sanctions, procedural law and register law. The starting point for the liability of associations under criminal law is the association offense. This is given, comparable to the previous provision in § 30 OWiG, if a criminal offense has been committed in accordance with the provisions of German core and secondary criminal law and either the association has been enriched or is to be enriched or duties that affect the association have been violated (§ 2 (1)(3) Draft Act).

As such, the Act does not extend the catalog of possible offenses. In this respect, the same conditions that are applicable to proceedings against natural persons apply. Moreover, according to the general rules (territoriality principle, § 3 of the German Criminal Code (*Strafgesetzbuch*, "StGB"); personality principle, § 7 StGB), German criminal law must be applicable to begin with. With regard to criminal jurisdiction, the Draft Act goes one step further than the criminal prosecution of natural persons. According to § 2 (2) Draft Act, an association offense is to be equivalent to an act "to which German criminal law is not applicable, if the act would be a criminal offense under German criminal law, if the act is liable to criminal penalties at the site of the act or if the site of the act is not subject to penal power" and "the association at the time of the act has a registered office in Germany [...]." The reason given for this extension of German penal power to foreign circumstances is that multinational corporations based in Germany should not be able to evade punishment for foreign offenses committed by foreign employees. This gap in the existing law must be closed.

B. Attribution

Not every association offense committed by an employee leads to criminal liability on the part of the association. An offense is attributed to an association only if it was committed by a "person in leadership position" (*Leitungsperson*) (§ 3 (1)(1) Draft Act) or "if managing persons of the association could have prevented the offense or made it considerably more difficult by taking appropriate precautions to avoid association offenses, such as in particular organization, selection, instruction and supervision" (§ 3 (1)(2) Draft Act).

C. Competence

The public prosecutors' office, which is also responsible for prosecuting offenses committed by an association, is responsible for prosecuting association offenses falling within the scope of the Act (§ 24 Draft Act). The principle of legality applies (§ 25 (1), § 36 *et seq.* Draft Act). As such, the prosecution of a company is not left to the discretion of the criminal prosecution authority, but takes place *ex officio* if there is an initial suspicion. The provisions of the opportunity principle apply accordingly (§ 37 Draft Act). In the proceedings, the association assumes the role of the defendant (§ 28 Draft Act).

D. Sanctions

The draft also provides for a comprehensive catalog of sanctions. The focus is on the "association monetary sanction" (§ 8 (1) Draft Act), the amount of which differentiates according to intent and negligence and the annual turnover (§ 9 (1), (2) Draft Act). In the case of an average annual turnover of more than 100 million euros, the association monetary sanction in the case of an intentional association offense amounts to at least 10,000 euros and a maximum of 10 percent of the average annual turnover (§ 9 (2) Draft Act). In accordance with § 9 (2) Draft Act, the following applies: "In determining the average annual turnover, the worldwide turnover of all natural persons and associations of the last three fiscal years preceding the conviction shall be taken as the basis, to the extent that such persons and associations operate with the association as one economic unit." Under certain conditions, § 14 of the draft also provides for the "dissolution of the association." Furthermore, § 15 Draft Act provides for the public announcement of the conviction "in the case of a large number of injured parties."

E. Monitoring Measures

As an alternative to a conviction of an association sanction, the law also provides for a warning with the reservation of a penalty (§ 10 Draft Act). In such a case, the court can issue conditions and instructions. The instructions pursuant to § 13 Draft Act may include taking compliance measures to prevent future association offenses and proving such "precautions by certification of an expert body" (§ 13 (2) Draft Act). The provision is based on U.S. criminal law and the prosecution of FCPA violations. In the relevant proceedings of the Department of Justice (DOJ), a settlement (deferred prosecution agreement) is often reached. The company has clarified the facts through an internal investigation submitted to the DOJ and is urged, among other things, to improve its compliance management system as part of the settlement. In doing so, the company is provided with an "independent compliance monitor," which accompanies and monitors the implementation of the measures. If the requirements are fulfilled, the company is certified as compliant by the monitor and the measure is deemed to be terminated.[32]

According to the provisions of the Draft Act, the company is to select the "competent body." However, the appointment requires the consent of the court (§ 13 (2) Draft Act). The costs are borne by the company, with which a mandate agreement is concluded.

---

32 For the figure of the "monitor" in U.S. law, see Benno Schwarz, *FCPA Compliance Monitorships - US Marotte or Flavor of the New Times? Practical experience with FCPA compliance monitorships*, CORPORATE COMPLIANCE ZEITSCHRIFT, 189 – 193 (2019).

F. Internal Investigations

Several provisions are dedicated to internal investigations.[33] The conducting of internal investigations is rewarded with an optional mitigation of penalties, § 18 Draft Act. The conducting of internal investigations, which can lead to a reduction in penalties, is then linked to conditions that are described by indefinite legal terms. The internal investigation must have "essentially" contributed to the fact that the act was cleared up. Cooperation with the investigating authorities within the framework of the internal investigation must have been "unrestricted." The "essential" documents must have been made available after the completion of the internal investigation. Furthermore, the mitigation of penalties presupposes that the person carrying out the work has not at the same time assumed the role of defense counsel for the company or individual. According to § 42 Draft Act, the conducting of an internal investigation may also lead to a suspension of the prosecution for the time being.

G. Procedural Provisions

For legal practice, it is highly problematic that, in Germany, there is no wide-ranging "legal privilege" and no freedom from seizure according to the "work product doctrine."[34] Under the current legal situation, only communication between the defense counsel and his client is subject to wide-ranging freedom from seizure pursuant to § 97 (1)(1) of the German Code of Criminal Procedure (*Strafprozessordnung*, "StPO"). Records of the defense counsel's communications entrusted to him by his client can likewise not be seized, § 97 (1)(2) StPO. Other objects, for example documents handed over to the defense counsel by third parties, are also not subject to seizure, § 97 (1)(3) StPO.

From the principle of the freedom from seizure of "other" documents just mentioned, a practice-relevant exception is made simply according to the applicable legal situation. According to prevailing opinion, documents relating to internal investigations (for example, reports, interview minutes and other evidence) are not subject to the protection of § 97 (1)(3) StPO[35], because the client of the internal investigation is usually not the defendant, and there is no relationship of trust between the defendant and the law firm conducting the internal investigation. After the planned legal changes in the course of the Draft Act,

---

33 On the topic of internal investigations, see Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 1 (1), 74 *et seq.* (2015); Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL, 2 (1), 14-25 (2016); Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 2 (1), 26-58 (2016); Hendrik Schneider, *The enterprise in testudo formation*, COMPLIANCE ELLIANCE JOURNAL, 3 (1), 43-62 (2017).

34 Hendrik Schneider, *The enterprise in testudo formation*, COMPLIANCE ELLIANCE JOURNAL, 3 (1), 43-62 820179; The differences between German and U.S. criminal proceedings are illustrated by Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, THE YALE LAW JOURNAL, 118 (1), 126 (150) *et seq* (2018).

35 BVerfG, Beschluss vom 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17; MICHAEL GREVEN, KARLSRUHER KOMMENTAR ZUR STPO (8th eds., Rolf Hannich), § 97, Rn. 14a (2019).

this legal view,[36] which was recently confirmed by federal constitutional law in the "Jones Day proceedings," is now to be enshrined in the Act. This is because, according to the new version of § 97 (1)(3) StPO, the scope of application of the law is to be limited to documents relating to a relationship of trust between the client and the defense counsel.

The Draft Act leaves open the conclusions to be drawn from this legal situation in the event that the company is in the role of defendant. To be sure, § 25 (1) Draft Act states that the provisions of the German Code of Criminal Procedure must be applied to proceedings against the company. If the company makes use of a company defense counsel, it can therefore be assumed that the protection against seizure provided by § 97 StPO also applies in proceedings against the company. However, it can be presumed that the legislator does not assume that the documents relating to internal investigations are seizure-free, even in proceedings against the company. In any event, a distinction is to be drawn in this respect between the internal investigation carried out by the company defense counsel who is commissioned, and the investigation carried out by the law firm commissioned to cooperate with the public prosecutors' office. Since, according to the concept of Draft Act, the latter acts as an "extended arm" of the public prosecutors' office, there will be no relationship of trust between it and the company in the role of defendant.

It follows from this that, although the company enters into the status of defendant and becomes the object of preliminary proceedings, the Draft Act does not grant it an equality of arms within the scope of its defense. In summary, it can in fact be assumed that interview records, compilations of documents and summary factual presentations in corresponding "internal investigation reports" are subject to the access of the investigating authority if they were not prepared directly by the company defense counsel, but by the persons with a duty of professional secrecy commissioned for the internal investigation. Moreover, the company's primary documents are not subject to freedom from seizure (see § 97 (2)(2) StPO in the version of the Draft Act).

IV. OPINION

A. Absence of Fundamental Criticism

Since the publication of the Draft Act within the framework of a press conference of the Ministry, the reports and information events regarding the draft Act have been overwhelming, although it is only to enter into force two years after its pronouncement. So far, fundamental criticism of the project as such has largely failed to materialize.[37] This is

36 BVerfG, Beschluss vom 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17; MICHAEL GREVEN, KARLSRUHER KOMMENTAR ZUR STPO (8th eds., Rolf Hannich), § 97, Rn. 14a (2019).

37 See, for example, the rather positive first classification in the operative part of Alexander Baur & Philipp Maximilian Holle, *Entwurf eines Verbandssanktionengesetzes – Eine erste Einordnung*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 186 (2019).

easy to understand among the voices from the legal profession, because, from the perspective of the compliance and internal investment industry, the Act represents a gift from the legislator in the form of a gigantic market.

This is because the comments on the deficits with regard to freedom from seizure alone show that, in the future, a company will be well advised to conduct two internal investigations relating to the initial suspicion of the investigating authority. In an initial procedure, which may be conducted under the direction of the company defense counsel, the company clarifies the dimension of the compliance violation and compares the findings with the suspected situation according to the records. On this basis, it will decide whether to conduct a second internal investigation, the results of which will be made available to the investigating authorities in the hope of mitigating the penalty. In addition, companies will protect themselves – in the form of compliance management systems – against attribution according to the model of breach of supervisory duty and, in the event of criminal proceedings against the company, will need one or more company defense counsels in addition to the individual defense counsels.

Even from the camp of university lecturers, criticism comes only sporadically.[38] Insofar as German criminal science is concerned with the draft, its deals the details of individual provisions.[39] In publications prior to the announcement of the Draft Act, only a few authors, such as the emeritus Munich criminal law teacher Schünemann[40], still offer resistance to "overkill" in criminal law, and refer to the marketing strategies used by the apologists of corporate criminal law to advance their project. The sources from which the new "belief in criminal law" of criminal law scholars is feeding itself is unclear.[41] In particular, the reason for which individuals are to be prevented from committing criminal offenses by the punishment imposed on the employer remains unclear. Whether preventive effects can be derived from the severity of the sanctions should also be clarified. This is because, as stated at the outset, companies are already subject to severe sanctions under the current legal situation[42]. It is possible that the preventive considerations with which the drafts of the most recent discussion phase and the present Draft Act are justified are merely pretext,

---

38 Frank Saliger & Michael Tsambikakis, *Verbandssanktionen: Reform mit Augenmaß*, BETRIEBSBERATER, 40, cover, I (2019).

39 For example. Bartosz Makowicz, *Die Reform des Rechts der Unternehmenssanktionen: Was ist Compliance? Das ist hier die Frage!*, BETRIEBSBERATER, 39, cover, I (2019).

40 Bernd Schünemann, *Der Kampf ums Verbandsstrafrecht in dritter Neuauflage, der „Kölner Entwurf eines Verbandssanktionengesetzes" und die Verwandlung von Kuratoren in Monitore – much ado about something*, STRAFVERTEIDIGERFORUM, 317 *et seq* (2018).

41 A critical examination of this new belief in criminal law can be found in Ralf Kölbel, *Die dunkle Seite des Strafrechts – Eine Kriminologische Erwiderung auf die Pönalisierungsbereitschaft in der strafrechtlichen* Kriminalpolitik, NEUE KRIMINALPOLITIK, 249 *et seq.* (2019).

42 See Ralf Kölbel, *Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 407 *et seq.* (2018); according to which the criminal policy program of the association sanctions act (in this respect it refers to the so-called " Kölner Entwurf eines Verbandssanktionengesetzes") is based on a "rather weak empirical basis."

and that the real issue is retaliation or adaptation to the "need for punishment of the people." Approaches in this regard are once again being advocated today in German criminal science, as if the critical discussion in the 1960s and 1970s had never existed (see Walter: "The law demands retaliation – the citizens as well").

B. Assessment of Penalties

The draft is also open to challenge at the level of the assessment of penalties. The penalty range is linked to the economic performance of the company and therefore relates to its annual turnover. The fact that this is not sufficient as a limitation principle is shown by the comparison with fines in the StGB, which can be imposed – in lieu of imprisonment – for certain criminal offenses and is calculated according to the daily rate principle (§ 40 StGB). According to its system, individual performance in the form of monthly income, which is taken into account at the level of the daily rate, is also important (§ 40 (2) StGB). In addition, however, the number of daily rates refers to another measuring principle, because a daily rate corresponds to one day's imprisonment in the correctional facility (§ 43 StGB). The number of daily rates depends in turn on the penalty range of the criminal law put into effect and the guilt expressed in the criminal offense. This may not be exceeded with the number of daily rates.[43]

Such a measuring principle is missing in the Draft Act. To put it bluntly, the principle of arbitrariness applies to the imposition of fines on associations, because, in particular, there is no provision for a link to the penalty range of the offenses committed by the offender. For negligent water pollution according to § 324 StGB, for which natural persons can be punished with imprisonment for up to three years or a fine, in principle, the same fine on the association can be considered as for manipulations according to the *modus operandi* of Dieselgate.

C. Lack of Equality of Arms between Defense Counsel and Public Prosecutors' Office

As already shown above, the Draft Act opens up far-reaching possibilities for the criminal prosecution and sanctioning of companies, which possibilities are oriented in principle to U.S. models. However, these far-reaching investigative and sanctioning powers of the state do not correspond to the respective far-reaching protection under U.S. law in accordance with "legal privilege" and the "work product doctrine." Therefore, as the Jones Day case impressively demonstrates, it is possible, both under current and future law, for law firms that have conducted internal investigations to be subject to searches, in order to seize the relevant documents[44].

---

43 In depth on the scope and determination of fines: FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN: DIE STRAFZUMESSUNG UND IHRE GRUNDLAGEN (3rd eds.), 63-80 (2012).

44 Comprehensive classification of the legal situation in Markus Rieder & Jonas Menne, Internal Investigations – Legal Situation, Possible Options and Legal-Political Need for Action, COMPLIANCE ELLIANCE JOURNAL, 5 (1), 20 *et seq* (2019).

Accordingly, the "powerfulness" of the upcoming German corporate criminal law is obviously asserting itself against the rule of law of proceedings. Therefore, those who let the company assume the role of the defendant on the basis of questionable arguments should at least grant it adequate opportunities for defense.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

DRAFT BILL ON GERMAN CORPORATE SANCTIONS ACT

Thomas Grützner, Carsten Momsen & Jonas Menne

AUTHORS

Prof. Dr. Thomas Grützner is a partner in the White Collar Group of Latham & Watkins LLP in Munich and a honorary professor at Free University Berlin.
Prof. Dr. Carsten Momsen holds a chair for Criminal Law, Criminal Procedural La, Corporate Criminal Law and Criminal Enviromental Law at Free University of Berlin.
Dr. Jonas Menne is an attorney in the White Collar Group of Latham & Watkins LLP Frankfurt.
The authors would like to thank Felix Sperrle for his support in the research for this article.

