The Role of Corporations in Criminal Justice

(5th AIDP Symposium for Young Penalists,
Freiburg, Germany, 22nd–23rd June 2018)

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Edited by

D BRODOWSKI
M ESPINOZA
E SAAD-DINIZ

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PREFACE

By Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Eduardo Saad-Diniz [*]

This issue of the RIDP builds upon the contributions to the Fifth AIDP Symposium for Young Penalists, which convened on 22 and 23 June 2018 in Freiburg, Germany. It rounded off a week-long program on the Prevention, Investigation, and Sanctioning of Economic Crime, and supplemented the Freiburg 2018 AIDP Conference and International Colloquium on Section III of the XXth AIDP International Congress of Penal Law.

The German National Group of the International Association of Penal Law (AIDP Deutschland e.V.) and the Max Planck Institute for Foreign and International Criminal Law (MPICC) jointly hosted the symposium, which was organized by the editors of this issue.

Also on behalf of the Young Penalists, we would like to thank the Max Planck Institute and in particular Prof. Dr. Dr. h.c. mult. Ulrich Sieber for their support in Freiburg and beyond, the AIDP and in particular Prof. Dr. Gert Vermeulen for granting us the opportunity to put together this issue of the Revue, and to Ligeia Quackelbeen, Nina Peršak and Christopher Blakesley for their invaluable editorial support.

[*] Dominik Brodowski is junior professor of criminal law and criminal procedure at Saarland University and a member of the AIDP Young Penalists Committee; Manuel Espinoza de los Monteros de la Parra is president of the AIDP Young Penalists Committee and partner at Worth Street Group; Eduardo Saad-Diniz is professor of criminology and criminal law at the Ribeirão Preto Law School and in the Program for Latin American Integration, University of São Paulo, Brazil, and a member of the AIDP Young Penalists Committee.

SETTING THE SCENE

THE ROLE OF CORPORATIONS IN CRIMINAL JUSTICE – AN INTRODUCTION

By Dominik Brodowski[*]

Abstract

In the corporative turn of criminal justice, most focus is spent on how to shape criminal, quasi-criminal or para-criminal liability of corporations. However, corporations are not only suspects and accused in criminal proceedings, they are also victims of crime. Their premises may be searched and their property may be seized in criminal proceedings against third parties; and they may be required to respond, as non-accused third parties and in witnesses-like situations, to requests for information. And corporations may even play investigatory or adjudicatory roles in criminal justice. In this introductory contribution and on the background of the general design and the general aims of criminal law and criminal procedure (1.), I will discern four roles (2.) and highlight five common themes of corporate involvement in criminal justice (3.).

1 The Classic Triangles of Corporate Crime, Criminal Law, and Criminal Procedure

Discussions on corporations in criminal justice usually tend to focus on three major topics: Whether and how to hold corporations liable for crimes (corporate criminal liability[1]), how to incentivize and optimize internal structures, procedures, and normative frameworks on the prevention and repression of corporate crime (criminal compliance[2]), and then

[*] Junior Professor of Criminal Law and Criminal Procedure, Saarland University, Saarbrücken, Germany; member of the AIDP Young Penalists Committee (2014-2019); secretary of the German AIDP national group.

[1] The literature on this topic is extensive; pars pro toto, see Dominik Brodowski, Manuel Espinoza de los Monterros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014); Marc Engelhart, *Sanktionierung von Unternehmen und Compliance* (Duncker & Humblot, 2nd edn 2012); James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Rutledge 2011); Martin Henssler, Elisa Hoven, Michael Kubiciel and Thomas Weigend, 'Kölner Entwurf eines Verbandssanktionengesetzes' [2018] 7 NZWiSt 1; Matthias Jahn, Charlotte Schmitt-Leonardy and Christian Schnoop, 'Unternehmensverantwortung für Unternehmenskriminalität – "Frankfurter Thesen"' [2018] wistra 27; Eberhard Kempf, Klaus Lüderssen and Klaus Volk (eds) *Unternehmensstrafrecht* (de Gruyter, 2012); William S Laufer, *Corporate bodies and guilty minds* (University of Chicago Press 2006); Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Springer 2011); Charlotte Schmitt-Leonardy, *Unternehmenskriminalität ohne Strafrecht?* (CF Müller 2013); Wolfgang Wohlers, 'Grundlagen der Verbandsverantwortlichkeit' [2018] 7 NZWiSt 412; Liane Wörner, 'Täterschaft und Teilnahme vor den Herausforderungen von Gremienentscheidungen und Organisationsverschulden – aus deutscher Sicht' (2017) 5(1) Journal of Penal Law and Criminology 27 <https://cdn.istanbul.edu.tr/file/1CD58DF90A/F9EAEB36C0B34CC1AD87B8464759FAF2?doi=> accessed 14 January 2019. See additionally William S. Laufer, 'Promoting a Progressive Corporate Criminal law' (2018) 89(1) RIDP 39 (in this issue); Amalia Orsina, 'Reactive fault: the "New" Frontier in Corporate Criminal Liability' (2018) 89(1) RIDP 177 (in this issue).

[2] The literature on this topic is extensive; *pars pro toto*, see Dennis Bock, *Criminal Compliance* (Nomos 2011); Engelhart (n 1); Anotonio Fiorella, *Corporate Criminal Liability and Compliance Programs: Toward a Common Model in the European Union* (Jovene 2012); Jahn, Schmitt-Leonardy and Schnoop (n 1); William S Laufer, 'The

specifically the legal framework for internal investigations[3]. Besides the criminological, constitutional (including human rights protection), and international aspects which need to be taken into account when addressing these aspects, it is always worth remembering the ultimate aims of criminal justice and to try to align the solutions in one specific field – here: economic misbehaviour – with the general design of criminal justice.

In terms of substantive criminal law, the general design of criminal justice is formed by a triangle of retribution/pacification, prevention and regulation. The traditional absolute theories of criminal justice focusing on retribution or even retaliation have been supplemented if not replaced by a (relative) paradigm of preventing future (re-)offending through criminal punishment. This is accompanied by the aim of what I call societal pacification, and which is linked to the expressive or communicative function[4] of criminal justice. In a nutshell: to avoid vigilante justice, victims in particular and society in general must see (public) justice being done.[5] Whether substantive criminal law is furthermore about regulating behaviour is highly disputed, not only in German criminal legal theory. Traditionally, some consider criminal law to be special, limited to the protection of specific legal interests, and not available to the state (or the legislature in particular) to improve society and/or to regulate behaviours beyond the most basic rules necessary for a society to function. I tend to disagree: as long as the constitutional limits of criminal law are obeyed[6], criminal law needs not stay in the past and regulate only social behaviours which already were a problem in the past (such as homicide, theft, fraud), but may also be utilized to

compliance game' (2018) 988 Revista dos Tribunais 67; Thomas Rotsch (ed), *Criminal Compliance* (Nomos 2014); Ulrich Sieber and Marc Engelhart, *Compliance Programs for the Prevention of Economic Crimes: An Empirical Survey of German Companies* (Duncker & Humblot 2014). See additionally Melena Krause, 'The Impact of Compliance on Liability and Sentencing of Corporations – a Comparable Approach between Germany and the US' (2018) 89(1) RIDP 189 (in this issue); Silvia Massi and Anna Salvina Valenzano, 'Compliance Programs and Legal Entity's Safeguards in Criminal Proceedings' (2018) 89(1) RIDP 303 (in this issue); Eduardo Saad-Diniz, 'Transforming the Role of Corporations in Criminal Proceedings: Ideas on Compliance and Corporate Victimization' (2018) 89(1) RIDP 73 (in this issue); Yuning Ruiheng, 'Carrot and Stick: the Liability Regime and Compliance Program Incentivizing – a Comparison between the USA and Germany' (2018) 89(1) RIDP 202 (in this issue).

[3] The literature on this topic is extensive; *pars pro toto*, see Thomas Knierim and Markus Rübenstahl, *Internal Investigations* (2nd edn, C.F. Müller 2016); Paul Lomas and Daniel J Kramer (eds), *Corporate Internal Investigations* (2nd edn, OUP 2013); Stephan Spehl and Thomas Grützner, *Corporate Internal Investigations* (Hart 2013). See additionally Ana E Carrillo del Teso, 'Corporations in criminal proceedings: how do internal investigations affect employees' human rights?' (2018) 89(1) RIDP 293 (in this issue); Sergio Herra, 'Key Elements for Conducting Internal Investigations' (2018) 89(1) RIDP 263 (in this issue); Anne Schneider, 'Search and Seizure of Documents Generated in Internal Investigations – Lessons to Learn from European law' (2018) 89(1) RIDP 315 (in this issue).

[4] See, *pars pro toto*, Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397, 400 ff.

[5] On the famous saying 'Not only must Justice be done; it must also be seen to be done', see R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256.

[6] This includes the constitutionality of the behavioral norm (*Verhaltensnorm*), including its conformity with human rights and with the principle of proportionality, as well as a limited understanding of the *ultima ratio* principle to criminal justice. See additionally Matthias Jahn and Dominik Brodowski, 'Krise und Neuaufbau eines strafverfassungsrechtlichen Ultima Ratio-Prinzips' [2016] 71 Juristenzeitung 969 with further references.

address new, increased, or pressing problems of today (such as sexual exploitation and harassment, environmental damages, and digital crimes).

In relation to criminal procedure and its intertwining with substantive criminal law, three goals are at the core of modern criminal procedure. Besides the quest to determine the truth on the accusation – so that those but only those who committed a crime are sentenced to an adequate punishment –, there exist the partially conflicting, partially aligning aims to provide a decision-making process, and 'to provide a platform, rich in symbols and in symbolic value, for people to be heard: For society and their representatives in court (especially prosecutors and judges), when they accuse or adjudicate someone under the view of the public …. For the defendant, who has the fundamental right to be heard in court. And … criminal procedure may provide a platform for victims to be heard, either at witnesses or even as formal participants and co-prosecutors … in a criminal trial.'[7]

This complicated setting of criminal justice in its substantive and procedural dimensions becomes even more complex in an economic context, where a multitude of actors are involved, each with his or her individual (and possibly conflicting) aims. Furthermore, societies tend to wish to cause no harm to the economy in general, but to protect the jobs, economic assets, and economic future prospects. Therefore, the regulatory impact on (inland) corporations by means of criminal justice tends to be reluctant, limited[8], if not look-awayish.[9] This underlines the need to find targeted, well-balanced but decisive approaches to corporate involvement in crime.

2 Broadening the Scope: Four Roles of Corporations in Criminal Justice

In order to find such well-balanced approaches, it is necessary to broaden the picture and to look at all roles corporations play in criminal proceedings[10]: If one parameter of corporate involvement in criminal justice is changed, one needs to be aware of the consequences and implications this causes for other elements of criminal justice. For example, determining who represents a corporation in a trial against the corporation may set a precedent on who represents a corporation when it participates in another criminal trial as a victim. And the

[7] Dominik Brodowski, 'Models of Economic Criminal Procedure. The intricate multi-actor setting of criminal justice in the field of the economy' in Eduardo Saad-Diniz, Pedro Podboi Adachi and Juliana Oliveira Domingues (eds), *Tendências em governança corporativa e compliance* (LiberArs 2016) 101, 102.

[8] For the prime example of the US criminal justice system not thoroughly enforcing sentencing against US corporations, see Ezra Ross and Martin Pritikin, 'The Collection Gap: Underenfocement of Corporate and White-Collar Fines and Penalties' (2010) 29 (2) Yale Law & Policy Review 3 <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1613&context=ylpr> accessed 14 January 2019.

[9] The prime example in a European context is the first leading case on criminal justice decided by the European Court of Justice: Greek officials were alleged to be complicit in subsidies fraud to the detriment of the European Communities. Nonetheless, Greece failed to investigate and prosecute these well-founded allegations for the presumed reason that the fraudulent subsidies were favorable to the Greek economy. See ECJ, Case 68/88 *Commission v. Greece* [1989] ECR 2965.

[10] Beyond the four roles highlighted here which directly relate to a criminal proceeding, corporations may, for example, also play a strong role in shaping the policy on criminal justice.

more prominent the role of 'bad' corporations is as suspects and accused in criminal trials, the more 'good' corporations may wish – and have legal standing to – represent themselves as victims of crimes.

2.1 Corporations as Suspects and Accused

The most prominent role corporations play in criminal proceedings is that of a suspect or accused. It is also the role which is discussed most extensively in contemporary legal literature.[11] Obviously, this role depends on the existence of some form of corporate (quasi-/para-)criminal liability and its framing, especially in terms of attribution: which acts and omissions by natural persons (known or unknown), which knowledge and intentions by natural persons (known or unknown), which data received or stored by the corporation and its computer systems are to be attributed to corporations? Additionally, further questions of the general part – such as relating to jurisdiction, justification, exculpation and sanctioning – may require additional attention in relation to corporations.[12] In terms of substantive criminal law, criminal justice systems must decide whether to limit corporate criminal liability to specific crimes, and whether specific crimes should be drafted with the corporate context in mind, such as criminal law statutes on corruption. Last but not least, procedural questions and especially procedural rights of corporations such as *ne bis in idem*[13], nemo *tenetur*[14] and the options for diversion (especially by NPAs and DPAs) including their rationale[15] are closely linked to the role of corporations as suspects and accused.[16]

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[11] The literature on this topic is extensive; *pars pro toto*, just see Dominik Brodowski, 'Minimum Procedural Rights for Corporations in Corporate Criminal Procedure' in Dominik Brodowski, Manuel Espinoza de los Monterros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014), 211; Piet Hein van Kempen, 'Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR' (2010) 14.3 Electronic Journal of Comparative Law <http://www.ejcl.org/143/art143-20.pdf> accessed 14 January 2019; Ingeborg Zerbes and Mohamad El-Ghazi, 'Unternehmensstrafprozess – Überlegungen zur verfahrensrechtlichen Seite des "Kölner Entwurfs"' [2018] 7 NZWiSt 425.

[12] See, e.g., Krause (n 2); Victor Yurkov, 'Restorative Justice for Victims of Corporate Crime: Existing Practices and Approaches for the Future' (2018) 89(1) RIDP 113 (in this issue), and, more generally, Laufer (n 1), Orsina (n 1) and Saad-Diniz (n 2).

[13] See, e.g., Brodowski (n 11) 223; Annarita De Rubeis, 'Ne Bis in Idem and Corporate Liability: are Corporations and its Agent really Different Persons?' (2018) 89(1) RIDP 231 (in this issue); Kilian Wegner, 'Prohibition of Double Jeopardy ("Ne Bis in Idem") in Transnational Criminal Proceedings against Corporations' (2018) 89(1) RIDP 217 (in this issue).

[14] See, e.g., Brodowski (n 11) 221–223; van Kempen (n 11) 15–16; Ana Maria Neira Pena, 'Corporations as Rights Holders in Criminal Proceedings: Special Reference to the Right against Self-Incrimination' 89(1) RIDP 275 (in this issue).

[15] See, e.g., Susana Aires de Sousa, 'The Relevance of the Collaboration of the Corporation in Criminal Proceedings' 89(1) RIDP 139 (in this issue); Marco Colacurci, 'Corporate Criminal Liability and Negotiated Justice in Italy: Something New under the Sun?' 89(1) RIDP 139 (in this issue); Martina Galli, 'The Effect-Oriented Approach in Criminal Proceedings against Corporations' 89(1) RIDP 151 (in this issue); Federico Mazzacuva, 'Corporate liability and Diversion: towards a New Criminal Law for Collective Entitites?' 89(1) RIDP 163 (in this issue).

[16] See additionally Schneider (n 3), Massi and Salvina Valenzano (n 2) and Lorena Varela, 'Biases in Judgment of White-Collar Crimes' 89(1) RIDP 51 (in this issue).

2.2 Corporations as Victims

It is well accepted that victims, including corporations, have standing in civil court, where they are able to claim (at least) just compensation for the damages they suffered because of a crime. Beyond this, it is a well-noted trend of contemporary criminal justice that it puts stronger emphasis on the victim and victim participation in criminal proceedings.[17] It should be noted that this trend does not only relate to natural persons as victims: as early as 1958, the German social-democratic party was recognized as a victim of defamation and allowed to participate in the trial as a formal *Nebenkläger*, a co-prosecutor with notable but limited rights under §§ 395 ff. German Code on Criminal Procedure.[18] While some in German criminal law literature consider this right to be limited to natural persons nonetheless,[19] it becomes ever more difficult to deny corporations the role as victims in criminal proceedings and related participation rights when they also may be subject to criminal proceedings as suspects, accused and defendants.[20] A fine distinction must be drawn, however, in terms of the protection of personal life, limb, and freedom by means of criminal law: in such cases, any specific victim rights – such as for state-sponsored compensation[21] – is obviously limited to natural persons.

2.3 Corporations as Witnesses or Third Parties

A legal person cannot witness events on its own, but only through its agents and employees. Therefore, criminal justice can and should, in principle, refer directly to natural persons when it requests witnesses to testify in court, before public prosecutors or the police. Yet again, the picture may be painted more broadly: Within the mist of corporations it is often unclear which natural person has witnessed an event. Corporations tend to obtain large amounts of data – also through automatic means – which is not witnessed by anyone, but merely accessible to the corporation. For example, credit card transactions issued online are not witnessed by any employee of the bank, but only registered in the financial institution's computer systems. In such cases, the most suitable means for the criminal justice system to

[17] See, e.g., the European Union Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime; OJ L215/57, and – critically and pointedly – Helmut Pollähne, 'Zu viel geopfert? Eine Kritik der Viktimisierung von Kriminalpolitik und Strafjustiz' [2016] Strafverteidiger 671.

[18] Landgericht Würzburg, [1959] Neue Juristische Wochenschrift 1934.

[19] Bernhard Weiner, '§ 395' in Jürgen-Peter Graf (ed), BeckOK StPO mit RiStBV und MiStra (31rd edn, Beck 2018) mn 16 (only 'living' persons).

[20] But see the criticism by Patryk Gacka, 'Institutions and Organizations as Victims of International Crimes? A Critical Analysis' 89(1) RIDP 87 (in this issue), as well as the discussion on corporate victimhood by Saad-Diniz (n 2).

[21] See, e.g., the aforementioned EU Directive 2012/29/EU […] establishing minimum standards on the rights, support and protection of victims of crime, OJ L215/57 (n 17).

access data are (data) production orders.[22] Closely related are data retention requirements, such as are discussed and partially implemented for telecommunications meta-data.[23]

Moreover, it is a largely unsolved question whether a corporation, on its own right, may deny the execution of production orders (1) on the basis of its own immunities and privileges – such as when the addressee is a law firm –, (2) on the basis of protection of (potential) self-incrimination (*nemo tenetur*), and/or (3) on behalf of natural persons who have entrusted the corporation with the storage of the data.[24] Last but not least, it is all but surprising that corporations put special emphasis on receiving compensation for the burden they have to bear as the addressee of data production and/or data retention requirements.

2.4 The Privatization of Criminal Justice: Corporations as Investigators and Adjudicators

I have already mentioned internal investigations and the role corporations play therein is at the heart of contemporary discussion of corporate roles in criminal justice.[25] While authorities rarely, if at all, formally require corporations to conduct internal investigations of criminal offenses and share the information on individual wrong-doing with them, such corporate behaviour is regularly a necessity for deferred or non-prosecution of corporations,[26] or at least a strong mitigating factor in sentencing.[27] This constitutes a sort of 'privatization of criminal justice', where the state externalizes (large parts of) the investigation of crimes to a private entity. The risks inherent to this privatization are evident: the corporation may itself be involved in the crime, the protections of criminal procedure do not apply (at least not directly) vis-à-vis the corporation as an investigator,[28] and judicial supervision is diminished.

Beyond this classic model of internal investigations, corporate involvement as an investigator of crimes increases: corporations are regularly contracted for forensic analysis, such as of computer storage devices. While such forensic analysis is to be conducted under the supervision of state authorities (judges and/or prosecutors), it nonetheless puts parts of the investigation in the hands of a corporation. In more complex cases, corporations are even entrusted with following leads (such as 'open-source intelligence' or OSINT leads) and

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[22] On the dubious differing practice seen in Germany, just see Dominik Brodowski, 'Anmerkung' [2010] Juristische Rundschau 546, 548.

[23] See, e.g., the European Union Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L105/54, which was held null and void by ECJ, joint cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2104:238; see additionally ECJ, joint cases C-203/15 and C-698/15 *Tele2 Sverige* ECLI:EU:C:2016:970.

[24] See, e.g. the discussion on the (EU Commission) Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final of 17.04.2018.

[25] See above at n 3.

[26] Just see Aires de Sousa (n 15); Colacurci (n 15); Galli (n 15) and Mazzacuva (n 15).

[27] Just see Krause (n 2); Yuning (n 2).

[28] See Carrillo del Teso (n 3), Schneider (n 3).

obtaining evidence themselves, and become (informal) partners in transnational joint investigation teams. This may even lead to public-private-partnerships, where corporations act in unison with the authorities to further the investigation (such as through information sharing) or strengthening the factual sanctioning (such as by terminating contracts or services, which is most effective if done business-wide or by a corporation holding a monopoly[29]).

In some contexts, corporations even move beyond a merely supportive role. In the regulation of online hate speech, it is oftentimes the corporations which, in a first step, decide whether to 'sanction' a comment by blocking access to it or by remove it, and/or whether to inform the authorities about such misconduct for additional (criminal) sanctioning. And in the context of production orders for e-evidence addressed at service providers, the EU commission recently proposed to empower corporations to adjudicate matters originally reserved for judicial authorities: whether a request for such data is manifestly abusive or manifestly violates the EU Charter of Fundamental Rights.[30]

3 Five Common Threads of Corporate Involvement in Criminal Justice

The complexity of corporate involvement in criminal justice further increases as corporations may play more than one of the aforementioned four roles, even at the same time and with regard to the same criminal allegation. Within this maze, it therefore becomes all the more necessary to find common threads of corporate involvement in criminal justice:

3.1 First Thread: Corporations as Economical Actors

Corporations are economic actors and therefore primarily (but not solely) deal on economic terms. This means that a rational-choice assumption – that corporations act based on what is best for them economically – may be more valid in an economic context than in other contexts. This allows corporate behaviour to be analysed on economic terms, such as by game theory,[31] and therefore enables a firmer grip on corporations for regulators. These regulators nonetheless need to take into account that the thought setting of corporations tends to focus on economically but not necessarily on morally or legally sound outcomes.

[29] A prime example may be seen in refusing admission to soccer matches for persons suspected and/or convicted of hooliganism; see Alexander Hellgardt, 'Wer hat Angst vor der unmitttelbaren Drittwirkung? Die Konsequenz der Stadionverbot-Entscheidung des BVerfG für die deutsche Grundrechtsdogmatik' [2018] JZ 901 with further references.

[30] Article 14 paragraph 4 lit. f Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final of 17.04.2018. On this aspect of the Commission proposal, see Christoph Burchard, 'Der grenzüberschreitende Zugriff auf Clouddaten im Lichte der Fundamentalprinzipien der internationalen Zusammenarbeit in Strafsachen – Teil 2' [2018] ZIS 249, 259 ff.; Dominik Brodowski, 'Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick' [2018] ZIS 504; Valsamis Mitsilegas, 'The privatisation of mutual trust in Europe's area of criminal justice: The case of e-evidence' (2018) 25(3) Maastricht Journal of European and Comparative Law 263.

[31] See generally, John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press 1944), and, on matters of criminal procedure, Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2008) 61 Stanford Law Review 271; Brodowski (n 7) 102.

This plays into the hands of corporations aiming at creative compliance with legal requirements, or even at fraudulent compliance whenever the risk of sanctioning is considered to be low.[32]

3.2 Second Thread: Accumulation and Flexibility of Power

Corporations bundle the power and capabilities of people and economic goods. In particular, they accumulate economic power with the goal to increase the economic good. In fact, a corporation-based free-market economy has, so far, generally proven to be of advantage to society and economic progress. However, the power of corporations means that they typically are, in comparison to natural persons, in a position of relative strength when they are in the role of the accused (versus the state), in the role of the victim (versus the suspect), in the role of investigator or adjudicator (again versus the suspect), and also in the role of a third party (versus the state and versus the suspect).

Criminal justice systems are traditionally designed with solely natural persons as accused, witnesses and victims in mind. Whenever corporations take on one of the aforementioned roles, their accumulation (and flexibility) of power therefore bears the risk that imbalanced situations occur which are detriment to those in an opposing role. What is worse, tweaking the criminal justice system to better deal with powerful corporations bears the risk of decreasing the rights of all suspects, accused, and defendants, including and especially of natural persons.

3.3 Third Thread: Distribution and Attribution of Knowledge and Power

The accumulation of people working together in a corporation, as well as the legal structure of corporations, means that knowledge, acts and omissions linked to a corporation may be difficult to track down to individual natural persons within the corporation. Which individual person within a large multi-national corporation did know, or should have known about a specific circumstance? Which individual person within such a corporation decided and acted in a particular manner, and which person failed to act in light of the circumstances known to him or her? These questions of attribution, of responsibility, and of liability are quite diffuse, especially compared to the clear-cut examples typically used in criminal law: those typically deal with one (and only one) person shooting at another person, or stealing something from another, etc. It is clear that such a limited outlook on attribution is highly insufficient within a corporate context.

3.4 Fourth Thread: Corporations as Fictitious Entities

One should never forget that corporations are fictitious entities. They are only formed by law, granted rights only by law (and not by human or corporate 'nature'), and exist only under the umbrella of the law. In short: the law giveth, and the law taketh away. This means

[32] On capitulative, committed, and creative compliance, see fundamentally Doreen McBarnet, 'When compliance is not the solution but the problem' in John Braithwaite (ed), *Taxing Democracy* (Ashgate 2003) 229 ff. See also Eduardo Saad-Diniz, 'A criminalidade empresarial e a cultura de compliance' (2014) 2 Revista Electrônica de Direito Penal AIDP-GB 112 ff.

that the legislator in particular and regulators in general have much larger leeway to decide between various regulatory options, can differentiate between corporate criminal trials and criminal trials against natural persons, and can even impose the 'corporate death penalty' even though this form of punishment is, from a human rights standpoint, unacceptable for natural persons.

3.5 Fifth Thread: Piercing the Corporation's Veil

And yet, it is important to remember what is behind the veil of legal persons. Legal persons and corporations in particular do not exist for their own sake, but for the sake of the people who accumulate goods and labour under the legal framework provided for by the law. When discussing the sanctioning of corporations, the decisive question therefore needs to be of how it affects the natural persons (employees, shareholders, stakeholders, customers, etc.);[33] when discussing corporations as victims, the decisive question is of how regulating this role affects the natural persons within the corporation (again employees, shareholders, stakeholders, etc.) and beyond (especially those suspect and accused of the crime committed against the corporation).[34] Immunities and privileges in particular, and limitations to data production requirements in general must not be granted for the sake of the corporation, but for the sake of the natural persons working in or working with a corporation.

4 Outlook

In this introductory contribution, I could only set out these roles corporations increasingly play in criminal justice, and common threads or themes which may be found when analysing these roles and the criminal justice framework for corporations. This setting also served as the background for the call for paper and the structuring of the 5th AIDP Symposium for Young Penalists, with a clear focus on setting the scene and on exemplifying the breadth of the topic at stake. Its main results, which are published in this issue of the RIDP and easily fit into this setting, therefore strive to provide building blocks in the task of shaping corporate involvement in criminal procedure.

[33] On the 'effects-oriented approach', see Galli (n 15); on the question of *ne bis in idem* between a corporation and its agents, see De Rubeis (n 13); on *nemo tenetur*, see Neira Pena (n 14). See additionally Varela (n 16) on biases in the judgment of white-collar crimes.

[34] See Gacka (n 20).

Selected Literature

Brodowski D, Espinoza de los Monterros de la Parra M, Tiedemann K and Vogel J (eds), *Regulating Corporate Criminal Liability* (Springer 2014)

– 'Models of Economic Criminal Procedure. The intricate multi-actor setting of criminal justice in the field of the economy' in Eduardo Saad-Diniz, Pedro Podboi Adachi and Juliana Oliveira Domingues (eds), *Tendências em governança corporativa e compliance* (LiberArs 2016) 101

Engelhart M, *Sanktionierung von Unternehmen und Compliance* (Duncker & Humblot, 2nd edn 2012)

Henssler H, Hoven E, Kubiciel M and Weigend T, 'Kölner Entwurf eines Verbandssanktionengesetzes' [2018] 7 NZWiSt 1

Jahn M, Schmitt-Leonardy C and Schnoop C, 'Unternehmensverantwortung für Unternehmenskriminalität – "Frankfurter Thesen"' [2018] wistra 27

Laufer WS, *Corporate bodies and guilty minds* (University of Chicago Press 2006)

– 'The compliance game' (2018) 988 Revista dos Tribunais 67

Pieth M and Ivory R (eds), *Corporate Criminal Liability* (Springer 2011)

Rotsch T (ed), *Criminal Compliance* (Nomos 2014)

Schmitt-Leonardy C, *Unternehmenskriminalität ohne Strafrecht?* (CF Müller 2013)

Sieber U and Engelhart M, *Compliance Programs for the Prevention of Economic Crimes: An Empirical Survey of German Companies* (Duncker & Humblot 2014)

Spehl S and Grützner T, *Corporate Internal Investigations* (Hart 2013)

van Kempen PH, 'Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR' (2010) 14.3 Electronic Journal of Comparative Law <http://www.ejcl.org/143/art143-20.pdf> accessed 14 January 2019

Wohlers W, 'Grundlagen der Verbandsverantwortlichkeit' [2018] 7 NZWiSt 412

OF CORPORATIONS AND INDIVIDUALS

By Stefan Schumann[*]

Abstract

This paper reviews the correlation of corporate criminal liability with the liability of individuals by referring both to practical examples and to legal rules. It aims at demonstrating common interests of corporations and individuals, but also interferences both within and beyond the proceedings establishing these liabilities. It argues that in certain jurisdictions like in the U.S. and in Austria corporate criminal liability is likely to be used also as a tool to ease the investigation of individual liability. And it indicates that corporates' claims for civil liability against those individuals whose criminal acts or whose omission of supervisory measures triggered corporate criminal liability are likely to influence also the correlation of corporate and individual criminal proceedings.

1 Three preliminary observations

1.1 The *Siemens Neubürger* case

In the follow up of the Siemens corruption case(s) in the first decade of this millennium, on 15 December 2008, the Munich I Public Prosecutors' Office ordered Siemens AG to pay a regulatory/administrative sanction of 395 million Euros.[1] The enterprise was held liable for a regulatory/administrative offence by decision makers of the enterprise.[2] The negligent omission of supervisory measures required to prevent contraventions was deemed to be a regulatory offence because such a contravention (here: bribery offences) had been committed and would have been prevented, or made much more difficult, if there had been proper supervision.[3] In short, the sanction against the enterprise responded to non-efficient supervision measures by the former Executive Board members of Siemens AG which did not prevent the establishment and use of slush funds for bribery offences abroad.[4] The administrative sanction was calculated based on a share of 250,000 Euros as a fine and a

[*] Dr. Stefan Schumann is Assistant Professor at Johannes Kepler University Linz and practices as a lawyer in Munich.

[1] The fine order by the Munich PPO was coordinated with the fine orders by the U.S. DoJ and SEC imposed on the Siemens AG, and three of its subsidiaries. In total, the fines sum up to more than 1.6 billion U.S. $, including a fine order by the Munich Regional Court of 4 October 2007, 5 KLs 563 Js 45994/07, in relation to briberies involving a decision maker, <https://openjur.de/u/748600.html> accessed 4 March 2019. For summary information on the 2008 decisions see <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> accessed 4 March 2019.

[2] § 30(1) OWiG (German Act on Regulatory Offences).

[3] §§ 30(1), 130(1) German OWiG.

[4] Bernd von Heintschel-Heinegg, 'Nochmals Schmiergeldaffaire: Staatsanwaltschaft München I erlässt Bußgeldbescheid in Höhe von 395 Millionen € gegen Siemens' (beck-community, 16 December 2018) <https://community.beck.de/2008/12/16/nochmals-schmiergeldaffaire-staatsanwaltschaft-munchen-i-erlasst-busgeldbescheid-in-hohe-von-395-millionen-e-gegen-si> accessed 4 March 2019.

share of 394.75 million Euros intended to confiscate the profits of businesses gained by bribery.[5]

Siemens AG demanded (partial) compensation from its former Board Members. Other than ten of the board members, the former executive board member and CFO *Neubürger* did not accept a compensation agreement proposal. Hence, the enterprise brought civil actions for damage compensation against him, claiming that the non-establishment of an effective compliance system violated his obligations as a board member. Criminal investigations against him were closed already in 2011; either for reasons of non-approval of allegations or minor guilt. The former manager paid 400.000 Euros for charitable objectives.[6] However, the enterprise held upright its claim for civil liability. In December 2013, the court of first instance ordered the former manager to pay 15 million Euros, mainly lawyers' fees of the enterprise, but also black money which was allegedly used for paying corruption fees.[7] The verdict did not enter into force because the manager appealed. Before a 2nd instance decision could have been taken, the case was settled by compromise agreement. In 2014, the former manager agreed to pay a damage compensation of 2.5 million Euros. The agreement was approved by the stockholders' meeting in 2015.[8]

Meanwhile, in November 2014, Greek public prosecutors in Athens filed an indictment for corruption in relation to a Greek telecommunication enterprise, and for money laundering. The former Siemens CFO was one of 64 accused. Tragically, in early 2015 the manager committed suicide. In 2019, the Greek criminal proceedings against others are still ongoing.

What becomes obvious is that the relationship between corporations and individuals involved in corporates' liability goes far beyond criminal or regulatory liability. In practice, the establishment of both individual and corporate criminal liability often cannot be grasped without taking into account civil liability and claims for damage compensation. This is of interest in two ways: on the one hand, the limits to this damage compensation should be discussed.[9] On the other, it is interesting to see that corporations' role in those cases might be twofold, corporations might be seen as being suspects, and victims in the very same case.[10]

1.2 The *ThyssenKrupp* case

In September 2015, the main trial stage of criminal proceedings against seven former steel companies' managers, four of them having been managers at the ThyssenKrupp enterprise,

[5] Based on §§ 30(2), 17(4) German OWiG.

[6] <https://www.zeit.de/2015/23/siemens-heinz-joachim-neubuerger-selbstmord> accessed 4 March 2019.

[7] LG München I, 12/10/2013 – 5 HKO 1387/10 <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2014-N-01998> accessed 4 March 2019.

[8] Siemens General Assembly 2015, TOP 11.

[9] See this paper, section 4.1.

[10] See this paper, section 1.2. and 4.2.

were opened.[11] They were accused of cartel law offences in the market area of steel railroad tracks. It has been reported in the news that ThyssenKrupp enterprise at that time already had paid 191 million Euros of cartel fines, and additionally more than 100 million Euros for damage compensation to their customer, the railroad company Deutsche Bahn.[12] ThyssenKrupp brought civil actions for damage compensation against former staff member already before the criminal trial against the former managers started.[13] In the press, sums allegedly up to 300 million were reported.[14] But then ThyssenKrupp joined the criminal proceedings against their former managers as a victim,[15] hoping to receive '*größtmögliche Aufklärung*', greatest possible investigation of the charges, as the board manager responsible for compliance issues explained to the press.[16]

1.3 The 2015 DoJ *Yates* Memorandum, and its 2018 clarification

Corporations' criminal liability cannot be established without individuals' wrongdoing. Coevally, the relationship between the individuals' being involved and the corporations being accused go far beyond the criminal proceedings, and economic dependence as well as labour law obligations might be used by a corporation to internally investigate and prepare its defence. Typically, corporations' defence depends on individuals' cooperation.

So, it is interesting to see how legislators, law enforcement and judiciaries expect corporations to make use of their opportunities, and to support the investigations against individuals.

On 9 September 2015, U.S. Deputy Attorney General Sally Yates issued the Memorandum on 'Individual Accountability for Corporate Wrongdoing'. Particularly, it states:

To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.[17]

The respective Title '9-28.000 – Principles of Federal Prosecution Of Business Organizations' of the Justice Manual, previously known as the United States Attorneys' Manual (USAM), was adapted coherently, and states in its chapter 9-28.700 on 'The Value of Cooperation' as follows:

In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts

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[11] Reported by Stefan Schumann and Thomas Knierim, 'Wettbewerb im Unternehmensstrafrecht: Individual- vs. Verbandsverteidigung' [2016] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 194, 194.

[12] 'Das Schienenkartell auf der Anklagebank' (FAZ of 15 September 2015).

[13] See LAG Düsseldorf, Partial Judgment of 20 January 2015 – 16 Sa 459/14.

[14] 'ThyssenKrupp verlangt Schadenersatz von Ex-Managern', (WELT of 15 September 2015) <http://www.welt.de/146382564> accessed 4 March 2019.

[15] § 403 German Code of Criminal Procedure.

[16] Donatus Kaufmann (ThyssenKrupp), quoted in WELT (n 14).

[17] <https://www.justice.gov/archives/dag/file/769036/download> accessed 5 March 2019.

relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing.[18]

On 29 November 2018, Deputy Attorney General Rod J Rosenstein announced a revision of the cooperation requirement. In fact, it is rather an adjustment than a revision. It explains to what extent cooperation by the corporation, namely the identification of individuals involved in corporate wrongdoings, can be, and will be, expected. *Rosenstein* restated that the

most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes. So we revised our policy to make clear that absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability. Our revised policy also makes clear that any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct.[19]

In JM 9.-28.700, it was clarified then:

If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit.

As stated by the U.S. Federal Prosecution's JM 9-28.700, it is explained in annotation 13 to the §8C2.5 on the 'Culpability Score', which is a part of the 2018 Chapter 8 U.S. Sentencing Commission's Guidelines on the 'Sentencing of Organizations':

To qualify for a reduction under subsection (g)(1) [on Self-reporting] or (g)(2) [on Cooperation in the investigation], cooperation must be both timely and thorough. […] To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.

[18] <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700> accessed 11 March 2019.

[19] <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0> accessed 11 March 2019.

In conclusion: *Impossibilium non obligatio* – the corporation is not expected to do something which is impossible for the corporation to be done.

2 Establishing corporate criminal liability as a legal construct

2.1 Corporate criminal liability is spreading out

In a historic perspective, corporate criminal liability was hardly a matter. Still today, the famous quotation of Edward, First Baron Thurlow[20], a British Lord Chancellor in the 18th century, vividly points at the main fundamental critics, or challenges to criminal liability of legal persons:

Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?[21]

Savigny (1840)[22] and Engisch (1953)[23] phrase the argument in substantial legal wording. The opposition to corporate criminal liability touches upon the theory of punishment, the preconditions to, and the aim of establishing criminal liability, and of punishment. In the U.S. federal system, corporate criminal liability is commonly accepted since the famous decision in the case of *New York Central & Hudson River Railroad Company v. U.S.:*

We see no reason why a corporation cannot be imputed with the knowledge of unlawful conduct by its agents acting within the scope of their designated authority, which actions accrue to the profit of the corporation. It is well established that corporations may, as a corporate entity, be held responsible for damages in a torts action. In these cases, liability is not imputed to the corporation because it itself participated in the tortuous conduct, but because the tortuous conduct was done for the benefit of the corporation.[24]

In Europe, England (1842) and the Netherlands (1952) are mentioned as early examples of establishing corporate criminal liability.[25] Whereas especially in civil law countries the debate whether or not a legal entity – being a legal construct instead of natural being – can be found 'guilty' has not yet come to an end in research and legal policy, legislators more and more seem to skip this debate. Models of corporate criminal liability, one way or another, are established, and spread out especially during the last two decades in nearly all

[20] Born on 9 December 1731, died on 12 September 1806; Lord Chancellor 1778–1783 and 1783–1792; see Alexander Wood Renton, 'Thurlow, Edward Thurlow, 1st Baron' in Hugh Chisholm (ed), *Encyclopædia Britannica. 26* (Cambridge University Press, 11th ed 1911) 903–904.

[21] Quoted by John C Coffee Jr., 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 386–397, 399–402.

[22] Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol 2 (Veit 1840) 312.

[23] Karl Engisch, in Ständige Deputation des DJT (ed), *Verhandlungen des 40. DJT*, vol 2 (Beck 1953) E 7, E 23 ff.

[24] US Supreme Court (1909) 212 U.S. 481.

[25] Klaus Tiedemann, 'Corporate Criminal Liability as a Third Track' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 11, 13.

regions worldwide.[26] Also (especially but not solely developed) Asian and African States implemented various models of corporate criminal liability.

2.2 From dogmatic to pragmatism – liability instead of guilt, and the debate on effectiveness

An early example of the legislator's pragmatism is to be found in Austria: There, the legislator denoted its law as the '*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG)*' – 'Act on the liability of legal entities for criminal offences' – instead of an 'Act on criminal liability of legal entities'. The term 'criminal liability' seems to be avoided carefully, same as no other reference to a legal entity's '*Schuld*' – the German term for 'guilt' – is to be found in the wording of the act.[27] Especially, in German language the term for a 'suspect' in criminal proceedings refers to the term '*Schuld*' – a suspect is, basically, called a 'Be*schuld*igter', and so he or she is labelled in the Austrian Criminal Procedural Code.[28] Yet, while the Austrian Act on the liability of legal entities orders the applicability of the Criminal Procedural Code as long as no specific rules are established in the Act itself, the legal entity in the focus of such proceedings is denoted by '*belangter Verband*' (which might be translated best as 'the legal entity being prosecuted') but not as '*Beschuldigter*'. And, while the application of both the Criminal Procedural Code and the Austrian Penal Code is ordered as long as no special rules are established in the thirty paragraphs in total of the VbVG, the Act does not designate the legal nature of those proceedings. Instead of calling it criminal proceedings, the procedural section's headline simply is '*Verfahren gegen Verbände*' – 'Proceedings against legal entities'.[29] Meanwhile, only as regards organizational matters it is explicitly ordered that proceedings against legal entities are to be treated as criminal proceedings.[30]

In 2016, the Austrian Constitutional Court held that the Austrian legislator by passing the VbVG established a new category of criminal law which cannot be measured against the principle of guilt. The Court stated that no constitutional principle binds the legislator to the principle of guilt when it decides on how to sanction legal persons.[31]

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[26] For overviews, and comparisons see *inter alia* Mark Pieth and Radha Ivory, 'Emergence and Covergence. Corporate Criminal Liability Principle in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risks* (Springer 2011) 3–60; Tiedemann (n 24); Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 53–70.

[27] See Schumann and Knierim (n 11) 194.

[28] § 48(1) No.2 Austrian CPC.

[29] § 3 Austrian VbVG.

[30] § 14(2) Austrian VbVG: '*Verfahren gegen Verbände gelten im Sinne der Bestimmungen des Gerichtsorganisationsgesetzes, des Staatsanwaltschaftsgesetzes und der Geschäftsordnung für die Gerichte I. und II. Instanz als Strafsachen.*'

[31] VfGH, 2 December 2016, G 497/2015-26, G 679/2015-20, para 50: '*Als von natürlichen Personen verschiedene Träger von Rechten und Pflichten sind juristische Personen rechtliche Konstruktionen, die – in gleicher Weise wie natürliche Personen – durch Teilnahme am Rechts- und Wirtschaftsleben bestimmte Zwecke verfolgen (VfSlg.*

A disclaimer is needed here: for the sake of clarity, this paper uses the terminology of 'corporate criminal liability' and corporations as 'suspects' without thereby taking a decision on the legal nature of those proceedings.

While legislators and courts, but also an increasing part of literature tend either to circumvent, or to overcome,[32] the debate on the concept of guilt, another debate comes up. This debate focuses on the effectiveness of corporate criminal liability. Disciplines other than legal dogmatics, from criminology to organizational theory, significantly contribute to that debate.[33] And the debate on effectiveness has not been decided yet.

2.3 Individual's misconduct triggering corporate criminal liability

Likewise, the debate whether, and how, the traditional concepts of corporate criminal liability need to be refined seems to have just started.[34] A common determinant of all existent concepts is that corporate criminal liability needs to be triggered by an individual's misconduct. In U.S. federal law, the broadest and most encompassing model of corporate criminal liability is applied. Under the *respondeat superior* doctrine (a variation of the vicarious liability doctrine), a corporation is liable for the deeds of its agents, employees, and even independent contractors at times. This liability applies regardless of the agent's rank in the hierarchy of the corporation and the type of infringement as long as, (aa) the agent acted in the course and within the scope of his employment, (ab) having the authority to act for the corporation with respect to the corporate business that was conducted criminally, and, (b) the agent acted, at least in part, with the intent to advance the business interests of the corporation.[35] It is reported that, only occasionally, the courts add a third precondition requiring that the criminal acts were authorized, tolerated, or ratified by corporate

19.522/2011). Mit der Verbandsverantwortlichkeit hat der Gesetzgeber eine (neue) strafrechtliche Kategorie eigener Art geschaffen, die nicht am Maßstab des – von den beiden Antragstellern ins Treffen geführten – Schuldprinzips gemessen werden kann. Dieser verfassungsrechtliche Grundsatz (vgl. VfSlg. 15.200/1998) hat im Individualstrafrecht in Bezug auf natürliche Personen Geltung, nicht jedoch in Ansehung von rechtlichen Gebilden wie juristischen Personen. Ein verfassungsrechtliches Gebot, das den Gesetzgeber iZm der Sanktionierung von Verbänden an das Schuldprinzip bindet, lässt sich weder aus den genannten Garantien noch aus sonstigen verfassungsrechtlichen Vorgaben ableiten.'

[32] Joachim Vogel, 'Unrecht und Schuld in einem Unternehmensstrafrecht' [2012] Strafverteidiger 427–432.

[33] See e.g. in favour Günther Ortmann, 'Für ein Unternehmensstrafrecht – Sechs Thesen, sieben Fragen, eine Nachbemerkung' [2017] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 241–251; critically Ralf Kölbel, 'Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes' [2018] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 407–412.

[34] For an innovative recent proposal see Matthias Jahn, Charlotte Schmitt-Leonardy and Carsten Schoop, 'Unternehmensverantwortung für Unternehmenskriminalität –"Frankfurter Thesen"' [2018] Zeitschrift für Wirtschafts- und Steuerstrafrecht 27–31. For some reflections on this proposal, see Richard Soyer and Stefan Schumann, 'Die "Frankfurter Thesen" zum Unternehmensstrafrecht unter Einbeziehung der Erfahrungen in Österreich' [2018] Zeitschrift für Wirtschafts- und Steuerstrafrecht 321–326.

[35] William Laufer, 'Culpability and the Sentencing of Corporations' (1992) 71 (4) Nebraska Law Review 1049–1094; Eli Lederman, 'Corporate Criminal Liability: The Second Generation' (2017) 46 (4) Stetson Law Review 71–87; Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer 2011), 63–89.

management.[36] When doing so, the approach narrows towards the recent (continental) European model, which itself roots back to Article 2 of the Second Protocol on the protection of the financial interests of the EU from 1997[37] which entered into force only more than a decade later on 19 May 2009. This protocol demands for the establishment of corporate criminal liability where an offence was committed by a person who has a leading position within the legal person and acted for the benefit of the legal person, or where the lack of supervision or control by a such a person having a leading position within the legal person has made possible the commission of an offence for the benefit of that legal person by a person under its authority. While this concept in the 2nd Protocol was limited to certain specific offences, over the years, this model has been extended to a broad variety of criminal offences, and it has been slightly adapted. For example, § 3 of the Austrian VbVG is not limited to specific offences of decision makers or staff members within a legal entity. Potentially, each type of an individual's offence might trigger corporate criminal liability, as long as the offence was committed for the benefit of the legal entity, or by violation of legal obligations of the entity. Furthermore, the individual's offence either needs to be done by a decision maker of the entity, who acts or omits under full responsibility (guilt). Or the infringement of the duty to take care by decision-maker(s) (not necessarily to be identified) enabled or eased the commitment of the staff member's offence.

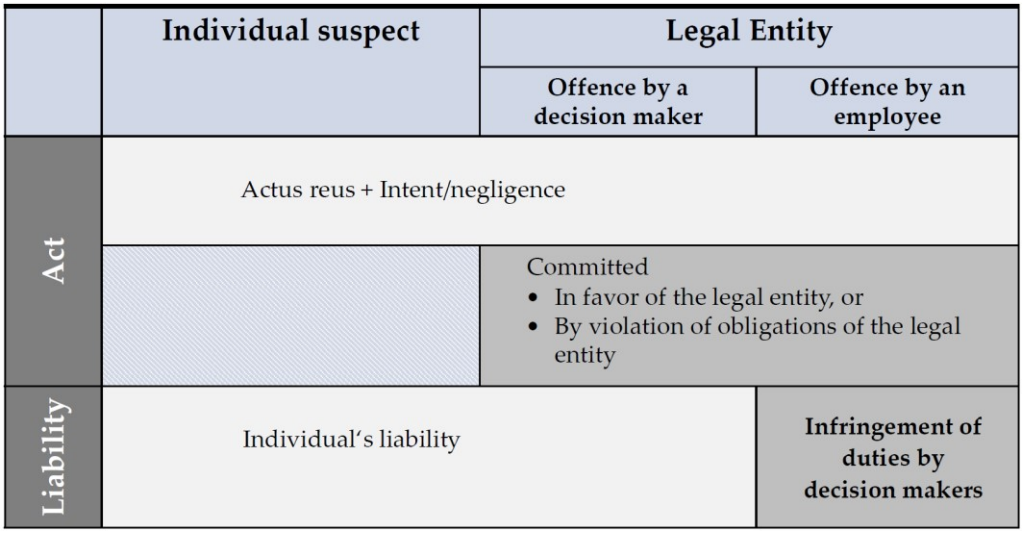

Figure 1. The model of corporate criminal liability according to § 3 Austrian VbVG.[38]

[36] Lederman (n 35) 71–87, who refers for examples to State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 20 (Minn. 1984); and State v. Wohlsol, Inc., 670 N.W.2d 292, 297 (Minn. Ct. App. 2003).
[37] [1997] OJ C 221/12.
[38] Stefan Schumann, unpublished presentation (2015), on file with the author; Soyer and Schumann (n 34), adapted.

3 Establishing corporate criminal liability in practice

The challenges of corporate criminal liability are not limited to the fundamental questions of a corporation's guilt, conscience, or receptiveness for punishment. Rather, when Thurlow misses the 'body to be kicked', he also points out at the 'incorporeality' of corporations which need to act and to be represented by natural persons. This is true not only when it comes to the establishment of corporate liability as a legal construct, but also when it comes to the establishment of a particular corporation's liability in criminal proceedings. Some aspects of the impact of corporate criminal liability to criminal procedures both against corporations and against individual perpetrators shall be focused on in the following chapter. When doing so, the chapter especially refers to the law in Austria, and its application in practice developed in the years since its entry into force in 2006.

3.1 Together but separated – the distinction between the proceedings against individuals and the proceedings against corporations

It has been said before that, while the legislator avoided to clarify the substantial character of criminal proceedings, it is explicitly ordered that for organizational matters those proceedings shall be treated as criminal proceedings. This is the more important since – as a general rule – proceedings against corporations shall be conducted together with the criminal proceedings against the individual perpetrators whose acts or omissions triggered the initiation of corporate criminal proceedings.[39] However, the proceeding against the individual and the one against the corporation are not identical but remain to be formally two proceedings. The court's obligation to deliver two separate judgments, the first against the individual suspect(s) and the second against the corporation, underlines the differentiation of the proceedings.[40]

3.2 Fair trial rights of legal entities

Conceptionally, a corporation facing proceedings on criminal liability is granted the full range of suspects' rights as provided for by the Austrian Criminal Procedural Code.[41] The inner link of the individual's act and the corporation's liability is taken into account. The corporation is granted the full suspects' rights also in the proceedings against the individual perpetrator regardless whether the proceedings are conducted together or separately.[42] The decision makers of the corporation (regardless whether or not they are individual suspects too) and those employees who are suspicious of having committed the offence which triggers the proceedings against the corporation or who are already convicted for these offences shall be interrogated as suspects, and informed accordingly.[43]

[39] § 15(1)1 Austrian VbVG.
[40] § 22 Austrian VbVG; see also OGH (Austrian Supreme Court) 13Os87/15s of 18 December 2015.
[41] § 14(1,3) Austrian VbVG.
[42] § 15(1)2 Austrian VbVG.
[43] § 17(1, 2) Austrian VbVG.

3.3 Mandatory prosecution in proceedings against individuals vs. discretionary power in proceedings against corporations

It is especially the discretionary power of the prosecution in corporate criminal proceedings that makes a difference to criminal proceedings against individuals. In the latter, the principle of mandatory investigation and prosecution applies. In the former, the mandatory initiation of proceedings is complemented by a wide discretionary power to discontinue proceedings. The prosecutor may refrain from continuing or close the proceedings if the assessment of the severity of the offence and the severity of the violation or infringement of duty, the consequences of the offence, the conduct of the corporation after the offence has been committed, the presumed fine and, if so, the already existent or presumed legal disadvantages to the corporation or its owners shows that the prosecution and sanctioning does not seem to be necessary.[44] Proceedings shall not be waived where prosecution seems to be necessary (1) because of a danger of further offences emanating from the corporation, or (2) in order to prevent further offending in the framework of other corporations' business, or (3) due to a specific public interest.

In fact, most of the criminal proceedings initiated against corporations in Austria do not reach main trial. On average, from 2010–2017 approx. 80% of the public prosecutors' decisions made on the merits are decisions for closure/discontinuation. For 2006–2010, a rate of approx. 80–90% is reported.[45]

[44] § 18(1) Austrian VbVG: '*Die Staatsanwaltschaft kann von der Verfolgung eines Verbandes absehen oder zurücktreten, wenn in Abwägung der Schwere der Tat, des Gewichts der Pflichtverletzung oder des Sorgfaltsverstoßes, der Folgen der Tat, des Verhaltens des Verbandes nach der Tat, der zu erwartenden Höhe einer über den Verband zu verhängenden Geldbuße sowie allfälliger bereits eingetretener oder unmittelbar absehbarer rechtlicher Nachteile des Verbandes oder seiner Eigentümer aus der Tat eine Verfolgung und Sanktionierung verzichtbar erscheint. Dies ist insbesondere der Fall, wenn Ermittlungen oder Verfolgungsanträge mit einem beträchtlichen Aufwand verbunden wären, der offenkundig außer Verhältnis zur Bedeutung der Sache oder zu den im Fall einer Verurteilung zu erwartenden Sanktionen stünde.*'

[45] Walter Fuchs, Reinhard Kreissl, Arno Pilgram and Wolfgang Stangl, *Generalpräventive Wirksamkeit, Praxis und Anwendungsprobleme des Verbandsverantwortlichkeitsesetzes (VbVG). Eine Evaluierungsstudie* (Institut für Rechts- und Kriminalsoziologie Wien 2011) 39, 45 (table 5, full set of data), and 74 (table 34, partial set of data).

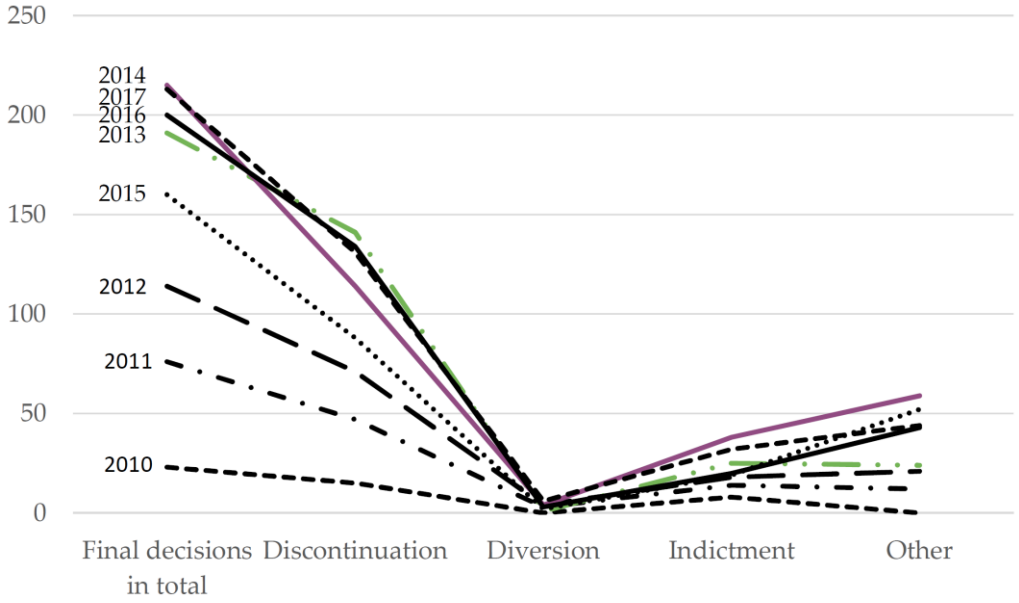

Figure 2. Final prosecutorial decisions against corporations in Austria 2010-2017.[46]

The discretionary power is highly disputed. While the equality principle might argue in favour of mandatory prosecution, a certain degree of vagueness of requirements on corporations' compliance measures might be used in favour of the discretionary powers. What becomes obvious is that the corporations' legal chances for closure of proceedings go far beyond those of the individual perpetrators in one and the same case.[47] Hence, corporations might be interested in cooperation with the prosecution where it is in the corporation's but not in the individual suspects interests. Corporations might become 'investigative tools' against the individuals, and might use their legal and economic powers when doing so. However, this is not a unique phenomenon of Austrian criminal proceedings, but also the underlying theme of the informally so-called 'Yates Memorandum' of the U.S. Department of Justice.

The discussion of so-called internal investigations in the German speaking area started with the handling of the *Siemens* corruption case(s). In Austria, the dispute on information and warnings requirements in the light of the principle of denial of compulsory self-incrimination did not culminate up to now. Other than in Germany, there are no court decisions relating to that topic (publicly) available.

[46] Adapted and amended version of Soyer and Schumann (n 34). Own calculation based on data extracted from Austrian Ministry of Justice, Sicherheitsbericht 2015, 2017.
[47] Schumann and Knierim (n 11) 202.

3.4 Crown witnesses

In the Austrian Criminal Procedural Code, there are, *inter alia*, two rules on crown witnesses which are also applicable in corporate criminal proceedings. Whereas one is applicable to crown witnesses in cartel proceedings,[48] the other, roughly spoken, refers to other categories of severe offences. What is of interest in the context of this paper is that, whereas the rules in crown witnesses as regards cartel offences allows for a coherent simultaneous application to both the corporation and the individuals contributing to the investigations, the other rule on crown witnesses being applicable in the context of other criminal offences does not provide for a simultaneous application to both the corporation and the individuals. A coherent application in analogy to the rule on cartel law crown witnesses is disputed in literature.[49]

4 Corporation vs. individuals – Claiming for damages compensation, and the use of criminal proceedings

Civil actions against former managers in case of enterprise insolvency are well known for years. Over the last decade, at least in Germany, it has ever more become common practice to claim compensation from board members also in case of (criminal) convictions of enterprises. Both the Siemens case and the ThyssenKrupp case, as briefly described at the beginning of this paper, are vivid examples for that growing practice. It is deemed to be an obligation of board members of the corporation to claim and pursue damages where ever possible, and the breach of such an obligation could be seen as a criminal offence itself, the betrayal of economic confidence ('*Untreue*').

4.1 Limits to compensation claims

According to the Austrian VbVG, a corporation must not claim compensation for sanctions or other legal consequences from their decision-makers or employees.[50] It does not exclude any type of damage compensation. Whereas the compensation for any type of sanctions including payments based on diversion decisions as well as defence costs cannot be claimed for, compensation of other types of civil damages may be demanded.[51] In the Siemens claim against Neubürger, it was reported that the damage claim mainly included lawyer fees. In this context it would be interesting to see whether or not the costs for internal investigations are considered to be defence costs; even more in the context of the discussion on internal investigations and the legal privilege.

[48] § 209b Austrian CPC.
[49] See e.g. Schumann and Knierim (n 11) 198ff.
[50] § 11 Austrian VbVG.
[51] Einhard Steininger, *VbVG. Kommentar* (Linde 2006) § 11 paras 2–3.

4.2 Corporation's multiple roles in criminal proceedings – Being a suspect and victim simultaneously?

Although in Germany there is no formal criminal liability of enterprise up to now, enterprises can be held liable for violations of criminal or administrative criminal law by their decision makers,[52] and also by staff members where the latter violation is alleviated by a missing supervision of a decision maker.[53] The establishment of a formal criminal liability of enterprises has been discussed several times in the past, and a new attempt to do so is expected before summer 2019.

However, one might think about transposing the constellation of the ThyssenKrupp case towards Austria. The proceedings against the corporation and the one against the individual suspects would be conducted together. The corporation were likely to sit both on the accused bench as well as side by side to the prosecution as a victim claiming the individual perpetrators for damage compensation. An interesting constellation.

5 Final remarks

1. Although the general Criminal Procedural Code is ordered to be applicable in corporate criminal proceedings, there are *leges speciales*, especially the enactment of the prosecutors' discretionary power which significantly differ from the general rules.
2. Due to the structure of establishing corporate criminal liability based on, or triggered by individual wrongdoing, there are common interests of the individual and the corporate suspect. However, these common interests are limited *inter alia* by the procedural rules on establishing individual and corporate criminal liability, including those on prosecutors' discretionary powers.[54] Transnational comparison shows that this is not a unique effect of the Austrian system as established, but it may also to be found, for example, in the U.S. federal criminal justice system.
3. The procedural specialties of legal persons – as legal constructs – being 'suspects' in 'criminal' proceedings still remain for in-depth analysis.[55]

[52] § 30 OWiG.
[53] §§ 30, 130 OWiG.
[54] In detail see Schumann and Knierim (n 11) 194–202.
[55] For the disclaimer on terminology in this paper, see 2.2. at the end.

Selected Literature

Kölbel R, 'Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes' [2018] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 407–412

Ortmann G, 'Für ein Unternehmensstrafrecht – Sechs Thesen, sieben Fragen, eine Nachbemerkung' [2017] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 241–251

Pieth M and Ivory R, 'Emergence and Covergence. Corporate Criminal Liability Principle in Overview' in Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risks* (Springer 2011) 3–60

Schumann S and Knierim T, 'Wettbewerb im Unternehmensstrafrecht: Individual- vs. Verbandsverteidigung' [2016] Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 194–202

Soyer R and Schumann S, 'Die "Frankfurter Thesen" zum Unternehmensstrafrecht unter Einbeziehung der Erfahrungen in Österreich' [2018] Zeitschrift für Wirtschafts- und Steuerstrafrecht 321–326

PROMOTING A PROGRESSIVE CORPORATE CRIMINAL LAW

By William S. Laufer[*]

Abstract

This Article offers a modern, progressive account of corporate criminal law. The central role of science and advancing technology in Twentieth century progressivism define the architecture of this account. Some of the intractable challenges of using the criminal law to regulate corporations are reviewed, followed by a recognition of a remarkable convergence of corporate compliance standards, measures, practices, and insights from conventional, plural, and polycentric theories of regulation. This is a convergence of informal corporate social controls offering a potentially powerful opportunity for the promotion of modern progressive interests, practices, and advocacy. This Article concludes by considering the unique position of progressives to address the compliance game while promoting corporate criminal justice.

1 Introduction

The absence of progressive voices in support of corporate criminal responsibility in the United States takes a toll. Scholarship rests far too comfortably on consequentialist theories and concerns. The missing progressive account in practice means that resort to corporate prosecution turns on narrow grounds of efficiency, deterrence, and costs rather than more broad normative goals of accountability, responsibility, distribution, and desert.[1] Instead of bemoaning the difficulty of bringing cases of corporate prosecution, we are left with exaggerated concerns over the idea of collateral costs and other externalities.[2] Add to this a regulatory status quo that encourages a tired multi-stakeholder compliance game; evidence-free compliance and diligence prescriptions from the government; and questions about whether some of our most powerful financial institutions are simply too systemically important to prosecute, take to trial, convict, and punish.[3]

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[*] Julian Aresty Endowed Professor, Professor of Legal Studies and Business Ethics, Sociology, and Criminology; Director, Carol and Lawrence Zicklin Center; The Wharton School, University of Pennsylvania (J.D., Ph.D.).

[1] See, e.g., Tom Fox, 'Trump and Compliance: This Conversation is Just Getting Started' (2016) <http://www.corporatecomplianceinsights.com/wp-content/uploads/2017/11/Trump-and-Compliance-by-Tom-Fox.pdf> accessed 14 January 2019 (discussing the future prospects of the Foreign Corrupt Practices Act); Robert Hahn, 'Playing the Long Game on Regulation' (*Brookings*, 13 January 2017) <https://www.brookings.edu/opinions/playing-the-long-game-on-regulation/> accessed 14 January 2019.

[2] William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2008) (discussing the longstanding ambivalence of 'compliance stakeholders' using the blunt instrument of the criminal law with corporations).

[3] See Committee on Financial Services, U.S. House of Representatives, *Too Big to Jail: Inside the Obama Justice Department's Decision Not to Hold Wall Street Accountable: Report Prepared by the Republication Staff of the Committee on Financial Services, July 11, 2016*. See also Office of Sen. Elizabeth Warren, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy* (January 2016), <http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf> accessed 14 January 2019.

This Essay, based on my remarks in Freiburg, promotes what I call the missing progressive account of corporate criminal liability.[4] Elsewhere I attempted to build a bridge between some of the foundational principles of twentieth century progressivism and its more modern iterations. This bridge consists of compliance principles and regulatory instruments that accommodate the central role of science, scientific management, and associated social controls. The objective is to move modern progressives to adopt these foundational principles in combatting the regulatory status quo and taming corporate wrongdoing. This account, I believe, is a necessary counterweight to right-of-centre deregulatory policies that aim to emasculate the suasion of the corporate criminal law.

In earlier work, I argued that progressive principles borrowed from the last century should support the consolidation of more rigorous compliance measures, measurement, and standards into formal regulatory policies. Progressive thinking about new models of regulatory-regulated engagement also are reviewed, convinced that many challenges accompanying the coordinated delegation of regulation to firms remain. Indeed, there is a 'compliance conundrum' that often undermines commitments to compliance science and technology. This conundrum reflects conflict in firms over how to diligently identify deviance, recognize the inevitability of a base rate of wrongdoing, honour disclosure and reporting requirements and, at the same time, avoid entity liability.

This conundrum is an artefact of a 'compliance game,' a regulatory status quo where both corporate and government players are, at times, subject to capture. Here, stakeholders placate each other with compliance expenditures that may be disconnected from any assurance of compliance. This game is marked by disincentives for firms to take the measurement of compliance seriously, and compliance expenditures that serve as preemptive penalties. Ultimately, the most significant loss coming from this game is one of justice undone, or undistributed corporate criminal justice.[5]

Jurisdictions with a more modest history of resorting to corporate criminal liability have much to learn from the U.S. experience: Lessons of both successes and failures. Part of these lessons, I hope, includes some progressive reflection and thinking, if nothing more. This reflection and thinking should do more than simply challenge the regulatory status quo. Progressivism promotes corporate accountability by asking why we burden the private sector with unbridled policing costs without evidence of efficacy; where is the public sector's commitment to serve as a genuine partner in corporate crime control by developing and then requiring evidence-based metrics for compliance investments; and who is going to break us out from the compliance conundrum?

I ask and attempt to answer these questions mindful that my position on corporate criminal law is very much in the minority. In the Young Penalists conferences in Brazil and Germany, I offered this disclaimer. I readily acknowledge that much of the legal academy in the United

[4] This contribution is an edited and abbreviated version of William S Laufer, 'The Missing Account of Progressive Corporate Criminal Law' (2017) 14 NYU J L & Bus 71.

[5] See William S Laufer, The *Dark Figure of Corporate Crime* (unpublished manuscript 2019, available from Author).

States still turns on a law and economics orientation, a deterrence rationale for sanctions, and perennial concerns about the collateral consequences of this heavy-handed formal social control. Many are concerned about over-criminalization and the questionable moral agency of corporate actors. I more than appreciate the importance of their message, and convey the same to the Young Penalists.

2 Why a Progressive Account?

There a need, however, for a reasonable counter to those in the mainstream who challenge entity liability; a reasonable alternative to abolitionism. Missing is a solution to the kind of corporate regulation that promotes boundless compliance expenditures under the pretence of a deterrence regime.[6] Absent is a desert-based account that captures the moral indignation that stakeholders should have with the corporate malfeasance of large and powerful private sector institutions.[7] There is also no justification for why criminal justice expenditures are so decidedly tilted in favour of the policing, processing, and confining of people of colour from urban populations of the disenfranchised and disaffiliated poor. Government expenditures are used to aggressively pursue the poor and are not oriented toward bringing institutional offenders of scale and means to justice. The scarcity of local, state, and federal resources to investigate, pursue, and combat corporate deviance, relative to street crime, requires explanation.[8] Finally, corporate criminal law is so very personal, even when it assumes the form of vicarious liability where attributions come from agents. The substantive law simply fails to capture the complexity of organizational science.

The criminal law applied to corporations is a patchwork of vicarious fault principles, held together by prescriptive prosecutorial and sentencing guidelines. The use of these guidelines determines charging, plea agreements, sentencing outcomes, and post-sentencing practices. That prosecutorial discretion nearly governs the entire criminal process is concerning for so many reasons, including that courts rarely have an opportunity to rule on substantive points of corporate criminal law. Legislatures also fail to rule on its general part. Practitioners are without federal and state decisional law that recognizes basic fault principles. What they get instead is a corporate criminal law that appears as canned compliance and risk management programs, practices, and functions as the backdrop of a multi-stakeholder game. When black

[6] See Sally S Simpson, Melissa Rorie, Mariel Alper, Natalie Schell-Busey, William S Laufer and N Craig Smith, *Corporate Crime Deterrence: A Systematic Review* (Campbell Systematic Reviews 2014); Natalie Schell-Busey, Sally S Simpson, Melissa Rorie and Mariel Alper, 'What Works? A Systematic Review of Corporate Crime Deterrence' (2016) 15 Crim & Public Pol 387; Peter C Yeager, 'The Elusive Deterrence of Corporate Crime' (2016) 15 Crim & Public Pol 439. Cf. Miriam H Baer, 'Linkage and the Deterrence of Corporate Fraud' (2008) 94 Va L Rev 1295.

[7] Perhaps most concerning, we do not have a regulatory approach with a reasonable chance of being integrated into existing law and practices. See William S Laufer and Alan Strudler, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 Am Crim L Rev 1285 (arguing for the importance of a desert-based account).

[8] William J Chambliss, *Power, Politics, and Crime* (Westview 1999) (discussing class and race-based reasons for an expansion of the criminal justice bureaucracy); Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (Pearson 2015) (reviewing the ways in which resources are disparate).

letter law is applied, it is done so differently depending on firm size.[9] That the playing field is still not level for small and big firms should be an issue for progressives.

There are few good alternatives to this patchwork of criminal liability. Regulators offer little hint that they might release their strong grip on a brand of discretionary oversight and treatment of organizational actors that is often arbitrary, largely symbolic, and frequently determined by firm size and power. For those looking to our complex political economy and our interconnected global markets, there is little choice but to hold on to the faint promise that regulators will see the many cultural nuances and coordinate with their counterparts around the world. This is, at best, an aspiration.

At the same time, regulatory and compliance costs continue to grow in ways that are disconnected with legal requirements, regulatory risks, and actual compliance failures. There are estimates that the costs of federal regulations to the private sector exceed $1.80 trillion annually. Thus, if federal regulation was its own economy, it would be the tenth largest in the world.[10] With a steep linear increase in compliance and regulatory risk staffing, particularly in the financial industry, one may ask how much responsibility the private sector should assume for self-policing and self-regulation without good compliance science?[11] Any answer to this question must attend to increasing concerns over individual liability for compliance and regulatory staff and, ultimately, the risks of a possibly over-controlled compliance state in the private sector.[12]

3 A Compliance Convergence

This critique of corporate criminal regulation would both harsh and unfair but for reflection on how the compliance industry has matured through the investment of the private sector. This industry changed in response to certain regulatory reforms, threats of more aggressive corporate prosecutions, the availability of technology-driven risk and compliance

[9] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) (a seminal treatment of firm size and corporate criminal justice); William S Laufer, 'The Compliance Game' in Eduardo Saad-Diniz, Dominik Brodowski and Ana Luíza Barbosa de Sá (eds), *Regulação do abuso no âmbito corporativo: papel do direito penal na crise financeira* (LiberArs 2015) 5

[10] See, e.g., Dieter Helm, 'Regulatory Reform, Capture, and the Regulatory Burden' (2006) 22 Oxford Review of Economic Policy 169; U.S. Government Accountability Office, *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies* (2013).

[11] Corporate compliance staffing levels are at an historic high. For example, by 2015, JP Morgan had a compliance and regulatory staff of more than 43,000. See, PYMNTS, 'Regulations, Regulators and The High Cost of Banking Compliance' (31 May 2016) <http://www.pymnts.com/news/security-and-risk/2016/banks-spend-and-hire-in-new-regulatory-environment/> accessed 14 January 2019. For this same period, the number of JP Morgan's compliance and regulatory staff exceeded the number of officers in the U.S. Custom's and Boarder Protection, and was three times the number of agents in the Federal Bureau of Investigation.

