Compliance under Pressure

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EDITORIAL

COMPLIANCE UNDER PRESSURE

The period of crisis is ongoing and still poses challenges for companies. In the aftermath of Covid-19 pandemic, the effects of the Russian war of aggression and inflation increase economic pressures. This might lead to less expenses on Compliance and increase the vulnerability to Compliance-violations. At the same time, legal policy trends are moving toward a stronger commitment to Compliance and transparency (e.g., the German Act on Corporate Due Diligence Obligations in Supply Chains or implementation laws of EU Whistleblower Directive).

In this edition, our authors address some of these legislative trends as well as the question of the limits of "Creative Compliance". If the term "Creative Compliance" is new to you as it was to us, switch to the essay of Prof. Sommerer on page 30 et seq.

In addition, the Compliance Elliance Journal team is very pleased to present with this edition our new Content Curator, Prof. Dr. Konstantina Papathanasiou, University of Liechtenstein. Her essay on Criminal Liability of Legal Entities and Criminal Compliance in the Principality of Liechtenstein can be read on page 3 et seq. of this edition.

The CEJ Content Curators are supported by the Advisory Board, for which we were able to win Markus Endres, attorney and Certified Fraud Examiner (CFE), who serves as the Chief Compliance Officer of an international pharmaceutical company. Together with Markus Traut, attorney and owner of his law firm in Wiesbaden, he will guarantee that the CEJ remains up to date on all issues relevant to Compliance.

We aim to continue the debates on the development of compliance and are interested in papers from all over the world. We eagerly await your respective impulses and hope you enjoy reading!

With our best regards,

Michele DeStefano & Hendrik Schneider
Content Curators of CEJ

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CRIMINAL LIABILITY OF LEGAL ENTITIES AND CRIMINAL COMPLIANCE IN THE PRINCIPALITY OF LIECHTENSTEIN

Konstantina Papathanasiou

AUTHOR

Prof. Dr. Konstantina Papathanasiou, LL.M., holds the Chair of Economic Criminal Law, Compliance and Digitalization at the University of Liechtenstein. Since the fall of 2022 Prof. Papathanasiou is a Content Curator of CEJ.

She pursued her legal studies from 2001 to 2005, and in 2007 completed a Master's Degree in Criminal Law Sciences in Athens. From 2008 onwards, she received the DAAD-Scholarship to pursue her research at the University of Heidelberg, where she completed her doctorate from 2010 to 2013. She conducted her doctoral studies as a scholarship holder of the Alexander Onassis Foundation. From 2017 to 2020, she worked on her habilitation thesis with a habilitation scholarship from the University of Regensburg on the topic "Ius Puniendi and the State Sovereignty – Origins, International Legal Limits and Theoretical Foundations of International Criminal Law." She habilitated in March 2021 and was subsequently awarded the venia legendi for criminal law, criminal procedural law, economic criminal law, international criminal law, comparative law and legal philosophy. Awarded the "Regensburg Prize for Women in Science and the Arts" on Oct. 27, 2021, for habilitation and "in recognition of outstanding achievements in the field of law".

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I. INTRODUCTION

The fact that a legal person can be "punished" is not self-evident. Some countries do not provide for corporate criminal law.[1] This is because, by definition, a penalty presupposes in particular the individual guilt of the perpetrator for the wrong he or she has committed, which is not readily comprehensible in relation to a legal person.

The Criminal Code of the Principality of Liechtenstein of 24 June 1987 entered into force on 1 January 1989. The liability of legal persons was not regulated by law until the Act of 20 October 2010 on the Amendment of the Criminal Code. More precisely, Articles 74a to 74g of the Criminal Code were introduced as the new 9th section, which define the circle of addressees, the scope of application and applicability, as well as the prerequisites for the liability of legal persons and their sanctioning. Corresponding procedural adjustments were also made to the Code of Criminal Procedure by means of specific additions tailored to the requirements of legal persons in the newly introduced XXV section ("On Proceedings Concerning the Liability of Legal Persons," Articles 357a et seq. of the Code of Criminal Procedure).

II. REASONS FOR THE INTRODUCTION OF THE CORPORATE CRIMINAL LIABILITY

The decisive factor for the legislative decision at that time was Liechtenstein's international obligations concerning the introduction of criminal liability of legal persons. Therefore, it would be useful to first briefly discuss this. This will make it clear on what grounds the Liechtenstein legislator advocated the criminal liability of legal persons.

In the so-called "Report and Proposal" of the Government (i.e. explanatory memorandum to the draft law; Bericht und Antrag [abbr.: BuA]), several international conventions were referred to on the one hand, which explicitly instructed the respective contracting states to take the necessary measures - not necessarily of a criminal law nature - in accordance with their domestic legal principles in order to hold legal persons accountable for certain criminal acts. The following four (among others) in particular are worthy of mention[2]:

(1) Art. 5 of the UN Convention for the Suppression of the Financing of Terrorism of December 9, 1999;

(2) Art. 10 of the UN Convention against Transnational Organized Crime of 15 November 2000 ("Palermo Convention");

(3) Art. 26 of the UN Convention against Corruption of October 31, 2003;

[1] This year, a project on the international criminal law of Liechtenstein legal entities will be carried out. Approximately 30 country reports (from Europe, Asia and Latin America) were arranged, which describe the legal situation in the respective countries and thus promote comparative law. To conclude the project, an "International Symposium on Corporate Liability" will be held on December 9 and 10, 2022, which can also be attended digitally. Further information will follow on the website of my Chair https://www.uni.li/de/universitaet/institute/institut-fuer-wirtschaftsrecht/organisation/lehrstuhl-fuer-wirtschaftsstrafrecht-compliance-und-digitalisierung.

[2] Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Strafgesetzbuches und der Strafprozessordnung zur Einführung der strafrechtlichen Verantwortlichkeit von juristischen Personen, 52 BuA, 8 (2010).

(4) Article 12 of the Convention on Cybercrime of 23 November 2001 ("Cybercrime Convention") and the Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems of 28 January 2003.

On the other hand, the Liechtenstein legislator has attached particular importance to the so-called 40 Recommendations of the FATF to combat money laundering. In particular, according to the 2nd FATF Recommendation, legal persons should be subject to criminal liability for acts of money laundering. Where this is not possible, civil or administrative sanctions should be sufficient, and in any case these must be effective, proportionate and dissuasive.[3]

However, unlike Switzerland, Austria and Germany, Liechtenstein is not a member of the FATF. This raises the legitimate question of why the FATF was and still is so important for the Principality of Liechtenstein.

According to the draft explanatory memorandum, the G-20 mandated the FATF to take measures in the area of domestic and international money laundering and terrorist financing to mitigate potential vulnerabilities.[4] The focus is on identifying countries and jurisdictions that are not cooperating or are classified as "high risk" for the global financial system. Criteria were defined for drawing up the above-mentioned list, which were based, among other things, on the results of country audits with regard to implementation in the area of combating money laundering and terrorist financing. Liechtenstein had been evaluated in spring 2007 by members of the Committee of Experts of the Council of Europe (MONEYVAL) as well as the International Monetary Fund (IMF), whereby the introduction of criminal liability of legal persons, which had already been recommended in the past, had been requested. In case of an insufficient implementation of the recommendations, Liechtenstein had to reckon with being classified as a problematic country by the FATF. For this reason, it appeared urgently necessary to provide by law for the extension of criminal liability for money laundering to legal persons.[5]

III. THE REGULATION OF THE CRIMINAL CODE

According to the explanatory memorandum to the draft, the Liechtenstein provision in Articles 74a et seq. of the Criminal Code adopted some provisions of the Austrian Act on the Liability of Associations (*Verbandsverantwortlichkeitsgesetz*; *VbVG*), but limited itself overall to the adoption of absolutely necessary special provisions. In decisive areas, the regulation deviated from the Austrian model - either by following the relevant Swiss provisions or by choosing a genuine Liechtenstein solution.[6]

The central regulation of the crime of a legal person is Article 74a of the Criminal Code with the heading "Responsibility". Here, a distinction is made between two cases that trigger the liability of the legal person: The responsibility can arise both on the basis of the commission of the offense by a manager (para. 1) and on the basis of the commission of the offense by subordinate employees, provided that

[3] 52 BuA 18, 19 (2010).
[4] 52 BuA 19 (2010).
[5] 52 BuA 20 (2010).
[6] 52 BuA 56, 57 (2010); For the Austrian regulation see in detail Heidelinde Luef-Kölbl, *Experiences with the Austrian Act on Corporate Criminal Liability ("Verbandsverantwortlichkeitsgesetz" or "VBVG),* CEJ, Vol. 6, 20 et seqq. (2020).

a breach of supervisory duty in the broader sense on the part of the management level at least substantially facilitated the commission of the offense (explicit "organizational culpability" of the legal entity, para. 4).

More specifically, according to Article 74a para. 1 of the Criminal Code, legal persons, insofar as they are not acting in execution of the law, are responsible for misdemeanors and felonies unlawfully and culpably committed by management persons as such in the course of business activities within the scope of the purpose of the legal person.

Legal entities are legally defined in Article 74a para. 2 of the Criminal Code. In particular, it concerns legal entities registered in the Commercial Register as well as legal entities that have neither their registered office nor a place of operation or establishment in Liechtenstein, provided that they would have to be registered in the Commercial Register under domestic law (No. 1), and foundations and associations not registered in the Commercial Register as well as foundations and associations that have neither their registered office nor a place of operation or establishment in Liechtenstein (No. 2).

Article 74a para. 3 of the Criminal Code contains the legal definition of a manager. On the one hand, persons with external representation authority (No. 1; e.g. the managing director of a limited liability company, the board member of a stock corporation), and on the other hand persons with control authority (No. 2; e.g. members of supervisory boards and boards of directors as well as executive employees) are subsumed under this definition. Furthermore, para. 3 covers those persons who *de facto* exercise significant influence on the management of the company without a corresponding authority (no. 3). According to the explanatory memorandum to the draft, it is irrelevant in all of the aforementioned cases on the basis of which legal relationship (employment contract, contract for work and services, temporary employment relationship, etc.) the management person acts for the legal entity.[7]

The purpose of the provision requires the restriction of the group of management persons under No. 1 to persons with a kind of general power of representation; power of representation for limited areas of activity cannot be sufficient, but power of representation limited to a branch office can be. Following the example of the Austrian VbVG, the requirement of organ or legal power of representation was also intended to exclude from the group of management persons those persons who had not been appointed by the legal entity but had been appointed from outside, such as liquidators or forced administrators.[8]

The explicit "organizational culpability" of the legal entity is of great relevance for the area of criminal compliance, regulated in Article 74a para. 4 of the Criminal Code. In detail, one reads the following: "The legal entity is only responsible for inciting acts committed by employees of the legal entity, although not culpably, if the commission of the act was made possible or substantially facilitated by the fact that management persons within the meaning of paragraph 3 failed to take the necessary and reasonable measures to prevent such inciting acts".

The prerequisite for the criminal liability of a legal entity is therefore the commission of an offense or crime by one or more employees in the course of business activities within the scope of the purpose

[7] 52 BuA 73 (2010).
[8] 52 BuA 74 (2010).

of the legal entity. In order for the legal entity to be criminally liable, it is also necessary for the legal entity to have been organized in such a way that the offense was made possible or substantially facilitated by the legal entity's deficient organization. According to the explanatory memorandum to the draft, the legal entity is also (explicitly) accused of having failed to introduce or ensure adequate risk management by its managers.[9]

In the case of an act committed by an employee, criminal liability on the part of the legal person is characterized by the failure of the management level to take necessary and reasonable measures to prevent such incidental acts, as a result of which the commission of the incidental act, which is in accordance with the facts and unlawful, has been at least substantially facilitated (increase in risk). Here, too, the incidental offense must be committed objectively and subjectively and unlawfully by at least one employee in his or her own person. However, it is not a question of culpable commission. Therefore, it is also irrelevant whether the employee has subjectively acted in a careless manner, i.e. whether he was able to observe the objectively required care according to his mental and physical circumstances.[10]

If both management personnel and employees are involved in the same incidental offense, or if, according to the draft law, the criminal result is negligently brought about at both the management and employee levels, then both para. 1 and 4 are fulfilled.[11] The legal person, however, would only be criminally liable once because of the realization of the same incidental offense. As a rule, the association's liability would have to be based on para. 1, since the commission of the offence by management persons – irrespective of the form of the offence (and probably also irrespective of the act or omission) – would regularly appear to be more serious (with the exception of the merely negligent facilitation of an intentional incidental offence by an employee). The circumstance of the simultaneous realization of para. 4 could be taken into account within the framework of the assessment of the association's punishment. Reasons for exemption from punishment on the part of the employee would not change the constituent elements of the offense and the unlawfulness of the incidental offense.[12]

The last par. 5 of Article 74a of the Criminal Code explicitly states that the liability of the legal person for the incidental offense and the criminal liability of managers or employees for the same offense are not mutually exclusive. According to the explanatory memorandum, this does not constitute "double punishment", as the legal entity and the perpetrator are different legal and sanctioning subjects which are charged differently.[13] After all, the conviction of the legal person is not dependent on whether the initiating offender(s) is (are) prosecuted and sanctioned.

The legal consequence is regulated in Article 74b of the Criminal Code: Insofar as a legal person is responsible for an incidental offense, Article 74b para. 1 provides that it shall be subject to an association fine. The important keyword "association fine" even appears as the heading of Article 74b of the Criminal Code. According to the explanatory memorandum, the association fine is imposed on the basis of and in accordance with the accusation made against the legal entity and expresses a social-

[9] 52 BuA 74 (2010).
[10] 52 BuA 75 (2010).
[11] 52 BuA 75 (2010).
[12] 52 BuA 76 (2010).
[13] 52 BuA 76 (2010).

ethical reprimand. The primary purpose of the threat and imposition of association fines is prevention. For the assessment of the association fine, a daily rate system is proposed, which is intended to ensure transparency and "victim equality".[14] In the case of legal entities, a distinction may be made between the *seriousness of the charge* (seriousness of the offense and its consequences and seriousness of the organizational deficiency), which is expressed by the number of daily sentences, and the *economic capacity*, according to which the amount of the daily sentence is determined.[15]

IV. REGULATIONS IN OTHER ACTS

In view of the introduction of criminal liability into the Criminal Code, several laws also had to be supplemented in their penal provisions or amended accordingly.

A. The Liechtenstein Due Diligence Act

Most important for the present context is the Liechtenstein Due Diligence Act of 11 December 2008 – Act on Professional Due Diligence to Combat Money Laundering, Organized Crime and Terrorist Financing (DDA). According to Article 1 para. 1, the Due Diligence Act regulates the assurance of due diligence in the professional exercise of the activities subject to this Act and, according to Article 1 para. 2, its purpose is to combat money laundering, organized crime and terrorist financing as defined in the Criminal Code (Articles 165, 278 to 278d).

Penal provisions are enshrined in Articles 30 and 31 DDA; the former is genuinely criminal law, the latter administrative criminal law (administrative violations sanctioned by the supervisory authority). The genuinely criminal provision of Article 30 DDA regulates a misdemeanor in para. 1 and several infractions in para. 2a and 2b.

The misdemeanor is fulfilled if one of the four types of conduct clarified as punishable is present:

a) violation of the obligation to notify under the first sentence of Article 17 para. 1;[16]

b) carrying out transactions contrary to Art. 18;

c) violation of the obligation to freeze assets pursuant to Art. 18a;

d) violation of the prohibition of information under Art. 18b para. 1.

[14] 52 BuA 78 (2010).

[15] The maximum number of daily sentences is set at 360 - as in individual criminal law. Analogous to the amount of the daily sentence under Article 19 para. 2 of the Criminal Code, a minimum amount of CHF 100 and a maximum amount of CHF 20,000 are proposed for legal entities. The maximum association fine is therefore CHF 7,200,000, which can still be exceeded by half if Article 39 of the Criminal Code is applied.

[16] Wording of Art. 17 para. 1 sentence 1 DDA: "If there is a suspicion of money laundering, a predicate offense to money laundering, organized crime or terrorist financing, those subject to due diligence must immediately notify the Financial Intelligence Unit (FIU) in writing; in this regard, the responsibility for making the notification rests with the member at management level designated for compliance with this Act."

Pursuant to para. 4 of Article 30 DDA, the liability of legal entities for misdemeanors and infractions is governed by Articles 74a et seq. of the Criminal Code. Thus, the general provisions from the Criminal Code apply. Nevertheless, Art. 33 para. 1 DDA specifies: "If the offenses are committed in the business operations of a legal entity, the criminal provisions shall apply to the members of the management level and other natural persons who acted or should have acted on its behalf, but with joint and several liability of the legal entity for fines, penalties and costs." In this respect, the provision of Article 74g para. 2 of the Criminal Code is applied at the same time, according to which: "If a legal person is sentenced to an association fine, the statutory provisions on the joint and several liability of legal persons for fines and costs shall not apply." Because otherwise a double claim of the legal person would come into consideration.[17]

B. The Liechtenstein Money Gaming Act

A more specific regulation of compliance is found in the Liechtenstein Money Gaming Act. For all categories of money games, a so-called *due diligence concept* is always required. This is regulated centrally in Art. 11 of the Gaming Act for casinos; however, according to Art. 61 of the Gaming Act, this requirement also applies mutatis mutandis to licenses for online gaming. Thus, according to the combined reading of these two provisions, the due diligence concept must set out the measures with which the casino or online gaming intends to ensure that the obligations of the due diligence legislation are complied with. In particular, the following must be demonstrated: a) the implementation of internal guidelines regulating all due diligence and related duties of the casino or online gaming; b) the regulation of internal organization and controls; c) the documentation and further organizational measures; d) the guarantee of training; e) the commissioning of the auditors; and f) the guarantee of reporting to the Office of National Economy and the Financial Market Authority (FMA).

Art. 90 of the Gaming Act explicitly states that criminal liability based on other criminal law norms, in particular the Due Diligence Act, is reserved.

C. The Liechtenstein Blockchain Act

Finally, the Liechtenstein legal system is quite innovative and original with regard to the regulation of so-called *tokens*. We are talking about the Law of October 3, 2019 on Tokens and TT-Service Providers (Token and Trusted Technology Service Providers Act; also known as the Blockchain Act – the world´s first regulation of Blockchain). According to Article 1 para. 1 of the Blockchain Act, this law establishes the legal framework for transaction systems based on trusted technologies. Among other obligations, Art. 17 of the Blockchain Act prescribes the need for special internal control mechanisms, which must be in place as soon as the activity begins. For example, Art. 17 para. 1 lit. d of the Blockchain Act requires TT token custodians to ensure: "1. the establishment of appropriate safeguards, in particular to prevent the loss or misuse of TT keys; 2. the safekeeping of customers' tokens separately from the TT token custodian's business assets; 3. the unambiguous allocation of tokens to customers; 4. the execution of customer orders in accordance with the order; 5. the maintenance of activities in the event of interruptions (business continuity management)."