ABSTRACT

After long discussions about the introduction of corporate criminal liability, the German Federal Ministry of Justice and Consumer Protection presented a first draft bill for a new Corporate Sanctions Act in August 2019. The act introduces a major shift in German Criminal law by proposing severe sanctions on companies for corporate criminal offenses. It includes regulations on internal investigations, compliance management systems and legal privilege. Since it was published, the act is discussed intensely among legal experts, politicians and the public. The following article presents the most important provisions of the draft bill. In addition, the authors compare the act to further jurisdiction's legislation, discuss potential impacts on companies, and provide proposals for improvements for the further legislative process

TABLE OF CONTENTS

I. INTRODUCTION

On August 22, 2019, the German Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz) presented a first draft bill on a Corporate Sanctions Act. The draft introduces severe sanctions on companies for corporate criminal offenses and includes regulations on internal investigations, compliance management systems and legal privilege.

The draft also introduces a major shift in German criminal law. Under existing German law, companies cannot be held criminally responsible. The German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz* - OWiG) permits corporate fines for offenses committed by certain personnel in managerial positions pursuant to § 30 OWiG[1] or by other employees if the person responsible for ensuring fulfilment of supervisory duties incumbent on the company itself violates these duties (§ 130 OWiG)[2]. Although being part of the regulatory law which historically was designed for minor offenses beyond the radar of criminal law, there could be severe sanctions imposed on companies and individuals - even under current law. The amount of the fine may be up to EUR 10 million. In special cases the amount may be significantly higher, e.g. § 56 of the German Banking Act (KWG): the higher of 20 million Euros or 10 percent of the total turnover achieved by the legal entity or association in the financial year preceding the decision of the authorities. In addition, there is the possibility of skimming off the profit achieved in full (confiscation).

However, the prosecution practice in Germany has been inconsistent due to the unregulated discretion of public prosecutors, with major regional differences in the number of investigations initiated by public prosecutors as well as in the amounts of fines imposed.[3] Moreover, the German system does not have anything comparable to the U.S. Sentencing Guidelines (USSG), which seek to impose similar sanctions for similar conduct.

After long discussions[4] about the introduction of corporate criminal liability, the German Federal Ministry of Justice and Consumer Protection presented a draft bill for a new

---

1 For an overview on § 30 OWiG see Charlotte Schmitt-Leonardy, *in*: Ordnungswidrigkeitengesetz, § 30, marginal no. 1 et seqq. (Heribert Blum et al eds., 1st ed., 2016).

2 For an overview on § 130 OWiG see Susanne Beck, *in*: Beck'scher Onlinekommentar Ordnungswidrigkeitengesetz, § 130, marginal no. 1 et seqq. (Jürgen Graf, 23rd edition 2019).

3 Elisa Hoven & Thomas Weigend, *Der Kölner Entwurf eines Verbandssanktionengesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 30, 31 (2018); Thomas Kutschaty, *Deutschland braucht ein Unternehmensstrafrecht*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 74, 74 et seq. (2013).

4 Cf. Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E)*, CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018); Alexander Baur, *Kommt jetzt das „Unternehmensstrafrecht"?*, DIE AKTIENGESELLSCHAFT, 457 (2018); Rolf Köllner & Jörg

Corporate Sanctions Act. This draft is not yet final and may be modified in the legislative process. However, it portends significant change in Germany, and we describe below the most important provisions of the draft bill as well as their potential impact on companies.[5]

II. OVERVIEW ON MAIN REGULATIONS

A. Duty to Investigate Corporate Criminal Offenses

Under the existing Act on Regulatory Offenses, it is at the public prosecution's discretion to initiate preliminary proceedings against companies (facultative prosecution). This is the main reason for the existing inconsistent investigation practice described above. The new draft bill plans to introduce the so-called principle of legality (mandatory prosecution), meaning that public prosecutors will be obliged to investigate possible corporate criminal offenses under the new Corporate Sanctions Act. A corporate criminal offense under the drafted Corporate Sanctions Act would be a criminal offense by which the company's duties are breached or by which the company was or was intended to be enriched (§ 2 (1) draft bill).

B. Monetary Sanctions up to 10 percent of Revenue

The existing German Act on Regulatory Offenses provides for an absolute upper limit of EUR 10 million per offense regarding administrative fines on companies, though it does permit confiscating illegal gains, which sometimes resulted in a greater sanction.[6] Pursuant to § 9 (2) of the new draft bill, this upper limit for fines would be raised significantly, up to 10 percent of the company's average revenue over the last three years (if it exceeds EUR 100 million). The relevant revenue would be comprised of the world-wide revenue made by all companies or individuals operating within the same business unit. If the average revenue was be-low EUR 100 million, the absolute upper limit would remain at EUR 10 million (§ 9 (1) of the draft bill).

Mück, *Praxiskommentar zum Kölner Entwurf eines Verbandsanktionengesetzes – VerbSG-E*, NEUE ZEITSCHRIFT FÜR INSOLVENZ- UND SANIERUNGSRECHT, 311 (2018); Klaus Leipold, *Unternehmensstrafrecht – Eine rechtspolitische Notwendigkeit*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 34 (2013).

5 For an overview on the key regulations and a first assessment see Björn Gercke & Andreas Grözinger, *BMJV-Entwurf zu Verbandssanktionene: Zuckerbrot und Peitsche*, LEGAL TRIBUNE ONLINE (Sep. 5, 2019, 03:06 PM), https://www.lto.de//recht/hintergruende/h/verbandssanktionengesetz-entwurf-bmjv-compliance-interne-untersuchungen-trennung-strafverteidigung-gastkommentar/; Alexander Ignor, *Privatisierung der Strafverfolgung*, FRANKFURTER ALLGEMEINE ZEITUNG – Einspruch (Sep. 9, 2019, 02:25 PM), https://www.faz.net/-irf-9qzju.

6 E.g., EUR 531 million were confiscated from Porsche, cf. Stefan Mayr, Mit der Geldbuße ist der Dieselskandal noch lange nicht abgeschlossen, SÜDDEUTSCHE ZEITUNG (May 7, 2019, 04:00 PM), https://www.sueddeutsche.de/wirtschaft/porsche-dieselskandal-strafe-1.4435894; EUR 995 million were confiscated from Volkswagen, cf. report by Frankfurter Allgemeine Zeitung, Volkswagen muss eine Milliarde Euro Bußgeld zahlen, FRANKFURTER ALLGEMEINE ZEITUNG (Jun. 13, 2018, 06:34 PM), https://www.faz.net/-i9d-9b6ss.

In addition, prosecutors will retain the ability to seek to confiscate value of the proceeds of the offense in addition to the monetary sanction.[7] There is no limit on the amount of values that can be confiscated.

C. Non-Monetary Sanctions

The draft bill proposes a variety of non-monetary sanctions against companies that the exist-ing law does not contain:

- The court may impose the duty to provide restitution to victims of the corporate criminal offense, § 12 draft bill.
- The court may also order a company to implement an effective compliance management system. The draft bill does not explicitly foresee the installation of a monitor as is sometimes ordered settlements with the U.S. Department of Justice or U.S. Securities and Exchange Commission.[8] However, the court may order the company to prove the installation and effectiveness of its compliance system by a certification of competent authority, i.e. attorneys, auditors or business consultants, § 13 draft bill.
- The court can issue a warning with a monetary fine to be imposed only if another corporate criminal offense is committed within a certain period of time or if the company repeatedly or severely disregards the court's order to compensate victims or to implement an effective compliance management system, § 10 draft bill.
- Lastly, and only in extraordinarily severe cases, the court may order a company's liquidation, § 14 draft bill.

D. Naming and Shaming

Under existing law, corporate sanctions are generally not publicly disclosed. § 15 of the draft bill proposes that, in cases where there are a large number of aggrieved parties, the court may publicly disclose the sanctions imposed on a company.
Generally, the draft imposes a non-public sanction register to be set up by the Federal Ministry of Justice and Consumer Protection (pursuant to §§ 55 et seqq. of the draft bill, containing information such as the imposed sanctions and details on the respective companies).

---

7 Under existing law, this is possible pursuant to § 30 (3) in conjunction with § 17 (4) OWiG; see Klaus Rogall, *in*: Karlsruher Kommentar zum OWiG, § 30, marginal no. 140 et seqq. (Wolfgang Mitsch, 5th ed., 2018); Carsten Krumm, *Gewinnabschöpfung durch Geldbuße*, NEUE JURISTISCHE WOCHENSCHRIFT, 196 (2011).

8 See Vikramaditya Khanna & Timothy L. Dickinson, *The new corporate monitor: the new corporate czar?*, 105 MICHIGAN LAW REVIEW, 1713 (2007).

E. Concluding Investigations without Criminal Charges

The draft bill also provides for several possibilities for the public prosecution to terminate preliminary proceedings without charging the company:

- First, while the draft bill mandates investigation, a prosecutor could terminate preliminary proceedings where the offense does not warrant criminal charges, § 36 draft bill.
- Second, the public prosecution would also be able to terminate preliminary proceedings and impose, with consent of the court, the duty to compensate victims or set-up an effective compliance system, § 37 in conjunction with §§ 12, 13 draft bill.
- Third, the public prosecution may terminate preliminary proceedings in case of anti-trust corporate criminal offenses (due to specific jurisdiction of the Federal Cartel Office) pursuant to § 43 draft bill, in case of the company's insolvency (§ 40 draft bill) and if the company is expected to be held liable for the offense in foreign countries (§ 39 draft bill). The latter is the case if the sanction that could be imposed by the German public prosecution was relatively low compared to the sanction expected to be imposed by the foreign state, or if the foreign sanction is expected to have a sufficient influence on the company's measures to prevent future corporate criminal offenses.
- Lastly, the public prosecution could temporarily suspend the preliminary proceedings pursuant to § 42 draft bill, and await the results of the company's independent internal investigation, if the company notifies the prosecution about its own ongoing internal investigation.

All these possibilities are not included in the existing law.

F. Mitigating Effect of Compliance Management Systems and Internal Investigations

The draft bill stipulates in § 18 that establishing compliance management systems and conducting internal investigations can be taken into account for sentencing purposes. This is in-tended to create an incentive to set up such compliance management systems or to conduct internal investigations which aid in detecting and remedying misconduct.[9] As a consequence, the court may reduce the sentence by up to half the upper limit of the monetary fines (§ 19 draft bill).

§ 19 draft bill, while outlining ways in which the prosecution might resolve a case without charges, does not provide guidance as to how the company might seek to achieve a reasonable settlement. It is therefore somewhat surprising that the Ministry of Justice and Consumer Protection has not taken the opportunity to introduce Non-Prosecution

9 Explanatory memorandum for the draft bill, p. 99.

Agreements ("NPAs") or Deferred-Prosecution Agreements ("DPAs") into the law. This could have created a regulated procedure to negotiate the benefits of cooperation between the prosecutors and the company. The draft bill would also have benefited from provisions guiding the exercise of discretion by the prosecution when determining sanctions. The UK approach to DPAs in combination with the sector-specific Sentencing Guidelines could have served as a model.[10] In the United Kingdom, law enforcement agencies can only negotiate DPAs with companies, not with individuals.[11] As a rule, the agreed conditions relate to fines, recompense obligations, the absorption of profits, if any, and a tightening of the company's internal compliance management system. The prerequisites for the conclusion of DPAs are set out in Schedule 17 to Section 45 of the Crime and Courts Act (2013). In addition, a Code of Practice ("CoP") was established for the purpose of uniform application of the law.[12]

If the law enforcement authorities and a company agree on a DPA for the time being, its draft will be discussed in a public hearing, i.e. in court. The DPA must be approved by the negotiating court. The DPA will then also be published.[13]

As the UK Bribery Act includes the offense of failure to prevent bribery, there is a particularly wide scope for DPAs. DPAs provide companies and prosecutors with an opportunity to resolve cases where there remain certain disputes – e.g., whether the compliance management system already provided for "adequate procedures" to prevent bribery. This, generally mutual uncertainty whether an existing compliance management system will be qualified as having already provided for "adequate procedures", offers considerable scope for the conclusion of DPAs.[14]

However, internal investigations only mitigate sanctions if they have been carried out success-fully and lawfully, and in full cooperation with the public prosecution.

- To be considered successful, the internal investigation must have made a significant contribution to solving the offense.
- To be considered lawful, the investigation must be conducted in accordance with the applicable law. This might particularly refer to data protection and labor law provisions, and the basic principle of fair trial (§ 18 (1) (6) draft bill). When conducting internal investigations, employees need to be notified on the possibility

---

10 *Schorn/Sprenger*, Deferred Prosecution Agreements nach neuem britischen Recht - Perspektiven für unternehmensinterne Compliance und Investigations, CORPORATE COMPLIANCE ZEITSCHRIFT, 211 ff.; (2014) CINDY ALEXANDER & MARK COHEN, TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING (April 2015).

11 See Part. 1, Schedule 17 zu § 45 Crime and Courts Act (2013).

12 (Sep. 5, 2019, 03:17 PM) https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

13 DPAs are published on the Serious Fraud Office website, (Sep. 5, 2019, 03:16 PM) https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

14 CARSTEN MOMSEN, CORINNA HELMS & SARAH WASHINGTON, WIRTSCHAFTS- UND STEUERSTRAFRECHT (2nd ed.) 2019.

that their statements could be used in criminal proceedings, on their right to be accompanied to interviews by an attorney (or a member of the workers' council), and on their right to remain silent, i.e. not to self-incriminate. Special attention should also be paid to the requirements of the EU General Data Protection Regulation (General Data Protection Regulation – GDPR[15]). Providing kind of a general allowance, Section 35 of the draft states the use of personal data from investigative measures within investigative procedure and court trial.[16] Whether this general rule can suspend the restrictions of the GDPR appears to be doubtful.

- To be considered in full cooperation with public prosecution, the company must make the results of the internal investigation as well as all relevant documents available to the public prosecution.

Furthermore, the draft bill includes rules about how investigations should be conducted and by whom. To be considered in full cooperation, internal investigations must be conducted by an attorney that is different from the company's defense attorney in order for the company to profit from the mitigating effect. It seems that the authors of the draft bill believe that full cooperation is only possible where the attorney conducting the investigation is independent of the company's defense to any criminal charges.[17]

Furthermore the draft does not address whistleblower protection. This omission may turn out as a crucial deficit. Since the provisions on witness protection in the Criminal Procedure Code do not fit whistleblowers and a Ruling like RICO (Racketeer Influenced Corrupt Organizations Act) is very much alien to German law, a provision is urgently needed. At present, however, it is not even clear whether a protection concept is intended or whether a reward scheme is to be the main focus. A combination would make more sense.

---

15 On the impact of the GDPR on internal investigations see Lukas Ströbel, Wolf-Tassilo Böhm & Christina Breunig & Tim Wybitul, *Beschäftigtendatenschutz und Compliance: Compliance-Kontrollen und interne Ermittlungen nach der EU-Datenschutz-Grundverordnung und dem neuen Bundesdatenschutzgesetz*, CORPORATE COMPLIANCE ZEITSCHRIFT, 14 (2018); Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499 (2017).

16 According to § 18 (1) draft bill personal data obtained as a result of measures taken to clarify the offence committed by the Association or an administrative offence connected with the offence committed by the Association pursuant to Section 130 of the Act on Administrative Offences may be used in sanction proceedings.

Whereas § 18 (2) draft bill clarifies Personal data being obtained as a result of measures to investigate other criminal offences or under other laws may be used in sanction proceedings if, under the Code of Criminal Procedure, they may also be used in proceedings relating to the offence committed by the Association. It is unclear if this can be seen as consent under GDPR as well concerning delivering the data to e.g. US agencies or the company´s headquarter if located outside Germany. If not, the Company bears a significant risk, since the fines under GDPR are similarly high as the maximum amounts that can be imposed with the criminal sanctions, cf. Thomas Grützner & Carsten Momsen, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?*, CORPORATE COMPLIANCE ZEITSCHRIFT, 242 ff. (2017).