[12] See Stacey English and Susanna Hammond, 'Costs of Compliance 2016' (2016) <https://risk.thomsonreuters.com/content/dam/openweb/documents/pdf/risk/report/cost-compliance-2016.pdf> accessed 14 January 2019 ('What is certain is that greater personal liability will become reality in 2016 in many jurisdictions').

applications, and the impressive marketing efforts by a large 'business ethics' industry.[13] The dramatic rise of both FinTech and RegTech applications and solutions lead to speculation about a transformative, if not paradigmatic shift in technology-driven compliance, e.g., the digitalization of compliance. The vast disruptive potential of the next generation of these technologies, across a wide range of business and regulatory functions, is only now coming into focus.[14] Advances in blockchain technologies are producing some very promising applications for domestic and international corporate regulation.[15] This includes the advent of increasingly sophisticated regulator-based systems, successful co-regulated systems, and even a well-integrated supra-regulator systems.[16]

Regulators are recognizing the need for new resources to oversee FinTech and RegTech technologies while, at the same time, considering how both might enhance their own examination, compliance, and enforcement capabilities.[17] The redesign and integration of compliance technologies across a wide range of business processes are more than promising.[18] Of course, all of the obvious regulatory challenges accompany rapidly evolving and disruptive technologies, e.g., regulatory inertia, lack of standardization, and limited network capacity.[19]

At the same time of the Fintech and GenTech disruption, there is an increasing reliance on sophisticated governance, risk, and compliance ('GRC') solutions by firms in many sectors and markets; big data across divisions, departments, and risk areas are only now beginning to be systematically aggregated, disaggregated, and mined by GRC applications; innovative open-source GRC models and metrics are now more commonly adopted and promoted

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[13] See, e.g., Michael Thoits, 'Enterprise Risk Management Technology Solutions' (2009) <https://www.rims.org/resources/ERM/Documents/ERM%20Technology%20Solutions.pdf> accessed 14 January 2019 (discussing the range of ERM solutions).

[14] Iris H-Y Chiu, 'FinTech and Disruptive Business Models in Financial Products, Intermediation and Markets-Policy Implications for Financial Regulators' (2019) Journal of Technology Law and Policy, in press (discussing the potential disruption).

[15] For a discussion of some creative applications, see Carlo RW de Meijer, 'Blockchain and the Securities Industry: Towards a New Ecosystem' (2016) 8 J of Securities Operations & Custody 322.

[16] Javier Cermeno, *Blockchain in Financial Services: Regulatory Landscape and Future Challenges for its Commercial Application* (BBVA Working Paper 2016); Laurent Probst, Laurent Frideres, Benoît Cambier and Christian Martinez-Diaz, *Blockchain Applications and Services* (Business Innovation Observatory 2016).

[17] Michael del Castillo, 'Blockchain Won't Just Change Regulation, it Could Reshape the SEC' (Coindesk 15 November 2016) (discussing how the SEC's Distributed Ledger Technology Working Group (DLTWG) views the demands of blockchain on regulators and how this technology might contribute to regulatory capacity).

[18] See: Ernst and Young, *Innovating with RegTech: Turning Regulatory Compliance Into a Competitive Advantage* (2016) <http://www.ey.com/Publication/vwLUAssets/EY-Innovating-with-RegTech/$FILE/EY-Innovating-with-RegTech.pdf> accessed 14 January 2019.

[19] Ernst and Young (n 18); see also, Peter Yeoh, 'Innovations in Financial Services: Regulatory Implications' (2016) 37 Business Law Review 190. For a recent report by the EU on the challenges posed by blockchain, see European Union Agency for Network And Information Security, 'Distributed Ledger Technology & Cybersecurity Improving Information Security in the Financial Sector' (2016) <http://www.the-blockchain.com/docs/European%20Union%20Agency%20for%20Network%20and%20Information%20Security%20-%20Distributed%20Ledger%20Technology%20And%20 Cybersecurity.pdf> accessed 14 January 2019.

across industries; and technology from both artificial intelligence and the cognitive sciences are beginning to shape and re-shape GRC modeling.[20]

It is a fair prediction that some iteration of GRC thinking today will lead to the integration of firm, industry, and regulatory standards tomorrow. The emergence of more sophisticated machine learning approaches and Cognitive GRC models hold particular promise as an enterprise, cross-functional platform for real-time monitoring of regulatory changes, minimizing operational risks, and managing risks from both vendors and multiple tier supply-chain partners.[21] Combining institutional frameworks with agent-based simulations (institutional agent-based models) and pairing AI robots with key compliance professionals offer a window into the complex dynamics of regulation that was unimaginable until only recently.[22] Augmented and virtual reality extensions to compliance offerings also offer new ways of delivering risk management practices, and new revenue streams for accountancies, consultancies, and law firms.[23]

Contemporaneous with FinTech, RegTech, and advances in GRC is a recognition that social science research on compliance may offer value in developing effective corporate crime policy.[24] While evidence-based research on corporate criminal regulation is still exceedingly difficult to find, there is an impressive stream of scholarship by psychologists, sociologists, and criminologists on the many motives that encourage or discourage compliance inside

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[20] Estimates regarding the size and growth of the GRC market vary widely. Industry forecasts, however, remain very positive. See, e.g., Mike Odgen, 'The GRC Market is Expanding at an Exponential Rate' (Lockpath 29 June 2015) <https://www.lockpath.com/blog/the-grc-market-is-expanding-at-an-exponential-rate/> accessed 14 January 2019 ('With over 600 GRC solutions on the market currently, it seems that predictions show that the GRC market would hit $31.77 billion by the year 2020 with global compliance market spend reaching $2.6 billion in 2015 alone'); John Verver, 'Big Data and GRC' (Corporate Compliance Insights 21 June 2013). Cf. Kenneth A Bamberger, 'Technologies of Compliance: Risk and Regulation in a Digital Age' (2009) 88 Tex L Rev 669, 677.

[21] See e.g., Christian L Dunis, Peter W Middleton, Andreas Karathanasopolous and Konstantinos A Theofilatos (eds), *Artificial Intelligence in Financial Markets: Cutting Edge Applications for Risk Management, Portfolio Optimization and Economics* (Palgrave Macmillan 2017); Heiko Thimm, 'ICT Support of Environmental Compliance—Approaches and Future Perspectives' in Volker Wohlgemuth, Frank Fuchs-Kittowski and Jochen Wittmann (eds), *Advances and New Trends in Environmental Informatics* (Springer 2017); Carole Switzer, 'Accelerating the Evolution of GRC' (2016) 74 Compliance Week (exploring the transformative power of cognitive GRC). Cf. Sean Lyons, 'Corporate Defense: Are Stakeholders Interests Adequately Defended?' (2006) 1 J of Operational Risk 67.

[22] See, e.g., Tina Balke, Marina De Vos and Julian Padget, 'I-ABM: Combining Institutional Frameworks and Agent Based Modelling for the Design of Enforcement Policies' (2013) 21 Artificial Intell L 371; Samson Esayas and Tobias Mahler, 'Modeling Compliance Risk: A Structured Approach' (2015) 23 Artificial Intell L 271; see also Anant Kale, 'Artificial Intelligence: The New Super Power for Compliance' (Corporate Compliance Insights 31 August 2016).

[23] See, e.g., Emilia Duarte, Francisco Rebelo and Michael S Wogalter, 'Virtual Reality and its Potential for Evaluating Warning Compliance' (2010) 20 Human Factors and Ergonomics in Manufacturing & Service Industries 526.

[24] Cf. Christine Parker and Vibeke L Nielsen, *The Challenge of Empirical Re- Business Compliance and Regulatory Capitalism*, (2009) 5 Ann Rev L Soc Ci 45.

and outside of complex organizations.[25] In spite of long-standing and near insurmountable challenges with access to good white collar and corporate crime data, there is also an emerging literature on the internal and external characteristics of firms that are most associated with law abidance.[26] A separate but related body of work, even more developed, explores organizational responses to innovations in regulation.[27] Some of the better quantitative research on environmental compliance, for example, is framed around a groundswell of new governance and new regulatory models that push plural and decentred concepts.[28] From systems-based regulation and principled-based regulation to smart regulation, meta-regulation, and regulatory excellence (RegX), the important role of third parties and non-state actors have helped reconceive thinking about conventional regulator-regulated relationships.[29]

When you add together recently introduced international enterprise-wide governance, risk, and compliance standards to this mix, such as those from the International Organization for Standardization (e.g., ISO19600, ISO31000, and ISO38500), and the Enterprise Risk Management standards from the Committee of Sponsoring Organizations of the Treadway Commission (COSO ERM), there is an impressive convergence. There is, quite simply, a gestalt of models, measures, metrics, data, standards, committed compliance professionals, relevant compliance scholarship, and vast firm resources dedicated to promote compliance and good governance while minimizing enterprise risk and liability.[30] This is an

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[25] David Hess, 'Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence' (2016) 12 NYU JL & Bus 317.

[26] For an excellent discussion of the difficulties of securing white collar crime research data, see*:* Sally S. Simpson and Peter Cleary Yeager, *Building a Comprehensive White-Collar Violations Data System* (2015) <https://www.ncjrs.gov/pdffiles1/bjs/grants/248667.pdf> accessed 14 January 2019; Marshall Clinard and Peter Yeager, *Corporate Crime* (Transaction 1980) 97 (discussing data limitations). See Danielle E. Warren, Joseph P. Gaspar and William S. Laufer, 'Is Formal Ethics Training Merely Cosmetic? A Study of Ethics Training and Ethical Organizational Culture' (2014) 24 Bus Ethics Q 85 (In a study of bank employees, two years after a single ethics training session, there were sustained positive effects on indicators of an ethical organizational culture).

[27] For a general treatment, see Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (CUP 2002). For the most notable industry and subject matter specific research, see John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Suny 1985); Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar 2009); John Braithwaite, Toni Makkai and Valerie A. Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar 2007); John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Routledge 2013).

[28] Charles F Sabel and William H Simon, 'Minimalism and Experimentalism in the Administrative State' (2011) 100 Georgetown L J 53; Neil Gunningham and Cameron Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12 Ann Rev of L & Soc Sci 1.1.

[29] See Cary Coglianese and Robert A Kagan (eds), *Regulation and Regulatory Processes* (Ashgate 2007). For recent extension of Cary Coglianese's work, see Cary Coglianese, *Listening, Learning, Leading: A Framework for Regulatory Excellence* (2015), <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf> accessed 14 January 2019; Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings 2017) (a series of outstanding contributions to the conception, applications, and limitations of regulatory excellence).

[30] See, e.g., Robert R. Moeller, *COSO Enterprise Risk Management: Establishing Effective Governance, Risk, and Compliance Processes* (2nd edn, Wiley 2011); ISO, *International Standard ISO 19600, Compliance Management*

opportunistic convergence of formal and informal social controls across the entire firm—from corporate strategy, organizational processes, and available technology to culture, leadership, and people. It is, in some ways, a challenge for a new, transformative promise of the scientific state. If there is any progress made accessing a vast array of white collar crime and organizational crime data from federal and state agencies, this also may be a critical turning point in the scientific study of corporate crime.[31]

How architects of the corporate criminal law should embrace this convergence in ways that recognize the importance of private and public sector social control is a central challenge to the development of a progressive account.[32] This challenge would be 'insurmountable' if conceived narrowly as a task for the state to assume the role of the new age experimentalists and decipher which specific variables, proxies, or metrics are part of a general prescription that should be offered to the private sector as effective compliance or organizational due diligence.[33] Instead, the burden must be shared across all compliance stakeholders to meet the challenges of this compliance convergence with a far more developed capacity that addresses regulatory needs, capabilities, and requirements. This is actually a co-regulatory challenge that will inevitably require different exchanges, revised instruments, and increasingly lower costs through the cross-enterprise integration of regulatory technology. It is also a challenge that will benefit from the lessons learned in maturing other regulatory settings, such as the many successful self-regulatory organizations (e.g., Financial Industry Regulatory Authority (FINRA); Municipal Securities Rulemaking Board (MSRB), and American Arbitration Association (AAA)), along with sector-specific co-regulation of environmental protection, health and product safety, and climate protection.[34] Finally, much can be learned from the many noteworthy co-regulatory successes in combating cybercrime, and ensuring cybersecurity and national security.[35]

This convergence in compliance thinking, standards, and metrics is certainly not provincial and, thus, should excite Young Penalists. The development and sharing of increasingly sophisticated and elaborate compliance models across Europe and Australia, for example, suggest that there is an emerging convention in regulatory technology and models in jurisdictions with and without the same threats from command and control approaches to

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Systems —Guidelines (ISO 2014); ISO, *International standard ISO 31000. Risk management—principles and guidelines on Implementation* (ISO 2009).

[31] Simpson and Yeager (n 26); see also, Marshall Clinard and Peter Yeager, 'Corporate Crime: Issues in Research' (1978) 16 Criminology 255 (reviewing the dearth of corporate crime research).

[32] See Daniel Richman, 'Institutional Competence and Organizational Prosecutions' (2007) 93 Va L Rev In Brief 115.

[33] Richman (n 32) ('Finding appropriate performance metrics is hard enough for those engaged in (or opposing) structural reform in prisons, schools, or other such institutions.').

[34] See, e.g., Bertelsmann Stiftung, *Fostering Corporate Responsibility Through Self- and Co-Regulation* (2013) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Fostering_corporate_responsibility.pdf> accessed 14 January 2019; Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Routledge 2011).

[35] See, e.g., Tatiana Tropina and Cormac Callanan, *Self- and Co-regulation in Cybercrime, Cybersecurity and National Security* (Springer 2015).

entity liability.[36] Many of our old concerns still define foreign civil, administrative, and criminal regulation of corporates, including 'paper compliance' programs, piecemeal and unpredictable changes to government guidance that tease the regulated with incentives and disincentives, and an absence of contemporaneous decisional and statutory laws to provide and interpret clearly-stated principles.[37] Notably, many of the most significant concerns with advancing financial and regulatory technology were raised first by regulatory bodies and non-governmental organizations outside the United States.[38]

In countries with a less developed rule of law, there are also lessons to be learned from successful public, private, and non-state regulation and enforcement.[39] The challenges of bringing leading compliance solutions to companies and government agencies at different strata in the economic pyramid are discussed. Seldom do we think about how governance, risk, and compliance solutions might apply, for example, to municipalities or state owned enterprises in developing countries. The fair melding of private and public interests in a diverse set of enterprises across cultures would be of great interest to progressives, so long as the outcome is more corporate criminal justice.

4 Revisiting The Modern Progressive Agenda

The modern progressive agenda is often broadly defined by the pursuit of individual freedom; freedom from undue government interference; the opportunity to work toward economic and civic success; taking personal responsibility, and a sense of responsibility to others. Modern progressive issues revolve around jobs and the economy; taxes and deficits; health care, social security and Medicare; education; immigration; environmental, climate and energy policy; reproductive rights and health; money in politics; and gay rights and marriage equality.[40]

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[36] See, e.g., Anotonio Fiorella, *Corporate Criminal Liability and Compliance Programs: Toward a Common Model in the European Union* (Jovene 2012); Ulrich Sieber and Marc Engelhart, *Compliance Programs for the Prevention of Economic Crimes: An Empirical Survey of German Companies* (Duncker & Humblot 2014); James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Rutledge 2011).

[37] See, e.g., Adan Nieto Martin, 'Use and Lack of Precision in Compliance Programmes: Any Solution?' [2012] 3 EUCRIM 124; Eduardo Saad-Diniz, *Inimigo e pessoa no direito penal* (LiberArs 2012); Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective', in: Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 53-76.

[38] See Douglas W. Arner, Janos Nathan Barberis and Ross P. Buckley, 'FinTech, RegTech and the Reconceptualization of Financial Regulation' (2019) Northwestern Journal of International Law & Business, in press.

[39] Helle Weeke, Steve Parker and Edmund Malesky, 'The Dynamics of Vietnam's Business Environment: Complying with Obligations Abroad and Competing at Home' (2009) 12 Developing Alternatives 1; Andrew A King, and Michael J Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43 Acad of Management J 698.

[40] See John Nichols, 'Elizabeth Warren Offers Democrats More Than a 2016 Candidacy—She Offers a 2014 Agenda' (*The Nation* 19 July 2014) <https://www.thenation.com/article/elizabeth-warren-offers-democrats-more-2016-candidacy-she-offers-2014-agenda/> accessed 14 January 2019 ('We believe that Wall Street needs stronger rules and tougher enforcement, and we're willing to fight for it.').

Matters of corporate responsibility, accountability, and justice are the subject of vociferous advocacy over what it means to break up the big banks; separate commercial and investment banking by bringing back a replica of the Glass–Steagall Act (Banking Act of 1933); enact financial speculation taxes; limit executive compensation; and use principles and practices of collective civil disobedience to 'occupy' Wall Street.[41] This advocacy attaches to the core progressive idea of 'taming the giant corporation' that dominated progressive dogma in the 1970s and 1980s. Calls from Ralph Nader for federal incorporation laws, and Christopher Stone for general and special public directors, inspired a share of the new progressive agenda.[42]

In recognition of the harm flowing from serious wrongdoing of the largest businesses, progressives see corporations as artificial entities whose domination and unconstrained power has now creeped into every aspect of life. This power has a damaging hold on the political process. We live in a near corporate state, modern progressives say, where our most significant issue should be how to best constrain, disable, and disassemble the largest private institutions that have so successfully aggregated corporate power. Something must be done to address the disconnect between the interests of Wall Street and a law-abiding, honourable if not selfless Main Street.

If this generation of progressives will be the constituency supporting a measured and just corporate criminal law, they will have to know where to best direct government and corporate controls. This means balancing the value of abolishing corporate personhood with the importance of personhood for the attribution of criminal liability. This also means sharing the power of informal social controls between regulators and the regulated, as co-regulators, using leading enterprise technology; accepting the increasing delegation and, thus, privatization of public regulation with increasingly plural and decentred models of regulation; and recognizing how a progressive corporate criminal law will apply to enterprises of all sizes and ownership status.

It also means thinking about how modern progressive advocacy is affected by criminal justice strategies that, according to some, make black lives all but incidental.[43] Neoconservative policing strategies characterized by containment, surveillance, pacification, and deception may meet law enforcement objectives but, at the same time, risk racial injustice.[44] Aggressive urban police policies and practices, modern progressives might argue, target precious criminal justice resources, a reasonable percentage of which could and should be used to combat corporate wrongdoing by companies of all sizes. Our malevolent portrait of street criminals, the 'badness' of street-level wrongdoing, contribute to a

[41] Nichols (n 40).

[42] For an older progressive take, see Melvin I Urofsky, 'Proposed Federal Incorporation in the Progressive Era' (1982) 26 The American Journal of Legal History 160.

[43] See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* (New Press 2010); Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton 2014).

[44] Alex S Vitale and Brian J Jefferson, 'The Emergence of Command and Control Policing in Neoliberal New York' in Jordan T Camp and Christina Heatherton (eds), *Policing the Planet: Why the Policing Crisis Led to Black Lives Matter* (Verso 2016) 157–172.

concentration of criminal justice attention and resources away from more aggressive investigation and prosecution of corporates.[45]

This is a time when the voices of modern progressives should compete with the stalwart advocates, corporate libertarians, and those of other ideologies in defining compliance constructs and principles. The days of faint speech at the margins should be over. Entering a more robust debate over corporate accountability is no short order given the highly bounded nature of disciplinary methods, journals, and intellectual exchanges. To have impact on the content and contours of corporate criminal law, proponents must speak in ways that engage policy makers as active partners in this competition.[46]

The good news is that modern progressives know that there is an inevitability to the development of increasingly integrated regulatory instruments; an inevitability to more sophisticated enterprise wide systems; an inevitability to the widespread adoption of plural and decentred, non-state regulatory solutions, and an inevitability to some kind of fair and just international regulatory regime. And modern progressives are uniquely positioned to understand what the inevitability of progress might mean for the future of corporate criminal justice. Soo, too, are Young Penalists.

Selected Literature

Coglianese C (ed), *Achieving Regulatory Excellence* (Brookings 2017)

Laufer WS, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2008)

Parker C, *The Open Corporation: Effective Self-Regulation and Democracy* (CUP 2002)

Parker C and Nielsen VL, 'The Challenge of Empirical Research on Business Compliance and Regulatory Capitalism' (2009) 5 Ann Rev L Soc Ci 45

Sieber U and Engelhart M, *Compliance Programs for the Prevention of Economic Crimes: An Empirical Survey of German Companies* (Duncker & Humblot 2014)

[45] See, e.g., Doron Teichman, 'The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition' (2005) 103 Mich L Rev 1831.

[46] Daniel S Nagin and Cody W Telep, 'Procedural Justice and Legal Compliance' (2017) 13 Annual Review of Law and Social Science 1 (reviewing the translation of research on compliance); Robert J Sampson, Christopher Winship and Carly Knight, 'Overview of: "Translating Causal Claims: Principles and Strategies for Policy-Relevant Criminology"' (2013) 12 Criminology & Public Policy 585.

BIASES IN JUDGMENT OF WHITE-COLLAR CRIMES

By Lorena Varela[*]

Abstract

The present work intends in the first instance to describe some theoretical positions that explain why the absence of total objectivity in the prosecution of economic crime. Both in a favorable and negative sense, in the judicial praxis some biases and heuristics are presented when evaluating the criminal culpability of this type of actors. In the second instance some ideas are proposed to counteract the pre-judicial in the judgments of economic crime.

1 Presentation of the problem

In this paper, the dynamics of decision-making by judges who examine and assess, during the course of the criminal proceedings, the degree of responsibility of the alleged perpetrators of white-collar crimes will be analyzed from a theoretical perspective. The methodological approach assumed as the valid basis to explain the way judges usually decide on white-collar crimes will be that of the model of *bounded rationality*, but the methodological approach to propose rational decision criteria will be that of the model of *perfect rationality*.

1.1 White-collar crime propositions

White-collar criminality is commonly identified with economic crimes, but there is a difference between the two concepts. While economic crime is rather a dogmatic concept that defines an unlawful and culpable behavior that endangers or harms the socio-economic order and other individual interests of the same nature, white-collar criminality rather refers to a criminological concept of economic crime, and under this umbrella also occupational or professional crime categories such as the business crime are contemplated. That is, while the economic crime is defined from its object of protection (of the economy), white-collar criminality is explained from the person of reference, taking into account certain characteristics of the offender, such as social status, profession and your economic wealth[1].

[*] Postdoctoral researcher, Saarland University (Germany); Guest Professor, *del Nordeste* National University (Argentina, since 2017). Professor of the Master in Economic Criminal Law, *La Rioja* International University (Spain, since 2018). Author of the book Dolo y error (Barcelona: JM Bosch 2016) and of publications in articles of indexed magazines and collective books.

[1] The theory of white-collar crime was coined by Edwin Sutherland, 'White-collar criminality' (1940) 5 Am S Rev 1, 4 in footnote 2, who from the perspective of critical sociology tackled the study of the crime committed by the so-called 'respected men of high society' in the exercise of their profession or work activity. With a lecture given in 1939, he drew attention to the imperceptible dimension of the criminality, but highly harmful to society: the criminality of the powerful, unpunished thanks to the complicity of state institutions. It was one of the first strong criticisms of the selective system of criminal law, and at the same time, the traditional causes of crime (poverty and social marginalization). A broader concept may be found in Richard Posner, 'Optimal sentences for white-collar criminals' (1980) 17 Am Crim L Rev 409-410.

Hence, white-collar crime is not a synonym of economic crime, but the terms represent two aspects of a shared phenomenon[2]. In any case, white-collar crime is closely related to economic crime, since business and finance are one of the professional activities performed by the reference subjects. This specific profile of the active subject of the occupational or business crime has given rise to the doctrine indicating it with very peculiar names, such as the criminal law of the elite against the criminal law of the person or citizen, the criminal law of the class dominant law and the criminal law of the dominated class, or the criminal law of the powerful versus the non-powerful persons, that of the producers against that of the consumers or that of the employers over that of the employees[3].

The majority empirical evidence reflects that white-collar crimes are in practice prosecuted and punished to a greater or lesser extent than common crimes, according to the social movement in the background, that is, according to the degree of social sensitivity for certain types of crimes[4]. However, this social movement rarely or never originates alone and blindly, but is always hand in hand and aware of some other movement of greater weight, such as the political-criminal strategy of the government or of certain private sectors in favor of prosecuting certain types of crimes[5]. In any case, when white-collar delinquency is found in the 'eye of the hurricane', in the worst case there is an authentic 'witch-hunt' with exemplary sentences that condemn a pair of 'scapegoats' of the powerful elite as a tranquilizing effect for the community[6], while letting the 'bigger fish' escape from criminal

[2] Perhaps the reason why it is common to address economic crime as a white-collar crime is due to a reduction in concepts, which Klaus Tiedemann's early writings on economic crime carried out with respect to the white-collar crime theory of Sutherland; giving way, from then on, to an identification without return between economic crimes and powerful delinquents. From this first identification, made from the reduction of the concept of economic crime to the crime of the powerful, it is common to assimilate both expressions without distinction, when, in reality, the theory of white-collar crime is more an explanatory theory (descriptive through the analytical-inductive method) of impunity enjoyed by the most respected individuals of the upper class of society for crimes committed on the occasion of their profession or activity, and a prescriptive theory of economic crimes committed exclusively by the powerful.

[3] Cornelius Prittwitz, ´Sonderstrafrecht Wirtschaftsstrafrecht?' [2012] 5 ZIS 218: ´Elitenstrafrecht vs. Bürger und Personenstrafrecht, Mächtige und Ohnmächtige, Konsumenten und Produzenten, Arbeitnehmer und Arbeitgeber´.

[4] The pioneer work of reference on the social movement against white-collar crime is Jack Katz, 'The social movement against white-collar crime' in: Egon Bittner and Sheldon Messinger (eds), *Criminology Review Yearbook* (Sage 1980) 161-184.

[5] Since Sutherland in 1939 exposed the real existence of white-collar crime, the criminality of the powerful began to stop being invisible. In the United States of America, the social movement against white-collar crime, although it began long before Watergate (1970s), only intensified with the trials and judgments of the Watergate era and continued in the post-Watergate era. See Stanton Wheeler, David Weisburd and Nancy Bode, 'Sentencing the white-collar offender: rhetoric and reality' (1982) 47 Am S R 641, 657. For John Hagan and Patricia Parker, 'White-collar crime and punishment: the class structure and legal sanctioning of securities violations' (1985) 50 Am S R, 302, 311,313, this could be termed the *Watergate* effect or *Harbourgate* effect, in reference to two big white-collar crime scandals.

[6] Hagan and Parker (n 5) 313 argue that managers are the ´scapegoats´ of the social movement against white-collar crime. Similarly, David Weisburd, Elin Waring and Stanton Wheeler, 'Class, status, and the punishment of white-collar criminals' (1990) 15 Law & Social Inquiry 223, 238.

prosecution[7]. But, in the best of cases, the prevention and condemnation of white-collar crime reaches justice and balances the distribution of social wealth.

Regardless of this phenomenon oscillating in time, white-collar crime occupies a real privileged position in the criminal system[8]. There are several reasons for this conclusion, where there are neither the low rate of economic crime nor the least social damage that it produces, because both are serious and high[9]. Among the reasons are the following:

(a) Many statistics on crime reflect biased results. The traditional criminological theories assume as a premise that crime is a matter of unfortunate people, of low economic resources and of mental or social deviations[10]. At the same time, it is assumed that 'economic crimes were due to "merely technical violations", which "involve no moral culpability"'[11].

(b) '[W] hite-collar criminals are relatively immune because of the class bias of the courts and the power of their class to influence the implementation and administration of the law'[12]. The prestige and economic, political and social power held by white-collar criminals turns out to be natural obstacles to initiating an investigation against them.

(c) '[T]he crimes of the lower class are handled by policemen, prosecutors, and judges, with penal sanctions in the form of fines, imprisonment, and death. The crimes of the upper class either result in no official action at all, or result in suits for damages in civil courts, or are handled by inspectors, and by administrative boards or commissions, with penal sanctions in the form of warnings, orders to cease and desist, occasionally the loss of a license, and only in extreme cases by fines or prison sentences. Thus, the white-collar criminals are segregated administratively from other criminals, and largely as a consequence of this are not regarded as real criminals by themselves, the general public, or the criminologists'[13].

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[7] John Braithwaite, 'Paradoxes of class bias in criminal justice', in: Harold E Pepinsky (ed), *Rethinking Criminology* (Sage 1982) 61, 76, passim.

[8] In relation to classical studies, recent investigations reveal that the criminal prosecution of white-collar crime continues to be more symbolic than real and that the powerful criminals continue to go unpunished for their crimes, even though since the Enron scandal (2001), in the United States of America, sentences have increased for economic crimes. See Shanna van Slyke and William Bales, 'A contemporary study of the decision to incarcerate white-collar and street property offenders' (2012) 14 Punishment & Society 217, 237, 238.

[9] Braithwaite (n 7) 62: 'White-collar crime does more harm and is more common than traditional serious crime'. Before Sutherland (n 1) 4ff.: 'The financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the "crime problem"'.

[10] Sutherland (n 1) 1,2, 6, 9, 12: 'The conventional explanations are invalid principally because they are derived from biased samples. The samples are biased in that they have not included vast areas of criminal behavior of persons not in the lower class. One of these neglected areas is the criminal behavior of business and professional men, which will be analyzed in this paper…'

[11] Sutherland (n 1) 139.

[12] Sutherland (n 1) 7; as well Braithwaite (n 7) 61, passim.

[13] Sutherland (n 1) 7-8. From an economic point of view Posner (n 1) 410 suggests that white-collar crimes are punishable by monetary penalties (fines) and not by imprisonment, because it is less costly to society.

(d) Due to the power of influence of white-collar criminals, in the case of conviction, prosecutors usually request attenuated and minor penalties, compared to common crime[14]. However, this conclusion is refuted by other field studies that reveal that in many cases when the official investigation succeeds in collecting sufficient evidence on the guilt of these people, then, the sentences are often exemplary[15], as if such individuals were more demanding due to its position of power or privilege[16].

1.2 On decision theory, human rationality and cognitive biases

Decision-making theory is a multidisciplinary and cross-disciplinary subject that has been studied for a long time, mainly in the fields of psychology, economics, philosophy and law. Its object of study is the cognitive-behavioral process of people or groups at the time of decision-making, especially in an environment of complex conditions or in obvious situations of uncertainty, but also in the face of certain or risk-free (zero risk) scenarios. Decision theory addresses the cognitive-behavioral process of people or groups from different internal (subjective) and external (objective), variable and invariable factors that influence the decision of the human being and from the time factor that surrounds the decision (before, during and after)[17].

Mainly, decision theory can be worked on from two perspectives: first, from normative (or prescriptive) proposals, through which one formulates how people or groups should make decisions or which one should be the best decision in certain circumstances. This is a theory of the '*ought to be*' of the decision. And, secondly, by means of the descriptive (or positive) version, which deals with empirical studies to demonstrate how in particular people or groups decide on a daily basis. This version deals with the '*is*' of the decision[18]. As a rule, the normative proposal uses as a pattern of speculation based on rational agents, prescriptive and ideal abstractions, and fictions. On the contrary, the descriptive proposal usually assumes as a measurement scale a limited rational agent, considering the concrete situation of a real individual with all its conditioning factors[19].

The pattern of speculation or the scale of measurement used by normative and descriptive proposals, respectively, come from a more general theory, that of human rationality, which presents different models. Broadly speaking, the models of human rationality are explanatory approaches of how the mental-behavioral structure of people is conceived, that is, of how human reason (rationality) is conceived, whether as something perfect and unlimited or, on the contrary, as something imperfect and limited[20]. While the model of

[14] Braithwaite (n 7) 75-78.
[15] Wheeler, Weisburd and Bode (n 5) 658.
[16] Wheeler, Weisburd and Bode (n 5) 657: 'Our judge interviews gave evidence of strong sentiment against crimes of greed rather than need, against crimes committed by persons in positions of trust and authority'.
[17] A philosophical approach to decision theory was developed by Michael Resnik, *Choices: an introduction to decision theory* (University of Minnesota Press 1987).
[18] Lorena Varela, 'Un esbozo sobre los modelos de la racionalidad humana en el juicio de imputación del tipo penal' (2017) 19 (2) Revista Electrónica de Ciencia Penal y Criminología, 1, 2 f.
[19] Varela (n 18) 3.
[20] Varela (n 18) 3 f.

absolute or perfect human rationality works from a hypothesis of ideally rational agents, that 'can acquire, store, and process unlimited amounts of information', that 'never make logical or mathematical mistakes', and that 'know all the logical consequences of their beliefs'[21], the limited or bounded rationality model works from a limited rational agent hypothesis, which has bounded capabilities and mental and emotional abilities[22]. These mental and emotional capacities are in turn subject to the influence of a series of cognitive biases, prejudices and heuristics or mental shortcuts, that induce to make, in many occasions, wrong decisions.

The bounded rationality is translated, precisely, in the natural limitations of the mental processing of the information that enters or is perceived by the intellect, taking into account the time and limited capacities of reflection of the people[23]. Cognitive biases are understood as 'cases in which human cognition reliably produces representations that are systematically distorted compared to some aspect of objective reality'[24]. Within the biases are heuristics, which as the name suggests, can be defined as generalizations and simplifications by way of practical rules and simple to apply in relatively familiar situations. The usefulness of heuristics is undeniable, but, at the same time, the cost of its easy use is the predisposition to act under errors. That is, through heuristics the complex task of assessing probabilities and predicting values is reduced, but, at the same time, the margin of error in the operation expands[25]. A pressure factor, in addition to the limited mental capacity of information processing, is the time available to make the most appropriate decision to the situation. Often, adaptive decisions must be made quickly and this can frustrate the choice of the most optimal strategy[26].

2 Decision theory and the criminal process

Decision theory assumes a technical nuance in the field of ethical philosophy through the theory of argumentation, from which cognitive biases are also studied as prejudices that evoke mistakes and injustices. In the theory of argumentation, as a general rule, biases are not considered as positive previous judgments but, on the contrary, completely negative because they affect the objectivity of the decision and, with it, the argumentation[27]. In a first sense, objectivity is impartiality and, in a second sense, objectivity is something independent of the mental states and attitudes of the person who decides or argues[28].

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[21] Resnik (n 17) 3 f.

[22] Theory created by Herbert Simon, *Reason in human affairs* (Stanford: Stanford University Press 1983) 17, passim; also before in Herbert Simon, 'Decision making in business organizations' (1979) 69 AER 493 passim.

[23] Martie Haselton, Daniel Nettle and Damian Murray, 'The evolution of cognitive bias' in David Buss (ed), *Handbook of Evolutionary Psychology* (2nd edn, Wiley 2016) 968, 970.

[24] Haselton, Nettle and Murray (n 23) 968.

[25] Amos Tversky and Daniel Kahneman, 'Judgment under uncertainty: heuristics and biases' (1974) 185 Science 1124, 1124.

[26] Haselton, Nettle and Murray (n 23) 970.

[27] Derek Allen, 'Ethical argumentation, objectivity, and bias' (2016) 82 OSSA Conference Archive, 1.

[28] Allen (n 27) 1.

Pejoratively, the biases are associated with the prejudice, partiality and unfairness of the decision[29], because these thought tendencies are fixed in the mental structure as something prior to the situation or life experience of the decider subject[30].

In all legal systems (at least in the Western world), the essence of the jurisdictional function is the objectivity and impartiality of the judges and courts when resolving the procedural situation of the accused of a crime, whatever it may be: from a homicide, going through a fraud to an act of terrorism. As a guarantee of a fair trial, are premises of the impartiality of judges, on the one hand, the 'non-submission to guidelines emanating from another will other than their own' and, on the other hand, 'the formation of such will based on the criteria established in objective rules, determined and established prior to the own judgment'[31]. Consequently, if the formation of the will of the judge does not follow the criteria established in the law, we will find ourselves in a system of pure decisionism or judicial arbitrariness, injurious to the aforementioned guarantee[32].

However, not even an impartial judgment is free from the influence of the cognitive biases and heuristic previously indicated. That is to say, judges can objectively judge a fact *with* their previous knowledge and past experiences, *with* their emotions and inclinations. In fact, it is what happens and it could not be otherwise, since judges are thinking and sentient human beings, just like the accused who is subjected to prosecution. What makes a judgment impartial is, on the contrary, that judges do not value the fact submitted to their jurisdiction *from* their passion, partisan prejudices or preconceived ideas[33]. This means that although the presence of cognitive biases reveals the absence of initial objectivity, its neutralization and separation at the time of prosecution makes it possible to achieve this objectivity. Likewise, as a manifestation of the subjectivity, the absolute apolitical nature of the judge is undoubtedly a desideratum not always possible to achieve, because 'unless we separate the judge in a human and other professional part it will be difficult to find true disinterested of public things, which is the most general meaning of what political'[34]. In any case, the prohibition of political affiliation and union membership of judges, as well as the prohibition of ideological procyclicalism of some kind (political or religious), as well as selection based on merit and ability, guarantee the apolitical nature of judicial decisions, although the judges maintain their political and morals tendencies in their internal forum[35].

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[29] Allen (n 27) 1.

[30] Haselton, Nettle and Murray (n 23) 982: 'there is abundant evidence that people's beliefs are indeed biased'.

[31] María Isabel Valldecabres Ortiz, *Imparcialidad del juez y medios de comunicación* (Tirant lo Blanch 2004) 116-117: 'no-sometimiento a directrices que emanen de otra voluntad que no sea la propia' and 'la formación de dicha voluntad a partir de los criterios fijados en reglas objetivas, determinadas y establecidas con anterioridad al propio juicio'. Also Alfonso Ruiz Miguel, 'Creación y aplicación en la decisión judicial' (1984) 1 Anuario de Filosofía del Derecho 29.

[32] Valldecabres Ortiz (n 31) 117.

[33] Valldecabres Ortiz (n 31) 117.

[34] Ruiz Miguel (n 31) 27: 'salvo que escindamos al juez en una parte humana y otra profesional será difícil encontrar verdaderos desinteresados de las cosas públicas, que es el significado más general de lo político'.

[35] Ruiz Miguel (n 31) 27.

2.1 The profile of many judges

Socially, the figure of the criminal law judge is one of the most important in the community. The expectations on his or her probity, discretion and wisdom places him or her among the most prestigious public officials. Judges perform, in this sense, a kind of honorable position, not only for the function entrusted but also for the responsibility that the same position entails. This kind of social stereotype affects not only society and individuals subjected to the process but also the self-perception of the judges themselves. They also tend to understand themselves as people of high knowledge, sensitive to the value of justice, human and empathetic. Accustomed to declaring the 'truth of certain facts' and deciding on the fate of many people, the sense of 'always being right' – because they argue reasons – ends up sharpening with the passage of time in the profession, and in many cases their decisions become dogmas for themselves. Such a predisposition to overestimate one´s cognitive and volitional capacities and abilities gives rise to the so-called egocentric or self-serving bias, which prevents recognizing the existence of erroneous thoughts, generalizations and mental simplifications.

This starting point, which characterizes the psychological profile of judges, generates a certain resistance to the correction of the cognitive and heuristic biases that each of them possesses. The bounded rationality of judges does not need to be proved, because they are also human persons (not superhuman), in such a way that the cognitive biases influence them in the same way they do with respect to the lay citizens. In any case, and unlike what some studies suggest when they argue that judges do not operate from limited rationality because they have complete knowledge of the case they judge, cognitive biases in judges are more strongly rooted in virtue of metabias blind spot. This type of prejudice is that the person ignores that he or she suffers from cognitive biases and rejects the idea that they could suffer them, considering, on the contrary, that the rest of people do[36]. From there, the rest of the cognitive biases that may arise in judges are more difficult to neutralize or correct.

2.2 The profile of many prosecutors

Like judges, prosecutors also enjoy social prestige, but while the former are expected to *provide* justice they are expected *to do* justice, chasing and imprisoning the criminals. The work entrusted to prosecutors is thus determined as a kind of social justice. This combative tendency of crime by prosecutors (punitive ideology) is exacerbated by social demands and official demands of the government regarding the prosecution of certain types of crimes: gender violence, drug trafficking, human trafficking, terrorism, white-collar crime, etc. Consequently, in criminal proceedings and before the beginning of the process, the influence of public opinion usually has a privileged place. For example, in terms of white-collar crime, since society began to know more directly and daily about corruption acts of the business

[36] On this bias: Emily Pronin, Daniel Lin and Lee Ross, 'The bias blind spot: perceptions of bias in self versus others' (2002) 28 Personality and Social Psychology Bulletin 369.

sector, and began to be aware of the extent of the damage they cause to the community, the social devaluation of his practice began to increase[37].

This social movement that drives the prosecution for certain criminal acts has long been supported by what is known as the culture of accountability and transparency of the socio-liberal and democratic rule of law models. In this sense, as the exercise of government transparency progresses and responsibility is demanded from economic agents (companies, corporations), the privileges of impunity for the powerful elite are reduced.

3 Cognitive biases in the criminal process

Cognitive biases in criminal proceedings directly affect both the principle of objectivity of the judicial decision and the principle of the impartiality of the judges. Broadly speaking, the principle of objectivity is compromised in many occasions due to the multivocity of the legal language, which allows that the interpretations of the courts result 'biased, consciously or unconsciously, by the origin and social belonging of the judges, as well as by their cultural referents'[38]. So too, judges make up a small and closed elite, often bordering on corporatism, which implies canons of adaptation of behavior for reasons of belonging and loyalty to the group. The spirit of body and the ideological endogamy, as well as the preference for certain legal arguments or evidentiary elements that come from public officials[39], cause numerous dysfunctions in the judicial task[40]. The concrete realization of the value of judicial impartiality raises various problems in different instances of the process of prosecuting the crime. In fact, the type of criminal act to be prosecuted entails the possibility of assuming certain positions for or against the perpetrators of the crime, according to the degree of empathy or familiarity that they arouse among the members of the court. Called sympathy bias due to similarity or proximity or vice versa of antipathy or distance[41] (for example, some group of judges may identify themselves with the author of the act due to the same surname or nationality, but another group of judges may distance themselves for the same reasons).

To date, in legal literature it has been written about prejudices and heuristics from the perspective of the perpetrator of the crime and from the approach of judges and prosecutors in the criminal process. Some contributions suggest that cognitive biases affect more the accused than the courts, taking into account that at the time of the decision to commit the crime, the author of the act has a complex and uncertain scenario to make an optimal

[37] Braithwaite (n 7) 62: 'no longer can it be asserted that the average citizen is unconcerned about and tolerant toward white-collar crime'. Also Francis Cullen, Jennifer Hartman and Cheryl Jonson, 'Bad guys: why the public supports punishing white-collar offenders' (2009) 51 Crime Law Soc Change 31 rescue the idea that society now considers, unlike years ago, the white-collar criminal as a 'bad guy'.

[38] Ruiz Miguel (n 31) 29: las interpretaciones de los tribunales resultan 'sesgadas, consciente o inconscientemente, por la procedencia y pertenencia social de los jueces, así como por sus referentes culturales'.

[39] Two paradigmatic cases are the preference for the legal arguments of the prosecutor and the opinions of official experts. About the topic Arturo Muñoz Aranguren, 'La influencia de los sesgos cognitivos en las decisions jurisdiccionales: el factor humano' [2011] InDret Penal 1, 17–21.

[40] Ruiz Miguel (n 31) 27.

[41] On the negative outgroup stereotypes Haselton, Nettle and Murray (n 23) 979.

decision, while judges, when they must judge a fact, have at their disposal all the elements of sufficient evidence and information, which allow them to be more assertive in their choice. This means that 'the defendant often makes his decision under conditions of limited rationality, while that limitation affects the court that has to assess the same decision less intensely'[42].

Contrary to this thinking, it is maintained that, although it is true that the accused could have acted in a scenario of uncertainty at the time of the events, this does not mean that the court is not facing the same situation of uncertainty regarding the prosecution of the facts. Both, the perpetrator and the judge, are conditioned by their bounded rationality when making decisions, because such limited rationality is not derived from a scenario of uncertainty 'x', but from the same subjective structure of the people. Even in environmental conditions of zero risk, people decide from their bounded rationality. In any case, just as a product of limited rationality, people can experience the subjective experience of a context of uncertainty – when objectively it is not – by the absence of prior knowledge that allows one to notice all the factors present in the situation. For this reason, judges also decide based on their bounded rationality influenced by cognitive biases and heuristics. What happens is that, normally, judges are affected by another type of prejudice.

The difference that yet, in any case, exists, between the moment of the decision of the accused and the moment of the decision of judges, is that while the author of the crime assumes a decision on something personal or a situation of his or her, a judge assumes a decision on the decision of another person. It is not something personal, not even in the strictest sense of *his or her* professional work, but of something objective relative to a subject other than him- or herself. In the phase of the evaluation of the evidence (selection, evaluation and description of the facts) 'the judge must establish what legally relevant facts have truly occurred'[43]. This task does not have the character of an empirical verification or a deductive conclusion, but of a process of interpretation and application (also creation) of the law with respect to the case being prosecuted[44]. The type of truth that the judge declares is a legal truth, which must coincide as much as possible with the real truth or historical reality of the fact declared as true[45]. On the contrary, in the commission of the crime, the accused party is

[42] Jamie Alonso Gallo, 'Las decisiones en condiciones de incertidumbre y el Derecho penal' [2011] InDret Penal 1, 9: 'con frecuencia el acusado toma su decisión en condiciones de racionalidad limitada, mientras que esa limitación afecta de forma menos intensa al tribunal que ha de valorar esa misma decisión'. Also, Enrique Rodríguez Celada, 'La criminalización del fracaso empresarial. Análisis crítico de la reforma del Código penal de 2015 en relación con el delito concursal' [2017] InDret Penal 1, 18 identifies the bounded rationality of the accused with the situation of uncertainty and environmental impositions suffered at the time of adopting the decision. This author also considers that judges decide on the basis of a perfect knowledge of the situation experienced by the accused and that is why they are not affected by limited rationality; although, later, this author attributes to the judges different biases, like the hindsight bias.

[43] Ruiz Miguel (n 31) 12: 'el juez debe establecer qué hechos jurídicamente relevantes han ocurrido verdaderamente'.

[44] Ruiz Miguel (n 31) 12.

[45] Ruiz Miguel (n 31) 12: in 'legal truth there is a linguistic mediation between the facts and the judge´s language...'; 'while the real truth is obtained largely through observation and verification of the facts, the legal truth is achieved through a process of interpretation subjected to normative guidelines not only in the sense

the one that generates the criminal act and, therefore, the one that establishes what must be taken or assumed as truth at a later time.

In other words, the facts that are prosecuted have two versions. An *ex ante* version and during the production of the act by the accused, and an *ex post* version of interpretation of the act by the judge. This *ex post* version is one of the possible versions of the event, according to the evidence produced and the conclusions assumed in relation to it, which amounts to maintaining that it could even be a version not entirely approximate to how the facts actually happened (objectively). With the acquisition of full knowledge of the *ex post* version, the judge must assess the *ex ante* version of the event, which requires a considerable effort, since he or she has to be hypothetically placed in the author´s place at the time of the commission of the offense with incomplete knowledge of the *ex ante* version. This means that judges must consciously ignore what they already know about the facts (such as the outcome), and pretend to ignore what the author did not know or that they know what he or she knew in the situational context of the past. This kind of cognitive descent of the facts, of knowing but pretending that one does not know, has the logical purpose of avoiding assuming a biased judgment in the evaluation of the behavior of the perpetrator of the crime[46]. Therefore, both in the *ex ante* version and in the *ex post* version of the facts, the accused and the judge, respectively, decide on the basis of their bounded rationality, whether or not it is a situation of uncertainty or risk.

3.1 A possible classification of cognitive biases in criminal prosecution

In general, two groups of cognitive biases can be presented in the prosecution of a crime: the cognitive biases related to the criminal act and the cognitive biases related to the author (individual profile or group prototype) of the criminal act. In turn, within each group, cognitive biases are common to all crimes and specific cognitive biases according to the type of crime. Both groups of biases violate the principle of objectivity of the judicial decision and the principle of impartiality of judges, but, to a greater extent, the first group of biases relates more directly to the principle of objectivity while the second group of biases with the principle of impartiality.

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already said that the analysis of the facts is it does so in terms of factual models provided for in legal norms (the so-called "factual assumptions"), but also in the sense that the facts are captured and interpreted in the light of non-legally binding cultural norms (...), such as the maxims of experience, the rules of common sense or the presuppositions about the "internal sense" of human actions' [en 'la verdad jurídica existe una mediación lingüística entre los hechos y el lenguaje del juez...'; 'mientras que la verdad real se obtiene en buena parte mediante la observación y la comprobación de los hechos, la verdad jurídica se alcanza mediante un proceso de interpretación sometida a pautas normativas no sólo en el sentido ya dicho de que el análisis de los hechos se hace en función de modelos fácticos previstos en normas jurídicas (los llamados "supuestos de hecho"), sino también en el sentido de que los hechos se captan e interpretan a la luz de criterios normativos culturales no forzosamente jurídicos (...), como las máximas de experiencia, las reglas del sentido común o las presuposiciones sobre el "sentido interno" de las acciones humanas'].

[46] In this kind of 'mental travel to the past' the judge cannot take the full knowledge of the ex post. To put it graphically, he or she cannot take the corpse.

Graphically:

(a) Objective biases or relative to the criminal act

(a.1) Common (for example: hindsight, confirmation, availability, anchoring, representativeness biases, etc.).

(a.2) Specific (for example: crimes of blood or passion, economic, gender, drug trafficking and organized crime, etc.).

(b) Subjective biases or relative to the criminal author

(b.1) Common (for example: social class and socioeconomic status biases, group attribution error, race, religion, nationality, etc.).

(b.2) Specific (for example: jealous person, ambitious person, soulless profile, etc.).

By way of illustration:

3.1.1 Objective-common biases

The hindsight bias in the prosecution of the facts affects the objectivity of the same, every time, that the people value a past event on the basis of a set of information presented as valid. In the judicial processes, the elements of evidence contain a closed account of a fact from its beginning to its outcome (the *ex ante* and *ex post facto* version) and, therefore, judges do not always manage to adequately hypothesize what has been represented and what the perpetrator could have done at the time of the commission since, knowing already the criminal consequences of the fact, they find it difficult to evade them in their evaluation[47]. To put it briefly, it is not the same to contemplate an event before it happens (as something future and, therefore, uncertain) as it is to observe it once it has already happened (as something past and, for that matter, certain)[48]. The retrospective bias is very common to be present in all those criminal processes of large dimensions, in which socially sensitive facts are prosecuted and the injurious results have shocked the public in a very severe way.

The confirmation bias is the mechanism through which people filter the information they acquire by assessing only that evidence that confirms their initial beliefs or opinions on the matter. For example, if from the beginning, for conscious or unconscious reasons, judges

[47] The reference work in cognitive psychology on hindsight bias is Baruch Fischhoff, 'For those condemned to study the past: heuristics and biases in hindsight' in: Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under uncertainty: heuristics and biases* (Cambridge University Press 1982) 335, 341: 'In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared ´relatively inevitable´ before it happened. People believe that others should have been able to anticipate events much better than was actually the case'. Also before in Baruch Fischhoff, 'Hindsight ≠ foresight: the effect of outcome knowledge on judgment under uncertainty' (1975) 1 J Experimental Psychol Hum Perception 298.

[48] '…past events seem more predictable than they really were', Jeffrey Rachlinski, 'A positive psychological theory of judging in hindsight' (1998) Ch L Rev. 571, 576.

already have an idea about a certain aspect of the criminal act, then, at the time of the evaluation of the evidence, they weigh mostly those indications that go in the same sense as their initial position, seeking legal support to confirm or ratify it[49]. The confirmation bias is very commonly presented along with the so-called primacy effect and belief persistence. 'When a person must draw a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight than that acquired later... This is called the *primacy effect*. People often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion'[50].

Evidently, many other biases and heuristics can be cited in this group, but the object of the work does not allow it at this time[51].

3.1.2 Objective-specific biases

Each of the criminal types have a criminal logic, which brings together a number of factors of various kinds. For example, crimes of blood or passion are usually subject to a series of prejudices, which do not always coincide in the specific fact. These stereotypes can be psychological (jealousy, envy, animosity, passionate love), of stationary nature (certain times of the year, such as summer or holidays), statistical (depending on the frequency, type of sample, etc.), cultural or religious (rituals or spells), racial, etc. Also economic crimes, drug trafficking and many others have certain conditions at the time of prosecution.

[49] 'People may treat evidence in a biased way when they are motivated by the desire to defend beliefs that they wish to maintain... But people also may proceed in a biased fashion even in the testing of hypotheses or claims in which they have no material stake or obvious personal interest. The former case is easier to understand in commonsense terms than the latter because one can appreciate the tendency to treat evidence selectively when a valued belief is at risk. But it is less apparent why people should be partial in their uses of evidence when they are indifferent to the answer to a question in hand', Raymond Nickerson, 'Confirmation bias: a ubiquitous phenomenon in many guises' (1998) 2 Review of General Psychology, 175, 176.

[50] 'The primacy effect is closely related to (and can perhaps be seen as a manifestation of) belief persistence. Once a belief or opinion has been formed, it can be very resistive to change, even in the face of fairly compelling evidence that it is wrong... Moreover, it can bias the evaluation and interpretation of evidence that is subsequently acquired. People are more likely to question information that conflicts with preexisting beliefs than information that is consistent with them and are more likely to see ambiguous information to be confirming of preexisting beliefs than disconfirming of them… And they can be quite facile at explaining away events that are inconsistent with their established beliefs...', Raymond Nickerson, 'Confirmation bias: a ubiquitous phenomenon in many guises' (1998) 2 Review of General Psychology 175, 187.

[51] About availability, anchoring and representativeness biases, Tversky and Kahneman (n 25).

3.1.3 Subjective-common biases

The social class and socioeconomic status biases influence human decisions both for and against the person according to their social level or economic power. In the criminal system some assumptions lead to punishing more severely the 'persons lower in wealth, status, or power than on persons (or organizations) higher on any of those dimensions'[52], but, other assumptions lead to the most severe punishment of the rich or powerful just on the basis of this condition. Singularly, certain types of criminal acts, such as bagatelle delinquency, street crime or violent crime are often associated in a biased way with socially lower classes, while business and financial crimes linked to people of high social status. Although, in principle, the second association is more successful than the first, since usually only the economically richest people could commit financial or business crimes, it is no less true that people from the working class can also become participants of white-collar crimes[53]. Also, many violent criminal types are not immune to authors of high economic and social status.

The group attribution error assumes as a starting point that the component members of a certain group or sector, including the social, cultural or economic class, think, decide and act in the same sense by the mere belonging to the group[54]. There are several reasons to suspect that people lack individuality when they are in a group: the need to belong, the sense of loyalty and the fear of rejection and exclusion from the group[55]. Judges usually incur in this type of error when they judge cases of co-authorship and multiple participation, or crimes of criminal gangs or illicit association, often unfairly and incorrectly assessing the degree of responsibility of each intervener in the act.

The race bias means that certain ethnic groups are assumed to be more predisposed to criminality because of their innate dangerousness, such as the black race, the aborigines or any dark skin contingent. This kind of stereotype is based on historical and sociological reasons, fed by all kinds of anthropological, theological and diverse literature, which drove culturally to associate certain races with crime. Special mention deserves the African-American race in the United States of America, which is still to date of this writing subjected to a dehumanization of the person[56].

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[52] Braithwaite (n 7) 61.

[53] Sutherland (n 1) 7.

[54] Scott Allison and David Messick, 'The group attribution error' (1985) 21 Journal of Experimental Social Psychology 563, 576–578.

[55] This is the in-group bias, which affects its members and which differs from the group attribution error, which is the one that suffers from the behaviour of the members of the group.

[56] Mark Bennett and Victoria Plaut, 'Looking criminal and the presumption of dangerousness: afrocentric facial features, skin tone, and criminal justice' (2018) 51 UC Davis Law Review 745, 773, 785: 'The stereotyping of Blacks´ predisposition to crime and dangerousness is rooted in the beliefs formed during slavery by Whites that Blacks were more animalistic than human. To the White European settlers of our nation, the darker skin of the Native Americans, and Black slaves abducted from Africa, were signs of a lack of moral worth and criminal intent. From the colonial times viewing Blacks as chattel, through slavery viewing Blacks as savages and brutes, the themes of Blacks´ criminality and dangerousness pervaded the contemporary thinking by Whites at the times'.

3.1.4 Subjective-specific biases

Like criminal types, there are also criminological models of individual profiles or group prototypes, which are used at the time of criminal prosecution. The risk of assessing the evidence presented during the course of the process from these predetermined typologies is to assume a perspective of criminal law of the author and not from the criminal law of the act proper to a state of guarantees. Subjecting the accused to a judgment based on their way of being and their personal characteristics or on their appearance similar to a certain type of offender, is to infringe the guarantee of objectivity proper to a rule of law.

3.2 Biases in judgment of white-collar crimes

The cognitive biases that affect the members of trial courts in general are the same as those affecting judges dealing with white-collar crime. However, each criminal area has a peculiar logic that gives rise to specific prejudices and heuristics. In white-collar crime, it is presented, in particular, that judges do not always have sufficient technical training on how business dynamics work and the corporate culture that characterizes them. In this sense, if in fact all judges start from a position very different from that of the defendant at the time of committing the crime, this distance from the *ex ante* perspective is increased by a judge´s lack of specialization in economic-business matters[57].

Especially important in socioeconomic matters have certain biases. Within the subjective-common cognitive biases of white-collar crimes are the following: the social class and economic status biases, the group attribution error, race and religion. And, in terms of subjective-specific cognitive biases, concur the ambitious person and a person with superior knowledge biases.

Both the business factor, of success and fame[58], and the presumption of wealth and the technical and special knowledge of the perpetrator of white-collar crimes generate a sufficient platform to make tendentious judgments about criminal behavior without taking into account the objective reality of the events. While the social perception of white-collar crime has long gone unnoticed and even valued as a synonym of success and social status, from the 1950s-1960s onwards many legal systems in the world began a campaign or political-criminal fight against the criminality of the powerful. Not only legal-positive changes in constitutional matters led to this new course (the transition from the liberal rule of law to the socioliberal and democratic rule of law) but the massive awareness of the real serious crimes that affect society. From the perspective of socioliberal political philosophy, those dimensions of criminality that the initial illustrated project of the liberal model had left out were understood. As is well known, the liberal model – inheritance of natural law –

[57] Rodríguez Celada (n 42) 17.

[58] What is known as the halo effect, which consists of making a positive or negative global judgment about a person, group or corporation based on some positive or negative attributes. For example, it is presumed that a prestigious company (for the quality of its products) would not commit a corporate crime, and vice versa. On this cognitive error, Edward Thorndike, 'A constant error in psychological rating' (1920) 4 Journal of Applied Psychology 25, 29.

built the world of knowledge on the basis of the binomial illustrated and unenlightened citizens, civilized and uncivilized, male-white-free-owners and everything contrary. From this valuation orientation the state assumed a 'discourse on the security of "civilized space"'[59], leaving out everything that was not understood as a natural delinquent, namely, the state itself, corporations and owners of the media of production.

Precisely, this prototype of man of the liberal model is that which lasts under the guise of social class bias. The businessman is the white man, trained (Catholic or Jewish, in preference), rich and powerful. When some or all of these factors are present in the author of white-collar crime, then, a series of characteristics that obscure the necessary objectivity of the trial are presupposed: the white man is contemptuous in relation to his employees of other ethnic groups, he knows enough as to know that he committed a crime because he has attended the best universities, his wealth makes him want more wealth and his power exerts it to get away with his misdeeds. Thus, roughly speaking, prejudices and mental heuristics operate. Class bias in white-collar crime is a double-edged sword. Either it operates as a benefit or as a punishment. In some empirical studies, it was detected that as a product of class bias the penal system was reluctant to initiate a criminal investigation against people of the social elite for white-collar crimes. On the contrary, other studies yielded adverse results[60]. Along with the social class bias, the racial bias, which has been so prevalent for a long time in the US courts regarding the African and African-American race, tends to operate as a danger indicator higher than that of the European and Aryan races, which would be more oriented towards avarice and greed[61]. In this aspect there is a presumption of danger with a tendency to violent crimes in the black race[62] as well as a presumption of greed with a tendency to economic crimes in the white race. One of the explanations for this cognitive bias is derived from a logical description: historically, the white ethnic group has been the socially and economically privileged, being the only one who could access university education, to position of well-paid jobs and, therefore, to a social circle of upper class. The rest is already known to everyone.

[59] Camilo Bernal Sarmiento, Sebastián Cabezas Chamorro, Alejandro Forero Cuéllar, Iñaki Rivera Beiras and Iván Vidal Tamayo, 'Debate epistemológico sobre el daño social, los crímenes internacionales y los delitos de los mercados' [2012] 2 Revista de Derecho Penal y Criminología 49, 52.

[60] In addition, the bias also operates at the emotional level, causing sympathy for similarity or closeness or, conversely, antipathy for inequality or distance. In this sense, class bias may cause some group of judges to be identified with the group of businessmen due to the same lifestyle or academic status, but another group of judges, on the other hand, distanced by reason of moral issues or religious.

[61] Related to religious and cultural biases (rich Jews in white-collar crimes).

[62] On racial biases in the criminal justice system Bennett and Plaut (n 56); for cultural biases Justin Levinson, Mark Bennett and Koichi Hioki, 'Judging implicit bias: a national empirical study of judicial stereotypes' (2017) 69 Florida Law Review 63.

4 Proposal

It is true that counting a problem does not solve it, but it is no less true, that by noticing it, by recognizing it as such, we can begin to solve it and this is already a potential way to solve it.

The prejudices and cognitive biases at the moment of the prosecution of a crime will continue to exist, even when over time, the judicial system will neutralize them. However, we must begin by devising mechanisms of correction if we do not want this to be a mere desire or kind prognosis.

Cognitive biases, in addition, are being immunized as they are intended to be controlled. In this sense, they reinvent themselves and regenerate themselves as a consequence of the bounded human rationality. This survival also influences social opinions, which continually evolve. For this reason, cognitive biases in courts that prosecute white-collar crimes are almost always backed up or conceived by some fashionable social or political-criminal movement of the moment.

The proposal to neutralize cognitive biases in the criminal justice system consists in the implementation of a *compliance program debiasing*. The normative structure and crime prevention function of compliance programs in corporate-business life is a model for designing judicial compliance programs. Obviously, the modus operandi would have to adapt to the judicial dynamic, especially in relation to the stages of the judicial process.

It is not a question of reforming the criminal procedural law in its essence, but of introducing technical control mechanisms within the regulations that regulate the jurisdictional activity. For this, it would be necessary to institutionalize a system of learning[63] and debiasing in the scope of the judicial power, due to the role of judges and prosecutors. Among the elements that would have to meet the compliance program debiasing are the following: normative platform and institutional platform.

4.1 Normative platform

(a) Guidelines for rational decision making;
(b) A catalogue of cognitive biases and debiasing techniques of each of them, with citations of statistics, field studies and theoretical underpinnings;
(c) The debiasing technique or the destructive testing of biases consists, precisely, in removing the biases of the mental structure of people. A kind of deprogramming of prejudices and heuristics should be pursued through their revision and correction, and reprogramming of knowledge as a new learning about certain aspects[64].

[63] As the institutional learning system that is foreseen for the private sector in Georgios Dimitropoulos and Philipp Hacker, 'Learning and the law: improving behavioral regulation from an international and comparative perspective' (2018) 25 Journal of Law and Policy 473.
[64] Baruch Fischhoff, 'Debiasing' in: Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under uncertainty: heuristics and biases* (Cambridge University Press 1982), 422–444.

(d) In the orientation of the process of deprogramming and intellectual reprogramming of judges, it is useful to contemplate the prescriptive theory of the perfect or unlimited human rationality. In this sense, although the scale of real agent yields more accurate results of how people behave in certain cases, it is also true that the ideal scale can be more useful in order to correct errors and cognitive prejudices, since, although the ideals they prescribe are unattainable in practice, they nonetheless serve to guide individuals in how they should readjust their thought structures[65]. With this argument, the normative theory would serve as a source of improvement of human thought, rather than as a theory of the imputation of how people should have behaved.

(e) Within the debiasing technique one can appeal to one of the reasonings that are part of the instruction of juries in the American judicial system. In the context of judicial proceedings, jurors are advised to dissociate the process of acquiring information from drawing conclusions about that information. In this sense, they are exhorted to *keep an open mind* during the presentation of evidence, without forming opinions as to what the verdict should be until all the evidence has been presented and the judge has instructed them. This type of warning is intended to prevent the jury at the time of deliberation from reaching a verdict on the basis of biases generated in the previous stage[66].

(f) And, in particular, in relation to the profile of judges it is worth remembering the following: the best condition that conducive to learning is the 'explicit admission of the need for learning. Entering an apprenticeship program that confers expertise is surely a sign of modesty'[67], a virtue that must be demanded of those who impart criminal justice.

For these guidelines of conduct to be translated and be effective in practice, it is necessary that the regulatory platform be accompanied by an institutional platform, which foresees the application and control mechanisms of the same. This institutional platform is independent of the traditional paths that already exist at the level of procedural law, such as the means of resources available to the parties.

4.2 Institutional platform

(a) Body of consultation and internal controller: decisions of judges will not be subject to a review or legal review but merely to technical-psychological (cognitive and social psychology) review by experts in the field, to assess the objectivity and impartiality of the decision. That is, it would not be a review by other judges or peers, but by

[65] Resnik (n 17) 4: 'The ideals they describe [rational agent], although unattainable in practice, still serve to guide and correct our thinking'.

[66] On the 'admonition to maintain an open mind during the evidence-presentation phase of a trial', Nickerson (n 50) 193.

[67] Fischhoff (n 67) 443.

specialized people or experts in the field. At this point, it could be recommended that judges themselves proceed spontaneously to review their decisions by the body of consultation (before publicizing them to the parties) in cases susceptible of being affected by cognitive biases, or, at the request of one of the parties of the process (that does not require additional resource because the revision is internal), or, even, like a compulsory mechanism in all the cases that solve the procedural situation of the defendant (sentences).

(b) In the essence of the body of consultation and control is not the ability to alter the sound criticism or the intimate conviction of judges, but to detect certain argumentative elements product of cognitive biases that could be obviously harming the objectivity of the decision. In favor of this idea the argument is presented, that we would modify the prejudice of infallible judge and reduce the expectations of the role of judges in relation to the idea of fairness, also assuming them as persons of limited rationality that are conditioned by cognitive and heuristic biases.

(c) In any case, as an internal and intermediate instance, a specialized objective observer could cushion much of the parties´ eventual resources[68], through their recommendations to the judges[69].

(d) Disciplinary instances of correction and reprimand: as a technical authority, it acts as the prelude to preventing prevarication.

While it is recognized that this type of proposal would enrich the already existing judicial bureaucracy, it is no less true that it would substantially improve the justice system in one of its most controversial aspects for the guarantees of the parties to the judicial process: the existence of cognitive biases in the judges of the criminal process. For this reason alone, the proposal is sensible and deserves some consideration.

To conclude, you cannot ignore that 'good practice will require better theory about how the mind works. Good theory will require better practice, clarifying and grappling with the conditions in which the mind actually works'[70].

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[68] It is true, that lawyers could take advantage of these intermediate instances to delay the process and on this point very interesting debates could be raised, but it is no less true that the judicial system cannot stop improving thinking that each reform could be used strategically by the interested parties.

[69] A list of recommendations could be considered, to measure the severity of the sentence that damages objectivity. Each of the levels of recommendations (for example, mild, intermediate or severe) would have different consequences. The need for the binding or not of the recommendation presents the same problem that the recommendations of international organizations present in certain global affairs, to which the States parties are 'obliged' to observe them.

[70] Fischhoff (n 67) 444.

Selected Literature

Braithwaite J, 'Paradoxes of class bias in criminal justice' in Pepinsky HE (ed), Rethinking Criminology (Sage 1982) 61–84

Fischhoff B, 'Debiasing' in Kahneman D, Slovic P and Tversky A (eds), *Judgment under uncertainty: heuristics and biases* (Cambridge University Press 1982) 422–444

Posner R, 'Optimal sentences for white-collar criminals' (1980) 17 American Criminal Law Review 409–418

Resnik M, *Choices: an introduction to decision theory* (University of Minnesota Press 1987)

Sutherland E, 'White-collar criminality' (1940) 5 (1) American Sociological Review 1–12

Tversky A and Kahneman D, 'Judgment under uncertainty: heuristics and biases' (1974) 185 Science 1124–1131

Varela L, 'Un esbozo sobre los modelos de la racionalidad humana en el juicio de imputación del tipo penal' [An outline on the models of human rationality in the imputation of the criminal offence] (2017) 19 (2) Revista Electrónica de Ciencia Penal y Criminología 1–20

Wheeler S, Weisburd D and Bode N, 'Sentencing the white-collar offender: rhetoric and reality' (1982) 47 American Sociological Review 641–659

BROADENING THE SCOPE : THE MULTIFACETED ROLE OF CORPORATIONS IN CRIMINAL JUSTICE

TRANSFORMING THE ROLE OF CORPORATIONS IN CRIMINAL PROCEEDINGS: IDEAS ON COMPLIANCE AND CORPORATE VICTIMIZATION

By Eduardo Saad-Diniz [*]

Abstract

This contribution sets out some provoking thoughts about transformative ideas to the role of corporations in criminal proceedings. It begins by analysing what could be a new set of values, moral arguments and strategies to overcome the moral split between moral obligations and legal duties, especially by using narratives rather than descriptions. Narratives are a promising approach, as they give voice to victims and include them more substantially in criminal proceedings. In the corporate field, a victim-centred approach raises challenges regarding the content and extent of corporate victimization as well as regarding alternative perspectives, such as the role of emotions and alternative initiatives in promoting the social control of business.

1 In search of innovative ideas about the role of corporations in criminal proceedings

Let me provide a brief historical overview before introducing the account of a transformative role of corporations in criminal proceedings. The Young Penalists (YP) of the International Association of Penal Law (AIDP) have been debating the dynamics of corporate crime since 2013. At the 3rd International Symposium in Munich, Germany, 2013, the YPs were engaged in more conceptual thoughts on corporate criminal liability. At that time, Klaus Tiedemann announced that corporate criminal liability would spread globally as the 'third track' of criminal liability[1]. Joachim Vogel called for more empiricism in the field[2]. And William Laufer critically pointed out the need of moral indignation over corporate crime[3]. In 2014, along with Dominik Brodowski and Manuel Espinoza, we brought the YP debate to São Paulo, Brazil. This meeting was more focused on the regulation of corporate mismanagement. Raul Zaffaroni presented his ideas on expanding the contents of the

[*] Professor of Criminal Law and Criminology at the Ribeirão Preto Law School and Program for Latin American Integration, University of São Paulo, Brazil.

[1] Klaus Tiedemann, 'Corporate criminal liability as a third track' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 11–18.

[2] Joachim Vogel, 'Rethinking corporate criminal liability' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 337–341.

[3] William Laufer, 'Where is the moral indignation over corporate crime' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 19–31.

genocide to the corporate field[4]. Jose Luis De La Cuesta debated the new Spanish model of corporate criminal liability[5]. William Laufer came up with the idea of a 'compliance game' between and among regulators and regulated[6]. John Vervaele closed the Symposium, drawing YPs' attention to conflicts of jurisdictions and double jeopardy issues[7]. Those seniors´ statements give us a good summary of the main ideas and challenges YPs were dealing with in the last years[8].

In 2018, at the 5th Edition of the YP Symposium in Freiburg, Germany, the role of corporations in criminal proceedings was elected as the core subject. Assuming the need of provoking the existing commonsense in the field, this essay aims to make some first explorations into a victim-centered approach as a possible spur towards a transformative criminal proceeding. The main purpose here is to analyse some core concepts that could inform a comprehensive set of enforceable victim's rights articulated to self-regulatory strategies. At the same time, the idea is to start criticizing the commonsense around the use of compliance strategies in criminal proceedings. Compliance research usually refers to 'enforced self-regulation', 'incentive structures', 'rational choices', or 'effectiveness' without a proper immersion in their insufficiencies. As if compliance had become a catch-all term, reaching almost any processes where the state is no longer identified as the provider of crime control.

In criminal science, there is still much room for reviewing the primary functions of the social control of business. In my particular point of view, the big picture seems to be the debate

[4] Raul Zaffaroni, 'O papel do direito penal e a crise financeira' in Eduardo Saad-Diniz, Dominik Brodowski, Ana Luíza Barbosa de Sá (eds), *Regulação do abuso no âmbito corporativo: papel do direito penal na crise financeira* (LiberArs 2015) 13–26.

[5] José Luis De la Cuesta, ´Auf dem Weg zu einem Strafrecht für juristische Personen – das spanische Strafrecht' in Ulrich Sieber, Gerhard Dannecker, Urs Kindhäuer, Joachim Vogel and Tonio Walter (eds), *Strafrecht und Wirtschaftsstrafrecht – Festschrift für Klaus Tiedemann* (Carl Heymanns 2008) 527–544.

[6] William Laufer, 'The compliance game' (2018) 988 *Revista dos Tribunais* 67–80.

[7] Michiel Luchtman and John Vervaele, ´Aplicação das regras de abuso de mercado (operações com informação privilegiada e a manipulação de mercado): rumo a um modelo integrado de aplicação da lei penal e administrativa da UE?´ in Eduardo Saad-Diniz, Dominik Brodowski, Ana Luíza Barbosa de Sá (eds), *Regulação do abuso no âmbito corporativo: papel do direito penal na crise financeira* (LiberArs 2015) 27–56.

[8] See, e.g., Dominik Brodowski, 'Minimum procedural rights for corporations in corporate criminal procedure' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 211–225; Anna Salvino Valenzano, 'Triggering persons in *ex crimine* liability of legal entities' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 95–107; Anna Maria Neira Penna, 'Corporate criminal liability: tool or obstacle to prosecution?' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 197–201; Patricio Sabadini, ´O novo Código de Processo Penal Argentino e a prisão preventiva desmedida: programas de *compliance* em matéria de controle de riscos?´ in Eduardo Saad-Diniz, Dominik Brodowski, Ana Luíza Barbosa de Sá (eds), *Regulação do abuso no âmbito corporativo: papel do direito penal na crise financeira* (LiberArs 2015) 27–56; Renata Barbosa, `Crise e crime: o direito penal como um potencial mecanismo de regulação da economia' in Eduardo Saad-Diniz, Dominik Brodowski, Ana Luíza Barbosa de Sá (eds), *Regulação do abuso no âmbito corporativo: papel do direito penal na crise financeira* (LiberArs 2015) 125–134.

about how we could further develop the notion of 'corporate criminal justice', once proposed by William Laufer, by embracing both new emerging approaches to criminal justice systems and innovative corporate initiatives to reduce criminality. Whenever possible in this essay, I underline the need of more progressive thoughts about corporate criminal justice, posing some questions to inspire future research that can provide evidence of meaningful changes in corporate ethical behavior[9].