[17] 52 BuA 90 (2010).

Failure to have such control mechanisms in place is then sanctioned by the FMA under Art. 47 para. 2 lit. d of the Blockchain Act if the act does not constitute the elements of a criminal offense falling within the jurisdiction of the courts. The elements of crime are regulated in particular in Art. 47 para. 1 of the Blockchain Act.

Pursuant to Art. 47 para. 3 Blockchain Act, the FMA also imposes fines on legal entities "if the violations pursuant to para. 2 are committed in the course of business activities of the legal person by persons who have acted either alone or as a member of the board of directors, executive board, management board or supervisory board of the legal person or by virtue of another management position within the legal person by virtue of which they: a) are authorized to represent the legal person externally; b) exercise controlling powers in a managerial position; or c) otherwise exercise significant influence on the management of the legal person."

According to Art. 47 para. 4 Blockchain Act, the legal entity is also responsible for infringements under para. 2 committed by employees of the legal entity, although not culpably, if the infringement was made possible or substantially facilitated by the fact that the persons named in para. 3 failed to take the necessary and reasonable measures to prevent such incidental acts.

V. CLOSING

The Principality of Liechtenstein may be geographically small, but as a financial center it is remarkably large and cannot be overlooked. Liechtenstein's legislation could be considered progressive – especially with regard to digitalization – and could itself act as a model for other countries.

Both corporate criminal liability and criminal compliance are now also being researched further, more comprehensively and in greater depth through the establishment of the new Chair of Economic Criminal Law, Compliance and Digitalization at the University of Liechtenstein. In terms of teaching, the focus is also on the criminal liability of legal persons as well as compliance; thus, a new and unique Executive Master of Laws (LL.M.) in Economic Criminal Law has been designed and introduced in the German-speaking region. The course offers a well-founded specialized legal education which, in addition to explaining the Liechtenstein regulations on white-collar crime, also provides comparative law as well as in-depth knowledge of European and international criminal law.[18]

As a new co-editor of the CEJ, I am already looking forward to the international as well as inter- and intradisciplinary exchange around compliance!

[18] The LL.M. starts in February 2023 - info and registration at uni.li/llm-wirtschaftsstrafrecht.

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TRENDS IN REGULATORY EXPECTATIONS AND THEIR IMPACT ON COMPLIANCE MANAGEMENT IN COMPANIES

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Dr. Stephanie Trossbach is a lawyer, Certified Compliance & Ethics Professional as well as Certified Fraud Examiner. Before founding her law firm Catus Law + Compliance, Dr. Trossbach worked for years at a global top 5 law firm and a listed healthcare company in various compliance positions in Germany and abroad. Her focus is on compliance management in the healthcare and life-science sectors, but she represents a wide range of companies in different industries, from listed companies to medium-sized companies in a national and international context. Most recently, she published an article entitled "Increasing Compliance Expectations and Entrepreneurial Risk, or The Bed of Procrustes", in the Corporate Compliance Zeitung 3/2021 (pp. 121-126) and gave a presentation for the Society of Corporate Compliance and Ethics (SCCE) on "Effective Compliance Risk Management in Environments of Increasing Regulatory Expectations" (5/2021).

ABSTRACT

Compliance requirements for companies are growing, especially in the fields of ESG (Environmental, Social, and Corporate Governance) and data privacy. The phenomenon can be observed not only within the EU, but also many other areas of the world. Within the regulatory environment, fostering ESG practices has long since developed from a voluntary commitment to a "real" compliance issue which lawmakers are driving forward with serious sanctions and which courts are also shaping within the framework of the evolving laws. These laws are very complex, often unclear, and intrude deeply into the areas of risk analysis and risk management, which traditionally represent a core responsibility of companies. Many regulations emphasize development and implementation of internal processes within companies. This greatly reduces companies' discretionary powers, since responsible use of leeway is a core area of entrepreneurial decision-making governed by the business judgment rule. Structurally, we are seeing increased legalization of risks, through which the legislator *de facto* takes away companies' leeway to make entrepreneurial decisions. Also, the threat of severe fines and uncertainty about the interpretation of legal terms makes it difficult for companies to decide what needs

to be done to meet the laws' requirements and to avoid risk. Looking at the character of the regulations, we see value-driven and symbolically-charged laws. However, these laws are anything but "dead letters" – they intervene deeply in companies' risk management, aim at changing behavior, and have sharp "teeth" in the form of sanctions. The EU may be a particularly fertile source of symbolic legislation, which can serve to create political identity. Companies can, however, choose different ways to deal with these challenges, and they are free to find the right path. Even if lawmakers are increasingly intervening in the way companies carry out risk analyses and the priorities they set in that context, companies should defend their leeway and use it wisely. It is of utmost importance to know the real risks well and to use leeway responsibly. A diligent risk analysis, carefully aligned to a company's circumstances and needs, is always a good starting point. Perfect knowledge of applicable laws and the company's operations is a prerequisite for a professional risk assessment and building an effective Compliance Management System (CMS). There is always room for balanced decision-making regarding risk assessment and prioritization in accordance with the business judgment rule and entrepreneurial responsibility.

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I. INCREASING COMPLIANCE REQUIREMENTS

It has become almost a commonplace to state that compliance requirements for companies are constantly increasing. And yet this is true, and it is all the more remarkable when one looks not only at existing regulations but also at those still in the legislative pipeline. Especially in an international context, it is necessary to examine overarching developments as well as legislative trends and determine whether they have broader significance. This allows companies to prioritize implementation of diverse aspects of compliance management more appropriately.

A. European Union

For the European Union (EU), the following are key areas:

- The concept of "Environmental, Social, and Corporate Governance" (ESG) plays an increasingly important role in the EU's legislative plans
- Data protection and information security continues to be a main focus since implementation of the *EU General Data Protection Regulation* (EU GDPR)

In the area of **ESG**, the European Parliament and EU member states adopted a directive in 2014, entitled the *EU Non-Financial Reporting Directive*, to expand the reporting obligations of large capital market-oriented companies, credit institutions, financial services institutions and insurance companies.[1] With the *CSR Directive Implementation Act* of 2017, which also applies to management reports, e.g. Germany has transposed this directive into national law. Companies are required to disclose information on environmental issues, social issues, treatment of employees, respect for human rights, anti-corruption and anti-bribery efforts, and diversity on company boards in terms of age, gender, educational, and professional background.[2] With the *EU Corporate Sustainability Reporting Directive*, the *EU Non-Financial Reporting Directive* will now to be extended, beginning in the 2025 financial year, to all companies with more than 250 employees, a balance sheet total of at least 20 million Euro, or annual sales of more than 40 million Euro. From January 2028, even capital market-oriented small and medium-sized enterprises will be added to the list.[3] In the event of infringement, fines of up to 50,000 Euro may be imposed, and in the case of capital market-oriented corporations up to two million Euro or twice the economic advantage derived from the infringement, whereby the economic advantage includes estimated profits made and losses avoided.

In September 2020, a report prepared by the European Parliament's Committee on Legal Affairs (JURI) on its own initiative became public. It contained recommendations to the EU Commission for its draft on a supply chain due diligence directive. This resulted in the draft EU Directive on Corporate

[1] European Parliament, Non-*financial Reporting Directive*, Europa.eu (Jul. 19, 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf.

[2] Bundesministerium der Justiz, *Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten*, bmj.de (Sep. 21, 2016), https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/CSR-Richtlinie-Umsetzungsgesetz.html.

[3] European Commission, *Corporate* sustainability *reporting*, Europa.eu (Jul. 19, 2022), https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

Sustainability Due Diligence (EU CSDD Directive) in 2022. The focus is on sustainability obligations for companies, with the aim of promoting sustainable and responsible corporate behavior in all global value chains.[4] The core elements of the directive are the identification, termination and prevention of negative human rights and environmental impacts within companies' operations, subsidiaries and value chains. In addition, certain large companies must develop a plan to ensure that their business strategy is consistent with limiting global warming to 1.5 °C, in line with the Paris Agreement. In the event of a breach, companies will be subject to civil liability for damages and financial penalties based on the company's revenues. Further decisions by regulators containing penalties for breaches of the directive's provisions will be made public. However, the exact nature of the sanctions will be left to the member states' discretion.

Within the EU, there are already national laws that address these issues. France introduced the *Loi de Vigilance* in 2017.[5] It requires large companies to develop a due diligence plan to identify and prevent risks of serious harm to human rights or fundamental freedoms, to the health and safety of people or the environment. The due diligence plan covers the company's operations, its subsidiaries, and activities of subcontractors and suppliers with which it has an established business relationship. Upon request, any person with a legitimate interest may petition a court to order the company to comply with the requirements. In addition, the company is liable for damages in the event of a breach of the due diligence requirements. The Netherlands also adopted a similar regulation in 2019 with the *Wet Zorgplicht Kinderarbeid*.[6] The law requires companies to check whether there is a risk that child labor has been used in their supply chain. If this is the case, an action plan to combat child labor must be developed. In addition, if this is the case, companies must make a statement, which will be recorded in a public register, about their investigations and the action plan. If no remedial action is taken within six months, companies face heavy fines, in the worst case even ten percent of annual sales. In the event of repeated violations within five years, managing directors must expect criminal consequences, even a prison sentence of up to six months. In 2021, Germany followed suit with the *Act on Corporate Due Diligence Obligations in Supply Chains* (German abbreviation LkSG).[7] Companies based in Germany with at least 3,000 employees (starting 2024: 1,000 employees) are required to comply with a number of due diligence requirements to ensure human rights and essential environmental protection standards in the supply chain. Companies are required, among other things, to establish appropriate risk management, issue a policy statement and establish a grievance procedure. These due diligence obligations apply not only to the company's own business operations, but also to direct and (albeit within narrower limits than the present EU CSDD) indirect suppliers. Violations can result in fines of up to 5 million Euro, and for companies with annual (group) sales of more than 400 million Euro, fines of up to two percent of average annual sales.

[4] Presse Release of European Commission, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.
[5] Legifrance, *Loi de Vigilance*, legifrance.gouv.fr (Mar. 27, 2017), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/.
[6] Staatsblad van het Koninkrijk der Nederlanden, Wet Zorgplicht Kinderarbeid, officielebekendmakingen.nl (Nov. 13, 2019), https://zoek.officielebekendmakingen.nl/stb-2019-401.html.
[7] Gesetze im Internet, *Lieferkettensorgfaltspflichtengesetz,* (Jul. 23, 2022), https://www.gesetze-im-internet.de/lksg/LkSG.pdf.

On October 22, 2020, the European Parliament adopted a legislative resolution with recommendations to the Commission for an EU legal framework to halt and reverse EU-driven global deforestation.[8] Extraordinarily far-reaching due diligence obligations are envisaged for companies that introduce raw materials covered by the proposal and products derived from them to the market for the first time within the internal market of the EU, or which finance economic operators carrying out these activities. In November 2021, the EU Commission then presented a proposal for a regulation on deforestation-free products. The aim is to protect against illegal deforestation, especially of rainforests, and the associated risks to the rights of indigenous peoples.[9] Penalties will include, at a minimum, fines proportionate to the environmental damage and the value of the relevant commodities or products, confiscation of the commodities and products from the operator and/or trader, confiscation of revenues gained by the operator and/or trader from a transaction with the commodities and products plus temporary exclusion from public procurement processes.[10]

A second focus area of compliance-relevant EU legislation is **data privacy and information security**. EU GDPR[11] was a landmark piece of legislation which imposed many new obligations on companies in 2018. In terms of content, it was not so much a matter of tightening up substantive data protection law. What was decisive and very costly for companies were procedural requirements, i.e. how companies must organize themselves to meet the legal requirements, and of course, the threat of sanctions of up to 10% of annual turnover.

After the EU GDPR was implemented, there have been further plans: The EU Data Act,[12] presented by the EU Commission in February 2022, is intended to ensure "fairness in the digital environment," promote a competitive data market, open up opportunities for data-driven innovation, and make data more accessible to all. The proposal includes measures to give users access to the data generated by their connected devices, measures to improve the negotiating power of small and medium-sized enterprises by preventing imbalances in data-sharing contracts, and funding for public authorities to access and use data held by the private sector.[13]

Other regulations are still pending, such as the EU e-Privacy Regulation, which was actually supposed to be developed with the EU GDPR but was then repeatedly delayed. It should mainly regulate the confidentiality of communications, the processing of communications data, and the storage and reading of information on terminal equipment (e.g., cookies).[14] The aim of the regulation is to align the rules

[8] European Parliament, Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation, Europa.eu (Oct. 22, 2020) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_DE.html.

[9] European Commission, *Questions and Answers on new rules for deforestation-free products,* europa.eu (Nov. 17, 2021), https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919.

[10] European Commission, *Proposal for a Regulation on deforestation-free products*, europa.eu (Jul. 23, 2022), https://environment.ec.europa.eu/system/files/2021-11/COM_2021_706_1_EN_ACT_part1_v6.pdf.

[11] European Parliament, *EU General Data Protection Regulation*, Europa.eu (Apr. 27, 2016), https://eur-lex.europa.eu/eli/reg/2016/679/oj.

[12] European Commission, *Data* Act, Europa.eu (Feb. 23, 2022), https://digital-strategy.ec.europa.eu/en/library/data-act-proposal-regulation-harmonised-rules-fair-access-and-use-data.

13 Press Release of European Commission, Data Act: Commission proposes measures for a fair and innovative data economy (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113.

[14] European Commission, *ePrivacy Regulation*, Europa.eu (Jul. 19, 2022), https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation.

on electronic communications with the EU GDPR.[15] The project is current still being negotiated among the European Parliament, the Council of the EU, and the European Commission.[16] It is unclear whether an agreement will be reached this year.

EU regulators and authorities have been making very clear that they intend to defend the privacy of personal data and will not hesitate to actively do so vis-à-vis the corporate world on an international basis. Prominent examples include Google and Facebook, which have been fined a combined record of 210 million Euro by the French data protection authority (CNIL) for making it difficult for users to stop the companies tracking their online activity.[17]

B. United States and United Kingdom

In the area of anti-corruption, both the United States, with the *U.S. Foreign Corrupt Practices Act* (FCPA) of 1977, and the United Kingdom, with the *UK Bribery Act* (UKBA) of 2010, are setting the pace for the development of compliance programs, especially for companies operating internationally. Both sets of rules have extraterritorial reach and can apply to foreign companies even if the acts of corruption were not committed in the United States or the United Kingdom. Both laws threaten serious sanctions. Further, both laws go beyond merely general obligation to comply with the law – they establish concrete guidelines for an effective compliance program which companies and their managers must follow if they want to influence the outcome of investigations in their favor.

However, in both the United States and the United Kingdom, the importance of other issues is growing, with a trend toward ESG issues and data protection also in evidence here:

In California, for example, the *California Transparency in Supply Chains Act*[18] has been in effect since January 2012. The law requires certain companies to publicly disclose their efforts to eliminate human trafficking and modern slavery in their operations. Companies fall within the law's scope if they identify themselves as retailers or manufacturers on their tax returns, meet the legal requirements to do business in California, and have annual worldwide gross receipts of more than 100 million USD. The goal is to provide consumers with enough information to make informed purchasing decisions about goods. Consumers should have the choice to buy goods produced by companies that manage their supply chains responsibly, thereby reducing slavery and human trafficking.[19]

[15] European Commission, *ePrivacy Regulation*, Europa.eu (Jul. 19, 2022), https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation.
[16] Statewatch, *EU:e-Privacy*, statewatch (Apr. 20, 2022), https://www.statewatch.org/news/2022/april/eu-e-privacy-council-proposed-amended-mandate-whilst-in-negotiations-with-parliament/.
[17] The Guardian, *France fines Google and Facebook €210m over user tracking,* theguardian.com, (Jul. 23, 2022), https://www.theguardian.com/technology/2022/jan/06/france-fines-google-and-facebook-210m-over-user-tracking-cookies.
[18] State of California Department of Justice, *The California Transparency in Supply Chains Act*, State of California Department of Justice (Jul. 23, 2022), https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf.
[19] State of California Department of Justice, *The California Transparency in Supply Chains Act*, State of California Department of Justice (Jul. 19, 2022), https://oag.ca.gov/SB657.

On the federal level, the *U.S. Uyghur Forced Labor Prevention Act* of 2021,[20] passed in late 2021, bans imports from China's Xinjiang region unless the importer can prove that the goods were produced free of forced labor.

The *Virginia Consumer Data Protection Act* of 2021 is an example from the field of privacy protection which protects Virginia consumers.[21] The Act grants consumers, among other things, the right to inquire whether a controller is processing their personal information, to receive confirmation if that is the case, to obtain access to personal information provided by the controller if it is being processed, and to have personal information deleted upon request if it was provided by or collected about the consumer.

In California, another data security law, the *California Privacy Rights Act*, is scheduled to come into force on January 1, 2023.[22] This will significantly expand and update the existing data protection law under the *California Consumer Privacy Act*.[23] The act is intended to prevent the disclosure of California consumers' confidential information. A new agency, the California Privacy Protection Agency, is also being planned to implement the act. Intentional violations can be punished with fines of up to 7,500 USD per violation.

In the United Kingdom, the *UK Modern Slavery Act* (UKMSA) of 2015 is currently in force. It can also have an extraterritorial effect under similar conditions as those established by the UKBA.[24] UKMSA requires companies with an annual receipts of 36 billion GBP or more to publish reports on the risks of modern slavery in their own business.

In October 2021, the British government published a strategy paper entitled "Greening Finance: A roadmap to sustainable investing."[25] The aim is to promote sustainable investment and make the financial system more environmentally friendly by (among other things) strengthening sustainability and disclosure obligations.

Another important initiative in the field of privacy and digital services is the draft UK Online Safety Bill,[26] which was recently introduced in the British Parliament. The bill contains comprehensive requirements for all providers of digital services operating in the United Kingdom, regardless of whether they are based there or not. Providers fall within its scope if they have numerous users in the United Kingdom. In the event of a breach, websites can be blocked, and fines of up to 18 million GBP or 10% of global receipts. However, the law only affects companies which host user-generated content, i.e.,

[20] Government Publishing Office, An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes, givinfo.gov (Dec. 23, 2021), https://www.govinfo.gov/app/details/PLAW-117publ78.
[21] Virginia General Assembly, *Consumer Data Protection Act*, virginia.gov (Jul. 19, 2022), https://law.lis.virginia.gov/vacode/title59.1/chapter53/.
[22] *California Privacy* Rights *Act of 2020*, ca.gov (Jul. 19, 2022), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop24.pdf.
[23] California Legislative Information, *California Consumer Privacy Act*, ca.gov (Jul. 19, 2022), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5.
[24] Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report*, gov.uk (Jul. 19, 2022) S. 40, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf.
[25] Government UK, Greening *Finance*, gov.uk (Jul. 19, 2022), https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing.
[26] House of Commons UK, *Online Safety Bill*, parliament.uk (Jul. 14, 2022), https://bills.parliament.uk/bills/3137.

which allow users to post own content online or interact with each other. The law also covers search engines, which are subject to tailored obligations aimed at minimizing the display of harmful search results to users.[27] The law also covers all websites that provide forums, message boards or user-generated content.