17 Nevertheless, it deems possible that both attorneys work for the same law firm. Talking about minimizing conflicts of interests this is surprising.

G. Company's Rights and Legal Privilege

Pursuant to the draft, companies would be given the same legal protections as accused persons (§ 28 draft bill). This would include the right on fair hearing, the right on motions in the proceedings, the right to an attorney and the right to remain silent for the company's legal representatives.[18]

Furthermore, the principles of legal privilege apply. However, in Germany legal privilege does not exist in in the same way as in Common Law countries, but only in a few cases regulated expressly by criminal procedural law. [19]While all attorneys have the right to refuse testimony concerning information that was entrusted to them or became known to them in this capacity pursuant to § 53 (1) sentence 1 no. 3 StPO (*Strafprozessordnung* - German Code of Criminal Procedure)[20], documents or data containing such information might be subject to seizure, especially if they are not part of the company's defense.

As stated above, the draft bill stipulates that the company's defense attorney and the attorney conducting an internal investigation must not be identical. While for the defense attorney, all attorney-client communication and all attorney work products would be subject to the prohibition of seizure, communication with and work products from the attorney conducting the internal investigation are privileged only under the following limited circumstances[21]:

- Preliminary proceedings have already been initiated by the public prosecution.
- Documents or data need to be subject to a special relationship of trust between the company and its attorney, which requires the company itself (and not, e.g., its mother company) to mandate the attorney to conduct the internal investigation. The draft bill does not provide in detail which kind of documents or data are subject to this relationship of trust.
- Documents or data need to be in the possession of the attorney. An investigation report or attorney-client communication referring to the internal investigation could always be seized in the company's premises.

The draft bill's explanatory memorandum explicitly excludes internal investigations from the application of legal privilege and the prohibition of seizure, if the investigation is conducted solely for internal compliance reasons and does not relate to any potential offence

---

18 Cf. explanatory memorandum for the draft bill, p. 110 et seq.

19 Markus S. Rieder & Jonas Menne, *Internal Investigations – Legal Situation, Possible Options And Legal-Political Need For Action*, 5 COMPLIANCE ELLIANCE JOURNAL, 20, 29 (2019); Thomas Grützner & Alexander Jakob, *in:* Compliance von A-Z, Anwaltsprivileg (Allgemein) (Thomas Grützner & Alexander Jakob, 2nd. ed., 2015).

20 Cf. Markus Bader, *in:* Karlsruher Kommentar zur Strafprozessordnung, § 53, marginal no. 16 (Rolf Hannich, 8th ed., 2019); Percic, *in:* Münchener Kommentar zur StPO, § 53, marginal no. 20 (Christoph Knauer et al eds., 1st ed., 2014).

21 Cf. Explanatory memorandum for the draft bill, p. 137.

punishable under the Corporate Sanctions Act.[22] In addition, business documents that a company is legally required to retain are exempted from the prohibition of seizure, since an attorney shall not—intentionally or unintentionally—act as a "safe harbor" for such documents.[23]

It is disappointing that the Federal Ministry of Justice and Consumer Protection decided against a broader protection of legal privilege, which can have adverse effects on how investigations are conducted in Germany and particularly for cross-border investigations subject to different legal regimes and privilege protections. The draft bill follows the Federal Constitutional Court's 2018 decisions on complaints against the search of a law firm and the securing of documents and data in the firm's premises. The Court's decisions had declared those measures to be in accordance with the constitution and therefore severely limited legal privilege in Germany. The Court and the Federal Ministry of Justice and Consumer Protection both justify the limitation of legal privilege with the "effectiveness of criminal prosecution". However, 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 require a corresponding protection of legal privilege. Moreover, the allegation that a comprehensive legal privilege would lead to numerous lawyers being used as a "safe harbor" for certain documents or even incriminating evidence is shortsighted and completely disregards the serious professional and criminal consequences of such conduct.[24]

A broader legal privilege that properly protects the attorney-client-relationship between a company and its lawyers would have been preferable. In particular, it is not comprehensible why the draft bill rigorously differentiates between defense counsel and other lawyers con-ducting internal investigations, as the whole process of conducting internal investigations should serve to detect and remedy misconduct, in ways that are not inconsistent with the company's potential defense. It also remains unclear why legal privilege should only apply if preliminary proceedings have already been initiated by the public prosecution. Such an arbitrary lean creates a disincentive for companies to proactively initiate internal investigations to detect and remedy misconduct, but subjecting them to privilege only if the government has already started investigating.

In an inquisitorial system, it is solely the prosecution's responsibility to investigate and collect evidence. It is under current law not the business of the defense. The draft bill tries to out-source internal investigations according to adversarial systems, but lacks adequate

---

22 Explanatory memorandum for the draft bill, p. 137.

23 Critical on the regulations on internal investigations Stefan Kirsch, *Entwurf zum Unternehmensstrafrecht: Affront für Verteidiger*, FRANKFURTER ALLGEMEINE ZEITUNG – Einspruch (August 16, 2019, 01:05 PM), https://www.faz.net/einspruch/entwurf-zum-unternehmensstrafrecht-affront-fuer-verteidiger-16352605.html.

24 Markus S. Rieder & Jonas Menne, *Internal Investigations – Legal Situation, Possible Options And Legal-Political Need For Action*, 5 COMPLIANCE ELLIANCE JOURNAL, 20, 37 et seq. (2019).

adjustments of legal privilege. The public prosecutor's office is given more extensive discretionary powers and approaches for investigative measures. On the other hand, the defense is still not granted its own investigative rights or provided with appropriate instruments. The latter must be made up for with increasing urgency in order to restore at least some equality of the arms in the investigation procedure.

H. Offenses Committed in Foreign Countries and by Foreign Companies' Employees

The legal consequences of offenses committed abroad and the sanction of foreign companies proposed by the draft bill would depend on whether the act for which the company is held liable is governed by German criminal law or not. German criminal law contains various constellations of extraterritorial application such as offenses involving German citizens or infringing domestic legal interests (cf. §§ 3 et seqq. StGB (*Strafgesetzbuch* – German Criminal Code)).[25]

If German criminal law applies to the act, foreign companies could be sanctioned if their legal typology was comparable to a German legal entity or partnership. German companies could be held liable without further requirements.[26] This is equivalent to the legal situation under existing law. However, the enforcement of an imposed fine against a foreign company could be an obstacle, if the concerned company does not have a seat or assets in Germany.[27]

Under existing law, no sanctions can be imposed if German criminal law does not apply to the act.[28] The Corporate Sanctions Act would, pursuant to § 2 (2), apply to such an act, if it were a criminal offense under German criminal law, if it is a criminal offense at the place of the offense and if the company has a seat in Germany. This applies to both German and foreign companies. The draft bill does not provide for any restrictions as for the place of the offense or the nationalities of either offender or victim. However, as stated above, investigation proceedings could be terminated without bringing charges against the company if the company is held liable for the act in a foreign country.

---

25 For an overview, see Jürgen Rath, *Internationales Strafrecht (§§ 3 ff. StGB)*, JURISTISCHE ARBEITSBLÄTTER, 26 (2007).

26 Markus Rübenstahl, Frank Saliger & Michael Tsambikakis, *in:* Wirtschaftsstrafrecht, § 30 OWiG, marginal no. 19 (Robert Esser et al eds., 1st ed., 2017).

27 Cf. Lars Niesler, *in:* Wirtschafts- und Steuerstrafrecht, § 30 OWiG, marginal no. 8 (Jürgen Graf et al eds., 2nd ed., 2017).

28 Alexander Meyberg, *in:* Beck'scher Online Kommentar OWiG, § 30, marginal no. 28 (Jürgen Graf, 23rd ed., 2019).

III. CONCLUSION

Overall, the draft provides prosecutors with effective tools to prosecute corporate crime. Deficits appear mainly due to the mixing of the historically inquisitorial German system with the reality of a partially adversarial procedure in white-collar crime. Areas that should be revisited before the draft bill becomes law include:

- Considering regulated instruments such as NPAs and DPAs into German law.
- Providing guidance for how sanctions will be determined, either on the model of the English Sentencing Guidelines or with a set of instruments comparable to the DOJ Principles.
- Not limiting the maximum mitigation to 50 percent, as extraordinary cooperation may justify a greater reduction in sentencing.
- Conceptualizing whistleblower protection
- Finally, a broader legal privilege would be desirable to properly protect the attorney-client relationship during internal investigations, appropriately recognize the position of lawyers as independent organ of the administration of justice, and better align with other major enforcement authorities in the U.S. and U.K.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

CORPORATE CRIMINAL LIABILITY IN SWEDEN – CORPORATE FINES FROM A CRITICAL PERSPECTIVE

Elvira Näs & Michael Nyman

AUTHORS

Elvira Näs is an associate at Eversheds Sutherland Advokatbyrå in Stockholm, Sweden. Elvira's main areas of practice include Swedish and international commercial law with focus on employment law and data protection. During her studies at Uppsala University, Elvira wrote her Master of Laws Dissertation on corporate fines titled Corporate Fines from a Criminal Procedure Perspective.

Michael Nyman is a partner at Eversheds Sutherland Advokatbyrå in Stockholm, Sweden. Michael has over 20 years' experience of qualified legal work and specializes in M&A, corporate law, commercial agreements and legal risk management issues. Michael also advises clients on how to identify and mitigate legal risks in areas such as contract management, bribery and corruption. Corporations regularly engage Michael to educate directors and employees on issues around legal risk and compliance.

ABSTRACT

Swedish criminal law does not allow for corporate criminal liability as it is built on the basic principle of personal criminal liability, meaning that only private individuals are considered able to possess criminal liability and consequently commit crimes. However, a corporation may be subject to corporate fines and other sanctions if a crime has been committed during the corporation's operations. Corporate fines are the closest equivalent to corporate criminal liability under Swedish law, which sole purposes is punitive although it has been deemed impossible to categorize corporate fines as a punishment in the strictest sense. This article will further explain the design of corporate fines today, the problems resulting from corporations not being able to possess criminal liability as well as the proposed changes to corporate fines from a critical perspective.

TABLE OF CONTENTS

I. INTRODUCTION TO CORPORATE CRIMINAL LIABILITY IN SWEDEN

Swedish criminal law is built on the idea of personal criminal liability and only private individuals are considered able to possess criminal liability and consequently commit crimes, which is why Swedish law does not allow for corporate criminal liability.[1] However, if a crime is committed during the corporation's operations, criminal liability may apply to the representatives or employees of the corporation who committed the offence. In conjunction with the individual criminal liability, the corporation may be subject to corporate fines (*Sw. företagsbot*), administrative sanctions and risks having to pay damages as a result of a crime. Corporate liability may also arise as a special administrative sanction from acts violating provisions in certain regulations, such as the Environmental Protection Act (*Sw: Miljöbalken*). Other examples of potential sanctions are administrative fines due to breaches of the General Data Protection Regulation, competition law fines (*Sw: konkurrensskadeavgift*) due to breaches of the Competition Act (*Sw: Konkurrenslag*) and being excluded from participating in public procurements under the Public Procurement Act (*Sw: Lag om offentlig upphandling*). In addition, any proceed of a crime may be declared forfeited (*Sw: förverkad*) under the Swedish Criminal Code.[2] In the following, focus is on corporate fines since it is the closest equivalent to corporate criminal liability in its strictest sense under Swedish Criminal Law.

II. CORPORATE FINES TODAY

Although corporate criminal liability where legal entities would be subject to punishment was discussed several times before the implementation of corporate fines, the proposals faced too much criticism and were never implemented.[3] The criticism was mostly based on fundamental and practical issues in changing the basics of Swedish criminal law.[4] Instead, corporate fines were introduced in Swedish criminal law in 1986.[5] Since corporations cannot possess criminal liability and commit crimes, they cannot be subject to punishments according to the Penal Code.[6] Hence, corporate fines are not deemed a criminal

---

1 PETTER ASP, MAGNUS ULVÄNG & NILS JAREBORG, KRIMINALRÄTTENS GRUNDER 73 (2nd ed. 2013), NILS JAREBORG & JOSEF ZILA, STRAFFRÄTTENS PÅFÖLJDSLÄRA, 54 (5th ed. 2017), PROPOSITION 1985/86:23, OM ÄNDRING I BROTTSBALKEN M.M. (FÖRETAGSBOT) 19, TOMMY ISESKOG, FÖRETAGSBOT – EN SANKTION VID BROTT I NÄRINGSVERKSAMHET, 7 (2006).

2 Chapter 36 Sections 1-6 of the Swedish Criminal Code.

3 Prop. 1981/82:142, Om ändring i brottsbalken (ekonomiska sanktioner vid brott i näringsverksamhet); Report No.5 of the Ministry of Justice 1978, *Företagsböter – En kartläggande undersökning av korporativt ansvar*; Report No.10 of the Ministry of Justice 1979, *Företagsböter – förslag till lagtexter*; Report No.3 of the Ministry of Justice 1981, Ekonomiska sanktioner vid brott i näringsverksamhet.

4 Prop. 1981/82:142, om ändring i brottsbalken (ekonomiska sanktioner vid brott i nä-ringsverksamhet) 4–5.

5 Prop. 1985/86:23, Om ändring i brottsbalken m.m. (företagsbot) 1.

6 Chapter 1 Sections 3 and 8 of the Swedish Criminal Code (1962:700) (Sw. Brottsbalk); Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot), 19.

sanction but instead a so called special legal effect with the character of a criminal sanction, although the intended purpose of imposing a corporate fine is strictly punitive and does not include a profit-reducing purpose.[7] Since the introduction of corporate fines, the Swedish legislator has numerous times investigated and considered changing the fundamentals of Swedish Criminal Law so as to enable legal entities to be subject to criminal liability in line with legal developments globally. However, the conclusion has repeatedly been that the difference between corporate fines being deemed as punishment or a special legal effect is mostly of a formal nature and does not in itself impact the corporate fines' efficiency and functionality. Corporate fines will as a result continue to be categorized as a special legal effect of a crime and not as a punishment in the strictest sense as defined by Swedish Criminal law.[8] It should, however, be noted that corporate fines most likely are to be categorized as punishment under the definitions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.[9]

Depending on the severity of the criminal action triggering the rules on corporate fines as further explained below, corporate fines are often applied together in tandem with individual criminal liability and not instead of individual criminal liability. In some cases, the corporation's responsibility may be primary in relation to the individual criminal responsibility in case of negligent breach of the business regulations, where fines would be an appropriate punishment for an individual offender. If the crime is committed by negligence and it is not likely to entail a sanction other than a fine, the individual offender may be prosecuted only if prosecution is called for in the public interest.[10]

Any crime committed during a corporation's business activities may lead to the issuance of corporate fines provided that the crime is punishable with a penalty greater than pecuniary fines (*Sw. penningböter*).[11] This excludes policy violations of criminal character and petty offences that otherwise are of trivial nature, such as speeding, for which only a fine is prescribed.[12] There is no requirement that the individual offender is prosecuted for the crime or even identified or prosecuted for it. It is however required that the crime itself is identified and that it has been committed with some form of personal criminal liability.[13] Criminal intent is generally impossible to ascertain if the perpetrator is unidentified except in very special situations. For negligence however, it is quite possible that a crime can

7 Chapter 1 Section 8 of the Swedish Criminal Code; Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 107–108.

8 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot); SOU 1997:127 Straffansvar för juridiska personer; Ds 2001:69 Företagsbot, Prop. 2005/06:59 Företagsbot p. 19; Prop. 2018/19:164 Skärpta straffrättsliga sanktioner mot företag pp. 14–15.