Of course, I am aware of the pitfalls. The development of a comprehensive transformative account of corporations in criminal proceedings could take years, or an entire generation of YPs. But, for now, in this essay there are a few topics with which I am particularly concerned. Having in mind that research in transformative sciences is a highly interdisciplinary field, and without disregarding the need for being as much realist as possible – it means, less normative in the suggestions –, I will discuss different approaches across a variety of disciplines. In the first part, I suggest that transformative criminal proceedings should use narratives rather than descriptions, because narratives introduce the tragic value of real human lives into the decision-making process. Here I criticize the split of moral obligations and legal duties and the alienation caused by the 'juridification' (i.e. the social construct of conflicts by means of criminal proceedings, as explained below). In the second part, I explore the boundaries of a corporate victimology, a field originally conceived by Laufer. Its main purpose is to accentuate that the study of corporate victimization could inform some possible strategies to recognize victimization processes as a rationale for legal sanctions against corporate harmful wrongdoing. In a third part, after briefly highlighting the 'emotional turn' in criminal justice, I try to encapsulate all this transformative push in a crisp suggestion: restorative justice in compliance settings combined with retributive punishment. This provides a possible theoretical background to address more properly victims needs in criminal proceedings. I conclude, very similarly to what Laufer proposed as being the progressive account on corporate criminal liability, with a suggestion that compliance resources could be used as a transformative trigger.

2 Transformative criminal proceedings should use narratives rather than descriptions

There are many interesting insights that reinforce the idea that criminal proceedings should use narratives rather than descriptions. I cannot develop it in further detail here, but it is a profound philosophical issue to review the decoupling between moral obligations and legal duties. I assume in this essay that the Kantian doctrine´s legacy makes it very difficult to perceive morals by means of law. Simply pointing out, this split obstructs the justification of punishment as a moral reprobation in the course of a criminal proceeding. In the Kantian doctrine, the practical principles are merely formal and suppress the subjective – or material – dimension. The formalization of legal duties apart from the material subjectivity is a

[9] For a concept of 'corporate criminal justice' and critical reflections about the measurement of corporate crime, see William Laufer, 'The missing account of Progressive Corporate Criminal Law' (2017) 14 New York University Journal of Law and Business 1–63.

conditional to ensure the abstract universality of juridical norms[10]. Otherwise, moral obligations require a sense of autonomous willingness to follow legal duties.

The moral split of legal doctrine could also be understood through a sociological perspective, specially concerning the 'juridification' (the original German word is *Verrechtlichung*), the process that socially constructs a conflict by means of providing a judicial proceeding resulting in a decision. A compelling reflection of this juridification process can be found in the sociological model proposed by Niklas Luhmann. According to him, the very essence of criminal proceedings lies behind descriptions. It supports the idea of juridical decision-making process based upon the observation of descriptive structures, within which the system achieves its function (according to Luhmann: the 'congruent generalization of normative expectations'[11]). The idea is quite reasonable. Traditional thinking indicates that criminal proceedings are based in social constructions that do not represent the conflict in itself but a mere phenomenal reconstruction of it. This is the reason why juridical systems could be operatively applied without any worry on moral justifications, social justice, recognition, fairness, or any other analysis concerning the social costs of decision making. Still, according to Niklas Luhmann, the entire question of legitimacy is a matter of having followed, or not, legitimate proceedings (the German expression for this is *Legitimation durch Verfahren*)[12]. Consequently, it reduces the regulatory reach of the law to the organization of proceedings without concern for a fair distribution of personal liberties in the society or for the recognition of victims.

Günther Teubner observes that proceedings alienate the conflict: 'legal subsumption and bureaucratic procedures subject the concrete life-problem to "violent abstraction"'[13]. This is a matter of juridification, a process responsible for avoiding moral reasonings by means of juridical formalities. As the sociologist clearly stated, the 'problem of juridification raises the fundamental issue of what constitutes a problem. A problem is not a scientific artefact: it is a sociological construct, it is a perception by a group of a state of affairs that is threatening that group´s interest'[14]. Indeed, the Kantian split mentioned above remains irresolute, because the social constructs in the proceedings consequently 'mutilate social conflicts' within the construction of truth restricted to what is internally in the proceeding. As Teubner

[10] Imannuel Kant, *Grundlegung zur Metaphysik der Sitten* (Suhrkamp 2007) 45 ff.
[11] Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993).
[12] Niklas Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1983).
[13] Günther Teubner, 'Juridification and Disorder' in Günther Teubner (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust and social welfare law* (De Gruyter 1987) 24. Originally, the idea was first incorporated into criminal proceedings by Fernando Fernandes, *O processo penal como instrumento de política criminal* (Almedina 2001) 94 ff.
[14] Teubner (n 13) 51

stressed, the juridification does not solve conflicts, it simply 'alienates'[15] them, it mutilates social experiences, moving away, consequently, socially adequate responses[16].

By assuming that this entire process causes the alienation of moral aspects in criminal proceedings, some unsolved issues arise: 1. What kind of theoretical foundation could challenge the Kantian´s legacy?; 2. Can narratives be more appealing than descriptions in proceedings?; 3. What kind of qualitative outcome can narratives bring to ensure the moral dimension in the decision-making process?; and by specifically looking at the corporate field, 4. Can corporate initiatives be providers of better social constructs for criminal proceedings than the traditional descriptive structures?; 5. Can corporations assume alternative strategies to perceive fairness in the proceedings?

For now, I would rather discuss only the role of transforming narratives as an alternative to breaking the very descriptive nature of criminal proceedings. Unlike descriptions, narratives can introduce the representation of human tragedies and the victim's voice, bringing concrete values to decision-making processes. Narratives avoid alienation. Narratives are more powerful than descriptions because they expose the conflicts based upon social lives, beyond the mere rigid and formalistic structure of a criminal proceeding. This is why telling victims' stories could be a promising alternative to recovering the lost moral sense of human lives that should be guiding criminal proceedings[17]. In sum, the main idea is that transformative social sciences, inspired by the critical use of narratives, could impact social constructions in criminal proceedings, from the primary deviance to the decision-making in our Courts.

Narratives can increase the level of qualitative knowing, recollection and learning processes. Maybe the use of narratives could even stimulate a more critical analysis on the social roles of offenders and victims. As Mark Findlay and Ralph Henham extensively analyzed, 'trials (…) offer a foundation language and practice for the expansion of access and victim participation. They certainly offer a mechanism of accountability within which these rights

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[15] Debating Luhmann's model and making references to Nils Christie's classic idea that victims are 'dispossessed of the conflict', Emmanouil Billis and Nandor Knust, 'Alternative types of procedure: aspects of social legitimacy'. Ulrich Sieber, Valsamis Mitsilegas, Christos Mylonopoulos, Emmanouil Billis and Nandor Knust (eds), *Alternative systems of crime control* (Duncker & Humblot 2018) 39–58 ('the lack of normative integration of the victims and the community affected by the original conflict into the criminal process make them almost disappear in this transposed state-conflict-resolution mechanism', 51).

[16] Teubner (n 13) 51.

[17] For instance, there are many advantages in the use of social science to reduce violent offending: 'The focus is on a "bad behavior, good person" approach in which those present seek to reconnect the offender to his or her values, with the goal of motivating the offender to want to follow the rules in the future. The restorative justice approach seeks ways to heighten the offender´s future motivation to engage psychologically and behaviorally in society. This engagement includes developing or becoming more committed to social values that promote self-regulation, and consequently adhering more closely to laws and social regulations in the future, that is, to lower levels of rearrest. In other words, one important goal is being able to create better community members', Tom Tyler and Lindsay Rankin, 'Public attitudes and punitive policies' in Joel Dvoskin, Jennifer Skeem, Raymond Novaco and Kevin Douglas (eds), *Using social science to reduce violent offending* (OUP 2012) 118.

may be tested'[18]. My point is that the use of victim´s narratives could be an inspiring strategy to recover the moral reasoning in legal decision-making processes. It does not differ from the dynamics of recognition, treating victims with special regard in the relationship they engage both with the offender and the criminal justice system[19].

This implies a wider range of transformative practices, beginning with the recognition of victims of corporate crime and giving them a protagonist role in the whole criminal justice system. Of course, this attempt requires much more profound research, but leaving aside for now the scholarly rejection of corporate moral agency, victim's recognition could provide us with a more accurate identification of blameworthiness. To make this venture come true, there are some key research questions: How could companies help victims addressing their narratives in criminal proceedings? Could their corporate codes and internal proceedings reconnect moral obligations and legal duties? To have the company as another part of the process, as a party interest in the 'reconciliation' with the wrongdoing? What could be the value of the new normative approaches on the moral obligations of corporations? Or, more directly, extending the reach of victimhood to corporations, is it possible to clearly recognize them as victimizers? More empiricism[20] and experimentation in this regard could demonstrate how it could work in practice.

Criminal law scholars worldwide are intensively engaged in comparative research mostly focused in a single setting of enhancing the quality of corporate criminal liability. At present, existing criminal law research seems to neglect central empirical questions of the extension of corporate harmful wrongdoing[21], not recognizing insufficiencies in comparing criminal justice system or intercultural[22] challenges to a more comprehensive account on legal

[18] Mark Findlay and Ralph Henham, Transforming International Criminal Justice: retributive and restorative practice in the trial process (Willan 2005) 292–294.

[19] 'This withdrawal of respect or recognition is our most basic response to wrongdoing and thus can correctly be described as the expressive form of *blame*. It is the most basic response to wrongdoing because it essentially involves the recognition that our relationship has changed in some way as a result of wrongdoing. Perhaps we can eve say that wrongdoing – that is, the failure to do what it is one has a moral obligation to do – is just whatever properly motivates us to this withdrawal of recognition. What blame express, through its symbolic withdrawal of recognition, is a deterioration in relationships: it expresses the view that things have changed for the worse between "us". A natural metaphor to reach for in explaining this is to talk about distance, or a rupture in relationships; we might even talk in more grandiose fashion about the alienation of the wrongdoer from the moral community', Christopher Bennett, *The apology ritual: a philosophical theory of punishment* (CUP 2008) 107.

[20] Arianna Visconti, ´Corporate violence: harmful consequences and victims´ needs: an overview' in Gabrio Forti, Claudia Mazzucato, Arianna Visconti and Stefania Giavazzi (eds), *Victims and corporations: legal challenges and empirical findings* (Wolters Kluwer 2018) 158 ff.

[21] Empirical literature is scarce. See, e.g., Ulrich Sieber and Marc Engelhart, *Compliance programs for the prevention of economic crimes: an empirical survey of German companies* (Duncker & Humblot 2014) 96–98, quantifying victimization of companies and third parties.

[22] Malcolm Feeley concerns are still from much value: 'The logic of comparative analysis – concomitant variation – has rarely been exploited effectively in the field since using the legal system or legal culture as the unit of analysis, like much of social science generally, is "negative" or "corrective", in that it is most successful in marshalling evidence to challenge or "disprove" the accuracy of received wisdom or generalization put forward by others. However valuable this may be, it does little to advance explanatory analysis', Malcom

sanctions. Varying in small subtleties, debates often consist in capturing different types of organizational behavior with a minimum of relevance to justify the use of criminal sanctions, conflicts across jurisdictions, low quality of domestic institutions, and some skepticisms about the deterrence of administrative sanctions.

There are some other unexplored issues, such as the supposedly moral autonomy of corporations as victimizers or as victims, their acceptance of norms or commitment to ethical standards, their role in shaping the regulatory architecture, resistance to prosecutors or regulators, or, ultimately, to mentioning more controversial sociological standpoint, the ignorance of the fact that victims of corporate crimes are mostly dependent on corporate resources. In one word, legal systems around the globe are failing to address more properly the social disapproval through corporate criminal liability[23], therefore corporate crime is barely conceived as a moral failure.

If this moral failure reflects the idea of lack of moral indignation over corporate harmful wrongdoing,[24] there is also a remarkable normative aspect in my attempt to further connect it to a transformative suggestion: it is an objective moral failure combined with subjective indifference in the decision-making, which ultimately leads to a societal moral confusion about the purposes of the criminal proceedings and punishment. Other researches in social sciences have also stressed the need to 'restore the moral balance' in responses to wrongdoing[25], but they poorly assess who is affected in what manner by corporate harmful wrongdoing. Assuming that the social bases of morality are alienated from criminal proceedings, the hardest challenge seems to be to identify the collective legitimacy of the criminal justice system. To move one step forward, perhaps the YPs could take benefit from transformative ideas to start empirically evaluating the moral legitimacy of corporate criminal justice.

3 The challenges of corporate victimization, emotions and restoration

At a minimum since the so-called Arthur Andersen effect, there are many critical analyses oscillating between the reduction of collateral damages or a prioritization of enforcements strategies – it is a great curiosity that the DOJ Memoranda usually cause exciting debates worldwide[26]. It is frustrating though to realize that there is no sufficient data on how

Feeley, Comparative criminal law for criminologists: comparing for what purpose?' in David Nelken (ed), *Comparing legal cultures* (Dartmouth 1997) 103.

[23] For a deep analyzes of the failure of corporate criminal liability in the US experience, William Laufer, *Corporate bodies and guilty minds* (University of Chicago Press 2006) 60 ff.

[24] Laufer (n 3).

[25] E.g. Dale Miller and Neil Vidmar, 'The social psychology of punishment reactions' (1980) 14 Law and Society Review 565–602.

[26] The use of guidelines to help regulators and enforcers articulating their strategies is a quite remarkable global trend. For instance, the Crimint Network in Argentina prepared a consistent protocol and opened the local debate for international experts´ feedbacks. See Juan Pablo Montiel and Nicolás Ayestarán (eds) *Lineamientos de Integridad* (Crimint 2018).

corporate victimization makes sense as a social construct in criminal proceedings[27]. In that case, explanatory constellations replace the lack of meaningful empiricism by mystifications of rational choices.

I am personally engaged in further developing the concept of corporate victimology, a new field of research originally proposed by William Laufer[28]. As Laufer´s explains in his latest work: '(…) a corporate victimology would likely reveal layers of victimization across a wide spectrum of stakeholders; reset our perception of corporate culpability in relation to possible sanctions; and correct the misperception that corporate wrongs are somehow less-than-serious wrongs against the State, wrongs against the community, and wrongs against us'. As a consequence, the neglected corporate victimization undermines the legitimacy of corporate criminal proceedings. Hence, without proper conceiving of the victims, proceedings are condemned to reproduce a deleterious sense of normlessness and lack of trust in institutions.

In my own attempts to put some flesh on the bone, I tried to make some explorations of the idea of corporate victimhood. If corporations are conceived as victims, and not exclusively as victimizers, then corporate victimology has much to inform the criminal justice system. A prior exploration goes back to the general state of misinformation of victims of corporate crime. They usually do not even feel victimized or have a fragmented idea of the realms of victimization. A second explanation concerns the dynamism found among and between organizations: in some cases, such as in high risky operations at the stock market, victimizers could be instantaneously converted into victims, and, in a vicious cycle, turn back to the offender position. The traditional layers of victimization, when applied to the corporate sectors, are very dynamic, in a very similar context to what is known as 'poly-victimization'[29]. Nonetheless, the proposal of a different sort of categories of victimization provides a more attractive framework to ascribe liability: 1. corporations as victimizers; 2. corporations as victims; 3. victimization within the corporation[30]. But helplessly I am still not able to find significant empiricism or any kind of scale on the seriousness of harm, or even the extension of victimization processes that could offer a more solid basis for my attempt of systematizing meaningful categories in the field of corporate victimology.

In practice, there are at least two possible strategies to face the challenge of corporate victimization. Firstly, it appears to be convincing that corporate victimology could take

[27] Kirk Johnson, 'Federal court processing of corporate, white collar, and common crime economic offenders over the past three decades' (1986) 11 Mid-American Review of Sociology 25–44; more specific about the role of corporations and victimization in criminal proceedings, John Hagan, 'Victims before the law: a study of victim involvement in the criminal justice process' (1982) 73 Journal of Criminal Law and Criminology 317–330.

[28] William Laufer, ´A very special regulatory milestone´ (2018) 391 University of Pennsylvania Journal of Business Law 413 ff.

[29] David Finkelhör, 'Developmental victimology' in Randy Davis, Arthur J. Lurigio and Susan Herman (eds), *Victims of crime* (Sage 2007) 28.

[30] All those comments are further detailed in Eduardo Saad-Diniz, *Vitimologia corporativa: um novo campo de pesquisa nas ciências criminais* (forthcoming 2019).

advantage from the use of human rights violations, giving life to the needs of victims in the courts. It is a reasonable suggestion that current international efforts to hold multinationals accountable for gross human rights violations could be exploring the lessons of corporate victimology, enhancing their impact in reducing victimization.

Secondly, the 'emotional turn' of corporate criminal justice – another quote presented by Laufer during the YP Symposium in Freiburg – raises challenging questions for the feasibility of a corporate victimology that will most certainly reshape the normative debate about emotions and expressions. Lawrence Sherman´s suggestions of a more 'emotionally intelligent justice'[31] could be a timely alternative justification of the moral limits to the role of corporations in criminal proceedings. There are some reasonable arguments to believe in the transformative aspect of the emotions: 1. victims want to express their emotions and a fair claim for Justice[32], not desires of revenge; 2. victims have the right not to be expropriated from their own conflicts; 3. victims deserve empowerment in the proceedings, the need to feel that they effectively have choices – and that those choices are real.

Among all options of controlling corporate crime – not to mention the use of new emerging and promising technologies which will undoubtedly be the subject to be more properly covered in future crime research and policies –, restorative justice[33] appears to be the light at the end of the tunnel. It is true that evidence about its effectiveness on reducing crime is, to say the least , limited[34]. Nevertheless, it is a promising way 'to recognize the rights to those forgotten in trial justice'[35], at least promising innovative strategies by using less formal processes and effective participation in the case[36]. Heather Strang accurately connected the pieces, affirming that 'it is the work of a restorative justice encounter to engender emotions

[31] Lawrence Sherman, 'Reason for emotion: reinventing justice with theories, innovations, and research' (2003) 41 Criminology 1–37.

[32] 'Victimhood produces grieving relatives, dominated by their hurt and loss, and survivors, maimed physically or psychologically, who take their victimhood into the future as a burden of grief and pain. Managing these emotions is foundational to peacemaking. These emotions are particularly divisive when all groups can claim themselves victims. The emotions around victimhood therefore need to be managed in such a way as to permit victimhood to be recognized as an issue, and the victims honoured, while moving them and the rest of society beyond the memory. This requires as a starting point a plural approach to victimhood by recognizing that all have suffered in different ways'. John Brewer, 'Dealing with emotions in peacemaking' in Susanne Karstedt, Ian Loader and Heather Strang (eds), *Emotions, crime and justice* (Hart 2014) 309.

[33] Heather Strang and John Braithwaite, *Restorative justice and civil society* (CUP 2001) 1–13. Conceptually, Strang and Braithwaite divide the restorative justice in three different categories: 1. procedural, engaging all stakeholders; 2. valorative (alternative mechanism to traditional approaches of justice); 3. integrated, optimally conceived as a *continuum* between stakeholders engagement and alternative forms of justice.

[34] Lawrence Sherman and Heather Strang, *Restorative justice: the evidence* (The Smith Institute 2007) 88 ff.

[35] Findlay and Henham (n 18) 292–294.

[36] The participation in the case means 'not only participating directly, they should be encouraged to do so to generate the emotional power upon which the 'success' of restorative justice depends', Heather Strang, 'Is restorative justice imposing its agenda on victims?' in Howard Zehr and Barb Toews (eds), *Critical issues in Restorative Justice* (Monsey 2004) 95–106

of remorse and forgiveness to the benefit of all participants. When that is achieved, then the restorative justice agenda has been fulfilled'[37].

Beyond the inclusion of those who are ordinarily neglected in the criminal justice, restorative practices give much more room to transformative narratives and raise moral issues in decision-making, and this is a strong reason why I am arguing in favor of an alternative set of chained arguments: for the moral split (moral obligations vs. legal duties) and the preferable use of narratives in order to insert a subjective account of the victim and embrace their emotions. Besides, Lawrence Sherman and Heather Strang offer an explanation that links to power-status theories of emotions. Theoretically, restorative justice facilitates the 'transfer of power from the once-dominant offender back into the now-victim', and thus to apologies and forgiveness in exchange[38]. Having that in mind, for now it is not possible to add some comments upon the role of emotions in the corporate field. This 'emotional turn' brought about by restorative practices lead us to the challenge of restoration and could be as promising as challenging in the private sector.

Normatively, transformative criminal proceeding, by combining restorative practices with retributive punishment entail the sense of a transformative justice[39]. The particular question about the moral disapproval of the company's wrongdoing implies a challenge to traditional legal theories and moral reasoning centered in the figure of a competent authority – the judge. Its partial displacement to the corporate field raises the question of whether there are particular sets of values and social practices, which may be more smartly enforced and punished.

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[37] Indeed, restorative practices provide 'means by which victim´s harms and needs are addressed, then the central role played by victims means that they are integral to the process. To be sure, victims may arrive at their conference full of retributive and bitter emotions, but this is usually no more than a normal reaction to the harm they have experienced. Only by acknowledging the legitimacy of these retributive emotions and permitting their expression can restorative justice be perceived as a mainstream alternative to the exclusive and impersonal punitive focus of the formal justice system. Without such an acknowledgment, restorative justice will remain limited to trivial disputes between people little affected by the crime or its treatment', Strang (n 36) 95.

[38] Lawrence Sherman and Heather Strang, 'Empathy for the devil: the nature and nurture of revenge' in Susanne Karstedt, Ian Loader and Heather Strang (eds), *Emotions, crime and justice* (Hart 2014) 145-168.

[39] '*Transformative justice* is about dealing with both the injustice of being victimized and with the injustice of distributive justice. Transformative justice departs from the adversarialism of repressive, retributive, vengeful, and even restorative justice on the ground that these forms of justice serve to perpetuate and reproduce the marginal and disempowering conditions of the victimized and the enraged. Instead, policies of nonviolence are called for that seek to transform the dominant practices of our penal-justice systems and of the larger systems of distributive injustice throughout society. At the same time, transformative justice seeks to move victims from vengeance to forgiveness, from defensive hatred and alienation to altruistic empathy and protectiveness, as it seeks to respond to the needs of the most vulnerable and harmed in our society who require at a minimum four things: (a) answers to why they were victimized; (b) recognition of the wrongs they incurred; (c) restitution for the injuries they received, and (d) the restoration or establishment of peace and security lost or never obtained', Gregg Barak, *Violence and nonviolence: pathways to understanding* (Sage 2003) 323.

It also raises the question of whether there are particular sets of symbols for expressing condemnation, regarding emotions relevant to wrongdoing[40]. As Fisse and Braithwaite posed, criminal proceedings should be focused on giving valuable corporate strategies the public recognition[41]. In my opinion, enforced self-regulation should not be taken as one more *dogma* we are almost forced to reproduce in our scientific work. Braithwaite himself critically evaluated this idea many times. For instance, he suggested some creative alternatives to Braithwaite's "big benign gun" in case of developing countries[42], especially because they usually do not have at their disposal consistent legal sanctions.

The next generation of penalists have the opportunity to encourage experimentation and propose innovative social practices to be put in the core of criminal proceedings. Social theory could be very relevant, in my point of view, to help us define how corporate criminal law can have different meanings within various social networks defining different meanings. It could be of most interest to ask under which social conditions, what kind of society and set of human values are we going to build our theoretical approaches. Maybe recognizing the fact that corporations are indeclinably and deeply intertwined with social interactions and that companies impact modern forms of solidarity and social cohesion would be enough. Maybe it is only a question of grounding the arguments on a more consistent basis, avoiding excessive – or exclusive – normative approaches.

It is not without purpose that many disenchanted criminologists see only a façade in the mainstream restorative practices and compliance programs. Restorative justice faces some distinctive challenges in corporate victimization, as Richard Young once figured out: the exclusionary nature of much corporate crime-control activity, rigidity of corporate responses to victimization, 'repeat victimization' and the routinized nature of corporate contributions to restorative practices, and representation issues[43]. Moreover, it is not rare to see misconceptions which refer to restoration only as a mere question of partial replacement of punishment by restorative practices[44].

It is not possible to investigate more properly the retributive function of punishment or the lack of deterrence in corporate crime[45] in this essay, but even in spite of limitations there are many advantages in the victim-centred restorative orientation that could be much more appealing to a transformative approach. For now, I can remind of one theoretical and another more practical benefit. Theoretically, restorative practices oriented towards victims represent much more profound normative consequences than this: the universality of justice

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[40] Bennett (n 19) 145

[41] Brent Fisse and John Braithwaite, *Corporations, crime and accountability* (CUP 1993) 218–238.

[42] John Braithwaite, 'Responsive regulation and developing economies' (2006) 34 World Development 884–898.

[43] Richard Young, 'Testing the limits of restorative justice: the case of corporate victims' in Carolyn Hoyle and Richard Young (eds), *New visions of crime victims* (Hart 2002) 133–172.

[44] David Vogt, 'The aims of restorative justice: some philosophical remarks on the challenges of integrating restorative justice into the criminal justice system. Reconciling the irreconcilable?' in Linda Gröning and Jorn Jacobsen (eds), *Restorative justice and criminal justice: exploring the relationship* (Santerus 2012) 21–40.

[45] Seminal, Sally Simpson, *Corporate crime, law, and social control* (CUP 2002) 180 f.

offered by regular proceedings is filled with a stronger sense of context-based and intersubjective – deliberative – account of justice, better accommodating a wider range of legitimate expectations in the corporate field. From a practical standpoint, Findlay and Henham mentioned 'a growing voice being formally conferred on the victim and their representatives. It would not take much to develop this in this direction of restorative interests within a retributive representational framework'[46]. In that sense, future research could learn from corporate victimology and present innovative solutions about how to use compliance resources to give voice to the victims and apply restorative justice in compliance settings.

4 Concluding remarks: exploring compliance as a transformative trigger

Remarkably, there is little empirical data on who has been damaged, what kind of needs they have, who is obligated to support them, what the causes are, who owns a stake in the conflict, or how could the harm be restored. And there is a list of complementary questions, such as: are the victims sufficiently supported? Emotionally? Protected from further violations? Do they have a voice in the proceeding? Are they sufficiently informed? Curiously, there is scarce literature debating the normative reorientation of the role of corporations in criminal proceedings. It is hard to find references addressing procedural strategies that embrace a new set of values and moral arguments. Maybe this new *rationale* will need less speculative or endless metaphysical efforts. Maybe Laufer is right, and this *rationale* could be grounded by more clear experimentations on how to connect the pieces that inform a proper response to corporate harmful wrongdoing. And this not only by evidencing what works, but by addressing what really matters: the needs of victims, the reduction of sources of crime, and the suffering in the world society.

Blameworthiness and moral agency appear to persist as a core issue in the field[47]. In my personal opinion, though, that kind of theoretical debate should be avoiding the philosophical pedestal or semantic pitfalls. Maybe it is time to realize that we could be excessively handcuffed in academic soliloquies, speaking only to ourselves by means of self-fulling elegant theories, living alone with our own thoughts and avoiding the very human essence of achieving social justice. The proposal of new theories in the field, from negative points of view to positives ones, through the social construction of corporate fault[48], there is the risk of making new theories only by recycling old-age arguments. I personally would

[46] Findlay and Henham point out some other possible outcomes of the 'restorative within a retributive' framework approach: 'disestablishing the professional monopoly over trial communication; deconstructing legal language to open up meaning to lay participants; reframing judicial discretion to facilitate more flexible and spontaneous levels of trial conversation; allowing the determination of truth to divert trial outcomes from the determination of individual liability through determinations of guilty; staging trial outcomes where RJ can precede and perhaps defuse the need for findings of guilt, and sentence to follow; softening the entry and exit stages in the trial and making the accountability of the process serve more than the satisfaction of professional participants', Findlay and Henham (n 18) 292–294.

[47] See, e.g., Amy Sepinwall, 'Blame, emotion and the corporation' in Eric Orts and Craig Smith (eds), *The moral responsibility of firms* (OUP 2016) 143–168.

[48] Laufer (n 23).

suggest that corporate criminal liability should be conceived according to a clear and objective comprehension of its size and power. What could be much easier – and fair and just – than assessing the harm, identifying the victims and addressing the proper response? I do not want to make one more naïve appeal to compassion with victims of corporate crime. I merely think that it is time for theories to be oriented towards achieving social justice, following a deeper democratic conviction. The missing *corpus theoricus*, at least in accordance with my assumptions, should be less focused on new theories about corporate personhood and more on practical ways of achieving a better regulatory framework to corporate behavior.

It seems that the very idea that the state holds the privileged centrality of attributing liability is currently challenged by a significant degree of 'privatization' within criminal justice systems. If this displacement to the private sector is true, the role of corporations in criminal proceedings cannot simply reproduce the 'regular' roles of offenders and victims in a criminal proceeding. Efforts in the regard of 'enforced self-regulation', 'incentive structures', 'rational choices', or 'effectiveness' have been widely cited in the literature, despite the fact that they deserve much more of our attention. Quite the opposite, a transformative reading of corporations in criminal proceedings would suggest a much broader account of the criminal justice system. The density of research is also extremely unequal according to different world zones. Our YP-scientific efforts should reflect real scientific *collaborative* efforts if we are really willing to expand it to a peripheral-central collaboration; they should be asking what sort of social condition, social settings, and relations between those involved in the process are.

YPs should use their voice to look at corporate initiatives as a transformative trigger. These implies a wide variety of experimentations with compliance strategies from a diverse set of angels. To mention Laufer´s ideas on corporate crime once more, corporate self-regulatory strategies are a central piece in achieving compliance convergence[49] and new arenas for expressive behavior. This is a clue, I argue, to liberate criminal proceedings for a more inclusive social construction of truth. Criminal proceedings are the most robust instrument of the criminal justice system, but they could be a much more prominent instrument if they could be constructively opened to self-regulatory *stories*, with broader explanations in corporate victimization, crime and punishment. This is how I think corporations could behave as *transformative* actors in criminal proceedings.

[49] 'Compliance convergence' consists in measurable corporate initiatives that provide the 'convergence of informal corporate social controls', Laufer (n 9) 63. YPs should encourage more experimentation in this regard. An opportunity to transform the role of corporations in criminal proceedings may lie in the flexibility proper to the corporate field. Such softening regulatory ideas are being largely debated in the field of human rights violations in the private sector, see, e.g., Eve Darian-Smith and Colin Scott, 'Regulation and human rights in socio-legal scholarship' (2009) 31 Law and Policy 271–276. See also Barnali Choudhury, 'Hardening soft law initiatives in business and human rights' in Jean Du Plessis and Chee Keong (eds), *Corporate governance codes for the 21st Century* (Springer 2017) 189–208 ('growing nonstate regulatory power requires either an acceptance of diminished rights or the elaboration of a new rights narrative which more effectively embraces private power').

Selected Literature

Braithwaite J, 'Responsive regulation and developing economies' (2006) 34 World Development 884

Findlay M and Henham R, *Transforming International Criminal Justice: retributive and restorative practice in the trial process* (Willan 2005)

Laufer W, 'Where is the moral indignation over corporate crime' in Brodowski D, Espinoza de los Monteros de la Parra M, Tiedemann K and Vogel J (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 19

– 'The missing account of Progressive Corporate Criminal Law' (2017) 14 New York University Journal of Law and Business 1

– 'The compliance game' (2018) 988 Revista dos Tribunais 67

Saad-Diniz E, *Vitimologia corporativa: um novo campo de pesquisa nas ciências criminais* (forthcoming 2019)

Sherman L, 'Reason for emotion: reinventing justice with theories, innovations, and research' (2003) 41 Criminology 1

Teubner G, 'Juridification and Disorder' in Teubner G (ed), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust and social welfare law* (De Gruyter 1987) 24

Vogt D, 'The aims of restorative justice: some philosophical remarks on the challenges of integrating restorative justice into the criminal justice system. Reconciling the irreconcilable?' in Gröning L and Jacobsen J (eds), *Restorative justice and criminal justice: exploring the relationship* (Santerus 2012) 21

Young R, 'Testing the limits of restorative justice: the case of corporate victims' in Carolyn Hoyle and Richard Young (eds), *New visions of crime victims* (Hart 2002) 133

INSTITUTIONS AND ORGANIZATIONS AS VICTIMS OF INTERNATIONAL CRIMES? A CRITICAL ANALYSIS

By Patryk Gacka[*]

Abstract

This article aims at critically reflecting upon the controversial depiction of legal persons as victims of international crimes and their debatable role as victim-participants in proceedings before the International Criminal Court in the Hague (ICC). This is an issue which could be very easily categorized as a grey area of the existing scholarship, for it has attracted very little scholarly attention yet. My main goal is not to offer another interpretation of the entire model of victim participation before international criminal tribunals (dogmatic interpretation), but to develop a line of arguments (semantic, conceptual and practical arguments) which could, in my view, challenge the present system by highlighting its various imperfections. Importantly, given the character of this critique, each of the arguments discussed below concerns a different dimension of victim participation. Thus, while the semantic argument revolves mainly around various definitions of crime victims as well as around the nature of international victimization, and the conceptual argument concerns multifarious legal and ontological characteristics of collective entities, the practical argument mainly draws on a selected case law of the International Criminal Court in relation to victim participation and, as such, represents the 'law in action' approach. Next, as a counterargument to this line of reasoning, I also identify and briefly examine the normative argument which supports the lex lata. *Then finally, in conclusions, on the basis of all the arguments discussed throughout this article, I defend the thesis that the international criminal justice system in force lacks coherence in a number of ways and that there are strong if not irrefutable points against the participation of legal persons in the victim capacity before the ICC.*

1 Introduction

By definition, corporate criminal law creates the vision of corporations as active subjects, and not merely passive legal objects. In spite of their abstract nature, so the reasoning goes, legal persons possess all the necessary qualities to classify their conduct as criminally relevant and, in effect, to view them as actors directly responsible for their deeds. It follows that not only natural persons but also legal persons are capable of committing a crime (including crimes which are not even directly connected to their field of operation)[1] and

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[1] For instance, The Corporate Manslaughter and Corporate Homicide Act 2007.

acquire the status of offenders. This simplified image of corporate criminal law hinges upon two determinants: the actor, i.e. the corporation, and its criminally relevant conduct. Nevertheless, as many studies have already demonstrated, crime is not simply a static two-dimensional phenomenon. For this reason, each and every analysis of criminal conduct should be supplemented with another factor: the long-forgotten victim of crime.[2] As a result of this paradigm shift, a criminal act is no longer viewed merely as an element of corporation's business activity, but becomes also a source of victimization relevant from the legal point of view.[3] This way, the classical two-tier model is reformulated into an equation consisting of corporations (1), their conduct (2) and crime victims (3).

However important this reformulation is, the concept of corporate victimization referred to in the scholarship still remains somehow factually flawed as it most often depicts only natural persons as potential victims of corporate crimes. In this intrinsically dichotomous image, corporations are classified as exclusive offenders and natural persons as ideal victims.[4] Therefore, if one refers to victims in the context of corporate criminal law, most often it is presumed that this category covers only natural and not legal persons. Needless to say, this popular vision reflects only part of the reality. In this concise study, however, I would like to adopt a different perspective on the 'corporate' element by inquiring whether a corporation can be not only an offender but also a victim of crime. Thus, in what follows, the concept of 'corporate victimization' will be understood as referring to legal persons as potential victims of crime (victimization of corporations). But rather than focusing on domestic corporate criminal law, I will diverge from this most common approach by searching for the source of corporate victimization in international criminal law.[5]

It is virtually impossible to deal at length with all aspects of legal persons' status in the criminal justice system in one article. Therefore, this piece does not purport to be a comprehensive overview of the *lex lata*, but sets to achieve a rather less ambitious goal to critically reflect upon the controversial depiction of legal persons as victims of international crimes and their debatable role as victim-participants in proceedings before the International Criminal Court in the Hague (ICC).[6] Certainly, this is an issue which could be very easily categorized as a grey area of the existing scholarship, for it has attracted very little scholarly

[2] See also Antony Duff, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 3. Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007) 214.

[3] I introduce this limitation deliberately, because in many victimological studies the source of victimization is considered to be of little importance. What really matters in that approach is the result of victimization: harm. Victimology then covers also acts that go beyond the scope of legal regulation (general victimology). Thus, every single phenomenon (even e.g. a lightning which kills a person out on a walk) leading to somebody's harm – not necessarily a crime – is recognized as falling within the purview of victimological research. In what follows, however, my remarks about victimization will be constrained to 'criminal victimology' (wrongful harms). See: Gerd Ferdinand Kirchhoff, 'History and a Theoretical Structure of Victimology' in Shlomo Giora Shoham and others (eds), *International Handbook of Victimology* (CRC Press 2010) 108-09.

[4] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (ed) *From Crime Policy to Victim Policy. Reorienting the Justice System* (Palgrave Macmillan 1986) 17-30.

[5] Because of that, also the conclusions of this article should be read as referring to international criminal law, and not to the whole area of penal law.

[6] Rome Statute of the International Criminal Court (ICCSt).

attention yet.[7] Nonetheless, my main goal is not to offer another interpretation of the entire model of victim participation before international criminal tribunals (dogmatic interpretation), but to develop a line of arguments (semantic, conceptual and practical arguments) which could, in my view, challenge the present system by highlighting its various imperfections. Importantly, given the character of this critique, each of the arguments discussed below concerns a different dimension of victim participation. While the semantic argument revolves mainly around various definitions of crime victims as well as around the nature of international victimization, and the conceptual argument concerns multifarious legal and ontological characteristics of collective entities, the practical argument mainly draws on a selected case law of the ICC in relation to victim participation and, as such, represents the 'law in action' approach. Next, as a counterargument to this line of reasoning, I will also identify and briefly examine the normative argument which supports the *lex lata*, for I admit that even the strongest argumentation has its weak spots (and certainly the argumentation developed in this article has at least one such weak spot). Then finally, in conclusions, on the bases of all the arguments discussed throughout this article, I will defend the thesis that the international criminal justice system in force lacks coherence in a number of ways and that there are strong if not irrefutable points against the participation of legal persons in the victim capacity before the ICC.

2 Victim participation in (international) criminal law – a brief historical and comparative overview

2.1 Indeterminacy of criminalization

Just as every domestic legal system, or for that matter every social institution, international criminal law is also historically contingent. This statement, however, seems to be particularly apposite if one refers to the substantive part of modern international criminal law which regulates the conditions of criminal responsibility and provides definitions of international crimes. Thus, even though the concept of an international crime and its genuine normative scope still remains a controversial issue, it is virtually undisputed that the following four types of offences should be classified as (core) international crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[8] Given their complex structure which requires an additional contextual element to be proved in order for an international crime to occur,[9] and even despite an inherently grave character of

[7] This is particularly striking considering the relatively large body of scholarship concerning corporations as potential perpetrators of international crimes, which has been produced over the years.

[8] It is still disputed, however, whether these four crimes exhaust the whole conception of an international crime. It becomes especially evident when one compares lists of international crimes compiled by various scholars. For instance, Cherif Bassiouni enumerates no fewer than twenty-five categories of international crimes, while other scholars (i.e. Antonio Cassese) adopt a more conservative approach. See: Cherif Bassiouni, 'International Crimes; The Ratione Materiae of International Criminal Law' in Cherif Bassiouni (ed), *International Criminal Law* (Martinus Nijhoff 2008) 129, 134–5; Antonio Cassese, *Lineamenti di diritto penale internazionale. Diritto sostanziale* (Il Mulino 2005) 24-27.

[9] For example, the 'widespread or systematic attack against any civilian population' within crimes again humanity (CAH). For a discussion of how the contextual element of CAH has changed since 1945, see Kai Ambos, *Treatise of International Criminal Law. The Crimes and Sentencing*, vol 1 (OUP 2014) 52-57.

many subtypes of these crimes (such as sexual violence during an armed conflict), it still remains pretty unclear what should be recognized as the proper normative scope of these crimes. For instance, why is the destruction of cultural heritage an international crime, while murder is not? Which acts deserve to be recognized as being so egregious that they merit international criminalization, and which do not? Where should the line be drawn between conduct amounting to international crimes and conduct which does not cross the 'seriousness' threshold?[10] Many more questions of this kind can be asked as well. Nowadays, however, these complex aspects of criminalization and principles that lie at its roots seem to be very rarely debated. Thereby, the prevailing tendency is to take international crimes in their entirety at face value by accepting the scope of international criminalization and leaving a more profound discussion aside. This unprincipled practice is certainly undesirable and can even lead to some damaging results for the international criminal justice project.[11]

The intrinsically contingent nature of the historical development of international criminal law could be exemplified by examining briefly the roots of the crime of genocide. This crime, labelled by some 'the crime of crimes'[12], was coined by a Polish-born lawyer Raphael Lemkin who believed that norms of criminal law should protect not merely the interests of individuals and states but also the survival and identity of groups. This aspect of human life is definitely relevant, though often unnoticed and underappreciated, and sometimes even openly contested. All the same, in the words of Neil MacCormick: '[w]e cannot live in complete isolation, and the full flourishing of human potentialities depends on our coexisting in relatively extensive social groups, or groups of groups'.[13] It is for this reason, as Lemkin argued also in his 1944 book[14], that a new type of crime should be introduced.[15]

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[10] For instance, in the case of *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that while 'the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" (…) it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations'. See: ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, para 94.

[11] In recent times there have been many internal clashes occurring within the field of international criminal justice. Examples are the announcement of an 'African exodus' from the International Criminal Court (ICC), or the U.S. hostile attitude towards the Court evincing itself in threats levelled at the ICC and countries which want to cooperate with the ICC to the detriment of 'American interests'. In this regard, see the full text of a recent speech by John Bolton, US national security adviser: 'Full text of John Bolton's speech to the Federalist Society, Aljazeera (10 September 2018) <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> accessed 6 October 2018.

[12] This is the phrase famously used by William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009). However, accepting the view that the crime of genocide is indeed the most serious of all international crimes, a contention – one should add – without any grounds in the black-letter law, could be the first step to constructing not only a hierarchy of crimes, but also a hierarchy of victims with victims of genocide at the top. However controversial it appears to be from a legal perspective, such hierarchies are widely accepted in social practice by many victims searching for a formal recognition of their suffering. On this topic, see also n 21.

[13] Neil MacCormick, *Institutions of Law. An Essay in Legal Theory* (OUP 2007) 208.

[14] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Columbia University Press 1944).

[15] Adam Redzik, *Rafał Lemkin – co-creator of international criminal law* (Oficyna Allerhanda 2017).

At that time, however, the now famous and commonly recognized crime was simply a scholarly idea, unsupported by any government and devoid of any normative power.[16] It was only in 1948 that Lemkin's long efforts and relentless battles[17] bore fruit in the form of the Genocide Convention adopted that year.[18] The reason I am mentioning this development here is that it clearly illustrates the randomness of the so-called 'international legislation'. One could speculate if a crime similar in scope and character would have been conceptualized and defined during or after the Second World War (WWII), had it not been for Lemkin and his personal experiences which were eventually translated by him into a completely novel concept of great legal significance. Obviously, this question cannot be answered with any degree of certainty. Assuming, however, that without Lemkin there would be no crime of genocide today, then we – as members of the different national, ethnical, racial and religious groups[19] which are covered by the official definition of genocide[20] – would be not only deprived of 'the crime of all crimes' but also less protected and safe than we are, at least in theory, at the moment. In addition, it would be impractical to label somebody as the victim of genocide inasmuch as this term (and label) would not even exist, given its unique Greek (*geno*) and Latin (*cide*) roots.[21] Let us not forget that this term was coined by Lemkin himself deliberately. In his words, after all, 'new conceptions require new terms'.[22]

This short exercise in alternative history, even if not entirely convincing from a legal point of view[23], clearly expresses how relevant a role individuals have played in the development

[16] It should not suggest that the conduct falling within its purview was lawful, for it definitely was not. Clearly, even at that time at least some acts (*actus reus*) that were later declared criminal as genocide had been covered i.e. by domestic laws against discrimination. Still, since these anti-discrimination laws were pure examples of domestic crimes, they do not refute an argument that the crime of genocide was a novel concept not only in its form, but also because of its normative content.

[17] John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave Macmillan 2008), Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press 2013) 112-179.

[18] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.

[19] See Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof* (Duncker & Humblot 2010) 80-93.

[20] Another dilemma revolves around the scope of this definition. Some scholars argue that it should be modified in order to include also political groups. See David Nersessian, *Genocide and Political Groups* (OUP 2010).

[21] Many victims expect to be recognised as victims of genocide even if they were harmed not because of their group-identity. These expectations are usually motivated by victims' belief that only this label may properly communicate their suffering. If such recognition is impossible due to obvious legal constraints, it may eventually lead to secondary victimization. This is also where the issues of fair labelling and its objective as well as subjective dimensions are often in conflict. See Talita De Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18 ICLR 788-821.

[22] Lemkin, *Axis Rule* (n 14) 79.

[23] For obviously acts constituting the crime of genocide are still unlawful even if the Genocide Convention were to be repealed. The motivation for keeping this crime, however, is in a sense a 'communitarian' one, namely that not only individual, but also collectives such as various groups enumerated above should be protected. Thus, according to this reasoning, for instance one's life is protected in certain situations not only because of the sanctity of life (this would be covered by provisions prohibiting homicide), but because a

of international criminal law[24] as well as how relative the concept of an international crime remains to this day.[25] Therefore, while there are certainly acts within the broader category of international crimes which are 'of concern to the international community as a whole'[26], it does not necessarily follow that the *lex lata* provides us with irrefutable arguments for accepting the product of international criminalization in its current form. So far, the development of legal rules at the international level has been motivated mainly by political interests of dominant states, rather than by sophisticated philosophical arguments or specified moral values. It is doubtful, however, if such a pragmatic justification (the argument of power) shall be classified as a desired principle of criminalization. Therefore, while innovative ideas held by individuals (such as Lemkin's ideas) have historically proved to be of great significance in such diverse areas as philosophy, economics or politics, in the international legal sphere they have turned out to be relevant only if and to the extent that they are in line with political interests of major political players.[27] Nevertheless, once codified, international rules seem to be relatively stable. Even if they change, the change usually goes in the progressive direction.[28]

2.2 Procedural dimension

In comparison to the substantive part of international criminal law, procedural rules of international criminal tribunals (ICTSs) are definitely less stable, since no 'model rules' which could be applied by every newly established international criminal tribunal (ICT) have been codified to this day. In effect, successive ICTs have adopted different procedural models. Rules of international criminal procedure are also less innovative due to their inherently derivative nature, manifested by the fact that the drafters of international procedural norms usually draw inspiration from normative mechanisms with which they are most familiar. Needless to say, most often it involves their domestic legal systems.[29] A

person's life represents a well-being of a certain group to which this person belongs and which was the true target of an attack on its member's life. See ibid 79.

[24] Philippe Sands, *East West Street. On the origins of genocide and crimes against humanity* (Weidenfeld & Nicolson 2016).

[25] Obviously, this is not to suggest that other conditions (political and economic power, lack, accident etc.) were not significant in and of themselves, and sometimes even equally important as the one which I described in the main body of this article.

[26] Article 5 ICCSt.

[27] This is also one of the reasons why the crime of genocide was not criminalized already in 1945 when both Tribunals in Tokyo and Nuremberg were set up. At that time, the major political powers did not have any interests in promoting Lemkin's concept. Even in 1948 some governments, notably the UK's, fought the idea of adopting the Convention and creating a new international crime due to their own complex and problematic relations with different minority groups in the already crumbling Empire. More on this topic: Brian Simpson, 'Britain and the Genocide Convention' (2003) 73 BYIL 5-64.

[28] By the progressive direction, I understand the normative expansion of international criminal law. See Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 HILJ 111-150.

[29] It follows that the end product of drafting depends to a large extent on who (representatives of which legal system) was more influential during negotiations. While in Nuremberg a more relevant a role was played by English and American lawyers, in Rome (ICC) continental lawyers were equally influential in drafting the

similar pattern can be also discerned with respect to international judges who put static procedural norms into motion and through this practice are able to modify their normative content (*law in action*).[30] Still, this phenomenon is relevant only to the extent that various systems of criminal procedure differ from one another. Thus, if the differences between these various systems were miniscule, it would be – at least in theory – relatively easy to reach a consensus as to the model of international criminal procedure and its subsequent interpretation by the judges. But since the opposite is true, for the differences between these models are of genuine systemic importance, the decision which (domestic) model of criminal procedure should be selected as an example for international criminal procedure is as significant as it is – again – politically motivated. The importance of this decision, one should add, refers also to victims' procedural status and substantive rights allocated to them.

2.2.1 Adversarial and inquisitorial models of victim participation

Depending on the adopted model of criminal procedure, victims may have either a stronger or a weaker position in criminal proceedings before domestic and international courts. For instance, in common law countries, where the model of adversarial criminal procedure has been traditionally in use, the crime victim can participate in a trial merely as a witness (victims as witnesses) because the case is argued by a public prosecutor. Victims are therefore not parties to the proceedings, and if they appear before the court, it is generally through the prosecutor or the accused.[31] All the same, it was in the common law system where victim compensation funds were pioneered. Since the 1960s, when first such schemes were established in New Zealand and England,[32] crime victims have gradually acquired the right to receive a state compensation also in other countries inspired by this innovative idea.[33] Another important characteristic of this system, which actually goes in the opposite direction than the model of a criminal process described above might suggest, concerns victim impact statements (VIS).[34] These statements may be submitted once the accused is found guilty or pleads guilty to a crime. However, considering the rationale for the criminal process in the common law system, as well as the victims' weak procedural position during the main trial, it could be argued that VIS exemplify something of a normative anomaly. On the basis of this mechanism, after all, victims have the right to submit or even read their

text of the Statute which led to the situation in which '[t]he Statute (…) combines common-law and civil-law traditions'. See Benjamin Schiff, *Building the International Criminal Court* (CUP 2008) 10-11.

[30] This, however, may lead (an in fact often does lead) to serious disagreements between the judges. Neha Jain, 'Radical Dissents in International Criminal Trials' (2017) 28 EJIL 1163–86.

[31] Gideon Boas, James Bischoff, Natalie Reid and Don Taylor, *International Criminal Procedure. International Criminal Law Practitioner Library Series*, vol 3 (CUP 2011) 306.

[32] Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan 2006) 162-166.

[33] Ernestine Hoegen, Marion Brienen, *Victims of Crime in 22 European Criminal Justice Systems. The implementation of Recommendation (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure* (Wolf Legal Publishers 2000).

[34] Robert Davis, Barbara Smith, 'Victim impact statements and victim satisfaction: An unfulfilled promise?' (1994) 22 Journal of Criminal Justice 1-12.

testimony in open court and, by that, influence the judges' decision as to the sentence imposed upon the offender.

As for the inquisitorial model in the civil law system, although it is definitely not as internally homogeneous as its common law counterpart, it still possesses certain characteristics which distinguish it from the adversarial model and, more importantly, are to a large extent shared by states of continental Europe. In short, in the inquisitorial process greater attention is paid to the pre-trial phase when the official dossier is compiled. In addition, in this system judges assume a more active role than in the Anglo-American equivalent.[35] In consequence, the trial does not have to be strictly adversarial, for it leaves room also for other modes of participation, including a certain role for victims of crime. For example, victims may play the role of an auxiliary prosecutor (*Privatklage*), or act as a civil party (*action civile*).[36] In essence, they are therefore no longer merely passive participants, but may shape the trial and independently influence the direction in which it goes.

In light of these findings, one could also pose the question as to whether rules of criminal procedure developed for ICTs should be based on mechanisms and formulas (adversarial or inquisitorial) adopted in domestic legal systems at all, given the substantially different nature of situations dealt with by ICTs in comparison with cases decided by domestic courts. Clearly, ICTs have not been set up to try a large number of offenders, nor are they there to deal with petty offences or isolated examples of even more serious crimes.[37] But while these courts' jurisdiction is inherently limited in that sense, the same cannot be said about the often-countless victims of international crimes. International crimes, after all, by their very nature are epitomes of mass-victimization. Bearing all that in mind, should ICTs secure victims' interests and respond to their needs? If so, how?

2.2.2 Theoretical models of victim participation

Logically, there are three possible ways of addressing this issue. Two extreme approaches seem to come down to either completely denying victims any participatory rights (institution-centred criminal law), or to equipping them with a position so strong that it could eventually resemble the one usually exercised by the prosecutor (privatized criminal law). In the latter case, victims of international crimes would take control over the whole trial in order to achieve deserved justice and even substitute the prosecutor, thus creating a model with two parties involved: the offender and the crime victim. Both of these approaches clearly feature hypothetical and abstract models which are not currently applied

[35] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 478.

[36] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 78-84.

[37] This characteristic can be very easily discerned both in their constitutive documents (for instance, article 27 ICCSt provides for the irrelevance of official capacity in the application of the Rome Statute) and in their legal practice (the vast majority of those suspected, accused, and sentenced by the ICTs were either political or military leaders).

in this pure form in any major legal system.[38] What these extreme models can do, however, is to exemplify an alternative to the solutions which we already know from the systems in force. But since they are, to say the least, rather controversial, the chance of them being ever put into practice is very slim. Therefore, it seems to be necessary to model international criminal procedure by reference to the 'middle ground' between these two extremes. Given the fact that this third option encompasses a great number of various procedural mechanisms (including adversarial and inquisitorial models described above), any attempt to define what it entails seems to be the task almost as difficult to complete as the one where all the three options were initially considered as possible solutions.

2.2.3 Models of victim participation in international criminal procedure

In spite of this, one could easily identify which models occupying the aforementioned middle ground have been applied by successive ICTs. First international criminal tribunals were set up after the end of WWII. The International Military Tribunal at Nuremberg as well as the International Military Tribunal for the Far East were modelled on adversarial criminal procedure.[39] This resulted in offering victims a weak procedural stance. Victims could participate in these trials only in the capacity of witnesses. Also, they did not have the right to claim any compensation from their offenders, the respective states or the international community for the suffered harm. But even in this role, only very few victims appeared in open court (94 victim-witnesses in Nuremberg and 416 in Tokyo).[40] In this regard, Sam Garkawe enumerates several different reasons for victims' constrained participation in these proceedings. The author rightly recalls that already at the beginning of the trial the Allies were in the possession of voluminous documentary evidence left by the Nazis. Far-reaching limitations were also inevitable on account of the adversarial model of criminal procedure which was applied during the trials. Furthermore, since both Tribunals had an *ad hoc* nature, the prosecution found itself under pressure to act swiftly due to informal time-limits and available resources. Interestingly, an objection to victims' testimonies came from the Tribunals' officials as well. It was predicated mainly upon victims' presumed lack of objectivity and the alleged risk of psychological trauma (revictimization) which could follow their testimonies and cross-examination.[41] Nevertheless, the decision to focus these proceedings solely on an attribution of criminal responsibility to the guilty leaders of the Third Reich and the Empire of Japan, instead of strengthening the position of victims and taking care of their needs, certainly was not as striking as it might seem from the current perspective also for another reason. Apart from the usual problems with victims' participation arising out of mass-victimization (too many victims, sparse resources etc.), we

[38] Because even if victims act as 'private prosecutors' or 'civil parties' in domestic criminal trials, they do not substitute a public prosecutor in every conceivable situation. This is merely an *ad hoc* function.

[39] Göran Sluiter, 'Adversarial v. Inquisitorial Model' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 231.

[40] Brianne McGonigle Leyh, *Procedural Justice?* (n 36) 136.

[41] Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal' in Herbert R. Reginbogin and Christoph J. M. Safferling (eds), *Die Nürnberger Prozesse: Völkerstrafrecht seit 1945* (Saur 2006) 86–93.

should remember that both the human rights movement and victimological research were still *in statu nascendi* when those trials took place.[42] It was only in 1985 – almost forty years after the trials – that the General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, marking the first occasion when victims' rights have been then so openly addressed at the international level.[43] Before that, victims' interests were officially declared and protected also by other international legal documents, such as the International Covenant on Civil and Political Rights (1966), but only in an indirect form. Still, these documents obviously did not have any impact on the way Nuremberg and Tokyo trials were conducted with respect to victims due to their adoption years after WWII.

The second stage in the development of victims' rights in international criminal law dates back to the mid-1990s, when two ad hoc tribunals were established by the United Nations: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[44] The procedural framework of both of these Tribunals was, to a large extent, also inspired by the adversarial model of criminal procedure. In comparison to the Nuremberg and Tokyo tribunals, however, a number of innovative victim-oriented measures were introduced in their Statutes and Rules of Procedure and Evidence (RPE). They included, among other things, special protective measures for participating victims (Article 22 of the ICTY Statute) as well as rudimentary provisions relating to compensatory justice (Rules 98b, 105, 106 RPE). On the other hand, victims were still relegated to their humble position of subjects providing evidence to the Court. In that sense, their role was still limited to that of witnesses.

The third, and – as yet – final phase in the development of international criminal law is demarcated by provisions of the Rome Statute of the International Criminal Court (ICCSt). The year 2002, when the treaty entered into force, saw not only the creation of the first permanent court of international criminal law but also the introduction of an entirely new model of victim participation. Accordingly, victims are no longer treated as passive objects of international criminal proceedings, but have been collectively transformed into constituencies who can directly shape the landscape of international criminal justice. Upon reading of the Rome Statute, the Rules of Procedure and Evidence (ICC RPE) as well as other documents crucial for the Court's functioning, it is clear that the architects of this institution introduced three different roles to be played by victims of international crimes. First, victims can engage with the traditional role of witnesses (victims as witnesses). Second, they can also participate in a unique position of active victim-participants to present their 'views and concerns' (article 68(3) ICCSt) at different stages of the proceedings (victims as victims). And third, after conviction, victims may also claim compensation (victims as claimants) from the

[42] Aurélien-Thibault Lemasson, 'La victime devant la justice pénale internationale' (PhD Thesis, Université de Limoges) 36-39.

[43] '*La victimologie n'est pas une idéologie mais une science nouvelle qui entend introduire plus d'équité dans le traitement des victimes en droit*' - Lemasson, 'La victime' (n 43) 37.

[44] ICTY – Security Council Resolution 827 (25 May 1993); ICTR – Security Council Resolution 955 (8 November 1994).

guilty offender (article 75 ICCSt). Moreover, the Rome Statute provides victims with various protective measures (article 68(1) ICCSt, rules 86–88 ICC RPE) and the right to legal representation (rules 90–92 ICC RPE). This way, the Court departs from the normative standards adopted by previous international criminal tribunals by drawing inspiration not only from the common law system but also from its civil law counterpart. In result, the procedural model adopted at the ICC is unique, for it is neither entirely adversarial nor genuinely inquisitorial. That is also the reason why, according to some scholars, it should be classified as a 'mixed' model.[45]

2.2.4 Communicative function of victim participation

This short historical overview proves that not only the substantive but also the procedural part of international criminal law tends to develop in a very haphazard way. Nevertheless, it would be a mistake to consider rules of criminal procedure as norms of mere secondary importance only because they do not declare and express – as norms of substantive criminal law clearly do – which goods or interests deserve to be protected within the legal system. Indeed, rules of substantive criminal law are not the only vessels of significant messages. Equally relevant signals can be communicated by a decision as to which model of criminal procedure is going to be applied by different states and international criminal tribunals. One component of this communication is 'actor-based', for it is concerned with the question of who and in what role can participate in criminal proceedings. This component may involve many different actors ranging from traditional ones such as offenders and prosecutors, to victims, witnesses and amicus curiae. On the other hand, in some systems this component may be restricted in scope, and thus limited merely to 'traditional actors of criminal justice'. Without a doubt, the decision which of these components should be selected and adopted in practice forms an important philosophical and political message to society, or in the case of international criminal law, to the whole international community.[46] It can also serve as a useful indicator as to whether the system in force accommodates victims' rights and interests. In effect, it could be argued that the ICC model – which in many ways is much more democratic and victim-oriented than the adversarial models of previous international criminal tribunals – communicates an important message that the concept of an international crime should not be limited merely to an offender and their act, but instead should be defined as a three-tier model (offender-criminal act-victims) where victims' harm does not go unnoticed. The role of rules of international criminal procedure then is to create the platform where all these elements and divergent interests can be debated, that is not only the offender's guilt and their criminal conduct but also the harm suffered by the victim(s).

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[45] Kai Ambos, 'International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?' (2003) 3 ICLR 1-37.

[46] In practice, however, there are many opinions about what should be the goal of criminal justice, *ergo* whether victims should have a strong position within this system. In the words of the former President of the ICC – 'The drafting of the regime on victims was probably the most challenging task undertaken by the Preparatory Commission'. Silvia Fernández de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence' in Roy S Lee (ed), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 256.

2.2.5 Defining victims of international crimes

Since the victim participation model in the ICC has already been briefly discussed above, it is now time to focus on analytical issues, including definitions of victims of international crimes. Although it might seem irrelevant at first sight, the way victims are defined is actually crucial because it determines not only to whom the 'victim label' may be attributed but also how many of those harmed by the criminal conduct may potentially use procedural and substantive rights included in the Statute. However, as this article is concerned first and foremost with legal persons as potential victims of international crimes, before providing specific definitions of victims in international criminal law, I will start with some theoretical interactions between legal persons and their agents with respect to both corporate criminal responsibility and corporate victimization.

In attributing criminal responsibility for the conduct of corporations, the fundamental legal dilemma is who exactly should be held accountable for this conduct. Inevitably, there are four possibilities. It could be (a) neither a legal person nor a competent natural person (leading to impunity); (b) exclusively a legal person (legal person as an independent actor); (c) exclusively a natural person acting for the legal person (depersonification of legal persons); or – last but not least – (d) both legal and natural persons (shared or dual liability for the corporation's conduct). These models cover the full spectrum of corporate criminal responsibility ranging from a total rejection of it to the expansive system where both natural and legal persons can be held responsible for an act of the former. Importantly for this article, these modalities are not only relevant with respect to corporate criminal responsibility. On the contrary, they may also help in identifying various modalities of corporate victimization when criminal acts are directed at legal persons' goods and interests. Therefore, if such an act 'harms' a legal person, there are four primary ways of establishing who should be recognized as a victim of crime in this situation: (a) neither a natural nor a legal person; (b) only the legal person; (c) only the natural person acting for the legal person (i.e. its owner); (d) both the legal and natural persons. Depending on which of these models is applied in practice, the position of victimized legal persons would obviously differ significantly. At one extreme, there is the system where corporate victimization is not recognised at all. In effect, this leads to the adoption of strict normativism which provides that for the commission of a crime it would be enough if a specific legal norm is violated (formal wrongfulness).[47] The violation of a legal norm, in turn, results in the 'harm' which is not suffered by a specific subject (be it a legal person or its agents). On the contrary, it is the state and perhaps the society in the case of conventional (domestic) crimes, or the whole international community when international crimes are at stake, who suffers the harm. At the other extreme, however, there is a system which includes a broad conception of corporate victimhood covering both legal and natural persons. Accordingly, even if acts are deliberately directed at legal person's interests, the circle of those who are harmed by this conduct is not limited merely to the

[47] In this regard, Albin Dearing differentiates between a state-centred and a human-rights based approach to criminal justice; Albin Dearing, *Justice for Victims of Crime. Human Dignity as the Foundation of Criminal Justice in Europe* (Springer 2017) 3-9.

direct victim (the legal person in this case), instead, it includes also indirect ones (i.e. agents acting for the legal person).

Both of these classifications are merely intellectual exercises consisting in identifying possible models of corporate responsibility and corporate victimization. But how do they operate in practice? For a long time, international criminal law did not include any definition of victims of international crimes. In the strictly adversarial procedures of Nuremberg and Tokyo, this was simply unnecessary. A definition of the victim of international crimes appeared for the first time only in the Rules of Procedure and Evidence of the ICTY which stipulated that it is a 'person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[48] Due to the double limitation included therein ('against whom' and 'jurisdictional' limitations) as well as the fact that it was concerned only with natural persons, it could be described as a narrow definition. In result, the group of potential victims was also smaller than it could have been, had the conditions included in this definition been less strict.

A couple of years later, the ICC adopted another definition. Rule 85 RPE ICC, which is still in force, introduces a binary understanding of victimhood which covers both natural and legal persons. Accordingly, victims are firstly defined as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court' (rule 85(a) RPE ICC). Thus, not only those natural persons against whom the crime was committed can be recognized as victims before the ICC. In addition, the Rules of Procedure and Evidence also provide that '[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes' (rule 85(b) RPE ICC).

Since this article is concerned with corporate victimization, in what follows only the second element of this definition referring to 'organizations and institutions' will be examined more extensively. In order to uncover the real scope of corporate victimization within the ICC's framework, three questions need to be posed. First, what are the 'organizations and institutions' to which rule 85(b) RPE ICC refers? Second, what is the difference between direct and indirect harm? Third, with regard to the 'property' limitation in rule 85(b) RPE ICC, which acts can be identified as a potential source of international corporate victimization?

Neither the Rome Statute nor the Rules of Procedure and Evidence, nor for that matter any other international document, provide the legal definition of 'organizations' and 'institutions'. It follows that the drafters of these documents decided to leave to the Court's discretion how these notions should be understood. Accordingly, in the case of *Lubanga*, the Court attempted to clarify their meaning by stating that organizations and institutions 'may include, inter alia, non-governmental, charitable and non-profit organisations, statutory

[48] Rule 2, Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 8 July 2015.

bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships'.[49] Nevertheless, since the enumeration provided by the Court is clearly not exhaustive, also the exact scope of 'organizations' and 'institutions' remains imprecise. In spite of this semantic imperfection, the definition developed in the case of *Lubanga* evidences its victim-orientedness, for it clearly aims at including a wide range of legal persons. Importantly, it is not limited merely to public organizations, but encompasses also private entities. The victim-friendly interpretation has been exercised by the Court also with respect to the identification requirement. On many occasions the ICC has ruled that it will accept any constitutive document which is recognized in the respective domestic legal system as a valid confirmation of legal personality.[50] Thus, it could be argued that the scope of victim participation is delimited partly by domestic rather than international rules. This, however, instead of being criticized, should be read as another example of how both domestic and international legal systems are connected or complementary to each other (see articles 1 and 17 ICCSt).[51] It follows that the extent to which legal persons will be accepted as victims of international crimes depends to a great extent on how broad the conception of legal personality is in their respective domestic legal systems.

Furthermore, as a main determinant of victimhood in international criminal law, rule 85 RPE ICC provides the notion of harm which is applicable to both natural and legal persons. For continental lawyers, at least those who have been influenced by the German legal system with its conception of legal good (*Rechtsgut*)[52], 'harm' is something of an unknown and, in a sense, a foreign requirement.[53] In addition, in contrast to natural persons, legal persons can be classified as victims of international crimes only if they have sustained direct harm. The Court's documents, however, do not provide any guidelines as to how the concept of harm and its various variants should be understood in practice. Since its first decision in the case of Lubanga, the Court has continued to define 'harm' as 'hurt, injury and damage'.[54] Sadly, the definition endorsed by the Court brings little, if any, clarification and guidance, for all three *definentia* are also highly imprecise concepts themselves. On the other hand, this lack

[49] *In the case of the Prosecutor vs. Thomas Lubanga Dyilo*, Order for Reparations, Appeals Chamber, 3 March 2015 (ICC-01/04-01/06-3129-AnxA), para 8.

[50] *See*: *In the case of the Prosecutor vs. Ahmad Al Faqi Al Mahdi*, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims, 8 June 2016 (ICC-01/12-01/15), para 24; *In the case of the Prosecutor vs. Thomas Lubanga Dyil*o, Decision on victims' participation, 18 January 2008 (ICC-01/04-01/06), para 89.

[51] '(…) and shall be complementary to national criminal jurisdictions' (article 1 ICCSt).

[52] The concept of *Rechtsgut* was coined by Karl Birnabum in the 19th century. See more: Albin Eser, 'The Principle of „Harm" in the Concept of Crime. A Comparative Analysis of the Criminally Protected Legal Interests' (1966) 4 Duquesne University Law Review 345-417.

[53] For instance, Article 49(1) of the *Polish Code of Criminal Procedure*, which defines victims of crimes, refers to the concept of legal goods (interests), instead of harm.

[54] *In the case of the Prosecutor vs. Thomas Lubanga Dyilo*, Order for Reparations, Appeals Chamber, 3 March 2015 (ICC-01/04-01/06-3129-AnxA), para 10.

of precision which inevitably brings certain level of interpretative flexibility could be, perhaps paradoxically, beneficial for the Court and – more importantly – for victims of international crimes as it allows the ICC's judges to determine the exact contours of harm *a casu ad casum*. Thus, it cannot be ruled out that in its future practice the Court will continue to adopt the victim-oriented interpretation on this matter.

Nevertheless, even if the Court should be willing to adopt such a pro-victim interpretation with respect to the concept of harm, it will still have to consider another constraint included in the definition, namely the 'property' limitation. According to this requirement, legal persons' harm is relevant for the Court only to the extent that it pertains to their property. It follows that the harm sustained by legal persons has to be material. Non-pecuniary damage, such as emotional suffering etc., which might be relevant for the determination of natural person's victimhood, is irrelevant with respect to legal persons. In addition, not all types of damage on property sustained by a legal person may matter for the Court. This *differentia specifica* comes down to two different spheres. First, it is the function of legal persons' property and not, for instance, its cultural value, organizational relevance or other characteristics.[55] Second, the definition also directly refers to two places without mentioning openly their function.[56] On the whole, it seems that this limitation will significantly reduce the number of legal persons as victims in the proceedings before the ICC.[57] For instance, it is unlikely that a commercial company whose buildings were destroyed during an armed conflict will meet all the requirements, and especially the one referring to the function of legal persons' property.

3 Arguments 'against' victim participation of legal persons

Bearing in mind the structure of an international crime, the rationale for conducting international criminal trials, as well as the evolving normative nature of victim participation described above, in this section I will focus on the core issue of this article, that is whether it is correct to claim that legal persons can be victimized by international crimes (1), and – if they can – whether and to what extent their participation in international criminal trials should be allowed by ICTs (2). For these reasons, I develop a set of three arguments (semantic, conceptual and pragmatic) which may, to my mind, call into question the commonly held view on victim participation of legal persons before ICTs.

[55] (…) is dedicated to religion, education, art or science or charitable purposes (…) and other places and objects for humanitarian purposes.

[56] (…) historic monuments, hospitals.

[57] Due to the 'property' limitation, only a small number of legal persons are in fact allowed to participate before the ICC in the victim capacity. In the case of Bemba, for instance, out of 5.229 participating victims only 14 were organizations or institutions. See: *In the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74 of the Statute, 21 march 2016 (ICC-01/05-01/08), para 18-21.

3.1 Semantic argument

In his seminal study on criminal law, George Fletcher aptly notices that '[l]awyers have no tools but words'.[58] For this reason, in order to examine the exact meaning of law as well as its application in practice, one has to start with words and their meaning. In this sense, legal terms are relevant both internally and externally. Internally – because they create a specific legal vocabulary which helps in organizing and defining the whole spectrum of legal mechanisms. And externally – due to their inherently constitutive and communicative character which translates into 'meaning-making power'.[59] Thus, a person harmed by the criminal act can be recognized as a victim, and a person who committed this harmful act can be labelled an offender (internal perspective) only because both victims and offenders have already been defined by the law and because there are institutions which are equipped with the authority to determine whether these persons meet the respective requirements (to become the victim and the offender) established by the law (external perspective). In what follows I would like to focus on the static 'internal perspective' by probing into the nature of victimhood as well as the way it is understood in the ordinary language, and then by juxtaposing it with the definition included in rule 85(b) RPE ICC (institutions and organizations as victims of crime).

In many languages, the notion of 'victim' (*victima*) is used to denote a creature killed as a religious sacrifice.[60] Historically, *victima* has had a very deep religious and symbolic connotation. In this regard, Jan Van Dijk noticed that '[t]hose affected by crime are (…) called victims because their suffering resembles that of the figure of Christ'.[61] Against this background, one could argue that harm emanating from the crime is always felt by the victims on a deeper psychological (emotional) level than, for instance, a wrong resulting from the violation of tort law. This specific semantic meaning of the victim-label attributed to persons harmed by an offence, however, is generally limited geographically to the Western and Arabic world. In other language groups, for instance in China and Japan, the word for sacrificial animal is not applied to victims of crime. On the contrary, these languages define the crime victim by reference to the neutral expression of person-receiving-harm.[62] International criminal law, however, seems to have been inspired by the former understanding developed in the languages of the 'biblical world'.[63]

Furthermore, the argument for limiting the scope of the victim-label only to natural persons can be derived from selected domestic and international legal documents. For instance, the definition of victims of crime included in rule 2 of the RPE ICTY did not cover legal

[58] George Fletcher, *The Grammar of Criminal Law. American, Comparative and International. Volume One: Foundations* (OUP 2007) 117.
[59] Claire Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC' (2016) 15 Journal of Human Rights 42.
[60] Jan Van Dijk, 'In the shadow of Christ? On the use of the word "victim" for those affected by crime' (2008) 27 Criminal Justice Ethics 13.
[61] ibid 19.
[62] ibid 14.
[63] I borrow this expression from G P Fletcher. See: Fletcher, *The Grammar* (n 58) 121.

persons.[64] The same conclusion stems from the way 'victims' are defined in the English legal system.[65] It seems, therefore, that the victim-label due to its specific etymology, and especially deep emotional connotations, should be limited only to those entities which (who) are able to recognize their victimization. This includes the subjectively conceived harm (self-recognition as a crime victim) which serves as a prerequisite to any official recognition of victimhood in the judicial process. In addition, one should not forget about the specific features of the definition contained in rule 85(b) RPE ICC. In particular, this relates to the 'property-limitation' included therein. Accordingly, institutions and organizations can be victimized only in the material (pecuniary) sense. Given the definition of harm provided for by the ICC as denoting 'hurt, injury or damage'[66], it seems that in case of legal persons it is the concept of damage or the concept of an injury, depending on the vague distinction between them, which properly reflects the victimization of legal persons. If that statement is correct, however, then maybe victimized legal persons should be redefined into 'injured persons', instead of victims of crime?