In addition to ESG compliance and data protection, corruption remains a high priority, particularly in the United States. As recently as December 2021, the U.S. government presented a comprehensive strategy to combat corruption.[28] This includes, first, better understanding and responding to the transnational dimensions of corruption, elevating anti-corruption as a cross-cutting priority in key ministries and agencies across government, and increasing law enforcement resources and information sharing between intelligence and law enforcement agencies.[29]

C. Other Countries

In countries outside the EU, the United States and the United Kingdom, the trend of prioritizing ESG issues is, unsurprisingly, less pronounced. A few examples show the point:

Japan has some regulations relating to ESG compliance. Examples include the JP Act on Promotion of Global Warming Countermeasures,[30] the JP Act on Promotion of Women's Participation and Advancement in the Workplace, [31] and the JP Green Bond Guidelines.[32] In addition, the JP Corporate Governance Code was updated last year. It recommends that large listed companies disclose information on risks and opportunities related to climate change based on a framework established by the Task Force on Climate-related Financial Disclosures.[33]

South Africa adopted a draft SA Green Finance Taxonomy in the middle of last year, responding to the increased importance of ESG compliance in the context of investment.[34] The draft identifies a minimum set of assets, projects, and sectors that can be defined as "green" in line with international best practices and national priorities. It is intended to be used by investors, issuers, asset owners and other participants in the financial sector.

India is trying to address ESG issues more intensively. A working group set up by the Indian Ministry of Finance is working on the development of a green taxonomy as part of a larger sustainable finance

[27] Department for Digital, Culture, Media & Sport, *Online Safety Bill: factsheet*, gov.uk (Apr. 19, 2022), https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet.
[28] The White House, Fact Sheet: U.S. Strategy on Countering Corruption, whitehouse.gov (Dec. 6, 2021) https://www.whtehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/.
[29] The White House, Fact Sheet: U.S. Strategy on Countering Corruption, whitehouse.gov (Dec. 6, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/.
[30] Act on Promotion of Global Warming Countermeasures, cas.go.jp (Jul. 19, 2022), https://www.cas.go.jp/jp/seisaku/hourei/data/APGWC.pdf.
[31] The Act on promotion of Women's Participation and Advancement in the Workplace, gender.go.jp (Jul. 19, 2022), https://www.gender.go.jp/english_contents/about_danjo/lbp/pdf/promotion_of_woman.pdf.
[32] Japan's Green Bond Guidelines, env.go.jp (Jul. 19, 2022), https://www.env.go.jp/content/900453297.pdf.
[33] ESG Investor, *Japan Proposes Mandatory Climate Risk Disclosure*, regulationasia.com (Sep. 6, 2021), https://www.regulationasia.com/japan-proposes-mandatory-climate-risk-disclosures/.
[34] http://www.treasury.gov.za/comm_media/press/2022/SA Green Finance Taxonomy - 1st Edition.pdf (Jul. 18, 2022).

architecture.[35] However, nothing has been published on this yet. The 500 largest listed Indian companies are, at least, required to disclose corporate responsibility and sustainability indicators based on the *National Guidelines for Responsible Business Conduct* and as part of Business Responsibility Reporting.[36]

China, as the biggest country in the world and an east Asian economic power player, puts some focus on ESG compliance. To provide a locally adapted framework for domestic companies, the China Enterprise Reform and Development Society, together with experts from China's leading research institutions and companies, initiated a project to produce a guide to ESG disclosure.[37] How effectively this is implemented and by what standards is another matter.

Brazil, which has been criticized for its economic exploitation of rainforests,[38] does not seem to have significant ESG activities.

D. Development Outside the Legislative Context

ESG reporting and compliance was originally understood as a voluntary commitment:

> *"ESG is the acronym for Environmental, Social, and (Corporate) Governance, the three broad categories, or areas, of interest for what is termed 'socially responsible investors.' They are investors who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity. (…) Socially responsible, or ESG, investing may also be referred to as sustainable investing, impact investing, and mission-related investing. ESG investors tend to be more activist investors, participating at shareholder meetings and actively working to influence company policies and practices."*[39]

Accordingly, the term ESG was popularized in 2004 by the report "Who Cares Wins", a collaborative initiative of financial institutions convened by the UN.[40] It was supported by 20 well-known institutions. One prominent initiative that grew out of this was the adaptation of the United Nations' 17 Sustainable Development Goals in 2015.[41] Since then, the topic of ESG has gained enormous popularity

[35] Bhasker Tripathi, *India's Proposed Sustainable Taxonomy and The Complexity of Weighing Climate Gains with Capital Concerns*, carboncopy.info (Jun. 3, 2022), https://carboncopy.info/indias-proposed-sustainable-taxonomy-lessons-to-remember-worries-to-address/.
[36] Financial Express, Navigating *the Complexities of ESG Compliance in India*, financialexpress.com (Jun. 21, 2021), https://www.financialexpress.com/opinion/navigating-the-complexities-of-esg-compliance-in-india/2275066/.
[37] China Enterprise Reform and Development Society, cerds.cn (Jul. 19, 2022), https://www.cerds.cn/site/content/8237.html.
[38] Cristina Müller, *Brazil and the Amazon Rainforest*, Umweltbundesamt GmbH (Environment Agency Austria), (May 2020) S. 24, https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL_IDA(2020)648792_EN.pdf.
[39] Kyle Peterdy, *ESG (Environmental, Social and Governance),* Corporate Finance Institute (Jul. 5, 2022), https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/.
[40] International Finance Corporation, *Who Cares Wins*, ifc (Aug. 2004), https://www.ifc.org/wps/wcm/connect/9eeb7982-3705-407a-a631-586b31dab000/IFC_Breif_whocares_online.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-9eeb7982-3705-407a-a631-586b31dab000-jkD12B5#:~:text=Who%20Cares%20Wins%28WCW%29%20was%20initiated%20by%20the%20UN,Bank%20Group%20%20were%20among%20the%20endorsing%20institutions.
[41] The United Nations, *The Sustainable Development Agenda*, UN (Jul. 19, 2022), https://www.un.org/sustainabledevelopment/development-agenda/.

and developed into a global phenomenon. This is not only shaping the social debate but is also having a significant impact on the investment market. In Germany alone, the total amount of capital investments which took ESG criteria into account rose by 25% in 2020 to a new record volume of 335.3 billion Euro.[42] This is increasing pressure on companies to operate sustainably. Larry Fink, founder and chairman of BlackRock, addressed the CEOs of German corporations in a letter in January 2020, calling for a stronger focus on ESG issues. Such risks are also investment risks, he said, which is why his company will increasingly include them in investment decisions in the future. This trend is ongoing.[43] The two largest EFT providers, BlackRock and Vanguard, offer ESG funds to their clients. BlackRock added six new ESG funds in 2020 and now also employs a Head of Sustainable Investing.[44]

These developments and the activities of national legislators, as set out above, influence each other, as the importance of ESG issues has increased in public discussions and is perceived as urgent, not least because of global climate change. Thus, both legislation and public concern are combining to increase interest in ESG issues.

Courts are also influencing the ESG environment at various levels. A worldwide "climate protection jurisprudence" is developing both at the level of constitutional law and between private parties. This trend was reflected in the Dutch “Shell Decision” and in the injunctive relief currently being sought by the German environmental aid organization Deutsche Umwelthilfe.

Last year, the oil and natural gas company Shell lost a lawsuit in the Dutch District Court in The Hague and was ordered to significantly reduce its carbon dioxide emissions. CO2 emissions, the court ruled, had to be reduced by 45% by 2030 compared to 2019.[45] The environmental protection organizations Milieudefensie and Greenpeace were among the plaintiffs. In 2021, Deutsche Umwelthilfe filed lawsuits against three companies demanding that they cease and desist from activities which produce greenhouse gases. In the case of Mercedes-Benz and BMW, Deutsche Umwelthilfe demanded that the sale of cars with climate-damaging internal combustion engines be halted by October 2030, while the Norwegian oil and gas firm Wintershall Dea would be required to cease production of natural gas and crude oil by December 31, 2033.[46] Large enterprises often produce several times as many greenhouse gases as some nations, and were thus obliged, the lawsuit argues, to adapt their operations to protect the climate and citizens' fundamental rights.[47] The lawsuits were filed in Germany at the Munich Regional Court, the Stuttgart Regional Court and the Kassel Regional Court. On June 21, 2022, the first hearings occurred before the Stuttgart Regional Court.[48]

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[42] Bayern Invest, *ESG-News,* bayerninvest.de (Jul. 19, 2022), https://www.bayerninvest.de/maerkte-meinungen/research-news/esg-news/index.html.

[43] Larry Fink, *Letter to the CEOs*, blackrock (Jan. 14, 2020), https://www.blackrock.com/ch/individual/en/larry-fink-ceo-letter?switchLocale=Y; Dorothy Neufeld, *New Waves: The ESG Megatrend Meets Green Bonds*, Visual Capitalists, (Aug. 11, 2020), https://www.visualcapitalist.com/esg-megatrend-green-bonds/.

[44] BlackRock, *Welcome to the* BlackRock *site for institutional investors*, blackrock (Jul. 19, 2022), https://www.blackrock.com/institutions/en-us/biographies/paul-bodnar.

[45] The Hague District Court, C/09/571932 / HA ZA 19-379 (May 26, 2021), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339.

[46] Deutsche Umwelthilfe, *Wir verklagen Unternehmen für mehr Klimaschutz,* DUH (Jul. 19, 2022) https://www.duh.de/klimaklagen/unternehmensklagen/.

[47] Deutsche Umwelthilfe, *Wir* verklagen *Unternehmen für mehr Klimaschutz,* DUH (Jul. 19, 2022) https://www.duh.de/klimaklagen/unternehmensklagen/.

[48] Spiegel, *Gericht sieht Klage der Deutschen Umwelthilfe* gegen *Mercedes kritisch,* (Jun. 21, 2022) https://www.spiegel.de/auto/deutsche-umwelthilfe-gegen-mercedes-gericht-sieht-klage-kritisch-a-1d01b8d1-12c5-4abf-bddc-f23d11369e26.

For both cases, it is characteristic that the connecting factor here is not existing damages, but rather future damages. This derives from the argument that "climate protection rights" are aspects of human rights, in particular the right to life (according to Art. 6 of the International Covenant on Civil and Political Rights, ICCPR) and in the right to privacy (according to Art. 17 of the ICCPR).[49]

E. Assessment

Obviously, the topic of ESG has long since been transformed from a voluntary commitment to a "real" compliance issue, backed by laws which impose severe sanctions and court decisions developing a human rights-based approach. Companies must therefore deal with these issues, assess the risks correctly, and draw the right conclusions for the company's CMS. This is not an easy undertaking, because, as the sections I. A.-D. of this paper have shown, legal obligations are onerous, and enforcement of them by the authorities is strict.

Further, the regulatory schemes are complex. First, we see high level of detail, especially in the area of ESG regulation. National supply chain laws provide an initial insight into the practical problems associated with regulatory ambiguities. This can be exemplified by the German LkSG which served as one model for the EU CSDD Directive. The annex to the German LkSG refers to many international conventions, protocols, and reports on human rights and environmental risks. These add up to 14 sources of "soft law". Furthermore, the EU CSDD references another 12 UN Guiding Principles, national action plans, OECD guidelines and similar. It is impossible to understand the scope of ESG obligations without addressing these sources.[50] Second, this high level of detail goes hand-in-hand with much ambiguity. The provisions are brimming with vague terms, including key ideas such as "supply chain", "company", "risk analysis", "risk management", and "preventive and remedial measures". Companies which intend to follow the guidelines responsibly quickly come up against these interpretive problems, and legislators and authorities have so far remained largely silent on these essential issues. It can, of course, be argued that interpreting undefined legal terms is nothing new and is even "day-to-day business" in companies and their legal departments. Yet, the challenge is not so much the vagueness of the legal terms *per se,* but the profound intrusion of these terms into the areas of risk analysis and risk management, which traditionally represent a core responsibility – and competence – of companies. We can note, for almost all of the ESG (and also data protection) regulation discussed above, that these laws interfere considerably with corporate decisions on how to conduct risk assessments, how to prioritize and steer risks, including how to organize internal processes, and even how to communicate internally and externally. As noted above, similar burdens attended the implementation of the EU GDPR. The regulation was not so much about substantive increases in data security, but on the development and implementation of internal processes in companies, for example regarding risk assessments, data protection impact assessments, procedures in the event of data breaches, responses to data subject inquiries, and the like. The draft of the EU CSDD Directive goes into a similar direction: Above all, it calls for "human rights and environmental due diligence" which must be integrated into the company's guidelines and processes. Abuses must be identified and harm prevented. Companies

[49] Christoph H. Seibt/Marlen Vesper-Gräske, *Lieferkettensorgfaltspflichtengesetz erweitert* Compliance *Pflichten*, Vol. 10 CB, 357, 358 (2021).

[50] See also, including for the references, Christoph H. Seibt/Marlen Vesper-Gräske, *Lieferkettensorgfaltspflichtengesetz erweitert Compliance Pflichten*, Vol. 10 CB, 357, 363 (2021).

must establish reporting procedures and review the effectiveness of their measures. The EU CSDD Directive does not plan to sanction any specific behavior such as a human rights or environmental violations. Rather, it specifies (for implementation by national legislators) which risks companies must assess (namely human rights and environmental risks), how they should do so (for example, by developing a code of conduct or through training), and, to a certain extent, provide a sketch of internal processes which would be evaluated as adequate for the purposes of risk management. For instance, the draft Directive prescribes in Art. 10 of the EU CSDD how often risk analyses should occur ("annual review"). This greatly reduces companies' discretion, even though responsible use of this discretion is key to entrepreneurial decision-making, which is ordinarily governed by the principle of legality and, not least, the business judgment rule. The rule defines the scope of entrepreneurial decision-making leeway of managing directors and board members and exempts reasonable decisions made after adequate research from legal challenge. This doctrine, which originated in the U.S., is now also widespread outside the common law and has been applicable law in Germany since around 1997.[51] According to the business judgment rule, managing directors and board members are not liable for the negative consequences of corporate decisions if the decision was made on the basis of adequate information, not driven by extraneous interests, and was made in the good-faith belief that it was in the best interests of the company. This freedom, however, has now been limited by legislators who explicitly removes leeway and requires companies to implement certain approaches to risk management and internal processes. Structurally, we are seeing a legalization of risks, through which the legislator *de facto* eliminates companies' entrepreneurial discretion.

It is further interesting that the focus on risk management and prevention closely resembles developments in "climate protection jurisprudence", which, as noted above, focuses on preventing future harm. In both cases, the spotlight is on prevention, and failures to prevent are sanctioned. Ultimately, therefore, we see a shifting of responsibilities to much earlier points in time.

Another complicating factor is that many of the legislative projects described in section I. A.-D. stand out due to the threat of very high fines. In the run-up to the EU GDPR, for example, the threat of fines coupled with considerable uncertainty about interpretation of legal terms and the horizon of expectations led to a great deal of speculation about how the authorities might react and what fines they might impose. Similar uncertainty surrounds the topic of supply chain due diligence. Even in companies where human rights and environmental protection violations are not obvious or likely, there are considerable worries about what needs to be done to meet the law's requirements. When legal demands are not only vague but also coupled with potentially severe sanctions, as was the case with the EU GDPR in particular, companies often abandon business practices which are actually acceptable or at least subject to oversight, even if these practices are essential for the company's business activity. Such risk avoidance is understandable: Anyone reckoning with fines several times as high as previous sanctions will incur even higher costs trying to avoid them, even if the probability of violation remains the same. Furthermore, risk aversion becomes more likely where the consequences increasingly affect company managers personally.[52] This forces autonomous entrepreneurial decision-making into the back seat.

[51] See sec. 93 para. 1 sent. 2 German Stock Corporation Act.

[52] This trend is not only evident in the much publicized „Yates-Memo" (DOJ, Yates-Memo, justice.gov (Sep. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.), but can also be observed in other contextes, see, for example, the German "Siemens/Neubürger" decision", Regional Court Munich I, Urt. v. 10.12.2013 – 5 HK O 1387/10.

In any case, these laws tie up enormous capacities within companies, since they must deal with the "new risks" in detail. Each new law requires a reassessment of the risks within the company and the required structures, processes, and resources must be determined and analyzed, which requires considerable effort.

In view of the importance of the laws' aims (such as human rights and protection of the environment), these negative effects could be recognized at least as justifying the demands placed on companies. Good laws should have positive consequences. If these occur, certain "side effects", such as increased expense or government interference in compliance risk management, can and must perhaps be accepted. But are the aforementioned regulations "good laws" leading to positive consequences, or are they primarily symbolic acts meant to keep companies on their toes? The discussion about the symbolic content of (criminal) law is not new, but it plays out quite variously in different legal systems.

A few examples may help clarify the matter: Even if uniform definitions across national jurisdictions are difficult, "symbolic law" is characterized by the fact that it is directed more towards reassurance than towards effective implementation of specific requirements and changing the behavior of specific addressees:

> *"Symbolic law means law that its sponsors enact for the sake of enacting the law. It sponsors demanded that law not primarily as an instrument to change behaviors, but to demonstrate to the world (and especially to their constituents) the sponsor's beliefs."*[53]

Here, reassurance has primarily a socio-communicative meaning:

> *"The primary aim of such legislation appears to be reassurance rather than redress, prevention, or punishment. (...) Governments are warming to the notion that it is in part through moral persuasion and debate created by legislation that attitudes and behavior will change."*[54]

In Germany, Niklas Luhmann attributed law to be primarily not a "coercive order, but a facilitation of expectations".[55] The criticism of symbolic (criminal) law focuses on legislative legitimacy, when the object of regulation are largely undefined universal legal interests, such as the "economy, environment, taxes, automatic data processing, terrorism, drugs, export of dangerous objects (...) which (...) leave nothing to be desired in terms of generalization".[56]

In the EU, the awareness of "symbolic law" is found not only on the national but also on EU legislative level: "The discrete presence of symbolic EU criminal law"[57] reveals that EU institutions are well aware of the expressive purpose of criminal law and conceive legal harmonization as a means to achieve objectives which are not limited to instrumental rationality. The EU may even be a particularly fertile

[53] Law Insider, *Symbolic law definition*, lawinsider.com (Jul. 19, 2022), https://www.lawinsider.com/dictionary/symbolic-law.
[54] Catherine Fieschi, Symbolic *laws*, Prospect magazine (Feb. 26, 2006), https://www.prospectmagazine.co.uk/magazine/symboliclaws.
[55] Niklas Luhmann, *Rechtssoziologie*, 100 (1987).
[56] Winfried Hassemer, *Symbolisches Strafrecht und Rechtsgüterschutz*, Vol. 12 NStZ 553, 557 (1989).
[57] Thomas Elholm and Renaud Colson, *The symbolic* purpose *of EU criminal law*, p. 7 (Jul. 19, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952582.

source of symbolic legislation, which can serve to create political identity:

> *"The advancement of mutual trust through symbolic legislation is supposed to forge a common culture among professionals but this logic also applies to ordinary people. By imposing on Member States an obligation to criminalize specific types of offenses, the Union seeks to create social consensus by identifying European shared values. (…) by reinforcing common moral norms, the European Union take a step towards a thicker social and political notion of European citizenship (…) to build 'the supranational demos' which Europe is repeatedly said to lack."*[58]

It is thus probably no coincidence that the focus of current EU compliance legislation is ESG. The EU's attempts to pass laws in this strongly values-driven domain (human rights, environmental protection, diversity, etc.) are unquestionably important, but not very contoured because the underlying values are so general by nature.