9 SOU 2016:82 En översyn av lagstiftningen om företagsbot, 108.

10 Chapter 36, Section 10 and 10a of the Swedish Criminal Code, prop. 2005/06:59, 41-50.

11 Chapter 36 Section 10 of the Swedish Criminal Code.

12 Section 1 of the Act on Penalties for Certain Traffic Offences (1951:649) (Sw: Lag om straff för vissa trafikbrott).

13 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 62; prop. 2005/06:59, Företagsbot 41.

be deemed to have been committed even if the perpetrator is unknown, although the assessment on the subjective requirements may to some extent become schematic.[14]

The crime must be committed in the exercise of business activities, meaning that the crime cannot be committed by individuals other than employees or others working on behalf of a corporation.[15] A large number of provisions in special criminal law contain either general regulations applicable to the wider business community such as the Working Hours Act (*Sw. Arbetstidslagen*) and the Work Environment Act (*Sw. Arbetsmiljölagen*) or special provisions that apply to certain types of business activities such as the Food Act (*Sw. Livsmedelslag*). When someone at a company violates obvious regulatory provisions such as these examples, there should be no doubt that the crime has been committed in the course of business activities. In addition, violations of key criminal provisions in the Swedish Criminal Code may also be considered as crimes in the course of business. This includes crimes that take direct aim at economic activity such as bookkeeping offences as well as other crimes that are not of a pronounced economic criminality nature such as fraud. When an employee of a company has committed a crime and the offence has a clear link to the business activities in question, the rule is in principle applicable irrespective of whether the management did have knowledge of the crime or not.[16] The fact that the crime has taken place without the management's knowledge or even contrary to its express orders may however lead to the liability being waived.[17]

In Chapter 36 Section 7, there are three alternative grounds for when a corporate fine can be imposed on a corporation. It is, however, important to note that even if one of the legal grounds is fulfilled, corporate fines are not to be imposed if the crime was directed against the corporation itself.[18] The first ground states that a corporation is liable if it has not done what can be appropriately reasonable to demand to prevent the crime.[19] This ground focuses on actions or omissions of the corporation itself and ultimately the corporation's own liability, for example where it has not had adequate procedures and controls for the prevention of crime. Regulations from the corporation must be sufficiently specific and precise in order to be considered serious, meaning that a general rule that all employees must comply with applicable provisions and regulations is not sufficient. The regulations must also be communicated precisely to prevent the particular kind of crime in question, the regulations must be effective with respect to their purpose and the controls required must be maintained. Regardless of the specific regulations or instructions issued, it should further be required that the activities have been organized so that a reasonable degree of control of lawfulness is exercised by the corporation. If it turns out that

14 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 62-63; case NJA 2014, 139 (I-IV).

15 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 28-29.

16 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 28-29.

17 Chapter 36 Section 10 of the Swedish Criminal Code.

18 Chapter 36, Section 7, paragraph 2 of the Swedish Criminal Code.

19 Chapter 36, Section 7, paragraph 1 (1) of the Swedish Criminal Code.

safety has been systematically neglected in the business because of lack of control, a corporation should still be liable even though it has issued the required regulations.[20]

The second ground states that a corporation is liable if the crime has been committed by a leading representative of the corporation.[21] That means persons who have a capacity to represent the corporation or to make decisions on behalf of it or otherwise by a person who has had a special responsibility to inspect or control the business' activities. In these cases, the corporation may have fully acceptable procedures and regulations in place for the prevention of crime but despite this, someone in a leading position or special responsibility within the corporation has committed the crime. The underlying thought is that the corporation has a greater responsibility for a particular circle of people since they are often outside the system of control and supervision in a company. Also, people in leading positions often have authorities and tasks which makes it reasonable to place a greater responsibility on them.[22]

The third and last ground for imposing a corporate fine is that a corporation is liable if the crime has been committed by a person who otherwise has had a responsibility for supervision or control of the business operation, such as a foreman or a work leader.[23] In these cases, someone responsible for controlling and supervising the rules or procedures and safety regulations has committed a crime. Since the responsibility of the employee must be qualified, employees merely responsible for the ongoing operations in business activities or similarly are not supposed to be covered by the provision.[24]

Corporate fines may be set between SEK 5,000 (approx. EUR 470) and SEK 10 million (approx. EUR 940,000).[25] The size of the fine is decided based on the severity of the crime committed and its connection to the company's business.[26] A corporate fine can also be imposed through an order of summary punishment (*Sw. strafföreläggande*) if the fine does not exceed SEK 500,000 (approx. EUR 47,000) and the company accepts the summary punishment.[27] Although plea bargains are not recognized under Swedish criminal law, a corporate fine may be set at less than it should have been. This is possible if the crime involves some other payment obligation or a special legal effect for the corporation and the total reaction to the crime would be unreasonable, the corporation has attempted

---

20 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 66-68, Prop. 2005/06:5, Företagsbot 24.

21 Chapter 36, Section 7, paragraph 1 (2a) of the Swedish Criminal Code.

22 Prop. 2005/06:59, Företagsbot, 25-26, 60-61.

23 Chapter 36, Section 7, paragraph 1 (2b) of the Swedish Criminal Code.

24 Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 61.

25 Chapter 36, Section 8 of the Swedish Criminal Code.

26 Chapter 36, Section 9 of the Swedish Criminal Code.

27 Section 5 of the Procedure in Certain Cases of Confiscation etc. Act (1986:1009) (Sw. Lag om förfarandet i vissa fall vid förverkande m.m.) and Chapter 48 Sections 2–5 of the Code of Judicial Procedure (1942:740) (Sw. Rättegångsbalk.

so far as it has been able to prevent, repair or restrict the damages of the crime, the corporation has voluntarily reported the crime or if there are otherwise special grounds for mitigation.[28] If it is specially justified taking into account any of these mitigating grounds, the imposition of a corporate fine may even be waived.[29]

In summary, the Swedish system is based on the idea that the decision of an appropriately balanced corporate fine should be done in three steps. Firstly, an assessment of the conditions to impose a corporate fine has to be met. Secondly, the amount of the corporate fine must be determined. Lastly, an assessment must be made of whether there are grounds to reduce, mitigate or waive the corporate fine.

III. PROPOSED CHANGES TO THE CORPORATE FINE

The Swedish Government has recently submitted a proposal to the Parliament proposing a number of changes to the rules on corporate fines.[30] One important proposed change in this context is that the company's financial position must be taken into account when determining the size of the corporate fine in relation to larger companies and if the crime is particularly culpable. In these cases, the maximum amount is proposed to be increased from SEK 10 million (approx. EUR 940,000) to SEK 500 million (approx. EUR 47 million), which is a significant increase of the maximum amount.[31] In addition, the maximum amount of summary punishment is proposed to be increased from SEK 500,000 (approx. EUR 47,000) to SEK 3 million (approx. EUR 280,000).[32]

The increased corporate fine is proposed to only be applicable to larger companies for crimes of a certain degree of severity. As a result, less serious crimes with a sanction value below SEK 500,000 (approx. EUR 47,000) will be fined to the same amount for all companies irrespective of their financial position. The limit is proposed in order to avoid a system where companies' ability to pay must be assessed in each case, leading to extensive and resource-intensive investigations. Hence, the Swedish government assesses that these increased and practical issues involved when assessing a company's financial position can be avoided in the vast majority of cases and can be limited to more severe crimes.[33]

The proposed increase of the maximum amounts is a response to the criticism that the Swedish corporate fines institute has faced, which has focused on the maximum amount being too low and that the corporate fines institute does not meet the requirements that sanctions imposed for crimes committed within the company's business must be efficient,

---

28 Chapter 36, Section 10, paragraph 1 of the Swedish Criminal Code.

29 Chapter 36, Section 10, paragraph 2 of the Swedish Criminal Code.

30 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag.

31 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag, 33-42.

32 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag, 56-58.

33 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 34-35.

proportionate and deterrent. Both the OECD and the EU have recommended that the maximum amount for corporate fines is increased within the framework of international bribery. It is also noted in the preparatory materials that the current maximum amount appears to be low by international standards.[34]

As described previously, corporate fines are under current law determined based on the severity of the crime committed and its connection to the company's business without taking into consideration the company's financial position. Hence, a corporate fine of a certain amount may constitute a considerable amount for a smaller company while the same amount may be insignificant to a larger company. The proposal to implement a legal basis for the Swedish courts to take the company's financial position into consideration when deciding on the amount of corporate fines is supposed to ensure that the result of the corporate fine to a greater extent is as noticeable for larger companies as for smaller companies. This change is further thought to be conceived as rather self-explanatory in other countries by the Swedish Government. Lastly, the credibility of the corporate fine should be increased since an increase of the amount for larger companies may be perceived as sufficiently interventional for larger companies as well, which may not be the case under the current rules.[35]

When assessing whether a company is deemed as a larger company, only the legal entity of the company and not the financial position of its company group is to be taken into account. This has been criticized by the Swedish Bar Association since it may create problems from a fairness perspective.[36] In one case, a particular business with multiple branches may be conducted within one single legal entity, while in another case, a similar type of business can be divided into several companies within a group structure. The effect of the rules of increased corporate fines may therefore be that the business in the first case but not in the second case will be assessed according to the rules for larger companies and the increased corporate fine.[37] However, the legislator has stated that taking the company group's financial position into consideration is associated with significant difficulties and may lead to the rules being difficult to understand and apply, which is why it was not included in the proposal.[38]

According to the preparatory materials, if the proposed changes would be implemented the corporate fine amount is to be determined in three steps. Firstly, the sanction value (*Sw. sanktionsvärde*) is to be determined, which marks the extent of reprehension that the

34 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 27.

35 Prop. 2018/19:164, En ny beteckning för kommuner på regional nivå och vissa frågor om regionindelning 27-28.

36 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38-39, the Swedish Bar Association Consultation Response R-2017/0003 pp. 4-5.

37 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38, the Swedish Bar Association Consultation Response R-2017/0003 pp. 4-7.

38 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38–39.

company deserves. During this assessment, the overall crime is to be taken into consideration in case of multiple crimes being committed. Secondly, the amount of corporate fines in case of particularly reprehensible criminality may be increased taking the company's financial position into consideration, triggering the rules on increased corporate fines. Thirdly, the court must consider if there are any grounds for mitigating or even waiving the corporate fine all together.[39]

IV. A CRITICAL PERSPECTIVE ON CORPORATE FINES AND THE PROPOSED CHANGES

As shown above, the fact that Swedish criminal law is based on the basis that only private individuals are considered to be able to possess criminal liability and consequently commit crimes has become a problem as to how to include corporate fines into the existing system. The rules are complicated and require an assessment divided into many steps as to ensure that all necessary requirements are met in order to impose corporate fines. Despite the fact that its only purpose is punitive and that the imposing of a corporate fine can have serious consequences for the company, it is not likely that the corporate fines' nature of a special legal effect is to change any time soon due to the extensive work that such a change would require.

One result of corporate fines not being deemed as a punishment as such but rather a special legal effect of crime is that there is no requirement that the company has possessed criminal liability. Since corporate fines may be imposed based on the fact that the crime was committed by a person of a certain position in the company, the prosecutor does not have to prove that the company has acted negligently. As a result, there are situations where a company has done what reasonably would be expected in order to prevent the crime in question and despite this will be imposed a corporate fine. This is not in line with the fundamental principles of conformity and of criminal liability. The principle of conformity entails that punishment or other criminal sanctions should only affect the person who has been able to comply with the law, meaning that the person has had the ability and opportunity to comply. The principle of criminal liability implies that persons who have manifested criminal liability through acting with intent or negligence are to be held criminally responsible.[40] As a result, strict liability for other persons' actions are as a main rule forbidden under Swedish law. By not categorizing the corporate fine as a punishment, these basic principles thus seem to have been avoided by the legislator to a certain extent.

Another aspect of the corporate fine not being deemed as a special legal effect of a crime and not as a punishment is that a company is not expressly given the same procedural rights in the Swedish Code of Judicial Procedure, where currently there are no regulations

39 Prop. 2018/19:164, En ny beteckning för kommuner på regional nivå och vissa frågor om regionindelning 28.

40 Asp et al., Kriminalrättens grunder p. 48 (2nd ed. 2013), Leijonhufvud et al., Straffansvar pp. 35–36 (9th ed. 2015).

on the corporate fines procedure in particular, nor are there any procedural rights for corporations.[41] This has been criticized by the Swedish Bar Association since although the company's procedural rights and the requirements of legal certainty are usually upheld despite it being deemed a special legal effect of crime, there are many cases where companies are treated differently. The Swedish Bar Association further states that there are situations where law enforcement agencies do not defend the companies' and their representatives' legal certainty during an ongoing criminal investigation and other investigations. The Swedish Bar Association therefore expressed that it would be welcomed to review and assess whether companies' procedural rights should be expressed in the Code of Judicial Procedure. This was in its opinion necessary in order to clarify that companies who run the risk of being imposed corporate fines should be equated with individuals who risk criminal penalties, since corporate fines as a special legal effect of crime is to be considered as a punishment under the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.[42] This criticism was mentioned in the preparatory materials, however, it is stated that it is not necessary to review companies' procedural rights during criminal investigations and trial.[43]

The possibility for prosecutors to impose corporate fines through summary punishment is a result of the legislator's intent to ensure that the corporate fines are an efficient legal remedy when crimes have been committed within a company's business. There was indeed an issue in the corporate fines not being imposed to the extent that was intended previously and it is often in both the prosecutor's and the company's best interest to avoid having to take the case to court if both parties agree that a crime has in fact been committed in the course of the company's business.[44] However, it should be noted that in cases where for example the perpetrator has not been possible to identify, it may not be as clear to the company that a crime has been committed. A requirement for imposing a corporate fine is that a crime has in fact been committed and that the perpetrator has fulfilled both the objective and the subjective requisites. However, since the prosecutor does not have to be able to identify the perpetrator, it is more difficult to assess whether the perpetrator has fulfilled the requirement of criminal liability through intent or negligence. As a result, it may be difficult for the company to assess whether a crime in fact has been committed. From an economic perspective, it may not be economically viable to take the risk of having to pay lawyers' fees and endure a longer trial period by not agreeing to the prosecutor's summary punishment. This leads to a risk that the company agrees to pay the corporate fine in cases of legal uncertainty, which also leads to the courts not being able to publish precedents for similar cases.

As for the proposed change to allow the courts to take the company's financial position into consideration in cases of increased corporate fines, it appears to be an important step

41 Chapter 23 of the Swedish Code of Judicial Procedure.

42 The Swedish Bar Association, consultation response R-2017/0003 p. 3.

43 Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 15.

44 Prop. 2005/06:59, Företagsbot 51.

to further ensure that corporate fines are efficient, proportionate and deterrent and live up to the international standards for corporate criminal liability and fulfill Sweden's international commitments. Having a system where more trivial crimes are punished equally for all companies irrespective of their financial position while more serious crimes are punished differently depending on the financial position of the company is in line with how private individuals are punished in terms of fines. However, as the Swedish Bar Association has shown, there may be cases where the corporate fines amount may appear unfair due to the company group's division of its operations between different legal entities.

It is evident that the design of Swedish corporate fines is rather complicated, mainly due to historical reasons and fundamental prerequisites, resulting in corporate fines not being deemed as a punishment. As of now, it appears that the design of corporate fines will not be simplified in the near future, nor will it be categorized as a punishment in the strictest sense of the word given the nature of the most recent proposal to changes of corporate fines. Since its design is mostly a result of national fundamentals, it may be difficult and perhaps even undesirable to draw inspiration from the Swedish equivalent to corporate criminal liability in other countries.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

CRIMINAL LIABILITY OF LEGAL ENTITIES UNDER BELGIAN LAW: A HIGH-LEVEL OVERVIEW

Karel De Smet & Elke Janssens

AUTHORS

Karel De Smet is a senior associate at NautaDutilh's Brussels office. His practice is focused on commercial law and business criminal law. Karel obtained his master's degree in law from the Katholieke Universiteit Leuven (KUL) in 2012, and was admitted to the Brussels' bar in that same year. He regularly publishes on topics of interest to his practice.