Another relevant element of this semantic argument can be derived from victimological studies. Classical victimology, after all, was concerned mainly with creating theoretical classifications of victims on the basis of their different personal characteristics as well as their relationships with the offender. Early authors such as Hans von Hentig[67], Benjamin Mendelsohn[68] and Stephen Schefer[69], and more recently also Ezzat A. Fattah[70], have all compiled their own lists of different victim-categories. Nowadays there is also a tendency to create specific terms or expressions which can capture certain phenomena of victimhood. This way we could talk about, among other things, 'ideal victims'[71], 'statistical victims'[72], 'juridified and abstract victims'[73], 'abstract victims', 'pathetic and heroic victims'[74], 'complex

[64] Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill-Nijhoff 2017) 41.
[65] *Code of Practice for Victims of Crime*, Ministry of Justice, October 2015, 9.
[66] *In the case of the Prosecutor vs. Thomas Lubanga Dyilo*, Order for Reparations, Appeals Chamber, 3 March 2015 (ICC-01/04-01/06-3129-AnxA), para 10.
[67] Hans Von Hentig, *The Criminal and His Victim: studies in the sociobiology of crime* (Yale University Press 1948).
[68] Benjamin Mendelsohn, *Une nouvelle branch de la science biopsycho-social: La victimology*. (1956) 2 Review international de criminologie et de police technique 95-106.
[69] Stephen Schafer, *The Victim and His Criminal: A Study in Functional Responsibility* (Random House 1968).
[70] Ezzat Fattah, *Understanding Criminal Victimization. An Introduction to Theoretical Victimology* (Scarborough, Ont 1991).
[71] Christie, 'Ideal Victim' (n 4) 17-30.
[72] Emily Haslam and Rod Edmunds, 'Whose Number is it Anyway? Common Legal Representation, Consultations and the 'Statistical Victim'' (2017) 15 Journal of International Criminal Justice 931-952.
[73] Sarah Kendall and Sara Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 Law and Contemporary Problems 235-262.
[74] Diana Tietjens Meyers, *Victims' Stories and the Advancement of Human Rights* (OUP 2016) 32-39.

political victims'[75], 'victims who victimize'[76], 'victims as constituencies'[77], beneficiaries[78], and, from the legal point of view, about the 'victims of the situation' and 'case victims'[79], 'victims of genocide'[80], 'victims of crimes against humanity'[81], 'victims of war crimes'[82] and 'victims of the crime of aggression'[83], including 'direct and indirect victims'[84]. Certainly, this exemplary typology of victims does not exhaust the whole complexity of the concept of victimhood in international criminal law. It does help, however, to identify different modalities of becoming a victim of crime. Thus, while according to rule 85(b) RPE ICC both organizations and institutions may become 'juridified victims'[85], they cannot be recognized as 'ideal victims' or 'victims who victimize' because, by their very nature, they are unable to meet all the requirements set for the respective status.[86]

3.2 Conceptual argument

As it was already demonstrated above, different models of victim participation adopted by successive ICTs can be very useful in finding out what type of philosophical justification for imposing an international punishment is adopted by these tribunals, or – in simpler terms – what international criminal law stands for. Thus, while the goals of military tribunals of Nuremberg and Tokyo on the hand, and *ad hoc* tribunals of the former Yugoslavia and Rwanda on the other, were predominantly retributive in character, the model of criminal procedure adopted for the ICC clearly reformulates the *telos* of international criminal trials by supplementing its retributive desert-based dimension with a forward-looking consequentialist justification. This forward-looking justification, alongside the much doubtful preventive goals, brings to its core the restorative justice paradigm by accommodating victims' interests and needs.[87] In result, no more does the 'achieving justice'

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[75] Erika Bouris, *Complex Political Victims* (Kumarian Press 2007) 75-90.

[76] Mark Drumbl, 'Victims who victimize' (2016) 4 London Review of International Law 217-246.

[77] Among others: Frédéric Mégret, 'In whose name? The ICC and the search for constituency' in Christian de Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP 2015) 23-45.

[78] Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls (2012) 12 International Criminal Law Review 375-408.

[79] Hector Olasolo and Alejandro Kiss, 'The Role of Victims in Criminal Proceedings before the International Criminal Court' (2010) 81 Revue internationale de droit penal 125-163.

[80] Article 6 ICCSt.

[81] Article 7 ICCSt.

[82] Article 8 ICCSt.

[83] Article 8*bis* ICCSt.

[84] For instance, see: Valentina Spiga, ''Indirect Victims' Participation in the Lubanga Trial' (2010) 8 JICL 183-198.

[85] '(...) victimhood as a legal category—juridified victimhood—is much narrower than that massive base. The legal process narrows the category of legally "recognized" victims': Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (n 73) 241.

[86] Nils Christie identified six attributes of ideal victimhood, for example that the victim is weak (female, elderly). Even this first condition for becoming an ideal victim is not fulfilled by legal persons.

[87] Claire Garbett, 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5 Restorative Justice: An International Journal 198-220.

rhetoric revolve solely around prosecuting and sentencing those guilty of committing international crimes. This way, 'international justice' has been transformed from a unidimensional model into a multi-faceted conception which motivates the Court and its officers to accommodate victims' rights (justice for victims),[88] rather than simply focusing on the defendant and their guilt.

The conceptual argument which will be briefly discussed below reflects my present philosophical stance towards international criminal law. I espouse the view that international crimes are public crimes because – as Antony Duff argues[89] – they concern the polity, or – as the Preamble to the Rome Statute stipulates – are of concern to the international community as a whole. This introductory assumption, however, clearly requires further clarification of notions such as 'the polity' and 'being of concern' to the international community (humanity). I argue that in the case of international crimes, the polity should not be associated with any particular continent, region, state, or society. International crimes, after all, violate specific norms and standards that, as to their character (fundamental nature) and scope, extend beyond any political organism or even geographically demarcated territory. Thus, in line with Antony Duff, I submit that international crimes are of concern to the humanity conceived as a moral – not political – entity which is arranged around values intrinsically linked to the human nature of every person.[90] Since these values are reflected in the human's nature[91], they do not need to be *empirically shared* by every single person (*inter alia* by offenders). Therefore, neither a non-universal ratification of the Rome Statute by the states (123 out of 193 countries in the world), nor frequent violations of norms of international criminal law by natural persons undermine the general nature of international crimes and values which lie at their roots. In addition, this philosophical assumption should not entail that the international moral community is or can be *harmed* through the commission of international crimes. Here I also follow Antony Duff's approach by drawing the distinction between being 'answerable to' the humanity as a whole (the polity) on the one hand, and undermining its values by wrongfully harming its specific members on the other.[92] While, to my mind, 'being of concern' can be translated into

[88] Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2013) 24-38.

[89] Antony Duff, 'Authority and Responsibility in International Criminal Law' in: Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 589-604.

[90] This should not suggest that every single international crime breaches norms of such deeply anthropocentric character. This justification is therefore strictly connected to an 'ideal' (pure) conception of an international crime protecting only fundamental values of concern to all of us. However, it is a completely different matter whether the current model of international criminal law, and more precisely the adopted scope of international criminalization, succeeds in fulfilling these criteria.

[91] 'In virtue of our membership of that community' (…) 'in virtue of our shared humanity' – as Antony Duff puts it in Duff, 'Authority and Responsibility in International Criminal Law' (n 89) 600.

[92] See also Antony Duff, *Answering for Crime* (Hart Publishing 2007).

the former,[93] it would be incorrect to claim the same with respect to the latter.[94] In consequence, I claim it is not apposite to depict regions, states or societies as victims of international crimes.[95] On the contrary, in my view, only the person whose rights (interests, goods) were violated (directly and sometimes also indirectly) through the commission of an international crime merits recognition as a 'genuine victim'.[96] Thus, although human's life is a good intrinsically linked to the human's nature and the international community as a whole is concerned with its protection because of its members' shared humanity, it is obvious that murder of *another person* or even the crime of genocide committed against *members* of a specific ethnic group does not result in victimization of every single human being, or – for that matter – of the humanity as a whole.

In spite of its explanatory potential, I am aware that an application of this philosophical approach does not justify the postulated exclusion of legal persons from the scope of the definition of victims of international crimes. For this purpose, two additional sub-arguments will be developed below – one relating to the notion of human dignity, and the other addressing the conceptual and normative incoherence within the victim-offender paradigm identified in the Rome Statute.

First of all, I would like to briefly examine legal persons through the prism of the concept of (human) dignity which not only lies at the roots of the human rights movement, but also runs through the whole area of international law,[97] including international criminal law. Many references to the concept of (human) dignity can be found both in constitutive texts of international criminal tribunals as well as in their legal practice.[98] Nevertheless, human dignity, however important, is not a particularly clear notion. In this regard, Meir Dan-

[93] Following the reasoning that these values are of concern to all of humanity, and therefore by violating them, you are answerable to the humanity (international community) as a whole. Thus, international crimes are public crimes not because they victimize the whole humanity, but because they are of concern to the international community as a whole.

[94] Following the reasoning that although an offender is answerable to the humanity as a whole by undermining its shared values, it does not mean that the humanity should be considered a victim of this violation. In the words of Antony Duff: 'The idea that crimes against humanity are those whose perpetrators should answer to the humanity expresses a sense of solidarity with the victims of such crimes: we share, or should share, collectively in the wrongs that they have suffered, and share a collective responsibility to respond to those wrongs by calling the perpetrators to account'. See: Duff, 'Authority and Responsibility in International Criminal Law' (n 89) 602.

[95] In contrast to what the International Criminal Court decided in the case of Al-Mahdi, where the population of Mali and the international community were also declared victims of the war crime of cultural heritage destruction. See *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016 (ICC-01/12-01/15), para 80.

[96] Recently this approach has been presented elaborately by Albin Dearing who argues that 'crime should be understood as the violation of the human rights of an individual (or of individuals)'. Dearing, *Justice for Victims of Crime. Human Dignity as the Foundation of Criminal Justice in Europe* (n 48) vii.

[97] See, for instance, the Preambles to the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948 where it is recognized that rights included in these acts are derived 'from the inherent dignity of the human person'.

[98] Heath Benton, 'Mapping Expansive Uses of Human Dignity in International Criminal Law' in: Silja Vöneky (ed), *The Ethicalization of Law* (Max Planck Research Group 2012).

Cohen notices that 'there appear to be a number of conceptions of one concept'.[99] Despite that, the same author manages to identify two main historical sources of human dignity: first, the religious, biblical idea of *imago Dei*; and second, the Kantian view of human autonomy.[100] It is much less clear, however, how this religiously and philosophically motivated idea has been translated into a legal concept. Christopher McCrudden argues, for instance, that there are three elements amounting to the 'minimum core' of human dignity: the 'intrinsic worth' of every human being, the idea that such worth should be 'recognized and respected', and the requirement that 'the state should be seen to exist for the sake of the individual human being, and not vice versa'.[101] It seems that in the case of international law the last condition could be reformulated by underscoring that it refers not only to the state but also to the whole international community ('positive obligations for states and international bodies'). This brief examination of the concept of (human) dignity, its meaning, as well as the way it is applied in practice suggest that legal persons – in spite of their 'personality' – do not possess the 'inherent dignity'.

Another dilemma arising at the conceptual level stems from the relation between corporate criminal responsibility and corporate victimization. Article 25 ICCSt, which sets the conditions for criminal responsibility before the ICC, limits the Court's jurisdiction only to natural persons.[102] It follows that only natural persons may be held accountable by the ICC for committing the crime of genocide, crimes against humanity, war crimes and the crime of aggression (article 5 ICCSt). It is also conceivable, however, that acts amounting to the aforementioned international crimes could be committed by natural persons acting as agents of a legal person. In this scenario, the criminal conduct of a legal person could be examined by the Court through the prism of international criminal law only to the extent that this conduct is somehow connected to an alleged criminal act of a natural person (e.g. acting on behalf of a legal person). In my view, a similar link could be identified and transformed into a binding legal mechanism with respect to corporate victimization. If we agree, after all, that natural persons may commit international crimes while acting as representatives of a legal person, why would we not accept the view that if an international crime is committed against 'the property' of organizations and institutions, in reality it is not targeted at legal persons, but at agents (natural persons) acting for such entities?

To put this theoretical framework into motion, it is worth examining here the hypothetical case of a 'private school'[103] which possesses legal personality and is owned by three natural persons (shareholders). During an ongoing armed conflict, the school 'suffers' harm (damage) on its property inasmuch as all its buildings are deliberately destroyed by a group of combatants (war crime)[104]. The question arises then as to who will be and who should be

[99] Meir Dan Cohen, 'A Concept of Dignity' (2011) 44 Israel Law Review 9-23.
[100] ibid 10-17.
[101] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655-724.
[102] Article 25(1) ICCSt: 'The Court shall have jurisdiction over natural persons pursuant to this Statute'.
[103] Rule 85(b) ICC RPE: "(…) direct harm to any of their property which is dedicated to (…) education.
[104] See article 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii) ICCSt.

labelled the victim. According to article 85 RPE ICC, it would certainly be the legal person. It is also conceivable that some natural persons might acquire the victim-status on account of their financial dependence on the school's functioning (consequential economic loss).[105] On the other hand, from the perspective of the conceptual argument developed in this article, it seems that neither the legal person (school), nor the destroyed buildings but first and foremost the three owners of this school (direct victims) as well as its students, their parents, the teaching staff etc. (indirect victims) are those who should be recognized as victims of this crime. This way, both conceptions of criminal responsibility of natural persons and corporate victimization would portray a coherent, deeply anthropocentric vision of law according to which only living creatures able to think and act independently should be categorized as potential victims and perpetrators of (international) crimes.

3.3 Pragmatic argument

The pragmatic argument is based upon the procedural dimension of victims' relationships with the ICC. It is undeniable that international criminal justice encompasses neither all offenders nor all victims of international crimes. Selection of those who are going to be either convicted or admitted in the capacity of victims is therefore crucial. As it was already described, victims can play three different roles in the proceedings before the ICC (as witnesses, as victims, as claimants). One of them, namely the role of 'victims as victims', without a doubt symbolizes the progressive development of international criminal procedure. This role, however, can be further characterized by examining its two different dimensions. The first dimension pertains to all those victims who are recognized as victims of international crimes allegedly committed by the defendant but whose role is, in fact, limited to a passive presence during the trial (for they are represented by the Legal Representative(s) of Victims).[106] The second dimension encompasses victims who, apart from being passive (or simply absent) participants, take on a more active role by presenting their 'views and concerns' (article 68(3) ICCSt) in open court.

As of today, very few victims have managed to describe their personal story before the Court in the capacity of 'victims as victims' and, in that sense, have become truly active participants.[107] There are many reasons for that, one of them being the fact that there are too

[105] This is how natural persons were declared victims of the war crime of the cultural heritage destruction. See *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017 (ICC-01/12-01/15), paras 72-83.

[106] Article 68(3) ICCSt: '(…) Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence'.

[107] For instance, in the case of *the Prosecutor v. Bosco Ntaganda*, the LRV requested the Chamber for leave to call four participating victims (par. 12) to present their views and concerns: 'The Chamber notes the expected account of the four victims above, their alleged harm suffered, and the temporal and geographical proximity of the alleged events in relation to the charges. In light of the information provided by the LRV, the Chamber considers that the personal interests of the four victims above are affected and that their expected accounts to be potentially representative of the harm suffered by a larger number of victims'. See *In the case of the Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), 15 February 2017 (ICC-01/04-02/06), para 49.

many participating victims in various cases decided by the Court, and much too few resources at the ICC's disposal. According to the most recent Report on the Activities of the ICC from 1 August 2017 to 31 July 2018, 12,509 victims participated in cases before the Court. For instance, there were more than 5,000 witnesses in the *Bemba* case, and more than 4,000 witnesses in the *Ongwen* case.[108] While examining these numbers, it becomes evident that the ICC cannot allow every single victim to present their views and concerns in open court. This is also the reason why victims have their own representative whose role is, among other things, to transmit the 'views and concerns' of victims to the Court in a more coherent and less personal way. With regard to legal persons, however, it is obvious that they are represented by a person who must 'provide information on his capacity to do so'.[109] It follows that with respect to legal persons one could speak of a 'doubly-remote participation', considering the fact that these victimized institutions and organizations are represented by two different agents: (1) an agent possessing the capacity to act on behalf of a legal person who – in case a legal person is admitted to participate in the proceedings[110] – is then represented by (2) a legal representative of victims (double representation) throughout the main trial.[111] Against this background, it might be argued that the participation of legal persons in the criminal phase of proceedings is irrational on account of their systemic inability to play the role of victims who present their 'views and concerns'. It is especially apposite considering the therapeutic role of this particular phase of the proceedings. In that sense, to my mind this procedural mechanism should only be used by natural persons who have been harmed through the commission of an international crime. On the other hand, the role of 'victims as witnesses' remains less controversial, for agents acting on behalf of the legal person certainly may provide the Court with relevant evidence.

As for the third modality of victim participation, that is the role of 'victims as claimants', *prima facie* one might be tempted to think that this role should be viewed as crucial from the perspective of legal persons and their economic interests. After all, only if certain war crimes which result in the destruction of legal persons' property are committed, organizations and institutions may apply for the victim status. In practice, however, the concept of

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[108] *Report of the International Criminal Court*, 20 August 2018, 1.

[109] *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 17 August 2017 (ICC-01/12-01/15), para 25.

[110] Sometimes it is confusing whether a natural person submitting an application wishes to participate in the personal capacity (as a natural person), as an agent acting on behalf of the legal person, or perhaps in both roles. See *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 17 August 2017 (ICC-01/12-01/15), para 28: ('However, the Chamber considers that the content of the Applications, in particular the description of the harm suffered and of the reparation sought, shows that the applicants intended to apply as individuals rather than as acting on behalf of an organization/institution').

[111] *In the case of the Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014 (ICC-01/04-01/07), para 31: 'Consequently, they participated in the trial via their legal representatives, who were able to examine witnesses, request that evidence be admitted into the record, file submissions throughout the proceedings, make opening statements and file closing briefs, and, ultimately, make closing statements'.

compensatory justice is more of an ideal to which the Court should aspire than the reality. As yet, all reparations orders issued by the Court had to be divided between a large number of victims. In consequence, reparations awarded by the ICC can be characterized as inherently symbolic.[112] It follows that even the pecuniary damage sustained by a legal person cannot be repaired in its entirety.

4 An argument 'for' victim participation of legal persons

Apart from the critical argumentation developed throughout the second part of this article, there is also one argument which, to my mind, should be identified as supporting the existing model on the basis of which legal persons are categorized as potential victims of international crimes.[113] According to article 5(1) ICCSt, '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression'. From among all these crimes, only one crime-category may lead to economic harm of legal persons: namely, selected types of war crimes (article 5(1)(c) and article 8 ICCSt).[114] This conclusion, however, is correct only if one accepts the assertion that legal persons can be directly victimized in case their property has been damaged (see the previous point developing the conceptual argument on this matter).

[112] For instance, the total liability of Ahmad Al Mahdi was set at the level of 2.7 million euros. The majority of the sum was directed towards inhabitants of Timbuktu in the form of individual and collective reparations. (*In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017 (ICC-01/12-01/15)). In the case of Katanga, the Trial Chamber ordered awards for reparations to 297 identified victims, comprised of an individual symbolic compensation award of $250 to each victim and of four collective awards to all victims, in the form of (1) housing assistance, (2) education assistance, (3) income generating activities, and (4) psychological rehabilitation. (*In the case of the Prosecutor v. Germain Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018 (ICC-01/04-01/07 A3 A4 A)). Next, the amount of Thomas Lubanga's liability for collective reparations was set at 10.0 million USD. (*In the case of the Prosecutor v. Thomas Lubanga Dyilo*, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, 21 December 2017 (ICC-01/04-01/06)).

[113] This argument was also the main reason for including 'organizations and institutions' as potential victims of international crimes before the ICC.

[114] In the case of Al.-Mahdi, 6 out of 8 participating victims were organizations or institutions. See: *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016 (ICC-01/12-01/15), para 6; *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016, (ICC-01/12-01/15), para 3.

5 Conclusions

There is no self-evident reason to claim that legal persons cannot be victimized by acts constituting international crimes and that they should not be allowed to participate in proceedings before international criminal tribunals. Corporations have legal personality, which separates them from natural persons, and they have capital and market value, which enables them to function irrespective of who precisely represents them in contacts with other entities. In this article, however, I wanted to challenge that widely shared idea by developing the line of three arguments (semantic, conceptual and pragmatic). I attempted to prove that it is relevant which words (labels) are used to describe certain phenomena. To this end, I proposed that it would be more correct from the semantic point of view to label legal persons 'injured parties', rather than 'victims of crime'. In addition, I argued that international crimes are criminal acts of different character than their domestic equivalents, for they operate on the basis of a different philosophy of criminal law and create a distinctive concept of victimhood. As part of the conceptual argument, I defended the thesis that the concept of (human) dignity should form the foundations of criminal law and victimization, respectively. On this basis, I concluded that legal persons do not have 'dignity' and, as such, should not be recognized as either responsible, or victimized entities. As a result, I put forward the view that even if an international crime is targeted at legal person's property, it is a natural person (e.g. the owner of this legal person) who should be labelled the victim of crime. Otherwise, an artificial concept of victimization will continue to be mistakenly applied by international criminal tribunals. To avoid it, perhaps the famous phrase retrieved from the Nuremberg Judgment that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'[115] should be reformulated into: 'international crimes are committed against men, not abstract entities, and only by recognizing harm of natural persons can the provisions of victim-oriented international law be at last enforced'? Last but not least, I also discussed the strongest among all three arguments developed in this article, namely the pragmatic argument. In this case, I tried to illustrate the irrationality of legal persons' participation in the capacity of victims by referring to the role of 'victims as victims' (article 68(3) ICCSt). This analysis proves, to my mind, that legal persons cannot participate in proceedings before the ICC in the true sense of this word (most definitely not as victims, and perhaps not even as witnesses). Finally and crucially, the fundamental rationale for their participation, i.e. the desire to receive full compensation for the sustained financial loss, is also not satisfiable at the international level due to the large number of participating victims and sparse resources at the disposal of the Trust Fund for Victims.

[115] International Military Tribunal (Nuremberg), Judgment of 1 October 1946, 55 <https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> accessed 15 October 2018.

Selected Literature

Bock S, *Das Opfer vor dem Internationalen Strafgerichtshof* (Duncker & Humblot 2010)

Christie N, 'The Ideal Victim' in Ezzat Fattah (ed), From Crime Policy to Victim Policy. Reorienting the Justice System (Palgrave Macmillan 1986)

Duff A, 'Authority and Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (OUP 2010)

Fletcher G, *The Grammar of Criminal Law. American, Comparative and International. Volume One: Foundations* (OUP 2007)

Garbett C, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC' (2016) 15 Journal of Human Rights 42

Garkawe S, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal' in Reginbogin HR and Safferling CJM (eds), Die Nürnberger Prozesse: Völkerstrafrecht seit 1945 (Saur 2006)

McGonigle Leyh B, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011)

Moffett L, *Justice for Victims before the International Criminal Court* (Routledge 2013)

Van Dijk J, 'In the shadow of Christ? On the use of the word "victim" for those affected by crime' (2008) 27 Criminal Justice Ethics 13

RESTORATIVE JUSTICE FOR VICTIMS OF CORPORATE CRIME: EXISTING PRACTICES AND APPROACHES FOR THE FUTURE

*By Victor Yurkov**

Abstract

The potential of restorative justice as a viable option for handling corporate crime is largely unexplored. This article will discuss existing and potential restorative justice approaches in tackling corporate crime. Furthermore, the challenges in implementing such approaches will be outlined, and the potential benefits for victims, local communities, businesses and society as a whole will be briefly explored. The final section elaborates the prospects of digital restorative justice in enhancing access to justice for victims of corporate crime.

1 Introduction

Illegal activities of local and global corporations seriously impact our lives in different spheres, be it the environment, health, finance, production, food and work safety, or in other areas.[1] As Dave Whyte states, '[i]t is no longer controversial in criminology to assert that the social and economic costs of corporate crime tend to exceed the corresponding costs of other forms of crime'[2]. Victims of corporate crime very often are either unaware of their victimization or face challenges to be recognized as such and to enjoy access to remedy.[3] William S. Laufer speaks of the absence of any systematic recognition of corporate victims and victimization.[4] Furthermore, victims of such crime often experience repeated and secondary victimization, for example, as a consequence of inadequate treatment by law enforcement agencies or other actors.[5] In some instances, the corporate victims are also

* Dr, Cand Sc (Law), LLM, Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law, Certified Mediator, Heidelberg, Germany. I would like to express my sincere thanks and gratitude to Imogen Canavan and Dominik Brodowski for very helpful comments on this contribution. All errors that remain are my own. I speak in my personal capacity only; any views expressed or information provided cannot be attributed to the institutions with which I am or had been affiliated.

1 See, for example, Insurance Information Institute, 'Current Table on man-made disasters' <https://www.iii.org/table-archive/22114> accessed 31 August 2018.

2 Dave Whyte, 'Victims of Corporate Crime' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge 2011) 446.

3 See, for example, Ivo Aertsen, 'Restorative Justice for Victims of Corporate Violence' in Gabrio Forti and others (eds), *Victims and Corporations. Legal Challenges and Empirical Findings* (Wolters Kluwer Italia 2018) 166–171; Stefania Giavazzi, 'Victims of Corporate Violence and the Criminal Justice System: Needs, Expectations, and Relationship with Corporations' in Forti and others (n 3) 185–210; Ariana Visconti, 'Corporate Violence: Harmful Consequences and Victims' Needs. An overview' in Forti and others (n 3) 237–239; Whyte (n 2) 446–452.

4 William S Laufer, 'The Missing Account of Progressive Corporate Criminal Law' (Working Paper No. 2017-5.0, University of Pennsylvania) <https://crim.sas.upenn.edu/sites/default/files/2017-5.0-Laufer_ProgressiveCorporateCrimLaw.pdf> accessed 18 September 2018, 10, 22, 29.

5 Giavazzi (n 3) 182–205; Visconti (n 3) 168–170.

dependent, economically or medically, on the offender, which exacerbates their vulnerability and makes the pursuance of the satisfaction of their needs more difficult.[6]

Policing and regulating corporate crime presents a challenge for all jurisdictions, especially in cases of trans-boundary violations. The United Nations Guiding Principles on Business and Human Rights (UNGPs) refers to three major categories of grievance mechanisms dealing with business-related human rights harms: a) judicial, b) State-based non-judicial and c) non-State based mechanisms. The State-based non-judicial methods may be mediation-based, adjudicative, or follow other culturally appropriate and rights-compatible processes – or involve some combination of these.[7] The last category – non-State based – encompasses mechanisms that are administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group.[8] Like the previous category, such mechanisms may, according to the UNGPs, use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. Elements of restorative justice are inherent to all three mentioned mechanisms, but may have the clearest focus in the State-based non-judicial mechanism. Before we turn to the existing restorative practices in corporate criminal justice, central terms in this article need to be defined, although without going into deeper theoretical discussions on their scope.

2 Definitions

When discussing restorative justice, we refer to the definition provided in the United Nations Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. According to para I.2 of the Annex to this Resolution, '[r]estorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator'.[9]

Restorative justice should not be confused with reparative justice, which refers to court efforts to make offenders repair the harm that they have caused when committing offences.[10]

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[6] cf Enrico Maria Mancuso, 'The Role of Victims of Corporate Violence within Criminal Proceedings: Current Status and Future Perspectives' in Forti and others (n 3) 85; Claudia Mazzucato, 'Victims of Corporate Violence in the European Union: Challenges for Criminal Justice and Potentials for European Policy' in Forti and others (n 3) 58–59; Alexandra Schenk, 'Victim Support for Victims of Corporate Crime and Corporate Violence' in Forti and others (n 3) 230.

[7] *UNGPs*, HR/PUB/11/04, United Nations 2011 <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 31 August 2018, 30.

[8] ibid 31.

[9] UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 24 July 2002, E/RES/2002/12, <http://www.refworld.org/docid/46c455820.html> accessed 30 September 2018.

[10] cf Jo-Anne M Wemmers, 'The Healing Role of Reparation' in Jo-Anne M Wemmers, *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 221–232; Rob White, 'Reparative Justice, Environmental Crime and Penalties for the Powerful' (2017) 67 Crime, Law and Social Change 118.

Next, when speaking about corporate crime in the context of this article, we mean, following Frank Pearce and Steve Tombs, any illegal acts or omissions, punishable by the State under administrative, civil or criminal laws, which are the result of deliberate decision making or culpable negligence within a legitimate formal organization.[11] The forms of corporate crime include, for example, corporate violence, corporate theft, corporate financial manipulation, corporate political corruption. Corporate crime is a major form of white-collar crime.[12]

Amongst victims of corporate crime may be natural or non-natural persons. According to article 2 (1)(a) Directive 2012/29/EU, a victim of a crime is/are '(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death'. The legal entity as a victim is a non-natural person directly or indirectly affected by a corporate crime.[13]

3 Existing practices

The results of empirical research indicate that negotiated compliance ('negotiated corporate criminal settlements', 'conversational regulation'[14] or 'compliance-focused enforcement'[15]) is widely applied by regulatory authorities when dealing with corporate breaches.[16] By participation in activities, which focus on reparation of the harm and prevention of future infringements, offending corporations can, in certain cases, avoid formal prosecution and conviction.

To date, there are several examples of the application of restorative justice principles in court proceedings, particularly in the area of environmental crime. One of the most interesting and apt examples of restorative justice intervention is the case of Garrett v Williams [2007] before the New South Wales Land and Environment Court (NSWLEC)[17]. In this case, the Chief Judge of the Court, Brian Preston, intervened in a sentencing hearing to divert the parties to a restorative justice conference. This case involved environmental offences committed by a mining company on an Aboriginal place in the Broken Hill area of New South Wales during construction and exploration activities, including the destruction of Aboriginal objects. The conference was facilitated by the prosecutor, funded by the defendant and conducted by an independent facilitator. After an apology by the defendant,

[11] Frank Pearce and Steve Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Ashgate Publishing 1998) 107.

[12] For more on the different forms of white-collar crime see, for example, David O Friedrichs, *Trusted Criminals. White Collar Crime in Contemporary Society* (4th edn, Wadsworth Cengage Learning 2010) 60–218.

[13] The notion of the 'victimised corporation' is controversial, cf Whyte (n 2) 453–454.

[14] Julia Black, 'Talking about Regulation' (1998) 1 Public Law 77–105.

[15] Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan 2013) 62–67.

[16] See, for example, Friedrichs (n 12) 283–288; Nicole Leeper Piquero, Stephen K Rice and Alex R Piquero, 'Power, Profit, And Pluralism: New Avenues for Research on Restorative Justice and White-Collar Crime' in Holly Ventura Miller (ed), *Restorative Justice: From Theory to Practice* (Emerald Group Publishing 2008) 215–218; Steve Tombs, 'Corporate crime' in Chris Hale and others (eds), *Criminology* (3rd edn, OUP 2012) 227–246.

[17] Garrett v Williams [2007] NSWLEC 96.

an agreement between the Broken Hill Aboriginal Land Council and the mining company was reached, in addition to the sentence imposed by the Court. This agreement included financial contributions to be made to the victims, future training and employment opportunities for the local community, and a guarantee that the traditional owners would be involved in any salvage operations of Aboriginal artefacts.[18]

An interesting practice with regard to the corporate offenders is corporate probation, which is applied, for example, in the USA and might include a variety of orders that could concern safety procedures, structural reorganization, compensation, community service, etc.[19] There is also existing practice of supplemental and/or creative sentences that are in parts restorative in nature.[20] The largest community service in environmental enforcement history is the BP Gulf of Mexico settlement:

> [A]pproximately $2.4 billion of the $4.0 billion criminal recovery is dedicated to acquiring, restoring, preserving and conserving – in consultation with appropriate state and other resource managers – the marine and coastal environments, ecosystems and bird and wildlife habitat in the Gulf of Mexico and bordering states harmed by the Deepwater Horizon oil spill. This portion of the criminal recovery will also be directed to significant barrier island restoration and/or river diversion off the coast of Louisiana to further benefit and improve coastal wetlands affected by the oil spill. An additional $350 million will be used to fund improved oil spill prevention and response efforts in the Gulf through research, development, education and training.[21]

Michael L. Rustad, Thomas H. Koenig, and Erica R. Ferreira provide an extensive case-study analysis of the Environment Protection Agency's enforcement policy, which in their opinion '… reflects a unique jurisprudence that creatively combines both deterrence-based

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[18] More on this case in John M McDonald, 'Restorative Justice Process in Case Law' (2008) 33 Alternative Law Journal 41–44; Nicola Pain, Rachel Pepper, Millicent McCreath and John Zorzetto, 'Restorative Justice for Environmental Crime: An Antipodean Experience' (paper presented at *International Union for Conversation of Nature Academy of Environmental Law* Colloquium, Oslo 2016) <http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PepperJ/PepperJ%20Restorative%20Justice.pdf> accessed 30 September 2018, 10–11.

[19] cf Richard S Gruner, *Corporate Criminal Liability and Prevention* (Law Journal Press 2005) § 12–03; Marianne Löschnig-Gspandl, 'Corporations, Crime and Restorative Justice' in Elmar G M Weitekamp, Hans-Jürgen Kerner (eds), *Restorative Justice in Context. International Practice and Directions (*Willan Publishing 2003) 152–154.

[20] See, for example: Andrew Spalding, 'Restorative Justice for Multinational Corporations' (2015) 76 Ohio St L J 357, 388–392; Cecily Y Strickland and Scott Miller, 'Creative Sentencing, Restorative Justice and Environmental Law: Responding to the *Terra Nova FPSO* Oil Spill' (2007) 30 Dalhousie L J 547, 562–571.

[21] Press Release, U.S. Dep't of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012) <https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental> accessed 12 September 2018.

punishment … and restorative justice principles in the form of mitigation projects and mandatory injunctions'.[22]

Based on the jurisprudence of the NSWLEC, Rob White elaborates on the model of 'reparative justice', in which restorative creative sanctions combine punitive and reparative elements.[23] However, one of the key elements of restorative justice – the empowerment and self-determination of the primary and secondary stakeholders through involvement in the justice process – is still missing in the most of the cases of 'reparative' justice. In addition, some important immanent values of restorative justice, like the restoration of damaged human relationships and emotional restoration might be missing in the pure 'reparative' alternative.

Next, we will briefly explore the main challenges associated with the implementation of restorative justice approaches as applied to corporate crime, but also touch upon their potential.[24]

4 Challenges and potential for restorative justice approaches

One of the main challenges in implementing restorative justice for corporate crime is a plurality of stakeholders in cases of corporate crime, as well as potential power imbalances among them. It is also often difficult to personalize accountability for the crime, as well as to identify victims, tangible harm, and to build a causal link. In many cases, victims are unaware of their victimization.[25] A complicating factor might be a long latency period that often occurs in cases of corporate violence.[26]

The reconciliation of restorative justice with established sentencing purposes, such as punishment, deterrence, rehabilitation of the offender, accountability of the offender, denunciation and recognition of the harm is another challenge in applying restorative responses. The deterrence effect of the restorative justice might not be achieved, for example,

[22] Michael L Rustad and others, 'Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000-2011' (2013) 65 Oklahoma Law Review 427–428.

[23] White (n 10) 117–132.

[24] Given the limitations on the length of the written version of the presentation, I could not include an in-depth analysis on these subjects and would like to just refer to a few relevant publications: Bruce A Arrigo, 'Postmodernism's Challenges to Restorative Justice' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2008) 472–482; John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 73–168; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (UN New York 2006) <https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf> accessed 30 September 2018, 86–88, 103–105.

[25] Zvi D Gabbay, 'Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime' (2006–2007) 8 Cardozo J Conflict Resol 421, 461; Braithwaite (n 24) 137.

[26] Aertsen (n 3) 246.

in the case of a remorseless corporate offender, and when restorative process is (mis-)used for an attempt to only avoid harsh sentencing.[27]

Employment of restorative justice also raises concerns related to a consistency in sentencing, because it might be demanding for a court to compare different restorative justice orders when attempting to achieve consistency.[28] The implementation of the restorative justice undertakings might cause an increase in resources required for the oversight process conducted by the court and/or the regulatory authorities.[29]

After having reviewed the main challenges, we will briefly explore the potential of the restorative justice approaches in handling corporate crime. First and foremost, the needs of victims, such as a need to be heard and to 'talk to the company', to receive an apology as well as financial compensation or restitution *in natura*, have better chances to be addressed – compared to a purely retributive approaches.[30] As William S Laufer rightly points out, '[c]orporate criminals are deserving of blame and any wrongdoer left behind represents undistributed justice, part of an unpaid debt to society'[31]. The restorative approach has potential to address causes and 'put things right'. Overall, truly restorative processes[32] can greatly contribute to the victim's empowerment.

From the perspective of the corporate offender, restorative processes can strengthen compliance and introduce preventing measures or mechanisms. It also prevents undesirable economic and social consequences of purely punitive sanctions for the corporate offender and affiliated persons (and eventually for the employees and local, national or even global economy). The outcome of the restorative process also might support the reparation of the offender's reputation: corporations intrinsically motivated in maintaining their reputation, as well as trust and good relations with their consumers and local communities.[33]

On the level of society, restorative justice as one of the instruments of informal social control might increase deterrence and reduce recidivism, which in turn contributes to the

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[27] Kathleen Daly, 'The Limits of Restorative Justice' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2008) 139–140; Daniel Luedtke, 'Progression in the Age of Recession: Restorative Justice and White-Collar Crime in Post-Recession America' (2014–2015) 9 Brook J Corp Fin & Com L 311, 330.

[28] Pain and others (n 18) 17–18.

[29] ibid 18–19.

[30] Luedtke (n 27) 325–328.

[31] Laufer (n 4) 30.

[32] In words of Howard Zehr: 'To be truly restorative … our processes must provide safety, vindication and balance for those victimized but also provide an environment that humanizes the "other"'. This is the core of restorative justice: repairing harm, meeting needs, carrying out obligations, engaging those who are part of the situation" (Howard Zehr, 'What do restorative justice and revenge have in common?' <https://emu.edu/now/restorative-justice/2009/06/11/what-do-restorative-justice-and-revenge-have-in-common/> accessed 30 September 2018).

[33] cf Aertsen (n 3) 247–248, Katherine Beaty Chiste, 'Retribution, Restoration, and White-Collar Crime' (2008) 31 Dalhousie L J 85, 112; Archie B Caroll, Len Karakowsky, Ann K Buchholz, *Business and Society: Ethics and Stakeholder Management* (Nelson Education Limited 2005) 44.

development of a social capital and has a social-emancipatory power.[34] Restoration of societal trust in business is another asset of the restorative process.

The outlined circumstances require seeking innovative restorative justice models and practices, which would be able to meet these challenges and to make best use of the outlined advantages. In the next subsection, we will discuss the existing proposals and working solutions from academia, related to the restorative justice approach in the corporate criminal justice.

5 A selection of proposals from academia

The employment of restorative justice in corporate crime is increasingly debated in the legal sciences. In the following, we will explore several viable proposals related to the conceptual framework of application of restorative justice in such cases. We will consider how restorative practices might be used in corporate cases, bearing in mind the outlined drawbacks and challenges, especially the plurality of stakeholders.

Daniel Luedtke develops a theoretical model of application of restorative justice, which could be suitable to white-collar crime, alongside the six questions offered by Howard Zehr and Ali Gohar to determine when to initiate restorative justice. Those guiding questions of restorative justice are:

1. Who has been hurt? 2. What are their needs? 3. Whose obligations are these? 4. Why has this happened? 5. Who has a stake in this situation? 6. What is the appropriate process to involve stakeholders in an effort to put things right and prevent its recurrence?[35]

Courts, victims, offenders and communities, based on the assessment of advantages and disadvantages, shall decide whether to conduct restorative process. If they decide positively, they, according to Luedtke, shall agree on: 1) appropriate candidate for restorative justice; 2) type of restorative program to be employed, and 3) relationship of restorative intervention with criminal sanctions.[36] This model constitutes almost generally applicable guidance at the initial phase of restorative process for the state institutions and parties involved in handling corporate crime case.

What types of restorative programs could be employed depending on the size of the victim's groups, their composition and the stakeholder's needs? For larger and potentially not homogeneous groups Zvi Gabbay and some other authors suggests adopting elements of

[34] Aertsen (n 3) 323–325.

[35] Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (2003) <https://www.unicef.org/tdad/littlebookrjpakaf.pdf> accessed 30 September 2018, 41.

[36] Luedtke (n 27) 330–334. Tony Foley introduced a generally comparable model – 'the Minimalist "Restorative Question" Model', which shall help the court to determine the responsive capacity of the relevant restorative approaches based on the set of criteria and guidelines, cf Tony Foley, *Developing Restorative Justice Jurisprudence* (Routledge 2014) 204–211.

the Truth and Reconciliation Model to dealing restoratively with white-collar crime.[37] Among the advantages he mentions the following: 1) transparency of the process, publicity and credibility; 2) it provides important deterrent in the form of public shaming; 3) ability to deal with large numbers of victims and offenders; 4) sole focus on restoration of all types of harm caused by certain types of offences as opposed to retribution or adjudication.[38] William Schabas also points (even if from a different prospective) to the South African Truth and Reconciliation Commission, which in its final report 'laid a share of the blame for apartheid upon the role of business, including transnational corporations, and called for companies to finance programs of compensation out of existing assets and future profits'.[39] In his point of view, it would seem desirable that the future truth commissions openly discuss the role of business in the conflicts.[40]

For smaller settings, a suggestion offered by Marianne Löschnig-Gspandl appear appropriate. She explores potential application of victim-offender mediation (VOM) with respect to corporate crime.[41] According to her, the VOM could be appropriate measure in specific cases when it could be in victim's interest, for example, when the victim is an employee of a corporate offender or an individual in a polluted area. Löschnig-Gspandl also refers to the existing practice in Austria and Germany when legal persons participate in the VOM as victims of a crime (for example, in an employee embezzlement case) and suggest considering this option too.

Regarding restorative justice for multinational corporations, Andrew Spalding made an interesting proposal: a hybrid of a restorative approach, which seeks restoration for victims, offenders and communities, with a transformative approach, which attempt to achieve a systemic change at the level of root causes.[42] This three-dimensional approach of restorative justice includes: 1) an independent investigation and disclosure of factual findings to the state authorities; 2) design of several community service projects for the affected local communities in close consultations with their various representatives and international experts and 3) disclosing a comprehensive report on the corporation's experience of paying bribes in that country. Another possible approach to dealing with trans-boundary (but not exclusively) corporate crime is presented in the next section.

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[37] Gabbay (n 25) 476–484; See also: Davalene Cooper, 'Thinking about Justice "Outside of the Box": Could Restorative Justice Practices Create Justice for Victims of International Disasters?' (2008) New England Law Review 696–698; Luedtke (n 27) 322–323.

[38] Gabbay (n 25) 477–478.

[39] William Schabas, 'War Economies, Economic Actors and International Criminal Law' in William Schabas, *War Crimes and Human Rights: Essays on Death Penalty, Justice and Accountability* (Cameron May 2008) 524.

[40] ibid 525.

[41] Löschnig-Gspandl (n 19) 153, 155–157.

[42] Spalding (n 20) 402–408. See also a response to this proposal in: Mark Umbreit, Janine Geske and Ted Lewis, 'Restorative Justice Impact on Multinational Corporations? A Response to Andrew Spalding's Article' (2015) 76 Ohio St L J 41–49.

6 Adding a digital perspective to restorative justice

The idea to employ information and communication technology (ICT) in the area of dispute resolution becomes increasingly common. Several years ago, pioneers in this emerging field started to elaborate on the potential of online redress systems, which use artificial intelligence-based ICT.[43] Pablo Galain Palermo and Pedro Freitas consider online restorative justice (or cyber-mediation) as technically feasible and potentially adequate for a specific set of offences – they mention cybercrimes as 'prime candidate' for online victim-offender mediation.[44] Regarding restorative practices in the urban context, Erik Claes, Iman Lachkar, Minne Huysmans and Nele Gulinck see a considerable potential of using digital storytelling for restorative justice theory and practice.[45] In the author's point of view, it is worth further exploring the use of digital restorative justice in the context of corporate criminal justice. Bringing restorative justice and digital justice together, harbors significant potential to increase access to justice of larger groups of victims of corporate crime.

Digital justice could offer restorative justice web-based technologies, which support dispute resolution. As Ethan Katsh and Erna Rabinovich-Einy rightly observe, '[t]he line between online "space" and physical surroundings is increasingly blurred. Even our understanding of what can be done online is changing …'.[46] There exist several online dispute resolution and negotiation platforms (for example, the Automated Legal Intelligent System (ALIS), the Online Dispute Resolution platform provided by the European Commission, Family_Winner, cogSolv, cybersettle, Kleros, modria™, Smartsettle™, PERSUADER, Picture is Settled®, Youstice as well as dispute resolution systems of the leading e-commerce marketplaces) for local and cross-border disputes. Digital justice can contribute even more than just facilitating communication and assisting negotiations between parties, sometimes with an online involvement of a human mediator, arbitrator or bidding systems. By employing innovative advanced computational approaches, like machine learning and data mining, the victims of corporate crime and other affected stakeholders, even the offenders, may benefit from the artificial intelligence when resolving matters arisen from the crime.

Imagine an easy-to-use online platform, funded by a corporate offender, operated by an impartial third party and supervised by a public authority. In the first stage, the company or state authority invites victims of a corporate crime and other affected persons to register to the platform and submit their claims, download evidence, including audio or video statements. The company discloses all relevant information related to the crime in a

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[43] Arno R Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (CUP 2010); Davide Carneiro, Paulo Novais and José Neves, *Conflict Resolution and its Context. From the Analysis of Behavioural Patterns to Efficient Decision-Making* (Springer 2014); Ethan Katsh, and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (OUP 2017); Katia P Sycara, 'Machine Learning for Intelligent Support of Conflict Resolution' (1993) 10 Decision Support Systems 121-136.

[44] Pablo Galain Palermo and Pedro Freitas, 'Restorative Justice and Technology' in Davide Carneiro and Paulo Novais (eds), *Interdisciplinary Perspectives on Contemporary Conflict Resolution* (IGI Global 2016) 80–93

[45] Erik Claes, Iman Lechkar, Minne Huysmans and Nele Gulinck, 'Digital Stories and Restorative Justice in Brussels' in Ivo Aertsen and Brunilda Pali (eds), *Critical Restorative Justice* (Hart Publishing 2017).

[46] Ethan Katsh and Orna Rabinovich-Einy (n 43) 178.

transparent manner, and informs of the status of the criminal proceedings. It also provides a hotline, chat or other means of communication to answer the victim's questions or give them an opportunity to speak out and to be heard.

At the next stage, a mediator or a group of mediators, selected jointly via online procedures, virtually enter the mediation process. The ICT assists in negotiation, generation and communication of an agreement to mediate. Further, the ICT processes large amounts of information, structures it and supports in establishing facts, observes the compliance with the agreement mentioned above. The software connected to the web offers many users the opportunity to participate in a process remotely, for example to attend a restorative conference virtually via interactive streaming and live link. Most of the other web-based features would be accessible at any time every day, including video podcasts.

When it comes to a generation of possible solutions, the software, which employs artificial intelligence, could offer suggestions produced by algorithms and the use of Big Data (even though such software is not yet fully mature technologically). Data resulting from the restorative process might be used for the purposes of the prevention of corporate crime. If the restorative process was successful, the same software might support the generation of a settlement agreement and its implementation, for example, in a non-bureaucratic handling of damage claims.

We must acknowledge possible objections and concerns related to this approach, especially regarding transparency, data protection and user privacy. The potential inaccessibility is another serious challenge: We need to ensure that this solution advance justice for all groups of victims, including those who are marginalized and disadvantaged. Further, inaccurate algorithms, possible data errors and mistaken predictions might detract from the fairness of the digital justice.[47] In addition, one important element of the restorative process – face-to-face meetings, is missing in a purely digital approach. This element is of great value for mediators and facilitators, because it enables them to work with emotions, feelings and needs of the parties to support them in restoration of damaged human relations (although there are attempts to develop an intelligent digital environment that is sensitive to its user's state by applying behavioural analysis techniques[48]). It remains to be seen whether virtual meetings can substitute in a similar manner meetings in person in the restorative process.

Yet when considering the main advantages of such an approach – relatively good accessibility (in comparison with other existing means) for a large number of victims in different jurisdictions, potential cost savings and convenience, connected with the support of ICT in negotiation and decision-making processes – one may conclude that this approach is worthwhile to be considered and developed further.

[47] Ethan Katsh and Orna Rabinovich-Einy (n 43) 49–50.
[48] See, for example, Carneiro and others (n 43) 189–205.

7 Conclusion

The proposals discussed above are designed in a way that they have potential to meet many of the above-mentioned challenges. At the same time, each of the proposals makes use of certain advantages of restorative justice in addressing corporate crime in a manner that fosters transparency, accountability and addresses the needs of collective and individual victims, including their healing and empowerment. It increases the chances for victims and involved communities to enhance their access to justice.

Some issues of practicability of the suggested in sections 5 and 6 still need to be addressed. Nevertheless, the assessment of the theoretical foundations of restorative justice, as well as existing promising practices allow to conclude that restorative justice shall be a viable complement or even alternative to the pure punitive sanction. It offers convincing arguments to bring the proposals from the academia into practice when dealing with corporate crime. We should use the power of technology as an aid in resolving matters arising from the corporate crime.

For this purpose, the scientific community should encourage the judiciary and regulatory agencies to use such approaches within pilot projects. Those cases should be academically accompanied, as more research on numerous aspects (criminological, victimological, etc) of such approaches is required.[49] The legal community should exchange information on instances of application of the restorative responses in this particular sphere to accumulate know-how and to enlarge the range of possible restorative responses to corporate crime. With empirical evidence at hand, it will be easier for criminologists to suggest or even advocate for required changes to the legislation and sentencing guidelines, which would allow all stakeholders to benefit from restorative approaches in corporate criminal justice.

[49] cf Laufer (n 4) 10, 39, 41–44.

Selected Literature

Aertsen I, 'Restorative Justice for Victims of Corporate Violence' in Gabrio Forti and others (eds), *Victims and Corporations. Legal Challenges and Empirical Findings* (Wolters Kluwer 2018) 166

Braithwaite J, *Restorative Justice and Responsive Regulation* (OUP 2002) 73

Cooper D, 'Thinking about Justice "Outside of the Box": Could Restorative Justice Practices Create Justice for Victims of International Disasters?' [2008] New England Law Review 696

Gabbay ZD, 'Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime' (2006–2007) 8 Cardozo J Conflict Resol 421

Laufer WS, 'The Missing Account of Progressive Corporate Criminal Law' (Working Paper No. 2017-5.0, University of Pennsylvania) <https://crim.sas.upenn.edu/sites/default/files/2017-5.0-Laufer_ProgressiveCorporateCrimLaw.pdf> accessed 18 September 2018

Löschnig-Gspandl M, 'Corporations, Crime and Restorative Justice' in Weitekamp EGM and Kerner HJ (eds), *Restorative Justice in Context. International Practice and Directions* (Willan Publishing 2003) 152

Luedtke D, 'Progression in the Age of Recession: Restorative Justice and White-Collar Crime in Post-Recession America' (2014–2015) 9 Brook J Corp Fin & Com L 311

McDonald JM, 'Restorative Justice Process in Case Law' (2008) 33 Alternative Law Journal 41

Spalding A, 'Restorative Justice for Multinational Corporations' (2015) 76 Ohio St L J 357

Strickland CY and Miller S, 'Creative Sentencing, Restorative Justice and Environmental Law: Responding to the Terra Nova FPSO Oil Spill' (2007) 30 Dalhousie L J 547

TO PROSECUTE OR NOT TO PROSECUTE, THAT IS THE QUESTION

THE RELEVANCE OF THE COLLABORATION OF THE CORPORATION IN CRIMINAL PROCEEDINGS

By Susana Aires de Sousa[*]

Abstract

The collaboration of a corporation with the investigation authorities can have positive consequences from a punishment perspective. Forms of voluntary (free) collaboration must be distinguished from those means of diversion used by the Public Prosecution with the purpose of ending or avoiding criminal proceedings against the corporation, such as non-prosecution agreements (NPA) or deferred prosecution agreements (DPA). In particular, it is important to discuss, in this respect, the legitimacy of these settlements, which are based on the disclosure of employees or collaborators of the corporation, as well as the aspect that the payment of amounts established by the prosecution extinguishes criminal liability. Those corporate settlements regimes are mainly accepted in systems with a discretionary (opportunity) principle, but they are being adopted in other countries as well. They have been criticized due to the arbitrariness and the imbalance of the decision on whether to prosecute the corporation. From a mandatory prosecution model perspective, such negotiations defy fundamental principles of criminal proceedings. The admittance of such procedures openly contradicts the principle of legality. Moreover, mandating the disclosure of individual wrongdoers and the report of incriminating evidence reduce the corporation to the quality of mere object or instrument of the criminal process and increases the risk of 'reverse whistleblowing'.

1 Introduction

Criminal liability of corporations has always been a borderline topic. The debate initially focussed on the possibility of corporations being criminally liable for actions considered as a crime. In particular, the discussion revolved about the best imputation or attribution model, both in relation to objective and subjective imputation. This was – and in some cases, still is – the essential question discussed in the criminal law literature in the late XXth century in European continental systems (e.g. in Germany, Italy, Spain or Portugal).[1]

[*] Professor, Faculty of Law, University of Coimbra.

[1] On this problem in the Portuguese literature, with additional bibliographic references, see Jorge Reis Bravo, *Direito Penal de Entes Colectivos* (Coimbra Editora 2008) 121-124; Germano Marques da Silva, *Responsabilidade Penal da Sociedades e dos seus Administradores e Representantes* (Verbo 2009) 110-126; Susana Aires de Sousa, 'Societas publicas (non) delinquere potest: reflexões sobre a irresponsabilidade dos entes públicos no ordenamento jurídico português' in *Actas do XV Encuentro AECA Nuevos caminos para Europa: El papel de las empresas y los gobiernos, 2012*, <http://www.aeca1.org/pub/on_line/comunicaciones_xvencuentroaeca/general.htm> accessed 12 December 2018.

In contrast, within common law countries, courts accepted corporation criminal liability since, at least, the late XIXth century and during the XXth century, and this even became a distinctive note, always underlined, when confronting the two mentioned systems.[2]

Initially, such responsibility was based upon a vicarial model (either from the civil model based upon the *respondeat superior* theory or from a causal contribution to the criminal fact[3]), that is, based on the acts and responsibility of the natural persons representing the corporation. However, this requirement has progressively been removed, particularly in the United States, and it became possible that any employee, independently of his or her larger or lesser role, be able to criminally bind the corporation when he or she acts in order to favour the corporation – and even when they act against the instructions of the corporation.[4] Corporations can therefore be held responsible for acts by an employee who did not even have any leading role within the corporation. The model for the imputation of the criminal fact has evolved, within the Anglo-Saxon context (particularly in the United States), towards a maximum amplitude, leading to a growth of the number of criminal proceedings against corporations.

Criminal trial of corporations in the USA have thus increased. However, it would soon become clear that 'some companies are not just "too big to fail" but also "too big to jail"', since they are of enormous importance to the economy.[5]

Moreover, one should consider that American criminal proceedings are based on a principle of discretionary prosecution, leaving the decision to press or to drop charges against a criminal suspect to public prosecutors, as opposed to a mandatory prosecution system[6]. This opportunity principle gives great latitude to pre-trial diversion in order to avoid a criminal conviction.

In fact, since 2001, pre-trial solutions gradually became an alternative to the criminal prosecution of corporations. A system granting an ample breadth to the discretionary prosecution partly explains the appearance of negotiation mechanisms between the prosecution and corporations. These diversion solutions take form in the deferred prosecution agreements (DPA) or non-prosecution agreements (NPA), which include as a necessary condition the cooperation of the corporation with the investigation in order to

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[2] Iñigo Ortiz de Urbina Gimeno , 'Responsabilidad penal de las personas jurídicas: the American way' in Santiago Mir Puig and others (eds), Responsabilidad de la Empresa y Compliance (B de F, 2014) 37.

[3] On these models and their application and development within American law, see Francis Sayre, 'Criminal responsibility for the acts of another' (1930) 93 Harvard Law Review 689, 723.

[4] cf. United States Sentencing Commission, 'Organizational Guidelines', <https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf> accessed 4 June 2018.

[5] Brandon Garrett, *Too Big to Jail* (Harvard University Press 2014) 1, 2.

[6] About the advantages and demerits of those two systems from an economic approach, see Keisuke Nakao and Masatoshi Tsumagari, 'Discretionary vs. Mandatory Prosecution: a game-theoretic approach to comparative criminal procedure', (2012) 3 Asian Journal of Law & Economics <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2015779> accessed 4 June 2018.

avoid both the indictment and a criminal conviction[7]. Such forms of negotiation have now been imported by other countries (for example in France, through the law Sapin II).

2 The Non Prosecution Agreements and related instruments: illustrative examples

2.1 United States

In the United States, the use of deferred prosecution agreements and non-prosecution agreements has grown since 2003, with the documents issued by the US Department of Justice on corporate prosecutions following the *Enron* and *Andersen* cases. The establishment of Organizational Guidelines concerning Corporations Criminal Liability, however, goes back to 1991. In its Chapter Eight, guidelines and policy statements are established for when the defendant is an organization. However, these guidelines have been modified several times: with the purpose 'of getting more consistency and uniformity in matters of prosecution of criminal corporations, attending to effects of a discretionary prosecution, the Department of Justice has published several Memoranda concerning corporations' criminal prosecution' in the following years[8]. One of the most important documents is the Principles of Federal Prosecution of Business Organizations, issued by Deputy Attorney General Larry Thompson, in 2003, after the Andersen case[9].

The *Thompson Memo* stated that in case of cooperation and voluntary disclosure, 'a corporation immunity or amnesty or pre-trial diversion may be considered in the course of the government's investigation.'[10] Special emphasis was put on out-of-court settlements with corporations, which thus have increased significantly since this date. One of the arguments in favour of these diversion instruments, invoked frequently in American literature, is the idea that the mere formal accusation of a corporation can ruin it, with nefarious consequences for those who rely on it or are economically related to it. These negative effects are hence known as *Andersen effect*, following the fall and bankruptcy of Arthur Andersen after facing criminal trial[11].

These procedures were often updated since. The last change occurred in 2015 by the *Yates Memo*[12] that established as its purpose to combat corporate misconduct, seeking accountability from the individual who perpetrated the wrongdoing. In this way, '[i]n order for a company to receive any cooperation credit (…) the Company must disclose to the

[7] A detailed study about these instruments and their evolution in the USA in the last decade can be found in Garrett, *Too Big to Jail* (n 5) passim. See also Gordon Bourjaily, 'DPA DOA: how and why Congress should bar the use of deferred and non-prosecution agreements in corporate criminal prosecutions', (2015) 52 Harvard Journal on Legislation 544, 544ff.

[8] Gimeno, 'the American way' (n 2) 64.

[9] cf. David M Uhlmann, 'Deferred prosecution and non-prosecution agreements and the erosion of corporate criminal liability' (2013) 72 Maryland Law Review 1311, 1311ff.

[10] <https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf> accessed 24 May 2018.

[11] See Gimeno, 'the American way' (n 2) 68.

[12] <https://www.justice.gov/archives/dag/file/769036/download> accessed 6 June 2018.

Department all relevant facts about individual misconduct' regardless their position, status or seniority. The extension of the cooperation credit – and achievement of non prosecution agreement – will depend from other requests and factors, traditionally admitted, such as the 'diligence, thoroughness and speed of internal controls or procedures, the proactive nature of the cooperation'[13].

Brandon Garrett emphasizes that before 2001 there were only a handful of DPAs or NPAs: 'the traditional approach was to either prosecute or not, possibly offering leniency in exchange of cooperation'[14]. However, in the following years there was an enormous change with the new approach of the Department of Justice emphasizing out-of-court settlements. As an example, Garrett underlines that in the period 2001–2014 prosecutors entered 306 deferred and non-prosecution agreements, whereas in the 1990s there were only a dozen of such agreements[15].

The settlement of these agreements between the prosecution and the company under criminal investigation intends to either avoid the criminal process – this means a non-prosecution agreement – or to suspend the prosecution for a given time, after which occurs the extinction of the procedure without judgement or sentence – a deferred prosecution agreement. We are therefore not discussing here settlements on the sentence of the court or on the maximum penalty applicable, but agreements which represent no conviction and which are settled without the intervention of a judge, where – in other words – everything happens at a pre-judicial stage. The set of crimes where these types of agreements has been applied is very wide and encompasses economic crimes up to crimes against the environment or public health.

2.2 United Kingdom

From 2014 onwards, a system of deferred prosecution agreement was adopted in the UK as well. A specific regulation was defined in Section 45 and Schedule 17 of the Crime Courts Act 2013[16]. This mechanism is however more limited in its scope and is applicable to economic crimes only, such as corruption, fraud, or money-laundering. According to it, it is possible to negotiate an agreement with the prosecutor in cases where the cooperation of the company allows, for example, the identification of the individuals responsible for the crime.[17] This is a bargain where the payment of the damage and a fine are also imposed to the company, as well as an order to improve the internal systems within the company to prevent future crime.

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[13] *Yates Memo* <https://www.justice.gov/archives/dag/file/769036/download>, 3, accessed 6 June 2018.

[14] Garrett, *Too Big to Jail* (n 5) 63.

[15] Brandon Garrett, 'The global evolution of corporate prosecutions' (2017) 11 Law and Financial Markets Review 57.

[16] This is a detailed statute 'unlike the US, where the approach was set out in non-binding prosecutions guidelines', Garrett, 'The global evolution' (n 15) 58.

[17] Alun Milford, 'Deferred Prosecution Agreements – the perspective from England and Wales' (*Handelsbatt Conference* 2016), <https://www.sfo.gov.uk/2016/09/14/deferred-prosecution-agreements-perspective-england-wales/> accessed 1 June 2018.

This agreement requires judicial approval, unlike what happens in the USA. This constitutes 'one of the fundamental differences with respect to the American system'[18]. For granting approval, the judge must conclude that the agreement is 'likely to be in the interests of justice' and is 'fair, reasonable and proportionate'.

The SFO department (Serious Fraud Office),[19] which is the office responsible for the investigation and accusation of the crimes that may be subject to agreements, refers in its website to the existence of four deferred prosecution agreements, and contains also the respective text[20] (among other information, this website also contains the sentences guidelines to be followed for the formalization of the agreements).

2.3 France

The Loi Sapin II (Loi n. 2016-1691, 9-12-2016, relative à la transparence, à la lutte contre la corruption et la modérnisation da la vie économique[21]), was inspired by the American and British models. Among other measures, this act created the Agence Française Anticorruption, a supervisory organ under the Minister for Justice and Budget. Article 22 – relating to penal law – introduces the new article 41-1-2 in the Code de Procédure Pénale. This article 41-1-2 foresees a new procedure for ending the responsibility of collective persons, under specific conditions. These concrete conditions must be included and developed in the settlement which is designated as a 'convention judiciaire d'interêt public' (CJIP). Even if the corporation declares to be guilty (which is not required), the 'convention' does not possess the effect of a criminal trial or a criminal conviction. It is an agreement, a transaction, that extinguishes the corporation's criminal responsibility.

These special rules are not valid for every crime (unlike the American instruments); they are restricted to the fight against corruption and the associated crimes such as the trading of influence or the promise of undue advantage. Notwithstanding the recent date of this statute, the first CJIP was signed on 30 October 2017 between the Procureur National Financier and the HSBC Private Bank Suisse.[22,23] Another 'convention', in an investigation on corruption, was signed on 14 February 2018 between the Procureur de la Republique and

[18] Kathleen Harris, 'Deferred prosecution agreements in UK and US' (*Financier Worldwide* 2013) <https://www.financierworldwide.com/deferred-prosecution-agreements-in-the-uk-and-us/#.Wx79EkgvzIU> accessed 1 June 2018.

[19] The website can be found on <https://www.sfo.gov.uk/> accessed 1 June 2018.

[20] cf. <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> accessed 1 June 2018.

[21] <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id> accessed 24 May 2018.

[22] cf. 'La première convention judiciaire d'interêt public' *Skadden* (8 December 2017).

[23] This convention is available in https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_HSBC.pdf accessed 1 June 2018. HSBC, interestingly, was also involved in a deferred prosecution agreement in the US in 2012, in relation to charges of money-laundering. Cf. Bourjaily, 'DPA DOA' (n 7) 551.

the company Set Environnement, and was validated in the 23rd February by the Tribunal de Grande Instance de Nanterre.[24]

3 Processual negotiation and the principle of mandatory prosecution

The question we intend to address is whether the models of diversion, such as those corresponding to the DPA and NPA or, more recently, the CJIP established in the French law Sapin II, are juridically admissible and compatible with processual systems based on mandatory prosecution (principle of legality of processual promotion). Is the criminal responsibility of collective persons a privileged arena for these negotiation forms? How should the possible negative effects of these diversion measures be dealt with, particularly with respect to the question of an arbitrary or non-equal application? Is this the end of criminal responsibility of big multinational companies?

3.1 Mandatory prosecution

With respect to the first question, the criminal procedure of continental systems, such as the Portuguese or the German systems, has a weaker tradition on pre-trial diversion, when compared to Anglo-Saxon systems.

Taking the Portuguese law as an example, the processual promotion is based on the principle of mandatory prosecution, implying that the Public Prosecutor is bound by law to promote the criminal proceedings, opening the investigations with the notice of a crime (articles 241 ff., as well as article 262 (2), of the Portuguese Code of Criminal Procedure) and to formulate an accusation whenever there are enough indications about the crime and about its author (article 283 (1))[25]. In procedural criminal law, the principle of mandatory prosecution translates, as clearly summarized by Pedro Caeiro, into the duty to investigate and the duty to prosecute.[26] Thus, the paradigm adopted by Portuguese law excludes, by its very nature, the possibility that the Public Prosecutor decides on whether to investigate and prosecute or not on the basis of aspects such as political or economic opportunity, or procedural expediency.[27]

The legal duty of the public prosecution to promote criminal proceedings is based upon several reasons. Firstly, it is based on the objective of avoiding external influences which can jeopardize the realization of criminal justice, as well as endanger the guarantee of an impartial and objective administration of the penal justice. The confidence of the community

[24] The decision is available at <https://www.economie.gouv.fr/files/files/directions_services/afa/Ordonnance_validation_CJIP_SAS_SET_ENVIRONNEMENT.pdf> accessed 1 June 2018.

[25] Também Jorge de Figueiredo Dias, *Direito Processual Penal* (1974, republished 2004, Coimbra Editora) 125; Anabela Miranda Rodrigues, 'Consenso e Oportunidade' in Centro de Estudos Judiciários (ed), *Jornadas de Direito Processual Penal. O Novo Código de Processo Penal* (Livraria Almedina 1997) 74; Manuel da Costa Andrade, 'Consenso e Oportunidade' in Centro de Estudos Judiciários (ed), *Jornadas de Direito Processual Penal. O Novo Código de Processo Penal* (Livraria Almedina 1997) 319; Maria João Antunes, *Direito Processual Penal* (2nd edn, Livraria Almedina 2018) 64.

[26] Pedro Caeiro, 'Legalidade e oportunidade: a perseguição penal entre o mito da "justiça absoluta" e o fetiche da "gestão eficiente" do sistema', (2000) 21 Revista do Ministério Público 32.

[27] cf. Antunes, *Direito Processual Penal* (n 25) 70.

in the administration of justice is therefore preserved by the rule of mandatory prosecution.[28] Secondly, the principle of mandatory prosecution is hereby connected with another fundamental and general principle: equality in the application of law[29] and its idea that all persons ought to be treated 'equally' under the law. Thirdly, as underlined by Figueiredo Dias, the principle of mandatory prosecution defends and amplifies the effect of general prevention that is connected not only to the penalty but also to the overall administration of criminal justice[30].

3.2 Diversion mechanisms

Despite the general prohibition of the public prosecution renouncing the criminal process when there are sufficient signs of a crime and of a perpetrator, there are some diversion mechanisms in the systems following the principle of mandatory prosecution. For example, a provisional suspension of the process as an alternative to the accusation/indictment for small and middle delinquency, within the conditions established by law; or the agreements about the sentence or about the maximum penalty applicable to the convicted, which are more or less comparable to the institute of plea bargaining.[31]

However, these diversion mechanisms are entirely different in their purposes and consequences of pre-trial negotiations such as NPAs or DPAs. Firstly, the non-prosecution agreements are based on a discretionary principle, which justify its ample extension with relation to crimes that can be subject to negotiation: they are not limited to small criminality but can encompass serious criminality, taking into account the objectives of criminal politics or other objectives outside the administration of justice (e.g. fight of corruption, processual speed, facility for evidence taking). Finally, the context of opportunity or discretionary prosecution is the fundament of the negotiation itself, eventually putting an end to the process without the intervention of a judge.

Accepting such processual schemes for collective persons, based on their exceptionality since they go beyond the processual forms defined and admitted by law, implies within mandatory systems an express intervention of the legislator (as it occurred in France). Such intervention is bound by the limits imposed by constitutional law (for example, the Portuguese constitution, through its article 219 (1), attributes the promotion of criminal procedure to the public prosecution, guided by the principle of legality).

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[28] More developments can be found in Dias, *Direito Processual Penal* (n 25) 129.

[29] Dias, *Direito Processual Penal* (n 25) 128.

[30] Dias, *Direito Processual Penal* (n 25) 129; see also José de Faria Costa, 'Diversão (desjudiciarização) e medicação: que rumos?' [1985] 61 Boletim da Faculdade de Direito da Universidade de Coimbra, Faculdade de Direito 26; Anabela Miranda Rodrigues, 'A celeridade no processo penal' [1998] 8 Revista Portuguesa de Ciência Criminal 239.

[31] On these agreements, in the Portuguese literature and practice, see Jorge de Figueiredo Dias, *Acordos sobre a sentença em processo penal* (Conselho Distrital do Porto da Ordem dos Advogados 2011).

3.3 NPA and DPA: the most convenient path?

We therefore arrive at the next question: are NPA and DPA the most convenient path with respect to criminal liability of corporations?

When looking for an answer, one must look at the experience in countries where these instruments exist. In particular, in the model followed in the USA, criminal liability of corporations has a large amplitude. From the procedural point of view, the American system has a pronounced imprint of opportunity, which has been praised for introducing much flexibility in the system and for avoiding the potential negative (even destructive) collateral effects connected with the conviction of the corporation.[32] However, this model has been criticized for several reasons. An important criticism is the arbitrariness and unpredictability in the application of the agreements, arising from the individual negotiation power of each company. This favours companies with larger negotiation power, connected with their dimension or their capacity to pay the negotiated amounts. The first big critical remark is thus linked to the principles of equality and fairness in the application of the agreements, where there is the risk, as remarked by Brandon Garrett, that 'some companies are not just "too big to fail" but also "too big to jail": they are considered to be so valuable to the economy that prosecutors may not hold them accountable for their crimes'.[33]

The second criticism is directed at the secrecy of the settlement. It is questioned whether the realization of criminal justice as a public interest is attained when an agreement on criminal facts is reached without knowing its clauses; and, in some legal systems, without the intervention of a judge, and therefore in disagreement with the principle that the application of criminal sanctions is reserved for a judge.

Thirdly, the compatibility of some of the agreed conditions with the fundamental principles of criminal law is debatable, in particular when the obligation to denounce the individual wrongdoers is established. This constitutes an instrumentalization by the prosecution as the entity responsible for the investigation, which then uses the possibility of non-punishment in order to obtain evidence that otherwise would be hardly obtained. Is this way of getting evidence still compatible with the right to a fair trial and the principle of equality of arms between the accused and the prosecution?

This type of clause can also raise problems when the agreement is not kept: what value should be assigned in this case to the evidence obtained through compliance systems, taking into account that 'no person… shall be compelled in any criminal case to be a witness against himself'? And do the laws protecting employees allow the company to provide information or elements accusing them?

[32] Garrett, 'The global evolution' (n 15) 59.
[33] Garrett, *Too Big to Jail* (n 5) 1.

As pointed out by William Laufer, 'the focus on securing evidence of wrongdoing routinely compromises the rights of employees, specially the right against self-incrimination'.[34] In this context, one must consider what Laufer calls 'reverse whistleblowing', which occurs 'when an organization, typically through the acts of senior management, identifies culpable employees and offers evidence against them in trade with prosecutor for corporate leniency or possible amnesty'.[35] We must not forget that a 'crime that occurs in a complex organization reflects more than an individual or group act – it is an organizational act'.[36] It is a result of the organization and not a result of one man.

Another criticism arises in the international arena. Companies face nowadays criminal processes all over the world. Sometimes, the same company operating across borders faces processes in several countries (raising complex problems of international cooperation). The globalization of corporate criminal responsibility contributes to the possibility that 'the same (multinational) company could face several processes in several countries'.[37] The inequality through the negotiation of the responsibility is thus also extended to the global and external setup: for the same actions, it is possible that a given company be criminally condemned in a country and free of any charge in another juridical system. Thus, the possibility of negotiation can eventually have an effect of manipulating business competition.