Another strategy of legislators, especially in the EU, is also emerging in the legislative domains discussed above, namely the strategy of indirect behavioral control. Companies are to be encouraged to be more "sustainable". Sustainable behavior is meant to be incentivized through regulation, which reflects the above discussion of the shift from reaction to prevention. Whether incentivization works is, however, questionable. Further, the assessment of what is good (sustainable) and bad (not sustainable) can quickly falter due to political and economic circumstances. The Russian war against Ukraine, for instance, has led to a boom in the arms industry. Likewise, the assessment of nuclear energy as sustainable under EU Taxonomy conflicts with the previous view: France pushed to have nuclear power, which is CO2-free and a key energy source in France, classified as a sustainable activity which addresses climate change.[59] In early July 2022, the EU Parliament approved this classification regarding gas and nuclear power. Austria already announced that it would file a lawsuit against the decision.[60]

However, symbolic legislation and incentives (if they work) may well be useful side effects of an understanding of the law which moves away from (reactive) sanctions more in the direction of (preventive) behavior changing.[61] But this is not experimental ground: We have already seen that the threat of severe sanctions clearly underlines the seriousness of the legislative ambitions and, at least in the area of the EU GDPR, that the law is also enforced. We are therefore dealing with complex, predominantly fuzzy, value-driven, symbolically-charged and preventive laws that are anything but "dead letters". They intervene deeply in corporate risk management, aim to change behavior, and definitely have sharp "teeth". It is therefore legitimate to ask how such laws will function and if they deliver what they promise. If they fail to achieve their declared and worthy goal of strengthening human rights, protecting the environment, and strengthening data protection and security, their heavy impact on

[58] Thomas Elholm and Renaud Colson, *The symbolic* purpose *of EU criminal law*, p. 8 et seq., with further references (Jul. 19, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952582.
[59] Rick Noack, *Is nuclear energy green? France and Germany lead opposing camps,* washingtonpost.com (Dec. 18, 2021) https://www.washingtonpost.com/world/2021/12/18/nuclear-energy-climate-france-germany/.
[60] Zeit Online, „*Österreich will Klage gegen Ökolabel für Atom- und Gaskraft einreichen*", (Jul. 6, 2022), https://www.zeit.de/wirtschaft/2022-07/taxonomieverordnung-oesterreich-klage-oeko-label-eu-parlament-eugh?utm_referrer=https%3A%2F%2Fwww.google.com.
[61] Catherine Fieschi, *Symbolic laws*, prospectmagazine (Feb. 26, 2006), https://www.prospectmagazine.co.uk/magazine/symboliclaws.

companies – particularly in the current crisis situations of the pandemic, the war in Ukraine and rising energy prizes – they will not be easy to justify.

Reliable answers to the effect of ESG legislation will only be possible once the national laws have been implemented and concrete experience with official prosecution and sanctioning as well as judicial review has been gained.

II. COMPANIES´ STRATEGIES FOR IMPLEMENTATION

Until such clarity is available, companies will have to adapt to the developments described, such as the density of regulation, interventions in risk management and the design of compliance processes. In doing so, they are pursuing very different strategies.

Some companies, particular smaller ones, are often overwhelmed by the volume and complexity of the regulations in areas such as ESG and data protection. They intuitively perceive these laws as exaggerating risks, setting hurdles at random, or being generally "not realistic". These companies are more inclined not to comply, mainly because they see no harm in disobeying the laws. They do not believe they are exposed to these risks and doubt that conducting complex risk assessments will benefit the company, shareholders, employees, or, for that matter, genuinely achieve goals in the areas of human rights or the environment. Other companies intend to comply but are still unclear about the details. They see laws which intervene deeply into company risk management without specifying exactly what companies are supposed to do. Often these corporations end up taking only half-hearted measures, or only performing minimal compliance to avert negative publicity.

Some companies, mainly larger ones, invest in ESG compliance, often as a reaction to grievances and scandals. Volkswagen recently appointed a new human rights officer in light of the allegations regarding its production in China. The specific concern is the VW plant at the Urumqi location in the western province of Xinjiang, which is operated together with the Chinese state-owned company SAIC. China has been criticized for years for its treatment of its Muslim Uyghur minority. According to human rights activists, hundreds of thousands of people have been sent to so-called re-education camps in Xinjiang.[62]

Finally, some companies, follow a certain trend, symbolically charge compliance measures with ESG content. Priority is often given to issues that enhance the company's image and meet the expectations of shareholders and stakeholders, as well as employees. One example is the ESG campaign of ice cream manufacturer Ben & Jerry's, which labels several general ESG topics as "Issues We Care About" and promotes initiatives in areas such as refugee treatment, fair trade, climate justice, peace-building, marriage equality, and vegetarianism.[63]

[62] BBC, *Who Are the Uyghurs and Why is China Being* Accused *of Genocide?,* BBC.com (May 24, 2022), https://www.bbc.com/news/world-asia-china-22278037. Following the coverage, the *Uyghur Forced Labor Prevention Act* (see I. B.) was released.

[63] Ben & Jerry's, *Issues* We *Care About*, benjerry (Jul. 19, 2022), https://www.benjerry.ie/values/issues-we-care-about.

III. RECOMMENDATIONS FOR COMPANIES

Part II shows the various ways companies can deal with increasing compliance requirements. The Ben & Jerry's example also shows that compliance and marketing can be blurred, and a line between the two is not always easy to draw. This also highlights that the compliance area has always been susceptible to a certain symbolism, and not only since the ESG trend emerged. It is well known that compliance goes beyond the mere letter of the law.[64] Compliance standards often talk about "compliance culture",[65] which is reflected in the oft-cited nostrum in compliance trainings which holds that "we don't have to do everything we're allowed to do". This approach is generally the right one. A CMS must find its foundation in the lived values of a company. After all, employees must be empowered to make complex decisions for the company about "right and wrong" and do so independently and on their own responsibility. In order to achieve that, they must understand what the declared interests of the company are and which underlying values and objectives play a role. As far as they follow the law, companies are also free to decide which values and which measure are right for them and the resulting corporate identity can certainly contribute to the brand. However, within an environment of burgeoning regulatory expectations which keeps companies in a continuous "pressure cooker" situation, it would be wise to approach the issue with realistic expectations.

Even if legislators are increasingly intervening in the way companies carry out risk analyses and altering the priorities they set, companies should defend their discretion and use it wisely. It is commonplace that risk of loss and profit opportunities are closely linked. Ignoring hazards – especially those that threaten a company's existence – can have fatal consequences. The same applies to overemphasizing them. It is therefore important to carefully examine the real risks and use discretion responsibly. A diligent risk analysis, carefully aligned to a company's situation and needs, is always a good starting point. It typically requires an investment, but it also can free up resources to be invested in measures which don't address real risks. It can identify activities companies should refrain from or indicate areas of lower tangible risk exposure. Knowing the law and the company's operations perfectly, is a prerequisite for a professional risk assessment. Even if laws intrude, there is still a space for responsible and balanced decision-making with regard to risk assessment and prioritization. It might be that ESG topics are very pertinent for a company, but maybe other issues are more pressing. Corruption, for instance, remains one of the greatest threats to global markets. On January 25, 2022, Transparency International released its Corruption Perception Index (CPI) for 2021, covering 180 countries ranked on a scale from 0 (high level of perceived corruption) to 100 (no perceived corruption).[66] Last year, the global score remained unchanged for the tenth consecutive year at 43 out of 100. Two-thirds of the 180 countries and territories in the study have a serious corruption problem and do not even reach the halfway point of the index.[67] This is a good reason for companies to continue to take anti-corruption compliance very seriously and not automatically place it behind ESG or data protection.[68] In any case,

[64] Wolfgang Leyk, *Compliance als wirtschaftliche Praxis, in* Corporate Compliance, Handbuch der Haftungsvermeidung im Unternehmen § 12 Rn. 1. (Hauschka/Moosmayer/Lösler, 3rd edition, 2016).
[65] For instance, ISO 37301, sec. 5.1.2.
[66] Transparency International e. V., *Corruption Perception Index 2021*, Transparency International (Jan. 25, 2022), https://transparency.am/en/cpi/2021.
[67] Transparency International e. V., *Corruption Perception Index 2021*, Transparency International (Jan. 25, 2022), https://transparency.am/en/cpi/2021.
[68] Transparency International e. V., C*orruption Perception Index 2021*, Transparency International (Jan. 25, 2022), https://transparency.am/en/cpi/2021. However, analyses also show that there is a close link between fighting corruption and respecting human rights. In most cases, more corruption can lead to restrictions on civil liberties, while fewer civil liberties make it more difficult to fight corruption.

companies are well-advised to look at their tangible risks and not to follow trends which push compliance – sometimes – over the line into marketing. They are free to do that of course but should remain aware of why they are doing it.

Finally, depending on the type of business activity and its specific framework, there will always remain risks that the best risk management cannot eliminate. The goal should be "decision-oriented risk management" which incorporates the results of the risk analysis into the decision-making process in accordance with the business judgment rule.[69] If this step is carried out carefully after an honest and unbiased examination of genuine risks, an effective CMS can be developed for the companies to comply with the law and implemented with entrepreneurial responsibility.

[69] Werner Gleißner, *Business Judgement Rule*, GRC 2019, 148 (2014).

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CRIMINOLOGY OF CRIME AVOIDANCE

Creative Compliance Delinquency in the Borderlands of Legality

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ABSTRACT

This article outlines the research program of a "criminology of crime avoidance" using the example of the preemptive use of legal opinions by white-collar actors to shift the boundaries of the law in their own favor. For this purpose, the term creative compliance is introduced and explained with regard to the Cum-Ex scandal in Germany. Then, a look is taken at possible criminological explanations for the phenomenon. Finally, the hypothesis is developed that law enforcement personnel is deterred from investigations by the reputational capital of certain legal advisors.

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White-collar advantage can be gained not only through the actions of those who construct and administer law, but through the actions of those subject to it.
McBarnet, 2006, 1091

I. INTRODUCTION[1]

Criminology's focus traditionally falls on situations in which the borders of legality have already been left behind. In white-collar crime, however, the transition from the permissible to the criminally prohibited is not always clear; the boundaries merge fluidly in the "foggy field of white-collar criminal law".[2] This article addresses the "borderland" between profitable legal behavior and white-collar crime. It will examine how private actors attempt to shift the borders of legality in their favor utilizing lawyer expert opinions designed to attest to the legality of an endeavor - not only in the case of a criminal indictment, but already well in advance of it ("preemptive exoneration through legal opinions"[3]).

The article considers itself a contribution towards a future "criminology of crime avoidance", a new branch of white-collar criminology. The research branch is concerned with investigating the avoidance of crimes from the perspective of private actors. The goal is on the one hand to combine existing, multidisciplinary lines[4] of research on corporate criminal compliance under one heading and on the other hand newly capture avoidance strategies around compliance. In this contribution, the focus is particularly on the latter. As part of a criminology of crime avoidance, "creative compliance delinquency", i.e. "creative" circumvention strategies that turn criminal will be examined and illustrated with reference to the Cum-Ex tax scandal in Germany.

[1] An extended version of this article has appeared in German in Lucia Sommerer, Kriminologie der Straftatvermeidung – Creative-Compliance-Delinquenz im Grenzbereich der Legalität, 34 Neue Kriminalpolitik 21 (2022).

[2] Thomas Rotsch, Compliance und Strafrecht – Fragen, Bedeutung, Perspektiven. Vorbemerkungen zu einer Theorie der sog. „Criminal Compliance", 125 Zeitschrift für die gesamte Strafrechtswissenschaft 481 (2013); Thomas Rotsch, Criminal Compliance, 5 Zeitschrift für Internationale Strafrechtsdogmatik 614, 615 et seq. (2010); see also Kai-D. Bussmann, Wirtschaftskriminologie I mn. 14 (2016); Hauke Brettel & Hendrik Schneider, 3 Wirtschaftsstrafrecht 38, 66 (2021); Klaus Volk & Stephan Beukelmann, § 1 Begriff und Entwicklung des Wirtschaftsstrafrechts, in Münchener Anwaltshandbuch: Verteidigung in Wirtschafts- und Steuerstrafsachen, mn. 64 (Klaus Volk & Stephan Beukelmann eds., 2020); Alaor Leite, Handeln nach falschem Rat. Zugleich ein Beitrag zum Schuldbegriff, 166 Goltdammer's Archiv für Strafrecht 554, 557 (2019).

[3] Hans Kudlich & Petra Wittig, Strafrechtliche Enthaftung durch juristische Präventionsberatung?, Teil 1: Allgemeine Irrtumslehren, 3 Zeitschrift für Wirtschaftsstrafrecht und Haftung im Unternehmen 253 (2013); Hans Kudlich & Petra Wittig, Strafrechtliche Enthaftung durch juristische Präventionsberatung?, Teil 2: Präventivberatung, Compliance und gehörige Aufsicht, 3 Zeitschrift für Wirtschaftsstrafrecht und Haftung im Unternehmen 303 (2013).

[4] Ralf Kölbel, Kriminologisch-empirische Forschung zu Criminal Compliance, in Criminal Compliance - status quo und status futurus 139 (Thomas Rotsch ed. 2021): inter alia, economics, management science, organizational psychology/sociology.

II. TERMINOLOGY

First, two terms must be briefly contrasted: classic criminal compliance and creative compliance.

A. Criminal Compliance

Criminal compliance - a concept that has gained increasing importance in the last decades[5] - is to be understood as a form of preventive self-monitoring by companies.[6] It involves internal corporate organizational models with procedures designed to ensure compliance with criminal law.[7] This includes the systematic control and reduction of opportunities for crime within the company and a corresponding crime deterring corporate culture ("tone from the top"),[8] as well as employee training and whistle blowing hotlines, to name just a few. Depending on the type and size of a company and the crime risk profile of an industry, different compliance measures are called for.[9] Rotsch concisely describes criminal compliance as "the *how* and not merely the *whether* of rule compliance in the foggy field of white-collar criminal law".[10]

Such partial transfer of the original governmental tasks of crime control to companies is based on the criminological insight that government-led law enforcement has reached its limits in the area of white-collar crime (keywords: lack of social control and the associated lack of a social-ethical legal consciousness).[11]

[5] Cf. Claudia Nestler et al., Wirtschaftskriminalität, *Mehrwert von Compliance – forensische Erfahrungen* 24 (2018).

[6] Also referred to as "externally regulated self-regulation", Philipp Traudes, *Zertifizierung als Massnahme der (Criminal) Compliance* 384 (2017) and "negotiated governance", Kimberly D Krawiec, *Cosmetic compliance and the failure of negotiated governance,* 81 Washington University Law Quarterly 487 (2003); for a detailed discussion of the term see Dennis Bock, Criminal Compliance 19 et seq. (2011).

[7] Summarized under the umbrella term Compliance Management System (CMS).

[8] Kai-D. Bussmann, *Wirtschaftskriminalität*, in Kriminalsoziologie 337, 350 et seq. (Dieter Hermann & Andreas Pöge eds., 2018); Marshall Clinard & Peter Yeager, Corporate Crime 58 et seq. (2006); cf. also "culture of compliance" vs. "culture of resistance" in John Braithwaite, *Criminological theory and organizational crime*, 6 Justice Quarterly 333, 346 (1989); see for a "precursor" of the concept of corporate culture, Sutherland, who speaks of "definitions favorable to law violation" in companies, Sutherland quoted according to Robert Apel & Raymond Paternoster, *Understanding "criminogenic" corporate culture: What white-collar crime researchers can learn from studies of the adolescent employment–crime relationship*, in The criminology of white-collar crime 15, 29 (Sally S. Simpson & David Weisburd eds., 2009).

[9] For the basic structures of any compliance management system, cf. for example certifications IDW 980 and ISO 19600, for details see Traudes, 181 et seq. 2017.

[10] Rotsch, 125 Zeitschrift für die gesamte Strafrechtswissenschaft 481 (2013).

[11] Kai-D. Bussmann, D*as moderne Experiment Strafrecht - Vom Strafrecht der Lebenswelt zum Strafrecht sozialer Systeme*, 16 Kriminalsoziologische Bibliographie 1, 7 (1989); Kai-D. Bussmann, *Compliance in der Zeit nach Siemens*, 61 Betriebswirtschaftliche Forschung und Praxis 506, 518 (2009); see also Hendrik Schneider, G*eneralprävention im Wirtschaftsstrafrecht - Voraussetzungen von Normanerkennung und Abschreckung*, in Festschrift Heinz 663 (Eric Hilgendorf & Rudolf Rengier eds., 2012); Kölbel, 139, 141. 2021: "hardly any control effect [through criminal law]"; however, more optimistic Johannes Kaspar, *Die Möglichkeiten strafrechtlicher Prävention von Wirtschaftsdelinquenz aus kriminologischer Sicht*, in Wirtschaftskriminalität 135, 138 et seq. (Britta Bannenberg & Jörg-Martin Jehle eds., 2010).

Even if the adoption of a compliance management system is not mandatory by law in many countries, including Germany,[12] a number of legal incentives to do so exist.[13] These incentives include not only possible criminal liability of the management level of a company if employees commit criminal acts in the absence of compliance management systems,[14] but also the consideration of these systems in the assessment of a corporate fine.[15]

According to a survey of 500 German companies, ¾ of companies already have their own compliance management system for self-monitoring, with the figure for large corporations being even as high as 97%.[16] In addition, 70% of companies also seek external legal advice from law firms on compliance issues.[17] In this respect, obtaining legal advice at the right time is also an important component of an effective compliance management system.

B. Creative Compliance

The focus of this article, however, is on when efforts of such classic Criminal Compliance transition into creative compliance: on how private actors may not straight forwardly violate the law, but also do not simply follow it, but rather - as *McBarnet's* opening quote points out - utilize the law, i.e. "play" (with) the law[18] to isolate their behavior *ex ante* from being considered a violation.