Elke Janssens is a partner at NautaDutilh's Brussels office. She focuses on corporate law and corporate governance. She advises listed companies and has assisted in several public offerings. Elke also regularly acts in negotiations for M&A transactions and restructurings. Elke received her law degree from the Vrije Universiteit Brussel (VUB) in 1996. She obtained a master's degree in business law from the Université libre de Bruxelles (ULB) in 1998 and a master's in management from VUB in 2001. She completed coursework in the executive MBA program at the Solvay Business School from 2006 to 2007. Elke was admitted to the Brussels Bar in 1997. She is the author of numerous publications in the fields of corporate and financial law, serves on the editorial board of various law journals and regularly lectures at seminars.

ABSTRACT

The principle that legal entities can be held criminally liable was first introduced into Belgian law in 1999. Some 20 years later, Belgian Parliament reviewed the rules, and adopted a number of significant changes. The present article offers a high-level overview of the currently applicable legal regime.

TABLE OF CONTENTS

I. INTRODUCTORY REMARKS

A. Legislative History

The idea that legal entities could violate criminal law was accepted in Belgian case law by the late 1960s.[1] As legal entities are capable of juridical acts, Belgian courts reasoned that they are also capable of juridical acts that violate criminal law.[2] However, absent a specific legal basis, courts could not hold legal entities liable for criminal offences.[3] A basic principle of Belgian law is that criminal responsibility is individual: a person cannot be liable for another person's actions. As a legal entity by definition acts through the intervention of a physical person, only the latter could be held responsible for any actions violating criminal law, even if those actions were taken on behalf of a legal entity.[4]

This situation was found to be unsatisfactory on multiple levels. Lacking alternatives, prosecutors would try to take action against individuals for crimes that could be attributed to a legal entity. Simultaneously, a correct application of the principle of individual criminal responsibility resulted in difficulties holding anyone liable for offences committed within a corporate context. For example, if a company's board of directors jointly or secretly decided to violate a criminally punishable norm, prosecutors would find it impossible to prove directors' individual contribution to the illegal decision.

B. Article 5 Criminal Code

Belgian legislature tackled this situation with the Act of 4 May 1999, which introduced a new article 5 into the Belgian Criminal Code (hereinafter: "BCC"). Article 5 BCC laid down the principle that legal entities can be held responsible for violations of criminal law.[5] This responsibility is autonomous: a legal entity can be held liable even if the physical person through which it acted is not deemed at fault or cannot be identified.[6] Some

---

1 See for instance Cass. 11 December 1967, Arr. Cass. 1968, 524. For further details on the legislative history of article 5 BCC, see F. DERUYCK, DE RECHTSPERSOON IN HET STRAFRECHT, (Mys en Breesch/ Kluwer Wkb Nv, 1996, 1st ed.) 4-39.

2 Patrick Waeterinckx, *De strafrechtelijke verantwoordelijkheid van de rechtspersoon en zijn leidinggevenden*, 2nd ed., INTERSENTIA, 49 (2015).

3 "Societas delinquere potest, sed non puniri potest." See for example, Advocate-General R. H., *De Termicourt's submissions to Cass. 16 December 1948*, JT, 150 (1948) (free English translation): "A legal entity can therefore commit, through its representative bodies, a violation of criminal law as well as any other illicit act [...] Where the Court affirmed in several earlier rulings that a legal entity cannot violate criminal law, it sought to stress that the punishment provided under criminal law applies not to the legal entity, but to the physi-cal person through which the legal entity acted."

4 F. DERUYCK, DE RECHTSPERSOON IN HET STRAFRECHT, (Mys en Breesch/ Kluwer Wkb Nv, 1996, 1st ed.) 12, 273.

5 Act of 4 May 1999 introducing the criminal responsibility of legal entities, Belgian State Gazette 22 June 1999.

6 Report on behalf of the Commission of Justice, Parliamentary exhibits, Senate 1998-1999, nr. 1217/1, 18.

20 years later, on 11 July 2018, a new act was adopted,[7] amending the existing legal framework on two major points. First, a complicated system regulating concurrent criminal liabilities of legal entities and physical persons was repealed. Second, the act abolished the immunity from criminal prosecution of certain legal entities of public law (notably municipalities and the Federal State).

C. Intertemporal Law

Although the Act of 11 July 2018 entered into effect on 30 July 2018, the old rules may continue to apply for some time into the future. Belgian law does not allow for the retroactive application of stricter criminal legislation (article 2 BCC). To the extent that the old rules set forth a more lenient regime, they will continue to apply to certain offences committed prior to 30 July 2018. The application of the old rules will gradually fade out.[8]

II. SCOPE OF THE CRIMINAL LIABILITY OF LEGAL ENTITIES

A. No Limitation as to the Nature of the Criminal Offence

Legal entities can be liable for any offence. There are no limitations as to the type of offence for which a legal entity can be held liable: under Belgian law, legal entities can be held criminally liable for any offence, regardless of its nature.[9]

B. Both Public and Private Legal Entities can be held Criminally Liable

Private legal entities. In principle, article 5 BCC applies to both private legal entities and entities of public law. Private legal entities comprise a.o. all commercial companies, but

---

7 Act of 11 July 2018 amending the Criminal Code and the preliminary title to the Code of Criminal Procedure with regard to the criminal responsibility of legal entities, Belgian State Gazette, 20 July 2018.

8 Without going into detail, it can be noted that the statute of limitations for violations of Belgian criminal law generally ranges between 6 months and 20 years, depending on the nature of the violation. Belgian criminal law distinguishes between three types of offences (art. 1 BCC). An infraction ("overtreding" / "infraction") is generally a minor offence, such as a lesser traffic violation, punishable with prison sentences of 1 to 7 days and / or fines of 1 to 25 EUR. The statute of limitations for this type of offences expires after 6 months. Misdemeanors ("wanbedrijf" / "délit") are more severe infractions, such as the misappropriation of corporate assets (art. 492bis BCC), punishable with 8 days to 5 years imprisonment and / or a fine higher than EUR 25. The statute of limitations is set at 5 years. Crimes ("misdaad" / "crime"), are a final category of offences, punishable with imprisonment for a period longer than 5 years and / or a fine higher than EUR 25, such as grave forms of physical violence. Depending on the nature of the crime, the statute of limitations is set at 10, 15 or 20 years. In practice, crimes can and often are "correctionalized", meaning that they are assimilated to a misdemeanor, including for purposes of the applicable limitation period. The limitation period starts on (last) day on which the violation was committed. The statute of limitations can be tolled or suspended by acts of investigation or acts of prosecution.

9 In practice, legal entities are most often prosecuted for offences typically associated with businesses (such as tax evasion, fraud and economic, environmental and social law violations). Nevertheless, theoretically speaking, there are no general limitations as to the crimes for which a legal entity could be prosecuted. Taking into taking into account legal entities' abstract nature, it is in practice not possible for a legal entity to commit certain crimes closely associated with physical persons.

also non-for profit organizations with legal personality. Article 5 BCC also extends criminal liability to a specified number of other groups which do not have legal personality, such as joint ventures, temporary associations and commercial companies in the process of incorporation.[10] [11] [12]

Public legal entities. Legal entities of public law are also criminally liable, although they do remain somewhat shielded from the consequences of prosecution: courts can enter a declaratory judgment against them (i.e. a simple guilty verdict) but cannot impose criminal sanctions (article 7bis BCC).

Prior to the act of 11 July 2018, certain legal entities of public law with a political nature were immune from criminal prosecution (notably the Federal State, the Regions, the Communities and municipalities). This immunity was granted as these entities were subject to political oversight, and because it was feared that criminal action could be used as a political instrument against or within these entities.[13] The distinction nevertheless gave way to severe criticisms: as the nature of the entity rather than the concrete actions in which it was engaged determined whether it could be criminally liable, identical behavior would result in prosecution for some legal entities, but not for others.[14] This distinction moreover had the adverse side effect that natural persons exercising functions within public legal entities with a political nature could be held criminally liable on behalf of the legal entity. The *travaux préparatoires* to the Act of 11 July 2018 refer to cases where a town's mayor or aldermen were prosecuted for accidents occurring on municipal playgrounds and on municipal roads with insufficient lighting or illegible traffic signs.[15]

---

10 This extension however generally applies only to groups with economic goals. A not-for profit organization in the process of incorporation is for instance not envisaged. Patrick Waeterinckx, *De strafrechtelijke verantwoordelijkheid van de rechtspersoon en zijn leidinggevenden*, 2nd ed., INTERSENTIA, 53 (2015).

11 The text of article 5 BCC also refers to civil companies which have not taken the form of a commercial company. Traditionally, this was the type of company through which for instance liberal professions organized their activities. The distinction between civil companies and commercial companies has however been repealed (art. 22 Act of 15 April 2018).

12 We can add here that for offences committed in the framework of groups or entities which do not fall under the scope of article 5 BCC, the formerly applicable rules as discussed in section 1 (legislative history) continue to apply, i.e. the criminal liability of physical persons will have to be shown.

13 Constitutional Court 10 July 2002, nr. 128/2002, www.const-court.be. See F. DERUYCK, DE RECHTSPERSOON IN HET STRAFRECHT, (Mys en Breesch/ Kluwer Wkb Nv, 1996, 1st ed.) 184 for a further discussion.

14 Note that in Belgium public bodies regularly enter the domain of activities typically associated with the private sector. See Patrick Waeterinckx & R. van Herpe, *De wettelijke regeling i.v.m. de strafrechtelijke verantwoordelijkheid van de rechtspersoon ontdoet zich na 19 jaar van twee groeipijnen*, N.C., 554 (2018), who refer to a.o. the construction of buildings, infrastructural works, the drenching of river beds, the operation of hospitals, etc.

15 Parliamentary exhibits, 54K0816 (Draft act amending the Criminal Code and the preliminary title to the Code of Criminal Procedure with regard to the criminal responsibility of legal entities), 2.

C. Non-Belgian Legal Entities can be held Criminally Liable

Foreign legal entities are not exempt. Legal entities under foreign law are not exempt from the criminal liability regime of article 5 BCC. They can also be prosecuted before Belgian courts for criminal offences entailing Belgian jurisdiction.

Principles of Belgian criminal jurisdiction. Belgian criminal law applies to offences commit-ted on Belgian territory, regardless of the nationality of the party that committed the offence. An offence is considered to have occurred in Belgium as soon as a material action constituting one of the constitutive elements of that offence occurred on Belgian territory.[16] This open-ended criterion allows Belgian prosecutors to claim jurisdiction rather easily. Subject to certain conditions, Belgium also exercises extra-territorial jurisdiction for a limited number of offences committed abroad, including certain forms of bribery of public office holders.[17] Belgian criminal jurisdiction is not barred by a foreign claim to jurisdiction for the same facts.

III. CRIMINAL LIABILITY OF LEGAL ENTITIES AND PHYSICAL PERSONS ACTING WITHIN THE FRAMEWORK OF LEGAL ENTITIES

A. Attribution of Offences to Legal Entities

Belgian criminal offences – two components. All Belgian criminal offences comprise two components: a material component (the "*actus reus*", or punishable action, e.g. the taking away of an asset, the discharging toxic waste into a stream) and a moral component (the "*mens rea*" or guilty mind-set that makes an action into a criminal offence, e.g. the specific intent to embezzle said asset, or the criminal negligence which resulted in the discharge of toxins into a stream).

Material component. For a legal entity to be convicted, it should first be shown that an "*actus reus*" can be attributed to it. In some cases, Belgian criminal law explicitly determines the party to which an action will be attributed. By way of example, numerous provisions of the Belgian Social Criminal Code designate "*the employer, its agents and representatives*" as the party responsible for criminally sanctioned violations of social law.

---

16 Cass. 24 January 2001 (A.R. nr. P.00.1627.F), Arr. Cass. 2001, nr. 167; Cass. 26 May 2009 (A.R. nr. P.09.0438.N), RW 2011-2012, 1246, annotation D. DE WOLF; Cass. 7 June 2011 (A.R. nr. P.11.0172.N/1), Arr. Cass. 2011, nr. 348. See also H. Fransen, *Strafwet, in:* X. Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere strafwetten, (Kluwer & Mechelen 2017) S.180-55; Fanklin Kuty, *Principes généraux dur droit pénal belge, Tome 1, La loi pénale*, 3, LARCIER, 365-369 (2009); CHRIS VAN DEN WYNGAERT, PHILIP TRAEST & STEVEN VANDROMME, STRAFRECHT EN STRAFPROCESRECHT IN HOOFDLIJNEN, (Maklu et. all eds. 2017) 152.

17 See article 6 – 12 Preliminary Title to the Code of Criminal Procedure. Typically, besides a number of procedural conditions, a double incrimination is required (an action committed abroad will only give rise to prosecution in Belgium if that action constitutes an offence both in Belgium and in the jurisdiction where it was committed).

In the absence of a specific legal provision, a criminal offence can be attributed to a legal entity in one of the following three situations:

- The offence shows an intrinsic link with the realization of the entity's corporate purpose. The corporate purpose can be found in the legal entity's articles of association or its by-laws. This criterion does not imply that the corporate purpose should be aimed at com-mitting criminal offences, but that an offence was committed with a view to realizing a legal entity's corporate purpose.[18]
- The offence shows an intrinsic link with the legal entity's interests. This criterion was adopted to avoid that a legal entity's criminal responsibility would be exclusively de-pendent on the description of its corporate purpose, as included in its own bylaws or articles of association.[19] Any offence committed to further a legal entity's (financial or moral) interests can be attributed to it.[20]
- When the concrete circumstances show that the offence was committed on behalf of and to the benefit of the legal entity. The mere fact that a legal entity benefitted from an offence does not suffice to attribute the offence to it in all circumstances, but can be a factual indication that the legal entity is responsible.[21]

Moral component. Second, the entity must have acted with "*mens rea*". Belgian law does not specify when that is the case, so that an analysis of all relevant factual circumstances should be made, taking into account the specific features of the legal entity.[22] By way of example, when a company's board of directors deliberately decides to act in a certain way, the legal entity could be considered to have acted with intent. Similarly, where criminal

---

18 See for instance Cass. 9 november 2004, NjW 2005, 769, where three not-for profit organizations founded with the corporate purpose of a.o. spreading Flemish national awareness were found guilty of violations of the anti-racism act for members' repeated racist state-ments in public.

19 CHRIS VAN DEN WYNGAERT, PHILIP TRAEST & STEVEN VANDROMME, STRAFRECHT EN STRAFPROCESRECHT IN HOOFDLIJNEN, (Maklu et. all eds. 2017) 136.

20 See for instance Cass. 5 June 2012, where a company was found responsible for the violation of certain environmental standards, committed intentionally and systematically out of economic considerations.

21 This criterion may for instance have been at the basis of the Gent correctional court's 7 September 2004 decision (NJW 2004, 1283), where a company was found liable for lacking environmental and health and safety standards. The court specifically added that by not making the necessary investments, the company had not only brought its employees and the environment in danger, but had also distorted competition with other companies that do make the required efforts.

22 Parliamentary exhibits, Senate 1998-1999, nr. 1217/1, 5 (free English translation): "It will have to be shown that the offence resulted from a deliberate decision made within the legal entity, or that there was negligence at the level of the legal entity which is causally linked to the offence. One can for instance envisage the hypothesis where a lacking internal organization within the legal entity, insufficient safety measures or unreasonable budgetary restraints have created the conditions which made the offence possible." For an in-depth discussion, see Hans van Bavel, *De rechtspersoon in ons schuldstrafrecht: over het moreel bestanddeel in hoofde van de rechtspersoon, in*: Strafrecht als roeping. Liber Amicorum Lieven Dupont (Frank Verbruggen, Raf Verstraeten, D. Van Daele & Bart Spriet 2005) 125-140.

offences result from the absence of sufficient oversight or from a general corporate culture, the legal entity could be considered to have been negligent.[23]

B. Attribution of Offences to Physical Persons

Current rules. Under the current rules, a legal entity's criminal liability does not exclude that of a physical person, nor does a physical person's liability exclude that of a legal entity. Both can be prosecuted either as co-perpetrators[24] or as an accomplice to an offence committed by the other person.[25] In practice, prosecutors generally try to take action against both the legal entity and any physical persons involved in the matter.