This analysis cannot be disconnected from the substantive model adopted in order to make corporations accountable for the crimes occurred in the context of the company. In fact, the origin and the impulse of diversion means such as DPAs and NPAs must be sought in a very wide model for holding the collective entity criminally liable.

Taking all this into account, even when one considers that the model for the liability of corporations implies the inclusion of novel means of diversion, we must consider and evaluate their effects, in particular from the perspective of criminal justice. It is clear that settlements about the sentence or about the maximum applicable penalty are still compatible with a mandatory principle. Should we go beyond? We believe that many doubts (some unsurmountable) are raised by pre-court agreements excluding the accountability of the corporation, such as those currently followed in the USA.

As a final consideration, we would like to underline that the negotiation of criminal proceedings based on the argument of the risk of collapse of the company is probably just a recognition that there is no capacity or possibility to criminally chase (big) corporations, those which are 'too big to jail'. Are these agreements an implicit declaration of incapacity to make big collective persons respond on a criminal trial? Or, even more troubling, are these means an instrumental weapon in order to ensure the cooperation of the corporation in question and to overcome the difficulties related to the individual imputation of criminal facts in the context of corporations? If so, the company is being used, through these pre-trial

[34] William S Laufer, 'Corporate Prosecution, Cooperation, and the trading of favors' (2002) 87 Iowa Law Review 652.
[35] Laufer, 'Corporate Prosecution' (n 34) 648.
[36] Laufer, 'Corporate Prosecution' (n 34) 657.
[37] Garrett, 'The global evolution' (n 15) 55.

settlements, as a Trojan horse that allows the prosecution to obtain information that would otherwise be denied or inaccessible.

4 Conclusion

As reflected throughout this article, corporate criminal settlements are one of the more often used answers given by some systems to the problems posed by the criminal trial of corporations. Pre-court settlements avoid a criminal conviction and allow the company to continue its operations with the aim of preventing future crimes through the adoption, for instance, of effective compliance programs. However, the problems posed by these settlements cannot be minimized, in particular if they take place under a discretionary system. The existing data show that those solutions can face serious problems as they can be potentially arbitrary in favour of big companies.

The questions we have posed (and the possible answers) must be seriously considered by the lawmaker, as it ponders the adoption of means of diversion for corporate crime. In a few words, William Laufer refers to a dark side of corporate-government cooperation that we must take in consideration: freedom from self-incrimination and rights of confidentiality are being increasingly sacrificed in the name of efficient law enforcement.[38]

Selected Literature

Andrade MDC, 'Consenso e Oportunidade' in Centro de Estudos Judiciários (ed), *Jornadas de Direito Processual Penal. O Novo Código de Processo Penal* (Livraria Almedina 1997) 317–358

Antunes MJ, *Direito Processual Penal* (2nd edn, Livraria Almedina 2018)

Bourjaily G, 'DPA DOA: how and why Congress should bar the use of deferred and non-prosecution agreements in corporate criminal prosecutions' (2015) 52 Harvard Journal on Legislation 543–569.

Bravo JR, *Direito Penal de Entes Colectivos* (Coimbra Editora 2008)

Caeiro P (2000), 'Legalidade e oportunidade: a perseguição penal entre o mito da "justiça absoluta" e o fetiche da "gestão eficiente" do sistema' (2000) 21 Revista do Ministério Público 31–47

Costa JDF (1985), 'Diversão (desjudiciarização) e medicação: que rumos?' [1985] 61 Boletim da Faculdade de Direito da Universidade de Coimbra, Faculdade de Direito 3–70

Dias JDF, *Direito Processual Penal* (1974, republished 2004, Coimbra Editora)

Dias JDF, *Acordos sobre a sentença em processo penal* (Conselho Distrital do Porto da Ordem dos Advogados 2011)

[38] Laufer, 'Corporate Prosecution' (n 34) 650.

Garrett B, Too Big to Jail (Harvard University Press 2014)

Garrett B, 'The global evolution of corporate prosecutions' (2017) 11 Law and Financial Markets Review 55–60

Harris K, 'Deferred prosecution agreements in UK and US' (Financier Worldwide 2013) <https://www.financierworldwide.com/deferred-prosecution-agreements-in-the-uk-and-us/#.Wx79EkgvzIU> accessed 1 June 2018

Laufer WS, 'Corporate Prosecution, Cooperation, and the trading of favors' (2002) 87 Iowa Law Review 643–667

Milford A, 'Deferred Prosecution Agreements – the perspective from England and Wales' (Handelsbatt Conference 2016), <https://www.sfo.gov.uk/2016/09/14/deferred-prosecution-agreements-perspective-england-wales/> accessed 1 June 2018

Nakao K and Tsumagari M, 'Discretionary vs. Mandatory Prosecution: a game-theoretic approach to comparative criminal procedure' (2012) 3 Asian Journal of Law & Economics <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2015779> accessed 1 June 2018

Rodrigues AM, 'A celeridade no processo penal' [1998] 8 Revista Portuguesa de Ciência Criminal 233–250

Sayre FB, 'Criminal responsibility for the acts of another' (1930) 93 Harvard Law Review 689–723

Silva GMD, *Responsabilidade Penal da Sociedades e dos seus Administradores e Representantes* (Verbo 2009)

Sousa SAD, 'Societas publicas (non) delinquere potest: reflexões sobre a irresponsabilidade dos entes públicos no ordenamento jurídico português' in Actas do XV Encuentro AECA Nuevos caminos para Europa: El papel de las empresas y los gobiernos, 2012, <http://www.aeca1.org/pub/on_line/comunicaciones_xvencuentroaeca/general.htm> accessed 12 December 2018

Urbina Gimeno IO, 'Responsabilidad penal de las personas jurídicas: the American way' in Mir Puig S and others (eds), Responsabilidad de la Empresa y Compliance (B de F 2014) 35–88

Uhlmann DM, 'Deferred prosecution and non-prosecution agreements and the erosion of corporate criminal liability' (2013) 72 Maryland Law Review 1296–134

CORPORATE CRIMINAL LIABILITY AND NEGOTIATED JUSTICE IN ITALY: SOMETHING NEW UNDER THE SUN?

By Marco Colacurci [*]

Abstract

Settlements, to be intended as extra-judicial forms of resolution of corporate crime cases, are rapidly spreading worldwide, as shown by the legislative measures recently adopted in the United Kingdom and France and by the growing attention of the OECD. Initially developed in the USA, these agreements allow corporations to avoid the adverse consequences of criminal proceedings in exchange for the adoption of measures such as compliance programs or external monitors. In Italy, albeit not formally disciplined by the law, we can observe the raise of elements of negotiation in the enforcement against corporate crime. This is happening in reference both to the existing pre-trial diversion mechanism ruled by the law and to new informal settlements developed in practice. More than a direct influence of the American experience, the phenomenon is considered to be a consequence of the hybrid nature of the Italian system – inspired by the American approach based on the compliance paradigm – and of the subsequent critical features emerged in practice. The raise of similar 'informal' negotiated justice deserves attention, since it occurs in an unregulated context, where the discretionary power of public prosecutors easily expands.

1 Introduction

The spreading of settlements as a form of resolution of corporate crime within the international framework is an easily observed phenomenon.[1] Pre-trial agreements such as Deferred Prosecution Agreements (DPAs) and Non Prosecution Agreements (NPAs) play a central role in the enforcement of the US Department of Justice (DOJ)[2], which is moreover notoriously characterized by a marked extraterritorial scope;[3] the Crime and Court Act 2013 and the *Loi Sapin II* of 2017 respectively acknowledged the Deferred Prosecution Agreements

[*] Post-doc in Criminal Law, University of Campania 'Luigi Vanvitelli' (Italy).

[1] Stefano Manacorda, 'Elementi di diritto comparato' in Camilla Beria D'Argentine (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffré 2017).

[2] Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93 Virg L Rev 853; David M Uhlmann, 'Deferred Prosecution Agreements and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2012–2013) 4 Md L Rev 1295; Jennifer H Arlen and Marcel Kahan, 'Corporate Governance Regulation Through Nonprosecution' (2017) 84 UCL Rev 323.

[3] Antoine Garapon, Pierre Servan-Schreiber, 'Nouveau modèle global ou extension de la puissance américaine' in Antoine Garapon, Pierre Servan-Schreiber (eds), *Deals de justice. Le marché américain de l'obéissance mondialisée* (1st edn, Presses Universitaires de France 2013).

in the United Kingdom[4] and the *Convention judiciare d'intérêt publique* in France;[5] the activity of the Organization for Economic Co-operation and Development (OECD) is also pushing for the adoption of settlements as privileged form of solution to international bribery.[6]

At a general level, this trend can be considered as a corroboration of the process of '*Americanisation*' of economic criminal law, as highlighted some years ago by distinguished scholars.[7] This expression, intended as descriptive and not evaluative, is not simply referred to a sort of 'legal imperialism' of the United States but to the multifaceted result of combined forms of influence of American legal institutions and of innovative choices of criminal policies on the legal framework of European states. The fight against drugs, terrorism and organized crime can represent valid examples,[8] as well as the emersion of corporate criminal liability, together with the compliance approach based on the 'stick-and-carrot' doctrine.[9] The same can be said in relation to the recent development of negotiated justice in the fight against corporate crime.

The present work aims to analyse the Italian answer to the last tendency. Although there is no explicit internal legislation on this kind of settlements, since the mandatory prosecution principle applies, the interferences between the proceedings against corporations and individuals are leading to the change of the existing legal tools and to the development of an 'informal' negotiated justice. This latter is also favoured by the principle of simultaneous process, for what the proceeding against corporations and the one against individuals on whose crime depends the corporate liability go on before the same judge. Anyway, as we shall see, more than the result of a direct influence of the American experience, the emersion of such informal negotiated justice in Italy can be considered as an indicator of some critical features of the internal system of corporate liability.

The Italian legislator, in fact, although importing the compliance paradigm developed in the US, has adapted it to the Italian framework in an attempt to grant also to corporations the criminal guarantees traditionally acknowledged to individuals[10]. The result is a hybrid

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[4] Peter Alldridge, 'Developments in the English Law of Corporate Criminal Liability. The Importance of the International Dimension' in Camilla Beria D'Argentine (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffré 2017).

[5] Antoine Garapon, 'État du debat actuel en France: à propos de la loi Sapin-II' in Camilla Beria D'Argentine (ed) *Criminalità d'impresa e giustizia negoziata* (Giuffré 2017).

[6] See e.g. the OECD Guidelines for Multinational Enterprises of 2011, where '*the use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments*'. A study on settlements promoted by the OECD Working Group on Bribery in International Business Transactions is currently ongoing.

[7] Adan Nieto Martin, 'Americanisation or Europeanisation of corporate crime?' in Mireille Delmas Marty, Mark Pieth and Ulrich Sieber (eds), *Les chemins de l'harmonisation pénale – Harmonising Criminal Law* (1st edn Société de législation comparée 2008); Stefano Manacorda, 'La dinamica dei programmi di compliance aziendale: declino o trasfigurazione del diritto penale dell'economia?' (2015) 4 Le soc. 473.

[8] Nieto Martin (n 7) 329.

[9] Manacorda, 'La dinamica' (n 7) 476.

[10] Francesco Centonze, 'La co-regolamentazione della criminalità d'impresa nel d.lgs. n. 231 del 2001. Il problema dell'importazione dei "compliance programs" nell'ordinamento italiano' (2009) 2 AGE 219.

system, at the crossroads between prevention and repression[11], which is showing some difficulties in terms of effectiveness. The phenomenon of informal negotiated justice deserves peculiar attention not only because it is symptomatic of structural problems of the Italian corporate liability system but also since it is happening in an unregulated context, broadening the discretionary power of public prosecutors in the enforcement against corporations. For this reason, after a preliminary analysis of the American experience (*infra* 2), the attention will be focused on the complex structure of the Italian system of corporate liability, halfway between administrative and criminal law (*infra* 3), and to the characteristics and critical aspects of formal (*infra* 4) and informal settlements adopted in practice (*infra* 5), on the basis of which concise conclusions will be drawn (*infra* 6).

2 The U.S. experience of settlements in the enforcement against corporate crime

Notoriously, the adoption of agreements in the fight against corporate crime within the US has to be related with the need to avoid the negative consequences, specifically reputational, of criminal conviction on accused corporations, shareholders and, more generally, on the whole market.[12] The 'Arthur Andersen effect',[13] from which the 'too big to fail/jail' doctrine developed,[14] is a highly-analysed phenomenon. Apart from this, the little effectiveness of the benefits to compliant corporations granted by the US Organizational Guidelines for Corporations of 1991 and subsequent amendments have to be taken into account for the development of such agreements.[15]

The idea behind DPAs and NPAs is evident: if criminal conviction is likely to have dramatic effects on the existence of indicted corporations, corporate criminal liability risks not to be applied anymore by public prosecutors. It becomes, instead, a sort of 'threat' to be used to obtain from suspected corporations cooperative behaviours and to solve cases extra-judicially. For this reason, more than agreements, DPAs and NPAs appear to be settlements, where a part imposes to the others the conditions whose respect ensures the postponing or even the renouncing of criminal conviction. In this way, the reputational consequences of criminal proceedings are avoided, the existence of corporations – even if misleading – is preserved, and the interests of shareholders are ensured. For their parts, corporations are not required to admit any guilt, since they only have to accept a statement of facts. Furthermore, they are asked to pay huge fines, to remove the consequences of their misconduct, to compensate the damages and, most of all, to put in place a cooperative behaviour. This consists of an internal re-organization aimed to prevent future crimes, envisaging the adoption and implementation of effective compliance programs, the appointment of external monitors and, more generally, the duty to comply with all the

[11] Maurizio Riverditi, *La responsabilità degli enti: un crocevia tra repressione e specialprevenzione. Circolarità ed innovazione dei modelli sanzionatori* (Jovene 2009).

[12] Uhlmann (n 2) 1310.

[13] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Conviction in the Twenty-First Century' (2013) 15 J Bus L 797.

[14] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (1st edn, Belknap Press 2014).

[15] Jennifer H Arlen, 'The Failure Of The Organizational Sentencing Guidelines' (2012) 66 U Miami L Rev 321.

mandates prosecutors impose on the single corporations. Moreover, the recent Yates Memo stressed the need to seek accountability for individuals, establishing that agreements can be granted only to corporations which give to the DOJ all the relevant information regarding the individuals responsible for the misconduct.[16]

Two main features emerge from DPAs and NPAs: the lack of conviction, and the heterogeneity of the *ex post facto* measures that can be asked to corporations. In fact, no laws provide for their regulation, and the DOJ memos only partially specify the criteria for their use.[17] Criticisms of opposite kind arose within the public debate, depending on which of those two features is enhanced. On the one side, settlements are considered as a bland answer to corporate crime, because of the loss of the stigma traditionally arising from the criminal proceedings, seen as a confirmation of the lack of moral indignation over corporate wrongdoing.[18] On the other side, settlements are seen as a harsh tool in the hands of prosecutors, their powers being excessively discretionary and unbalanced, in potential conflict with the rule of law.[19]

Despite those critical features, as already pointed out, settlements are receiving a growing recognition in the international scenario, both for the extraterritorial application of DPAs and NPAs by the DOJ and for the spontaneous transposition by the European states. We will see how those kind of critiques can also be found within the Italian framework. In particular, although forms of negotiation are acknowledged in a more narrow way, a broad discretionary power of prosecutors can be observed. This power is used both to sanction corporations in cases where the proof of their liability is hard to obtain and also to dismiss the charges against corporations, in order to reach the conviction of the individuals who act within them.

3 The hybrid nature of the Italian Corporate Liability system

The Legislative Decree n. 231/2001 (hereinafter 'the Decree') introduced the direct liability of corporations in Italy[20]. The compromise nature of the Decree was evident since its coming into force. The Italian legislator, in fact, had to take into account multiple needs: the traditional reluctance of legal scholars to admit a criminal liability of corporations[21] (considered to be contrary to the principle of culpability[22]); the natural distrust of corporate world for any severe enforcement regime; the obligations established in different

[16] Sally Quincy Yates, 'Individual Accountability for Corporate Wrongdoing' (New York, 9 September 2015) <https://www.justice.gov/archives/dag/file/769036/download> accessed 30 August 2018.
[17] Garrett, 'Structural Reform Prosecution' (n 2) 893; Arlen and Kahan (n 2) 327.
[18] William Laufer, 'Where Is the Moral Indignation Over Corporate Crime?' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer 2013).
[19] Jennifer H Arlen, 'Prosecuting beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Leg An 191.
[20] For recent comments on the Decree: Francesco Centonze, 'Responsbailità da reato degli enti e agency problems', (2017) 3 RIDPP 945; Carlo Enrico Paliero, 'La colpa di organizzazione tra responsabilità collettiva e responsabilità individuale' (2018) 1-2 Riv trim dir pen econ 175.
[21] Cristina De Maglie, *L'etica e il mercato. La responsabilità penale delle società* (Giuffré 2002) 303-386.
[22] Giancarlo De Vero, *La responsabilità penale delle persone giuridiche* (Giuffré 2008) 31-68.

international conventions Italy had subscribed, which imposed the adoption of a direct regime of liability for legal entities.[23] The result is a hybrid system – a '*third track*', using the words of the Italian Supreme Court of Cassation[24] – which nominally degrades the liability of corporations to the administrative level, and at the same time elevates the guarantees to the maximum. So, on the one side preventive and late compliance is encouraged and, on the other one, criminal conviction still has a central role: in particular, liability of corporations depends on the occurrence of a crime committed by a natural person related to the legal one, jurisdiction belongs to criminal courts and severe sanctions, including disqualification, apply. Furthermore, the preventive adoption of compliance measures can be evaluated not only for a reduction of sanctions but also for the exclusion of the corporate liability. In this way, corporate liability is grounded on the 'organizational fault', considered to be compatible with the principle of culpability.[25] Consequently, a set of rights modelled on those recognized to natural persons in criminal matters are ensured to corporations: the rule of law (article 2), the right to a fair trial (articles 34ff.), the principle of culpability (articles 6 and 7). According to the majority of scholars,[26] the mandatory prosecution principle also applies, albeit the Decree is silent on this matter and the concrete enforcement appears to be characterised by a discretionary power of prosecutors.

Even at first glance, it is easy to notice the ambiguity of the Decree. Although it aims to achieve preventive compliance, it is still modelled accordingly to the traditional features of criminal enforcement, centred on the application of sanctions as a consequence of the assessment of liability. And more than fifteen years after the coming into force of the Decree, lights and shadows emerge in practice. If the corporate compliance logic appears to be spread in the corporate governance, especially of large companies, still few judgements acknowledge the adequacy of the preventive self-organization, which grants corporations the exclusion of liability. In other cases, the decisions seem to be influenced by hindsight bias, for what the occurrence of the crime committed by natural persons is considered a proof of the inadequacy of the compliance measures adopted.[27] As a result, late compliance, which originally received little attention, is getting a growing importance.[28] In fact, for corporations it is actually more convenient to adopt and implement compliance programs belatedly, since benefits in this cases are granted. And it is precisely in reference to this

[23] ibid 119-121.

[24] SSUU Cass pen 18 September 2014 n 38343 *ThyssenKrupp*.

[25] See the *Ministerial Report to the Legislative Decree n. 231/2001* par 3.3.

[26] Francesca Ruggieri, 'Reati nell'attività imprenditoriale e logica negoziale. Procedimenti per reati d'impresa a carico di persone ed enti tra sinergie e conflitti' in Camilla Beria D'Argentine (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffré 2017) 67.

[27] Stefano Manacorda, 'L'idoneità preventiva dei modelli di organizzazione nella responsabilità da reato degli enti: analisi critica e linee evolutive' (2017) 3 Riv trim dir pen ec 49. See also Marco Colacurci, 'L'idoneità del modello nel sistema 231, tra difficoltà operative e possibili correttivi' (2016) 2 Riv trim dir pen cont 66.

[28] Massimo Donini, 'Compliance, negozialità e riparazione dell'offesa nei reati economici. Il delitto riparato oltre la restorative justice' in Camilla Beria D'Argentine (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffré 2017); Matteo Caputo, 'Colpevolezza della persona fisica e colpevolezza dell'ente nelle manovre sulla pena delle parti' (2017) 1 RIDPP 148.

situation that more pervasive elements of negotiated justice have developed, with regard to both the already existing legal tools and new informal ones.

4 "*Patteggiamento*" and its application to corporations

In Italy, the mandatory prosecution principle applies, as acknowledged by article 112 of the Italian Constitution ('*The public prosecutor has the obligation to institute criminal proceedings*').[29] This principle is coherent with the nature of Italian public prosecutors, who have no political legitimacy, being subject only to the law (article 101 of the Italian Constitution). It assures the equality of people before the law and the respect of the rule of law, as repeatedly affirmed by the Italian Constitutional Court.[30]

Negotiated justice nonetheless finds some space. In particular, the so-called *patteggiamento* ('*Applicazione della pena su richiesta delle parti*', articles 444ff. Italian Code of Criminal Procedure) can be considered as the legal translation – more than the legal transplant[31] – of the American plea bargain in the Italian system, since it consists of a deal between the accused persons and prosecutors about the amount of sanctions applied.[32] The deal is subject to judicial oversight, which relates to whether the legal conditions for reaching the agreement were respected and the effectiveness, proportionality and dissuasiveness of the sanctions were applied correctly. If validated, the deal puts an end to the criminal proceeding.[33] In this way, the accused persons benefit from a reduction of sanctions in exchange for waiving their constitutional right to a full trial. Not by chance, *patteggiamento* was introduced simultaneously with the shift from an inquisitorial system to an adversarial one, when the need for a reduction of full trial arose.[34] Originally, the deal could be reached only when penalties to be applied were fines or imprisonment for a length that, reduced with the benefit, did not exceed two years. This amount has been increased over time, broadening the field of application of the bargain.

Two main features emerge from the original version of *patteggiamento*: no admission of guilt is required and remedial measures are of little importance. Both elements have been nevertheless subject to partial changes. In relation to the first, which apparently represents the most important difference with the American plea bargain, it must be noticed that article 445 of the Italian Code of Criminal Procedure now explicitly affirms that the deal is considered as a conviction, unless the law provides otherwise. Furthermore, it is argued that the approval of the deal entails an assessment on the criminal liability of the accused persons.[35] So, even if some effects of the conviction are excluded and the deals are no publicly

[29] Francesca Ruggieri, 'Azione penale', in *Enciclopedia del diritto. Annali* III (2010) 129.
[30] See Corte Cost. n 84 of 1979.
[31] Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 Harv Intl L J 1.
[32] Massimo Donini, *Alla ricerca di un disegno. Scritti sulle riforme penali in Italia* (CEDAM 2003) 367-372; Matteo Caputo, *Il diritto penale e il problema del patteggiamento* (Jovene 2012) 279-287.
[33] Mitja Gialuz, 'Applicazione della pena su richiesta delle parti', in *Enciclopedia del diritto. Annali II* (2008).
[34] Donini, *Alla ricerca di un disegno* (n 32) 370-376.
[35] Gialuz (n 33) 19-21.

available, *patteggiamento* does not seem to totally shield the accused person from the reputational consequences typically arising from a criminal conviction. With regard to the second point, in the last few years cooperative behaviours of the accused persons have grown in importance.[36] For example, the restitution of the income of the crime of corruption is now mandatory for the approval of the deal (see article 444 (1ter) Italian Code of Criminal Procedure).

Patteggiamento applies also to corporations: in relation to them, the last trend appears to be much more evident. At a general level, article 63 of the Decree lets corporations be admitted to *patteggiamento* under the same conditions as the ones that apply for natural persons, the deal instead being denied when the final penalty is a definitive disqualification.[37] If nothing is formally said about remedial actions, the importance that the Decree gives to late compliance, which is a mitigating factor, plays a decisive role in the judicial oversight over the grant of the deal. This happens, in particular, during the phase of the assessment of the adequacy of the sanctions applied, where the judicial power of control is greater. Recent judgments clearly show the tendency: the decision about the formal respect of the legal conditions and the one on the adequacy of the sanction *de facto* overlap, giving a pivotal role to remedial actions.[38]

It has to be stressed that *patteggiamento* of corporations is also an exemption to the principle of simultaneous process. So, when a deal with legal persons is approved, the process continues only for natural persons. This gives prosecutors an important tool to solve complicated situations, for example when the individual responsible for the crime on which the liability of the corporation depends cannot be identified. Although prosecution is allowed in this case (*ex* article 8 of the Decree), assessing the liability of the legal person can be difficult.[39] Through *patteggiamento* prosecutors can avoid such difficulties, obtaining from corporations, without the proof of their liability, compliance activities, restitutions, payment of fines and compensation of damages. Corporations, for their parts, are encouraged to reach the deal, since the exclusion of the trial – and its reputational consequences – represents to them an attractive benefit, even in cases like these.[40]

[36] Caputo, 'Colpevolezza della persona fisica e colpevolezza dell'ente' (n 28) 159.

[37] Augusta Iannini, 'Articolo 63. Applicazione della sanzione su richiesta' in Marco Levis and Andrea Perini (eds), *La responsabilità amministrativa delle società e degli enti* (1st edn Zanichelli 2014).

[38] E.g. Trib. Roma, G.u.p. Liso, 20 March 2018; Trib. Roma, G.i.p. Arioli, 9 January 2012.

[39] Ombretta Di Giovine, 'Lineamenti sostanziali del nuovo illecito punitivo' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti. Una guida al d.lgs. n. 231/2001*, (2nd edn Giuffré 2010) 138.

[40] E.g. in 2016 for the first time the Public Prosecutors' Office of Milan reached a *patteggiamento* in a case of money-laundering with a foreign bank through art. 8 of the Decree.

5 Traces of informal negotiated justice in the enforcement against corporations in Italy

The interconnections between corporate and individual liability could go further, leading to the potential development of informal settlements between prosecutors and corporations. In particular, prosecutors can take advantage from the discretionary powers the Decree gives them, to a greater extent than what happens with individuals.[41] Firstly, the Decree does not explicitly acknowledge the mandatory prosecution principle, although it is based on the respect of criminal guarantees. So, even if article 55 of the Decree provides for the '*immediate registration*' of the corporate offence, which formally starts the proceeding, prosecutors consider it to be discretionary, as explicitly stated by the Public Prosecutors' Office of Milan in 2016[42]. Furthermore, prosecutors usually subordinate this registration to the evaluation on the existence of the objective conditions of corporate liability, albeit '*this assessment must follow and not precede registration*'.[43] Multiple reasons lie behind this phenomenon, not only related to the high number of offences daily arriving at Prosecutors' Offices but also prompted by pragmatic choices of criminal policy. Proceedings against corporations, in fact, can be difficult to manage by prosecutors, who may prefer to hold legal persons responsible for the civil damages within the criminal proceedings against individuals, or to order asset-protection measures against corporations, as these do not require to prove the elements of the crime.[44]

Also the procedure to dismiss charges gives prosecutors a broad power. Unlike for individuals, there is no judicial oversight over the decision of prosecutors to dismiss charges against legal persons. They just have to communicate their decisions to the general prosecutor of the Court of Appeal, who has a power of substitution in the prosecution of the corporations after in-depth investigations.[45] The absence of judicial control over the dismissal of charges is highly commented on by Italian scholars, divided between those who see in it as denying the criminal nature of the action against corporations, and those who instead believe that the corporate liability system is compliant with the mandatory prosecution principle, since judicial control is not always necessary.[46] It must be noted that the conditions for the dismissal of the cases are indicated only negatively by the Decree, although the hypothesis of dismissal for corporations can in practice be more varied than for natural persons, given the peculiar nature of corporate liability. For example, the dismissal could be ordered in the light of the adoption of adequate compliance programs. Apart from the relevance of the issue in relation to the criminal or administrative nature of

[41] Rosa Anna Ruggiero, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* (Giappichelli 2018).

[42] -- 'Bilancio di responsabilità sociale 2016' See -- 'Bilancio di responsabilità sociale 2016' (Milano, 2016), <https://www.procura.milano.giustizia.it/files/BRS-Procura-2016.pdf> accessed 30 July 2018.

[43] ibid.

[44] Ruggiero (n 41) 14-17.

[45] Gaetano Ruta, 'Articolo 58. Archiviazione' in Marco Levis and Andrea Perini (eds), *La responsabilità amministrativa delle società e degli enti* (1st edn, Zanichelli 2014).

[46] Ruggiero (n 41) 76-86.

the corporate liability, it emerges that prosecutors have an extensive '*trash power*'[47] over the charges against corporations, with a very limited oversight over it, considering also that the decree issued by prosecutors is not publicly available.

The outline emerging from the combined effects of the described procedures of registration of the corporate offences and of dismissal of cases is characterized by a central power of prosecutors in the enforcement against corporations. The chances of postponing the beginning of the action and of autonomously deciding for the dismissal of charges make prosecutors able to interact with corporations privately, outside the courtroom and in an informal and unregulated way, while investigations against individuals go ahead. There could therefore be a sort of 'latency time', during which the public authority can deal with corporations. These can have interest in putting in place restorative measures, in order to show a sort of goodwill, with potential positive effects neither on the final sanctions, as provided by the Decree for late compliance, nor in getting a *patteggiamento*, but directly on the dismissal of the case. The lack of transparency to the decisions concerning dismissals does not allow to have a statistical support for these considerations, but it has been demonstrated how broad and free from control the prosecutors' powers can be.

6 Conclusions

The analysis highlights the progressive expansion of formal settlements and the raise of informal ones in the enforcement against corporations in Italy, revealing some of the weak spots of the Italian system of corporate liability. This was originally conceived for prevention, through the stimulation of compliance measures adopted *ex ante* and judged at the end of a full trial, within a legal framework oriented to the respect of the traditional criminal guarantees. Instead, it is now fostering settlements between corporations and prosecutors outside of the limits provided by the law.

The decisive relevance of restorative measures and the existence of an extra-judicial space where prosecutors have the chance to negotiate deals with corporations are features that the Italian experience shares with that of the US DPAs and NPAs. The first trend can be identified in relation to the growing importance of late compliance, which reduce the amount of the final sanction at the end of the full trial, stimulated by the difficulties corporations face to obtain positive judgments about the adequacy of the preventive compliance adopted, and it is also evident in case of *patteggiamento*, where *ex post* measures of corporations have gained a central role, although not explicitly requested by the law. The second trend, instead, is fostered by the discretionary powers given to prosecutors, with regard to the registration of the corporate offences and to the dismissal of cases. Moreover, the causes of the phenomenon appear to be analogue between the two countries, since they ultimately concern the lack of attractiveness of the benefits for compliant corporations granted by the law and the need for corporations to avoid the reputational consequences of criminal conviction.

[47] Enrico Maria Mancuso, 'Art. 58' in Angelo Giarda, Enrico Maria Mancuso, Gianluca Varraso and Giorgio Spangher (eds), *Responsabilità 'penale' delle persone giuridiche* (1st edn Ipsoa 2007) 440.

However, the emersion of forms of negotiation within the Italian framework cannot be directly linked to the influence of the American settlements. Instead, as pointed out, it is strictly related to the current face of the Italian system of corporate liability, and it is along these lines that possible solutions have to be found. Negotiation can certainly be considered as an indicator of the ineffectiveness of the preventive aim pursued by the Decree: in this regard, numerous proposals have been made by Italian scholars, focused on the judicial assessment of the adequacy of the preventive compliance programs adopted by corporations[48]. Instead, in relation to the spreading of negotiated justice as such, the debate is at an early stage. The aim of the present work was then to shed light on the phenomenon, especially with regard to what we have called the 'informal' negotiated justice. The expansion of discretionary powers of prosecutors, within a legal system oriented towards the respect of the mandatory prosecution principle, raises same concerns, linked to the 'method' more than to the 'merit' of the phenomenon. The comparative experience reveals how negotiation in the fight against corporate crime can be a powerful and effective tool, to be used nonetheless carefully, in order to grant the respect of the guarantees to the legal and natural persons. In this sense, the Italian legislator should address the issue: not necessarily limit negotiated justice, but regulate it in a clear way.

[48] See Manacorda, 'L'idoneità preventiva dei modelli di organizzazione' (n 27) 100-112.

Selected Literature

Arlen JH and Kahan M, 'Corporate Governance Regulation Through Nonprosecution' (2017) 84 UCL Rev 323

Arlen JH, 'Prosecuting beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Leg An 191

Caputo M, 'Colpevolezza della persona fisica e colpevolezza dell'ente nelle manovre sulla pena delle parti' (2017) 1 RIDPP 148

Donini M, 'Compliance, negozialità e riparazione dell'offesa nei reati economici. Il delitto riparato oltre la restorative justice' in Beria D'Argentine C (ed), Criminalità d'impresa e giustizia negoziata (Giuffré 2017)

Garapon A and Servan-Schreiber P (eds), *Deals de justice. Le marché américain de l'obéissance mondialisée* (1st edn, Presses Universitaires de France 2013)

Garrett BL, 'Structural Reform Prosecution' (2007) 93 Virg. L. Rev. 853

Laufer W, 'Where Is the Moral Indignation Over Corporate Crime?' in Dominik Brodowski and others (eds), Regulating Corporate Criminal Liability (Springer 2013)

Manacorda S, 'La dinamica dei programmi di compliance aziendale: declino o trasfigurazione del diritto penale dell'economia?' (2015) 4 Le soc. 473

Ruggiero RA, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* (Giappichelli 2018)

Uhlmann DM, 'Deferred Prosecution Agreements and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2012–2013) 4 Md L Rev 1295

THE EFFECT-ORIENTED APPROACH IN CRIMINAL PROCEEDINGS AGAINST CORPORATIONS

By Martina Galli [*]

Abstract

One of the main issues about prosecuting corporations is the risk of detrimental collateral effects. In order to avoid such negative social and economic consequences, enforcement authorities are encouraged to reach an agreement with the company (or in any case not to apply the expected interdictory sanctions), whenever this corresponds to the 'public interest'. This 'effect-oriented approach' is becoming widely employed in both practices and legislation of different systems, such as in the US, UK, France and Italy. However, this approach raises some criticism, especially with reference to the principle of equality of all persons before the law. It also seems to put a strain on the principle of the separation of powers. This criticism might be mitigated by both enhancing the concept of 'public interest' and better defining the role of the different penal authorities (the legislator, the prosecutor and the judge) charged with balancing the different interests at stake.

1 Introduction

The metaphoric image of Justice-as-a-Woman, with a sword in one hand and the scales in the other, usually includes a blindfold on the divinity's eyes as a symbol of impartiality and equality.[1] But wearing a blindfold while swinging a sword may lead to unwanted or excessive outcomes. Quite unavoidably, the criminal law enforcement action, and in particular the application of the criminal sanction, is accompanied by collateral effects.

The present work aims to scrutinise the opportunity of adopting an *effect-oriented approach* in criminal proceedings against corporations. After having defined this approach as a particular perspective in which public authorities are called to ground their decisions on the potential of social and economic harm that may follow the company's condemnation or even indictment (2), the analysis will try to explore its penetration in both practices and legislations of different systems, notably in the US, UK, France and Italy (3). Consequently, the attention will be focused on some blind spots of this approach, concerning the *why*, the *when*, the *how* and the *who* (4). Here, some considerations will be made about major critical aspects of this approach, especially regarding the principle of equality of all persons before the law. The *public interest* underlying the choice to renounce prosecution may offer legitimacy to different treatment reserved to companies of certain nature and size. Nevertheless, this concept deserves to be subjected to further reflections by scholars and to

[*] PhD Student in Criminal Law, University of Tuscia (Italy).

[1] Mario Sbriccoli, 'La benda della Giustizia. Iconografia, diritto e leggi penali dal Medioevo all'età moderna' in Mario Sbriccoli (ed), *Ordo iuris: storia e forme dell'esperienza giuridica* (Giuffré 2003) 41-95; Adriano Prosperi, *Giustizia bendata. Percorsi storici di un'immagine* (1st edn Einaudi 2008).

a more accurate definition by legislators, in order to both find a theoretical basis to the approach and to orientate the action of the enforcement authorities.

2 The effect-oriented approach: a preliminary definition

Distinguished scholars closely examined the problem of collateral consequences over the years, in particular with regard to natural persons. In the individual context, collateral consequences have been meant mainly in terms of *legal* disabilities imposed by legislatures on the basis of past conviction, but not as part of a criminal sentence (such as loss or restriction of a professional license, ineligibility, loss of voting rights, deportation for immigrants).[2] Nonetheless, the notion of collateral consequences may be intended in a more general sense. Indeed, it indicates all sorts of repercussions that might follow a criminal proceeding or conviction, including social costs stemming from the response to the crime as a *matter of fact* (e.g. social marginalisation, family problems, homelessness, personal sufferance).[3] All these consequences, even though directly touching the person subjected to a criminal charge, may also affect innocent persons whose life is linked to the person convicted, in particular his or her family members[4] or, when the person is a company's individual director, his or her employees.[5] In reality, the problem of social costs, deriving from the conviction of an individual, hardly influences the development of the trial. It rather finds a partial translation in the individualisation of the penalty,[6] the enforcement of the sentence and in possible re-entry educational programs.[7] On the contrary, in the context of legal entities this problem has had a great influence in the development of the trial, as long as both prosecutors and judges are obligated to warn about collateral consequences upon

[2] Michel Pinard, 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals' (2006) 86 B U L Rev 624 (note 1) and 634; Margaret C Love, 'Collateral consequences after Padilla v. Kentucky: From punishment to regulation' (2011) 31 St Louis U Pub L Rev 87; Sandra G Mayson, 'Collateral Consequences and the Preventive State' (2015) 91 Notre Dame L Rev 302; Gabriel J Chin, 'Collateral consequences of criminal conviction' (2017) 18 Criminology, Crim Just L & Soc'y 1.

[3] Mirjan Damaska, 'Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study' (1968) 59 J Crim L C & P S 347 (defining the social consequences of criminal convictions as ´those that attach "on account of societal disapprobation" such as ostracism or refusal to employ individuals with criminal convictions'); Kathleen M Olivares and others, 'The collateral consequences of a felony conviction: A national study of state legal codes 10 years later' (1996) 60 Fed Probation 10; George P Fletcher, 'Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia' (1999) 46 Ucla L Rev 1895.

[4] Barbara Mulé and Michael Yavinsky, 'Saving One's Home: Collateral Consequences For Innocent Family Members' (2006) 30 NYU Rev L & Soc Change 689; James P Lynch and William J Sabol, 'Assessing the Effects of Mass Incarceration on Informal Social Control in Communities' (2004) 3 Criminology and Public Policy 267–294; Dina R Rose and Todd R Clear, 'Incarceration, Reentry and Social Capital: Social Networks in the Balance' in Jeremy Travis and Michelle Waul (eds), *Prisoners once removed: the impact of incarceration and reentry on children, families and communities* (Urban Institute Press 2003) 313–341.

[5] Mick Woodley, 'Bargaining over Corporate Manslaughter – What Price a Life?' (2013) 77 J Crim L 35.

[6] Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010), 184-185 (presenting arguments against the relevance of the collateral consequences of conviction as mitigating factor).

[7] Pinard (n 2) 649.

the choice to prosecute or not to prosecute a corporation. Criminal justice is called then to take off its blindfold in order to better ponder the effects of a strict application of the law.

By *effect-oriented approach*, we actually refer to a particular perspective in which public authorities are called to ground their decisions in criminal proceedings against corporations on the potential of social and economic harm that may follow the company's condemnation or even indictment. Dealing with companies of a certain size, punitive response hardly remains limited to its principal target or to its inner circle, but ends up having repercussions on a broad public of innocent third parties, like shareholders, workers and the entire community and, in the final analysis, it could have a great economic impact. Not unlike what happens with natural persons[8], collateral effects may result both from *de iure* and *de facto* reactions to misconducts. *De iure* reactions include court-imposed penalties and other punitive measures that may automatically result from a criminal conviction, such as suspensions or debarments from government contracts as a consequence of a condemnation. For some industries, this may make the difference between bankruptcy and survival.[9] The *de facto* collateral effects may accompany the law enforcement action as a practical matter. They include significant costs for the trial and, more importantly, reputational penalties imposed by the market.[10] On the basis of the stigma that derives from prosecution, the market may organise its own punitive response to the crime, for example throughout disinvestment movements or boycotting actions.

The simplest answer to the concern for collateral effects would be declining prosecution. However, criminal justice cannot completely renounce to reaffirm the social values breached by the company's conduct. At the same time, when the community turns from a beneficiary to a victim of law-enforcement, the function of criminal justice goes into crisis. The criminal justice system seems here to be at an *impasse.* Agreements offer a more sustainable solution to this. As long as an agreement normally neither entails condemnation[11] nor compels the company to admit guilt,[12] the corporation avoids debarments and license forfeitures, meanwhile the probability of a market-based reaction is by far mitigated. Besides, even if deferral involves indictment, the indictment is accompanied by the government's assurance

[8] Sharon E Foster, 'Too big to prosecute: collateral consequences, systemic institutions and the rule of law' (2015) 34 Rev Banking & Fin L 663–664.

[9] Benjamin M Greenblum, 'What Happens to a Prosecution Deferred – Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Colum L Rev 1886.

[10] Reputational penalties consist in losses of cash flow that occur when customers and other related parties stop dealing with the offending corporation or change their willingness to pay for the offender's product. Cindy R Alexander, 'On the Nature of the Reputational Penalty for Corporate Crime: Evidence' (1999) 42 JLE 490–491.

[11] Under the U.S. Sentencing Guidelines, a past deferred prosecution will not count toward a defendant's criminal history if there was no finding of guilt by a court and the defendant did not plead guilty or otherwise admit guilt in open court: see U.S.S.G., para 4A1.2 (f) (2016).

[12] Unlike a guilty plea, DPAs and NPAs do not require an admission of responsibility as a necessary procedural step. The acknowledgement of the alleged facts is normally just a potential (even if recommended) content of the agreement. See U.S.S.G., para 4A1.1(c) (2016); Crime and Courts Act 2013, Schedule 17, Part 1, 5 (1). In any case, the acknowledgement of wrongdoing will never be as harsh as a criminal record.

that the firm is cooperating and making amends.[13] Meanwhile, the state gives up punishing and blaming, but may obtain a certain degree of compensation for the violation, reparation to the victims and the company's *compliance* for the future.

3 The expansion of the effect-oriented approach

A balancing exercise between factors for and against prosecution lies at the basis of these agreements and collateral consequences are one of the loads on the scales. An overview of the regulations of some countries allows us to demonstrate this allegation.

In the U.S., the *effect-oriented approach* dominates the literature under the name of 'Arthur Andersen effect'.[14] This expression refers to the negative effects, notably the severe job losses, which resulted from Arthur Andersen's conviction and consequent collapse.[15] By extension it indicates the potential of massive social and economic harm that the prosecution of corporations may cause and it has been indicated as the main reason for lack of prosecution after the financial crisis of 2008.[16] This policy has proponents[17] and detractors,[18] but its impact in practice is undeniable. From Holder's Memorandum for prosecutors of 1999,[19] collateral

[13] Greenblum (n 9) 1886.

[14] Peter J Henning, 'The Organizational Guidelines: R.I.P.?' (2007) 116 Yale L J Pocket Part 314.

[15] The case is notorious. In 2002, Arthur Andersen was convicted (United States v. Arthur Andersen, No. 02-121 - S.D. Tex. June 15, 2002) for obstruction of justice in connection with its destruction of documents relating to its accounting work for Enron Corporation. Arthur Andersen actively attempted to reach an agreement with the DOJ but refused to admit wrongdoings as a company. In return, the DOJ refused the company's settlement proposal and brought an indictment. Andersen was convicted at trial and was sentenced to pay $ 500,000, on top of the $ 7 million already paid to the SEC. The real punishment, however, was the company's prohibition from auditing public companies, which had devastating consequences. About 28,000 U.S. employees lost their jobs when Arthur Andersen went out of business, and the company's shareholders suffered major losses. See e.g. E Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 Am Crim L Rev 110.

[16] Court E Golumbic and Albert D Lichy, 'The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy' (2014) 65 Hastings L J 1295; Jake A Nasar, 'In Defense of Deferred Prosecution Agreements' (2017) 11 NYU JL & Liberty 838; Foster (n 8) 656–657; Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 113th Cong. 6 (2013) <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81760/pdf/CHRG-113hhrg81760.pdf> accessed 20 December 2018; Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?', NY Rev of Books B (9 Janunary 2014); Lanny A Breuer, Assistant Att'y Gen., Dep't of Justice, Remarks at the New York City Bar Association (13 September 2012) <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association> accessed 20 December 2018.

[17] Nasar (n 16) 881; Greenblum (n 9) 1896.

[18] Gabriel Markoff 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15 U Pa J Bus L 797; Russel Morkhiber, Crime without conviction: The Rise of Deferred and Non Prosecution Agreements. A Report Released by Corporate Crime Reporter (2005) 20 (1) Corporate Crime Reporter 1; Golumbic and Lichy (n 16) 1322; Foster (n 8) 685.

[19] Memorandum from Eric H. Holder, Deputy Att'y Gen., to All Component Heads & U.S. Att'ys (16 June 1999).

consequences have been included amongst factors that should generally drive prosecutors in choosing whether to charge or not charge a corporation.

Nonetheless, former Memoranda until Filip's Memorandum of 2008,[20] did not recognise deferral as an option to avoid collateral effects. They simply pointed out that, facing serious and organised violations, declining prosecution could not be the choice even in the presence of collateral harm.[21] The weight of collateral effects changed in the perspective of deferred and non-prosecution agreements, skyrocketing from the year 2004, and which appears fatally linked to the Andersen's effect.[22] The current version of the *Principles of Federal Prosecution of Business Organisation*, as incorporated in the U.S. Attorney's Manual,[23] explicitly recognises the legitimacy of the effect-oriented approach regarding DPA's and NPA's. Here it is suggested that 'when collateral consequences would be *significant*, it may be appropriate to consider a non-prosecution or a deferred-prosecution agreement' as a third way between indictment and declination, with conditions designed to promote compliance with applicable law and to prevent recidivism. Therefore, the present written policy of prosecution assigns to collateral consequences an important weight in the balancing exercise.[24]

However, the question of when collateral consequences become relevant and thus deserve to be put on the scale is left to the discretion of the single prosecutor. The Principles merely speak about *disproportionate* harm (to shareholders, pension holders, employees, and others not proven personally culpable) and say that the consequences should be *significant* with respect to the size and nature of the corporation, but do not determine what *disproportionate* or *significant* means.[25] The uncertainty of the balancing exercise is exacerbated by the fact

[20] Memorandum from Mark Filip, Deputy Att'y Gen., to All Component Heads & U.S. Att'ys (28 August 2008).

[21] Prosecutors' Memorandums changed throughout the years. However, the Holder, Thomas, and McNulty memoranda sections on collateral consequences remained substantially the same. It was the Filip's Memorandum that widened provisions on collateral consequences by explicit reference to the opportunity to enter a DPA or NPA.

[22] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Belknap Press 2014) 41, 44, 55.

[23] Dep't Components and U.S. Attorneys, U.S.A.M. paras 9-28.1100 B (2015).

[24] In the HSBC's case, collateral consequences seem to have been the dispositive factor in the DOJ's decision not to charge HSBC. At a press conference announcing the settlement, the Assistant Attorney General Breuer explained that, in case of prosecution, HSBC 'would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat and the entire banking system would have been destabilized'. Instead, 'our goal is not to bring HSBC down, (not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs'. See U.S. Dep't of Justice, Press Release, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (11 December 2012) <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html> accessed 20 December 2018; Golumbic and Lichy (n 16) 1318–1321.

[25] Besides, the Principles of Federal Prosecution of Business Organisation state that in evaluating the relevance of collateral consequences, others factors should be considered in determining the weight to be given to collateral consequences: see Dep't Components and U.S. Attorneys, U.S.A.M. paras 9-28.1100 B (2015).

that judicial supervision over DPA is traditionally non-existent.[26] Indeed, all evaluations lie in the prosecutor's hands, both regarding the choice of the procedure and the conditions of the agreement. In fact, despite some openness to a wider oversight,[27] judges essentially continue to rubber stamp agreements and only ensure that they are in line with the Speedy Trial Act[28]. However, some commentators have recently suggested that judges become guarantors of the minimization of corporate criminal liability's negative externalities, in order to ensure that the interest of justice is best served.[29]

In the UK, the *effect-oriented approach* has not yet had the same resonance. However, following the American model, collateral effects find their place in the *DPA's Code* of 2013. They are mentioned amongst the additional public interest factors' list in last place.[30] Unlike the American Memorandums, the Code does not even make reference to a level of significance or relevance of the collateral effects. Moreover, DPA's Code does not provide any indication about the weight this factor may have in the balancing exercise. Nonetheless, despite the marginal position assigned to collateral consequences, it is always quite possible that this factor ends up orientating the balance in favour of negotiating, even when all the others factors (for example, the seriousness of the offence and the absence of collaboration) tend to be in favour of prosecution.[31] The Code leaves open this option when corresponding to the interest of justice. As is well-known, in the U.K. it is always for the judge to say if a DPA is the appropriate course of action in relation to the circumstances of the case, thereby safeguarding the public interest.[32]

Negotiations between corporations and prosecutors are spreading also in civil law countries. In France, thanks to the new *convention judiciaire d'intérêt public*, introduced in 2016, [33] the company which enters an agreement at the prosecutor's conditions is able to avoid condemnation and inscription in bulletin n° 1 of the criminal record. Since this inscription

[26] The Speedy Trial Act does not specify the terms of the court's approval. Therefore, judges tends to rubber stamp requests, approving the agreements the same day they are presented for approval. See Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis L Rev 505; Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93 Va L Rev 893.

[27] Patricia Jo, 'The "Rakoff Effect": The Growing Trend of Heightened Judicial Scrutiny of Government Settlements with Corporate Defendants' 7, <http://socialaw.com/docs/default-source/judge-william-g.-young/patricia-jo--spring-2013-paper.pdf?sfvrsn=4> accessed 20 December 2018; --, Criminal Law – Separation of Powers – D.C. Circuit Holds That Courts May Not Reject Deferred Prosecution Agreements Based on the Inadequacy of Charging Decisions or Agreement Conditions, (2017) 130 Harv L Rev 1048.

[28] Mary Miller, 'More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power' (2016) 115 Mich L Rev 135.

[29] Greenblum (n 9) 1901 (2005); Nasar (n 16) 884; Golumbic and Lichy (n 16) 1344.

[30] Deferred Prosecution Agreements Code of Practice. Crime and Courts Act 2013 (DPA's Code) section 2 para 2.8.2 (vii).

[31] DPA's Code, section 2 para 2.6 (vii).

[32] Crime and Courts Act 2013 Schedule 17 paras 7-8.

[33] The convention judiciaire d'intérêt public (CJIP) was introduced in art 41-1-2 of the French code of criminal procedure (CPP) by the article 22 of the law of 9th December 2016, n. 2016-1691, better known as 'Sapin II law'.

normally results in debarment from public contracts,[34] the conclusion of a *convention* may mean side-stepping the company's death. The law provides that the judge must validate the agreement to the condition that corresponds to public interest.[35] However, quite surprisingly, the law does not define the criteria that may orientate the prosecutors' choice and neither the *public interest* that the judge should verify. The weight of collateral consequences in the balancing exercise remains thus substantially undetermined.[36] Nevertheless, practice suggests a certain valorisation of this factor. In the *conventions* concluded in the last months by some big corporations, many factors would have suggested to prosecute them,[37] as long as the offences were serious and there was very little (or any) cooperation. However, these negative factors where finally considered only with respect to the amount of penalty (the '*amende d'intérêt public*') and did not prevent the conclusion of the *convention*. The reading of the agreements – where reference is made to the corporations' dimension and the number of employees – suggests that collateral consequences, such as serious job losses, played an important role both in the conclusion and validation of the *convention*.

The Italian situation is quite exceptional since the mandatory prosecution principle applies (article 112 Italian Constitution)[38] and the effect-oriented approach finds quite a narrow window of application in the field of negotiated justice[39]. Nonetheless, it finds a precise legislative recognition in connection with both the moment of the penalty individualisation

[34] Art 45, ordonnance n° 2015-899, 23 juillet 2015.

[35] Art 41-1-2, II, al. 2, CPP.

[36] Antoine Garapon, 'État du debat actuel en France: à propos de la loi Sapin-II' in Camilla Beria d'Argentine (ed), '*Criminalità d'impresa e giustizia negoziata*' (Giuffré 2017), 117; Martina Galli, 'Une justice propre aux personnes morales. Reflexions sur la convention judiciaire d'intérêt public' (2018) 2 RSC 359; Martina Galli, 'Giudicare l'avvenire. Uno studio a partire dalla convention judiciaire d' «intérêt public»' (2018) 3 Riv it dir proc pen 1285; Etienne Vergès, 'La procédure pénale hybride' (2017) 3 RSC 579.

[37] All the conventions concluded by HSCB Private Bank (Suisse), Sas Kaefer Wanner, Sas Set Environnement, Societé Générale SA are published on the official site of the Agence française anticorruption (AFA), <https://www.economie.gouv.fr/afa> accessed 20 December 2018.

[38] According to art 112 of the Italian Constitution, '*[t]he public prosecutor has the obligation to institute criminal proceedings*'. The principle of mandatory prosecution represents a theoretical obstacle to the introduction of agreements on the model of DPAs and NPAs (see Vittore D'Acquarone and Riccardo Roscini-Vitali, 'Sistemi di diversione processuale e d.lgs. 231/2001: spunti comparativi' (2018) 2 Resp soc amm enti 123–146). Nonetheless, informal settlements are becoming widely used. In particular, they take place either before the entity's indictment or the formal dismissal of a charge. In the absence of precise legislative conditions for dismissal and in the lack of any judicial oversight, prosecutors exert their power with broad discretionality. See Rosa Anna Ruggiero, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* (Giappichelli 2018).

[39] The impact of this approach in the field of negotiated justice is instead unclear. Some recent studies (see Francesca Ruggieri, 'Reati nell'attività imprenditoriale e logica negoziale. Procedimenti per reati d'impresa a carico di persone ed enti tra sinergie e conflitti' (2017) 3 Riv it dir proc pen 921–945) have enlightened that the concern for collateral effects' seems to influence, on the one hand, the implementation of formal negotiated justice tools (in particular, the '*patteggiamento*'), and, on the other hand, the development of informal settlements between prosecutors and corporations. However, since this subject remains broadly unregulated and the decisions concerning discharges are not accessible, it is difficult to objectively estimate the influence of the harmful effect problem on the pragmatic choices of prosecutors.

and the adoption of a precautionary measure. Indeed, this approach can be clearly traced within the field of 'alternative sanctions' against corporations, and in particular in articles 15 and 45 of legislative decree n. 231/2001 on the '*commissariamento giudiziale*'.[40] Here the law asks the judge not to adopt a disqualification measure giving rise to interruption of the corporate's activity if this may cause *relevant* consequences on occupational levels or a *serious* prejudice to the community, considering the company's dimension, the local economic conditions and the nature of the company's activity. *In lieu* of the interdictory sanction (or precautionary measure) application, the judge orders the entity's activity to continue and to be run by a temporary receiver for a period amounting to the duration of the disqualification. Therefore, the law provides that the interest in avoiding collateral consequences must always prevail over punishing, even if it is always the task of the judge that determines whether a consequence is relevant or a prejudice is serious. This approach implies the respect of the general principle of proportionality and gradualism in the choice of both penal sanctions and preventive measures, on the basis of its repercussions on public social and economic interests. In this respect, the approach also permeates other provisions dealing with the choice of the best preventive measure to apply to corporations involved in criminal activity (see e.g. the new 'controllo giudiziario' provided in the new article 34bis of the 'Codice Antimafia', which guarantees the business integrity of the company)[41].

4 The *why*, the *when*, the *how* and the *who* of the approach

The effect-oriented approach has penetrated both practices and legislations of different systems. The evaluation of collateral effects influences public authorities' decisions against corporations. However, much uncertainty affects this approach. Quite apart from the risk of a criminogenic result and the problem of ensuring the effective compliance with the law, four issues in particular should be scrutinised: the *why*, the *when*, the *how* and the *who*.

As for the *why*, we have said that the pursuit of big corporations might have important collateral consequences. However, as the American memorandums point out, almost every conviction of a corporation, as well as almost every conviction of an individual, might have an impact on innocent third parties.[42] The mere impact on third parties may not function as legitimacy for the different treatment reserved to companies of certain nature and size, which has nonetheless implications on individuals whose life is somehow related to the corporation's activity. The necessity to ground such different treatment between different categories of persons on more solid foundations arises. The presence of a *public interest* in avoiding side-effects of the penalty – as the *ratio* underlying the effects-oriented approach – seems capable of covering this role and mitigating major criticism raised by the 'too big to jail' attitude.

[40] Carlo Piergallini, 'I reati presupposto della responsabilità dell'ente e l'apparato sanzionatorio' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (2nd edn Giuffré 2010) 233; Giorgio Fidelbo and Fabio Lattanzi, 'Le misure cautelari' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (2nd edn, Giuffré 2010) 562.

[41] Teresa Bene, 'Dallo spossessamento gestorio agli obiettivi di stabilità macroeconomica' (2018) Arch Pen - Speciale Riforme 383.

[42] Foster (n 8) 710–711.

Nevertheless, the concept of *public interest* lies quite undetermined. In our view, it marks a turning point where collateral consequences are not only unfair and unjust, but also *unsustainable* as they negatively affect the future development of an entire community. Thus, the different treatment does not stem only from the extent of the social harm, which may reach a systemic dimension, but also from its duration, corresponding to the time that a certain community (that could be local, national or even global) needs to recover and re-establish previous levels of wealth and employment. But these are all just some preliminary thoughts and we hope that future studies by legal scholars will be able to unravel the meaning and significance of this approach to further results.

The *why* opens the question of *when* collateral consequences should be taken into account when assessing whether and how to prosecute a corporation. None of the regulations analysed adopts a system of thresholds in order to orientate public authorities' activities, and does not even limit the effects-oriented approach to public-interest entities as outlined in legislations.[43] The impact of collateral effects and the necessity to avoid them cannot but being evaluated on a case-by-case basis, and hence major evaluations should be left to the enforcement authorities. A general reference framework provided by the legislator or by governmental authorities may help penal actors to orientate their decisions and to ensure a consistent application of the law. Sometimes, like in the US and in Italy, an evaluation framework is given. However, the criteria adopted remain rather generic, given that legislations make reference at most to wide concepts like the *relevance* or *seriousness* of the collateral effects, to be assessed on the basis of the company's dimension, the local economic conditions and the nature of the activity. If we agree that this approach is geared towards a problem of *sustainability* of the criminal sanction, the parameter of the evaluation should include, in addition to the extension and the weight of collateral consequences, also the time that the system should invest in order to reabsorb the collateral effects.

The question of *how* follows right after. When collateral consequences cover a public interest, it remains uncertain *how* they should factor into the balancing exercise. Are they just one of the weights on the scales or can they counterbalance on their own the interest in prosecuting and punishing? The problem arises in particular in the field of negotiated justice. In our opinion, collateral consequences should be the key factor when assessing whether or not to enter an agreement, while other factors (i.e. co-operation, the existence of a proactive compliance programme, a lack of history of a similar conduct) should influence the terms of the agreement, in particular regarding the payment of a financial penalty and the prosecutors' cost.

The final issue addresses the *who,* namely which actor is the best qualified to determine how and when collateral effects should have a bearing on criminal proceedings. Potential concerns about separation of powers thus emerge. Major worries raised in legal scholarship regard the transformation of corporate justice system into a regulatory regime run by

[43] In the EU, the Public Interest Entities (PIEs) are defined by article 2(13) of the Directive 2006/43/EC, 2006 OJ L157/ 87–107.

prosecutors' discretion.[44] The risk that collateral consequences may be used as a sort of bugbear to neutralize judicial control is tangible. A judicial control over prosecutors' choices seems instead to be desirable: the judge should be in the position to check whether the prosecutor and corporate defendant's fear of collateral consequences is well-founded, in order to guarantee that the different treatment finds a rational justification. Taken to the extreme, this line of reasoning would lead not only to assign the judge the role to ensure that the deferral mechanism is not abused[45] (and thus the power to reject an agreement when unfounded or to change its conditions when unfair), but also to stop the trial when catastrophic consequences might follow.

The separation of powers concern applies also the other way round. Indeed, the judge runs in a sensitive area, where his or her activity is likely to interfere with the prosecutor's charging decision or with the evaluations made by the legislator. Therefore, the judicial discretion deserves to be properly limited. That being said, it is difficult to articulate the precise contours of the court's authority. One possible solution could be to restrict the exercise of judicial discretion to the estimation of the *significance/relevance/seriousness* of the harm to the public[46]. In so doing, the judge, actually excluded from the proper balancing exercise, would be charged only to verify that the probability, the extension and the duration of collateral consequences warrant the renunciation to punishment. However, we are aware that this is only a partial solution to the problem, as long as it does not prevent the judicial power from trespassing its functions and attributions. In any case, the concern of the separation of powers seems to be inextricably linked to the definition of the concept of *public interest.*

5 Conclusions

The comparative analysis shows the emergence of a particular approach, which leads to the interruption of the ordinary 'criminal sequence'[47] (commission of a crime–prosecution–sanction) when entailing non-sustainable effects, in terms of social and economic losses. Some may describe the effect-oriented approach as a victory of the market and the economic prerogatives upon criminal justice and the rule of law, and the absence of such an approach in the individual context may confirm that view. However, from another angle, this approach could be regarded as the attempt of the criminal justice system to counteract the

[44] Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Legal Analysis 192, concluding that DPAs are 'inconsistent with the rule of law'; Wulf A Kaal and Timothy A Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013' (2014) 70 Bus Law 1.

[45] Greenblum (n 9) 1901.

[46] Judges are thus free to determine the criteria to fulfil these standards of relevance; however, they should commit themselves to justify the choice in the light of the requirement of 'universalizability' of judicial decisions. See Michele Taruffo, 'La giustificazione delle decisioni fondate su standards' in Paolo Comanducci and Riccardo Guastini (eds), *L'analisi del ragionamento giuridico. Materiali ad uso degli studenti*, Volume II (Giappichelli 1989) 340; Neil MacCormick, 'Universalisation and Induction in Law' in Chiara Faralli and Enrico Pattaro (eds), *Reason in Law*: *Proceedings of the Conference Held in Bologna*, 12-15 December 1984, Vol I (Giuffré 1987).

[47] Alberto Di Martino, *La sequenza infranta. Profili della dissociazione tra reato e pena* (Giuffré 1998).

market's autonomous sanctioning capacity, when the latter interferes with objectives of justice. By preventing a disproportionate reaction to the crime, which might lead to excessive social costs, criminal justice appears to reveal a human side; a human side that the market seems instead incapable to show, by continuing to punish blindly and brutally.

Furthermore, whilst this approach leads to the waiver of the penalty intended in the classic sense (the pronunciation of a condemnation and the imposition of a criminal sanction for the committed crime, in order to guarantee retribution and deterrence), it does not imply the renunciation to the criminal law's mission of orienting social behaviours and protecting society from the crime, even through a different method of positive exemplarity and compliance. In this sense, it discloses and reassembles the original ambivalence with the idea of a criminal liability consisting in the fact that corporations are aggregates of innocent stakeholders who unfairly suffer from a criminal investigation, indictment, and conviction, but serious consequences must result from corporate deviance[48].

Nonetheless, while being desirable in its purposes and results, the effect-oriented approach entails some crucial concerns. The basic issue is to find solid legitimacy to the breach of the principle of equality of all persons before the law. The concept of *public interest* seems to be a good candidate to act as legitimacy, but it deserves to be subjected to further in-depth analysis by legal scholars and to more accurate definition by the legislators[49], in order to assure that Justice, bandage off, continues to act in respect of its fundamental principles.

[48] William S Laufer, *Corporate bodies and guilty minds: the failure of corporate criminal liability* (The University of Chicago Press 2006) 7.
[49] Brandon L Garrett, '*The Public Interest in Corporate Settlements*' (2017) 58 BCL Rev 1483.

Selected Literature

Ainslie E, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 Am Crim L Rev 107

Arlen J, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Legal Analysis 192

Ashworth A, *Sentencing and Criminal Justice* (5th edn Cambridge University Press 2010)

Damaska M, 'Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study' (1968) 59 J Crim L C & P S 347

Foster S, 'Too big to prosecute: collateral consequences, systemic institutions and the rule of law' (2014–2015) 34 Review Of Banking & Financial Law 655

Garrett B, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Belknap 2014)

Golumbic C and Lichy A, 'The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy' (2014) 65 Hastings L J 1295

Laufer WS, *Corporate bodies and guilty minds: the failure of corporate criminal liability* (The University of Chicago Press 2006)

MacCormick N, 'Universalisation and Induction in Law' in Faralli C and Pattaro E (eds), *Reason in Law: Proceedings of the Conference Held in Bologna, 12-15 December 1984, Vol I* (Giuffré 1987)

Markoff G, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15 U Pa J Bus L 797

Nasar J, 'In Defense of Deferred Prosecution Agreements' (2017) 11 NYU J L & Liberty 838

CORPORATE LIABILITY AND DIVERSION: TOWARDS A NEW CRIMINAL LAW FOR COLLECTIVE ENTITIES?

By Federico Mazzacuva[*]

Abstract

The article surveys the evolution of pre-trial diversion for corporate offenders in the US enforcement policies, portraying its common features as developed in practice. A brief description of the UK regime of deferred prosecution agreements – introduced in 2013 by the Crime and Courts Act – is also offered, in light of the Code of Practice published in 2014 by the Serious Fraud Office and the Crown Prosecution Service. The effectiveness of these new prosecutorial tools is discussed on the basis of judicial statistics and other available data. The paper aims to show how pre-trial diversion seems to move the pivot of corporate liability, from the traditional criteria for referring crimes to company to the so-called 'reactive fault'. Not only should corporate culpability be focused on those actions that were taken at or before the time the crime was committed, but also it can be judged within a reactive time frame. In this regard, the article invites reflection on the problem of justifications and limits of negotiated justice for collective entities.

1 Introduction

It is widely agreed that corporate crime, and the struggle to handle it, have become one of the most urgent legal and regulatory issues. In this regard, while considering the role of corporations in criminal proceedings, attention should be paid to different forms of diversion, from the traditional criminal process, tested initially in the United States and later exported to other countries: not only to the United Kingdom, as discussed below, but also – for example – to France, while in November 2017 Canada concluded the consultation period on the proposal to introduce similar proceedings.[1] In this regard, within systems of criminal justice based upon the principle of prosecutorial discretion, such the North American one, the practice tends to expand the toolkit to address corporate crime with new instruments aimed, on the one hand, at bringing corporate offenders to justice and, on the other, at avoiding negative effects deriving from conviction, namely harming shareholders and stakeholders. Among the collateral consequences of conviction, there is indeed the

[*] Ph.D., Research Fellow in Criminal Law, University of Milan-Bicocca, Department of Business and Law (DI.SEA.DE), Milan, Italy.

[1] France's law on corruption (*loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*), the so-called *Sapin II* after Finance Minister Michel Sapin who presented the legislation, introduced the '*convention judiciaire d'intérêt public*' for collective entities. On this issue, see Antoine Garapon, 'État du débat actuel en France: à propos de la loi Sapin-II' in Camilla Beria di Argentine (eds), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017). As far as Canada is concerned, see Government of Canada, 'Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream' (discussion paper for public consultation) <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/aps-dpa-eng.html> accessed 13 November 2018.

reputational damage: the adverse publicity that follows (together with other measures, such as disbarment, exclusion from governmental contracts, revocation of licenses, etc.) can devastate a corporation (the so-called 'Arthur Andersen effect').[2] These new prosecutorial tools, as an alternative to traditional prosecution, have proven to be extraordinary means of achieving the very goals of prosecution.

This article will first provide a general overview of the evolution of pre-trial diversion as part of US enforcement policies; secondly, the present research surveys the new regime of deferred prosecution agreements in the United Kingdom. Some brief conclusions follow.

2 Pre-trial diversion in the US criminal justice system: from juvenile to corporate offenders

In the United States, Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) were traditionally used with juvenile offenders, however in the '90s they have been extended to corporations with the same original purpose, namely to avoid reputational damage deriving from criminal proceedings.[3] That said, their application has been radically reversed. The agreements were initially intended for cases involving minor crimes, whereas nowadays they can be used to handle high-profile cases involving companies too big to fail and, thus, too big to jail.[4] More specifically, a DPA is an agreement between the prosecutor and the target corporation whereby the former agrees to dismiss a filed criminal charge, after a set period of time (usually a year or two), if the latter fulfils a series of obligations. A NPA distinguishes itself because it does not involve the formal filing of charges or judicial review.[5] Any breach of the agreement by the company would subject it to full prosecution. The above-mentioned evolution is curiously the same outlined in recent reform proposals of the corporate 'punitive' liability system in Italy, that is to say the extension of a pre-trial probation period to legal entities, only currently provided to juvenile and adult offenders.[6] As we can see, different experiences lead to the same solution: there can be different criminal justice systems depending on the nature of the subjects involved. Coming back to pre-trial diversion in the US, it has to be noted that, in a system permeated by prosecutorial discretion, DPAs and NPAs have been introduced without any formal

[2] This kind of consequence has been known as 'Arthur Andersen effect', due to the collapse in 2002 of Arthur Andersen LLP, the Enron Corporation's accountant. On this issue, among other authors, see Kanthleen F Brickey, 'Andersen's Fall from Grace' (2003) 81 Wash ULQ 917-959.

[3] Gennaro F Vito and Deborah G Wilson, *The American Juvenile Justice System* (Sage Publications 1985) 22.

[4] Quoting the title of Brandon L Garret, *Too Big To Jail. How Prosecutors compromise with corporations* (Belknap Press, 2016). On this topic, see also Russel Mokhiber, 'Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements' (2005) <http://www.corporatecrimereporter.com/deferredreport.htm> accessed 13 November 2018.

[5] Christopher A Wray and Robert K Hur, 'Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice' (2006) 43 Am Crim L Rev, 1104-05.

[6] Paola Severino, 'La responsabilità dell'ente ex d. lgs. n. 231 del 2001: profili sanzionatori e logiche negoziali' in Carlo E Paliero and others (eds), *La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini* (Giuffrè 2018).

statutory or regulatory action by either Congress or any regulatory agency, respectively,[7] relying instead upon the US Attorney's memoranda ('Holder Memorandum', 'Thompson Memorandum', etc) diffused by the Department of Justice (but also other enforcement authorities adopt similar guidelines, such as the Security and Exchange Commission and the Environment Protection Agency), which provide factors that prosecutors should consider when investigating, charging and discussing an agreement.[8]

More specifically, in reaching a decision regarding the proper treatment of a corporate target, prosecutors should weigh the factors that are generally valid in all kinds of cases: the sufficiency of the evidence; the likelihood of success at trial; the probable effects of conviction in terms of deterrence and rehabilitation, and the adequacy of non-criminal approaches.[9] Then, the guidelines specify that, due to the peculiar nature of the corporate 'person', some additional factors should be taken into consideration. First of all, prosecutors should consider the facts, that is to say: the nature and the seriousness of the allegations; the pervasiveness of wrongdoing within the corporation; the company's previous judicial history; the presence of collateral consequences deriving from the crime committed, etc.[10] Then, the guidelines invite prosecutors to consider the corporation's timely and voluntary disclosure of wrongdoing, its willingness to cooperate in the investigation of its agents and also the remedial actions put in place, including any effort to adopt an effective compliance programme or to improve an existing one; etc.[11] As has been pointed out, 'while prosecutors retain broad discretion to charge corporations, in no other area do federal prosecutors provide such detailed guidelines to explain and limit (albeit in a non-binding way) how they exercise their discretions'.[12]

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[7] Actually, there is only one provision that alludes to pre-trial diversion: the Speedy Trial Act 1974 provides that, in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial must commence, 'any period of delay' shall be excluded 'during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct' [US Code ch 208 – Speed Trial Act 1974, s 3161(h)(2)].

[8] The first development occurred in 2000, when the DOJ refined its prosecutorial priorities in corporate crimes issuing the guidelines Federal Prosecution of Corporations (known as 'Holder Memo'). In 2003, the revised criteria for prosecution of corporations, 'Principles of Federal Prosecution of Business Organizations' (the 'Thompson Memo'), were published. The 'Thompson Memo' added a paragraph on a prosecutor's evaluation of the corporate governance mechanism adding a list of questions designed to explore the strength and seriousness of companies' corporate governance mechanisms: see Memorandum from Larry Dean Thompson, Deputy Attorney General, 'Principles of Federal Prosecution of Business Organizations' (2003) <https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf> accessed 13 November 2018, pt VII, para B. The 'Thompson Memo' has been revised several times so far.

[9] Memorandum from Eric Holder, Deputy Attorney General, Federal Prosecution of Corporation ('Holder Memo') (1999), pt II, para A.

[10] US DOJ, 'Federal Prosecution of Corporations' (n 9), pts III, para B, IV, para A and V, para B.

[11] US DOJ, 'Federal Prosecution of Corporations' (n 9), pts VI, para B and VIII, para B.

[12] Brandon L Garrett, 'Globalized Corporate Prosecution' (2011) 97 Va L Rev 1775.