The term creative compliance – while having already appeared in international literature[19] and occasionally having been picked up by German scholars[20] - has hardly ever been clearly delineated. *Kölbel* comes closest when he describes creative compliance as "behaviors that realize the same goals as

[12] See for international incentives for the expansion of compliance structures e.g. US Foreign Corrupt Practices Act (1977); Sarbanes Oxley Act (2002), US Federal Sentencing Guidelines (expanded to include compliance aspects in 1991 & 2004); see also UK Bribery Act (2010), EU Directive 2019/1937 (Whistleblower Directive); see also Thomas Rotsch, Teil 1 Kap. 4 Criminal Compliance, in Handbuch Wirtschaftsstrafrecht, mn. 18 et seq. (Hans Achenbach et al. eds., 2019); for USA see Todd Haugh, The Criminalization of Compliance, 92 Notre Dame Law Review 1215 (2016).

[13] Rotsch, Teil 1 Kap. 4 Criminal Compliance, mn. 18 et seq. (2019); on the civil law incentives in the context of a looming liability to pay damages on the part of the Board of Management, see the Siemens/Neubürger Judgment, LG München I, December 10, 2013 - 5 HKO 1387/10, ZIP 570 (2014).

[14] Bock, 350 et seq. (2011); Regina Michalke, *Untreue – neue Vermögensbetreuungspflichten durch Compliance-Regeln*, Der Strafverteidiger 245 (2011).

[15] In Germany pursuant to Section 30 OWiG in conjunction with Section 130 OWiG; cf. BGH NZWiSt 2018, 379, 387; Bock, 364 et seq. (2011).

[16] Nestler et al., 24 (2018).

[17] CMS, Compliance Barometer 2018 4 (2018).

[18] Cf. references to "game-playing" and "gaming the system" scholarly literature: Christine E Parker et al., *The two faces of lawyers: Professional ethics and business compliance with regulation*, 22 Georgetown Journal of Legal Ethics 201, 210 (2009); Sol Picciotto, *Constructing compliance: Game playing, tax law, and the regulatory state*, 29 Law & Policy 11 (2007); Doreen McBarnet, *After Enron will 'whiter than white collar crime'still wash*?, 46 British Journal of Criminology 1091, 1107 (2006).

[19] McBarnet, British Journal of Criminology, 1091 (2006); Doreen McBarnet, *Financial engineering or legal engineering? Legal work, legal integrity and the banking crisis*, University of Edinburgh, School of Law, Working Papers 1, 11 (2010); Picciotto, Law & Policy, 12 (2007); Justin O'Brien, Engineering a financial bloodbath: how sub-prime securitization destroyed the legitimacy of financial capitalism 45 (2009); Justin O'Brien, Redesigning Financial Regulation: the Politics of Enforcement 3 (2006).

[20] Kölbel, 139, 163 (2021); Ralf Kölbel, *Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF,* in Zehn Jahre ZIS-Zeitschrift für Internationale Strafrechtsdogmatik 815, 837, Thomas Rotsch ed. (2018); Traudes, 385 (2017).

illegal conduct, but in a seemingly legal manners, by means of 'functional equivalents')".[21] Such behavior is also sometimes referred to as "(creative) legal engineering".[22] *Brettel & Schneider* use the term "gamester lawyer",[23] who seeks holes in the meshes of criminal law in order to enable entrepreneurial transactions in the gray area between legality and crime.[24]
Against this background, the working definition of creative compliance developed for this article is:

> *Ex ante use of legal expertise (i.e. well before the actual commission of a crime), in order to be able to lay claim to lawfulness, or at least a lack of awareness of wrongdoing in the borderland of legality via a creative interpretation of the laws.*

Creative compliance understood in this way thus describes the use of legal expertise by private actors not so much to obtain genuine clarification as to protect and preemptively exonerate themselves. Such behavior is not about finding the boundaries between right and wrong, but about attempting to redraw the boundaries to one's own profit. The sociologist McBarnet aptly names this "using the letter of the law to defeat the spirit of the law".25 It is the opposite of what Bussmann calls "integrity".[26] Inspired by the criminological labeling theory, one may even speak of an attempt of active self-labeling as law-abiding.[27]

However, it must be emphasized: Behavior in the sense of this working definition is by no means generally to be equated with crime. Everyone is allowed to seek their own advantage within the framework of the law, and to interpret the law up until its borders to illegality. This is clearly evident in the distinction between criminal tax evasion vs. legal tax avoidance and tax structuring: Not everyone who creatively avoids taxes is a criminal. On the contrary, entire (legitimate) economic sectors have established themselves around the phenomenon of legal tax avoidance. Despite this anchoring of creative compliance at a legal starting point, it is nevertheless undeniable: Creative compliance endeavors that seek to walk the thin line between legal and illegal always harbor a risk of being subsequently assigned by the courts to the illegal side, and thus becoming criminally delinquent after all.

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[21] Kölbel, Criminal Compliance 139, 163 (2021).
[22] McBarnet, University of Edinburgh, School of Law, Working Papers, (2010); Kölbel, Criminal Compliance 139, 163 (2021); Ralf Kölbel, Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF, 11 Zeitschrift für Internationale Strafrechtsdogmatik 452, 461 (2016); see related to this also the term „cosmetic compliance" Krawiec, Washington University Law Quarterly, (2003); see also Jodi L Short & Michael W Toffel, Making self-regulation more than merely symbolic: The critical role of the legal environment, 55 Administrative Science Quarterly, 364 et seq., 387 (2010); Garry C Gray & Susan S Silbey, Governing inside the organization: Interpreting regulation and compliance, 120 American Journal of Sociology 96, 116 et seq. (2014).
[23] Parker et al., Georgetown Journal of Legal Ethics, 210 (2009): "Lawyers may function as 'gamesters,' expanding what constitutes 'legal' compliance so that their clients do not have to bring their activities into accord with what regulators and the community see as the 'purposes' of the law".
[24] Brettel & Schneider, Wirtschaftsstrafrecht, 62 (2021).
[25] McBarnet, British Journal of Criminology, 1091 (2006); see also Doreen McBarnet, It's not what you do but the way that you do it: tax evasion, tax avoidance and the boundaries of deviance, in Unravelling Criminal Justice 247, 264 (D. Downes ed. 1992): "[L]aw can be not just a mechanism of social control but a mechanism for escaping it. What is being used in the management of boundaries is the law, its rules, institutions and forms. Law can be used to construct techniques which escape tax but also provide immunity from control".
[26] Kai-D. Bussmann, *Integrität durch nachhaltiges Compliance Management - über Risiken, Werte und Unternehmenskultur*, 9 Corporate Compliance Zeitschrift 50 (2016).
[27] Doreen McBarnet, *Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 British Journal of Sociology 323 (1991); for details see below IV. C.

It is this that the article wants to examine: Not the possible moral objectionability of legal creative compliance measures, but the moment of crossing the border into the illegal.

III. CURRENT EXAMPLES AND RESEARCH INTEREST

Examples of creative compliance that have crossed the line into the criminal can be found, inter alia, in the aforementioned transition from tax avoidance to tax evasion,[28] as well as in the Enron accounting scandal in the USA,[29] and in corrupt pharma-marketing.[30] Further, a look at the behaviors in the current Cum-Ex tax scandal in Germany seems particularly suited to illustrate creative compliance via legal opinions.

A. Cum-Ex Tax Scandal

Behind the term Cum-Ex stand controversial share transaction patterns around the dividend record date, which will not be discussed in detail here.[31] It will suffice to note the following key points: Cum-Ex was a financial construct sold as a "tax-driven equity fund". The return, however, stemmed - simply put - from the fact that shares were traded over the dividend record date in such a circular and confusing manner that the tax authorities lost track and refunded the capital gains tax not once but multiple times.[32] In other words, taxes were "refunded" that had never been paid. In March 2020, two stock traders were criminally convicted of tax evasion for the first time in this context in Germany.[33] In July 2021, the German Federal Supreme Court confirmed this ruling.[34] In addition, there are currently around 120 other criminal proceedings underway in Germany in the Cum-Ex complex involving more than 1,500 defendants.[35]

Of particular interest for the present article is that the legal advice given to private actors (e.g. banks) by third-party law firms played a very central role in the scandal. Prior to the execution of the crime-relevant Cum-Ex actions, renowned law firms offered expert opinions on the alleged permissibility of the actions (hereinafter referred to as "ex ante legal opinions"). Only based on these expert opinions, were the banks involved in the transactions able to make claims of legal compliance towards investors, the tax office and law enforcement agencies.

[28] McBarnet, It's not what you do but the way that you do it: tax evasion, tax avoidance and the boundaries of deviance 247 (1992).
[29] McBarnet, British Journal of Criminology (2006).
[30] Ralf Kölbel et al., Die institutionelle Form von Korruption und deren Implikationen, in Institutionelle Korruption und Arzneimittelvertrieb 341, 346 et seq. (Ralf Kölbel ed. 2019); Kölbel, Zeitschrift für Internationale Strafrechtsdogmatik 461 (2016).
[31] See for details Christoph Knauer & Soeren Schomburg, *Cum/Ex-Geschäfte – kommen Strafrechtsdogmatik und Strafrechtspraxis an ihre Grenzen?*, 39 NStZ 305 (2019); Richard S Collier, Banking on Failure: Cum-ex and why and how Banks Game the System (2020); *Rau, „Cum/Ex" und „Cum/Cum" abgeschlossene Aktiengeschäfte über den Dividendenstichtag*, 59 Deutsches Steuerrecht 6 (2021); instructive furthermore LG Bonn, judgement of 18.3.2020, Az. 62 KLs - 213 Js 41/19 - 1/19, mn. 20 et seq; Florstedt, *Alea iacta est: Cum/Ex-Geschäfte waren rechtswidrig und strafbar*, NStZ 129 (2022); BGH NZWiSt 425 (m. Anm. Ransiek, Heger, 2021).
[32] LG Bonn, judgement of 18.3.2020, Az. 62 KLs - 213 Js 41/19 - 1/19, mn. 43.
[33] Ibid.
[34] BGH NJW 90 (2022).
[35] Sönke Iwersen & Volker Votsmeier, *Cum-Ex-Steuerskandal - Deutlich mehr Banken involviert*, Handelsblatt, 19.1.2022, accessible at https://perma.cc/9QUW-NTNJ.

Notably, in December 2020, the first indictment against employees of one such law firm has been admitted in Germany. The former tax law partner Ulf Johannemann of the renowned law firm Freshfields Bruckhaus Deringer has been charged with aiding and abetting tax evasion by, as the prosecutor put it, "providing fig-leave expert opinions".[36] The law firm Freshfields Bruckhaus Deringer as a whole was also investigated in this context. In January 2021, however, the law firm was able to avert a looming corporate fine by making a "voluntary payment" of €10 million to the tax authorities.[37]

B. Research Interest

In view of the serious economic consequences of creative compliance delinquency - estimated losses in tax revenue of up to €31.8 billion in Cum-Ex[38] as well as liability risks,[39] reputational damage and even insolvencies[40] - a better understanding of the crime avoidance model of creative compliance is not only in the interest of the state, but of companies themselves.

However, so far, a precise criminological analysis of this borderland is missing. Kölbel points to its existence,[41] but in-depth studies of the phenomenon have not yet taken place. A future "criminology of crime avoidance" must fill this gap.

IV. EXPLANATORY MODELS

How does creative compliance delinquency occur? In criminology, as is well known, a variety of theories are used to explain criminality. This article would like to pick out three which - without claiming exclusivity - appear to be particularly fruitful in the context of creative compliance delinquency: the subculture theory, the theory of neutralization supplemented by the concept of "moral disengagement" as well as the labeling theory.

A. Subculture Theory

The subculture theory, according to which criminality is a consequence of membership in segregated social groups in which deviant values predominate ("society within society"[42]), originally developed for

[36] LG Frankfurt, Eröffnung des Hauptverfahrens wegen Steuerhinterziehung im Zusammenhang mit Aktiengeschäften um den Dividendenstichtag, Pressemitteilung, 14.12.2020, accessible at https://perma.cc/YMQ2-D87D.
[37] ah/LTO-Redaktion, V*erfahren gegen Freshfields ist eingestellt*, lto, accessible at https://perma.cc/KV6W-M2XN; persuant to Section 47 OWiG.
[38] Lutz Ackermann et al., *Cum-Ex: Der größte Steuerraub in der deutschen Geschichte*, Zeit, 7.6.2017, accessible at https://perma.cc/8DLB-WKTY.
[39] Cf. Martin Ströder & Christiane Schiffer, *Vergleich: Freshfields zahlt Maple Bank-Verwalter 50 Millionen Euro*, juve, 29.08.2019, accessible at https://perma.cc/ZL8T-QDSW; in 2019, the law firm Freshfields Bruckhaus Deringer paid €50 million to the liquidator of Maple Bank, which it had advised on Cum-Ex transactions, after the firm was initially sued for €95 million.
[40] BaFin, BaFin stellt Entschädigungsfall für Maple Bank GmbH fest, Pressemitteilung, 12.2.2016, accessible at https://perma.cc/TG77-XMD4; insolvency of the Maple Bank in 2016, which was involved in Cum-Ex transactions.
[41] Kölbel, Criminal Compliance 139, 163 (2021); Kölbel, Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF 815, 837 (2018).
[42] Hartmut Lüdtke, *Jugend – Gesellschaft in der Gesellschaft: die These von der Subkultur*, in Handbuch der Familien- und Jugendforschung 113 (M. Markefka & R. Nave-Herz eds., 1989).

youth gangs in the USA,[43] can also be transferred to processes in a corporate environment.[44] Here, too, subcultures can be formed by "a temporal shift of the daily routine, in particular by [...] the merging of the professional and leisure spheres as well as by the selection and restriction of self-chosen contacts"[45] with the consequence that the "perception of the environment can take on features of a lack of reality control".[46] Based on this, both Coleman[47] and Schneider[48] include subculture concepts in their multifactorial integrated explanation models for white-collar crime. Further, Bussmann speaks of "value subcultures"[49] and Kaiser sees a "particularly important condition of macrocrime in the collective change of moral value orientations".[50]

A value orientation in a company, the so called "corporate culture", may thus be the accumulation of financial gains at any cost, or the "tricking" of the government, rather than rule-compliant, ethical behavior. A witness statement from the first Cum-Ex trial in Germany points to such a subculture with deviant values. Those who questioned the Cum-Ex business model were met with answers such as: *"If anyone has a problem with the fact that because of our work fewer kindergartens are built ... there is the door!"*[51]

From this point of view, focusing on the subculture values in a company is one of the most important starting points for preventing creative compliance delinquency - even more so than is the case with white-collar crime in general. This follows from the fact that the line between unethically permitted and illegal behavior in Creative Compliance is extraordinarily thin. We are thus dealing with situations in which simply admonishing "You shall not violate criminal laws" will not get us anywhere, i.e., it will not reach the actors in their motivational situations. This is because, in the case of creative compliance, the actors often convince themselves that they are still acting on the side of legality or believe that they are protected by an ex ante legal opinion, or may not be exposed to a high probability of detection.[52]

This brings us to the second criminological theory to be examined: the theory of neutralization complemented by moral disengagement.

[43] Albert K Cohen, Delinquent Boys. The Culture of the Gang (1955); see also *Walter B Miller, Lower class culture as a generating milieu of gang delinquency*, 14 Journal of Social Issues 5 (1958); William Foote Whyte, 5 Street Corner Society: The Social Structure of an Italian Slum (2012).
[44] In this vain already James William Coleman, *Toward an integrated theory of white-collar crime*, 93 American Journal of Sociology 406, 416 et seq. (1987): "deviant occupational subculture"; "work related subcultures"; see also Hendrik Schneider, *Das Leipziger Verlaufsmodell wirtschaftskriminellen Handelns*, 27 NStZ 555, 559 (2007); Kai-D. Bussmann, *Nationales Recht und Anti-Fraud-Management – US-amerikanische und deutsche Unternehmen im Vergleich*, in Wirtschaftskriminalität und Ethik 111, 124 (Albert Löhr & Eckhard Burkatzki eds., 2008).
[45] Schneider, NStZ, 559 (2007).
[46] Hendrik Schneider, *Person und Situation. Über die Bedeutung personaler und situativer Risikofaktoren bei wirtschaftskriminellem Handeln*, in Wirtschaftskriminalität und Ethik 135, 144, 147 (Albert Löhr & Eckhard Burkatzki eds., 2008).
[47] Coleman, American Journal of Sociology, 422 (1987).
[48] Schneider, NStZ, 559 (2007); Hendrik Schneider, § 25 *Wirtschaftskriminalität*, in Kriminologie 418, 429 (Hans Göppinger & M Bock eds., 2008).
[49] Bussmann, 111, 124 (2008).
[50] Günther Kaiser, Kriminologie. Ein Lehrbuch 432 (1996); see also Bernd Schünemann, Unternehmenskriminalität und Strafrecht 22 (1979).
[51] LG Bonn, judgment of 18.03.2020, Ref. 62 KLs - 213 Js 41/19 - 1/19, mn. 858.
[52] On the low probability of detection in white-collar criminal law in general, cf. Kaspar, 135, 146 et seq. (2010); especially for corruption Britta Bannenberg, Korruption in Deutschland und ihre strafrechtliche Kontrolle 347, 365, 370 (2002).

B. Neutralization & Moral Disengagement

1. Displacement of Responsibility

An important addition to the well-known theory of neutralization techniques[53] is offered by Bandura's concept of "moral disengagement", i.e., the temporary disengagement of the self from one's own values.[54] The Stanford psychologist Bandura is known in criminology primarily for his social learning theory.[55] It is, however, his lesser-known concept of moral disengagement, which can be of particular use in analyzing the role of expert legal opinion for creative compliance delinquency. Interestingly, Bandura himself has already observed moral disengagement in white-collar criminals, in the context of the Enron scandal in the USA,[56] as well as the world financial crisis.[57]

While the theory of neutralization merely describes several internal mechanisms to persuade oneself of a clear conscience,[58] moral disengagement offers an approach to the question of why: Which are the conditions that particularly drive people to access neutralization mechanisms? Bandura emphasizes network-situations that allow for a *displacement of responsibility*.[59] These are situations that enable a shift of responsibility to external decision-making authorities (e.g., superiors or consultants). The shift psychologically frees oneself from personal responsibility and may cause anyone involved to cease their own critical thinking, to not ask questions, because they assume someone else in the network will have already undertaken this task of thoroughly "thinking it through".

2. Displacement of Responsibility via ex ante Legal Opinions

It is precisely in the use of legal opinions for Creative Compliance where we find such displacement of responsibility. If something goes "wrong", i.e., if the courts determine that a company's activities crossed the line into crime, those responsible in the company point toward an exonerating ex ante legal opinion by renowned law firms. The law firm, however, has placed a so-called disclaimer at the end of all their expert opinions, stating that it assumes no responsibility for decisions taken on the basis of its expert opinion. This means that the law firm, too, "disengages" itself of responsibility. In the end, everyone thinks that they bear no responsibility for decisions in the borderland of legality; everyone in the network is morally disengaged.