Old rules (prior to entry into effect of act of 11 July 2018). The old rules provide for a complicated regime of concurrent liabilities. As a matter of principle, only the legal entity or the natural person acting on its behalf can be held criminally liable. The severity of their respective wrongdoing is to be compared, and only the party that committed the more serious wrongful act will be deemed at fault. A court cannot sanction the other party but can enter a declaratory judgment against it (i.e. declare it guilty, without imposing any sanctions). An exception to this general rule applies for criminal offences committed intentionally, in which case both the legal entity and the natural person are liable. The complexity of this concurrent liability regime lay at the basis of Belgian Parliament's 2018 decision to repeal it.

Managers' responsibilities are sometimes filled in (all too) broadly. There are cases where Belgian courts interpreted the responsibilities linked to managerial or executive positions very broadly, basing individual convictions on general observations regarding their responsibilities or competences (by way of example, see the cases where a manager was found guilty because he "could not have been unaware" of a criminal violation;[26] or where a corporate officer was convicted for an offence after the court found that he was generally

---

23 See e.g. *Police Tribunal Marche-en-Famenne*, 20 December 2004, VAV 2005, 128, ruling that a large transport company should be able to ensure that its employees respect transport regulations, for instance by setting up a department that monitors tachographs, and organizes trainings for drivers.

24 If all constitutive elements of a criminal offence are present on the part of the legal entity and on the part of the natural person, both will be liable as co-perpetrators of said offence. Under certain circumstances, parties which have offered essential assistance without which a criminal offence could not have been committed, as well as parties which have directly induced another party to commit a criminal offence can also be considered (co-)perpetrator (art. 66 BCC).

25 Criminal complicity implies that a party knowingly, willingly and voluntarily contributed to the realization of a misdemeanour or a crime, in one of the ways described in the criminal code. This includes offering information or material aid to the perpetrator of a criminal offence, or otherwise enabling or facilitating a criminal offence (art. 67 BCC). Complicity requires deliberate intent. It is not possible under Belgian law to be an accomplice to a criminal offence through carelessness or negligence.

26 Correctional court Antwerp, 27 May 2009, cited in Patrick Waeterinckx, *De strafrechtelijke verantwoordelijkheid van de rechtspersoon en zijn leidinggevenden*, 2nd ed., INTERSENTIA, 21 (2015).

"responsible for the company's operations"[27]). Such decisions are subject to justified criticisms: a criminal conviction should be substantiated with proof of a concrete and individual fault; generic observations as to an individual's function or responsibilities do not suffice.[28]

Under the old rules, a broad interpretation of managers' responsibilities could limit the legal entity's liability for unintentional violations. As noted above, in such cases, a court would have to compare the severity of both parties' wrongdoings and could only sanction the party that commit the more serious wrongful act. A court may have accepted easily that the manager should be held accountable. Under the new rules, there is no general principle which would stop a court from holding both the legal entity and the manager liable, insofar both can be deemed at fault (regardless of the severity of their respective wrongdoing).

C. Effects of Delegation of Competences to Physical Persons

Delegation of competences and of corollary responsibilities. If a legal entity delegates a competence or a task to a physical person, the criminal liability attached to that competence or task may shift from the legal entity to the physical person. By way of example, a company may designate a corporate officer to monitor and safeguard compliance with a specific environmental standard. If that standard is subsequently violated, the violation will not be at-tributed to the legal entity, but to the physical person who was responsible for preventing it in the first place.

A delegation of competences can only result in a shift of criminal responsibilities under strict conditions. Firstly, some tasks are considered to be of such importance that they cannot be delegated and always remain under the supervision and responsibility of the legal entity and / or its upper management.[29] Additionally, a delegation of competences should (i) relate to a specific / limited activity or task, (ii) be done explicitly, (iii) be accepted by the physical per-son on an informed basis, (iv) be effective, i.e. the physical person should have the practical means and background required for a successful performance of his assignment, and (v) the legal entity should maintain due supervision.[30]

---

27 Correctional court Hasselt, 6 March 2009, cited in Patrick Waeterinckx, *De strafrechtelijke verantwoordelijkheid van de rechtspersoon en zijn leidinggevenden*, 2nd ed., INTERSENTIA, 22 (2015).

28 Cass. 9 October 1984, Pas. 1985, 194.

29 Primarily, this covers strategic decisions. Note that some authors also consider certain more practical tasks, such as applying for environmental licenses, as being core competences that cannot be delegated (see e.g. Michael FAURE, *De strafrechtelijke aansprakelijkheid voor milieuverontreiniging, in:* Milieurecht voor bedrijfsleiders en hun adviseurs (P. Morrend 1994) 81-115).

30 A. Jansen, *Délégations de pouvoirs dans l'entreprise et risque pénal: un état des lieux*, RPS 2013, 43; Luc Bihain, *Quelles réactions face à la fraude, in: Droit pénal des affaires – l'heure des comptes*, (Emmanuel R. France 2016) 127-135.

D. Effects of Corporate Compliance Programs

A compliance program can mitigate criminal responsibility. In the first place, corporate policies, codes of conduct and compliance monitoring are prevention instruments. Under certain circumstances, they can also mitigate the criminal liability of a legal entity. Written policies can be used to show that a legal entity prohibits its employees from taking certain actions on its behalf, so that those actions are neither materially nor morally attributable to it. Criminal responsibility will not be attributed to a legal entity that has an effective internal organisation, when an offence was caused solely by a physical person's individual decisions.[31] The existence of a compliance program could also be taken into account by courts as a mitigating circumstance when determining the appropriate sentencing measure for a given violation.

The absence of a compliance program can be held against companies.
Although there is no general legal requirement for companies to introduce a compliance program,[32] the absence thereof could be held against a legal entity. In practice, companies are most often prosecuted for unintentional violations of legal norms.[33] The absence of prevention mechanisms could be used by prosecutors to show culpable negligence on behalf of a company.[34]

IV. EFFECTS OF CORPORATE RESTRUCTURINGS

Certain types of restructurings lead to a discontinuation of criminal proceedings. In principle, criminal charges against legal entities elapse upon their liquidation, judicial dissolution or dissolution without liquidation.[35] In those cases, it will no longer be possible to bring criminal charges. In contrast, other juridical acts that somehow entail a restructuring of a legal entity do not affect criminal charges against it (e.g. the transfer of a business, the transfer of all or part of a company's assets or shares, a corporate transformation, a partial demerger, etc.) (art. 20 Preliminary Title to the Code of Criminal Procedure).

There are two exceptions where it remains possible to bring new criminal charges against a legal entity that has been liquidated, judicially dissolved or dissolved without liquidation. A first exception applies when the liquidation, judicial dissolution or dissolution

---

31 See for instance Liège 23 September 2009, Dr. pén. Entr. 2010, 51-53, finding that the employees who had knowingly ignored clear instructions from their employer should be considered solely responsible for a consequent criminal violation.

32 Note that certain sector-specific laws require the implementation of specific policies (absent which administrative fines can be imposed).

33 CHRIS VAN DEN WYNGAERT, PHILIP TRAEST & STEVEN VANDROMME, STRAFRECHT EN STRAFPROCESRECHT IN HOOFDLIJNEN, (Maklu et. all eds. 2017) 137.

34 See *Police Tribunal Marche-en-Famenne*, 20 December 2004, VAV 2005, 128.

35 This regime mirrors the rule that criminal charges against a physical person expire upon that person's decease. When a person dies pending a criminal trial, the proceedings will be discontinued, and it will not be possible to bring new criminal charges.

without liquidation was aimed at avoiding prosecution (i.e. in cases of "*fraus legis*"). In most cases, it is difficult to bring proof of this specific intention to escape the law. Second, prosecution can continue when the legal entity was already indicted, referred to or summoned before the criminal courts prior to its loss of legal personality.
Belgian courts have at times gone beyond the letter of the above legal framework, by holding newly constituted legal entities criminally liable for the actions committed by another legal entity, after having established through an analysis of both entities' respective activities, offices, shareholders, management, etc. that the former was in fact identical to the latter, and had been set up to continue its operations.[36]

V. PROCEDURAL ASPECTS

Ad hoc proxy holder. In principle, parties to a Belgian criminal procedure appear in person (for physical persons), through their organs (for legal entities), or through representation by a lawyer. This can lead to a conflict of interests when a legal entity is prosecuted together with a physical person who is also competent to represent it (e.g. a director). In such cases, the competent court will appoint a proxy-holder on an *ad hoc* basis, who will represent the legal entity's interests for purposes of the criminal procedure (article 2*bis* Preliminary Title to the Code of Criminal Procedure). Without going into further detail here, the unclear wording of article 2bis gives rise to a number (of oftentimes very practical) questions as to the appointment and assignment of the ad hoc proxy holder.[37]

VI. EFFECTS OF CORPORATE RESTRUCTURINGS

Statutory conversion mechanism. Traditionally, Belgian criminal sanctions envisage physical persons, and are structured around custodial sentences. For legal entities, criminal sanctions are converted into corporate fines, by a way of a specific conversion mechanism set forth in article 41*bis* BCC. Additional sanctions applicable to physical persons, such as the confiscation of criminal gains realised through an offence also apply to legal entities. Further, there is a specific set of sanctions that applies only to legal entities, including the dissolution of the entity, the temporary or permanent prohibition to exercise a specific activity, the temporary or permanent closure of all or part of the legal entity. A legal entity that was convicted of a criminal offence will be exposed to civil actions for damages from victims of the offence. Criminal convictions could also have other adverse effects, such as the exclusion from certain public tenders.

---

36 PATRICK WAETERINCKX, DE STRAFRECHTELIJKE VERANTWOORDELIJKHEID VAN DE RECHTSPERSOON EN ZIJN LEIDINGGEVENDEN, (2nd ed. 2015) 153.

37 The appointment of a proxy holder could lead to a limitation of the legal entity's right to freely organize its defense, and could there-fore infringe upon its right to a free and fair trial. Notwithstanding such potentially grave consequences, it is not always clear under which circumstances a proxy holder should be appointed. For a further discussion, see PATRICK WAETERINCKX, DE STRAFRECHTELIJKE VERANTWOORDELIJKHEID VAN DE RECHTSPERSOON EN ZIJN LEIDINGGEVENDEN, (2nd ed. 2015) 154-165. The Act of 11 June 2018 did not amend the rules governing the mandate of the ad hoc proxy holder. Some authors consider this a missed opportunity.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

MONEY LAUNDERING THROUGH CONSULTING FIRMS

Fabian M. Teichmann & Madeleine Camprubi

AUTHORS

Fabian M. Teichmann is an attorney-at-law and public notary in Switzerland. After earning an undergraduate degree in Economics and Finance (Bocconi University, Italy), he then earned graduate degrees in Management (Harvard University, USA), Accounting and Finance, and Law (University of St. Gallen, Switzerland). He also holds a PhD in Law (University of Zurich, Switzerland), a Doctorate in Economics and Social Sciences (Kassel University, Germany), and an LL.M. (King's College, England). Teichmann teaches courses on compliance, corruption, money laundering, and terrorism financing at various universities. He is the author of several books and over 100 scholarly articles.

Madeleine Camprubi is an attorney-at-law at Teichmannn International (Schweiz) AG in Switzerland. After graduating with a master's degree at Zurich University, she wrote a prize-wining thesis on the judicial remedies to human right breaches and worked as a clerk at the Swiss Supreme Court. She has also earned a post-doctoral thesis about the principle of non-retroactivity in Swiss law.

ABSTRACT

The aim of this article is to illustrate potential conduits for money laundering in the consulting sector in Austria, Germany, Liechtenstein, and Switzerland. A qualitative content analysis of 100 semi-standardized expert interviews with both criminals and prevention experts was conducted, along with a quantitative survey of 200 compliance officers, allowing for the identification of concrete methods of money laundering in the consulting sector. Due to their excellent reputation, consulting companies in German-speaking countries in Europe continue to be extraordinarily attractive to money launderers. Most notably, they can be used for layering and integration, as well as for working around various issues with tax codes. As the qualitative findings are based on semi-standardized interviews, they are limited to only the 100 interviewees' perspectives. The identification of loopholes and weaknesses in the current anti-money laundering mechanisms is meant to provide compliance officers, law enforcement agencies, and legislators with valuable insights into how criminals operate, with the aim of helping them to more effectively combat money laundering. While the previous literature focuses on organizations fighting money laundering and on the improvement of anti-money laundering measures, this article illustrates how money launderers operate to avoid arrest. Prevention methods and criminal perspectives are equally taken into account.

TABLE OF CONTENTS

I. INTRODUCTION

It is well-known that laundering illegally obtained money is expensive. Nevertheless, criminals are often willing to spend a significant portion of their criminal assets on laundering activities. Prominent examples include, but are by no means limited to, using restaurants, bars or nightclubs to disguise criminal activity.[1] In these examples, money launderers pretend to have more revenue than they actually have and, thereby, place pecuniary proceeds from illegal activities into legitimate businesses. However, this implies that they need to maintain a certain infrastructure, which usually has its own associated costs, and, ultimately, they must pay taxes on the money they place into the businesses that act as fronts for their illegal activities.[2] In result, laundering cost can easily exceed 30 percent of the assets laundered.

However, money laundering can actually be quite profitable if done through the right conduits. This research article illustrates money laundering in the consulting sector in Austria, Germany, Liechtenstein, and Switzerland from the criminal's perspective.

II. LITERATURE REVIEW

The inception of money in human society was undoubtedly followed by the immediate rise of its laundering for criminal purposes. It was outlawed primarily to combat drug trafficking, under the rationale that trading drugs would be less attractive if it was subsequently difficult to spend or invest the proceeds of criminal activities. Today, money laundering, which includes revenue made from large variety of criminal activities, has been outlawed all around the world.[3]

Almost all definitions of money laundering include hiding, moving, or investing criminal assets. For the purposes of this study, money laundering is considered as any "act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which [an individual] knows or must assume originate from a felony or aggravated tax misdemeanor" (Art. 305bis of the Swiss Criminal Code). The definition in Article 305bis of the Swiss Criminal Code is an exemplary national implementation of Article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was adopted in Vienna on December 19th 1988. It contains a compre-

1 Fabian Teichmann, *Real Estate Money Laundering in Austria, Germany, Liechtenstein and Switzerland*, 3, JOURNAL OF MONEY LAUNDERING CONTROL (2018), p. 370.

2 Fabian Teichmann, *Twelve Methods of Money Laundering*, 20 (2), JOURNAL OF MONEY LAUNDERING CONTROL (2017), pp. 130 f.

3 Fabian Teichmann, Umgehungsmöglichkeiten der Geldwäschereipräventionsmassnahmen (1st ed. 2016), pp. 11 f.

hensive description of this crime, and it emphasizes that money laundering aims to obscure the provenance, tracing, or forfeiture of criminal assets.[4]

The vast majority of the existing literature focuses either on mechanisms and organizations aimed at preventing money laundering or on attempts at estimating its volume.[5] However, these estimates are not very convincing, given the paucity of data and not knowing the true extent of global organized crime. Nonetheless, it is commonly acknowledged that money laundering continues to be a massive global problem[6], and efforts at curbing such criminal activity have so far proved inadequate.[7]

Assessment of the national implementation of anti-money laundering laws is conducted by the Financial Action Task Force (FATF), which also coordinates global efforts in the fight against money laundering.[8] The overwhelming majority of the FATF's recommendations focus on the financial sector, while other areas, such as the consulting sector, have received less attention in the past. Moreover, although the literature outlines several stages in money laundering, such as placement, layering and integration, it does not explain exactly how criminals act.[9] In the past, the analysis of cash transactions has played an important role in better understanding money laundering.[10]

The classic case of money laundering has three stages: placement, layering and integration. Money is placed during the first stage – both the most important and most difficult step in the process, as the criminal assets are cleaned of their most immediate traces during this

---

4 Fabian Teichmann, Umgehungsmöglichkeiten der Geldwäschereipräventionsmassnahmen (1st ed. 2016), pp. 12 f.

5 Michele Bagella, Francesco Busato & Amedeo Argentiero, *Money laundering in a micro-founded dynamic model: simulations for the US and the EU-15 economies*, REVIEW OF LAW AND ECONOMICS (2009), p. 896; Elöd Takáts, *A theory of 'crying wolf': The economics of money laundering enforcement*, IMF WORKING PAPER (2007), p. 4.