Considering almost three-decade practice of pre-trial diversion, it is possible to identify general characteristics of DPAs and NPAs.[13] To begin with, the deal generally contains a public statement of facts on the part of the company in which it accepts the allegations, even if a formal recognition of responsibility is not required. Another typical feature is the commitment to adopt or implement a compliance programme, often under the supervision of an external monitor, aimed at preventing misconduct. Moreover, the target company is almost always obliged to cooperate in the prosecution of individuals, by identifying relevant witnesses, making documents available to prosecutors, through the waive of the so-called 'attorney-client' and 'work-product privileges', replacing managers who are accountable for the underlying problems and terminating the contracts of those employees who refuse to cooperate in the investigations. Finally, a typical enforcement mechanism is the obligation of the company to pay financial penalties, the allocation of which between fines, criminal restitution, compensation of damages and restorations, is matter of ad hoc negotiations.[14]

The practice in the US allows us to evaluate the mechanism and operational effectiveness of pre-trial diversion. On the one hand, data shows that DPAs, as well as NPAs, have been used as a successful tool in the arsenal of prosecutors, particularly in the field of economic and financial criminality, especially concerning high-profile cases. Since 2000, the DOJ and the SEC have entered into 483 agreements with corporate entities, extracting a total of $ 57.1 billion in fines, penalties and compensations. However, 2017 saw DPAs and NPAs drop to their lowest levels since 2009 (only 22 signed agreements by the DOJ).[15] Possible explanations for this negative trend could be the change of the administration as well as the introduction of more recent options for corporate resolutions, namely the new 'declination with disgorgement letter' (also termed 'letter agreement') in the field of foreign corruption.[16]

Thus, even though in the US corporate prosecutions are very rare events,[17] the use of DPAs and NPAs is highly pervasive for dealing with the most important cases; whereas, traditional criminal law (more correctly, the costs related to investigations and criminal proceedings)[18] seems to be anti-economic. On the other hand, evaluating the effectiveness of

[13] Concerning the general contents of the agreements, see Leonard Orland, 'The Transformation of Corporate Criminal Law' (2006) 1 Brook J Corp Finn & Comm L 73.

[14] ibid 75.

[15] '2017 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)', database collected by the American law firm 'Gibson Dunn', <http://www.gibsondunn.com/publications/pages/2017YearEndUpdate-CorporateNonProsecution-DeferredProsecutionAgreements.aspxx> accessed 13 November 2018.

[16] In November 2017, Deputy Attorney General Rod Rosenstein announced a new policy creating a presumption that companies will receive a declination for Foreign Corrupt Practices Act (FCPA 1997) misconduct if they satisfy certain standards, including self-disclosure, full cooperation and timely remediation: see 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> accessed 13 November 2018.

[17] William S Laufer and Alan Strudler, 'Corporate Crime and Making Amends' (2007) 44 Am Crim L Rev 1307.

[18] Concerning the limited resources available for corporate criminal enforcement, see among other authors Jennifer H Arlen, 'Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops', in *Criminalità d'impresa e giustizia negoziata* (n 1).

DPAs and NPAs is not an easy task. Two possible measures could be whether the company repeats the criminal behaviour either during or after its agreement; or whether the company successfully implements the terms of the agreement. That said, there is no research that has successfully evaluated if, how and to what extent DPAs and NPAs contribute to combat corporate crime. To date, it seems that very few companies have been prosecuted for the breach of the terms of their deals,[19] but it has also to be considered that there have been several firms whose agreement terms were extended. Moreover, the US Sentencing Commission publishes partial data regarding federal sentencing of corporations, since it relies on self-reported data by the Courts,[20] and therefore it does not follow up and obtain unreported data regarding the sentencing of a particular firm.[21] These considerations notwithstanding, federal sentencing statistics show that, in the last 10 years, almost 1.5% of collective entities sentenced under Chapter Eight of the Federal Sentencing Guidelines had similar prior criminal or administrative violations; furthermore, almost all of these corporations (approximately 99.1 %) did not have an effective compliance programme.[22] These statistics might be considered an indication that companies, that have already experienced a pre-trial diversion (and have consequently adopted a compliance programme), do not repeat the relevant criminal behaviour either during or after the agreement.[23]

[19] In a case dealing with groups of related corporations, in 2007, three subsidiaries of Vetco International Ltd pleaded guilty to FCPA violations concerning bribes paid to Nigerian officials related to deep-water oil drilling, while in November 2008 a formally wholly owned subsidiary, Aibel Group Ltd, entered a DPA, along with its own subsidiaries. At the end of 2008, Aibel Group Ltd reported that it had continued to violate the FCPA, which constituted a breach of the terms of the agreement. As a result, the firm pleaded guilty and was ordered to serve two years of supervised organizational probation requiring periodic reports on implementation of anti-bribery measures. See Garrett (n 12) 1847.

[20] US Sentencing Commission. 'Annual Report 33' (2009) describing document submission process <https://www.ussc.gov/about/annual-report/archive> accessed 13 November 2018.

[21] Garrett (n 12) 1806.

[22] US Sentencing Commission's, 'Sourcebook of Federal Sentencing Statistics' (2008-2017) Table 54 ('Organizations Sentenced Under Chapter Eight: Culpability Factors') <https://www.ussc.gov/research/sourcebook/archive> accessed 13 November 2018, , paras 8C2.5, subpara (c) (f).

[23] However, the same statistics are considered by some authors as the evidence of an 'unseemly disparity between treatment of large and small firms': Laufer and Strudler (n 17) 1315.

3 Deferred Prosecution Agreements in the United Kingdom: the emphasis on corporate's reactive fault

After a consultation period in 2002, during which the proposal registered generally positive feedback by the respondents,[24] the Crime and Court Act 2013, the statute that introduced DPAs in England and Wales[25], received Royal Assent on the 25th of April 2013. Firstly, it has to be noted that in the UK, there was – until 2013 – no tradition of pre-trial diversion, thus a statutory regime in this field was needed; and secondly, that NPAs have not been included in the Crime and Court Act 2013, due to their lesser degree of transparency and the absence of judicial review.[26] Indeed, DPA proceedings are based on the key principles of transparency and consistency.[27] They always start before a judge in private at a preliminary hearing. After the beginning of negotiations, but before the terms of the DPA are agreed, the prosecutor must apply to the Court for a declaration that entering into a DPA is likely to be in the interest of justice, and that the terms are 'fair, reasonable and proportionate'[28]. Then, in case of full compliance to the DPA, the prosecution is dismissed and the agreement, together with the judicial scrutiny, must be published.[29] On the contrary, if the agreement has not been timely and completely executed, the case goes to trial. Diversion is solely provided for a legal person, whether incorporated or not. It can be a corporate body, a partnership or an unincorporated association, but may not be an individual.[30] Moreover, diversion does not have a general application, since it can be opened only after the commission of one of the crimes indicated by law, which have their root in economic or financial offences (such as: fraud, forgery, bribery, theft, false accounting, etc.).[31]

The statute came into force in 2014, when the Code of Practice was issued – pursuant to schedule 17, paragraph 6(1)(a) and (b) – by the Public Prosecution Service and the Serious Fraud Office. [32] Unsurprisingly, the factors provided by the Code of Practice are similar to

[24] UK Ministry of Justice, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organizations: Deferred Prosecution Agreements' (2012) para 43. See also UK Ministry of Justice, 'Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organizations' (2012) paras 35-38.

[25] DPAs have been firstly introduced only in England and Wales; they will be extended to Scotland and Northern Ireland: see UK Ministry of Justice, 'Consultation on a New Enforcement Tool' (n 24) para 11.

[26] UK Ministry of Justice, 'Consultation on a New Enforcement Tool' (n 24) para 69.

[27] UK Ministry of Justice, 'Deferred Prosecution Agreements: Government Response' (n 24) para 16.

[28] Crime and Courts Act 2013, sch 17, para 7, subparas 1-6.

[29] Crime and Courts Act 2013, sch 17, para 8, subpara 7.

[30] Crime and Courts Act 2013, sch 17, para 4, subpara 1.

[31] Crime and Courts Act 2013, sch 17, paras 15-27, which encompass both common law and statutory offences. During 2017, Parliament adopted legislation expanding the category of cases that might be resolved through DPAs to include a number of new financial offences (Policing and Crime Act 2017 and Criminal Finances Act 2017). However, the statute contains a 'closing valve', whereby the list of crimes includes any 'ancillary offences' relating to an offence indicated in the list itself: see Crime and Courts Act 2013, sch 17, paras 28 and 29.

[32] UK Public Prosecution and the UK Serious Fraud Office, 'Deferred Prosecution Agreements. Code of Practice' (2014), <http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements-code-of-practice-and-cosnultation-response-aspx> accessed 13 November 2018.

those indicated by the DOJ's guidelines. However, it could be said that what distinguishes the guidelines operating in England and Wales is the fact that it brings to its extreme consequences the lessons learnt through the American experience, giving great importance to the proactive approach taken by the target company. First of all, among the factors that the prosecutor may take into account, the Code encompasses the 'existence of a proactive corporate compliance programme both at the time of the offending and at the time of reporting'.[33] Secondly, the guidelines suggest that, as an additional 'public interest factor' against prosecution, 'considerable weight may be given to a genuine proactive approach adopted by P's [i.e. organisation's] management team when the offending is brought to their notice', involving remedial actions including, where appropriate, the compensation of victims.[34] Finally, when the offence is not recent and a proactive approach has already been undertaken by the management, the Code of Practice significantly asks the prosecutor to consider if the company 'in its current form is effectively a different entity from that which committed the offence'.[35] DPAs in England and Wales had a slow start. To date, statistics in the UK do not allow for accurate evaluation of pre-trial diversion: so far, only four agreements have been stipulated under the new regime.[36]

4 Concluding remarks

This rapid analysis of the Anglo-American experience of pre-trial diversion for corporate offenders leads to some brief conclusions. The main purpose of this article is to try to answer two main questions: firstly, if it is a better choice to prosecute or not to prosecute, according to the recent enforcement policies above mentioned; and secondly, if a new criminal law for collective entities is emerging. The answer to the first question could be that prosecution should be used only as the last resort. As was observed, pre-trial diversion has proved that it can achieve – in a pragmatic way – the main goals of any prosecution: rehabilitation of offenders, deterrence, compensation of victims, and vindication of law.[37] As far as the second question is concerned, it could be said that, in a globalized market, not only a new system of corporate criminal liability has risen up, but also new criminal justice for corporate offenders.[38] On the one hand, the guidelines on pre-trial diversion have certainly resulted in a 'quiet legal revolution that made corporate indictment and conviction an extreme rarity',[39] reforming systems of corporate criminal liability that had remained unchanged for almost a century. In short, it can be said that pre-trial diversion seems to move the pivot of corporate liability, from the traditional ascription criteria to a new concept of corporate culpability: the so-called 'reactive fault'.[40] Not only should corporate culpability be focused on those actions

[33] UK CPS, SFO, 'Code of Practice' (n 32) pt 2, para 2.8.2, iii).
[34] UK CPS, SFO, 'Code of Practice' (n 32) pt 2, para 2.8.2, i).
[35] UK CPS, SFO, 'Code of Practice' (n 32) pt 2, para 2.8.2, iii).
[35] UK CPS, SFO, 'Code of Practice' (n 32) pt 2, para 2.8.2, v).
[36] See Peter Alldridge, 'Developments in the English Law of Corporate Criminal Liability. The Importance of the International Dimension', in *Criminalità d'impresa e giustizia negoziata* (n 1).
[37] Among other authors, see Arlen (n 18) 98.
[38] Garapon (n 1) 117.
[39] Orland (n 13) 136.
[40] Brent Fisse, John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) 49.

that were taken at or before the time the crime was committed, but also it can be judged within a reactive time frame. What matters is not the corporation's general policies of compliance, but what it practically proposes to do to implement its internal organization, cooperate with authorities and guarantee restoration.[41] On the other hand, pre-trial diversion invites reflection, from a comparative point of view, on the nature of negotiated justice, generally considered as 'Copernican revolution' in the field of criminal law.[42]

As it is well known, in the '80s Claus Roxin proposed to consider 'restoration' ('Wiedergutmachung') as a third track in the criminal justice system, alternative to punishment and security measures.[43] The term restoration has a broad meaning, since it means not only to compensate victims ('Schadenersatz'), but also – and above all – to repair what criminal law aims to protect: for instance, in crimes against the environment, it implies environmental redevelopment and restoration of the site.[44] In this regard, it has to be noted that, unsurprisingly, negotiated justice has been born in juridical systems where the distinction between criminal law and civil law is not as rigid as in the European continental tradition. Having said that, it could be observed that pre-trial diversion has a double nature since it can be considered either a rehabilitative or a rewarding measure.[45] Some authors focus on corporate culpability and on corporate rehabilitation (i.e. the corporation is allowed to escape trial if 'it demonstrates, on pain of prosecution for failure to do so, that it is indeed a "good corporate citizen"'[46]), which are, on the contrary, the object and the purpose of trial and punishment, respectively.[47] However, the risk of this approach is to consider not only pre-trial diversion as a disguised punishment, often filled with ethical judgments. In this regard, in the American experience prosecutorial abuses are not unusual[48]. Authors were particularly struck by the agreement concluded in June 2005 between Bristol-Myers Squibb Company (BMS) and the US Attorney Office, Department of New Jersey: among the terms of the deal, BMS was obliged to 'establish and maintain a training and educational program

[41] For the *incongruence problems* raised by this approach, see Laufer and Strudler (n 17) 1311.

[42] Among other authors in Italian literature, see Francesco Palazzo, '*Giustizia riparativa e giustizia punitiva*' in Grazia Mannozzi and Giovanni A Lodigiani (eds), *Giustizia riparativa* (Il Mulino 2015).

[43] Claus Roxin, 'Risarcimento del danno e fini della pena pena' [1987] Riv it dir proc pen 14.

[44] Correction and remediation are considered conditions for diversion by EPA's Policy ('Incentives for Self-Reporting: Discovery, Disclosure, Correction and Prevention of Violation' <https://www.epa.gov/compliance/epas-audit-policy> accessed 13 November 2018).

[45] The double nature of pre-trial diversion, in Italian legal system, is considered – among recent authors – by Roberto Bartoli, '*La "novità" della sospensione del procedimento con messa alla prova*' [2015] Dir pen cont <https://www.penalecontemporaneo.it/upload/1449160218BARTOLI_2015a.pdf> accessed 13 November 2018.

[46] Orland (n 13) 84. In this regard, the author further observes that in an era where the penal policy goal of rehabilitation has been abandoned in the prosecution of individuals 'rehabilitation has been rehabilitated…as a goal in corporate prosecution' (ibid 84). On the emergence of the so called "good citizen corporation movement", see William S Laufer, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance' (1999) 52 Vand L Rev 1343.

[47] This approach is criticized, among other authors, by Laufer and Strudler (n 17) 1316.

[48] Among other authors who share this view, see Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich and others (eds*), Regulating Preventive Justice: Principle, Policy and Paradoxe* (Routledge 2017) 226.

… designed to advance and underscore the Company's commitment to exemplary citizenship, to best practices of effective corporate governance and the highest principles of integrity and professionalism, and to fostering a culture of openness, accountability and compliance throughout the Company'.[49] But, above all, BMS had to endow a chair at Seton Hall University School of Law (where curiously the lead prosecutor had studied) '… dedicated to teaching of business ethics and corporate governance'[50]. On the contrary, other authors suggest that, when an offence has been committed, the abdication to punishment can be justified only when restoration has occurred in the meanwhile, that is to say when the interests protected by criminal law have been defended (it does not matter before or after the wrongdoing) and the civil damages (if present) compensated. This approach seems to be more suitable since it leads to the conclusion that, in a secularized criminal law, the interests that are behind the rule violated in a single case can be considered the justification and, also, the limit of negotiated justice for corporate offenders.[51] From this point of view, at least from the perspective of many European continental systems, it is more suitable to think not in terms of theoretical categories, but in terms of principles: while the principle of culpability and the related principle of rehabilitation regard the judgment and the punishment, respectively; on the contrary, negotiated justice (i.e. avoiding criminal charges or convictions in exchange for restoration) is based on the principle of subsidiarity.[52]

More generally, as recent Italian literature points out, if we assume that corporate criminal liability aims at engaging companies to prevent crimes and their negative consequences, then we have to conclude that corporate offenders should not be prosecuted or held liable – because of the lack of *mens rea* or as a result of a rewording measure provided by law – when, after the wrongdoing, a full restoration has occurred. Not only for pragmatic reasons (as was observed, criminal proceedings against collective entities require a huge amount of resources and they have massive collateral consequences), but also the principle of subsidiarity leads to such a conclusion[53].

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[49] <https://www.sec.gov/Archives/edgar/data/14272/000119312505125970/dex992.htm> accessed 13 November 2018. In this regard, John C JR Coffee, 'Deferred Prosecution: Has It Gone Too Far?' (2005) 27 Nat L J 13.

[50] <https://www.sec.gov/Archives/edgar/data/14272/000119312505125970/dex992.htm> accessed 13 November 2018.

[51] In Italian literature, see – among other authors – Massimo Donini, 'Compliance, negozialità e riparazione dell'offesa nei reati economici. Il delitto riparato oltre la restorative justice' in Camilla Beria di Argentine (eds), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017).

[52] Roxin (n 43) 14.

[53] Donini (n 51).

Selected Literature

Alldridge P, 'Developments in the English Law of Corporate Criminal Liability. The Importance of the International Dimension' in Beria di Argentine C (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017)

Arlen J H, 'Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops' in Beria di Argentine C (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017)

Bartoli R, 'La "novità" della sospensione del procedimento con messa alla prova' (2015) <https://www.penalecontemporaneo.it/upload/1449160218BARTOLI_2015a.pdf>

Brickey K F, 'Andersen's Fall from Grace' (2003) 81 Washington University Law Quarterly 917

Bronitt S, 'Regulatory Bargaining in the Shadow of Preventive Justice: Deferred Prosecution Agreements' in Tulich T and others (eds), *Regulating Preventive Justice: Principle, Policy and Paradoxe* (Routledge 2017)

Coffee J C JR, 'Deferred Prosecution: Has It Gone Too Far?' (2005) 27 The National Law Journal 13

Donini M, 'Compliance, negozialità e riparazione dell'offesa nei reati economici. Il delitto riparato oltre la restorative justice' in Beria di Argentine C (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017)

Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (Cambridge University Press 1993)

Garapon A, 'État du débat actuel en France: è propos de la loi Sapin-II' in Beria di Argentine C (ed), *Criminalità d'impresa e giustizia negoziata* (Giuffrè 2017)

Garret B L, *Too Big To Jail. How Prosecutors Compromise with Corporations* (Belknap 2016)

Laufer W S, 'Corporate Liability, Risk Shifting and the Paradox of Compliance' (1999) 52 Vanderbilt Law Review 1343

Laufer W S and Strudler A, 'Corporate Crime and Making Amends' (2007) 44 American Criminal Law Review 1307

Mokhiber R, 'Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements' (2005) <http://www.corporatecrimereporter.com/deferredreport.htm>

Orland L, 'The Transformation of Corporate Criminal Law' (2006) 1 Brooklyn Journal of Corporate Financial & Commercial Law 45

Palazzo F, 'Giustizia riparativa e giustizia punitiva' in Mannozzi G and Lodigiani G A (eds), *Giustizia riparativa* (Il Mulino 2015)

Roxin C, 'Risarcimento del danno e fini della pena' [1987] Rivista italiana di diritto e procedura penale 3

Severino P, 'La responsabilità dell'ente ex d. lgs. n. 231 del 2001: profili sanzionatori e logiche negoziali' in Paliero C E and others (eds), *La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini* (Giuffrè 2018)

Vito G F and Wilson D G, *The American Juvenile Justice System* (Sage 1985)

Wray A C and Hur R K, 'Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice' (2006) 43 American Criminal Law Review 1095

CRIMINAL COMPLIANCE AND ITS RELATION TO CORPORATE LIABILITY

REACTIVE FAULT: THE 'NEW' FRONTIER IN CORPORATE CRIMINAL LIABILITY

By Amalia Orsina[*]

Abstract

Organizational fault is generally considered the most prestigious model of corporate blameworthiness: corporations are guilty for not adopting adequate compliance programs to prevent offenses committed within them. In turn, under the reactive fault model, corporations should be reproached for failing to react to offenses. Contrary to the common belief, in the comparative landscape, the latter shows its concrete relevance in pre-trial diversion practices (Deferred Prosecution Agreements), through which corporate culpability refers not to the prevention of offenses, but to the reaction to them. Interpreting these practices under the reactive fault theory, it becomes evident that this negotiated approach has a distorted effect: the shift of liability judgment from the ex ante *to the* ex post *perspective could produce an indulgent neo-liberalistic policy. Nevertheless, the* ex post *approach could be useful in vanguard fields where risks coming from scientific-technological progress are to be faced. Enterprises deal with unknown risks with scientific certainty (e.g. food safety and GMOs; health safety and pharmaceuticals; environmental protection and pathogenic agents). If harm occurs to consumers, workers or the environment as a result of these risks, corporations should not be condemned for the harm in case of lack of predictability and lack of chances to avoid it. However, considering that any harmful event increases the knowledge of risks, corporations could be charged if they do not react adequately to this event, and avoid its reiteration. Therefore, given the importance of scientific and technological advancements, reactive fault could constitute the new frontier of corporate criminal liability. More generally, reactive fault can serve as a criterion on whether to bring forward charges in all the cases where there is a lack of specific rules of conduct that can usefully guide,* ex ante, *the enterprise in fulfilling the duty of preventive organization.*

1 From Organizational Fault to Reactive Fault: an evolving landscape

Organizational fault is generally considered the most prestigious model of corporate blameworthiness. This theoretical approach is grounded in two distinct juridical traditions: the notion of *Organisationsverschulden* elaborated by *Klaus Tiedemann*,[1] and the philosophy of compliance programs dating back to the 1991 *Federal Sentencing Guidelines* in the USA.

The success of this model rests on the fact that in this perspective corporations play a proactive role in pursuing the aim of corporate legality. Under this criterion of corporate

[*] PhD in Criminal Law and Research assistant at the University of Catania (Italy). This article could be realized thanks to the financial support of the University of Catania research fund in the Research Plan 2016/18.

[1] Klaus Tiedemann, 'Die «Bebußung» von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] NJW 1169.

liability, corporations are guilty for failing to adopt adequate compliance programs to prevent offenses committed within them.

However, it is possible to observe a growing spread of forms of negotiated justice, wherein decisive importance is given to the reaction to such offenses by the corporation, rather than to their prevention. The emblematic example is the experience of the United States concerning *Deferred Prosecution Agreements* (*DPAs*) and *Non-Prosecution Agreements* (*NPAs*). Such pre-trial diversion tools appear to be inspired by a different conception of corporate blameworthiness, specifically corporate reactive fault. According to this theory, corporations should be reproached for failing to react to offenses.[2]

Emerging from such an applicative practice, therefore, is the need to reflect on the potential interactions between, on the one hand, organizational fault, and on the other, reactive fault. In this way, an efficient model of corporate criminal liability may be elaborated.

Within the aforementioned theoretical framework, the aim of this paper is to propose the use of reactive fault as a regulatory criterion in two kinds of particularly problematic cases of corporate liability: firstly, cases of vanguard industrial activities conducted by large enterprises during conditions of scientific uncertainty and involving advanced technologies (in these contexts, corporations must face the problem of updating their preventive organizational systems in response to scientific and technological advancements); secondly, and more generally, cases in which, legally, rules of conduct which corporations can refer to with confidence have not yet been established, that is, no consolidated precautionary rules can guarantee the corporation that the adopted compliance program is actually sufficient or suitable.

In these cases, the application of an organizational fault criterion could lead to questionable outcomes. Indeed, following the logic of organizational fault, a corporation is burdened with a duty of preventive organization that may be interpreted in a particularly broad way. That is, in the aforementioned cases, a corporation may be held criminally liable for the inadequacy of the organization's preventive structures even if a more efficient compliance program could not have been required e*x ante.*

Such a questionable extension of corporate criminal liability could be avoided by recourse to the intuition at the base of the reactive fault criterion, which consists of an *ex post* slippage of the judgment of responsibility: the liability of the corporation could be assessed taking into consideration the adequacy not of its prevention of the offense but of its reaction to it. This article follows such an approach and undertakes the following argumentative steps.

First of all, it is necessary to provide a brief description of the theory of corporate reactive fault as well as to summarize the USA experience in the matter of DPAs and NPAs. Emphasis will be placed on the alignment of pre-trial diversion instruments with the conception of corporate culpability as reactive fault, as well as on the potential distorting effects deriving from such a logic of negotiated justice. Then, a different use of the criterion of reactive fault

[2] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993).

will be proposed with reference to the two aforementioned kinds of problematic contexts; in this regard, the advantages deriving from such a conception of corporate blameworthiness on the objective and on the subjective side of corporate liability will be highlighted.

2 Reactive Corporate Fault

Reactive Corporate Fault is defined as 'unreasonable corporate failure to undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offense by personnel acting on behalf of the organization'.[3] Structurally, this concept of corporate culpability is peculiar in that it considers the corporation's reaction put into practice after the commission of the offense by the individual as the object of the judgment of responsibility.

This conception of fault takes the form of a strategy of allocation of responsibility that is not bound by time, but is related to the dynamic configuration of corporate action. Therefore, the timeframe of the judgment of responsibility is not limited to the time of commission of the offense, or to the previous moment, but is extended to the phase following the commission of the offense. In particular, according to this accountability model, if the commission of an *actus reus* is discovered within the corporation, the corporation itself is required to prepare a compliance report, containing a description of the measures already taken, as well as those to be implemented, in response to the commission of the offense.

Then, it needs to be evaluated whether the reaction is satisfactory. The corporation is guilty in case of reactive policy of non-compliance, that is, if it did not react upon the discovery of the offense, or if its reaction is unsatisfactory. In this case, a system of 'pyramidal enforcement' shall apply. This involves a varied range of sanctions, which, according to the degree of non-compliance for which the corporation is responsible, may extend from informal advice and warnings to corporate capital punishment, that is, liquidation.

3 Deferred Prosecution Agreements: lights and shadows of the implementation of the logic of reactive fault

A practical implementation of the philosophy underlying reactive fault can be found in the USA experience in the field of DPAs and NPAs[4]. Under these pre-trial diversion instruments,

[3] ibid, 48.

[4] These forms of negotiated justice are spreading in other legal systems such as the UK and France. The literature on this subject is very wide; see, for example: Jennifer Arlen, 'Prosecuting beyond the rule of law: corporate mandates imposed through pretrial diversion agreements' (2016) 8 J Legal Analysis 191; Jennifer Arlen and Marcel Kahan, 'Corporate governance regulation through non prosecution' (2017) 84 U Chi L Rev 323; Jennifer Arlen (eds), *Research handbook on corporate crime and financial misdealing* (Edward Elgar Pub 2018); Anthony S Barkow and Rachel E Barkow (eds), *Prosecutors in the boardroom. Using Criminal Law to regulate corporate conduct* (New York University Press 2011); Benyamin Barr, 'Get your hands off my DPA! The proper scope of the judicial supervisory power in deferred prosecution agreements' (2017) 54 Am Crim Law Rev 571; Michael Bisgrove and Mark Weekes, 'Deferred Prosecution Agreements: A Practical Consideration' (2014) 61 Crim LR 416; Lawrence D Finder, Ryan D McConnell and Scott L Mitchell (2009) 'Betting the corporation: compliance or defiance?' (2009) 28 Corporate Counsel Rev 1; Brandon L Garrett, 'Structural reform

a corporation undertakes to fulfill some rehabilitative obligations within a predefined period. In turn, the prosecutor files charges but does not seek conviction (DPAs), or agrees not to file any charge against the corporation (NPAs). These practices of negotiated justice could be potentially interpreted in the *ex-post* logic typical of reactive fault, given that they provide decisive importance to the *post-factum* conduct.

In this regard, it should be pointed out that, pursuant to the 1991 Federal Sentencing Guidelines, a corporation which adopts an adequate compliance program, and which self-reports and is cooperative, is eligible for a reduced fine. However, according to the corporate criminal liability regime which currently prevails in practice[5], a corporation, having proved itself to be compliant *ex post*, can obtain the benefit of radically avoiding the indictment through the use of one of the aforementioned agreements (DPAs or NPAs). Therefore, such tools, by offering an alternative to the criminal trial, seem to put in place the slippage resulting from reactive fault theory. This shifts the judgment of responsibility from an *ex-ante* to an *ex-post* perspective.

As a result of these pre-trial diversion institutes, which are more flexible than the traditional ritual forms of criminal justice, it should be possible to declare more corporations responsible for corporate offenses, and, at the same time, avoid the negative externalities a trial may have, both for the corporation and for the market.

Nevertheless, many grey areas arise regarding the functionality of these practices of negotiated justice. They could be exploited to endorse a too indulgent neo-liberalistic policy, oriented to safeguard the free market capitalism from any interference of the public authority, including the exercise of criminal justice. Through the stipulation of agreements such as DPAs, corporations could remain unpunished for the assessed offenses and perform

prosecution' (2007) 93 Va L Rev 853; Benjamin M Greenblum, 'What happens to a prosecution deferred? Judicial oversight of corporate deferred prosecution agreements' (2005) 105 Colum L Rev 1863; William S Laufer, 'Corporate liability, risk shifting, and the paradox of compliance' (1999) 54 Vand L Rev 1343; William S Laufer, 'Where is the moral indignation over corporate crime?', in Dominik Brodowski et al. (eds), *Regulating corporate criminal liability. Switzerland* (Springer 2014); Nicola Padfield, 'Deferred Prosecution Agreements' (2016) 63 Crim LR 449; Peter Reilly, 'Corporate Deferred Prosecution as Discretionary Injustice' (2017) 5 Utah law review 839; David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Md L Rev 1295. See also, in the Italian literature: Annalisa Mangiaracina, 'Persone giuridiche e alternative al processo: Inel Regno Unito e in Francia' [Corporations and alternatives to the trial: The deferred prosecution agreements in the United Kingdom and in France] (2018) 6 Cass pen 2182; Federico Mazzacuva, 'Justifications and purposes of negotiated justice for corporate offenders: deferred and non-prosecution agreements in the UK and US systems of criminal justice' (2014) 78 J Crim L 249; Rosa A Ruggiero, 'Non prosecution agreements e criminalità d'impresa negli U.S.A.: il paradosso del liberismo economico' [Non prosecution agreements and corporate crime in the U.S.A.: the paradox of economic liberism] (2015) <https://www.penalecontemporaneo.it>; Rosa A Ruggiero, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* [Discretionary choices of the public prosecutor and role of compliance models in prosecuting corporations] (Giappichelli, 2018).

[5] Jennifer Arlen, 'The Failure of the Organizational Sentencing Guidelines' (2012) 66 U Miami L Rev 321.

only apparent reorganization operations, thus not taking – even after the discovery of the offense – concrete actions to implement corporate legality[6].

Moreover, from another perspective, a strong imbalance emerges between the two parts of the agreement. The corporation, in order to avoid the trial, might be forced to accept every kind of claim coming from the prosecutor; in turn, the prosecutor could be tempted to invade the field of business strategy planning[7]. These practices are also carried out without judicial scrutiny. Judicial control, totally lacking with regard to NPAs, may result in a merely formal supervision in relation to DPAs.

From the preceding critical discussion of pre-trial diversion tools, a crucial issue concerning corporate liability thus emerges for future academic reflection and criminal policy: it is necessary to reflect on how to more correctly combine the logic of negotiation with criminal justice, so as to elaborate a more efficient liability model based on a reasonable balance between the *ex-ante* and the *ex-post* dimension.

Within this theoretical horizon, specific considerations will now be developed in order to elaborate an acceptable balance between the preventive logic of organizational fault and the restorative logic of reactive fault.

4 The potential ambiguity of organizational fault

Organizational fault owes its success to its ability to engage corporations in the prevention of the risk of crimes by imposing on them the duty to adopt compliance programs. Nevertheless, this model has an intrinsic theoretical ambiguity, which, upon application, may lead to a questionable extension of corporate liability; indeed, under the organizational fault theory, a corporation is obligated to a significantly wide duty of preventive organization. In short, the corporation is required to control what might be neither foreseeable, nor avoidable, by individuals[8].

Such a theoretical construction is justified by the fact that the cognitive and operational resources of corporations are assumed to be greater than those available to individuals. This means that the risk, even when unpredictable for the individual, can instead be neutralized by the corporation through compliance programs aimed at avoiding harmful or dangerous consequences of the enterprise activity.

This assumption, even if reasonably well founded, has the potential drawback of obliging corporations to a duty of diligence involving substantially unlimited content: the

[6] Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (n 4).

[7] Garrett, 'Structural reform prosecution' (n 4).

[8] See, for example, Richard S Gruner, *Corporate crime and sentencing* (Michie 1994) 58: 'Although many of the criminal consequences of corporate policy and operating practice choices are not foreseeable, they are often detectable and controllable through active monitoring and curative responses'; Giorgio Marinucci, 'Innovazioni tecnologiche e scoperte scientifiche: costi e tempi di adeguamento delle regole di diligenza' [Technological innovations and scientific discoveries: costs and time of adaptation of the diligence rules] (2005) 1 RIDPP 29, 56.

corporation may be charged with any risk concerning its business activity. As mentioned in the introduction, such an inconvenience is particularly evident in two kinds of circumstances: firstly, cases of vanguard industrial activities conducted by large enterprises during conditions of scientific uncertainty and involving advanced technologies (in these contexts, corporations must face the problem of updating their preventive organizational systems in response to scientific and technological advancements); secondly, and more generally, cases in which, legally, rules of conduct to which corporations can confidently refer have not yet been established, that is, no consolidated precautionary rules can guarantee to the corporation the suitability of the adopted compliance program.

5 Regulatory inadequacy of organizational fault in contexts of scientific-technological uncertainty...

The first of the aforementioned cases may be exemplified as follows: the production and marketing of GMOs (Genetically Modified Organisms), the human health and environmental effects of which still lie at the center of much debate within the international scientific community; the production of pharmaceutical products which may provoke harmful side effects not yet known with scientific certainty; more generally, industrial activities in which potentially pathogenic agents are used, the harmfulness of which to the environment and to the health of workers – as well as the rest of the population – has not yet been assessed with scientific certainty.

A corporation operating in such contexts is likely to have greater financial and organizational resources than those available to individuals. Therefore, it can better cope with scientific progress and related technological innovations, and consequently, it can conduct a proper assessment and management of risk. Nevertheless, the corporation is required to deal with sources of risk the harmful potential of which is not known with scientific certainty and which may produce damages that available technologies cannot prevent. This means that it might be considered unreasonable to require the adoption of compliance programs aimed at preventing events that are, as yet, not predictable.

Imagine, for example, a case in which a worker, who during the production process is exposed to a substance about which there is no scientific certainty of danger and contracts a disease which only in retrospect, with the development of scientific knowledge, can be demonstrated as being causally linked to that pathogenic substance. Or, alternatively, the case of a consumer who suffers ill-health after consuming a food product made with GMOs, about which, currently, potential risks are only suspicions, and are therefore not yet supported by any scientific certainty. Or finally, to the case of a patient who complains of damages after taking a newly-developed drug.

In such cases, the application of the criterion of organization fault would charge the corporation with the harmful event for not having adopted the organizational measures necessary to prevent the harm. This outcome would be based on the assumption that

the corporation can be reasonably burdened with a duty of diligence far larger than that owed by individuals. However, this overlooks the point that for corporations, as well as for individuals, there is no scientific background knowledge and/or related technological applications which would make it possible to comprehend the actual dangerous nature of the source of risk and consequently to foresee and avoid the harmful event. The application of the criterion of organization fault would thus end up imposing an all-encompassing duty of preventive organization on the enterprise and determining a potentially unlimited extension of its responsibility.

6 …and, more generally, in case of lack of consolidated diligence parameters

Secondly and more generally, the application of the model of organizational fault reveals the aforementioned drawback of an unlimited extension of corporate liability in all problematic hypotheses where there is a lack of specific rules of conduct that can usefully guide, *ex ante*, the enterprise in fulfilling the duty of preventive organization.

If at the time of the fact there were no precautionary rules which could function as guidelines for the adoption of compliance models, the corporation cannot legitimately be declared liable for adopting an inadequate compliance model, and thus also for not preventing corporate offenses eventually committed within it. Importantly, this is the case because in the legal system there were no diligence parameters to which the corporation could refer in order to identify the most suitable organizational measures to be implemented.

For example, consider the introduction of a new offense in the legal system, and then imagine that, following such legislative novelty, the same offense is committed within an enterprise. This enterprise could theoretically be declared liable for the fact by way of organizational fault, that is to say, for not having adopted a suitable compliance model to prevent that offense. Nevertheless, in doing so, we would overlook the fact that in the aftermath of such a legislative reform, probably no precautionary rules of conduct had yet emerged to which the corporation could refer with certainty, and which could be used for the preparation of suitable organizational models to face the risk of the commission of the offense in question. Therefore, in consideration of the *ex-ante* lack of consolidated diligence parameters, the automatic application of organizational fault criterion risks leading to the affirmation of a substantially objective liability.

To sum up, when the adoption of a suitable compliance model to avoid the offense cannot be required – either because at the time of the fact there was scientific and technological uncertainty concerning the source of risk to be faced or because there were no specific rules of conduct, the observance of which could allow the corporation to adopt an adequate preventive organization – then, by applying the organizational fault criterion, corporate liability would function as a protective 'umbrella' to cover any risk potentially related to the business activity. Such an outcome should be avoided for two main reasons.

First of all, regardless of the differing choices adopted in the comparative horizon when introducing corporate criminal liability, the responsibility of corporations should be

recognized to have a punitive connotation; therefore, the same guarantees and principles traditionally affirmed for individuals should also be applied to corporations. Although the artificial nature of corporations may legitimize an attenuation of the aforementioned guarantees, these same guarantees cannot be totally disregarded to satisfy the punitive needs of social defense.

Furthermore, an unlimited punitive responsibility would have deleterious effects, not only on the observance of the fundamental guarantees but also on the stability of the socio-economic system. An indefinite extension of corporate liability would end up unjustifiably restricting freedom of enterprise with a potentially devastating impact on economy and society.

Therefore, in the light of the aforementioned critical issues arising from a too wide extension of the applicative scope of organizational fault, the concept of applying the intuition behind the reactive fault criterion, consisting of an *ex post* slippage of the judgment of corporate liability, will now be proposed.

7 Reactive fault as possible remedy

Under organizational fault theory, the reproach of the corporation is interpreted in a static way, as anchored to the conduct adopted before the commission of the offense; whereas, reactive fault theory implies a dynamic conception of responsibility, that is, as related to the diachronic development of the reaction to the offense committed by the individual. This dynamic connotation of reactive fault could be useful in regulating the aforementioned problematic cases.

First of all, the hypothesis of the occurrence of harmful events related to productive activities carried out in contexts of scientific-technological uncertainty will be considered. Taking account of these cases again in light of organizational fault, it should be stressed that, within this logic, the adequacy of compliance programs is to be assessed through an *ex ante* judgment. This means a corporation could be reproached for its organizational deficiencies if, in configuring its compliance programs, it culpably disregarded alarm signals which, at the time of the fact, revealed the possible symptomatology of the harmful event.

However, in these contexts of scientific and technological uncertainty, it is quite possible that the damaging event is not due to a culpable organizational defect. Rather, the damaging event could be the indicator of a source of risk, which was latent until the production of the damage, and which could not be foreseen by the corporation. In this case, the enterprise could not legitimately be held responsible for the inadequacy of its preventive organization; nevertheless, its liability may be reasonably assessed regarding its reaction to the risk signal.

The injurious event, indeed, can be interpreted as a warning signal, which, insofar as it increases knowledge about the potential offensive of a certain risk factor, burdens the corporation with the duty to control the emergent source of risk and to avoid the recurrence of damage. So, in cases of failure in reaction or inadequate reaction, the enterprise can be considered responsible by way of reactive fault. Consequently, given the importance of

scientific and technological advancements, reactive fault could represent a new frontier in corporate criminal liability.

More generally, the category of reactive fault could be usefully applied when there are no *ex ante* precautionary provisions able to function as points of reference for the fulfillment of the duty of preventive organization. In these cases, if an offense is committed within the enterprise, the declaration of corporate liability by way of organizational fault may be illegitimate, and this is precisely because the corporation could not be expected to act differently from how it acted in reality, in consideration of a lack, at the time of the fact, of certain diligence parameters to which the corporation could conform its conduct.

At the same time, however, the corporate offense, once discovered, marks the emergence of new and more adequate rules of conduct. The commission of the offense within the enterprise, indeed, reveals profiles of unsuitability of the adopted compliance program, so that it becomes possible for the corporation to learn from its mistakes and adapt its organization to the factors of crime-risk brought to light by the commission of the corporate offense. In this sense, then, the dynamic component of reactive fault could be usefully called upon in all cases in which the canon of organizational fault cannot yet be applied due to the lack of consolidated precautionary parameters.

By shifting the judgment of responsibility from the *ex-ante* dimension to the *ex post* dimension, it is possible to avoid declaring the corporation responsible for a fact that *ex ante* was neither foreseeable nor avoidable and, at the same time, accompany the corporation in the process of individuation of rules of conduct; rules, which only after being consolidated, will be able to be considered, if violated, as the basis of the reproach towards the corporation by way of organizational fault in case of reiteration of the offense.

In particular, it is through the duty of the corporation to update its compliance models that reactive fault can be usefully applied as an efficient criterion of corporate criminal liability. Indeed, a general requirement that the compliance model must have to be considered adequate is that it must be adjusted to the risk factors emerging within the enterprise. This means that when the commission of an offense is discovered, but the corporation cannot be legitimately considered liable for it by way of organizational fault, it may be possible to charge the corporation with the fact of not having fulfilled its reactive duty of updating the compliance models in cases where it did not remedy the emergent organizational gaps.

After having defined in this way the regulative usefulness of reactive fault in the problematic cases at issue, it must now be emphasized that the criterion at issue is advantageous, both on the objective and on the subjective side of corporate liability.

7.1 Advantages of the reactive fault approach on the objective side of corporate punitive paradigm…

From the objective point of view, that is, with regard to the definition of the objective standard of diligence that the corporation is required to comply with, the reactive fault criterion allows the balancing of repressive demands and criminal guarantees. In the

reactive phase, it is possible to require the observance of a higher standard of care than the one in force *ex ante*; however, at the same time, such a high precautionary standard is in compliance with traditional guarantees, in particular, with the principle of non-retroactivity.

More specifically, in order to define the content of the duty of care in the *ex-post* phase, the precautionary parameters emerging after the fact must be taken into account. As already mentioned, in the problematic contexts in question, characterized by the *ex-ante* absence of sufficiently certain precautionary provisions, the commission of the corporate offense marks the emergence of new and more adequate rules of conduct: it highlights the nature of the source of risk-offense to be faced as well as the aspects of unsuitability of the adopted organizational model. The definition of the duty of care in the 'reactive phase', therefore, should be related to evolving new and more appropriate precautionary standards following the commission of the offense. In this way, the diligence threshold to be complied with increases compared to the 'prevention-phase'.

At the same time, such an increase in the standard of care takes place in full compliance with the classical guarantees of criminal justice, with particular reference to the principle of non-retroactivity, to the extent that what is assessed in the light of this higher standard of *ex-post* diligence is the reaction, and not the prevention. On this point, it should be stressed once more that if the criterion of organizational fault were to be applied to the problematic cases at issue, then, given the risk of a particularly extensive interpretation of this canon, the corporation would probably be charged with the failure of the duty to prevent the corporate offense. Then, we would disregard the fact that no precautionary parameters which could guide the conduct of the corporation were available *ex ante*.

This means that, even if, within the perspective of organizational fault, the object of the charge is identified in the failure to prevent the offense, the negligent connotation of such conduct would be unduly assessed, not according to the standards of diligence in force at the time of the fact, but retroactively, by applying precautionary parameters which have become available only due to the subsequent scientific-technological development, or the like, which occurred after the commission of the fact. This drawback can instead be avoided by applying the reactive fault criterion which implies an *ex post* postponement not only of the standard of diligence but also of the object of the judgment of liability.

Within the perspective of reactive fault, it is indeed true that corporate liability is assessed using parameters based on standards of diligence made available by scientific-technological progress, or, more broadly speaking, which emerged from the evolution of the precautionary procedures after the commission of the corporate offense. Nevertheless, the use of such parameters does not imply a violation of the principle of non-retroactivity, insofar as it is applied to judge the corporate guilt in the reaction phase and not in that of prevention.

7.2 … and on the subjective side

On the subjective side of corporate responsibility, it should be kept in mind that, historically, the issue of recognizing corporations as truly culpable has been at the center of a heated

debate which has never ceased and is still considered an insurmountable obstacle to the introduction of the corporate criminal liability in some legal systems, such as in Germany.

An in-depth consideration of this profile obviously goes beyond the more limited borders of this paper; nevertheless, the idea will now be advanced that in the problematic cases at issue, the reactive fault could allow a better appreciation of the subjective dimension of corporate responsibility by allowing recognition of the 'personal' possibility of the corporation to 'dominate' the fact.

On this point, the emphasis should once more be put on the circumstance that, with reference to the hypotheses of damaging events occurring in conditions of scientific uncertainty, the appearance of the damage marks an increase in the experience and in knowledge regarding the potential offensive nature of the source of risk to be faced. In the same way, more generally, in cases where consolidated diligence standards are lacking, the commission of a corporate offense within the enterprise brings out new knowledge and experience regarding the nature of the source of risk, the inadequacy of the adopted compliance model, and the corrections to be made to remedy this inadequacy.

Taking account of this within the perspective of reactive fault it becomes possible to charge the corporation with a fact that is fully covered by a coefficient of guilt: the corporation is considered responsible, not for failing to avoid an unpredictable event, but for disregarding this event as an alarm signal.

Thus, a kind of *post-factum* culpability can be identified in the circumstance in which the corporation has not learnt from the offense, that is to say, it has omitted to adapt its compliance models to the *surplus* of knowledge and experience concerning that particular source of risk; surplus, in this sense, emerging from the commission of the offense.

8 An open question: How to find the balance between organizational fault and reactive fault?

In conclusion, this paper has proposed calling upon the category of reactive fault differently from the way in which it is evoked in the USA experience on pre-trial diversion. In the latter regulatory model, the *ex-ante* logic of organizational fault is completely replaced by the *ex post* logic of reactive fault. This means that the corporation that proves to be compliant in the reactive phase can evade trial without having adequately fulfilled its *ex ante* preventive obligations. If implemented on these terms, the logic of reactive fault could be distorted in two opposite ways: unduly indulgent one and illegitimately punitive the other.

On the one hand, it is possible that the corporation, responsible for organizational deficiencies committed *ex ante*, opportunistically adopts a *post-factum* collaborative behavior so as to avoid the conviction for its preventive non-fulfillment. On the other hand, there is the risk that the corporation, in order to avoid the trial, accepts to sign a pre-trial agreement and therefore submits itself to the requests made by the prosecutor, even when the evidence gathered by the prosecution could not withstand the trial and would be insufficient as a basis for a conviction.

Therefore, it is necessary to reflect upon more appropriate mechanisms for integration of this logic of negotiation into criminal justice, so that a more efficient liability model may be elaborated on the basis of a balanced relationship between organizational fault and reactive fault. Following this logic, the proposal advanced here aims to apply reactive fault as a regulatory criterion both in contexts of scientific-technological progress and, more generally, in problematic cases in which consolidated diligence parameters are lacking.

Selected Literature

Arlen J, 'Prosecuting beyond the rule of law: corporate mandates imposed through pretrial diversion agreements' (2016) 8 J Legal Analysis 191

Barkow AS and Barkow RE (eds), *Prosecutors in the boardroom. Using Criminal Law to regulate corporate conduct* (New York University Press 2011)

Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (Cambridge University Press 1993)

Garrett BL, 'Structural reform prosecution' (2007) 93 Va L Rev 853

Laufer WS, 'Corporate liability, risk shifting, and the paradox of compliance' (1999) 54 Vand L Rev 1343

Laufer WS, 'Where is the moral indignation over corporate crime?' in Dominik Brodowski and others (eds), *Regulating corporate criminal liability* (Springer 2014)

Marinucci G, 'Innovazioni tecnologiche e scoperte scientifiche: costi e tempi di adeguamento delle regole di diligenza' [Technological innovations and scientific discoveries: costs and time of adaptation of the diligence rules] (2005) 1 RIDPP 29

Mazzacuva F, 'Justifications and purposes of negotiated justice for corporate offenders: deferred and non-prosecution agreements in the UK and US systems of criminal justice' (2014) 78 J Crim L 249

Ruggiero RA, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* [Discretionary choices of the public prosecutor and role of compliance models in prosecuting corporations] (Giappichelli 2018)

Tiedemann K, 'Die «Bebußung» von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] NJW 1169

THE IMPACT OF COMPLIANCE ON LIABILITY AND SENTENCING OF CORPORATIONS – A COMPARABLE APPROACH BETWEEN GERMANY AND THE US

By Melena Krause[*]

Abstract

There has been some debate on how compliance efforts should be taken into account within the system of administrative liability and in sentencing of corporations under German law. Recently, also the German Federal Court of Justice held that compliance measures can have an impact on the sentencing of corporations. But still questions arise on how compliance efforts can and must be taken into account in terms of assessments of corporate liability and in sentencing. Therefore, it is crucial to create legal requirements for compliance measures. Since corporate criminal liability is a basic principle of the American legal system, the US also established Federal Sentencing Guidelines in 1991, stating requirements for compliance measures in order to be considered effective. A comparable approach may not only benefit analysis of the impact of compliance within the existing German system, but will also contribute to establishing further rules for this field within corporate liability in Germany.

1 Introduction

Whereas proceedings against natural persons are aimed at punishing wrongdoing which occurred earlier, the underlying principle of proceedings against corporations – may they be criminal or administrative – is to prevent further wrongdoing and improve future corporate behavior.[1] This, very much incentive-based approach, is the reason for the importance of compliance within proceedings against legal persons.

Even though the German legal system does not know either corporate criminal liability or binding regulations on compliance,[2] German companies are increasing their efforts on compliance. On average, 75 % of all Corporations with 500 and more employees have implemented compliance programs depending on their size.[3]

The idea of compliance is to detect and prevent violations of law and to create a corporate governance.[4] Thus, companies will set up compliance departments, employ compliance-

[*] PhD Candidate at the University of Leipzig (Professor Hoven).

[1] For the US, see Sara Sun Beale, ´Die Entwicklung des US-amerikanischen Rechts der strafrechtlichen Verantwortlichkeit von Unternehmen' (2014) 126 ZStW 27; for Germany, see Alexander Meyberg, ´§ 30' in Jürgen-Peter Graf (ed), *BeckOK-OWiG* (18th edn, Beck 2018) at 10f.

[2] Except for the credit sector, § 14 GeldwäscheG or § 33 WpHG.

[3] PricewaterhouseCoopers, *Wirtschaftskriminalität 2018*, 24, <https://www.pwc.de/de/risk/pwc-wikri-2018.pdf> accessed 23 February 2019.

[4] Richard Gruner, *Corporate Crime and Sentencing* (The Michie Company 1994) 817; Christoph Hauschka, Klaus Moosmayer and Thomas Lösler, 'Grundlagen zu Compliance' in Christoph Hauschka, Klaus Moosmayer and Thomas Lösler (eds), *Corporate Compliance* (3rd edn Beck 2016) para 1 at 4.

officers, improve their communication-structure and implement advanced training sessions for their staff. On average, German corporations with more than 1000 employees spend EUR 1,34m on compliance each year.[5] Due to a lack of regulations on how to create compliance programs, the implementation of these programs varies significantly and causes legal uncertainty within the economy.

Because of the much earlier implementation of corporate criminal liability in the US-American legal system, the question on the impact of compliance on liability and sentencing of corporations has been discussed in depth and has found its way into case-law and regulations. But it remains to be seen how effective these regulations are to avoid corporate wrongdoing.

Therefore, I want to focus on the benefits of compliance measures taken by a company in a doctrinal and economical way in this contribution.

2 The impact of compliance programs on the liability of corporations

2.1 Excluding liability through compliance under German law

Because of the constitutional principle of guilt, only natural persons can be held criminally liable under German law.[6] As a person, you are free in your decision to act in accordance with the law or against the law. But since a company cannot make a subjective decision, nor can it act itself – only by the natural persons united in it –, German criminal law does not recognize any corporate criminal liability. Germany has a system of accessorial administrative liability of corporations for criminal or administrative offences of their management staff based on section 30 of the Administrative Offences Act. Fines can be imposed on corporations, if anyone who is able to act on behalf of the corporation commits a criminal offence or misdemeanor that violated the obligations of the corporation or enriched the corporation. Within the question whether or not compliance measures can or must affect corporate liability, the connecting crime or misdemeanor is decisive.[7] The most important misdemeanor committed by a high-managerial agent, that can cause corporate liability according to section 30 is section 130 of the German Administrative Offences Act.[8] Section 130 describes the breach of supervisory duties by management personnel and thus enables the ability to impose fines against the corporation in the event of a breach of supervisory duties committed by the management persons acting on behalf of the corporation.[9] The provision does not specifically stipulate to the employer how to organize the business, but merely requires the fulfilment of supervisory duties. The question arises

[5] PricewaterhouseCoopers (n 3) 28.

[6] Stating the prevailing opinion. The continued, broad discussion on this topic cannot be represented here.

[7] Marc Engelhart, *Sanktionierung von Unternehmen und Compliance* (2nd edn, Duncker & Humblot 2014) 402.

[8] Since there are not many important reference points: § 91 Abs. 2 AktG, § 25a KWG, § 33 WpHG or § 9 GwG are not subject to administrative or criminal penalties.

[9] Felix Rettenmaier and Lisa Palm, ‘Das Ordnungswidrigkeitenrecht und die Aufsichtspflicht von Unternehmensverantwortlichen‘ [2010] NJOZ 1414, 1415.

which efforts of the management can be considered sufficient and therefore not accountable according to section 130?

Due to the wording of the provision, the standard requires a 'proper supervision' capable of preventing or significantly complicating the infringement. According to the German Federal Court of Justice the extent of supervisory duty can be derived from the 'type, size and organization of the business, the different possibilities for monitoring, but also from the variety and importance of the regulations to be observed and the vulnerability of the business to violations of these provisions, in particular those errors which have already been made in the past'.[10] Unfortunately, the result of such jurisprudence is an inconsistent application of administrative law, because of case-by-case decisions and legal uncertainty. Surveys show that compliance has a positive effect on liability and can lead to an abatement of prosecution.[11] But since the prosecution of administrative offences is not mandatory, studies are unable to provide cases where courts considered compliance systems as sufficient to exclude liability. Corporations consider compliance programs to rather have an effect on the sentencing and on the decision to refrain from prosecution.[12]

2.2 Compliance cannot save US-American corporations from criminal liability

Also the American idea of corporate liability follows vicarious liability and thereby focuses on the wrongdoing of an employee.[13] Hence, it is most striking that a corporation may be liable even if the individual offender cannot be detected.[14] Consequently, corporate liability follows also the idea to punish supervisory or organizational fault. By applying this principle strictly, compliance measures should be able to exclude liability.

Contrarily, it turns out that compliance has no influence on the liability of the company. Corporations will be held liable for crimes even if the action is against the corporate policy – which contradicts to the idea of liability because of supervisory or organizational fault.[15]

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[10] BGHSt 9, 319 (323), NJW 1956, 1568; BGHSt 25, 158 (162 f.), BGH [1973] NJW 1511; BGH [1985] wistra 228; KG [1985] wistra 205.

[11] PricewaterhouseCoopers (n 3) 56–57.

[12] PricewaterhouseCoopers (n 3) 56–57.

[13] In *New York Central Railway Co. v United States*, 212 US 481 (1909) the US Supreme Court transferred the responded superior doctrine – which existed in tort law – to criminal law, thereby finally establishing the criminal liability of companies for intended crimes. According to this principle, corporations can be held liable for wrongdoings of their employees committed in the scope and nature of their employment and with the intent to – at least in part – benefit the corporation. The legal responsibility of a natural person is transferred to a legal person.

[14] *Re WorldCom, Inc. Securities Litigation*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005); *U.S. v American Stevedores, Inc*., 310 F.2d 47 (2nd Cir. 1962), cert. den., 371 U.S. 969 (1963); *U.S. v General Motors Co.*, 121 F.2d 376 (7th Cir. 1941), S. 411, cert. den. 314 U.S. 618 (1941); Beale (n 1) 34.

[15] This question was first raised in *Holland Furnace Co. v United States,* 158 F.2d 2 (6th Cir. 1946), assuming a possibility to exclude responsibility through Compliance measure-s to limit the scope of the *respondeat superior*-doctrine; but the opinion got denied in: *United States v Hilton Hotels Corp*., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 938 (1973): Accordingly, the court sustained a jury instruction stating that '[a] corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to

According to US-American law, internal compliance measures can therefore only lead to refraining from a conviction or to a reduction of the penalty.

3 The impact of compliance programs on the allocation of the sentence

3.1 Impact of compliance without clear guidelines within the German law

The possible fine imposed under section 30 of the German Administrative Offences Act includes an absorbing and a punitive part. Whereas the punitive part is limited to a maximum of EUR 10m by law, the main goal of the fine is the absorption of the benefit gained by the corporation through misconduct. The amount of the benefit shall become the lower limit of the fine and can exceed the limit of EUR 10m. The criteria within the calculation of the punitive part of the fine are (a) the significance of the committed offence, (b) the accusation against the offender – meaning the person who committed the offence, not the corporation[16] – and (c) the financial circumstances of the offender – here the corporation. These criteria illustrate that there is no connection to the accusation against the corporation and thereby, compliance programs might not need to be taken into account within the calculation of the fine by law.

It is discussed in academia how compliance programs can be taken into account within the allocation of a fine according to section 30.[17] In this context, it is perceived as a problem that not the accusation against the corporation, but the accusation against the natural person is crucial for the measurement of the fine. Since legislation and courts emphasize particularly the impact of compliance within the allocation of the fine against corporations according to section 30, it remains unclear how compliance has to be taken into account.[18] This is only possible if the provision is understood to include factors that imply organizational fault of

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the corporation's stated policies'; *United States v Ionia Management SA,* 555 F.3d 303, 310 (2d Cir. 2009); *United States v Potter*, 463 F.3d 9, 26 (1st Cir. 2006); see also USAM § 9-28.800(B); critical Charles Walsh and Alissa Pyrich, 'Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul' (1995) 47 Rutgers L Rev 663; Joel Androphy, Richard Paxton and Keith Byers, 'General Corporate Criminal Liability' (1997) 60 Texas Bar Journal 122.

[16] BGH, judgment of 09.05.2017 – 1 StR 265/16 (para 112) = [2017] BeckRS 1145578; BGH, decision of 8.12.2016 – 5 StR 424/15 = [2016] BeckRS 110754 = [2017] wistra 242 (243) with a case note by Carsten Wegner; BGH, judgment of 14.02.2007 – 5 StR 323/06 = [2008] NStZ-RR 13 (15); Ulrich Sieber, ´Compliance-Programme im Unternehmensstrafrecht' in Ulrich Sieber, Gerhard Dannecker, Urs Kindhäuser, Joachim Vogel and Tonio Walter (eds), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (Carl Heymanns Verlag 2008) 472; Steffi Kindler, *Das Unternehmen als haftender Täter* (Nomos 2008) 145; Margarete Gräfin v. Galen and Sina Maas, ´Ahndungsteil der Geldbuße' in Werner Leitner and Henning Rosenau (eds), *Wirtschafts- und Steuerstrafrecht (*Nomos 2017) § 30 at 44; Engelhart (n 7) 434.

[17] Depending on the question whether to understand the concept of section 30 as vicarious liability (only) or (to include) collective failure, see Sieber (n 16) 471; Simone Kämpfer, ´Sanktionenausschließende und -mildernde Wirkung von Compliance-Programmen de lege lata' in Heiko Ahlbrecht, Matthias Dann, Helga Wessing, Helmut Frister and Dennis Bock (eds), *Unternehmensstrafrecht. Festschrift für Jürgen Wessing* (Beck 2015) 59.

[18] Following this strict understanding of section 30, supervisory or organizational fault – the downside of compliance programs – only be taken into account in the case of a misconduct according to section 130, see Joachim Bohnert, Benjamin Krenberger and Carsten Krumm, 'Verbandsgeldbuße' in Benjamin Krenberger and Carsten Krumm (eds), *Ordnungswidrigkeitengesetz* (5th edn Beck 2018) § 30 at 41.

the corporation as well as individual fault through the connecting crime or administrative offence.[19]

While the problem of whether and how compliance measures affect the allocation of the association's fine is already widely discussed within literature, awareness of the problem has found its way into the supreme court jurisprudence only recently. In 2017, the Federal Court of Justice expressly took compliance measures into account within the calculation of the fine and found that both – the previous and the new compliance measures that have been implemented as a reaction to the offence – can have a mitigating or increasing effect on the fine. Unfortunately, the senate dealt with the requirements which have to be met by compliance measures to a very limited extent: Compliance programs must be designed to 'prevent legal violations'. In the context of the evaluation of the behavior after the misconduct occurred, it must become apparent that the goal of the introduction of new compliance measures or the improvement of existing measures is the prevention of further offences ('in any case clearly complicates in the future').[20]

Previously to the above-mentioned ruling, courts only stated principles for the measurement of the fine. Since the law is very vague on how to measure fines, a deeper analysis of the impact of compliance within the case law would be desirable in order to create legal certainty and improve the incentivizing effect of compliance programs in Germany.

3.2 Existing guidelines in US-American law

The US Sentencing Commission introduced the Federal Sentencing Guidelines in 1991, drafting a separate chapter on sentencing for corporate liability.[21] However, the application of the guidelines within the criminal trial is not mandatory but merely a recommendation.[22]

In contrast to the penalty rules on the liability of natural persons, the rules on the liability of corporations include other mitigating and increasing factors.[23] The leading idea is to create incentives for companies to act lawfully.[24] To this end, they contain high (deterrent) penalties on one hand, and opportunities to reduce these penalties through compliance programs on the other.[25] As they also contain a description of an effective compliance program,[26] they are

[19] Sieber (n 16) 471; Engelhart (n 7) 434; Kämpfer (n 17) 59; similarly Klaus Rogall, ´Bemessung der Geldbuße´ in Wolfgang Mitsch (ed), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (5th edn Beck 2018) §30 at 134.

[20] BGH, judgment of 09.05.2017 – 1 StR 265/16 para 118 = [2017] BeckRS 114578.

[21] Chapter 8 of the Federal Sentencing Guidelines 2016, <https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8> accessed 18 December 2018.

[22] *United States v Booker*, 543 U.S. 220 (2005); Ellen Podgor, 'Sentencing of Organizations' in Ellen Podgor, Peter Henning, Jerold Israel and Nancy King (eds), *White Collar Crime* (West 2013) 772.

[23] Podgor (n 22) 772.

[24] Introduction of Chapter 8 of the Federal Sentencing Guidelines 2016; Podgor (n 22) 771.

[25] Podgor (n 22) 771f.

[26] Requirements that a compliance program has to meet to be considered as effective according to 8C2.5(f) of the Federal Sentencing Guidelines 2016 are regulated in 8B2.1 of the Guidelines.

of great importance not only within the judicial sentencing process. In addition, they provide science and practice with inspiration for a good corporate organization.[27]

The punishment is based on the severity of the infringement and the culpability of the company. The guidelines provide a points system for calculating the fine: The fine is calculated by determining a 'base fine', which is then multiplied by culpability factors defined in the guidelines. The company's culpability is measured according to six factors, including the existence of an effective compliance system.[28]

Whereas factors like (1) tolerating illegal conduct within the company, (2) a history of similar acts, (3) violation of previously imposed currency requirements or other court orders and (4) obstruction of justice will increase the fine, (4) the existence of an effective compliance and ethics program and (5) the improvement of compliance measures, which the corporation takes as a result of the act, will lead to a decrease of the sanction. Such improvement includes, in particular, cooperation with the authorities by voluntarily reporting the infringement and assuming responsibility for wrongdoings.[29] Thus, compliance programs have an immense effect on the sentencing of corporations according to the Federal Sentencing Guidelines.

The guidelines provide a reduction of the culpability score by three points if the company had an effective compliance system at the time of the violation. One point can be translated into 20 % according to the table. As a result, a reduction of three points means that the upper and lower limits for the fine can be reduced by 60% by setting a lower multiplier within the calculation of the fine range.[30]

However, in 2016, only one company (out of 47 convicted companies this year) met the conditions for an effective compliance program and received a reduction of the fine. Statistically, the reduction of penalties by reducing the culpability factor due to an effective compliance system is very rarely applied overall.[31]

There are two main reasons for the failure in application practice:[32] one is the limited scope of the reduction of the fine. Compliance programs should not benefit the company if it becomes aware of the violation, but reports to the authorities only after an unreasonably long period of time.[33] The voluntary disclosure is a prerequisite for companies to be able to

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[27] Ethics Resource Center Report, The Federal Sentencing Guidelines for Organizations at twenty years (2012) <https://www.theagc.org/docs/f12.10.pdf> accessed 18 December 2018; Podgor (n 22) 772.

[28] 8C2 5(f) Federal Sentencing Guidelines 2016.

[29] 8C2 5(b)–(g) Federal Sentencing Guidelines 2016.

[30] Gruner (n 4) 596; Michael Nagelberg, Christopher Balser, Samuel Ford and Dante Frisiello, 'Corporate Criminal Liability' (2017) 54 American Crim L Rev 1104.

[31] U.S. Sentencing Commission's Interactive Sourcebook 2016, Table 54, < https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table54.pdf> accessed 23 February 2019.

[32] Comprehensively Jennifer Arlen, 'The failure of the Organizational Sentencing Guidelines' (2012) 66 U Miami L Rev 325f.

[33] 8C2 5(f)(2) Federal Sentencing Guidelines 2016.

benefit from their compliance measures within the framework of the sentencing. Another exception to the scope of application is the participation of high-level personnel in the infringement. In this event, there is an enforceable presumption that the compliance system was not effective in the sense of the guidelines. If the assumption cannot be refused, the company is also denied the reduction of the culpability score.[34] The second reason is that statistics do not take into account out-of-court settlements. In deciding whether or not to conclude such a settlement, an effective compliance system before and after the misconduct plays an important role.

The reduction of the culpability score is even greater if the company agrees to cooperate after the incident. This means that the behavior of the corporation after the incident – not an internal restructuring of the company, but an external cooperation with the authorities – has great importance for the sentencing and shows that the detection of already committed wrongdoing is equally important as the prevention of future crimes within the intention of compliance programs.[35]

If the company reports the infringement in full to the competent authorities before disclosure of the infringement or a government investigation is imminent and as soon as the company becomes aware of the infringement, the score should be reduced by five points. The company is also required to cooperate fully with the authorities and to assume responsibility for the actions accused.[36] However, none of the 47 companies convicted in 2016 reported the incident to the authorities and benefited from the five-point reduction.[37]

A reduction of two points in the culpability score will be rewarded if the company fully participates in the state investigations during the investigation and assumes responsibility for criminal conduct.[38] The guidelines define full cooperation as the publication of all information known to the company and the reporting of specific criminal conduct. This does not mean the reporting of individual misconduct, but rather the reporting of corporate misconduct.[39] If the company is not fully involved in the investigation, but pleads guilty before the trial begins and admits its participation and involvement in the crime, this will reduce the culpability score by one point.[40] In 2016, 29 out of 47 companies convicted under the guidelines took advantage of this two-point reduction and fully cooperated with the authorities. 12 of the 47 companies only took responsibility for the criminal conduct, which led to a reduction of one point. Only 6 of the 47 companies did not cooperate at all with the state authorities.[41]

[34] 8C2 5(f)(3)(B) Federal Sentencing Guidelines 2016.
[35] 8C2 5(g)(1)–(3) Federal Sentencing Guidelines 2016.
[36] 8C2 5(g)(1) Federal Sentencing Guidelines 2016.
[37] U.S. Sentencing Commission's Interactive Sourcebook 2016 (n 31) Table 54.
[38] 8C2 5(g)(2) Federal Sentencing Guidelines 2016.
[39] 8C2.5 Application Note 13 Federal Sentencing Guidelines 2016.
[40] 8C2 5(g)(3) Federal Sentencing Guidelines 2016.
[41] U.S. Sentencing Commission's Interactive Sourcebook 2016 (n 31) Table 54.

Once again, the question arises why companies are not taking advantage of the possibility of reducing the culpability score by five points and the regulation therefore does not have the intended incentivizing effect in practice. And once again, the convincing reasons are the limited scope of the penalty-reduction and the much more attractive out-of-court settlements. In cases where companies voluntarily and completely report their misconduct to the authorities and then cooperate with the authorities, there is no conviction at all. The figures given here only include the convictions of companies in accordance with Chapter 8 of the Sentencing Guidelines. Companies that have reached an agreement with the authorities and thus escaped conviction are not shown. Full disclosure and admission of misconduct entails considerable risks for the company. Moreover, there is still the possibility that the authorities would not know about the misconduct without the company's own admission.[42] Additionally, as long as the company is not prepared to admit its guilt, disclosure to the authorities should not have a reducing effect. In such cases, the guidelines do not provide any incentive to disclose themselves to the authorities. This also applies to cases in which the company comes to the conclusion that there is no criminal conduct. Although companies can still benefit in this case from the mitigating effect of existing, effective compliance measures, they can never benefit from the reduction of the score through cooperation with the authorities. The reporting of a particular behavior, with the indication that the company itself does not classify it as a criminal offence, has therefore no effect within the guidelines. If there is uncertainty within the company about the criminal evaluation of the offence, it will be rather reluctant to report the behavior because it carries the risk that the authorities will discover the behavior and assess it as criminally relevant.[43]

4 The impact of compliance programs on – administrative or criminal – proceedings

4.1 Lack of data due to non-mandatory prosecution according to German administrative law

Whereas prosecution is mandatory in the case of criminal offences under German Law, state authorities are free in their decision to investigate and press administrative fines in the case of administrative offences.[44] As a result, no regulations on the execution of their discretion exist. Empirical data is very hard to find since administrative decisions do not have to be published and are not accessible to the public. In a qualitative survey, only 21 of 500 German companies reported investigations with regard to an infringement according to section 130 of the Administrative Offences Act.[45] 37% of the affected companies were in the opinion that their compliance system has had a positive effect on the allocation of the fine. And even more companies – 43% – felt an effect on the execution of the prosecutor's discretion whether to investigate or to press charges. However, most companies do not consider compliance programs as a possibility to benefit from during proceedings, which is interesting in view

[42] Arlen (n 32) 343–345.
[43] Arlen (n 32) 343–344.
[44] Section 47 of the Administrative Offences Act.
[45] PricewaterhouseCoopers (n 3) 56.

of the intended incentive effect. While none of the questioned corporations saw a possible negative result of compliance, it remains open which positive results they see – if not to gain any positive influence during administrative or criminal proceedings.[46]

4.2 Taking into account compliance within the exercise of discretion under US-American law

Under US law, criminal prosecution is not mandatory; the public prosecution has the discretion to investigate and press charges. Since court proceedings also involve considerable effort and costs for the state, out-of-court settlements are very popular. Additionally, such settlements balance the often-criticized broad scope of application of corporate criminal liability by the equally wide prosecutor's discretion not to initiate proceedings in the first place or to discontinue them retrospectively. Requirements on how the prosecution shall use their discretion can be found in the Principles of Federal Prosecution in the US Attorneys' Manual (USAM).[47] The entering into Deferred- (DPA) or Non-Prosecution-Agreements (NPA)[48] enjoys great popularity on both sides: companies can avoid a conviction and the associated costs of a lawsuit, possible civil claims and public stigmatization through such an agreement. Additionally, such agreements save the state the expense of a process. Furthermore, considerable pressure can be exerted on companies within the setting of the conditions,[49] so that the measures and payments agreed in the conditions often exceed the level of payments and cooperation that could have been obtained by a judgement. They generally contain a probation period and conditions of probation, which, however, are ordered without a conviction or even just an admission of guilt by the company. The requirements usually include the introduction of new or improvement of existing compliance measures, the establishment of an independent monitor and the obligation to cooperate with the authorities to clarify the violation.[50] While NPAs do not require any legal review at all, DPAs are usually closed in court.[51]

Within the decision to prosecute a corporation, the companies' culpability and willingness to cooperate has to be taken into account. Compliance measures are a decisive factor in determining these two criteria, since they can be a proof of the extent to which the company tried to comply with the law or how the company is willing to cooperate with the

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[46] PricewaterhouseCoopers (n 3) 56f.

[47] Since the information in the USAM is merely an internal guideline, the violation or non-compliance with the guidelines has no legal consequences for the public prosecutor.

[48] While the accused company would have to plead guilty to enter into a so-called 'plea-agreement' (thereby accepting resulting costs from civil claims), the company does not have to plead guilty by entering into a DPA or NPA. By entering into a DPA, the prosecutor agrees not to press charges, if the company complies with the conditions set out in the agreement. NPAs apply in an earlier stage of the investigation, when the prosecution did not prepare a charge.

[49] Also pointing out the risks: Christopher Wray and Robert Hur, 'Corporate Criminal Prosecution in a Post Enron World: The Thompson Memo in Theory and Practice' (2006) 43 American Crim L Rev 1143; Nagelberg and others (n 30) 1090–1091; Ellen Podgor, 'Educating Compliance' (2009) 46 American Crim L Rev 1524f.

[50] Wray and Hur (n 49) 1105; Nagelberg and others (n 30) 1089.

[51] Podgor (n 22) 39.

authorities.[52] 9-28,300 A. No. 4 USAM expressly clarifies that the existence and effectiveness of the corporations pre-existing compliance program plays an important role in the discretionary decision on criminal prosecution.

The USAM sets requirements for the public prosecutor's evaluation of compliance measures in 9-28,800. The decisive factor is whether the compliance system itself was created in such a way that it can prevent all conceivable infringements as effectively as possible and whether the managers promote the system to the employees and do not ask them to circumvent or disregard it.[53]

In deciding whether the company should be prosecuted, the behavior after the misconduct is also of great importance. A factor that has a positive effect on the discretionary decision is cooperation with the authorities. 9-28,700 USAM expressly states that the refusal to cooperate must not have a negative effect on the discretionary decision, unless this constitutes a criminal offence itself. If we take a closer look at section 9-28,700 USAM, however, we find that it places very high demands on cooperation to benefit from a positive effect on the discretionary decision of the public prosecutor: The company must name all persons, regardless of their position in the company, who were involved in the misconduct. In addition, the company must provide the authority with all information regarding the misconduct of these persons. Only if the company agrees to these two steps and provides complete information, cooperation will be positively taken into account in the measurement decision.