It can thus be seen that the fact that several parties act in a networked manner - company actor and legal advisors - is quite decisive in enabling this disengagement. In some cases, the network relationship may even be established precisely to increase the complexity of a situation thereby deliberately diffusing responsibility.

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[53] Gresham M Sykes & David Matza, *Techniques of neutralization: A theory of delinquency*, 22 American Sociological Review 664 (1957).
[54] Albert Bandura, Moral Disengagement: How People Do Harm and Live with Themselves (2016).
[55] Albert Bandura et al., T*ransmission of aggression through imitation of aggressive models*, 63 The Journal of Abnormal and Social Psychology 575 (1961).
[56] Bandura, 213 et seq. (2016).
[57] Id. at, 208 et seq.
[58] Schneider, § 25 *Wirtschaftskriminalität* 418, 428 (2008).
[59] Bandura, 3, 62 (2016); see also Herbert Jäger, Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt 200 (1989); for committee decisions Christoph Knauer, Die Kollegialentscheidung im Strafrecht 30 (2001); for large corporations Thomas Rotsch, Individuelle Haftung in Grossunternehmen: Plädoyer für den Rückzug des Umweltstrafrechts 37 (1998).

Complexity as a cause of white-collar crime has already been addressed inter alia by Schröder in the context of crimes in the capital market sector[60] as well as by Schünemann.[61] In the case of creative compliance delinquency, however, it is not just the inherent complexity of the "thick and unwieldy underbrush of laws" in the "ever expanding field of white-collar crime regulation"[62] that needs to be taken into account as criminogenic,[63] but rather the deliberate creation of additional complexity layers by private actors via responsibility displacing networks.

Such deliberate use of networks is also found in the third criminological theory to be examined.

C. From Traditional Labeling Theory Towards a Theory of "Self-Labeling"

The labeling theory[64] assumes that crime is not something given or pre-existing, i.e., not a property inherent to people and their actions. Rather, according to the labeling theory:

1. crime is the result of social definition processes through norm setting and norm application.[65]

2. only certain groups in society have "definitional power", i.e. the power to say what is a crime and what is not, and subsequently apply this definition to all members of society. Collectives of the political elite, for example, have this power.[66]

At this point, the labeling theory's analysis on definitional power and the group of people being able to access this power usually ends.

In the field of white-collar crime, however, this article posits that the labeling theory must be extended to a third dimension, the dimension of "self-labeling". It is not only powerful collectives at the political level that define what is crime and what is not. Corporations do not merely possess definitional power

[60] Christian Schröder, Die Finanzkrise und das Strafrecht, in Handbuch Kapitalmarktstrafrecht 504, 521 et seq. (Schröder ed. 2020).
[61] Bernd Schünemann, *Alternative Kontrolle der Wirtschaftskriminalität*, in GS Kaufmann 629 (Dornseifer ed. 1989).
[62] Bussmann, Wirtschaftskriminologie I preface, mn. 702 (2016).
[63] Brettel & Schneider, 66 (2021): "criminogenic laws"; see also ibid. p. 58: "increasing density of regulations [...] perverted criminal law", ibid. p. 61: "substantive law hypertrophy"; Hendrik Schneider, Wachstumsbremse Wirtschaftsstrafrecht: Problematische Folgen überzogener Steuerungsansprüche und mangelnder Randschärfe in der wirtschaftsstrafrechtlichen Begriffsbildung, 24 Neue Kriminalpolitik 30 (2012); Bock, 136 et seq. (2011): "Criminal law mutates into a political sham weapon"; "Excessive threats of punishment only bring the mental balance of their advocates into line", ibid. p. 157: "The legislator has extended punishability to such an extent that it can no longer be grasped with a normal sense of justice. But those who do not have an inner sense of forbiddenness have little inhibition about doing the deed." John Braithwaite, Through the Eyes of the Advisers: A Fresh Look at High Wealth Individuals, in Taxing Democracy 245, 265 (Valerie Braithwaite ed. 2002): "Both conscience and fear of deterrence work better in the realm of black and white than in the realm of gray"; cf. also Volk & Beukelmann, mn. 64 et seq. (2020); for companies' perspective cf. survey in Claudia Nestler et al., Wirtschaftskriminalität und Unternehmenskultur 2013 61 (2013): 16% of respondents see the main reasons for competition law offenses in a confusing network of applicable law.
[64] Howard S Becker, Outsiders (1973); see also Edwin M Lemert, Social Pathology. A Systematic Approach to the Theory of Sociopathic Behavior (1951); on the reception in Germany see Fritz Sack, Definition von Kriminalität als politisches Handeln: der labeling approach, 4 KrimJ 3 (1972).
[65] Becker, 8 et seq. (1973).
[66] Id. at, 17 et seq.

when they band together in lobbying governments for favorable laws.[67] Rather, it is not least *individual* economic actors and their legal advisors, i.e., *small* networks of private actors, who demand this power of defining criminality for themselves.[68] Through creative legal advice when acting in the borderland of legality, a process of "self-labeling" or rather "self-*de*-labeling" from the label of the criminal can be observed.[69] Through the right, resourceful legal advice, private actors attempt to buy their way out of the criminal label.

V. DETERRENCE THESIS

One research hypothesis that can be derived from these observations is one of deterrence: *law enforcement agencies are "deterred" from criminal investigations by the existence of an ex ante legal opinion.*

Public prosecutors work with limited resources. The time pressure as well as the financial and personnel constraints under which prosecuting authorities operate, especially in the area of the very extensive, complex investigations of white-collar crime, are well known. Work economy and limited judicial capacities often force the authorities to drop cases in preliminary proceedings.[70] It stands to reason that public prosecutors may "think twice" before investigating acts of companies supported by expert opinions of renowned law firms (armoring effect through reputational capital). From a prosecutorial perspective, *Güroff* also speaks generally in white-collar criminal proceedings of a deterrent "power of expert opinions", which companies "like to use as further legal facades to document first their alleged integrity and later lack of *mens rea*".[71]

If this deterrence hypothesis were true, one could speak of a de facto decriminalizing effect (since it de facto impedes criminal prosecution) of ex ante legal opinions. This would make it all the more important, in addition to raising awareness among law enforcement agencies, to start at the company level in order to prevent this type of delinquency.

VI. CONCLUSION – CRIMINOLOGY OF CRIME AVOIDANCE

The increased "defense power" of private companies,[72] i.e., the legal expertise that is often available to them by virtue of their finances at the time when investigations against them are underway, is well known and researched. Less well known is the use of legal expertise well *in advance* of any crime-

[67] Klaus Boers, *Wirtschaftskriminalität: Begriffe, Methoden, empirische Erkenntnisse, Theorien und Forschungsziele. Einführung in die Untersuchung*, in Wirtschaftskriminalität und die Privatisierung der DDR-Betriebe 17, 47, see esp. in mn. 140 (Klaus Boers et al. eds., 2010); see also Bock, 207 et seq. (2011); cf. for lobbying in the context of Cum-Ex instructive also LG Bonn, judgment of 18.03.2020, Ref. 62 KLs - 213 Js 41/19 - 1/19, mn. 237.

[68] Pistor refers to this for the field of private law as "private coding strategies" Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality 43, 162 (2019).

[69] See also questions about the role of "individual companies themselves in these attribution processes" in Tobias Singelnstein, *Wirtschaft und Unternehmen als kriminogene Strukturen? Vernachlässigte Aspekte einer theoretischen Perspektive auf Corporate Deviance*, 95 Monatsschrift für Kriminologie und Strafrechtsreform 52, 63 (2012).

[70] Klaus Boers, *Wirtschaftskriminalität und Strafverfahren*, 17 Neue Kriminalpolitik 136 (2005); *Eduard Güroff, Die Staatsanwaltschaft im Wirtschaftsstrafverfahren*, see id. at 137, 138.

[71] Güroff, Neue Kriminalpolitik, 138 (2005).

[72] Kai-D. Bussmann, *Business Ethics und Wirtschaftsstrafrecht. Zu einer Kriminologie des Managements*, 86 Monatsschrift für Kriminologie und Strafrechtsreform 89, 91 (2003).

related act. In a criminology of crime avoidance, however, classic criminal compliance measures come into focus naturally as do the related challenges of creative compliance outlined here.

A criminology of crime avoidance is not concerned with infinitely extending the gaze of criminology to any and all behavior somewhat ethically questionable. Rather, it is a matter of sharpening criminology's focus on actions in the borderland of legality and shifting the perspective to the networked diffusion of responsibility to be found here.

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THEORETICAL REPERCUSSIONS REGARDING THE DETERMINATION OF THE FRAMEWORK OF LEGAL REPORTS

Environmental protection through the prism of the regulatory instrumentation used in environmental law

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ABSTRACT

In the situation where the environmental issue is becoming an increasingly addressed issue, and the legislator in various legislative acts imposes new and new regulations with a nature of environmental protection, it becomes difficult to identify whether, being incorporated in the text of a certain law, a certain legal norm, belongs to environmental law or is a norm that belongs to the field which in substance represents the regulatory object of this law. In other words, it is often quite complicated to identify the boundary of environmental law regulations, especially since the norms of this branch are not always compactly found in environmental legislative acts. It must be recognized that the legal mechanisms for environmental protection change their appearance over time, becoming much more aggressive and relentless. They are often applied without taking into account certain traditional rules and presumptions that often do not ensure effective protection of the environment. In such cases, it is necessary to understand that the regulatory mechanisms for environmental protection are a component of environmental law,

even if they are based in other legislative acts and even if they are very similar to the mechanisms used in the regulation of other categories of legal relations.

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I. INTRODUCTION

In our contemporary law, in addition to many of the really important problems, we can also encounter "litigious" approaches, which traditionally have been going on for hundreds of years. One of these is related to the procedures and institutions that can be applied in a certain branch of law.
It is necessary to remember that in the theory of law, traditionally the branches of law are divided into branches of public law and private law.

From here comes the idea that some regulatory methods, as well as institutions of public law, are not applicable for solving the objectives that are in the arsenal of private law. And vice versa, most of the methods and institutions of private law have no applicability in public law relationships.

Such an approach was on the agenda of the day when the question regarding the nature of the institutions, was raised but also the content of environmental law regulations.

II. DISPUTES REGARDING DEBATABLE APPROACHES

From the very beginning, it was quite difficult to get recognition of the existence of such a branch of law as environmental law. Even today, some specialists in traditional matters claim that environmental law is nothing more than a sub-branch of administrative law.

Although at the moment such approaches are already extremely rare, the claims regarding whether the institutions that are meant to ensure the protection of the environment belong in integrity only to environmental law or to other branches of law are still actual, anyway.

We could exemplify with the approach to the question regarding the ecological expertise. Some authors claim that this is an institution exclusively of environmental law, others argue that this is an institution of administrative law, but which is also applied in order to achieve the objectives of environmental protection.

Another segment in which such approaches are current, is that of reparative liability for environmental damage. Some consider that reparative liability is a civil one, others argue that we are facing a liability distinct from environmental law.

In any case, discussions on such topics do not stop even up to the present moment, and the set of arguments that researchers make do not always have a beneficial effect on the regulatory field. That being said, since scholars do not have a single opinion, neither does the legislator have a definite position on how and what to regulate.

We must mention from the start that the method of regulating a branch of law is determined by the need to legislate certain categories of relationships in relation to the most effective mechanism for achieving the goal of legislating these relationships. The method of environmental law regulation is related to the needs of regulating the relations of use, conservation, development and protection of environmental components. As it is argued in specialized literature, the way the state acts on the social

relations of environmental protection indicates the method of authoritarianism.[1] This fact dictates the priority need to establish mandatory norms in environmental law. The application of such regulatory methods is conditioned by the importance of the environmental problem, as well as due to the fact that this is a major issue of public interest. As a result, environmental law methods are public law regulation methods.[2]

However, claiming "purity" in the application of public law methods in solving environmental problems would be a fatal mistake.

III. SETTING MANDATORY NORMS IN ENVIRONMENTAL LAW

The idea from which we start is that in order to solve a specific problem for human society, such as the problem of environmental protection, which is a vital problem[3], it also requires the application of specific rules. These rules do not always have a social foundation. This is because natural phenomena occur independently of human will and that any human intervention in the environment inevitably leads to changes. Therefore, the procedures used to solve these problems must include a spectrum that ensures the achievement of this goal, regardless of the fact of which field they belong to - either public law or private law. They must be the most categorical, drastic and even exclusive, so that in the end they exclude intervention or totally remove the danger or consequences of negative influences on the environment.

It is also undeniable that environmental law is not only a branch of domestic law, but also has an international significance.[4] Even the rules that regulate the use and protection of environmental components cannot be reconciled with the rules of international law. This is largely due to the fact that environmental phenomena "do not know" and "do not obey" state borders.

Therefore, the question arises and is actual until today: Is environmental law a branch of law or is it an amalgam of legal norms from different branches of law? As we can see from the specialized literature, there are several opinions regarding the consideration of the legal nature of environmental law, including those that claim that environmental law is a branch of synthetic law. In this sense, even if we are aware that environmental law is a complex field of regulations, where procedures and methods are applied by administrative law, civil law, criminal law and contravention law, as well as other branches of law, however, it is not justified to speak of an inter branch field and not of a distinct branch of law.[5] This is because, in our opinion, environmental law is characterized by the presence of its distinct regulatory object, which are the ratios of rational use, protection, conservation and development of the environmental components.[6] In this sense, the need to ensure a rational use and protection of environmental factors dictates the realization of a combination of regulatory methods present in several

[1] E. Lupan, Dreptul mediului, ed. «Lumina Lex», Vol. I București, 126 (1996).
[2] Michel Prieur, Droit International Et Comparé De L'environnement, Formation à distance, Campus Numérique "Envidroit" Tronc Commun Cours N°5 Les Principes Généraux Du Droit De L'environnement, 3.
[3] Manuel Sur Les Droits De L'homme Et L'environnement (Manual on Human Rights and the environment), Editions du Conseil de l'Europe F-67075 Strasbourg Cedex (2012); Imprimé dans les ateliers du Conseil de l'Europe, 33.
[4] Gh. Beleiu, Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil, București, 46 (1998).
[5] I. Trofimov, G. Ardelean, A. Crețu, Dreptul mediului, ed. Editura Bons Offices, Chișinău, 25 (2015).
[6] M. Duțu, Dreptul mediului, Editura economică, București, 40 (1996).

branches of law. Environmental law is entitled to take up these methods, provided that their application provides efficiency and results. Therefore, the institutional framework will be composed of its own elements, but also of "the borrowed" ones, but adapted to the needs of environmental protection. Examples can be the institution of ecological expertise, the institution of responsibility for environmental law,[7] etc.

However, when we "choose" the procedures for regulating environmental relations, we must take into account the fact that "people easily accept collective measures for environmental protection, but easily ignore measures that require individual discipline and personal efforts"[8]. That is why the measures that the legislator adopts at a certain stage, as a rule, are consistent with the level of intellectual development of society. Thus, when from the rostrum of the country's parliament, notes of derision will be heard regarding the importance of examining some draft laws related to the protection of natural environmental elements, so far, internal environmental law will be characterized by an increased tolerance for polluting acts. Whereas on the contrary, when the level of society's perception regarding environmental issues will be more advanced, the less will be the legislative tolerance for polluting acts. The researchers in the field, whose task is to propose and argue the necessity of imposing extraordinary measures to protect the environment, have had huge contribution to the realization of "intolerance". This is often done by "taking over" some institutions from other branches of law.

IV. PROPOSED SOLUTIONS

Many times the proposed solutions have been so extraordinary, that they are initially perceived by the majority as utopian. For example, in some specialized sources it is proposed to recognize religious norms as a source of environmental law. In this sense, it is argued that religious traditions around the world provide a basis for the right to the environment. Representatives of Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Zoroastrianism and other religions, who belong to the Alliance of Religions and Conservation, a non-profit organization, found in religious traditions a common basis for land management. Thus, in ancient Buddhist chronicles dating from the third century BCE, they recount a sermon on Buddhism in which the son of Emperor Asoka of India asserted that "birds of the sky and animals have the same right to live and move in any part of the country. Another rule says that the Earth belongs to humans and all living things, and you are only the guardian of the Earth.[9]

Thus, the complexity and dynamics of social relations often imposes the need to regulate one and the same category of relations through the legal norms of different branches of law. This is also necessary starting from the fact that the branch of environmental law is a new one, and the appearance of new categories of legal relations, qualitatively new, makes it necessary to place them in the space of all other relations. Often this creates the wrong impression of a synthesis branch.

In the context of the above-mentioned, we find that the basic task of the legal science of environmental law is to reveal the criteria for identifying the categories of legal relations under environmental law, in order to delimit them from other categories of legal relations, a fact that produces effect both on the

[7] Igor Trofimov, «*Răspunderea ecologică - concepţie contemporană*», «Legea şi viaţa» nr. 11, Chişinău, 1997, p. 17-19; Ernest Lupan, Igor Trofimov, «*Răspunderea de dreptul mediului*», «Fiat Justiţia» nr. 1, Cluj-Napoca 207, 217 (1998).
[8] Ernest Lupan, Dreptul mediului, ed. «Lumina Lex», Vol. I Bucureşti, 45 (1996).
[9] Ph. Billet, C. Billiet, D. Guihal, M. Pallemaerts, M. Pâques, Manuel Judiciaire De Droit De L'environnement, Nairobi, 27 (2006).

identification of environmental law relations from the multitude of legal relations of other similar branches of law, as well as ensuring the correct application of the legislation in force. According to Professor Prieur, the recognition of the general interest related to the environment has its effects on the control of legality and the emergence of a public service for the environment aimed at ensuring an ecological public order.[10]

For the reasons stated above, often in the practice of environmental law reports, different situations arise ,in which we are faced with the task of identifying whether a certain legal report, which has as its object environmental elements, is part of the category of environmental reports or, as the case may be, ,it is one of administrative, civil law, labor law, etc.

As for example, we could refer to the fact that in environmental law relations, property rights, already considerably worn out over time, create additional reasons to thin out, when it comes to acquisitions (protected areas), use (easements and constructions) or disposition. Although the administrative legislation indicates that the allocation of land for use or alienation is the exclusive competence of local councils or the Government, however, when discussing land, a big question mark appears – "are we facing an environmental law report or do we have a civil law relationship, whether we are facing a legal administrative law relationship? "[11]

The solution regarding the identification of the nature of legal relationship, can be identified specifically through the lens of the legal mechanisms used, but also in relation to the purpose of the regulations. In this way, if we identify the fact that a specific rule aims to ensure the management of public affairs, such as the realization of an order for the adoption of decisions in a certain concrete field, then these reports are of an administrative nature, and therefore the legal norm is one of administrative law. However, if the norm in question aims to ensure the protection of an environmental factor, even if it incorporates apparently mechanisms of administrative law, then the report in question is a report of environmental law, and the legal norm is attributed to environmental law.