6 Harvey, (2004), p. 339; Van Duyne, (1994), p. 62; Walker, (1999), p. 36.

7 Friedrich Schneider, *Money laundering and financial means of organised crime: some preliminary empirical findings*, 10(3), GLOBAL BUSINESS AND ECONOMICS REVIEW (2008), p. 309 f.; Fabian Teichmann, *Recent trends in money laundering and terrorism financing*, JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE (2019), p. 1 f.

8 Samuel Kern Alexander, *The international anti-money-laundering regime: The role of the financial action task force*, 4 (3), JOURNAL OF MONEY LAUNDERING CONTROL (2001), p. 231; Todd Doyle, *Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law*, HOUSTON JOURNAL OF INTERNATIONAL LAW (2001), p. 312; Michael Levi & William Gilmore, *Terrorist finance, money laundering and the rise and rise of mutual evaluation: a new paradigm for crime control?,* in: Financing Terrorism (Mark Pieth, 1st ed. 2002), p. 88.

9 Christoph Graber, Das neue GwG: Gesetzesausgabe mit englischer Übersetzung, Ausführungserlassen und Anmerkungen, 2 (2009); Friedrich Schneider & Ursula Windischbauer, *Money laundering: some facts*, EUROPEAN JOURNAL OF LAW AND ECONOMICS (2008), p. 394; Stefan Trechsel, Geldwäscherei: Prävention und Massnahmen zur Bekämpfung (1997), p. 14.

10 Fabian Teichmann, *Recent trends in money laundering and terrorism financing*, JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE (2019), pp. 1 f.

phase.[11] This followed by the layering stage, whereby the money is provided with an accounting legend. Layering often involves opening bank accounts in various jurisdictions.[12] Lastly, the money is integrated into the legal economic cycle[13] – the stage that underscores the fundamental importance of accountants to money launderers.[14]

In sum, this study investigates how accommodating the consulting sector is for money laundering. In addition, concrete methods of money laundering are illustrated, and the criminals' detection risk are taken into account. Finally, perspectives of compliance officers are also provided.

III. RESEARCH DESIGN

Since prior studies have not explored criminals' money laundering methods, the literature review could not present a quantitatively testable hypothesis due to lack of data. Therefore, we adopted an exploratory, and thus qualitative, approach, having chosen semi-standardized expert interviews as a suitable research method.

When selecting interviewees, it was important to include the perspectives of both criminals and experts in compliance and prevention within our sample. Hence, our research was divided evenly between 50 informal interviews with presumed white-collar criminals and 50 formal interviews with prevention experts, all of whom requested and were granted anonymity. After the analysis of the 100 interviews, theoretical saturation had been reached and the answers tended to become repetitive, and therefore further sampling became unnecessary. Both groups were asked how they could hypothetically get away with money laundering and to address three essential elements: (a) the resources needed, (b) concrete steps, and (c) detection risks.

Personal network was tapped in the recruitment of interviewees, which includes an extensive pool of well-qualified compliance professionals and law enforcement officers (connections made during seminars given in the past). The age of the formal interviewees ranged from 27 to 76, the majority of whom worked for financial institutions (78 percent), followed by government ministries (ten percent), prosecutor's offices (six percent), and financial intelligence units (six percent). The range of industry experience was 5-35 years.

---

11 Christoph Graber, Das neue GwG: Gesetzesausgabe mit englischer Übersetzung, Ausführungserlassen und Anmerkungen (2009), p. 2.

12 John Madinger, A Guide for Criminal Investigators (3rd ed. 2011), p. 20.

13 Friedrich Schneider & Ursula Windischbauer, *Money laundering: some facts*, EUROPEAN JOURNAL OF LAW AND ECONOMICS (2008), p. 394; Stefan Trechsel, Geldwäscherei: Prävention und Massnahmen zur Bekämpfung (1997), p. 14; Gao & Xu, XXX (2009), p. 1494.

14 Fabian Teichmann, Umgehungsmöglichkeiten der Geldwäschereipräventionsmassnahmen (1st ed. 2016), p. 11 f.

Recruiting the launderers themselves for interviews was more challenging. Thankfully, however, the first named author is well connected with the law enforcement sphere in Eastern Europe, and his contacts were able to put him in touch with presumed criminals. The informal interviewees ranged from 22-78 years of age. Given that the conversations strictly focused on potential ways of laundering money, no specific (underlying) crimes were discussed. Furthermore, the informal interviewees' criminal record were not inquired about, in order to avoid ethical dilemmas.

Moreover, while this study focuses on money laundering trends in Austria, Germany, Liechtenstein and Switzerland, interviewees from all over the world were recruited. The underlying reasoning was that, while the aforementioned four countries are particularly suitable for money laundering, the perpetrators do not necessarily need to be Austrian, German, Swiss or Liechtenstein nationals. Nevertheless, the formal interviews were composed mostly by Swiss (46 percent), followed by Austrian (24 percent), German (16 percent) and Liechtenstein (six percent) nationals. The informal interviews, however, included Ukrainian (32 percent), Russian (30 percent), and Italian (28 percent) nationals, all of whom were considerably knowledgeable about money laundering in the German-speaking area of Europe.

Given that the presumed criminals would have not given their consent to be recorded for fear of possible prosecution, the informal interviews were documented through memory protocols, specifically involving note-taking both during and immediately after the interviews. Although this might be considered a limitation of the study, it was the only realistic means of including the money launderers' perspectives in the study. However, the formal interviews with prevention experts were recorded and transcribed.

Qualitative content analysis[15] was performed on both sets of interviews. In particular, thematically similar statements were categorized, which were then reduced to generalizable core items for the facilitation of further analysis. Triangulation was used to assess the category system's objectivity, reliability, and validity. Furthermore, given that the author conducted the entire coding process, inter-rater reliability did not have to be assessed.

The results of the qualitative study were used to formulate the following three hypotheses, each tested via a quantitative survey of 200 compliance officers:

(1) Compliance officers assess the role of the consulting sector in money laundering as significant.

(2) Compliance officers rarely see cases of money laundering in the consulting sector.

(3) Compliance officers believe that, from their experience, the money laundering activities carried out in the consulting sector are undetectable.

15 Philipp Mayring, Qualitative Inhaltsanalyse: Grundlagen und Techniken (2010), pp. 7 ff.

A password-secured online questionnaire was then created and distributed to carefully selected experts.

The quantitative survey was backed by a major compliance advisory firm, which provided a list of potential respondents. Letters with individual user names and passwords were sent to all individuals on the list. The survey resulted in a 43 % response rate was achieved. FluidSurveys, a survey software, was used to collect quantitative data.[16]

IV. EMPIRICAL FINDINGS

A. General Suitability

Consultancy firms – as legal and recognized entities operating largely outside regulated areas – appear to be particularly suitable for the layering and integration stages of money laundering. Non-transparent price formation and performance is difficult to objectify and thus is only conditionally measurable; however, it strengthens the suitability of these firms for money laundering.

Moreover, given that cash payments are rather uncommon in the consulting industry, consulting companies have only limited suitability for the placement level. Large cash amounts intended for deposit are usually questioned by the compliance departments of the banks However, if the cash has already been paid in, layering and integration can be carried out by consulting companies. Money launderers can inject cash into the banking system in jurisdictions where the deposit of large cash amounts does not come under close scrutiny and then remit them to a consulting firm abroad. This consulting firm can then use the services of other companies, ideally also owned by the money launderer, and ultimately the money can be invested in legal activities, such as listed public companies.

Through such a strategy, consulting companies gain a significant advantage of being able to create legal and recognized structures with relatively little effort. For example, imagine a stock corporation in Switzerland that is required to pay 100,000 Swiss francs for a start-up account. These costs can be easily covered, along with another mere 5,000 Swiss francs to create a serious Internet presence. Finally, the "company" would need to organize a small office (often for comparatively low rent). Having done all this, a legal entity domiciled in Switzerland would appear (on paper) in international business dealings.

Close scrutiny by the authorities is circumvented by avoiding regulated areas. In addition, financial advisers or insurance brokers tend to be less likely to engage in money laundering than marketing consultants. Moreover, a marketing consultancy firm does not need to join a self-regulatory organization and is not the focus of financial market supervision.

---

16 Fabian Teichmann, *Recent trends in money laundering and terrorism financing*, JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE (2019), p. XX.

Furthermore, consulting services are often very difficult to objectify and therefore hardly measurable, illustrated by the above-mentioned example of marketing advice. While the value of a legal opinion or investment advice should still be in proportion to the amount in dispute or to the assets to be invested, the development of a marketing strategy involves much greater discretion, especially when dealing with a new trademark, the value of which is difficult to fix.

B. Concrete Steps

First, the money launderer must choose a trustworthy country, preferably Switzerland, to establish a business. They should disguise the beneficial owner and establishes subsidiaries abroad. The function of the money launderer's front is to provide advisory services at home and abroad. For the next step, they set up a professional website and a representative business address. It is essential that the money launderer actually provide some of the offered advisory services, which requires the involvement of existing companies. Only then do they shift the focus of services abroad, choosing destinations that make it almost impossible to verify the actual provision of the services. The money launderer then offers hard-to-objectify services, such as brand development, market analysis, and business brokerage services, the payment for which is made by bank transfer from e.g. Russia, Latvia and Kazakhstan. By simulating operating expenses, the money launderer ensures the plausibility of the business. Moreover, by including various neighboring countries and offshore centers, the money launderer creates a complex structure with multiple levels of concealment, complicating any potential investigation. Additionally, having accounts in different jurisdictions ensure the social fabric. Ultimately, meticulous care is taken to ensure that the accounting books withstand a comparison to other companies within and outside the industry. Tax assessments are consistently permitted and taxes are paid promptly.

Establishing a public limited company in a trustworthy country is not a major problem. For example, thanks to the express procedures of Switzerland's commercial register, the process can be completed there within two weeks. The advantages of creating a stock corporation with a network of other legal persons primarily ensures the higher credibility of international business dealings. Especially when establishing further business relationships in Germany and Austria, a stock corporation is much less scrutinized than a limited liability company, creating a credibility that is vital to money launderers. Therefore, known as a safe haven in international business, Switzerland is a considerably more trustworthy jurisdiction than others for establishing a stock company that (ostensibly) adheres to fiscal responsibility. In contrast, a company registered in South Africa or the Cayman Islands, for example, is already suspect in European business.

A stock company in Switzerland should be established by a beneficial owner who is veiled, which can be done, for example, via subsidiaries and parent companies abroad. In times of increasing pressure from the OECD and the notorious Base Erosion and Profit Shifting program, the possibilities of disguising the beneficial owner have experienced a historic low for fiscal reasons. In terms of long-term obfuscation, bearer shares no longer offer a

serious solution. Instead, the use of chastity bonds and legal persons provide better alternatives. In the case of the latter, the beneficial owner is usually questioned, but they may be disguised abroad on several levels. Using straw people is by far the most discreet obfuscation method. However, they are also subject to a certain risk that they may potentially act contrary to the interests of the money launderer.

The choice of the company's stated purpose is essential. In principle, at this stage the company declares its interest in providing services in Germany and abroad, making it easier to justify an international customer base later. The most suitable consulting services involve family offices, given that they are not objectifiable. However, in the case of family office services, special care must be taken to ensure that no financial services are provided, as otherwise the company might have to join a self-regulatory organization.

In order to withstand superficial checks by authorities and banks, it is especially important to maintain a professional website. Pure domiciliary companies tend to face greater scrutiny and appear less trustworthy than companies with their own offices and employees. A website without subpages, which is obviously not search engine optimized and is thus only conditionally suitable for the acquisition of new customers, appears suspicious to the naked eye. Therefore, a clever money launderer ensures that their website meets the standards of medium-sized consulting companies.

Furthermore, the practical money launderer choses a representative business address that does not cause excessive costs or attract the suspicion of neighbors due to vacant offices. Therefore, it should not be located at a known address for domiciliary companies in the canton of Zug, for example. It would be better to choose a small office near the University of St. Gallen, which would be affordable and appear more plausible at first glance. The proximity of the office to the university could even be used as a front providing access to international know-how.

This is followed by what is probably the biggest obstacle to this method of money laundering: this newly founded consulting firm must actually provide consulting services for easily verifiable clients in Switzerland. This serves as a proof of the actual conduct of consulting services, which could mitigate or even eliminate any suspicion of money laundering in the event of an investigation. Therefore, it is essential that established and trust-inspiring companies are advised.

Companies to be consulted are selected in two ways: 1) the money launderer can use an already existing company, such as restaurant, for example, to be advised; 2) existing consulting firms could be bought up and management consultants recruited with a solid customer base.

By holding such investments, a solid customer base can be simulated. For the next step, fictional customers are created abroad. These clients are located in jurisdictions where it is possible to inject large amounts of cash into the banking system. To this end, it is particularly suitable to choose jurisdictions in Eastern Europe, as the supervisory authorities there are sometimes less strict than in Switzerland, Germany or Austria. Moreover, the

high level of corruption in these countries suggests that even strict controls can be circumvented.

The fake Eastern European customers make use of various advisory services, including the especially popular market analysis. For example, let's say some money launderers have created a new brand for the introduction of a sweet-tasting soft drink on the world market to compete with existing brands in this area. There are barely any upper limits to the sums of the consulting fees for such a product. Other customers, however, use less sophisticated and more modest services, such as the recommendation of a school or university in Europe for their children.

Next, business expenses are simulated. The advantage of this is that a consulting company without personnel expenses would seem less plausible. Next, expenses for the company headquarters as well as for company cars have to be considered, which should be in line with industry averages to withstand a possible examination by the investigative authorities. The size of the consulting firm will dictate the exact amount of expenditures.

Consulting companies typically face a fairly high expenditure for the above-mentioned camouflages. Therefore, it is essential that these funds not end up in the private pockets of auxiliaries, but ultimately remain in the economic sphere of the money launderer. Utilizing subcontractors abroad can achieve this effect. For example, agencies in Russia could receive lavish fees for brokering Russian consulting clients. Consulting companies in Dubai, for example, could provide part of the services, which would then be billed using standard transfer pricing methods. Moreover, Cost Plus and the Resale Minus methods appear to be particularly suitable in this context.

By including foreign companies, the money launderer creates complex networks, which can only be checked with considerable effort. No authority would question that such a consulting firm holds interests in other consulting firms and recruitment agencies in more than 20 countries. This, in turn, complicates any investigation of the social fabric, as official and legal assistance would be necessary from more than 20 countries, thus significantly delaying and complicating any investigation.

In addition, all subsidiaries should have bank accounts in different jurisdictions, ensuring that the companies will be even more confusing. Ideally, other jurisdictions would have to be included in any investigations, creating additional complexity. This would help, for example, if a bank suspects money laundering. With active accounts both at home and abroad, the company is capable of acting even if under suspicion.