Furthermore, there should be a positive effect if the company improves its existing compliance measures in response to the violation or implements effective measures as a result. With regard to the behavior after wrongdoings occurred, it is also crucial whether certain management positions are replaced in response to the misconduct or whether the company pays damages. It should also be considered whether shareholders, employees or other third parties were damaged. Furthermore, it should be decisive whether the criminal prosecution of the responsible natural persons or the conviction under civil law is not already sufficient.

5 Conclusion

The examination of the effects of compliance and the comparison between the German and US legal system show certain defects. The German legal system of corporate administrative liability lacks comprehensive regulations to create legal certainty and an incentivizing effect of compliance. While the US Federal Sentencing Guidelines and the USAM are able to state requirements for an effective compliance program, the comprehensive regulations get bypassed in practice. However, in both legal systems, compliance nowadays has the greatest impact within the discretion whether to investigate and to prosecute. But it is also this decision that contains the highest tension between the interests of corporations and the intended effect of compliance on one hand and the rights of natural persons on the other

[52] 9-28.300 A. Nr. 7 USAM.
[53] 9-28.800 B. USAM.

hand. Therefore, binding regulations within the measurement of the fine or discretionary decision are desirable to enforce the intended incentivizing effect of compliance measures.

Selected Literature

Arlen J, 'The failure of the Organizational Sentencing Guidelines' (2012) 66 U Miami L Rev 321

Beale SS, 'Die Entwicklung des US-amerikanischen Rechts der strafrechtlichen Verantwortlichkeit von Unternehmen' ZStW 126 (2014) 27

Engelhart M, *Sanktionierung von Unternehmen und Compliance* (2nd edn, Duncker & Humblot 2014)

Kämpfer S, 'Sanktionenausschließende und -mildernde Wirkung von Compliance-Programmen de lege lata' in Ahlbrecht H, Dann M, Wessing H, Frister H and Bock D (eds), *Unternehmensstrafrecht. Festschrift für Jürgen Wessing* (Beck 2015)

Nagelberg M, Balser C, Ford S and Frisiello D, 'Corporate Criminal Liability' (2017) 54 American Crim L Rev 1073

Sieber U, 'Compliance-Programme im Unternehmensstrafrecht' in Sieber U, Dannecker G, Kindhäuser U, Vogel J and Walter T (eds), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (Carl Heymanns 2008)

Wray C and Hur R, 'Corporate Criminal Prosecution in a Post Enron World: The Thompson Memo in Theory and Practice' (2006) 43 American Crim L Rev 109

CARROT AND STICK: THE LIABILITY REGIME AND COMPLIANCE PROGRAM INCENTIVIZING – A COMPARISON BETWEEN THE USA AND GERMANY

By Ruiheng Yuning[*]

Abstract

Compliance programs are a novel approach of preventing corporate crimes compared to traditional countermeasure of preventing corporate crimes through aftermath punishment. However, due to its astronomical expenditure, there must be a suitable reward to encourage the implementation of an effective compliance program. This article compares the American and German approaches of incentivizing compliance and their respective developments in order to answer the questions: how should an effective compliance program be rewarded, and should corporate accountability or individual accountability be the basis of compliance rewarding mechanisms?

1 Introduction

The game of carrot and stick is a classical metaphor describing the compliance program incentivizing mechanism. For corporate crimes, there must be criminal punishment as the 'stick'. Whereas there is an effective compliance program implemented, there must be a reward granted as the 'carrot' for such good-Samaritan efforts in preventing corporate crimes. When looking at the incentivizing regimes of compliance, the USA and Germany took different approaches to deliver the stick and carrot. They vary fundamentally at two points: the reward itself and its recipient. First, in the USA, based on *respondeat superior*, the Organizational Guidelines offer criminal fine reduction,[1] Prosecutors' Memorandums provide avoidance of conviction for compliance efforts. Meanwhile in Germany, although the normative basis of compliance programs is still controversial[2] and there is still no corporate criminal liability so far , thanks to the scholarly interpretation of the *Ordnungswidrigkeitsgesetz* (Act of Administrative Offences, hereinafter as OWiG), an effective compliance program can still receive administrative fine reduction[3] according to

[*] PhD Candidate of the Research School of Retaliation, Mediation and Punishment at Max Planck Institute for Foreign and International Criminal Law.

[1] (2016) U.S.S.G. MANUAL §8C2.5. (f)(1).

[2] Christian Rosinus, *Haftungsvermeidung und-minimierung bei Aufsichtspflichtverletzung und Verbandsgeldbuße durch Compliance in der Praxis* (Nomos 2015) 56; Charlotte Elisabeth Grundmeier, *Rechtspflicht zur Compliance im Konzern* (Heymann 2011) 23; Uwe H Schneider, ´Compliance als Aufgabe der Unternehmensleitung' [2003] Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 645, 649.

[3] Marc Engelhart, *Sanktionierung von Unternehmen und Compliance* (2nd edn, Dunker & Humblot 2012) 440; *Klaus Rogall*, ´§30' in Wolfgang Mitsch (ed), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (5th edn, CH Beck 2018) para 137; Simone Kämpfer, ´Sanktionsausschließende und –mildernde „Wirkung" von Compliance-Programmen de lege lata' in Heiko Ahlbrecht (ed), *Festschrift für Jürgen Wessing* (CH Beck 2015) 55, 67.

§30 OWiG and administrative liability exoneration[4] according to §§ 130, 9 OWiG prescribing liability for breach of supervision responsibility. Second, the recipient of the relevant carrot and stick in the USA is a corporation, whereas in Germany the recipient is more often a natural person, that is, the owner of the corporation according to §130 OWiG and the compliance officer or other positions of the same function according to §9 OWiG.

However, when facing respective dilemmas, both countries are trying to relocate the emphasis of combating corporate crimes and incentivizing compliance. In this process, one common question faces both the USA and Germany: whether the corporation or individual should be the ultimate target of punishment as well as compliance incentive recipient? In my opinion, individual accountability is more desirable than corporate criminal liability for incentivizing compliance. Hence, this article is structured as follows to demonstrate this point: Ongoing Transformation in the USA and Germany (2), Personal Opinion: Personal liability prevails over corporate criminal liability (3), Summary (4)?

2 Ongoing Transformation in the USA and Germany

2.1 USA

Since the downfall of Arthur Anderson in 2002, where the mere prosecution led to the disappearance of one of the largest accounting firms in history, the collateral consequence of punishing a corporation came to light. Therefore, prosecution agreements started to replace prosecution more commonly in the USA in order to avoid the side effect of punishing corporations,[5] which renders the Organizational Guidelines more and more irrelevant. In the meantime, the USA also began to shift the focus on culpable individuals with the promulgation of new rules emphasizing the accountability of individuals in combating corporate crimes.

2.1.1 Failure of Organizational Guidelines

First, apparently, the importance of Organizational Guidelines related to rewarding compliance has been replaced by prosecution agreements.[6] As illustrated in Chart 1, the

[4] Regarding liability exoneration as a reward, Ulrich Sieber, ´Compliance-Programme im Unternehmensstrafrecht' in Ulrich Sieber and others (eds), *Festschrift für Klaus Tiedemann* (Heymann 2008) 449, 470; Marc Engelhart, ´§130' in Robert Esser (ed), *Wirtschaftsstrafrecht Kommentar* (Otto Schmidt 2017) para 40; Anna Carolin Pietrek, *Die strafrechtliche Verantwortlichkeit des Betriebsinhabers aus Compliance-Pflichten* (Kovač 2012) 199; Simone Kämpfer (n 3) 58. Regarding the correlation between compliance and §130 OWiG, Dennis Bock, ´Strafrechtliche Aspekte der Compliance-Diskussion – § 130 OWiG als zentrale Norm der Criminal Compliance' [2009] Zeitschrift für Internationale Strafrechtsdogmatik 68, 70; Sebastian Sonnenberg, *Verletzung der Aufsicht in Betrieben und Unternehmen (§130 OWiG)* (Kovač 2014) 158.

[5] Michael Nagelberg, Christopher Balser, Samuel Ford and Dante Frisiello, 'Corporate Criminal Liability' (2017) 54 Am Crim L Rev 1087; Gabriel Markoff, '"Arthur Andersen" and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15 U Pa J Bus L 807; Brandon L Garrett, 'Globalized Corporate Prosecution' (2011) 97 Va L Rev 1870.

[6] U.S. Sentencing Commission: Resource Book Table 53 (2010-2016).

numbers of prosecution agreements started to increase since 2003,[7] while the number of trials started to decrease in the meantime. Although the number of corporate trials is still substantially larger than its prosecution agreement counterpart, the influence of trials against corporations is actually weakened by selective prosecution policy. While small companies are still routinely convicted, usually through the guilty plea and sometimes by trial verdict, many large companies are not even prosecuted and receive prosecution agreements.[8] Second, Organizational Guidelines' promise of reducing criminal fine is too far-fetched. Ever since 2000, there have been only five compliance programs recognized as effective and receiving fine reduction, which pales in comparison to the number of no compliances: 1,320.[9] Third, the systematic flaw destroyed the compliance incentivizing mechanism.[10] Theoretically, an effective compliance program shall reduce the culpability score by three. Yet the size of the company could increase culpability score. When there is involvement of leading personnel in the commission of related corporate crime, culpability score will increase by five for a corporation with staff members of five thousand or more, up by four for one thousand or more, and up by three for two hundred or more.[11] Few companies with two hundred employees would need a compliance program. By this calculation, for an enterprise having thousands of employees, an effective compliance program would not receive any reward either, since a compliance program's positive input (three points decrease) cannot counterbalance the negative correlation to the size of the enterprise (four or five points increase). The hypothetic outcome of this calculation is that no company receives the reward for compliance under the Organizational Guidelines. Last but not least, the nature of Organizational Guidelines is no longer mandatory for the American judiciary since the case of *United States vs. Booker*.[12]

[7] Corporate Prosecution Registry, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> accessed 17 November 2018.

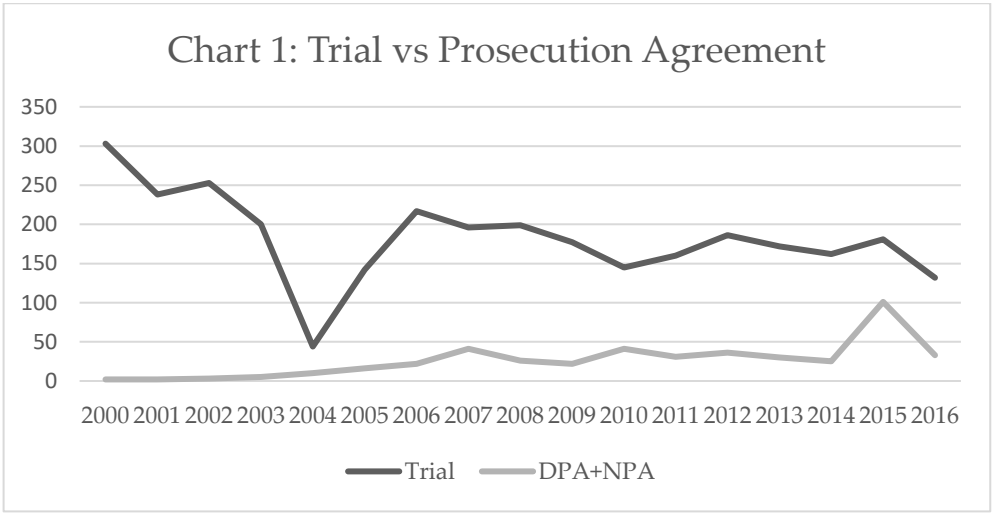
[8] Gabriel Markoff (n 5) 800; Brandon L. Garrett, 'Structure Reform Prosecution' (2007) 93 Va L Rev 888; Frank W III Bowman, 'Drifting down the Dnieper with Prince Potemkin: Some Skeptical Reflections about the Place of Compliance Programs in Federal Criminal Sentencing' (2004) 39 Wake Forest L Rev 683.

[9] U.S. Sentencing Commission: Sourcebook Table 54 (2000-2016).

[10] For detailed calculation and algorism, please refer to Jennifer Arlen, 'The Failure of the Organizational Sentencing Guidelines' (2012) 66 U Miami L Rev 321.

[11] (2016) U.S.S.G. Manual §8C2.5. (b).

[12] Nagelberg, Balser, Ford and Frisiello (n 5) 1093. *U.S. vs. Booker*, 543 U.S. 245 (2005).



2.1.2 Rise of Individual Accountability

In the USA, the primary focus of deterring corporate crimes and enforcing compliance programs is on punishing and rewarding corporations with sentencing mitigation. However, due to the downfall of Enron, which was a contractor of the aforementioned Arthur Anderson accounting firm, the USA has taken steps to address individual responsibility. It is clear that the tendency has emerged in the USA that individuals are more focused on in combating corporate crimes. Although these regulations are not directly related to the core mechanism of incentivizing compliance program, some facts are relevant in that they shed light on the considerations behind the development that are critical for further discussion and comparison with the criminal law and compliance program development in Germany.

To name a few: the primary purpose of the Sarbanes-Oxley Act of 30 July 2002 (hereinafter SOX) is reinforcing the transparency and disclosure by imposing the responsibility for meeting these financial reporting and disclosure requirements directly on corporate chief executive officers and chief financial officers.[13] Following SOX, the New York Department of Financial Service announced a proposed regulation on 1 December 2015. It is modelled on SOX certification requirements and would hold chief compliance officer of New York-regulated banks and money transmitters personally and perhaps criminally liable for the effectiveness of the anti-money laundering transaction monitoring and economic sanctions filtering programs of their institutions.[14] Last but not least, on 9 September 2015, Deputy Attorney Yates of the Department of Justice issued a new Prosecutorial Memorandum announcing to 'hold to account the individuals responsible for illegal corporate conduct' as

[13] Jenny B Davis, 'Sorting out Sarbanes Oxley' (2003) 89 ABA J 44: Brian Kim, 'Sarbanes-Oxley Act' (2003) 40 Harv J on Legis 236; Felix R Ehrat, 'Sarbanes-Oxley-A View from Outside' (2003) 31 Intl Bus Law 76.
[14] Available at <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179880055> accessed 17 November 2018.

a response to the public outrage and criticisms[15] against its virtually unilateral prosecution policy[16] against corporations instead of individuals involved in corporate crimes.

2.2 Germany: Corporate or Management Individual Criminal Liability?

In Germany, the development is more ambiguous. On one hand, academia's interpretation of the OWiG 'troika' seems a promising solution to incentivize compliance practice and the recent judgment of the *Bundesgerichtshof* (German Federal Court of Justice, hereinafter as BGH) even brought the correlation between OWiG troika and compliance closer.[17] In this judgment, BGH related the application §§30, 130 OWiG to pre-existing compliance measures for the first time in history. On the other hand, the mainstream development still attempts to break through the traditional German criminal law doctrines by introducing corporate criminal liability in Germany through legal drafts. Meanwhile, there is another less conspicuous but no less important trend against the mainstream tendency through gradually reviving a controversial legal term *Geschäftsherrenhaftung*, management duty, and broadening its application in modern German society. Those drafts and *Geschäftsherrenhaftung* overlap at one point, preventing corporate crimes. Yet they contrast each other at another point: whether the corporation or the natural person is the responsibility recipient of supervising the company.

2.2.1 Corporate Criminal Liability Drafts

There are two recent drafts attempting to introduce corporate criminal liability in Germany, namely a North Rhine-Westphalia Draft of 2013 (hereinafter NDW Draft) and a Cologne Draft of 2017. Although they have different emphases, they share some striking similarities that are relevant to compliance incentivizing. First, given the fact that there is no corporate criminal liability in Germany and corporations are sanctioned with administrative fine according to §§30,130 OWiG for corporate crimes, both drafts seek to introduce authentic criminal sanction against corporations.[18] Second, different from their archetype §130 OWiG, which regulates breach of supervision liability against the owner of corporation, in both drafts the liability recipients for breach of corporate supervision are no longer the owner of the corporation but the corporation itself.[19] Third, both drafts attempt to honour compliance implementation through liability exoneration.[20] As the logic extension from the recipients shift in both drafts, the recipients of compliance reward inevitably become corporations as well, rather than natural persons.

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[15] Robert Quigley, 'The Impulse towards Individual Criminal Punishment after Financial Crisis' (2015) 22 Va J Soc Pol'y & L 128; Michael Erman, 'Five years after Lehman' (Reuters 2013), <https://www.reuters.com/article/us-wallstreet-crisis/five-years-after-lehman-americans-still-angry-at-wall-street-reuters-ipsos-poll-idUSBRE98E06Q20130915> accessed 17 November 2018.

[16] Brandon L Garrett, *Too Big to Jail* (Belknap 2014) 82.

[17] BGH, 1 StR 265/16, para 118.

[18] §4 NRW Draft. §4 Cologne Draft.

[19] Sec.2, §2 NRW Draft. Sec.2, §3 Cologne Draft.

[20] §5 NRW Draft. Sec.1, §3 Cologne Draft.

These drafts have inevitably raised the age-old question whether there should be corporate criminal liability in Germany. Opponents largely rest their arguments on two points. First, they rest it on the criminal law principle that corporations are inconsistent with the criminal law application because they are incapable to act and to be held criminally liable like a natural person.[21] Second, they claim the current regime and the OWiG troika are sufficient to fulfil the purpose of the corporate crime prevention.[22]

On the other hand, supporters rest their arguments on two points. First, on the reality: corporations have become more powerful than before,[23] hence, criminal law should evolve with the time.[24] To a certain extent, based on the collective guilt or fault manifested in internal structural flaw,[25] corporations already have the capability to act through leading personnel,[26] and therefore can be held criminally liable. Second, the current regime does not suffice to deter corporate crimes. Punishing the direct perpetrator of corporate crimes cannot fulfil deterrence because of the structural complexity of the modern corporation, which is the underlying conundrum of punishing corporate crimes.[27] In the end, due to its non-criminal nature, current regime OWiG troika cannot provide the strong deterrence with administrative fine.[28]

2.2.2 Geschäftsherrenhaftung

A rough translation for the term *Geschäftsherrenhaftung* is the responsibility of the owner or any other leading personnel of a company to act to prevent a staff member from committing a company-related offence.[29] During the time of German Empire in nineteenth century, it

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[21] Hans Joachim Hirsch, *Die Frage der Straffähigkeit von Personenverbänden* (Westdt. Verl. 1993) 9; Hans-Heinrich von Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts* (5th edn, Dunker & Humblot 1996) 227. Friedrich von Freier, *Kritik der Verbandsstrafe* (Dunker & Humblot 1998) 88.

[22] Gerson Trüg, ´Zu den Folgen der Einführung eines Unternehmensstrafrechts' [2010] Zeitschrift für Wirtschafts- und Steuerstrafrecht 241, 243. Bernd Schünemann, ‚Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie' [2014] ZIS 1, 15; Gerhard Wagner, `Sinn und Unsinn der Unternehmensstrafe' [2016] Zeitschrift für Unternehmens- und Gesellschaftsstrafrecht 112, 122.

[23] Klaus Tiedemann, *Wirtschaftsstrafrecht* (4th edn, Vahlen 2014) para 377.

[24] Jürgen Wessing, 'Braucht Deutschland ein Unternehmensstrafrecht?' [2012] Zeitschrift für Wirtschaftsrecht und Haftung im Unternehmen 301, 302.

[25] Klaus Tiedemann, 'Strafbarkeit von juristischen Personen?' in Friedrich Schoch (ed), Freiburger Begegnung (Müller 1996) 46; Klaus Tiedemann, 'Die "Bebußung" von Unternehmen nach dem zweiten Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] NJW 1169, 1172.

[26] Anne Ehrhardt, *Unternehmensdelinquenz und Unternehmensstrafe* (Dunker & Humblot 1994) 233; Günter Stratenwerth, ´Strafrechtliche Unternehmenshaftung?' in Klaus Geppert and others (eds), *Festschrift für Rudolf Schmitt* (Mohr 1992) 295, 298. Harro Otto, *Die Strafbarkeit von Unternehmen und Verbänden* (de Gruyter 1993) 15.

[27] Bernd Schünemann, *Unternehmenskriminalität und Strafrecht* (Heymann 1979) 30; Günter Heine, *Die Strafrechtliche Verantwortlichkeit von Unternehmen* (Nomos 1995) 75. Gerd Eidam, *Straftäter Unternehmen* (CH Beck 1997) 64. Christina Schwinge, *Sanktionen gegenüber Unternehmen im Bereich des Umweltstrafrechts* (Centaurus 1996) 43.

[28] Wessing (n 24) 301; Schünemann (n 27) 59, 125.

[29] Bernd Schünemann, '§14' in Burkhard Jähnke, Heinrich Wilhelm Laufhütte and Walter Odersky (eds), S*trafgesetzbuch Leipziger Kommentar* (11th edn, De Gruyter 2003) para 14; Claus Roxin, *Strafrecht Allgemeiner Teil Band II* (CH Beck 2003) §32 para 134; Tiedemann (n 23) para 289.

has been stated that the management of a company has the duty to prevent crimes of its employee. However, the scope of this duty remains unclear, since the BGH has not given out a clear clarification on this regard until recently.[30] In recent years, two judgments from BGH stated that *Geschäftsherrenhaftung* should be confined to corporation-related crimes[31] and the compliance officer should bear similar responsibility to prevent corporate crimes.[32]

The normative basis for *Geschäftsherrenhaftung* is §13 German Penal Code, which prescribes omission offence based on responsibility to act (*Garantenstellung*). Hence, academia's justifications for *Geschäftsherrenhaftung* focus on how to derive the responsibility to act for management to prevent corporate crimes from §13 of German Penal Code. The prevailing theories largely overlap on the key position of management in the corporation. According to them, management should bear the responsibility to act to prevent corporate crimes because management either has the power to command (*Befehlsgewalt*) the corporate inferiors,[33], like a commander to its subordinate, or to control the company as a source of danger (*Gefahrenquelle*),[34] like an owner to his ferocious dog, or to treat opening company as a previous endangering behaviour (*Ingrenz*),[35] like leaving a hammer on a wobbly ladder at a crowded street.

Although up to now, *Geschäftsherrenhaftung* is still relatively vague and not directly related to compliance incentivizing, if there were concrete *Geschäftsherrenhaftung*, an effective compliance program must play a critical role in determining the management's individual criminal accountability, as compliance itself overlaps with the core emphasis of *Geschäftsherrenhaftung*, i.e. preventing corporate crimes.

3 Personal Liability Prevails over Corporate Criminal Liability

In my opinion, corporate liability was indeed a novel approach of tackling corporate crimes instead of punishing direct perpetrators in that corporate crimes are the outcome of corporate collective fault which resulted from internal atmosphere. Hence, corporate criminal liability aims to influence the management decision-making process through holding the corporation collectively liable. However, due to the development of corporation through time, the corporate criminal liability, as a product from a very specific period in the past, has become outdated since it failed to evolve with the time.

In contrast, personal criminal liability of the management in more effective in fulfilling the purpose of punishment against corporate crimes. More importantly, due to its non-

[30] Schünemann (n 29) para 14; Marc Engelhart, ´Development and Status of Economic Criminal Law in Germany' (2014) 15 German L J 703.
[31] BGH, 4 StR 71/11, para 13.
[32] BGH, 5 StR 394/08, para 27.
[33] Schünemann (n 27) 102; Bernd Schünemann, *Grund und Grenzen der unrechten Unterlassungsdelikte* (Schwartz 1971) 329.
[34] Claus Roxin, ´Geschäftsherrenhaftung für Personalgefahren' in Christian Fahl and others (eds), *Festschrift für Werner Beulke* (Müller 2015) 244; Roxin (n 29) §32 para 137.
[35] Jürgen Welp, *Vorangegangenes Tun als Grundlage einer Handlungsäquivalenz der Unterlassung* (Dunker & Humblot 1968) 235.

monetary nature, it functions as the better and more coherent incentive for encouraging compliance implementation than corporate criminal liability.

3.1 Corporate Punishment as Misplaced and Distorted Punishment

Punishment against a corporation primarily and exclusively focuses on the ownership of the corporation instead of on the management, which is the key role of shaping the organizational collective fault as the blameworthiness of corporate crimes.[36] Both in Germany[37] and in the USA,[38] it is acknowledged how important management is in preventing corporate crimes. However, due to the separation of ownership and management as one of the significant features of modern corporations,[39] punishment against corporations has become outdated in terms of influencing the management. Further, because of the fluidity of internal corporate structure, the deterrence effect of punishing corporations can be further watered down.

First, the corporate criminal liability in the USA stemmed from a time when the separation between management among largest corporations had not been fulfilled. This process emerged gradually in the last quarter of nineteenth century until 1930s in the USA.[40] However, corporate criminal liability was established gradually on the federal state level since the first half of nineteenth century,[41] until the landmark case *New York Cent. & H.R.R. Co. v. U.S* in 1909 on the highest judiciary level of the USA,[42] which occurred almost twenty years earlier than the corporation transformation finished. Before the transformation, the average size of corporations at that time was inconceivably small by our modern conception. For instance, in 1927 two-thirds of all corporations reporting net incomes earned less than $5,000 each and the average non-banking corporation in that year had an income of only $22,000 and gross assets of but $570,000.[43] As the corporations have been evolving with time, the corporate criminal liability has not. Punishment against corporations might be effective and deterrent against small corporations back at that time whose owners actually ran the companies, but it is no longer similarly intimidating towards modern colossal enterprises worth billions of dollars, whose ownership is completely disassociated from management.

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[36] Tiedemann, `Bebußung' (n 25) 1172; Brunhilde Ackermann, *Die Strafbarkeit juristischer Person im deutschen Recht und ausländischen Rechtsordnungen* (Lang 1984) 239; Heine (n 27) 250.

[37] Schünemann (n 27) 102; Schünemann (n 33) 329; Roxin (n 34) 244; Roxin (n 29) §32 para 137; Welp (n 35) 235.

[38] New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 496 (1909). U.S. vs. Dotterweich, 320 U.S. 285 (1943). Richard S Gruner, *Corporate Criminal Liability and Prevention* (Law Journal Press 2018) 2-5.

[39] Gregory M Gilchrist, 'Individual Accountability for Corporate Crime' (2018) 34 Ga St U L Rev 348.

[40] John C Coffee Jr., 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 Yale LJ 25.

[41] People vs. Corporation of Albany, 11 Wend. 539 (1834). Commonwealth vs. Hancock Free Bridge Corp., 68 Mass. 58 (1854). State v. Morris Canal & Banking Co., 22 NJ L 537 (1850).

[42] New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 496 (1909).

[43] Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (2nd edn, Harcourt Brace 1968) 18.

Second, as an extension of the misplacement of punishment, the corporation, instead of management, becomes criminally liable, this mistake results in compromised deterrence effect. Although punishing a corporation seems convenient in that company A, in which a crime was committed, can be the same company B that is held liable for the crime, staff used to work for company A can be replaced entirely in company B. The fluidity of modern corporate structure results in the short-term deterrence, either general or specific, of corporate criminal sanction in that no specific individual is accountable for corporate crime.[44] Hence, as the key figure of corporate governance, the management, too, cannot feel the imminent threat from criminal punishment imposed on the corporation. Thus, the deterrence effect on those punished corporations will be inevitably temporary. Because most managers do not believe that, they personally are at risk for corporate crime prosecution. Therefore, they do not fear or adjust their behaviours based on the possibility that the company may be penalized.[45] Further, the deterrence realization through criminal punishment is based on the ideal picturing that corporation as a whole calculates pros and cons of corporate crimes rationally in terms of cost-benefit analysis. However, the calculation process of corporation is largely compromised by the corporation itself in that a single individual calculates far more rationally alone than in a group yet corporate staff, either management or low-level employees, working as a group is another essential feature of corporate business.[46] In the end, rather than deviating from compliance with the law , the real corporation breaks the law like this: managers within sales and marketing share a deviant subculture, while other subunits within the company may be relatively crime-free.[47]

Third, effect of corporate punishment can be further distorted by the perception of the public. Since the public is expecting retribution against corporate crimes going beyond punishment against lower-level wrongdoers,[48] criminal law is the ultimate weapon available at hand to express the social condemnation and outrage against massive delinquencies like corporate crimes, which cause tremendous and irreversible social harm and large scale of legal violation. However, as a misplaced sanction, as discussed previously, punishing a corporation directly cannot affect its management directly and very rarely involves even the individual accountability.[49] Not only is the deterrence effect against management as the true culprit of corporate crimes substantially discounted by indirect punishment against corporation but also the general condemnation expression of criminal law, which can be

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[44] Sally S Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press 2002) 55. Brent Fisse and John Braithwaite, *Impact of Publicity on Corporate Offenders* (State University of New York Press) 227. Albert K Cohen, 'Criminal Actors: Natural Persons and Collectivities' in Melvin J Lerner (ed), *New Directions in the Study of Justice, Law, and Social Control* (Springer 1990) 103.

[45] Simpson (n 44) 43.

[46] Simpson (n 44) 53. John C Coffee Jr, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanction' (1980) 17 Am Crim L Rev 433.

[47] Simpson (n 44) 53; William S Laufer, 'Illusions of Compliance and Governance' (2006) 6(3) Corporate Governance 244.

[48] Richard Busch, *Grundfragen der strafrechtlichen Verantwortlichkeit der Verbände* (Weicher 1933) 122; Hans Eberhard Rotberg, ´Für Strafe gegen Verbände!' in: Juristische Studiengesellschaft Karlsruhe (ed), *Festschrift für den 45. Deutschen Juristentag Band II* (Müller 1964) 196, 224.

[49] Garrett (n 16) 83.

largely distorted and misread by the public through this approach. To the outside, it might seem that the criminal law is selectively blind to culpable management and the innocent shareholders are sacrificing themselves in the meantime as a shield against justice punishment for those who committed white-collar crimes on the Wall Street, yet criminal law and prison are awaiting those others who committed petty crimes on the Main Street.[50] Therefore, the corporate criminal liability and its effect against corporate crimes are not only misleading but also not irreplaceable through other means as a combination, for example, charging accountable management members, initiating civil procedures for the damage of torts, and so on. Cases where all these remedies are exhausted while deterrence effects still did not get accomplished are extremely rare.[51]

3.2 Logical Ambivalence in Incentivizing Compliance Program

To begin with, the logical ambivalence results from the pecuniary nature of corporate criminal sanction. When it comes to corporate criminal liability, any corporate sanction can be translated into money,[52] either into a criminal fine, a revocation of business license, or even into imposing probation order on corporations and so on. Moreover, punishing corporation can generate deterrence, but the connection between ownership and control can be sufficiently attenuated as such: effective deterrence requires unwieldy penalties, while penalties that are more reasonable are unlikely to generate sufficient deterrence, which is known as the deterrence trap.[53]. Under certain circumstances, irrationally extreme punishment could only deter the deterrence rather than improve it.[54] In the meantime, we should bear in mind that no matter how effective compliance program is in terms of preventing corporate crimes, the corporations themselves must bear the astronomical cost of compliance program at first.

When adding incentivizing compliance program into the picture, it is going to be essentially the same paradox, because deterring corporate crimes and honouring compliance program with sanction reduction based on corporate liability are fundamentally incompatible. By adopting these two strategies at the same time, companies only find themselves ending up in an ambivalent situation: the more money they invest in compliance, the more monetary sanction there will be. For the authority evaluating the effectiveness of compliance, the paradox is essentially the same: either they will be rewarding compliance by compensating compliance cost through substantial monetary sanction reduction – at this scenario, the residual sanction would be so infinitesimal to fulfil any function of punishment – or they will still wish to punish the corporation so badly that the original sanction before reduction might be higher than the astronomical expenditure of compliance. In the latter case it could

[50] Gilchrist (n 39) 349; William S Laufer, 'The Missing Account of Progressive Corporate Criminal Law' (2017) 14 NYU J L 82.
[51] Vikramaditya S Khanna, 'Corporate Criminal Liability: What Purpose does it Serve' (1996) 109 Harv L Rev 1533.
[52] Daniel Fischek and Alan O Sykes, 'Corporate CrimeÄ (1996) 25 J Legal Stud 320.
[53] Gilchrist (n 39) 348; John C Coffee, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 390.
[54] Simpson (n 44) 52.

probably exceed the paying ability of any company and then no purpose of punishment could be fulfilled either.[55] Absurd as these two possible case scenarios may sound, it is true that the compliance program is a favour did by corporation for prevention and investigation of those difficult corporate crimes that is hard to access for a traditional investigation authority. Only when there are sufficient incentives provided to corporations for these good-Samaritan efforts, could there be authentic and genuine cooperation from the corporations' side.

Therefore, after comparison, when considering the liability reduction and exclusion as compliance rewards, it is apparent that liability exoneration is more encouraging than liability mitigation for incentivizing compliance program.[56] Although it seems achievable also under the corporate regime, due to the reality of compliance, however, in my opinion, liability reduction is far more pertinent than liability exoneration for encouraging compliance.

It should be duly noted that for a short time, from 2000 until 2003, the American Sentencing Commission even calculated existing-yet-not-effective compliance program as the third outcome of compliance effectiveness evaluation, in addition to the effective compliance and no compliance options.[57] Whether this statistic had ever played any role in determining the corporate liability is nowadays untraceable; what is worse is that the Sentencing Commission stopped calculating these statistics in 2004. When looking at the result, however, the contrast is striking. There were already 16 existing-but-not-effective compliance programs enumerated during the short time span between 2000 and 2003[58] yet there have been merely 7 effective compliance programs ever recognized by the Sentencing Commission from 1996 until 2016.[59]

Hence, it is perfectly reasonable to assume that the number of existing but ineffective compliance programs would have outnumbered the effective compliance single-handedly if it had been calculated for the same long period over 20 years. In my opinion, this reflects the true conundrum of incentivizing compliance programs., as the effectiveness of compliance programs can be easily tainted by corporate crimes. Further, it does not make sense to differentiate between them through labelling them effective or ineffective. Because an effective compliance program would have prevented corporate crimes in the first place, it is only sensible to recognise those compliance program mentioned above as tainted or partially failed compliance program.

[55] Gilchrist (n 39) 343; Coffee (n 53) 390.

[56] Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 J Legal Stud 863; Albert W Alschuler, 'Two Ways to Think about the Punishment of Corporations' (2009) 46 Am Crim L Rev 1380; Andrew Weissman and David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 Ind L J 429.

[57] U.S. Sentencing Commission: Sourcebook Table 54 (2000-2003).

[58] U.S. Sentencing Commission: Sourcebook Table 54 (2000-2003).

[59] U.S. Sentencing Commission: Sourcebook Table 47(1996), Table 52(1997-1998), Table 54(1999-2016).

Only based on personal liability, which is largely incarcerative and under certain circumstances monetary, it is possible to punish the corporate crimes as well as to encourage compliance implementation simultaneously with liability reduction according to the actual effectiveness of compliance. Besides, the effectiveness evaluation of compliance should not be binary, i.e. black or white. Rather, effectiveness of compliance ought to be differentiated by different shades of grey. When combining liability reduction with personal liability, the effectiveness of compliance would bring about essentially different and meaningful liability reductions. Meanwhile the residual punishment, even a year or two of imprisonment or even probation, will still be effective enough to fulfil the purpose of punishment because the costs of imprisonment are front-loaded in that the stigmatizing and loss of wealth accompanying it are inflicted already in the early phase of criminal proceedings.[60] Hence, even short-term imprisonment can be deterrent enough, especially to white-collar criminals who are used to extravagant life style.

Therefore, I would argue that most compliance programs that entered the vision of judiciary should be deemed as partially failed and be primarily rewarded with liability reduction, since the wealthy status of a corporation would influence the effect of criminal punishment when rewarding compliance predominantly with liability exoneration. While large corporations affording a qualified compliance program could walk away from punishment, small and medium corporations would be constantly held liable, which would result in distorted expression of criminal law as demonstrated earlier and illustrated vividly by the American selective prosecution policy. Compliance programs ought to assist in the prevention of corporate crimes and not build a safe haven for them. However, given the size of a modern corporation with thousands of employees, chances are that there are very likely rogues among them that are just not susceptible to good corporate governance.[61] Therefore, liability exoneration should still be reserved for exceptional circumstances as the optimum reward in order to encourage goodwill compliance implementation despite isolated aberrations. Only then would punishing direct perpetrators be sensible, instead of seeing the corporate crime as result of a collective fault of a corporation.

In the end, this logical deduction is preliminarily substantiated by the empirical research as well. Although the incarcerative punishment might seem old-fashioned in comparison with the development of modern corporations, it might still turn out to be the most deterrent punishment against corporate crimes. According to the research conducted by *Sieber* and *Engelhart*, imprisonment is considered as the most effective penalty for corporate crimes against either direct wrongdoer[62] or superior[63] of company of any size. *Vice versa*, the imprisonment reduction or exemption should be considered as the most meaningful reward for compliance efforts.

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[60] Coffee (n 46) 432.

[61] No Author, Compliance Officer Empowerment (2017) 6 Am U Bus L Rev 264.

[62] Ulrich Sieber and Marc Engelhart, *Compliance Programs for Prevention of Economic Crimes* (Dunker & Humblot 2014) 163.

[63] Ulrich Sieber and Marc Engelhart (n 62) 165.

In a nutshell, without the commitment of the management, the real culpable entity is neglected in terms of punishment against corporate crimes, and, moreover, no effective compliance program could be expected.[64] Therefore, the personal liability of the management is not only more effective in providing incentive for implementing compliance but also essentially compatible with the idea of encouraging compliance program with liability reduction.

4 Summary

To sum up, there are several points worth noticing as the summary of my personal opinion that personal criminal liability is far more desirable than corporate criminal liability for incentivizing compliance implementation:

1. Due to the development of modern corporations whose ownership is completely separate from the management, corporate criminal liability, which still aims at punishing corporate ownership, as a misplaced sanction is rendered powerless (and even outdated) to influence the management and its decision-making process in a modern corporation.

2. Using American experience as reference, liability reduction turns out to be a more pertinent reward to tainted compliance than liability exoneration, in that the effectiveness of compliance implementation can be easily contaminated by corporate crimes and only the liability reduction can fulfil the purpose of punishing corporate crimes and rewarding compliance with meaningful reward simultaneously. The liability exoneration should only be reserved for exceptional circumstances.

3. Due to the non-monetary nature of personal punishment, the personal liability provides better flexibility and functions more coherently at encouraging compliance implementation than corporate criminal liability.

Indeed, criminal punishment is the most formidable weapon that criminal justice systems have at hand and its corresponding procedural protection is the most solid defence available for any entity involved in criminal prosecution. Nonetheless, based on previous analyses, when there is individual criminal punishment and corresponding procedural protections existing already to punish the corporate crimes and management with justice, corporate criminal liability only renders itself redundant and even undesirable, especially in incentivizing compliance programs.

[64] Marie McKendall, Beverly Demarr and Catherine Jones-Rekkers, 'Ethical Compliance Program and Corporate Integrity: Testing the Assumption of Corporate Sentencing Guidelines' (2002) 37 J B Ethics 379; Laufer (n 47) 241.

Selected Literature

Alschuler AW, 'Two Ways to Think about the Punishment of Corporations' (2009) 46 Am Crim L Rev. 1359–1392

Berle AA and Means GC, *The Modern Corporation and Private Property* (2nd edn, Harcourt Brace 1968)

Busch R, *Grundfragen der strafrechtlichen Verantwortlichkeit der Verbände* [Fundamental Questions of Criminal Accountability of Associations] (Weicher 1933)

Coffee JC, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386–459

Engelhart M, *Sanktionierung von Unternehmen und Compliance* [Sanctioning of Corporations and Compliance] (2nd edn, Dunker & Humblot 2012)

Garrett BL, *Too Big to Jail* (Belknap 2014)

Gilchrist GM, 'Individual Accountability for Corporate Crime' (2018) 34 Ga St U L Rev 335–388

Schünemann B, *Unternehmenskriminalität und Strafrecht* [Corporate Criminality and Criminal Law] (Heymann 1979)

Sieber U, 'Compliance –Programme im Unternehmensstrafrecht' [Compliance Programs in Corporate Criminal Law] in Sieber U and others (eds), *Festschrift für Klaus Tiedemann* (Heymann 2008) 449–484

Wessing J, 'Braucht Deutschland ein Unternehmensstrafrecht?' [Does Germany Need a Corporate Criminal Law] [2012] Zeitschrift für Wirtschaftsrecht und Haftung im Unternehmen 301–305

DOUBLE JEOPARDY PROTECTION IN CRIMINAL PROCEEDINGS AGAINST CORPORATIONS

PROHIBITION OF DOUBLE JEOPARDY ('NE BIS IN IDEM') IN TRANSNATIONAL CRIMINAL PROCEEDINGS AGAINST CORPORATIONS

By Kilian Wegner[*]

Abstract

Transnational protection against multiple prosecutions is becoming increasingly important because states have shown a tendency in recent decades to extend their jurisdiction in criminal matters far beyond their borders.[1] *Looking at 'long-armed-statues' like the U.S.-Foreign Corrupt Practices Act or the UK Bribery Act, this is especially true for Corporate Criminal Law. From the perspective of corporations or company groups that operate in several countries, this trend towards transnational criminal prosecution bears a rising risk of being prosecuted for the same offense multiple times all over the world. At least from a German perspective, the Volkswagen-Case is an omnipresent example for such a case. In course of the so called 'exhaust emission affair', there are criminal investigations being conducted against the Volkswagen AG and/or its daughter companies in over a dozen countries. Sometimes the charges only relate to criminal conduct in the respective country where the investigation is being held, sometimes also events in the German headquarters are under scrutiny, and often both is part of the investigation. Against the background of such a scenario, in this article I will first provide an overview of existing rules on transnational* ne bis in idem *(1). The second part of the contribution is then devoted to selected legal problems that specifically arise regarding the protection of corporations from cross-border multiple prosecution, which I will deal with by example of the transnational ne bis in idem rules that exist in the Schengen area (2).*

[*] Kilian Wegner is a research associate and PhD candidate at the Chair of Criminal Law, White Collar Crime and Criminal Procedure Law of Professor Dr. Thomas Rönnau at the Bucerius Law School, Hamburg, as well as a trainee lawyer at the Berlin Court of Appeal.

[1] Danielle Ireland-Piper, *Accountability in Extraterritoriality – A Comparative and International Law Perspective* (Edward Elgar Publishing 2017) 3-4, 7-14 with further references; concisely Alejandro Chehtman, The Philosophical Foundations of Extraterritorial Punishment (OUP 2010) 1: 'Extraterritoriality is deeply entrenched in the modern practice of legal punishment'; with special focus on the legislative development in Germany see in detail Peter Roegele, *Deutscher Strafrechtsimperialismus – Ein Beitrag zu den völkerrechtlichen Grenzen extraterritorialer Strafgewaltsausdehnung* (Verlag Dr. Kovač 2014) 15-23 and Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts – Grundlagen und Grenzen der Geltung des deutschen Strafrechts für Taten mit Auslandsberührung* (Mohr Siebeck 2017) 42-107; current country reports on the assertion of cross-border criminal law jurisdiction by the member states of the European Union can be found in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the EU, vol 1* (Nomos 2013).

1 Transnational Double Jeopardy Prohibition – An Overview

Regulations that protect against cross-border multiple prosecutions are rare. Neither is *ne bis in idem* in its transnational dimension a rule of international law[2] nor do provisions such as article 4 of the 7th Additional Protocol to the ECHR, article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR) or article 8 (no. 4) of the American Convention on Human Rights (AMRC) contain such protection.[3]

However, a practically important manifestation of transnational *ne bis in idem* can be found in article 54 of the Convention implementing the Schengen Agreement (CISA). This provision – which according to the European Court of Justice (EJC) has to be interpreted in the light of article 50 of Charter of Fundamental Rights of the European Union (CFR)[4] – contains a full-scope cross-border double jeopardy prohibition within all 28 member states

[2] This has already been stated several times by the German Federal Constitutional Court, see BVerfGE 75, 1, 24 ff., BVerfGK 13, 7, 13 ff. and BVerfGK NJW [2012] 1203; consenting e.g. Kai Ambos, 'vor §§ 3-7' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum Strafgesetzbuch, vol 1* (3rd edn, Beck 2017) para 65; Thomas Hackner, 'Das teileuropäische Doppelverfolgungsverbot insbesondere in der Rechtsprechung des Gerichtshofs der Europäischen Union' [2011] NStZ 426; Dieter Inhofer, 'Art. 54 SDÜ' in Bernd von Heintschel-Heinegg (ed), Beck'scher Online-Kommentar StGB (38rd edn, Beck 2018) para 48; Margarete von Galen and Sina Maass, '§ 84 OWiG' in Werner Leitner and Henning Rosenau (eds), *Wirtschafts- und Steuerstrafrecht* (Nomos 2017) para 22 – each with further references; for international literature see e.g. Jonathan Tomkin, in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (C. H. Beck / Hart / Nomos 2014) Art. 50 GRC para 50.20 and Van Bockel and Willem Baastian, *Ne Bis in Idem in EU Law* (Dissertation Leiden 2009) 2.

[3] On the merely national dimension of article 4 of the 7th Additional Protocol to the ECHR see Kai Ambos, *European Criminal Law* (CUP 2018) 147, para 165 and Robert Esser, 'Das Doppelverfolgungsverbot in der Rechtsprechung des EGMR (Art. 4 des 7. ZP-EMRK) – Divergenzen und Perspektiven' in Gudrun Hochmayr (ed), *"Ne bis in idem" in Europa – Praxis, Probleme und Perspektiven des Doppelverfolgungsverbots* (Nomos 2015) 27, 28; numerous references regarding Art. 14 (7) ICCPR are provided by Anika Yomere, *Die Problematik der Mehrfachsanktionierung von Unternehmen im EG-Kartellrecht* (Nomos 2010) 249; for article 8 (no 4) AMRC see Monroy Cabra and Marco Gerardo, 'Rights and Duties Established by the American Convention on Human Rights', [1980] The American University Law Review 21, 37.

[4] On the relationship between Art. 54 CISA and Art. 50 CFR see the leading decision ECLI:EU:C:2014:586 *Spasic*. Both rules have a different scope of application since not all Schengen States are bound by Art. 50 CFR, see Ambos, *European Criminal Law* (n 3) 147 para 166.

of the European Union (UK still counted)[5] plus Norway and Island[6] as well as Switzerland[7] and Liechtenstein[8]. According to Art. 54 CISA, none of these 32 states may prosecute a person who has already been convicted for the same act within the wider Schengen-Area provided that, if a penalty has been imposed, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing state.[9]

Art. 54 CISA, however, only applies if all the sanctioning states involved are Schengen states. If, on the other hand, the first sanction is imposed in a third country (like the U.S. for example), the provision does not protect against further prosecution within the Schengen area. Still, I believe that the principle of proportionality enshrined in Art. 49 (3) CFR, which is also recognized as a general legal principle of the European Union, [10] in this situation requires that the sanction of the third country has to be at least deducted from the second

[5] The CISA was first incorporated into Union law by article 2 (1) of the Protocol to the Amsterdam Treaty integrating the Schengen acquis into the framework of the EU (the so-called 'Schengen Protocol', [1997] OJ C 340/93). Since article 54 CISA was then applicable in the 13 Member States that were already Schengen States at that time (BE, DK, DE, GR, ES, FR, IT, LU, NL, AT, PT, FI, SE), the United Kingdom and the Republic of Ireland also declared shortly afterwards, with the Council's approval, that they wished to apply article 54 CISA – among other provisions of the Schengen acquis (see article 1 (a) (i) Council Decision 28.2.2002 concerning Ireland's request to do so, [2002] OJ C L64/20, and article 1 (a) (i) Council Decision of 29.5.2000 concerning the request of the United Kingdom, [2000] OJ C L131/43). The impact of the UK's EU withdrawal ('Brexit') on the applicability of article 54 CISA cannot yet be predicted. The 10 states that joined the EU on 1.5.2004 (EE, LV, LT, MT, PL, SK, SI, CZ, HU, CY) do not all participate fully in the Schengen acquis, but in any case are bound by article 54 CISA (see No 2 in Annex I to the Act concerning the conditions of accession of these states of 16.4.2003, [2003] OJ L326/50). The same applies to Bulgaria and Romania (see point 2 in Annex II to the Protocol on the conditions and arrangements for their accession to the EU of 25.5.2005, [2005] OJ L157/49). For Croatia, the applicability of article 54 CISA results from point 2 of Annex II to the Treaty between the Republic of Croatia and the EU Member States on the Accession of the Republic of Croatia to the EU of 7.11.2011 ([2002] OJ L 112/36).

[6] See article 2(1) in conjunction with Annex A Part 1 to the Agreement between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of the latter two States with the implementation, application and development of the Schengen acquis of 18.5.1999 ([1999] OJ L176/36) and article 1 Council Decision of 1.12.2000 on the entry into force of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway ([2000] OJ L309/24).

[7] The applicability of article 54 CISA follows here from article 2 (1) in conjunction with Annex A Part 1 of the Agreement between the EU, the EC and the Swiss Confederation concerning the association of this State with the implementation, application and development of the Schengen acquis of 26.10.2004 ([2008] OJ L53/52).

[8] See article 2 (1) of the Protocol between the Swiss Confederation, the EU, the EC and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the Swiss Confederation, the EU and the EC concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis of 28.2.2008 ([2008] OJ L160/3) in conjunction with Annex A Part 1 of the Agreement referred to in n 7.

[9] For further details see Ambos, *European Criminal Law* (n 3) 149.

[10] Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law – Towards an Anticipative Understanding?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law – European and Comparative Perspectives* (OUP 2017) 167, 177.

sanction to be imposed if an EU Member State pursues the same case again.[11] As far as the ECJ and the EGC have so far rejected such an obligation of taking into account third-country sanctions in the area of EU competition law,[12] this is due to the specific concept of the 'same act' in EU competition law, under which the EU courts assume that EU competition sanctions on the one hand and third-country competition sanctions on the other hand each only relate to the effects of the offence in the respective territory and therefore never apply to 'the same matter'.[13] Outside EU competition law, these rulings from the ECJ und the EGC therefore do not preclude an obligation of an EU institution or an EU Member State to deduct sanctions already imposed by third countries in the event of a new sanction in the same matter.

In my opinion, the aforementioned obligation to offset foreign sanctions against renewed sanctions in the same case ultimately applies to all states that deem themselves committed to the principle of proportionality. The principle of proportionality always imposes a special burden of justification on the state if it wishes to punish the individual several times for the same conduct. This must also apply if the initial sanction was imposed by a third country. Although this first sanction cannot be attributed to the second prosecuting state and its judicial organs, a liberal state governed by the rule of law must not expose its citizens to disproportionate multiple prosecutions, even if the sanction envisaged by it itself would per se constitute a proportionate reaction to the offence being prosecuted.

2 Applying Article 54 CISA in Criminal Proceedings against Corporations

Following this overview on the (small) prevalence of rules prohibiting multiple cross-border prosecutions, I will now address some selected legal problems that arise when applying *ne bis in idem* in its transnational dimension to corporations. In view of the great practical importance of this provision, article 54 CISA will serve as an example for this analysis.

2.1 Is Article 54 CISA Applicable to Corporations?

An analysis of article 54 CISA in the context of cross-border criminal proceedings against corporations first raises the question of whether article 54 CISA is applicable to corporations at all. The answer is clearly yes.[14] Although the European Court of Justice has so far not dealt

[11] With the same view Nicolai Behr and Thomas Streinz, 'Wann droht doppelt Strafe?' [2014] CB 35, 38. For a more detailed analysis of the relationship between the principle of proportionality and the principle of taking into account ('Anrechnungsprinzip') cf Dörte Poelzig and Tabea Bauermeister, 'Kartellrechtsdurchsetzung, ne bis in idem und Verhältnismäßigkeit (Teil 2) – Die Anrechnung kartellrechtlicher Sanktion' [2017] NZKart, 568, 574.

[12] See e.g. ECLI:EU:C:2006:433, *SGL Carbon AG* paras 34-38.

[13] Gerhard Wiedemann, '§ 6 Der Missbrauch marktbeherrschender Stellung' in Gerhard Wiedemann (ed), *Handbuch Kartellrecht* (3rd edn, Beck 2016) para 19; Karl M Meessen and Thomas Funke, '1. Part F' in Ulrich Loewenheim, Karl M Meessen, Alexander Riesenkampff, Christian Kersting and Meyer-Lindemann (eds), *Kartellrecht* (3rd edn, Beck 2016) para 127.

[14] That seems to be a general view, see Hackner (n 2) 428; Felix Walther, 'Commentary on ECJ, Decision of 26.02.2013 – Rs. C-617/10 (*Fransson*)' [2013] WiJ 158, 163; Martin Böse, 'Chapter 3 Part D' in Carsten Momsen and Thomas Grützner (eds), *Wirtschaftsstrafrecht: Handbuch für die Unternehmens- und Anwaltspraxis* (Beck 2013) para 17; Behr and Streinz (n 11) 36; Thomas Rönnau, 'Doppelabschöpfung im Strafverfahren – strafbares

with a case concerning a cross-border multiple prosecution of a corporation, the court applies *ne bis in idem* as an unwritten, fundamental principle of EU law to corporations on a regular basis in the area of EU competition law.[15] According to the prevailing opinion, article 50 GRC is applicable to corporations too.[16] It would therefore be odd if – of all things – article 54 CISA were interpreted differently, especially since there are good reasons to apply article 54 CISA to corporations: Generally speaking, the prohibition of double jeopardy is a manifestation of the principle of proportionality.[17] The scope of the principle of proportionality, however, is obviously not limited to natural persons but also includes corporations. Apart from that, transnational double jeopardy prohibition within the Schengen Area (respectively the European Union) also aims at protecting the freedom of movement, since the risk of multiple prosecutions for the same offense in different EU member states may have a chilling effect on cross-border movement.[18] As the European Treaties guarantee freedom of movement for both natural persons and corporations (see article 49, 54 (1) TFEU), this is another argument in favour of applying article 54 CISA to corporations as well as to natural persons.

2.2 Which Forms of Judicial Decisions Fall Under the Scope of Article 54 CISA?

The second question I want to touch upon concerns the problem of which forms of judicial decisions fall under the scope of article 54 CISA. When it comes to criminal proceedings against corporations, it is interesting in particular, to examine whether the norm applies to Non-Prosecution-Agreements (NPAs) or Deferred-Prosecution-Agreements (DPAs). Looking at the relevant case law of the ECJ, in my opinion article 54 CISA applies to such settlements (as well as to any other procedural act that discontinues a criminal case), if three conditions are met:[19]

2.2.1 Criminal Nature of the Sanctions Involved

Article 54 CISA is only applicable if both the sanction threatening the accused in the first prosecuting state and the sanction threatening him or her in the same case in another

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Unrecht?' in Winfried Hassemer, Eberhard Kempf and Sergio Moccia (eds), *In dubio pro libertate, Festschrift für Klaus Volk zum 65. Geburtstag* (Beck 2009) 583, 590; Christian Rathgeber 'Chapter 6' in Markus Adick and Jens Bülte (eds), *Fiskalstrafrecht* (C. F. Müller 2015) para 145.

[15] ECLI:EU:C:2012:72 *Toshiba*; ECLI:EU:C:2006:433 *SGL Carbin*; ECLI:EU:C:2004:6 *Aalborg Portland*.

[16] Johannes Stalberg, *Zum Anwendungsbereich des Art. 50 der Charta der Grundrechte der Europäischen Union* (Peter Lang 2013) 41-43; Walther (n 14) 163; Tomkin (n 2) para 50.42; cf also ECLI:EU:C:2017:264 *Orsi and Baldetti*.

[17] From a German perspective, see Eberhard Schmidt-Aßmann, 'Art. 103 GG' in Theodor Maunz and Günter Dürig (fd), *Grundgesetz*, (81 suppl., Beck 2017) paras 276 ff. with numerous references; see also Martin Böse, 'The Transnational Dimension of the ne bis in idem principle and the Notion of res iudicata in the European Union' in Martin Böse, Michael Bohlander and André Klip (eds), *Justice Without Borders: Essays in Honour of Wolfgang Schomburg* (Brill Nijhoff 2018), 59.

[18] ECLI:EU:C:2008:708 *Bourquain*, para 41; ECLI:EU:C:2006:614 *Van Straaten*, paras 45-46; ECLI:EU:C:2006:610 *Gasparini*, para 27; ECLI:EU:C:2006:165 *Van Esbroeck*, paras 33, 35; ECLI:EU:C:2005:156 *Miraglia*, para 32; ECLI:EU:C:2003:87 *Gözütok and Brügge*, paras 38, 40.

[19] The restrictions resulting from article 55 CISA are omitted here for reasons of space.

Schengen State are of a criminal law nature. When this is the case, the ECJ has not yet answered in more detail for article 54 CISA. However, it is to be assumed that the court will apply the same standard in this respect as it does regarding article 50 GRC. In determining the criminal nature of a sanction within the meaning of Art. 50 CFR, the ECJ follows the so-called *Engel* case law of the ECtHR, which the ECtHR originally developed in the context of article 6 ECHR and later transferred to the national prohibition of double jeopardy under article 4 of the 7th Additional Protocol to the ECHR. The classification of a sanction or prosecution measure as 'criminal' within the meaning of article 50 CFR (and subsequently article 54 CISA) thus depends firstly on the legal classification of the offence under the national law of the state concerned, secondly on the intrinsic nature of the offence and thirdly on the degree of severity of the penalty that the person concerned is liable to incur.[20] According to these criteria, fines against corporations generally fall under article 50 GRC and therefore also under article 54 CISA. It remains unclear, however, to what extent confiscation orders[21] and sanctions of a nonfinancial nature, such as so-called shaming sanctions,[22] may have transnational *res judicata* effect according to article 54 CISA.

Also, still unresolved is to what extent the most recent (and still very incomplete) case law of the ECJ on the restriction of article 50 CFR (in its domestic dimension) in cases where criminal sanctions and administrative sanctions are cumulated[23] can be transferred to article 54 CISA. According to this case law, the accumulation of criminal penalties with other sanctions and prosecution measures of a 'criminal nature' within the meaning of article 50 CFR may be justified, if the different sanctions pursue complementary aims relating to different aspects of the same unlawful conduct at issue.[24] For such an accumulation, the ECJ requires that

- the Member State concerned establishes clear and precise rules enabling citizens to predict which conduct is liable to be subject to such a duplication of proceedings and penalties,[25]
- there are rules in the laws of the Member States to coordinate criminal prosecution on the one hand and administrative prosecution on the other[26] and

[20] ECLI:EU:C:2018:193 *Garlsson Real Estate*, para 28; ECLI:EU:C:2013:105 *Åkerberg Fransson*, para 35; ECLI:EU:C:2012:319 *Bonda*, para 37.

[21] Rönnau (n 14) 587-594; on the 'criminal nature' of confiscation orders within the meaning of the ECHR see also recently Frank Saliger and Christian Schörner, 'Neues Recht für alte Fälle? Die Vermögensabschöpfung im Spannungsfeld zwischen lex mitior-Grundsatz und Verschlechterungsverbot' [2018] StV 388–392 with numerous references.

[22] Thomas Rönnau and Kilian Wegner, '§ 30' in Andreas Meyer, Rüdiger Veil and Thomas Rönnau (eds), Handbuch Marktmissbrauchsrecht (C. H. Beck 2018) paras 48-49.

[23] ECLI:EU:C:2018:193 *Garlsson Real Estate*; ECLI:EU:C:2018:192 *Di Puma and Zecca*; ECLI:EU:C:2018:197 *Menci*. For a detailed analysis of these judgments, see Kilian Wegner, 'Iterum iterumque in idem? – Einschränkungen des europäischen Mehrfachverfolgungsverbots bei Zusammentreffen von Kriminalstrafe und anderen Sanktionstypen' [2018] HRRS, 205-213.

[24] ECLI:EU:C:2018:193 *Garlsson Real Estate*, para 46; ECLI:EU:C:2018:197 *Menci*, para 44.

[25] ECLI:EU:C:2018:193 *Garlsson Real Estate*, para 51.

[26] ibid. paras 55, 57.

– the national legal order contains provisions ensuring that the severity of the sum of all of the penalties imposed corresponds with the seriousness of the offence established.[27]

An example of this case law is the judgment in the *Menci* case.[28] This case was based on an Italian administrative procedure in which Mr *Menci* was accused of having failed to pay VAT in the amount of EUR 282 495.76 in due time. The proceedings ended with a decision by the Italian tax authorities according to which Mr *Menci* had to pay a tax surcharge of 30 % of the tax liability (= EUR 84,748.74) as an administrative sanction in addition to the payment of the VAT owed. After this decision had become final, criminal tax proceedings were initiated against Mr *Menci* on the same facts. The ECJ considered this multiple prosecution to be in conformity with article 50 CFR. The court argued that, under Italian law, the initiation of criminal tax proceedings following the final conclusion of administrative sanction proceedings in the same case is only possible in cases of serious tax offences. Furthermore – and this is, in my opinion, crucial – Italian law provides for a regulation which suspends the enforcement of the final administrative sanction during newly instituted or continued criminal proceedings in the same case and completely prevents the enforcement of the administrative sanction in the event of a criminal conviction. The latter aspect raises doubts as to whether the *Menci* ruling can be transferred to transnational proceedings in the sense of article 54 CISA without modifications, since in a transnational setting it is impossible for the second sanction state to ensure that the first sanction is not enforced in the first sanction state.[29]

2.2.2 *Final character (= res judicata effect) of the First Sanctioning Decision According to the National Law of the First Prosecuting State*

Article 54 CISA only prohibits a person from being prosecuted again in the same case, if the first sanctioning decision has already become final. A decision is final if, firstly, under the law of the first prosecuting state the criminal proceedings can only be reopened if new evidence ('nova') is produced[30] or – in cases where a conditional discontinuation of criminal proceedings is concerned – the accused fails to comply with the conditions for the discontinuation.[31] Secondly, the decision has to be based on a 'determination as to the merits

[27] ibid. para 56.

[28] ECLI:EU:C:2018:197 *Menci*.

[29] Hans Kudlich and Elisa Hoven, 'Deutsche Manager vor Gericht in Griechenland – zur Geltung von ne bis in idem in Verfahren der Auslandskorruption', in Dionysios Spinellis and others (eds), *Essays in Honour of Nestor Courakis* (Ant. N. Sakkoulas 2017) 583, 616-617.

[30] ECLI:EU:C:2015:812 *Kossowski*, paras 34 ff.; ECLI:EU:C:2014:1057 *Menci*, paras 31 ff.; a similar statement can already be found in ECLI:EU:C:2008:768 *Turanský*, paras 34 ff.; see also ECLI:EU:C:2003:87 *Gözütok and Brügge*, para 30; for further information on the development of the concept of a 'final' decision in the meaning of article 54 CISA in the case law of the ECJ, see Kilian Wegner, 'Entscheidungen zur Verfahrenserledigung im Strafverfahren und ihre transnationale Rechtskraftwirkung gem. Art. 54 SDÜ, Art. 50 GRC' [2016] HRRS 397-402 and Böse (n 17) 53-65.

[31] The fact that decisions to discontinue criminal proceedings provisionally under certain conditions may also fall under article 54 CISA was implicitly stated by the ECJ in its *Brügge* judgment (ECLI:EU:C:2003:87; decided together with the *Gözütok* case), because in this judgment the ECJ considered a prosecutorial decision according to § 153a of the German Code of Criminal Procedure (StPO), which under German law leads to the

of the case'.[32] Apart from that, it does not matter whether a court was involved in the decision[33] or whether a sanction was imposed: Acquittals[34] and suspensions of proceedings[35] may also have a barring effect for renewed prosecution within the meaning of article 54 CISA.

The first criterion mentioned above (= decision prevents renewed prosecution under national law of the first prosecuting state unless new evidence is provided) can be illustrated by the example of DPAs under UK Criminal Law, as they are regulated in detail in Schedule 17 of the UK Crime and Courts Act 2013.[36] According to this legislation, criminal proceedings against the person concerned can only be continued under a DPA if the person concerned either fails to comply with the conditions of the DPA (cf. section 9 'Breach of DPA') or new evidence shows, that the person concerned wilfully or negligently provided inaccurate, misleading or incomplete information to the prosecutor (section 11 (3)). A DPA under UK law therefore has a transnational *res judicata* effect within the meaning of article 54 CISA. In this context, it is worth noting that all decisions falling under article 54 CISA lead to a *permanent concentration of jurisdiction* in the first prosecuting state.[37] Thus, if new evidence emerges or if the accused fails to comply with the conditions of a temporary discontinuation of the criminal proceedings, it is the sole competence of the first prosecuting state to continue the proceedings.[38] However, another state may not prosecute the accused in the same case despite new evidence or a breach of a settlement agreement.

Since its *Kossowski* ruling, the ECJ has regarded the second criterion (= 'determination as to the merits of the case') as a kind of 'seriousness test',[39] according to which a decision to discontinue criminal proceedings due to lack of evidence must be based on a minimum level of investigative activity by the competent judicial body. It cannot be excluded that this criterion is also relevant when it comes to the *res judicata* effect of NPAs, DPAs or other forms

provisional discontinuation of criminal proceedings subject to conditions, as final within the meaning of article 54 CISA. In the subsequent decision in the case *M*, the ECJ explicitly confirmed this interpretation (ECLI:EU:C:2014:1057; for a precise contextualization see Christoph Burchard, '"Wer zuerst kommt, mahlt zuerst – und als einziger!" – Zuständigkeitskonzentrationen durch das europäische ne bis in idem bei beschränkt rechtskräftigen Entscheidungen' [2015] HRRS 26-32).

[32] ECLI:EU:C:2016:483 *Kossowski*, paras 42-54; ECLI:EU:C:2014:1057 *M*, para 30; ECLI:EU:C:2005:156 *Miraglia*, paras 28-35.

[33] See ECLI:EU:C:2003:87 *Gözütok and Brügge*, para 30, where the ECJ ruled that the barring effect of article 54 CISA may also occur if a public prosecutor – without the involvement of a judge – discontinues criminal proceedings on the condition of the payment of a fine. Nevertheless, it is often claimed in Germany that the scope of article 54 CISA is limited to court decisions, see the overview of the debate delivered by Böse (n 17) 63 with numerous references.

[34] ECLI:EU:C:2006:614 *Van Straaten*. The decision concerned an acquittal for lack of evidence.

[35] ECLI:EU:C:2006:610 *Gasparini*. This judgement addressed a discontinuance of criminal proceedings on the grounds of the statute of limitations.

[36] Available online at <http://t1p.de/psjb> accessed 12 December 2018.

[37] Karsten Gaede, 'Transnationales "ne bis in idem" auf schwachem grundrechtlichen Fundament' [2014] NJW 2990, 2992; Burchard (n 31) 26.

[38] Böse (n 17) 68.

[39] Wegner (n 30) 403.

of settlements, which are – more or less – completely based on the facts provided by the investigated corporation: from an attorney's point of view, when stipulating a settlement, it should be ensured that the facts submitted by the corporation are sufficiently substantiated so the competent judicial authority has the possibility to check the information at least for plausibility and does not blindly rely on the portrayal of facts by the corporation. The review efforts of the authority should be documented to ensure that the settlement is not denied the *res judicata* effect in another state due to a lack of a 'determination as to the merits of the case'.

Finally, the question of how to deal with decisions discontinuing criminal proceedings, which take place on legal grounds (e.g. because the criminal offence prosecuted has become time-barred) and which are therefore not preceded by a 'determination as to the merits of the case' in the sense of a comprehensive collection and investigation of evidence, has not yet been clarified.

To solve this problem, I have made the following suggestion:[40] A discontinuation of proceedings on legal grounds must be deemed to have taken place after a 'determination as to the merits of the case' if it reflects *a normative decision* on whether the offense concerned is *generally worth prosecuting (anymore)*. Such a decision may, for example, be related to

- the date or extent of the offence (e.g. in the event of discontinuation due to statute of limitations or insignificance);
- the personal characteristics of the perpetrator at the time of the offence (e.g. in the case of discontinuation due to incapacity for punishment at the time of the offence);
- the personal characteristics of the perpetrator at the time of the first prosecution (e.g. in case of discontinuation due to low remaining life expectancy);
- the willingness of the injured party to prosecute (e.g. in the absence of a criminal complaint or a request for prosecution);
- special features of the procedure in the first prosecuting state (e.g. in the case of discontinuation due to the use of an *agent provocateur* or due to overlong procedure duration).

In each of these situations, the accused regularly has a legitimate expectation that he will not be prosecuted again in the same case.[41] Such an expectation is not worthy of protection, however, if the final decision to discontinue the criminal proceedings in the first prosecuting

[40] See already Wegner (n 30) 401-402.

[41] An exception may apply if the law of the first persecutor state blatantly (!) deviates from the usual standard of protection for the accused, which is customary in the Schengen area or in the EU (for example by providing for a discontinuation of the proceedings simply because the accused is over 70 years old), because in such cases the accused may not legitimately assume that such an extraordinary regulation will be recognized on a Schengen-wide or EU-wide basis. If there are obligations under EU law to impose penalties, however, such procedural provisions which give the accused too great an advantage will regularly be in violation of EU law anyway (cf the leading decisions ECLI:EU:C:2015:555 *Taricco*, ECLI:EU:C:2017:936 *M.A.S. and M.B.* and ECLI:EU:C:2018:392 *Kolev*). A further exception to the concept represented here is imaginable if the decision to discontinue the criminal proceedings is based on an arbitrary, obviously unjustifiable application of the law in the first prosecuting state.

state does not state whether an offence is generally worth prosecuting, but merely expresses the fact that the prosecution by the judicial body concerned is not appropriate. Accordingly, article 54 CISA does not apply to discontinuation of proceedings due to a lack of competence of the judicial body discontinuing the proceedings.[42] Furthermore, decisions to discontinue proceedings which are only due to formal errors or because the prosecution in the first prosecuting state would require special efforts and/or another state appears more appropriate as a state of persecution have no cross-border *res judicata* effect pursuant to article 54 CISA.[43]

2.2.3 Enforcement element

If a penalty has been imposed, article 54 CISA only bars renewed prosecution if the imposed penalty has been enforced, is currently in the process of being enforced or can no longer be enforced under the laws of the sentencing state. In the case of discontinuation of criminal proceedings (e.g. in the context of a DPA or a NPA), which take place under conditions (e.g. payment of a fine), the transnational *res judicata* effect is therefore only triggered after the conditions have been fulfilled. However, if the sanction is suspended on probation, article 54 CISA already applies as soon as the probation period has begun.[44]

2.3 Are Mother and Daughter Company "the Same Person" in the Sense of Art. 54 CISA?

It is obvious that prohibitions on multiple prosecutions can only apply if the persons prosecuted are the same person. In the context of article 54 CISA, for example, it is well established that the conviction of an offender in one Schengen State does not bar the conviction of an accomplice in another Schengen State.[45] More difficult, however, is the question of how to deal with cases in which both the first and second offender are corporations that form an organizational and/or economic unit. This is illustrated by the following example:

'B'-GmbH, headquartered in Germany, is a 100 %-subsidiary of 'A'-S.A., based in France, and transfers its profits completely to the parent company based on a control and profit transfer agreement. G, the managing director of 'B'-GmbH, is also chairman of the board ('directoire') of the 'A'-S.A. In the course of investigations by a German public prosecutor's office, it turns out that G committed crimes in Germany for the benefit of 'B'-GmbH and 'A'-S.A. Therefore, a large fine is imposed and enforced against 'B'-GmbH. G's actions are later investigated in France and a new fine is to be imposed on 'A'-S.A. by French authorities.

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[42] This was already indicated by Mayeul Hiéramente, 'Ne bis in idem in Europa – Eine Frage der Einstellung' [2014] StraFo 445, 449; see also Gudrun Hochmayr, 'Europäische Rechtskraft oder gegenseitige Anerkennung. Anforderungen an die Bestandskraft der Erledigung' in Gudrun Hochmayr (ed), *"Ne bis in idem" in Europa – Praxis, Probleme und Perspektiven des Doppelverfolgungsverbots* (Nomos 2015) 110-111.

[43] cf ECLI:EU:C:2005:156 *Miraglia.*

[44] Ambos, *European Criminal Law* (n 3) 159 para 188 with further references.

[45] See ECLI:EU:C:2006:610 *Gasparini*, paras 34 ff and Tomkin (n 2) Art. 50 GRC para 50.41.

The case raises the question of whether article 54 CISA constitutes an obstacle to punishing 'A'-S.A. because the association has already been sanctioned in the same case by the fact that 'B'-GmbH as a subsidiary has received a fine. At first glance, the fact that 'A'-S.A. and 'B'-GmbH are formally independent associations and thus also different addressees of sanctions within the meaning of article 54 CISA speaks against this assumption. From an economic point of view, however, it could be argued that 'A'-S.A. and 'B'-GmbH are identical addressees of sanctions, since 'A'-S.A. can dispose of the assets of 'B'-GmbH (almost) as much as its own assets and has access to the profits of its subsidiary. A financial loss due to sanctions on the part of 'B'-GmbH therefore has (almost) the same economic effect for 'A'-S.A. as if 'A'-S.A. had suffered this loss directly itself. From this perspective, it seems reasonable to conclude that 'A'-S.A. and 'B'-GmbH are regarded as a 'sanction unit' and thus as identical addressees of sanctions within the meaning of article 54 CISA.[46] The initial sanction against 'B'-GmbH would thus bar a new sanction against 'A'-S.A. in the same case.