V. PROVISIONS AND MECHANISMS

We could exemplify this fact with the provisions of article 25 of the Land Code of the Republic of Moldova[12], according to which land beneficiaries who do not cultivate the agricultural land for a year, will be summoned in writing by the local public authority regarding the need to cultivate the land, and when the beneficiary of the use of the land does not comply with this summons, may be penalized for contravention. If the land beneficiaries do not fulfill their obligations within the established term, they may lose the right of possession and use of the land by the decision of the court at the request of the land owner.[13]

In the example stated above, we see that although the legal norm establishes attributions for the authority of the local public administration, a matter that would give the possibility to think that we are

[10] Emmanuel D. Kam Yogo, Manuel judiciaire de droit de l'environnement en Afrique, Institut de la Francophonie pour le développement durable (IFDD) 56 (2018), rue Saint-Pierre, 3e étage Québec (Québec) G1K 4A1, Canada, 2.
[11] Iancu Gheorghe. „Drepturile Fundamentale şi Protecţia Mediului", Bucureşti 151 (1998).
[12] Codul funciar, nr. 828-XII din 25.12.91, republicat: Monitorul Oficial nr.107/817 din 04.09.2001.
[13] Cotorobai M., Zamfir P., Ursu V. "Dreptul funciar", Chişinău, 48 (2001).

close to an administrative law report, however this norm is one of environmental law, because it aims to ensure protecting the quality of lands (soils), which are subject to the danger of degradation as a result of the non-processing of agricultural land. This norm remains one of environmental laws, even if it operates with mechanisms specific to administrative law. In this case, environmental law "borrows" these mechanisms.

The question often arises as to which mechanisms can be "borrowed" by environmental law in order to ensure the regulatory framework. The answer to this question, we believe, has at least two aspects. First of all, environmental law is entitled to take over from other branches of law those regulatory mechanisms, which truly ensure the effective fulfillment of the purpose of protecting the environment. Secondly, it is rational to take over the mechanisms that are already used by the entities involved in the environmental protection process. The argument can even serve as the example given above, where in order to ensure the execution of the land processing obligation by the beneficiaries, the legislator gave the local public administration authorities the right to operate the summons, and in case of lack of reaction from the beneficiary of land use, the legislator offered the right to request the withdrawal of the right to land benefit through legal action. Such categories of documents do not represent anything new for local public administration authorities, and therefore no difficulties can arise in the process of applying these rules.

VI. CONCLUSION

In conclusion, we can mention that, ensuring the protection of the environment through legal means must be carried out in such a way that it does not count against the "boundaries" dictated by social-human values. Environmental conditions do not obey the values and rigors of the socio-human order. They have a distinct nature – independent of the psychological and social considerations of humanity. These "boundaries" must be broken there and to such an extent as to obtain a natural condition of human existence.

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UPDATE ON THE GERMAN IMPLEMENTATION ACT OF THE EU WHISTLEBLOWER DIRECTIVE

and on the "German Midway" for centralized whistleblowing systems in corporate groups

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I. INTRODUCTION

The process of drafting legislation has progressed further in recent months and the draft law of the Federal German Government[1] has been submitted to the Bundestag for a decision. Provided that the legislative process proceeds according to plan, the law is expected to be promulgated before the end of this year. Although the draft law still provides for a "grace period" – according to Article 10 of the draft law dated 07/22/2022, the law is not to come into force until three months after promulgation in the first half of 2023 the introduction of internal reporting channel[2] will become a legal obligation for around 90,000 German companies[3].

The resulting organizational and financial burden for companies already in distress due to the Corona pandemic and currently due to the effects of the war in Europe[4] are known to be cause for criticism, both of the directive and of the draft implementation law[5]. The burden on "companies in this country with new bureaucracy, one-off costs of over 200 million euros, annual costs of 400 million euros"[6] due to the obligation to set up and operate internal whistleblowing systems was also a topic of discussion within the parliamentary debate in the German Bundestag.[7]

From an economic perspective, it is of interest to companies to find out what kind of resource-saving implementation options are available. Potential savings are offered by whistleblowing units that can be used by several companies or by centralized whistleblowing systems, which are often already in place, especially in international operating groups[8]. However, the EU Commission has so far rejected such central offices as inadequate.[9] Nevertheless, according to the German Minister of Justice, Dr. Marco Buschmann, the German legislature has now opened up a "Midway" for centralized whistleblowing functions.[10]

[1] Draft law of the Federal German Government, 07/22/2022, available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Hinweisgeberschutz.pdf?__blob=publicationFile&v=2.

[2] This designation corresponds to the wording of the EU Whistleblower Directive. Only whistleblowing systems that meet the requirements of the Directive are therefore included here. Henceforth, the term "whistleblowing system" will be used as an umbrella term that includes all internal reporting channels and other systems that pursue the same goal but may not comply with all the requirements of the Directive. Only systems that comply with the Directive are referred to as internal reporting systems.

[3] According to the data from the business register of the Federal Statistical Office, which was used as the basis for the draft law, there were 90,621 companies with more than 50 employees in Germany in 2019, cf. Draft law of the Federal German Government, p. 46.

[4] Cf. for example https://www.tagesschau.de/wirtschaft/unternehmen/firmenpleiten-insolvenzen-september-101.html.

[5] Cf. speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6390, plenary protocol available at: https://dserver.bundestag.de/btp/20/20057.pdf.

[6] Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6390.

[7] Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, available at: https://dserver.bundestag.de/btp/20/20057.pdf.

[8] Cf. Felix Metzner/Isabel Gloeckner, *"Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?*, CCZ, p. 256 (5/2021).

[9] See also Felix Metzner/Isabel Gloeckner, *"Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?*, CCZ, p. 256 et seq. (5/2021).

[10] Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6389.

II. THE CURRENT STATUS OF THE GERMAN DRAFT LAW "HINWEISGEBERSCHUTZGESETZ (HINSCHG-E)"[11] AND THE LEGISLATIVE ASSESSMENT OF THE FINANCIAL BURDENS FOR COMPANIES

A. The path to the "Draft Law for Better Protection of Whistleblowers and for the Implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law" and its status quo

The Directive (EU) 2019/1937 of the European Parliament and of the Council of 10/23/2019 on the protection of persons who report breaches of Union law (from now on: EU Whistleblower Directive) has already entered into force on 12/16/2019. According to Article 26 para. 1 EU Whistleblower Directive, EU member states were required to transpose the Directive into national law by 12/17/2021.

As is known, the legislative process has not been completed in many member states in time.[12] In Germany, the Federal Ministry of Justice and Consumer Protection had already developed a draft bill for an implementation law in November 2020.[13] However, the parties of the grand coalition[14] could not agree on this draft, in particular on an extension of the material scope of application to national law.[15] The "Ampelkoalition" of the Social Democratic Party of Germany (SPD), the German Green Party and the Free Democratic Party of Germany (FDP), in office after the last federal election in 2021, had in the coalition agreement the "legally secure and practicable"[16] implementation of the EU Whistleblower Directive, with protective effect "not only in the reporting of violations of EU law (...) but also of significant breaches of regulations or other significant misconduct, the disclosure of which is in the particular public interest"[17].[18]

The Federal Cabinet then adopted the draft of the "Law for better protection of whistleblowers and for the implementation of the Directive on the protection of persons who report violations of Union law". After the expiry of the deadline for comments by the various interest groups on the draft law[19], it was

[11] This abbreviation of: „Entwurf eines Gesetzes für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden" will be used from now on to designate the draft law.

[12] As of 10/25/2022, only 10 of the 27 obligated member states have implemented a national law, 16 of the member states are still in the implementation phase, Hungary has not yet started an implementation process, see the overview: https://www.whistleblowingmonitor.eu.

[13] Cf. Simon Gerdemann, *Referentenentwurf für ein deutsches Hinweisgeberschutzgesetz*, ZRP p. 37 et seq. (2021).

[14] Meant is the grand coalition between Sozialdemokratischen Partei Deutschlands (SPD) und der Christlich Demokratischen Union Deutschlands (CDU) from 2017 to 2021.

[15] See the reporting https://www.sueddeutsche.de/wirtschaft/kriminalitaet-whistleblower-hinweisgeberschutz-justizministerium-1.5245315.

[16] Coalition contract 2021-2015 between the Sozialdemokratischen Partei Deutschlands (SPD), Bündnis 90/ Die Grünen und den Freien Demokraten (FDP) 12/07/2021, p. 88, available at: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf.

[17] Loc. Cit.

[18] As timely implementation was no longer possible, the EU Commission initiated formal infringement proceedings on January 27, 2022 against the member states, including Germany, that had missed the deadline for implementation, cf. https://www.handelsblatt.com/politik/deutschland/vertragsverletzungsverfahren-ueberfaelliges-whistleblower-gesetz-deutschland-bekommt-blauen-brief-aus-bruessel/28056780.html. This was averted by the resumption of the legislative process in the meantime, see the Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6389.

[19] Available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Hinweisgeberschutz.html.

now debated in the Bundestag on 09/29/2022. On the part of the opposition, the draft law was criticized as "unclear, half-baked and unbalanced"[20]. In addition, the considerable burden of "about 90,000 companies in this country with new bureaucracy, one-time costs of over 200 million euros, annual costs of 400 million euros"[21] was denounced.

B. Expected costs for companies in setting up an internal reporting channel

In the explanatory memorandum to the HinSchG-E[22], different cost estimates are given for the establishment of an internal reporting channel. According to the impact assessment of the European Commission[23], medium-sized companies are expected to incur implementation costs on average of EUR 1,374.[24] However, this sum is far below the estimates of inquired bodies in Germany.

According to a survey of its members, the German Institute for Compliance[25] assumes implementation costs of EUR 12,500[26]. According to an international law firm[27], which was also queried by the Normenkontrollrat[28], costs of EUR 15,000 to 25,000 could be incurred for "legal advice and support in the conception of a whistleblower system, the creation of the necessary guidelines and process flows, support in implementation and communication, design in compliance with data protection law, and training of whistleblower office employees in total."[29] However, as stated by this last assessment, how much companies actually have to spend in practice depends on company-specific factors such as existing structures, e.g., internally available know-how and existing compliance units. Companies could save between EUR 3,000 and 5,000 here by having suitably good and modern compliance equipment.[30] In the case of German companies that already have a whistleblowing system in place[31], the key factor here will be the extent to which the systems comply with the new legal requirements.

There is also fundamental savings potential for companies that do not have their own whistleblowing system but belong to a group that already operates a centralized whistleblowing system. This way of recognizing the "external" whistleblowing system, e.g., of the parent company, for one's own company and referring the employees to use it, has so far been blocked by the positioning of the EU Commission (see below the details under III. B.). However, the move by the German legislator now offers a loophole

[20] Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6390.
[21] Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6390.
[22] Draft law of the Federal German Government, p. 47 et seq.
[23] European Commission, Impact Assessment, SWD (2018) 116 final.
[24] European Commission, Impact Assessment, SWD (2018) 116 final, p. 61.
[25] Deutsches Institut für Compliance e.V., for more information see: https://www.dico-ev.de.
[26] See draft law of the Federal German Government, p. 47 with reference to German Institute for Compliance - DICO Member Survey (2021), inquiry by the Normenkontrollrat on the implementation of the EU Whistleblower Directive.
[27] See draft law of the Federal German Government, p. 47 with reference to CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB, Inquiry of the Normenkontrollrat on the Implementation of the EU Whistleblower Directive.
[28] Institution of the German Federal Government that examines draft rules and estimates compliance costs for citizens, businesses and public authorities, for more information see: https://www.normenkontrollrat.bund.de/nkr-en/overview-of-nkr-tasks/ex-ante-review.
[29] Draft law of the Federal German Government, p. 47.
[30] Draft law of the Federal German Government, p. 47.
[31] According to the information in the draft law, 73.9% of companies with more than 250 employees and 43.7% of SMEs have already introduced a whistleblowing system, draft law of the Federal German Government, p. 46.

through which, at least group companies, might be able to significantly reduce the costs of implementation – and further also the operation of the internal reporting channel – by using already existing systems.

III. IS THE USE OF CENTRALIZED WHISTLEBLOWING SYSTEMS IN CORPORATE STRUCTURES POSSIBLE AFTER ALL?

A. Admissibility of outsourcing and sharing resource under the EU Whistleblower Directive

The EU Whistleblower Directive already expressly provided for the possibility of commissioning third parties to receive and – with the appropriate professional competence – also to process whistleblowing, see Recital 54 and Article 8 para. 5 of the EU Whistleblower Directive. These third parties must "provide appropriate guarantees of independence and confidentiality, data protection and secrecy," Recital 54 of the EU Whistleblower Directive. External third parties are named in the Directive as, e.g., external consultants, auditors, trade union representatives or employee representatives.

In addition, it is also emphasized that the decision as to which person or department is most suitable to act as an internal reporting office depends decisively on the respective structure of the company, cf. Recital 56 of the EU Whistleblower Directive. A recommendation for or against outsourcing the whistleblowing function is therefore not made.

In view of the differences in the human and financial resources available for the establishment and operation, the EU Whistleblower Directive also provides in Article 8 para. 6 that companies between 50 and 249 workers "may share resources for the receipt of reports and for investigations that may have to be carried out".

B. Rejection of the EU Commission to the use of centralized whistleblowing systems as internal reporting channel

With the adoption of the EU Whistleblower Directive, the question arose for companies that were covered by the scope of the Directive but in whose group there was already a whistleblowing system as to their own need for action. The core of the problem was whether Article 8 para. 3 EU of the Whistleblower Directive: "Paragraph 1 applies to legal entities in the private sector with 50 or more employees" should be interpreted strictly according to the wording, or whether the given possibilities of use of a central system of the parent company could be sufficient.

Accordingly, inquiries were already submitted to the European Commission's expert group on whistleblower protection in 2021, in response to which the (further) use of a central system was rejected: „Article 8(3), which provides that "Paragraph 1 [the obligation to establish channels and procedures for internal reporting] shall apply to legal entities in the private sector with 50 or more workers", does not make any exemption for distinct legal entities belonging to the same corporate group. This entails that reporting channels cannot be established in a centralized manner only at group level; all medium-sized

and large companies belonging to a group remain obliged to have each their own channels."[32]

Centralized whistleblowing systems could continue to be offered but should only represent an additional option to the group company's own reporting internal channel. By referring to this possibility of coexisting whistleblowing channels within the group, the Commission also rejected the preferability of receiving and processing information via a centralized system, e.g., with regard to better protection of the anonymity of the whistleblower and ensuring uniform treatment of whistleblowing and uncovered misconduct throughout the group.[33]

C. The German Midway: "Outsourcing" within the group

The fact that the EU Commission's position on centralized whistleblowing systems is also unlikely to meet with much approval in Germany is to be expected, if only because of the human resources required to create additional decentralized whistleblowing channels. The approach now chosen for German implementation is therefore likely to be a relief for some companies.

In the parliamentary discussion in the German Bundestag, the Federal Minister of Justice, Dr. Marco Buschmann, stated: "In the implementation, it was important to us that we exploit all the flexibility margins in the directive. We also had very intensive discussions with the Commission and we succeeded in changing the Commission's legal view on a whole range of things to the benefit of our companies."[34]

However, the fact that a middle course was chosen on the question of the possibilities of using the resources of the group parent company is not clear from the text of the law itself, but only from the explanatory memorandum to the law.

Section 14 para. 1 HinSchG-E "Forms of organization of internal channels" initially only clarifies that, as already provided for by the Directive, a third party can be entrusted with the tasks of the internal channel. The German Midway does not result from the text of the law, but only from the understanding of the third party set out in the special section of the explanatory memorandum to the law on pages 90 et seq.[35]

[32] Opinion of the European Commission, Directorate – General Justice and Consumers, 06/02/2021, JUST/C2/MM/rp/ (2021)3939215; European Commission, Directorate – General Justice and Consumers, 06/29/2021, JUST/C2/MM/rp/ (2021)4667786: "Any different interpretation would be *contra legem*."; European Commission, Directorate – General Justice and Consumers, 07/16/2021, JUST/C2/MM/rp/ (2021)4622438, in addition, the comments refer to the possibilities opened up in the Directive, e.g., as a company with 50 to 249 employees, to share resources that would also be open to sister companies in the group or, even if always subject to the consent of the whistleblower, to use investigation capacities of the parent company or to treat the report as relevant for the entire group and thus also inform the parent company about it.

[33] Cf. Felix Metzner/Isabel Gloeckner, *"Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?*, CCZ, p. 256 et seq. (5/2021).

[34] Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6389.

[35] Criticism of this due to the resulting legal uncertainty: Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update!,* ZRFC, p. 234 (2022).

With reference to the principle of separation under group law[36], from which the legal independence of each member of the company results, it is clarified that an organizational unit of another group company can also be a third party within the meaning of the HinSchG-E and thus a suitable reporting office. This means for practice: If, e.g., a compliance department already has a central or regional reporting office within the group that meets the other requirements[37], this can be commissioned as a third party. The existing structures and the given personnel resources can still be used for all or at least several companies of a group.

However, there is still a need for action. This is because, just as with the commissioning of another third party (e.g., an external law firm or ombudsperson), an explicit commissioning of the body by the individual companies is required. It must be clear that the commissioned body, even if it is an organizational unit of another group company, will act in its function as an internal reporting channel for the respective client company. In addition, it is necessary that the competencies and responsibilities are regulated in such a way that there is no transfer of responsibility to the parent or sister company at which the organizational unit is located. At the latest, decision-makers of the commissioning company must be involved in the decision-making process as to how an assumed or already discovered legal violation is to be remedied.[38]

In addition to the questions regarding the regulations of whistleblowing management within the group, it will also be central in practical implementation that the organization of the internal reporting channels ensure the clear allocation of the whistleblowing to the subsidiary in question without endangering the confidentiality of the whistleblower. Due to the remaining legal responsibility of the individual company (see above), there could otherwise be liability risks e.g., due to failure to take measures to put an end to a breach.

IV. Conclusion

The German government's draft seeks to give companies freedom in the design and organization of internal reporting channels. This provides opportunities to adapt the design and organization to the company and its human and financial resources (which may be scarce anyway due to the current situation) in a meaningful way. It is therefore positive that already existing whistleblowing systems can continue to be used as internal reporting channels (if necessary by adapting them to the new legal requirements).