Furthermore, by consistently accepting tax assessments and promptly paying any tax debts, the aforementioned consulting companies benefit from additional camouflaging, as money launderers would not want tax authorities to take a second look at their accounts. After all, these companies can avoid scrutiny best by meticulously managing books, hiring a confidence-inspiring tax expert who has good contacts with the relevant tax authority, and a certain tolerance for any errors made by the authorities.

C. Resources

To implement the illustrated method of money laundering, the money launderer needs placement options for cash deposits. This requires a bank with correspondent branches abroad and a solid network of offshore companies with bank accounts in Dubai, for example, and other destinations. In addition, owning a company in Switzerland with consultants, directors and a good reputation is necessary.

Placement by cash deposits in this variant is quite a challenge. Ideally, the money launderer has good contacts with banks in Russia and Kazakhstan where he or she deposits the criminal funds. Then, the funds are transferred twice within Russia, after which the money launderer has to transfer the criminal funds abroad. Upon the third transfer, the money launderer will ensure that the money reaches an account that allows for further transfer abroad. Due to current sanctions on Russia, this means the money lands in a Kazakh bank. As European banks have settled in these post-Soviet countries, a bank with correspondent branches in Switzerland should be easy to find.

At the same time, establishing companies in countries like the United Arab Emirates (Dubai) provides a significant advantage to the money launderer due to their free-trade zones. Once such a company has been set up (which can be done quite easily), and together with a letter of recommendation from another bank, there should be no further obstacles to opening the bank account in Dubai.

A similar company in Switzerland is also easy to set up. However, given that consultants, directors and a good reputation are required, it is worth considering whether or not buying an existing company with a solid infrastructure and customer base. Any new company should include competent advisers in order to be able to exercise actual control over the funds. To avoid surprises, the money launderer ensures the competency of his advisers so that any problems arising from language barriers are avoided.

Furthermore, a money launderer needs directors to ensure an actual offer. A consulting firm without a director is usually considered to have very poor credibility. Moreover, the presence of real people on the internet who can actually be contacted makes it easier for a company to withstand a superficial review.

Most suitable are directors with a good reputation. Should the local prosecutor's office have doubts about the company, a director with an impeccable reputation as an honorable business person, who is ideally well-connected locally, will certainly help calm investigators.

D. Risks

Any official and legal assistance is clearly a risk that could remove the anonymity of the beneficial owner, which is a serious problem for the money launderer. An additional risk is transaction analysis by the banks. A money launderer must also remember that cash fees are uncommon in the consulting industry and would certainly give rise to suspicion.

Moreover, excessively high fees or silent companies could quickly attract a detailed check by the police, the prosecutor's office or the tax authorities.

Official and legal assistance are the money launderer's natural enemies. Transaction analyses by banks pose another problem. For example, a Swiss bank could investigate suspicious transactions and choose to report them to the Swiss Money Laundering Reporting Office to protect themselves from compliance risks. It is therefore important to keep banks happy by being open and cooperative in sustaining a lucrative business together. Small private banks are probably better suited for this purpose than large corporations, since the individual customer in smaller banks carries more importance. Thus, a money launderer should encourage the bank, through commercial interests and proper fulfillment of all formal compliance requirements, to refrain from reporting. Alternatively, it helps to choose banks with less competent compliance officers. However, it can prove difficult to determine ex ante which compliance officer will audit the transaction. Thus, it may make more sense to seek out corrupt compliance officers.

Instituting cash fees is uncommon in the consulting industry and would immediately attract attention, especially during a transaction analysis. Over time, a detailed review of the company by the police, the prosecutor's office or the tax authorities should always be expected. As a precautionary measure, having some real customers in Switzerland is wise. A money launderer should be well-prepared: if he or she begins to fake contracts after the first house search, then it is usually already too late. A forward-thinking money launderer expects a search of his or her business premises at some point and maintains complete, plausible and reputable-looking documentation of every important business transaction there. By observing these precautionary measures, he or she can manage to curb suspicion immediately.

Silent companies could also be dangerous for the money launderer. It is therefore important that he or she creates the appearance of activity in order to reduce the risk. A website that is easy to find using popular search engines can be helpful here.

A serious problem is the large number of persons involved – ultimately, these connections can always be used as potential witnesses in criminal proceedings. By creating plausible companies, several people are involved in the end, and they have access to business records. Therefore, it is advisable to use close confidants and small companies.

E. Overall Assessment

The method and strategies presented above offer many advantages for money laundering. In particular, it is suitable for laundering large amounts of money while only taking on relatively low costs. While restaurants have to cope with the cost of goods, for example, a consulting company has to shoulder significantly less effort. Yet, this model also carries

certain risks, the most potentially devastating being the number of potential witnesses.[17]

It should also be kept in mind that this method attracts the attention of compliance officers relatively often. Within the scope of this study, 62 percent of the surveyed compliance officers mentioned being aware of cases of money laundering in connection with consulting services in the past three years. The main reason for this is that consulting services are usually paid through bank accounts rather than in cash, which inevitably involves banks and compliance officers. However, achieving success by undertaking the abovementioned steps seems likely for the money launderer, as 85 percent of compliance officers believe that, in most cases, they are unable to detect money laundering activities carried out in the consulting sector. This suggests that this sector is overlooked in terms of money laundering activities.[18]

V. CONCLUSION

In conclusion, it can be stated that the consulting sector in Austria, Germany, Liechtenstein and Switzerland continues to remain extraordinarily attractive for money laundering. Despite this reality, it has received relatively little attention in the literature, especially with regard to the actual methods used for laundering money.[19]

This study has aimed to help fill this gap in the research. The methods outlined in this paper are suitable for all stages of the money laundering process, namely: placement, layering, and integration. While money laundering tends to be expensive in other business sectors, the consulting sector provides a potentially profitable alternative for money launderers.[20] This is largely due to tax benefits obtained through the involvement of offshore companies.

In addition, few risks are presented in this method of money laundering, especially given that compliance officers often claim that money laundering in the consulting sector is undetectable. Data from our interviews with compliance officers confirms this.[21]

---

17 Fabian Teichmann & Bruno Sergi, Compliance in Multinational Corporations: Business Risks in Bribery, Money Laundering, Terrorism Financing and Sanctions (2018), pp. 50 f.

18 Fabian Teichmann, Umgehungsmöglichkeiten der Geldwäschereipräventionsmassnahmen (1st ed. 2016), pp. 150 f.

19 Fabian Teichmann, *Real Estate Money Laundering in Austria, Germany, Liechtenstein and Switzerland*, 3, JOURNAL OF MONEY LAUNDERING CONTROL (2018), p. 375.

20 Fabian Teichmann, *Real Estate Money Laundering in Austria, Germany, Liechtenstein and Switzerland*, 3, JOURNAL OF MONEY LAUNDERING CONTROL (2018), p. 375.

21 Fabian Teichmann, *Real Estate Money Laundering in Austria, Germany, Liechtenstein and Switzerland*, 3, JOURNAL OF MONEY LAUNDERING CONTROL (2018), p. 375.

CEJ
COMPLIANCE
ELLIANCE
JOURNAL

BOOK REVIEW

KOOPERATIONEN IM GESUNDHEITSWESEN AUF DEM PRÜFSTAND

AKG E.V./BPI E.V., 1. EDITION 2018

Reviewed by Fabian M. Teichmann & Marie-Christin Falker

AUTHORS

Fabian M. Teichmann is an attorney-at-law and public notary in Switzerland. After earning an undergraduate degree in Economics and Finance (Bocconi University, Italy), he then earned graduate degrees in Management (Harvard University, USA), Accounting and Finance, and Law (University of St. Gallen, Switzerland). He also holds a PhD in Law (University of Zurich, Switzerland), a Doctorate in Economics and Social Sciences (Kassel University, Germany), and an LL.M. (King's College, England). Teichmann teaches courses on compliance, corruption, money laundering, and terrorism financing at various universities. He is the author of several books and over 100 scholarly articles.

Marie-Christin Falker is a research associate at Teichmann International (Schweiz) AG. She obtained an undergraduate degree in English and American Culture and Business Studies, focusing particularly on international management and marketing (Kassel University, Germany). She also studied at University of Maryland at College Park (USA) during her undergraduate studies.

REVIEWED BOOK

The book critically assesses cooperation in the German healthcare sector. In particular, it analyzes the role of bribery and discusses various forms of legal and illegal cooperation with and between healthcare institutions. In this context, it also provides a detailed overview of competition law implications. The book concludes by illustrating the practical role of bribery in the German healthcare sector and provides concrete suggestions for criminal defense lawyers.

Medical compliance is becoming increasingly important throughout the world. In particular, corruption appears to influence the procurement of pharmaceuticals and medical equipment in developing economies, such as China[1] and Bulgaria.[2] This is easily explained by high levels of corruption in these countries.[3] In addition, the medical procurement sphere is traditionally characterized by very high levels of bribery.[4] However, corruption in medical procurement is also an issue in the most developed countries such as Germany. Hence, this book is of enormous practical importance and relevance. The authors successfully combine expert scientific insight with discussion of practical implications. It was a pleasure to read their analyses, as the findings are presented in an interesting narrative style, which induces curiosity in the reader. The authors also explore groundbreaking themes.

The work pursues an interdisciplinary approach to assessing cooperation in healthcare, especially involving the medication and pharmaceutical industry. The current challenge in this domain is to meet patients' expectations while also justifying the legality of cooperation. As the authors expressly state, their book contributes to understanding this justification with reference to criminal law and "the legal perspectives of social, professional, fair competition, and antitrust laws."[5] Further, it aims to "give a comprehensive view of the enforcement practices in fighting corruption in healthcare, from the perspectives of both the public prosecutor and the defense."[6]

In his chapter on bribery and bribability, Prof. Dr. Schneider thoroughly delineates the elements of an offense under sections 299a and 299b of the German Criminal Code (StGB) and how these are construed. He elaborately defines the characteristics of these sections by discussing their structures, identifying disparities, and explaining implications. Further, the paradigm shift on April 13, 2016 is examined brilliantly through an astute assessment from a criminal policy perspective of sections 299a and 299b StGB, which became effective on June 4, 2016. Moreover, the chapter profiles potential offenders, namely healthcare professionals, who must complete a government-regulated education before being authorized to enter the profession. Schneider provides an elaborate overview of medical professions and distinguishes them from health trade professions. He also illustrates the German legal situation and discusses foreign healthcare providers. Other content includes examples of bribery from the perspectives of both payers of bribes, as

---

1 Susan Rose-Ackerman & Yingqi Yan, *Corruption in the Procurement of Pharmaceuticals and Medical Equipment in China*, 32, UCLA PAC. BASIN L.J. 1-53 (2014).

2 Patrick Meagher, *Prescription for Abuse? Pharmaceutical Selection in Bulgarian Healthcare, in:* International Handbook On The Economics Of Corruption, 546–597 (Susan Rose-Ackerman ed., 2006).

3 Martha Gabriela Martinez, *Jillian Clare Kohler, & Heather McAlister, Corruption in the Pharmaceutical Sector, in*: The Handbook Of Business And Corruption: Cross-Sectoral Experiences, 329–361 (2017).

4 Abdul Wahab Yousafzai, *Corruption in Medical Practice: Where Do We Stand?*, 27, J. AYUB MEDICAL COLLEGE ABBOTTABAD, 515 (2015).

5 HENDRIK SCHNEIDER ET AL., KOOPERATION IM GESUNDHEITSWESEN AUF DEM PRÜFSTAND, 33 (2018).

6 Id. at 33.

well as receivers of bribes, the exploration of competitive and market behavior, and additional legal definitions.

Prof. Dr. Schneider's detailed and thorough exploration of the issue is not only highly informative but also inspires a desire to learn more. He successfully illuminates bribery in healthcare from multiple perspectives while also basing his reflections on legal expertise. His excellent points are written in an absorbing manner. In his superb overview of both active and passive bribery in the healthcare sector, Schneider succeeds in concisely summarizing all relevant aspects for the reader. He profoundly analyzes the various elements of the relevant crimes, focusing especially on sections 299a and 299b StGB.

Chapter 4 was written by attorney-at-law Claus Burghardt and dissects cooperation in healthcare. After competently illustrating cooperation in healthcare and its manifestations, he discusses insurance contracts and patient compliance initiatives. He also thoroughly investigates consultant contracts and other service contracts. Finally, Burghardt provides an interesting and informative examination of financial support for continuing medical education. Like Schneider, he excels in his analysis, which is both comprehensive and engaging.

In Chapter 5 attorney-at-law Dr. Daniel Geiger analyzes cooperation with institutions, which entails sponsoring, donations, and third-party funding. We were particularly intrigued by his analysis of external funding acquisition through institutions and universities. Geiger argues that university law and criminal law must be brought in line on what constitutes an "advantage" according to corruption delicts (§§ 331 ff. StGB). His illustrations are extensive, and his discussion of the issue combines a scientific viewpoint with practical implications. Moreover, the theme builds on previous chapters, and so is well integrated into the book's overall narrative.

Unfair competition concerns are highlighted in Chapter 6, which is authored by attorney-at-law Michael Weidner. He examines the legal implications of cooperation with pharmacies, including discounts on both prescription and over-the-counter medications. Weidner then compellingly debates advanced education measures for pharmacists concerning products, sales, and scientific content. He also discusses marketing formats, such as promotional gifts, shop window renting and placement, print advertisements, and more. Weidner's contribution offers fascinating insights and fits seamlessly with the content of the preceding chapters.

Chapter 7 addresses the antitrust implications of sections 299a and 299b StGB. Attorney-at-law Dr. Christian Burholt impressively discusses issues, such as discounts for pharmacists, medical deliveries, and the German and EU antitrust legislation governing the granting of discounts. After delineating the history of sections 299a and 299b, he details violations of antitrust laws and market abuse restraints. Burholt succeeds in conveying the key points in an intriguing manner. His analysis of different types of discounts is comprehensive, giving readers a detailed overview of the issue.

The practical implications of corruption in healthcare are documented in Chapter 8, which gives insights into penal praxis. Its co-authors – Alexander Badle, Christian Konrad Hartwig, and Dr. Andreas Raschke – provide an extremely elaborate and detailed analysis of a multitude of associated aspects. The chapter begins by explaining the principle of legality. It then considers how anonymous complaints are investigated, covering the investigation procedure in detail. The presentation of their findings is both informative and compelling, with particularized descriptions that are in no way prosaic or irrelevant. Especially interesting is the analysis of the potential for conflict between the corporation and their employees induced by internal investigations, as well as limitations due to medical secrecy, and two-stage examinations based on consent or anonymization. In addition, the authors discuss authorities' utilization of the media, which is a highly relevant and entertaining topic. Finally, their conclusion summarizes the discussed points and forecasts how the work of authorities will develop in the future with regards to medical science laws.

The final chapter considers the criminal defense of individuals and companies charged with corruption under sections 299a and 299b StGB. Attorney-at-law Felix Rettenmaier gives a knowledgeable description of how an investigation develops and isolates criminal offenses that could lead to a criminal charge. He then describes the ensuing investigative procedure and analyzes potential defense strategies. Rettenmaier details possible measures, such as temporary employment bans and searches. He also compellingly explains who is affected when an investigation ensues, and how those individuals or groups could be defended. In particular, he skillfully depicts how to execute a defense in a corruption investigation, illuminating every single step of the procedure: counseling clients determining the state of affairs, evaluating circumstances, and formulating the defense strategy. Rettenmaier is immensely thorough in detailing the process, which facilitates deep understanding of the attorney's activities in such cases. Finally, he stipulates the consequences for companies, thus reinforcing the book's practical relevance.

Overall, the entire book combines highly informative content with suspenseful and absorbing writing. The authors succeed in presenting legal issues that some might consider prosaic in a manner that maintains readers' interest throughout. Indeed, the authors give a "comprehensive overview of nearly all practically relevant case constellations and their legal appraisal."[7] The book is of utmost importance for both academics and practitioners in the field of medical compliance.

7 Id. at 35.