Nevertheless, the approach taken in the draft law continues what already caused problems with the Directive: the text of the law itself explicitly only contains the obligation of companies with 50 or more workers and the reference to the possibility of outsourcing to third parties. The fact that a third party does not have to be outside the group of companies is not made clear by the wording of the law;

[36] Gerd Krieger, in Hoffmann-Becking (Ed.), Münchener Handbuch des Gesellschaftsrechts, 5th Edition, chapter 12, Konzernrecht des Aktiengesetzes, Rn. 64 (2020).
[37] Cf. p. 91 of the draft law of the Federal German Government: guaranteeing confidentiality, independence and impartiality; For further requirements, also specifically with regard to transnationally active groups see Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update!,* ZRFC, p. 234 (2022).
[38] Draft law of the Federal German Government, p. 92.

instead, group companies are dependent on the supplementary references to the legislator's understanding. Since it has not yet been finally clarified whether the EU Commission will take a position on the "German Midway", the sustainability of this solution approach is at least questionable.[39]

[39] Critical with regard to a possible renewed threat of infringement procedure: Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update!,* ZRFC, p. 234 (2022).

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A BLINK OF HARVARD BUSINESS SCHOOL'S PROGRAM "CERTIFICATE OF MANAGEMENT EXCELLENCE"

- and takeaways for the work of a Chief Compliance Officer in an international environment

Jérôme-Oliver Quella

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Jérôme-Oliver Quella, LL.M., is presently a name partner of Quella & Associate in Germany, which offers advisory services for various industries and organizations with particular emphasis on interims management, turn-around and change management and closely connected compliance subjects. He has a Pricewaterhouse-Coopers background and hold several SVP / C-Level positions and steered these assignments successfully through mostly troubled waters.

ABSTRACT

The following blink reflects the personal experiences and takeaways made by the author during a selected program at Harvard Business School during March 2022 to August 2022. It is neither intended to pretend, assert, or even assume that similar experiences are not possible in applicable universities or learning institutions at any other place nor is the author financially bonded of either receiving gratuities or benefits of some kind to/from Harvard Business and/or Law School. Therefore, the blink is an aftermath of the specific experience in an extraordinary divers and professional learning environment that has been.

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I. THE BLINK

A. Why this blink?

Hendrik Schneider, Founder and Content Curator of CEJ, recently approached me after reading my latest post about my completion of my Senior Executive Program "Certificate of Management Excellence (CME)[1]" at Harvard Business School on LinkedIn. While we talked about the qualifying programs, their topics and how they are structured and executed, we got accidently stuck at one specifictopic related to "negotiation". Harvard and Negotiation pairs and usually triggers something for someone who practices law; and it is rather not "Harvey Specter" of the American legal drama Suits than the well-known Harvard Law Program on Negotiation (PON)[2]. PON, the consortium program of Harvard University, Massachusetts Institute of Technology, and Tufts University that serves as an interdisciplinary research center dedicated to developing the theory and practice of negotiation and dispute resolution in a range of public and private settings.

And as a matter of fact, one of my qualifying programs has been an abstract of one of PON`s programs. It is called "Strategic Negotiations: Dealmaking for the Long Term" and has been led by James K. Sebenius [3] who holds the Gordon Donaldson Professorship of Business Administration at Harvard Business School and took the lead in the HBS's decision--unique among major business schools--to make negotiation a required course in the MBA Program and to create a Negotiation Unit (department) which he headed for several years after establishing it in 1993. He also currently serves as Vice Chair and as a member of the Executive Committee of the Program on Negotiation (PON) at Harvard Law School. At PON, he chairs the University's annual Great Negotiator Award program.[4]

Having found a link between Management and Law, we shared thoughts on further aspects of the program and moreover the adjacent qualifying program "Managing Turbulence". It appeared to us that this combination has several topics beyond the primary goals of each of the programs but to compliance.

B. Strategic negotiations, Long-term business relationships and Compliance

To find a starting point for this headline and the following, I would like to begin with some basics to the program and some highlights of the "Strategic Negotiations" - since this was the basis of looking over the fence. The program is as mentioned above part of the CME, a senior executive program, and therefore booked with divers and mostly international attendees that are usually with approximately 15-20 years of professional business experience, situated in c-suite or at least in SVP-level. My program carried 42 participants with a set-up of self-called shes 1/3 and hes 2/3 from about 22 nations worldwide. Main goal of that course has been: "[…] in business negotiation strategies, someone has

[1] The Harvard Business School Certificate of Management Excellence (CME) provides advanced learning that can help you expand your business management and leadership skills—and your career potential. The CME is awarded to those who complete three qualifying programs in the areas of strategy, negotiation and innovation, and leadership. https://www.exed.hbs.edu/certificate-management-excellence.
[2] https://www.pon.harvard.edu.
[3] https://www.exed.hbs.edu/strategic-negotiations/.
[4] https://www.hbs.edu/faculty/Pages/profile.aspx?facId=6550.

to know how to bring together the right players, identify and address key issues, and develop the best process for each deal—all before the negotiations even start."[5]

Hence, barriers and hurdles of the creation of efficiencies by developing a systematic approach to managing negotiations, synchronizing internal and external negotiations, addressing the complexities associated with multiple parties and agendas as well as evolving timeframes, negotiating effectively across borders and cultures, and fostering understanding and promote resolution among parties whose interests and perceptions conflict became subject of the determinizing 3D-negotiation approach[6].

Practically, next to scrutinizing HBS Business Cases there has been several training sessions wherein participants have to represent and defend a predefined role in a multi-role play by keeping its interest as high as possible; even with the risk of ending up with a no-deal. It became obvious that rarely the "cold-blooded", well experienced deal maker made the best outcome – actually only, if the goal was the maximum short-term profit -, but in an international, multi-cultural environment the most empathic and "prepared" negotiator with a win-win attitude regularly brought the price home. This outcome is very reasonable in the aftermath because a hard call "all-or-nothing" closes instantly the door for "in between" - if not a bluff. Such aggressive approaches have been proven to be much too narrow- and short minded and ended up in a no-deal much more often than in a collaborative approach. This outcome is not meant to be stipulated for all kind of negotiations, but it seemed to me that this approach happened to be the most promising strategy – especially if someone is targeting for a long-term business relationship with strong roots and solid commitments from both sides in an international environment. This outcome has been a real highlight to me since I was experiencing very challenging negotiations and situations in my professional (and even private) life myself of which some ended up surprisingly poorly or at least less satisfying than expected starting the negotiations.

This insight made me wonder how to integrate this intel into compliance procedures/techniques? On the assumption that top-notch negotiations on (long-term) business contracts/relationships are often done by the top management and probably some contract law lawyers/experts, contractual bi-lateral compliance procedures on the long run are most of the time "secondary" or even "odd items", meaning nice to have clauses and therefore easy to trade-off. I think this is a capital mistake and misinterpretation of the negotiation chips on the table. From my point of view these secondary items should be an integral part of a solid and stable "communication platform" for the well-being of that contractual bondage; and therefore, being treated as a priority negotiation goal.

This opinion results from the fact, that we are currently experiencing so-called turbulent times wherein not only economic and ecological challenges bundle but also from a HR-perspective a new generation is challenging business models and developments. In June of this year, PricewaterhouseCoopers held its "2022 Global Risk Survey Webcast"[7] wherein the top risks with significant effect to the surveyed organizations have been again Market, Business Operation, Cyber, External Changes, Geopolitical; but surprisingly no HR issue has been openly mentioned while mitigating key personal risk becomes

[5] See "Summary" of the program on https://www.exed.hbs.edu/strategic-negotiations/.
[6] Lax, David, and James K. Sebenius. *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals*. Boston: Harvard Business School Press (2006).
[7] To be recasted via https://pwccpeportal.xyvid.com/GRS2022 based on the published survey which can be downloaded under https://www.pwc.de/de/managementberatung/risk/global-risk-survey.html.

a more and more important issue – or should be, considering cyber risks in conjunction with insider risks. The missing link might be owed to the PricewaterhouseCoopers' "Global Workforce Hopes and Fears Survey 2022" published in May 2022[8] wherein these mentioned new HR-challenges become evident: clear preference of a mix of in-person and remote (blended) working environment plus a majority that expects fulfillment in someone's job.

By reading both professional and international surveys it turns out to be evident that there is a need to set cornerstones and more important rights and privileges in terms of compliance procedures – especially in respect of compliance investigation. From my experiences problems within a compliance investigation arise if data is not available due to missing links, "lost" data, etc. Since it takes two to tango, almost each data has an image. But these images are most of the times located outside the scope/grip of the Compliance Officers since information are on servers of a contracting counterpart; due to ongoing globalization even in very different legal environments. An adjoining thread in terms of compliance to this, is the global development of ESG embracement[9] which is creating a new (business) impact / purpose component with constantly growing pace to more and more businesses.

This component is more a Damocles sword than most business leaders currently think. The creation of a taxonomy and reporting requirements in the EU or US[10] are proofing that these subjects will penetrate not only publicly traded companies but also SMEs[11]. The reason is, ESG is more than good intentions. It's about embedding values into principles - and more across business cases - from investment to sustainable innovation. Therefore, shouldering these principles becomes an economic factor and moreover a key element if or if not, there is new personnel going to be hired[12]. Ignoring this development is meanwhile no business weakness any more than an existential business risk.

[8] To be downloaded under https://www.pwc.com/gx/en/hopes-and-fears/downloads/global-workforce-hopes-and-fears-survey-2022-v2.pdf

[9] Environmental, Social and Governance (ESG). An organizations total efforts to be socially and environmentally responsible. The importance of this new business "requirement" becomes not only an intrinsic necessity but also a must have to shareholders and other stakeholders (https://corpgov.law.harvard.edu/2020/06/10/the-ripple-effect-of-eu-taxonomy-for-sustainable-investments-in-u-s-financial-sector/) . An analysis based on Preqin's list of the 10 largest North America-based fund managers by total capital raised for private equity funds in the past 10 years has been already giving such indication (see https://docs.preqin.com//reports/2019-Preqin-Global-Private-Equity-and-Venture-Capital-League-Tables.pdf).

[10] E.g. the EU Sustainable Finance Action Plan has defined 10 packages of measures that have been translated into corresponding regulations (EU Taxonomy, Disclosure Regulation and MiFID II; more in detail see https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en) or the discussions in context of the SEC Climate Disclosure (https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities) - almost as if there is developing a green deal disclosure championship via the best taxonomy (see Sustainable Taxonomy development worldwide: a standard-setting race between competing jurisdictions https://gsh.cib.natixis.com/our-center-of-expertise/articles/sustainable-taxonomy-development-worldwide-a-standard-setting-race-between-competing-jurisdictions)

[11] Small and Medium-sized Entities.

[12] In detail to value propositions of the Generation Z read recent publication "Understanding the Impact of Generation Z on Risk Management—A Preliminary Views on Values, Competencies, and Ethics of the Generation Z in Public Administration"; 19 International Journal of Environmental Research and Public Health 1 (2022); also download via https://www.researchgate.net/publication/359438853_Understanding_the_Impact_of_Generation_Z_on_Risk_Management-A_Preliminary_Views_on_Values_Competencies_and_Ethics_of_the_Generation_Z_in_Public_Administration. The effect of falling short in terms of Generation Z expectation on compliance to ESG and the effects on the willingness to sell one's workforce see Felix Oberholzer-Gee, Better, *Simpler Strategy: A Value-Based Guide to Exceptional Performance.* Boston, MA: Harvard Business Review Press, 135 (2021).

II. COMPLIANCE TAKEAWAY

Having this said, I want to emphasis two isolated things that need to be carried home from this experience of multi-dimensional negotiation tactics with respect to compliance developments.

Firstly, the more international a business relation becomes the more compliance topics become relevant; thus, it is highly recommended to integrate relevant parts of one's own Compliance Management System into a long-term agreement in order to stipulate access to contracting partner's compliance relevant data. This might sound odd but if both parties are willing to comply with obligatory ESG – and the definition of ESG is the same to both sides -, deficiencies in terms of "G" harms both parties by at least damaging the reputation. For this reason, one might say, it should be in both mutual interests to cooperate; but "better save, than sorry". In cases related e.g., international taxes, customs, etc. it is even necessary to have quick access to details such as order and booking entries just to be able to move fast and prevent potential penalties. Certainly, an agreement to exchange data that focusses on fraud, bribery and corruption in a long-tern business relationship building negotiation is no easy task, but at the long end it is the most prudent and convincing partnering offer – because this agreement works both ways und underlines trust in well behavior in all terms of the agreement. Plus, it might even create value since procedures should be aligned, standardized and reduces potential risks on both sides.[13]

Secondly, it cannot be said often enough that the upcoming generation is increasingly concerned with promoting new concepts such as corporate social responsibility and sustainable development[14]. A failure of management in this area will scare off potential employees and causes constrains to the business operations and development instantly. In addition to that this generation is eager to use the tools of compliance such as whistleblowing in order to eliminate the misfits and therefore demand an appropriate process to reestablish the balance of ESG – if not, due to their principle-based approach they are much likely to quit than more mature generations such as baby-boomer. And if they are not quitting, they are consequently becoming a valid thread of insider compliance issues sooner than later.

Last but not least: This blink intended to show by example that there is a tremendous movement going on. Since this movement is about people with individual goals and dreams in very divers initial positions and points of view, it becomes more and more important to accept the circumstances and face the fact that the playing field for compliance management becomes as volatile as the business environment. Volatility causes exceptions and unexpected outcomes which call for a higher flexibility within the systems - even the compliance systems. Therefore, there will be negotiations about compliance which have to be holistically thought through and for long-term.

Compliance has never been more agile and demanding than today…

[13] I assume this will be a matter to industries and German Companies that are subject to the new Supply Chain Act (Lieferkettengesetz) that aims to protect the rights of people who produce goods for the German market, because they must set up grievance mechanisms and report on their activities. They have to vis à vis their direct suppliers; even indirect suppliers are involved as soon as the company receives substantiated reports of human rights violations at that level.

[14] Zbyslaw Dobrowolski, Grzegorz Drozdowski, Panait Mirela, *Understanding the Impact of Generation Z on Risk Management—A Preliminary Views on Values, Competencies, and Ethics of the Generation Z in Public Administration"*, 19 International Journal of Environmental Research and Public Health 2 (2022).

CORRUPTION IN THE HEALTHCARE SECTOR. CRIMINAL LAW ASSESSMENT ON CORRUPTIVE BEHAVIOR IN THE MEDICAL SECTOR (2020)

Book Review

Original: Korruption im Gesundheitswesen. Strafrechtliche Beurteilung korruptiven Verhaltens im Medizinsektior

Hendrik Schneider

AUTHOR

Prof. Dr. jur. Hendrik Schneider, Founder and Content Curator of CEJ, studied at the Johannes Gutenberg University in Mainz, where he received his doctorate on a criminological topic and his habilitation on a criminal law topic. Between 2006 and 2020, he held the Chair of Criminal Law, Criminal Procedure Law, etc., at the Faculty of Law, University of Leipzig as a full university professor. His research and practice focus is on medical and white collar criminal law as well as white collar criminology. Prof. Dr. Hendrik Schneider is chairman of the AKG expert committee "Fachbeirat Healthcare Compliance", member of the advisory board of the journal "Der Krankenhaus-JUSTITIAR", renowned scientific author and since September 2020, as a licensed attorney, owner of the law firm for business & medical criminal law in his hometown Wiesbaden.

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I. AUTHOR

Dr. Elias Schönborn is a Senior Associate at DORDA Rechtsanwälte GmbH in Vienna and member of the law firm's Dispute Resolution/White Collar Crime team. He specializes in anti-corruption law, white collar crime, compliance as well as civil procedural law matters. He passed the Austrian bar exam in 2020 with distinction and advises and defends clients in complex and cross-border business cases. Furthermore, he represents aggrieved parties in criminal proceedings in asserting their civil claims by way of joining the proceedings as a private party. Elias is the author of numerous publications and articles on all areas of white collar crime, corruption law and compliance. In 2020, his monograph on the topic of anti-corruption in the health sector was published by Linde. DORDA Rechtsanwälte GmbH ranks among the leading law firms in Austria and advises domestic and international clients in all relevant areas of business law. Currently, Legal 500 ranks the law firm in Tier 1 for White Collar Crime (including fraud). For further information, visit https://www.dorda.at/en.

II. REVIEW

It is always worthwhile to think outside the box. Dr. Elias Schönborn, the author of the work under review, is a lawyer in Vienna, a certified compliance officer and the author of numerous publications on corruption offenses under Austrian criminal law. Although his book on corruption in the healthcare sector is primarily addressed to the healthcare market of our neighboring country, it utilizes all relevant literature penned by German authors and provides a comparative legal overview. The work analyzes all relevant issues from the perspective of the scientifically working practitioner and is therefore also recommended to German readers. This applies not only to companies in the medical device and pharmaceutical industries that want to cooperate with healthcare professionals in Austria, but also due to the cross-national approach, to in-house counsel and compliance officers in German hospitals.

Schönborn turns to the legal situation in Germany, if only because the “special criminal offenses” of corruption in the healthcare sector have been establishes in this country since 2016, for which there is no counterpart in Austrian criminal law. In terms of legal policy, the author argues against the introduction of corresponding criminal offenses on the basis of considerations on the protected legal interest of §§ 299a, b StGB and on the subsidiarity of criminal law (p. 248 ff.), although contract physicians and dentists, like pharmacists, for example, are not covered by the criminal offenses of the current Austrian criminal law.

The scope of the protection of legal interests under criminal law in both countries is largely the same for official offenses. These are relevant if the recipient is a public official. These are, for example, the employees of “public Hospitals” (p. 96 ff.) as well as of “university hospitals”, “army hospitals” and “outpatient clinics operated by health insurance institutions”. It corresponds to the legal situation in Germany that the employees in church hospitals and physicians in private practice are not public officials and therefore do not fall under the official offenses of §§ 305 ff. ÖStGB or §§ 331 ff. DStGB. The attending physician is also not to be classified as a public official and therefore falls through the cracks of Austrian, but not German criminal law, because §§ 299 a, b DStGB are applicable in this respect.

The analysis of Austrian jurisdiction on the relevant case constellations (pp. 86 ff., 131 ff.), which has

received little attention in Germany, is extremely interesting. The jurisdiction of our neighbor interprets the concept of advantage more narrowly, also with a view to private autonomy, and does not regard the offer to generate income by concluding a contract as an advantage (on criticism of the case law of the BGH. Schneider, in: FS (commemorative publication) Seebode, 2008, p. 331 et seq.).

Excessive fees, e.g. for giving a lecture, should therefore not be an indication of the existence of an unlawful agreement (p. 87). Schönborn, who takes an interdisciplinary look at such case constellations, also assesses the legal situation on the basis of the "Medical Code of Conduct", a 2014 "Announcement of the Austrian Medical Association", which regulates cooperation with the pharmaceutical and medical device industry in a much more precise manner than the German professional law for physicians. Also very interesting is the criminal law examination of benefits in connection with duties of representation" (p. 80 ff.), a problem that, contrary to its considerable practice relevance, is still hardly considered in the relevant works penned by German authors.

Schönborn proves himself to be an excellent expert on the subject. The book should not be missing in any reference library of in-house hospital counsel and compliance officer.