While this question has not yet been clarified by the courts, the economic approach described above is largely rejected in (German) legal literature with reference to the principle of (formal) separation of a group parent association and its subsidiaries.[47] As an alternative, it is often proposed to take the legally binding initial sanction against one corporate subsidiary into account when assessing a new sanction imposed on company of the group in the same case.[48]

It can be regarded as certain, however, that article 54 CISA – irrespective of the discussion outlined above – bars a new prosecution of all group associations if the initial sanction has been imposed against the group as an economic entity and/or the group associations as joint and several debtors.[49]

2.4 The 'Same Act' (*idem*) in Criminal Proceedings against Corporations

According to the case law of the ECJ, 'the same act' in the sense of article 54 CISA is to be understood as a set of concrete facts which are 'inextricably linked together in time, in space and by their subject-matter'.[50] The legal qualification of these facts is just as irrelevant as the legal interest protected by the offence concerned.[51] Since the ECJ thus refrains from

[46] This is proposed e.g. by Marco Mansdörfer and Sven Timmerbeil, 'Zurechnung und Haftungsdurchgriff im Konzern – Eine rechtsgebietsübergreifende Betrachtung' [2004] WM 362, 369.

[47] Andreas Minkoff, *Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern* (C. F. Müller 2016) 221-222; Anja Tschierschke, *Die Sanktionierung des Unternehmensverbunds* (Nomos 2013) 262-263, each with further references.

[48] Minkoff (n 47) 222 with further references.

[49] Christian Muders, *Die Haftung im Konzern für die Verletzung des Bußgeldtatbestandes des § 130 OWiG* (Nomos 2014) 252; cf also Tschierschke (n 47) 112, 263.

[50] ECLI:EU:C:2010:683 *Mantello*, paras 39-40; ECLI:EU:C:2007:444 *Kraaijenbrink*, para 26; ECLI:EU:C:2007:441 *Kretzinger*, paras 29, 37; ECLI:EU:C:2006:614 *Van Straaten*, paras 48, 53; ECLI:EU:C:2006:165 *Van Esbroeck*, paras 36, 42; see also ECLI:EU:C:2018:197 *Menci*, para 35; ECLI:EU:C:2018:192 *Garlsson Real Estate*, para 37 (regarding article 50 CFR).

[51] ECLI:EU:C:2010:683 *Mantello*, para 39; ECLI:EU:C:2007:444 *Kraaijenbrink*, para 36; ECLI:EU:C:2007:441 *Kretzinger*, paras 29, 37; ECLI:EU:C:2006:614 *Van Straaten*, para 53; ECLI:EU:C:2006:610 *Gasparini*, para 54;

determining the scope of 'the same act' on the basis of the substantive breach of the law, the described approach of the ECJ is often referred to as an 'factual' or 'naturalistic' understanding of the act[52] and is thus distinguished from the rather 'normative' concept which the ECJ follows in the context of EU antitrust and competition law when applying *ne bis in idem* as a general principle of Union law.[53] However, this must not hide the fact that the question of when facts 'are inextricably linked together in time, in space and by their subject-matter' is itself highly normative.[54]

Answering this question ('When are facts inextricably linked together in time, in space and by their subject-matter?') is already difficult in individual criminal law and causes even greater difficulties when it comes to prosecuting corporations. This can be illustrated, for example, using the scenario in which several natural persons trigger multiple persecution of an association by (partially) parallel action:

A is a member of the Management Board of 'S'-AG (based in Germany) and in this function has slush funds set up in order to finance bribes to obtain public contracts in Denmark. The offence is discovered and an association fine is imposed on 'S'-AG in accordance with section 30 German Administrative Offences Act ('OWiG'). Later, it turns out that B, who is also a member of the Management Board of 'S'-AG, set up an identical bribery system for the Belgian market. For this reason, another fine is now to be imposed on 'S'-AG in Belgium. The relevant Belgian law provides that associations are liable, irrespective of fault, for association-related offences committed by their managers to the extent that the commission of the offence violates obligations relating to the association or the association is intended to benefit from the act.

The example case raises the question whether the acts of A and B are 'inextricably linked together in time, in space and by their subject-matter' and thus correspond to the ECJ's understanding of the 'same act' in the sense of article 54 CISA. In this respect, I suggest – in

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ECLI:EU:C:2006:16 *Van Esbroeck*, paras 36, 42. In detail, the wording used by the ECJ in these cases differs slightly from each other, without any substantive differences arising therefrom.

[52] Henning Radtke, 'Der strafprozessuale Tatbegriff auf europäischer und nationaler Ebene' [2012] NStZ 479, 483; Henning Radtke, 'Mehrfachverfolgung durch verschiedene Schengen-Vertragsstaaten – Ein- und Ausfuhr derselben Betäubungsmittel' [2008] NStZ 162, 162-163; Hackner (n 2) 427.

[53] In EU competition law, the application of *ne bis in idem* as a general principle of EU law according to the ECJ 'is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected' (see ECLI:EU:C:2004:6 *Portland*, para 338; confirmed by ECLI:EU:C:2012:72 *Toshiba I*, para 97). An 'idem' therefore exists – irrespective of the facts – only if the sanction provisions applied by the first and second prosecuting states each protect the same legal interest. This approach to define 'idem' can be described as 'normative'.

[54] Remarkably, the ECJ leaves the answer to this question in principle to the national courts and law enforcement authorities in the second prosecuting State, which therefore have a margin of discretion in this respect (cf, for example, ECLI:EU:C:2007:441 *Kretzinger*, para 37; ECLI:EU:C:2006:614 *Van Straaten*, para 52; ECLI:EU:C:2006:610 *Gasparini*, paras 32, 56; ECLI:EU:C:2006:165 *Van Esbroeck*, paras 38, 42). In the aforementioned decisions, this margin of discretion is expressly granted only to the 'competent national courts', but must likewise be available to all other sanctioning authorities (e.g. a public prosecutor's office) that are authorized to bring about a 'final judgement' within the meaning of article 54 CISA.

a first step – considering whether the individual perpetrators have committed *structurally comparable acts*, which may be indicated, for example, by comparable means of action, motives and (if available) victims. If, according to these criteria, comparable individual acts exist (as in the example case, where in each incident bribes were paid to public officials in order to obtain public contracts!), in a second step the *degree of cooperation and communicative coordination* of the individual perpetrators (in the example: A and B) must be taken into account: If the connected acts are parts of a concerted general plan, in which the participants deliberately worked together, there is one single act in the sense of article 54 CISA. This may be indicated by regular telephone and e-mail contact as well as the holding of meetings related to the crime or strong overlapping of the people involved. If, on the other hand, the individual acts are attributable to different 'systems' whose participants have coordinated their actions at best on a selective and irregular basis, it cannot be assumed that their actions culminate in one single criminal act of the corporation.

3 Conclusions

From a global perspective, the protective mechanisms for avoiding cross-border multiple prosecution of companies are lagging behind the growing eagerness of law enforcement authorities prosecuting crime across borders around the world – an unfortunate situation. In the Schengen area, where article 54 CISA offers a least a minimum level of cross-border *ne bis in idem* protection, there is still considerable legal uncertainty regarding the application of this provision. This uncertainty – together with the fundamental problem that cross-border *ne bis in idem* rules alone are structurally unsuitable for the resolution of jurisdictional conflicts[55] – leads to a situation in which the law enforcement authorities in cross-border investigations frequently fear that authorities of other Schengen States could – through premature sanction decisions – create an Schengen-wide sanction bar under article 54 CISA.[56] In practice, this fear often leads to national authorities deliberately keeping the results of investigations to themselves in order to prevent improper final decisions in other Schengen States. As a result, there is a risk of paralysis of cross-border persecution cooperation in the Schengen area, thereby undermining the political guiding principle of an area of freedom, security and justice. In conclusion, I can therefore only reiterate the demand to finally create binding and transparent rules for the coordination of cross-border criminal

[55] See pars *pro toto* Frank Zimmermann, *Strafgewaltkonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen* (Nomos 2014) 280-286 with numerous further references.

[56] The 'Volkswagen' case shows that this fear is not always completely unjustified: By decision of 8 August 2016, the Italian competition authority AGCM imposed a fine of EUR 5 million against Volkswagen AG and its Italian subsidiary Volkswagen Group Italia S.p.A. (as joint and several debtors) for violations of certain regulations in connection with the so-called 'exhaust emissions scandal'. A cursory review of the facts on which this decision is based (cf. the reasoning of the decision, which can be accessed online at http://t1p.de/q5ru) makes it seem possible that large parts of the sanction proceedings conducted against Volkswagen AG in the EU (such as pursuant to section 30 OWiG in Germany) are blocked by the *res judicata* effect of the AGCM decision under article 54 CISA.

proceedings with in the Schengen Area and/or the European Union:[57] transnational double jeopardy protection without transnational coordination of criminal proceedings remains a mission bound to fail!

Selected Literature

Behr N and Streinz T, 'Wann droht doppelt Strafe?' [2014] CB 35

Böse M, 'The Transnational Dimension of the ne bis in idem principle and the Notion of res iudicata in the European Union' in Martin Böse, Michael Bohlander, André Klip (eds), *Justice Without Borders: Essays in Honour of Wolfgang Schomburg* (Brill Nijhoff 2018) 59

Hochmayr G, 'Europäische Rechtskraft oder gegenseitige Anerkennung. Anforderungen an die Bestandskraft der Erledigung' in Gudrun Hochmayr (ed), *"Ne bis in idem" in Europa – Praxis, Probleme und Perspektiven des Doppelverfolgungsverbots* (Nomos 2015) 110

Minkoff A, *Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern* (CF Müller 2016)

Muders C, *Die Haftung im Konzern für die Verletzung des Bußgeldtatbestandes des § 130 OWiG* (Nomos 2014)

Tschierschke A, *Die Sanktionierung des Unternehmensverbunds* (Nomos 2013)

Wegner K, 'Iterum iterumque in idem? – Einschränkungen des europäischen Mehrfachverfolgungsverbots bei Zusammentreffen von Kriminalstrafe und anderen Sanktionstypen' [2018] HRRS 205

Zimmermann F, *Strafgewaltkonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen* (Nomos 2014)

[57] An overview of the numerous proposals already made in this regard is provided by Ambos, *European Criminal Law* (n 3) paras 190-192; see also Böse (n 17) 72.

NE BIS IN IDEM AND CORPORATE LIABILITY: ARE CORPORATION AND ITS AGENT REALLY DIFFERENT PERSONS?

By Annarita De Rubeis[*]

Abstract

The recent developments in European and Italian case law regarding ne bis in idem *have focused the attention on cases where, for the same violation, two sanctions would follow. The first sanction would be imposed on the individual while the second sanction on a legal entity of which the individual is an agent. The ECtHR has solved the problem by concluding that the legal entity and its agent are not the same person, while the ECJ has agreed with this solution. However, this solution is contradictory with the principle that identifies the actions of the legal entity with the ones of its physical agent. This is the cardinal rule on which corporate liability rests on both the UK and continental Europe. The problem first emerged in the UK and in other common law country for those crimes which require a certain* mens rea. *The best solution is neither in discarding the identification principle nor in establishing that the legal entity and its agent are two different legal actors, but rather in identifying liability criteria specifically tailored to the legal entity. In this way, both the prohibition against* bis in idem *and the culpability principle would be respected.*

1 The problem of *ne bis in idem* for the punishment of the corporation and its agent for the same offence in Italian tax law

Focusing on the *ne bis in idem* principle in the case-law of European Courts brings attention to the question whether this principle is respected in cases where two sanctions are applied for the same corporate offence (that is, an offence committed within the activities of a corporation), one to a natural person and the other to a corporation. This problem emerged in the debate on *ne bis in idem* following a number of judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ), which have criticized the existence of so-called double-track sanctions, in which the same conduct leads to a double liability, one criminal and the other formally administrative (but essentially

[*] PhD in criminal law and procedure, Sapienza University of Rome.

punitive in nature).[1] One of the cases that have been addressed by the ECJ[2] concerns the Italian tax system, which, in certain cases of failure to pay taxes, provides for two offences, one administrative and the other criminal in character, based on the same conduct.[3] The connection with liability of the corporations for crimes stems from the fact that Italian law provides that, if the tax relates to a legal person, then the administrative sanction is due only by the legal person.[4] So, ultimately, the same conduct is punished with a criminal sanction for the manager and with a formally administrative (but essentially punitive) sanction for the corporation.

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[1] The problem of so called double-track sanctions (in Italian, *doppi binari sanzionatori*) rose originally from some decisions of ECtHR dealing with the violation of article 4 of Protocol No. 7 to the European Convention of Human Rights, which reads '1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State': *Sergey Zolotukhin v. Russia* [GC] no. 14939/03, ECHR 2009-I 71; *Grande Stevens and others v. Italy* no. 18640/10 (ECtHR, 2 March 2014); *A. & B. v. Norway* [GC] app. nos. 24130/11 and 29758/11 (ECtHR, 15 November 2017). The same question has been dealt with by ECJ, as article 50 of EU Chart of Fundamental Rights reads: Right not to be tried or punished twice in criminal proceedings for the same criminal offence. 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law': C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105; C-524/15, *Menci* [2018] ECLI:EU:C:2018:197; C-537/16, *Garlsson Real Estate and o*. [2018] ECLI:EU:C:2018:193; C-596/16 and 597/16, *Di Puma and Zecca* [2018] ECLI:EU:C:2018:192.

[2] Joined cases C-217/15 and C- 350/15, *Orsi and Baldetti* [2017] ECLI:EU:C:2017:264.

[3] The case dealt with ECJ judgement *Orsi and Baldetti* concerning the two criminal offences provided by art 10-bis d.lgs. 74/2000, which reads 'Any person who fails to pay, by the deadline fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 150,000 for each tax period', and art. 10-ter d.lgs. 74/2000, which reads 'Any person who fails to pay the value added tax owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 250,00 for each tax period', and the administrative offence provided for by art 13 d.lgs. 471/1997, which reads 'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalization payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less'. So, both the criminal offences and the administrative one punish the failure to pay withholding tax or VAT and the only differences are in the period considered, because the criminal offence consists in the failure to pay the annual obligation, instead the administrative offence consists in the failure to pay the monthly obligations and, furthermore, in the amount due, because for the criminal penalty it must be more than 150,000 (for the withholding tax) or 250,00 (for the VAT) euros. As it is easy to note, it is the same sets of facts that fulfill both the criminal offences and the administrative one. And, in fact, even if the Italian Corte di cassazione in its highest composition (so called Sezioni Unite, judgements 28.3.2013 n. 37424, Romano and n. 37425, Favellato) and, after it, all the other Italian courts, said that there are two different sets of facts – argument that is strongly criticized by Italian scholarship – the Court of Justice recognizes without any discussion that, in that point, there's an *idem factum*: *see* C-524/15, *Menci*, para 38.

[4] *See* article 7 d.l. 30 September 2003, n. 269.

For the sake of clarity, this hypothetical is different from the general Italian system of corporate liability for crimes provided for by the Legislative Decree 231/2001, as the latter does not include tax crimes. In this case, there are two different offences, one criminal and one administrative in nature, provided for by two separate legal provisions that apply jointly also to the natural person.[5] However, if the tax duties refer to the corporation, then there is a situation analogous to corporate liability for crimes, where the same sets of facts generate two liabilities, one criminal in nature for the manager that committed the criminal conduct, and another (formally) administrative for the legal entity. The twist is that corporate liability flows automatically from that of the individual, without any further conditions (unlike the Legislative Decree 231/2001 system) that – as it will be further explained – bases the liability of the legal entity on specific elements.

2 The solution adopted by the Court of Justice of the European Union in the *Orsi and Baldetti* case and the friction with the identification theory

The solution adopted by the ECJ – based on two previous decisions of the European Court of Human Rights against Norway and Finland[6] – is not convincing in that it provides that *ne bis in idem* is not violated since the natural and legal person (literally) 'are not the same person'.[7] This finding is inconsistent with the principle of identification between the individual and the corporate body (in Italian, the *immedesimazione organica* theory), which is both in common law and civil law countries – in Italy, but also in Germany, Spain and France for example – the main criterion according to which legal persons are liable for the acts of natural persons.

According to the identification theory, the legal person acts through some particular agents, called *organs*: it is possible to say that a company, for example, 'signs a contract', 'fulfills an obligation' and so on, because there is a natural person who acts as if the one acting were the legal person. To achieve this result, it is stated that *the organ is the corporation as such*, i.e., it is identified with the legal person and does not simply represent it.[8] This comes from the

[5] And, in fact, also the violation of *ne bis in idem* when the administrative offence provided for by art. 13 d.lgs. 471/1997 and the two criminal offences provided for by art. 10-bis and 10-ter d.lgs. 74/2000 are applied jointly to a natural person has been dealt with in ECJ, C-524/15, *Menci*.

[6] *See Isaksen v. Norway* app. no. 13596/02 (ECtHR, 2 October 2003); *Pirttimaki v. Finland* app. no. 35232/11 (ECtHR, 20 May 2014).

[7] These are the words of Advocate General (Joined Cases C-217/15 and C-350/15, *Orsi and Baldetti*, Opinion of AG Campos Sánchez-Bordona delivered on 12 January 2017, ECLI:EU:C:2017:14, para 37), to which the judgment refers in para 22.

[8] About the organic theory in the general corporate theory, in Italian, *see* Massimo Severo Giannini, 'Organi (teoria generale)', in *Enciclopedia del Diritto* (vol XXXI, Giuffrè 1981) 37-60; Angelo Falzea, 'Capacità (teoria generale)', in *Enciclopedia del Diritto* (vol VI, Giuffrè 1960) 31; Riccardo Orestano, *Il «problema delle persone giuridiche» in diritto romano* (Giapplichelli 1968) 40; Santi Romano, 'Organi', in *Frammenti di un dizionario giuridico* (Giuffrè 1943) 145-171; Salvatore Foderaro, 'Organo (teoria dell')', in *Nuovissimo Digesto Italiano* (vol XII, Giappichelli 1965) 214-233.

famous *Organschaft* theory (also called *Theorie von der realen Verbandspersoenlichkeit*) of Otto von Gierke that has had a great diffusion in all European countries.[9]

The argument set forth in European decisions denies this basic principle, which belongs to general corporate law theory. However, the argument also highlights a large limitation of identification when applied in the criminal sphere (in addition to the other important – and much more studied – objection to the use of the identification theory in criminal matters, that is the friction with the principle of culpability[10]). In fact, identification is absolutely valid in the extra-criminal field, as it determines a complete absorption of the legal identity of the natural person in that of the legal person. In short, only the corporation is legally relevant and, consequently, liable, while the natural person is irrelevant.[11] In the criminal sphere, however, this does not happen and identification is used to make the legal person liable, even when the natural person is also liable.[12] This happens in Italian tax law but, for example, also in the context of many European legal acts, starting from the European model of corporate liability for crimes, article 3 Second Protocol to the PIF convention[13] (now reproduced in article 6 of the PIF Directive[14]), which establishes liability of legal persons based on the identification principle and expressly requires that the individual be punished jointly with the legal entity (§ 3).[15]

With reference to the criminal cases then, there is a sort of *incomplete identification*: the organ *is* the corporation when it comes to making the entity liable, but the organ *is not* the

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[9] *See* Otto von Gierke, *Das deutsche Genossenschaftsrecht* (vol IV, Weidmannsche Buchhandlung 1868).

[10] The friction with the principle of culpability in the Italian scholarship is a classical argument against the use of *immedesimazione organica* to attribute criminal liability: on the *vexata questio* of the compliance of the identification theory with culpability principle, *see* for example, Franco Bricola, 'Il costo del principio «societas delinquere non potest» nell'attuale dimensione del fenomeno societario' [1970] Rivista italiana di diritto e procedura penale 951; Carlo Federico Grosso, voce 'Responsabilità penale', in *Nuovissimo digesto italiano* (vol XV, Giappichelli 1968) 707, and, more recently, Antonio Fiorella and Nicola Selvaggi, 'Compliance programs e "dominabilità aggregata" del fatto. Verso una responsabilità da reato dell'ente compiutamente personale [2014] Diritto penale contemporaneo (rivista trimestrale, vol 3-4) 107.

[11] Foderaro (n. 8) 215; Angelo Falzea, 'La responsabilità penale delle persone giuridiche' in Barbero Santos and others (eds), *La responsabilità penale delle persone giuridiche in diritto comunitario* (Giuffrè 1981) 157.

[12] In the same sense, Nicola Selvaggi, *L'interesse dell'ente collettivo quale criterio di ascrizione della responsabilità da reato* (Jovene 2006) 65 underlines the inadequacy of the organic theory to attribute criminal liability just because it, if correctly taken, would determine the deresponsabilization of the individual as well. Also Vincenzo Mongillo, *La responsabilità penale tra individuo ed ente collettivo* (Giappichelli 2018) 120 speaks about the 'inadequacy' of the organic theory to found the double punishment of individual and corporation.

[13] Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, [1997] OJ C 221/12.

[14] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, [2017] OJ L 198/29.

[15] This provision is reproduced, for example, by art 6 of Directive 2008/99/CE, of 19 November 2008, on the protection of the environment through criminal law; art 11 of Directive 2009/52/CE of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals; art. 8-*ter* of Directive 2009/123/CE, of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements; art 5 of Directive 2011/36/UE, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

corporation when it comes to making him or her liable as a natural person. In this sense, the European Courts are right to say that there are two persons, but if this is true, then why should the legal person be liable since the criminal act is undoubtedly committed by the natural person?

The point is that in criminal matters the individual and the corporation are neither the same person nor two different persons. The problem lies in the way in which the legal person is made liable, and the friction with *ne bis in idem* derives precisely from attempting to punish both the natural and legal persons on the basis of a principle which states they are one person.

3 A glance at common law countries: the experiences of England and Australia

This friction becomes clear when looking at common law countries, where there is a peculiar version of identification principle applied in criminal matters since the 1970s. It was created by the English House of Lords to make corporations liable also for *mens rea* offences, and until now it is the only (general) criterion for attributing states of mind to corporations in a very large number of countries influenced by English common law. According to this principle, some individuals do not act *for* the corporation but *are the embodiment of the corporation*, given the role they play within the organization, as they represent the *directing mind and will*. If one of these individuals commits a crime, then the crime was committed by the corporation *as such* (the *mens rea* of the natural person becomes the *mens rea* of the legal person itself).[16] By this theory, English courts wanted to create a form of *direct* or *personal* liability of the corporation,[17] opposed to the other type of corporate liability known by English system that is the *vicarious liability*. In fact, the vicarious liability is considered an *indirect* liability, because the corporation is held responsible for the acts of its employees and, for that reason, can operate only for offences of strict liability.[18]

To achieve the result of creating a (real) *personal* liability of the corporation, English courts elaborated a very narrow meaning of *identification*, limiting the persons who could be considered the *directing mind and will* of the corporation to those high-level managers that express, *in those sets of facts that integrated the offence*, the *complete will* of the corporation, and so to those who had the total *mens rea* required for the offence. In the English system, this proved to be effective in very few cases in which the company was so small that actually the natural person who had acted could be identified. The most striking case is that of Mr. Kite,

[16] The theory belongs to the *common law*. The *leading case* is the famous *Tesco Supermarket Ltd. v. Nattrass* [1971] 2WLR 166, that had a great diffusion in all the commonwealth countries.

[17] The definition of the identification as a form of *direct liability* is generally diffused in case-law: see, for example, Attorney General's Reference (No 2 of 1999) [2000] 3 All ER 182, p. 186. Scholars use the same definition, too: *see*, among the others, Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) 154.

[18] On the distinction between *identification* and *vicarious liability*, see in English scholarship, James Gobert, *Rethinking Corporate Crime* (CUP 2003) 55; Celia Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence and Risk* (Springer 2011) 96.

who ran a company, OLL Ltd (with himself as the only partner plus one employee, and of which 'no one had heard nothing before the tragedy'[19]) who organized canoe trips.[20] During one of these trips, three boys died. The identification principle, in this case, worked in full, but what happened was that Mr. Kite was being punished twice for manslaughter, first as a natural person and then as a company. As English scholars point out, identification only works when it is useless, as in these cases there is already a natural person who is fully liable for the crime.[21] In addition, here we can say that there is also a violation of *ne bis in idem* principle.

The same problem has clearly emerged in the Australian legal system. The Australian High Court often discussed the question of whether the liability of the corporation could coexist with the liability of the person who acts on its behalf for the same sets of facts.[22] On this, Franklyn J emblematically said in a famous case: 'It appears to me clearly wrong and oppressive to then prosecute Whitehead [*the managing director of a company that committed market abuse*] personally for the identical acts and decisions as were relied on as the acts of the company.'[23]

The High Court decided to overcome this objection for reasons of *criminal policy*, because 'the fundamental purpose of the companies and securities legislation – to ensure the protection of the public – would be seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves have perpetrated'[24] and also for the influence of the case law of English House of Lords, which applied the sanction to both the individual and the corporation. And so, it built a complex mechanism to distinguish the sources of liabilities of the corporation and of the

[19] Wells, *Corporations and Criminal Responsibility* (n 17) 115.

[20] *R. v. Kite and OLL Ltd., Indipendent* (9 dec. 1994) reported by Wells, *Corporations and Criminal Responsibility* (n 17) 107.

[21] In this sense, see Wells, *Corporations and Criminal Responsibility* (n 16) 162; James Gobert, 'Corporate criminality: four models of fault' (1994) 14 Legal Stud 401; Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Sydney L Rev 278.

[22] Really, the solution adopted by the High Court is more complex and relies on the difference between identification theory and vicarious liability: the High Court, in fact, distinguishes these two forms of liability of corporation saying that the identification theory determines a direct liability of the corporation, in which there is 'some sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of the company and the separate act of himself as an individual': *The Queen v. Goodall* (1975) 11 SASR 94; while in vicarious liability there is just an indirect liability of the corporation, that responds of the fact of the individual, and 'it would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts': *Mallan v. Lee* [1949] HCA 48; (1949) 80 CLR 198. However, as Gobert, 'Corporate criminality' (n 21) 396 says, even the liability based on identification is 'derivative', it is just a fiction to say that there's a *direct* liability of the corporation and, so, in our opinion, the argument of the *conceptual inversion* of *Mallan v. Lee* is valid also for identification.

[23] *Hamilton v. Whitehead* [1988] HCA 65; (1988) 166 CLR 121, para 4.

[24] *Hamilton v. Whitehead* [1988] HCA 65; (1988) 166 CLR 121, para 14.

individual, saying that they are co-offenders in the same offence, the first as a principal, the second as a participant.[25]

4 The only possible solution: overcoming the identification theory

The English and the Australian experiences clearly show that the attempt to solve the problem by *counting* how many *persons* are involved (as the European courts do) short-circuits the principle. Franklyn J is right when he says that it is 'clearly wrong and oppressive'[26] to punish personally that Australian managing director for the identical acts already punished as acts of the company. Relying exclusively on the position of the natural person within the company to assign liability is not a satisfactory criterion because it relies on the identification principle, according to which there is only one person, to impose two distinct liabilities. This can generate double surreptitious punishments.

The example of small corporations is extreme, but the argument is valid in general regardless of the size of the legal entity. Consider, just for example, those large companies that belong to a company group where there is no real division between ownership and management (in Italy, this is the case for the majority of large companies). Even in these cases, punishing the management and the legal entity means targeting the same assets twice, although the liable persons are formally two.

Therefore, it does not make much sense to reiterate that a legal person and a natural person are formally two different persons. It is the concept of *corporate personhood*, created in the context and for the purposes of civil law, which is not adequate to criminal law, which is informed by the principle of personality.[27] As it has been said, its use to attribute criminal liability 'exists with a very weak theoretical foundation'[28] and could be another of those cases of attributing a general meaning to a concept that, not having a *counterpart* which corresponds to it in the world of fact that the ordinary words have, must not be abstracted from its original contest.[29]

So, it is not the fact itself that the corporation is considered by law a *person* to justify the duplication of sanctions. Conversely, what we should ask is whether it is right and useful to

[25] *Hamilton v. Whitehead* [1988] HCA 65; (1988) 166 CLR 121. The principle is still applied, even if could be derogated by the law and, so, when there is a statutory scheme which requires a corporation to perform particular acts through an individual, it may not be appropriate to punish both the individual and the corporation for a failure to perform those acts: *O'Connors Management Pty Ltd v Curry; Smith v Curry*, Supreme Court of Western Australia, unreported, 17 February 1997 (Walsh J, BC 9700410), but cited by *R v Jo* [2012] QCA 356; 227 A Crim R 396: on the matters, see, Judicial College of Victoria (eds), *Victorian Criminal Proceedings Manual* (Judicial College of Victoria 2009) para 9.6.2.

[26] *Hamilton v. Whitehead* [1988] HCA 65; (1988) 166 CLR 121, para 4.

[27] In the same sense, see Wells, 'Corporate Criminal Liability in England and Wales' (n 18) 94, and, with specific reference to Italian Legislative Decree 231/2001, see Silvia Massi, *'Veste formale' e 'corpo organizzativo' nella definizione del soggetto responsabile per l'illecito da reato* (Giappichelli 2012) 19.

[28] William S. Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43 Emory L J 650.

[29] Herbert L A Hart, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37, now in *Essay in Jurisprudence and Philosophy* (Clarendon 1983) 31.

punish the corporation in a distinct and autonomous way from the natural person. In other words, it is necessary to create an offence specifically targeted to the corporation, based on specific elements that are distinct from those of the crime target to the natural person.

The problem is obviously not that both the individual and the corporation are punished. On the contrary, the legal entity must not shield the natural person from liability. Many well-known reasons make it necessary to avoid transforming *collective liability* into *collective irresponsibility*.[30] What appears incorrect, however, is holding the company automatically liable when the conduct was perpetrated by one of its managers, based on the theory that the manager and the corporation are the same person. This is counterproductive for two reasons: theoretically, because one of the two sanctions could be unjust; practically, because, if seriously taken, it works in few cases (as the examples taken from the English system show) and it is useless when this happens, because in substance we end up punishing the same person twice.

In the end, the problem of *ne bis in idem* arose by the (mere) *overlapping* of individual and corporate liability, and the respect of this basic principle is another reason (along with other, well known reasons, such as the respect of the culpability principle) to *distinguish* individual liability from corporate liability, premising the latter on autonomous criteria. Clearly, the criterion of the position of the offender within the organization ('purified' from the 'idea of identification' and its theoretical implications) could still be valid, as it represents a sort of first connection of the offence with the activity of the corporation and could be the starting point of a more complex mechanism of imputation targeted specifically to the corporation.

So, the ECJ was a bit hurried in concluding that there is no violation of *ne bis in idem* just because there are formally *two* different persons. In fact, there is a violation to the extent that for one conduct both persons are punished, the natural person and the legal person, but the latter based on a principle that these two are the *same* person.

The Italian general system of corporate liability for crimes provided by Legislative Decree 231/2001 is more satisfactory, since both individuals and legal entities are punished, but the latter is punished based on autonomous requirements. In fact, in this system the corporation is responsible for *an offence that derives from the criminal offence of the individual* and that does not overlap completely with it.[31] The position of the natural person within the corporation is relevant, but along with other criteria, such as the following ones: (i) the natural person acted in the interest or for the benefit of the legal entity; (ii) the entity has not adopted nor

[30] The reasons that make necessary to punish both the corporation and the individual has been clearly underlined: see, for example, John S. Coffee jr, '"No soul to damn: no body to kick": an unscandalized inquiry into the problem of corporate punishment' (1980–1981) 79 Mich L Rev 393; Cristina de Maglie, *L'etica e il mercato. La responsabilità penale delle persone giuridiche* (Giuffrè 2002) 277.

[31] See, for an interpretation of the system that goes in the sense of the autonomous reconstruction of the offence of the corporation, Antonio Fiorella, 'From "Macro-anthropos" to "Multi-person Organisation" – Logic and structure of compliance programs in the corporate cirminal liability' in Antonio Fiorella (ed), *Corporate Criminal Liability and Compliance Programs – II. Towards a Common Model in European Union* (Jovene 2012) 421 and, more recently, Antonio Fiorella and Nicola Selvaggi, *Dall'«utile» al «giusto». Il futuro dell'illecito dell'ente da reato nello 'spazio globale'* (Giappichelli 2018) *passim* but in particular 177.

implemented a compliance program adequate to prevent offences of the same kind of that occurred; and (iii) the manager has not fraudulently circumvented the compliance program.[32]

Identifying autonomous requirements for corporate liability seems to be the solution that is being adopted in the United Kingdom and Australia as well, where legislators are trying to overcome the principle of identification on a statutory level. This is done by creating *ad hoc* offences such as the Corporate Manslaughter in the UK,[33] as well as corporate *mens rea*, such as the one provided in the Australian Model Penal Code.[34]

In conclusion, to answer the question posed in the title of this work, 'we must resist the temptation to reduce the criminal law to a single formula for determining when conduct ought to be treated as criminal',[35] understanding that the question is not whether the corporation is a *person*.[36] As emerged in the debate of this symposium, we must remember that a corporation is not a 'macro-antropos' but a 'multi-person organization';[37] that is to say that it is something made of persons, who finally suffer the sanctions and – on the other hand – it is something different from the persons, a peculiar way of organizing activities, that must be specifically considered.

Selected Literature

Bricola F, 'Il costo del principio «societas delinquere non potest» nell'attuale dimensione del fenomeno societario' [1970] Rivista italiana di diritto e procedura penale 951

Coffee JL, '"No soul to damn: no body to kick": an unscandalized inquiry into the problem of corporate punishment' (1980–1981) 79 Mich L Rev 393

de Maglie C, *L'etica e il mercato. La responsabilità penale delle persone giuridiche* (Giuffrè 2002)

Falzea A, 'Capacità (teoria generale)' in *Enciclopedia del Diritto* (vol VI, Giuffrè 1960) 31

[32] See, in general, Antonio Fiorella, 'Responsabilità da reato degli enti collettivi' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2005) 5101. Specifically, on the link between the criterion of the position of the individual within the organization and the criterion of the lack of organization in the Italian system of corporate criminal liability, *see* Enrica Villani, *Alle radici del concetto di 'colpa di organizzazione' nell'illecito dell'ente da reato* (Jovene 2016) 208.

[33] On UK Corporate Manslaughter and Corporate Homicide Act 2010, see Wells, 'Corporate Criminal Liability in England and Wales' (n 18) 99.

[34] On the corporate *mens rea* in the Australian federal system, see Enrica Villani, 'Responsabilità dell'ente e imputazione soggettiva dell'illecito nell'ordinamento federale australiano' in Antonio Fiorella and Anna S. Valenzano (eds), *La responsabilità dell'ente da reato nella prospettiva del diritto penale 'globalizzato'* (Jovene 2015) 59 and de Maglie, *L'etica e il mercato* (n 30) 165.

[35] George P Fletcher, *Rethinking Criminal Law* (OUP 1978, reprint 2000), XXII.

[36] Wells, 'Corporate Criminal Liability in England and Wales' (n 18) 94.

[37] Fiorella, 'From "Macro-anthropos" to "Multi-person Organisation"' (n 31) 421.

– 'La responsabilità penale delle persone giuridiche' in Santos B and others (eds), *La responsabilità penale delle persone giuridiche in diritto comunitario* (Giuffrè 1981) 157

Fiorella A, 'Responsabilità da reato degli enti collettivi' in Cassese S (ed), *Dizionario di diritto pubblico* (Giuffrè 2005) 5101

– 'From "Macro-anthropos" to "Multi-person Organisation" – Logic and structure of compliance programs in the corporate cirminal liability' in Fiorella A (ed), *Corporate Criminal Liability and Compliance Programs – II. Towards a Common Model in European Union* (Jovene 2012) 421

Fiorella A and Selvaggi N, 'Compliance programs e "dominabilità aggregata" del fatto. Verso una responsabilità da reato dell'ente compiutamente personale' [2014] (3-4) Diritto penale contemporaneo 107

– , *Dall' 'utile' al 'giusto'. Il futuro dell'illecito dell'ente da reato nello 'spazio globale'* (Giappichelli 2018)

Fisse B, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Sydney L Rev 278

Fletcher GP, *Rethinking Criminal Law* (first published 1978, OUP 2000)

Foderaro S, 'Organo (teoria dell')' in *Nuovissimo Digesto Italiano* (vol XII, Giappichelli 1965) 214

Giannini MS, 'Organi (teoria generale)' in *Enciclopedia del Diritto* (vol XXXI, Giuffrè 1981) 37

von Gierke O, *Das deutsche Genossenschaftsrecht* (vol IV, Weidmannsche Buchhandlung 1868)

Gobert J, *Rethinking Corporate Crime* (CUP 2003)

– 'Corporate criminality: four models of fault' (1994) 14 Legal Stud 401

Grosso CF, voce 'Responsabilità penale' in *Nuovissimo digesto italiano* (vol XV, Giappichelli 1968) 707

Hart HLA, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37, now in *Essay in Jurisprudence and Philosophy* (Clarendon 1983) 31

Laufer WS, 'Corporate Bodies and Guilty Minds' (1994) 43 Emory LJ 650

Massi S, *'Veste formale' e 'corpo organizzativo' nella definizione del soggetto responsabile per l'illecito da reato* (Giappichelli 2012)

Mongillo V, *La responsabilità penale tra individuo ed ente collettivo* (Giappichelli 2018)

Orestano R, *Il 'problema delle persone giuridiche' in diritto romano* (Giappichelli 1968)

Romano S, 'Organi', in *Frammenti di un dizionario giuridico* (Giuffrè 1943) 145

Selvaggi N, *L'interesse dell'ente collettivo quale criterio di ascrizione della responsabilità da reato* (Jovene 2006)

Villani E, 'Responsabilità dell'ente e imputazione soggettiva dell'illecito nell'ordinamento federale australiano' in Fiorella A and Valenzano AS (eds), *La responsabilità dell'ente da reato nella prospettiva del diritto penale 'globalizzato'* (Jovene 2015) 59

– *Alle radici del concetto di 'colpa di organizzazione' nell'illecito dell'ente da reato* (Jovene 2016)

Wells C, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001)

– 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in Pieth M and Ivory R (eds), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011) 96

THE NE BIS IN IDEM PRINCIPLE AND THE DUPLICATION OF PARALLEL CRIMINAL AND ADMINISTRATIVE PUNITIVE MEASURES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE

By Waleed M. ElFarrs[*]

Abstract

The tensions between both the requirements of effectiveness and doctrinal consistency as well as between pluralism and formalism have crystalized in the recent jurisprudential debate over parallel prosecutions and ne bis in idem, which led to a ne bis in idem doctrine which is more tolerant to double prosecutions. The tolerance as such was compellingly criticized because it allegedly goes against the rationales of ne bis in idem. Thus, this paper sheds light on the rationales as such and assesses whether and to what extent the ne bis in idem principle should allow duplication of both an administrative-punitive and criminal prosecutions in the field of economic and financial crime under article 50 CFR, article 54 CISA and article 4 protocol 7 ECHR.

1 Introduction

'No one shall be liable to be tried again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'[1]

Ne bis in idem is a legal principle recognized by almost all contemporary legal systems and international treaties;[2] it is widely known as double jeopardy elsewhere, such as in the US.[3] In Europe, in particular in the confines of the European Union (the EU), the principle of *ne bis in idem* quoted above, is precisely understood as a prohibition against criminally prosecuting or punishing the same person twice for the same material acts.[4] The ingredients of the *ne bis in idem* principle may *prima facie* seem crystal clear regarding what the principle actually entails: The 'same person' 'cannot be tried 'multiple times' for the 'same offence' for which the person has already been 'acquitted or convicted'. However, there has been an

[*] Criminal lawyer; law instructor; enrolled in the Legal Research Master's of Utrecht University, specializing in international criminal law and human rights.

[1] The Charter of Fundamental Rights of the European Union [2000] OJ C364/02, article 50.

[2] For comprehensive comparative and international reviews see the conclusions of the International Association of Penal Law (AIDP) at the Fourteenth International Congress of Penal Law in October 1989 Principles of procedures 3(d): 'If an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice…' (1990) 61 (3-4) RIDP 86-110 (French); 111-134 (English) and at the Seventeenth International Congress of Penal Law in September 2004: 'At any rate, double prosecutions and sanctions of a criminal nature have to be avoided' (2004) 75 (3-4) RIDP 761-783 (French).

[3] The Constitution of the United States, Amendment 5 – Trial and Punishment, Compensation for Takings, as ratified on 15 December 1791. 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury […] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'.

[4] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 34.

abundance of, rather slightly unsteady, case-law as well as extensive literature on what these elements entail or should entail. This paper sheds light on what should constitute the 'multiple times' element; the *bis* part of *ne bis in idem*.

The European *ne bis in idem* principle is applicable in almost all fields of European law, yet each field has its nuances. In the field of economic and financial crime, particularly in the field of EU tax law, recent case law has allegedly departed from the traditional meaning of what constitutes multiple prosecutions or punishments. The departure as such, in the eyes of many, may have not only caused a blurry picture for individuals regarding what to anticipate from the European *ne bis in idem* protection, but it may have also enfeebled the essential protection that *ne bis in idem* affords. Thus, it is the purpose of this article to critically analyse the latest developments in the case-law between 2013 and 2018. In fact, there are various challenges that can be analysed in the period between 2016 and 2018, precisely between the judgment of the European Court of Human Rights (ECtHR) in the case of *A and B*[5] and the decisions of the European Court of Justice (ECJ) in 2018 on four relevant cases.[6] While this paper tackles these challenges swiftly and roughly, it mainly takes the rationale of *ne bis in idem* to normatively assesses whether and to what extent the *ne bis in idem* principle should allow the duplication of both an administrative-punitive and criminal prosecutions in the field of economic and financial crimes under article 50 CFR, article 54 CISA and article 4 protocol 7 ECHR.

This article starts by setting out the tension in the field of economic and financial crimes concerning the duplication of punitive prosecutions. Then, the article reviews the legal outlook of *ne bis in idem* in Europe. Thereafter, the article zooms in on the recent case law to show the extent to which the jurisprudence allows for such a duplication of punitive prosecutions or punishments to happen under the European *ne bis in idem* principle. Finally, the article sheds light on the rationale of *ne bis in idem* and evaluates how the rationale tolerates the recent developments regarding the duplication of prosecutions or punishments.

[5] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11.

[6] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 paras 17–25; ECJ, Case C-537/16 *Garlsson Real Estate and Others vs. Commissione Nazionale per le Società e la Borsa (Consob)* ECLI:EU:C:2018:193 paras 11–16; ECJ, Joined Cases C-596/16 and C-597/16 *Enzo Di Puma vs. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) vs. Antonio Zecca* ECLI:EU:C:2018:192 paras 13–23.

2 The problem of parallel prosecution in the field of economic and financial crime

2.1 The sources of the problem

The field of economic and financial criminal law is concerned with the substantive and procedural aspects of the enforcement and sanctioning of violations of laws concerning economic and financial matters; in the EU, this relates in particular to provisions set out by the European Union.[7] Hence, defining what is included in this field of law is debatable, but can be generally determined by deciphering whether the protected interests in question are economic and financial.[8]

In this field, EU member states are bound to effectively counter all illegal activities affecting the financial interests of the EU, at least equivalently to how they counter activities affecting their own financial interests.[9] This means that EU member states are obliged to stand against the activities as such with deterrent legislative and administrative measures which are appropriate for ensuring, for instance, the collection of the VAT due and for the prevention of fraud on their respective territories.[10] To this end, various EU member states employ various kinds of penalties which they deem effective to suppress violators; they adopt administrative penalties, criminal penalties or a combination of both.[11]

The EU member states are also bound to respect the rights guaranteed by the CFR when implementing EU law.[12] States are accordingly expected to not only implement an effective protection of the EU financial interests, but also to meet the threshold set forth by article 50 CFR – and its equivalent provision in the European Convention of Human Rights (ECHR).[13] In implementing the aforementioned obligation to protect the financial interests of the EU, some EU member states, through their domestic laws, consider it effective to apply two punitive measures, one administrative and one criminal, against the same person for the

[7] Katalin Ligeti and Vanessa Franssen, 'Current Challenges in Economic and Financial Criminal Law in Europe and the U' in Vanessa Franssen and Katalin Ligeti (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing 2017) 3.

[8] Ligeti and Franssen (n 7) 3.

[9] ECJ, Case C-42/17 *M.A.S. and M.B* ECLI:EU:C:2017:936 paras 30–31.

[10] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 25.

[11] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 34.

[12] ECJ, Case C-617/10 *Äklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 27; see also ECJ, Joined cases C-217/15 and C-350/15 *Orsi and Baldetti* ECLI:EU:C:2017:264 para 16.

[13] The obligation to follow ECHR standards in conjunction with CFR standards does not only flow from the fact that all EU member states are signatories to the ECHR, but also from the CFR as well as the ECJ case-law. Although the EU has not yet acceded to the ECHR as required by article 6 (2) TEU, article 52(3) CFR provides that the rights contained in the CFR and correspond to rights guaranteed by the ECHR shall have the same meaning and scope as provided by ECHR, and article 53 CFR suggests that the CFR rights should not be interpreted in a way that restricts fundamental rights of, i*nter alia,* the ECHR. Moreover, the ECJ confirmed this view in ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 3.

same economic or financial offence or act. Such scenarios can lead to parallel or successive prosecutions or punishments, and raise questions under *ne bis in idem*.

2.2 Emerging approaches in case-law

This ability of applying two punitive measures, one criminal and another administrative, was not deemed consistent with the fundamental protection afforded by article 50 CFR.[14] In a judgment in 2016,[15] the ECtHR altered this view which used to be adopted by both courts (the ECJ and the ECtHR). Instead, it allowed such a possibility of applying two penalties, one criminal and another criminal in nature, if both penalties or prosecutions were connected in substance and time. The decision as such was shocking for many and was compellingly criticized, most famously by the dissenting Judge Paulo Pinto de Albuquerque, and after him by the Advocate General of the ECJ M. Campos Sánchez-Bordona.[16] In 2018, the ECJ then issued four landmark decisions on the matter.[17] While the ECJ has seemingly not uniformly adopted the stance of the ECtHR, it has not also left it in the lurch; same as the ECtHR, the ECJ allowed the duplication of two punitive measures, but it further defined under which circumstances this may happen.

3 The legal framework of *ne bis in idem*

3.1 The legal sources of *ne bis in idem*

The European *ne bis in idem* principle can be derived from various sources; the CFR, protocol no. 7 to the ECHR and the Convention Implementing the Schengen Agreement (CISA). It is also found in all EU member states[18] as a fundamental or constitutional human right, and is mentioned in various EU directives.[19] In the EU, the CFR constitutes a contemporary primary source of fundamental rights.[20] Although the CFR is not the first document referring to *ne bis in idem* principle in the EU, it can be taken as a point of departure when describing the *ne bis in idem* principle. According to the CFR and its interpretation, the scope of *ne bis in idem* is neither the same nor is it absolute in every area of EU law. Articles 51–54 of the CFR provide that the *ne bis in idem* principle is mainly triggered in matters relating to the implementation of EU Law (article 51 (1) CFR), and where a national legislation falls within the scope of EU law.[21] As a rule of thumb, any domestic situations involving EU law cannot

[14] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para 34.

[15] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11.

[16] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667.

[17] See n 6 above.

[18] See, for example, article 103 of the German Constitution or article 68 of the Dutch Criminal Code.

[19] Martin Wasmeier, 'The principle of ne bis in idem' (2006) 77(1) RIDP 121.

[20] ECJ, Case C-236/09 Association Belge des Consmmaterurs Test-Achats ASBL and Others ECLI:EU:C:2011:100 para 16. Mjöll Arnardóttir and Antoine Buyse, Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders (Routledge 2016) 10.

[21] John AE Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU' [2013] 9(4) Utrecht L Rev 223–224.

arise without the *ne bis in idem* principle being applicable. The *ne bis in idem* principle can only be limited by another provision in EU law, but such provision has to offer a proportionate limitation; 'limitations may be made only if they are necessary and genuinely meet objectives of general interest' (article 52 (1) CFR). In other words, EU directives such as the VAT directive[22] and the directive concerning financial markets,[23] must be interpreted considering Article 50 CFR and considering the proportionality test.

In the explanations relating to the CFR, the section on article 50 refers to article 54 CISA as a provision covered by article 52 CFR. Thus, article 54 CISA is applied in parallel to article 50 of the CFR. Article 54 CISA states:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Domestic courts of EU member states, when riddled by claims of *ne bis in idem,* raise requests asking for a preliminary ruling by the ECJ.[24] In particular because of the different wording of *ne bis in idem* in article 50 CFR and article 54 CISA, the ECJ has been striving to wipe the uncertainty caused by having two Articles on the *ne bis in idem* principle. In *Kossowski,* the ECJ held that article 54 CISA must be interpreted in light of article 50 CFR.[25] Relying on article 52 CFR, the ECJ has scrutinized the enforcement criterion which is included in article 54 CISA, but not in article 50 CFR, concluding that the criterion as such is compatible with article 50 CFR. The same applies for the transnational effect of article 54 CISA; the ECJ, in *Kossowski*, applied article 54 in alignment with article 50 CFR when deciding on a transnational *ne bis in idem* case.[26] Hence, article 50 CFR is also triggered in a cross-border context.

Furthermore, according to article 52 (2) CFR all equivalent fundamental rights stipulated in both the CFR and the ECHR shall have the same meaning and scope as laid down by the ECHR. Here, the *ne bis in idem* principle in article 50 CFR has a counterpart in article 4 protocol 7 ECHR stating that:

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. The provisions of the preceding paragraph shall not prevent the reopening of the

[22] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.
[23] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation [2003] OJ L96/16.
[24] Article 267 of the Treaty on the Functioning of the European Union [2000] OJ C326/01.
[25] ECJ, Case C-486/14 *Kossowski v Generalstaatsanwaltschaft Hamburg* ECLI:EU:C:2016:483 para 22.
[26] ECJ, Case C-486/14 *Kossowski v Generalstaatsanwaltschaft Hamburg* ECLI:EU:C:2016:483 paras 20–22.

> case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. No derogation from this Article shall be made under Article 15 of the Convention.[27]

The ECJ has also been grappling to maintain a uniform understanding of *ne bis in idem* between article 50 CFR and article 4 protocol 7 ECHR. To begin with, there are two main differences between the two provisions on *ne bis in idem*; whereas article 50 CFR can apply in both national and cross-border contexts, article 4 protocol 7 ECHR can only apply within the same state. Moreover, according to article 4 protocol 7 ECHR there is a possibility for reopening a case if there is evidence of new or newly discovered facts, which is not explicitly included in article 50 CFR. A final and obvious difference is the possibility for each court to come to a different interpretation to the respective meaning of the *ne bis in idem* principle. However, the interpretation between both courts is governed by the so-called *consistent interpretation* doctrine.[28] Furthermore, the ECJ has precisely established the importance of ensuring that the interpretation of article 50 CFR does not disregard the level of protection guaranteed by the article 4 protocol 7 to the ECHR.[29] Moreover, article 53 CFR, which is referred to as the 'non-regression clause', explains the level of protection of the CFR.[30] This article can arguably be considered a shield to the CFR and its provisions from being interpreted in a way that lowers the level of protection previously afforded to fundamental rights.[31] Article 53 CFR in conjunction to article 52 (3) CFR can also be understood to preclude the ECJ from following the ECtHR in case the latter decides to lower the level of protection below that guaranteed by EU law.[32]

Taken altogether, where the fundamental right not to be tried or punished in criminal proceedings twice for the same offence is triggered in the context of EU directives, an application must be given considering the CFR standards. However, article 50 CFR, by turn, is read in conjunction with its counterpart article 4 protocol 7 ECHR, and is informed, where relevant, by article 54 CISA. According to the CFR, the corresponding rights guaranteed by the CFR and the ECHR are the same. However, the ECJ can provide a higher protection than what is provided by the ECtHR.

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[27] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

[28] Jan H Jans, Sacha Prechal, Rob JGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 155.

[29] See n13 above; also, see C-350/15 *Orsi and Baldetti* ECLI:EU:C:2017:264 para 24.

[30] Xavier Groussot and Ingrid Olsson, 'Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni' [2013] Lund Student EU Law Review 20.

[31] Kelly Ana Muniz, 'The Ne Bis in Idem Principle in European Union Tax Law' (*LUP Student Papers* 2018) 54 <https://lup.lub.lu.se/student-papers/search/publication/8956331> accessed 12 January 2019.

[32] Koen Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' [2011] 31(1) Polish Yearbook of International Law 98.

3.2 The legal requirements of *ne bis in idem*

Having the general guidelines of *ne bis in idem* established, one can zoom in on the requirements of the *ne bis in idem* principle. In the period of 2003 to 2018, the ECJ has issued several key judgments concerning the *ne bis in idem* principle in criminal matters.[33] Throughout these years, the court, *inter alia,* has defined the material scope of application of the principle, which is translated into requirements by which the *ne bis in idem* protection is triggered. As a first prerequisite, the *ne bis in idem* principle can only be invoked when the *same person* is subject to two or more criminal punishments or proceedings.[34] There has been only one case on this point which settled the parameters regarding whether a natural (company representative) person is the same as a legal person she or he works for.[35]

Second, for *ne bis in idem* to be invoked, there needs to be a *final decision*, which includes a trial that has been disposed of[36] but also out-of-court settlements which meet this criterion.[37] Third, the kind of *acts* that the ECJ considers part of *ne bis in idem* are the material facts, not the legal acts – meaning that the court tackles the sameness of facts not the sameness of the legal labels attributed to it.[38] Fourth, the enforcement requirement of Art 54 CISA entails that, for *ne bis in idem* to be applicable in criminal proceedings, a penalty must not only have been imposed in a former proceeding but also enforced or in the process of being enforced or can no longer be enforced.[39]

Last but not least, in order to trigger the applicability of *ne bis in idem*, it has to be proven that all measures adopted against the person in question by a way of a final decision are of a 'criminal nature'.[40] This means that *ne bis in idem* prohibition extends not only to criminal proceedings in a strict sense but also to all proceedings that are punitive or deterrent.[41] The following subsection is dedicated to analysing this element.

3.3 The chronology of permissible duplication of prosecutions and penalties

In the *Åkerberg* case in 2013, the ECJ precisely established that *ne bis in idem* prohibits EU member states from imposing a combination of administrative penalties and criminal penalties, if the administrative penalty is criminal in nature.[42] But which kind of penalty is criminal in nature? In answering this question, the ECJ ruled that determining the nature of

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[33] Eurojust, 'The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union' (EUROJUST: The European Union's Judicial Cooperation Unit, September 2017) 2 <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis> accessed 4 June 2018.
[34] ECJ, Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti* ECLI:EU:C:2017:264 paras 17–19.
[35] ECJ, Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti* ECLI:EU:C:2017:264 paras 10–23.
[36] ECJ, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* ECLI:EU:C:2003:87 para 21.
[37] ECJ, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* ECLI:EU:C:2003:87 para 21.
[38] ECJ, Case C-436/04 *Van Esbroeck* ECLI:EU:C:2006:165 para 27.
[39] ECJ, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* ECLI:EU:C:2003:87 para 33.
[40] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 para 33.
[41] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 para 33.
[42] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 paras 34–38.

a penalty is a matter for the competent national court to settle.[43] Nonetheless, the ECJ suggested to domestic courts to apply the *Engel* criteria developed in the ECtHR case-law to discern the criminal nature of administrative sanctions.[44] The criteria are: the legal classifications of the offence under national law; the very nature of the offence; and/or the nature and degree of severity of the penalty.[45] According to the ECtHR case-law, an administrative sanction which is a general sanction (as opposed to disciplinary or targeted sanctions) and which has a deterrent and punitive nature (as opposed to compensatory) is classified as a criminal sanction.[46]

In similar fashion, the ECtHR ruled in the *Grande Stevens* case in 2014 that administrative penalties obtained by the Italian Companies and Stock Exchange Commission (Consob) blocked a criminal prosecution for the same acts by the same company.[47] As can be seen, in Europe, the ability to pursue violations of economic or financial laws through a duplication of prosecutions or punishments had been prohibited by the ECJ as well as the ECtHR. Accordingly, the approach as such was perceived by commentators to be a settled rule of practice prohibiting the duplication of both criminal and administrative-but-criminal-in-nature prosecutions or penalties.[48]

However, during 2015 and 2016, four cases were lodged to the ECJ concerning the duplication of criminal and administrative penalties in the context of VAT directive, insider dealing and market manipulation, which indicated that the discussion regarding the duplication of two penalties was still not quite settled after all.[49] First, in the *Menci* case, the Italian court inquired about the compatibility of the duplication of proceedings and penalties with the *ne bis in idem* principle, namely, whether it is possible to conduct criminal proceedings regarding the non-payment of VAT for which the defendant had already been issued a definitive administrative penalty.[50] Second, the *Garlsson Real Estate and others* case: in this case, the core question was about the compatibility of the duplication of new proceedings concerning an imposed administrative penalty on Mr. Stefano for market manipulation conduct, and an exposed criminal penalty concerning the same acts.[51] Third, in the joined cases *Consob* and *Di Puma,* the main issue related to the parallel criminal and

[43] ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 para 39.
[44] ECJ, Case C-489/10 *Łukasz Marcin Bonda* ECLI:EU:C:2012:319 para 37.
[45] ECtHR, 23 November 1976 *Engel and Others v the Netherlands* 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 para 82.
[46] ECtHR, 21 February 1984 *Öztürk v Germany* 8544/79 para 53.
[47] ECtHR, 4 March 2014 *Grand Stevens v Italy* 18640/10.
[48] See, for example, John Vervaele, 'The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU' [2013] 6(1) Review of European Administrative Law 133; Michiel Luchtman, 'Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle' [2011] 4(2) Review of European Administrative Law 5.
[49] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1; Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation [2003] OJ L96/16.
[50] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 paras 17–25.
[51] ECJ, Case C-537/16 Garlsson Real Estate and Others vs. Commissione Nazionale per le Società e la Borsa (Consob) ECLI:EU:C:2018:193 paras 11–16.

administrative proceedings with respect to insider dealing.[52] The question referred to the ECJ essentially inquired whether the directive concerning financial markets, obliging states to provide for effective, proportionate and dissuasive penalties for infringements, read in light of the *ne bis is idem* principle, precludes the initiation or prosecution of further proceedings based on the same facts for which a final criminal judgment of acquittal had already been rendered.[53]

The four cases essentially offer different inquires, but they all boil down to whether the generalized prohibition of two penalties is a strict and absolute prohibition under article 50 CFR. The cases as such were ruled upon in 2018, but before that, the ECtHR had made an alteration in the established approach regarding the prohibition of two criminal penalties or prosecutions.[54]

In late 2016, the ECtHR tackled in the *A and B v. Norway* case the possibility of duplication of essentially two criminal penalties.[55] To the surprise of many, it decided that the duplication is possible if the prosecutions are connected in time and substance.[56] The crux of this case lied in answering whether the prohibition of successive duplication of proceedings under Article 4 protocol 7 ECHR also includes the prohibition of two concurrent and connected criminal prosecutions. The ECtHR ruled that the combination of a definitive tax penalty which is criminal in nature and a criminal penalty as a punishment for the same tax offence is not, *per se*, prohibited under the *ne bis in idem* principle, if both proceedings have 'a sufficiently close connection, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions.'[57] The court did not elaborately explain either what constitutes a sufficiently close connection or the overall scheme, but it referred to earlier cases in which this criterion had been raised, but has nonetheless neither been entertained[58] nor admitted.[59]

The court provided requirements for determining whether there is a sufficiently close connection: Were complementary goals pursued by addressing a different aspect of the social misconduct in question? Was the duality foreseeable? Were the collection and the assessment of the evidence coordinated? Is the duplication proportionate?[60] Thus, according

[52] ECJ, Joined Cases C-596/16 and C-597/16 Enzo Di Puma vs. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) vs. Antonio Zecca ECLI:EU:C:2018:192 paras 13–23.
[53] ECJ, Joined Cases C-596/16 and C-597/16 Enzo Di Puma vs. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) vs. Antonio Zecca ECLI:EU:C:2018:192 paras 13–23.
[54] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11.
[55] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11.
[56] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11.
[57] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 paras 130–147.
[58] ECtHR, 20 May 2014 *Glantz v Finland* 37394/11; ECtHR, 20 May 2014 *Nykänen v Finland* 11828/11; ECtHR, 27 November 2014 *Lucky Dev v Sweden* 7356/10.
[59] ECtHR, 13 December 2005 *Nilsson v Sweden* 73661/01.
[60] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 para 132.

to the ECtHR, the duplication of procedures is permissible to the extent that these requirements are fulfilled.[61]

In his dissenting opinion, judge Pinto de Albuquerque argued that the ECtHR in the *A and B* case had conducted a diverging step backwards; a *revirement*.[62] He further argued that the criteria put forward are vague, uncertain and unnecessary, because the court did not further specify how states could measure the 'sufficiently close connection' as such. In his opinion, determining such a close connection leaves the door open for various interpretations and risks to disturb the '[t]he progressive and mutual collaboration between the two European courts'.[63] Furthermore, he referred extensively to the developed rationale of *ne bis in idem* because agreeing to adopt two criminal proceedings against the same person neither respects the principle of *res judicata,* nor protects individuals from the *ius puniendi* of the state.

Then the question was raised in Luxemburg whether the ECJ should follow the ECtHR in allowing parallel prosecution and if so, how? Or should it rather retain the level of protection it had laid down in *Åkerberg Fransson*? This inquiry had been imperative to the future of *ne bis in idem* in the EU, because if the ECJ aligns with the ECtHR then there is a European accord between two major European courts restricting a protection that had previously been afforded more extensively to the citizens. The inquiry was further tricky because, as highlighted above, the ECJ is not strictly obliged to follow the ECtHR, especially if the latter provides a lower protection than what had been recognized earlier, which may mean EU member states are faced with two binding but conflicting approaches on the same matter. This inquiry was particularly tricky for the ECJ because it had to deviate in either option, either from its own approach or from the new approach the ECtHR had taken Furthermore, departing from the ECtHR approach would mean abandoning the mutual coordination which has been maintained between the two courts.[64] Also, if the ECJ chooses to follow the ECtHR, how should the ECJ lay down a judgment in the four cases mentioned, without conveying the message that the ECJ deviates whenever the ECtHR deviates? How should the ECJ strike such a balance?

The AG of the ECJ Campos Sánchez-Bordona delivered his opinion on the four cases posed above in 2017, mainly building upon the arguments made by the ECtHR judge Albuquerque.[65] He essentially argued that the recent case-law, namely the *A and B case,* does

[61] For an elaborated and updated review on ECtHR case law regarding the duplication of prosecutions and a detailed discussion on the test it laid down in the *A and B* case, see Directorate of the Jurisconsult, European Court of Human Rights Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights Right not to be tried or punished twice, updated on 31 December 2018.

[62] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 para 80.

[63] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 para 80.

[64] The ECJ would be inclined to keep its collaboration because it has showed its awareness and dedication to the issue. See, Sonia Morana-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 (4) European Journal of International Law 1072.

[65] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667 para 73.

not ensure the foreseeability and certainty provided for everybody in the EU when exercising their fundamental rights laid down in the CFR; the CFR rights must be easily understood by all.[66] Accordingly, he opined that the ECJ should develop an autonomous EU concept of *ne bis in idem* principle; a concept that does not follow the most recent ECtHR case-law and is in line with the established case-law of the ECJ.[67] By recalling article 52(1) CFR, he argued that the duplication of penalties ought not to be prescribed by the ECJ as a limitation on the *ne bis in idem* principle because it does not make up a necessary limitation to ensure an effective enforcement.[68] The AG confirmed that the administrative proceedings are more expeditious, but even this feature does not liberate it from respecting the same safeguards provided by criminal law.[69] States ought to combine an effective response while maintaining their fundamental rights protection, and the ECJ should not consider otherwise in the name of effectiveness. [70]

In 2018 the ECJ, nonetheless, has considered effectiveness as a decisive criterion in its ruling on the three judgments concerning the four cases posed above. [71] The ECJ showed a great deal of alignment with ECtHR; it also allowed parallel prosecution or punishment. [72] The court affirmed that *ne bis in idem* could be limited for the purpose of protecting the financial interests of the EU.[73] Nevertheless, the limitation as such requires a justification and objectives; it must not exceed what is strictly necessary to achieve those objectives. The court explicitly decided that ensuring the collection of the VAT due or guaranteeing the integrity of the financial markets of the EU are objectives capable of justifying a concurrent set of proceedings and penalties of criminal nature.[74] However, the court provided extra interpretation and requirements for the national legislator to consider. It first stressed that duplication shall be allowed because it provides member states with a possibility to pursue complementary aims.[75] However, any limitation must be proportionate to what is strictly required to attain the objectives legitimately pursued by the national legislation.[76] The duplication of two penalties must either pursue a general interest and/or pursue additional necessary objectives.[77] Precise rules allowing individuals to predict the duplicity must be

[66] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667 para 73.
[67] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667 para 69.
[68] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667 para 69.
[69] ECJ, Opinion of AG Sánchez-Bordona, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2017:667 para 82.
[70] ECJ, Opinion of AG Sánchez-Bordona, Case C-537/16 Garlsson Real Estate and Others vs. Commissione Nazionale per le Società e la Borsa (Consob) ECLI:EU:C:2017:668 para 80.
[71] ECJ, 'Press Release 34/18' 1 <https://curia.europa.eu> accessed 8 January 2019.
[72] ECJ (n 50,51,52,53).
[73] ECJ, Opinion of AG Sánchez-Bordona, Case C-537/16 Garlsson Real Estate and Others vs. Commissione Nazionale per le Società e la Borsa (Consob) ECLI:EU:C:2017:668 para 80.
[74] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 para 57.
[75] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 para 44.
[76] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 para 46.
[77] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 para 63.

established,[78] and it needs to be ensured that the proceedings are coordinated and that the severity of the penalties is the result of a balance of what is strictly necessary (excessive) in view of the seriousness of the offence.[79] In the joined cases *Di puma* and *Zicca,* the court applied this test and ruled that bringing proceedings for an administrative fine of a criminal nature infringes the *ne bis in idem* principle if it relates to a matter where a final criminal judgment of acquittal had already been reached. In such a situation, the administrative proceedings exceed what is necessary in order to achieve the objective of protecting the financial interests of the EU.[80]

Ultimately, the previously established case-law for both courts as well as the view held by commentators was to consider *ne bis in idem* as a prohibition against multiple criminal prosecutions or punishments. In 2016, the ECtHR was convinced by submissions by seven states in *the A and B* case to modify this all-encompassing view, and instead adopt a practical approach that allows for multiple prosecutions whenever they are sufficiently connected.[81] In 2018, the ECJ did not refuse this new approach and did not adopt an autonomous approach as suggested by the AG of the ECJ. Instead, it only further delimited this limitation in a way consistent with the ECtHR.

In sum, the ECtHR as well as the ECJ nowadays allow parallel administrative punitive and criminal prosecution to the extent that the requirements set by each court are met. The ECJ asserted that its judgment maintains a level of *ne bis in idem* protection which is not inconsistent with that of the ECtHR. However, the ECJ has not discussed the non-regression clause discussed above in section 3.1. Thus, it did not discuss the legality of lowering the fundamental protection to what was previously provided.

Notably, in the *A and B* case, the submissions of the government of Sweden, the third-party interventions of six states, and the ECtHR in its judgment relied heavily on the *Nilsson v Sweden* case. This case suggests that the 'sufficiently close connection' test was once considered before by the ECtHR, but nonetheless was not met nor discussed further because the application in question was rendered manifestly ill-founded. Strikingly, none of the intervening states nor the ECtHR tackled the 'safety' basis for such a test in *Nilsson*. In *Nilsson,* the duplication was convincingly justified because applying the second penalty was not only foreseeable and direct, but was also for the safety of road. In other words, the test implicitly included the safety of others to justify the limitation on *ne bis in idem.* The protection of the rights of others has neither been tackled nor deemed a prerequisite by the ECtHR for the dual-track system. The ECJ has not tackled the same issue; however, it affirmed that the rights of others can limit fundamental rights.[82]

[78] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 paras 49–51.
[79] ECJ, Case C-524/15 Luca Menci v Procura della Repubblica ECLI:EU:C:2018:197 para 63.
[80] ECJ, Joined Cases C-596/16 and C-597/16 Enzo Di Puma vs. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) vs. Antonio Zecca ECLI:EU:C:2018:192 para 44.
[81] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 paras 94-100.
[82] ECJ, Case C-524/15 *Luca Menci v Procura della Repubblica* ECLI:EU:C:2018:197 para 41

4 The rationale of *ne bis in idem* and the duplication of prosecutions

4.1 The rationale of ne bis in idem

N*e bis in idem* is a principle historically and richly justified. Historically, the principle of *ne bis in idem* emerged in national situations in Roman times, ancient Greece and Demosthenes. To live up to the natural requirements of equity[83] and justice,[84] they promulgated that it is illegal to trial the same person twice on the same matter. In contemporary Europe, *ne bis in idem* is still accorded actual respect, and has not only become relevant in national, but also transnational matters.[85]

The principle's rationales are believed to be manifold:[86] *ne bis in idem* sustains proportionality because it prevents a second punishment which usually does not take into account the first punishment;[87] upholding *ne bis in idem* maintains a fair administration of criminal justice because it restraints additional burdens such as the extra pecuniary psychological burdens which are resulting from the repeated prosecutions and provides an incentive for efficient prosecution;[88] *ne bis in ide* assists in achieving an efficient law enforcement because it results in one trial instead of multiple;[89] respecting the rule of law which envisions states to respect the outcome of its proceedings against its subjects;[90] *ne bis in idem* preserves certainty because it preserves the authority of a judgment;[91] it defends impartiality because it renders the first decision binding not only on the subjects but also on the organs and courts of the state;[92] it protects legality which would become illusive if a state could prosecute the same person continually for the same act or fact; and it facilitates achieving the various objectives of

[83] ECJ, Opinion of AG Ruiz-Jarabo Colomer, Case C-436/04 *Léopold Henri van Esbroeck v Openbaar Ministerie* ECLI:EU:C:2005:630 para 19.

[84] Willem Bastiaan van Bockel, *The Ne Bis In Idem Principle in EU Law* (Kluwer 2010) 2.

[85] See ECJ, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* ECLI:EU:C:2003:87; see also John AE Vervaele, 'The transnational ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights' [2005] 1(2) Utrecht L Rev 100.

[86] Van Bockel (n 84) 25.

[87] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158–185.

[88] Bas van Bockel, 'The 'European' Ne Bis in Idem Principle: Substance, Sources and Scope' in Bas van Bockel (ed), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) 23

[89] Silke Brammer, Cooperation between National Competition Agencies in the Enforcement of EC Competition Law (Hart Publishing 2009) 356.

[90] Van Bockel (n 84) 25.

[91] The type of certainty which *ne bis in idem* affords is not to be confused with the legal certainty or legality principle. *Ne bis in idem* as a human right entails that individuals are confident that a final judgment can finish the case against him or see, André Klip & Harmen van der Wilt, 'The Netherlands –Non bis in idem', [2002] Revue Internationale de Droit Pénal (73) 1094; Michiel Luchtman, 'Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle' [2011] 4(2) Review of European Administrative Law 7-8.

[92] Maria Fletcher, 'The problem of multiple criminal prosecutions: building an effective EU response' [2007] Yearbook of European Law 10.

sanctions such as deterrence or punishment because it gives weight to a sanction in addressing a specific violation.[93]

Two main particular rationales are deemed a cornerstone of the *ne bis in idem* principle: *res judicata* and *ius puniendi.* Firstly, the observance of *ne bis in idem* is an observance of the principle of *res judicata;* a principle that establishes respect of the finality of judicial judgments. *Res judicata* was, in fact, a later development in the history of the principle of *ne bis in idem*.[94] This addition was to confer finality on *ne bis in idem*'s rationale, which was aimed at narrowing down the expansive scope of *ne bis in idem;* from a prohibition on the initiation of a second prosecution if the first had been merely initiated to a prohibition on the initiation of a second prosecution only if the first has finally been resolved.[95] Although the addition as such narrowed down the scope of the *ne bis in idem* principle, it enriched its rationale. Considering that the respect of *res judicata* forms the foundation of a legitimate state, the extent to which *ne bis in idem* is observed feeds into the legitimacy as such.[96] Secondly, *ne bis in idem* also offers a judicial protection for persons against the states' *ius puniendi*.[97] The idea is that 'governments should not structure the adjudication game so that it is "heads we win; tails, let's play again until you lose; then let's quit (unless we want to play again)."'[98] Consequently, prosecuting the same person twice touches upon the legitimacy of the state.[99] In other words, *ne bis in idem* remonstrates that rules are certain, and persons are protected from potential abuses and arbitrary acts of the state. Thus, the *ne bis in idem* principle is seen not only as an *equity* principle, but also as a fundamental right subsumed under the principles of due process and fair trial rights as a fundamental right.[100]

4.2 Opportunities and obstacles of parallel prosecution

From an analytical reading of the *A and B* case, it is apparent that the pressure of several states was high.[101] The states contended that *ne bis in idem* should not be interpreted to restrict their management of their respective internal punishment systems.[102] The concerned and intervening states upheld a strong stance and provided compelling arguments supporting their position regarding the duplication of prosecution. In essence, they argued that having such a low threshold for *ne bis in idem* is a merely formal rule, because if two

[93] Brammer (n 89) 355.
[94] ECtHR, 15 November 2016 *A and B v Norway* - separate opinion 21430/11; 29758/11 para 3.
[95] ECtHR, 15 November 2016 *A and B v Norway* - separate opinion 21430/11; 29758/11 paras 55–56.
[96] Bockel (n 84) 24; see also Vervaele (n 85) 100.
[97] ECJ, Case C-129/14 PPU *Zoran Spasic* ECLI:EU:C:2014:586 paras 60–64; Vervaele (n 21) 213.
[98] Akhil Reed Amar, 'Double Jeopardy Law Made Simple' (1997) 106 Yale L. J. 1807, 1812 f.
[99] ECtHR, 20 July 2004 *Nikitin v Russia* 50178/99 para 57.
[100] Vervaele (n 21) 213.
[101] The pressure of these states such as Greece, Italy and Austria was already high even before the landmark *Åkerberg* case. Notably, those states either did not ratify or made reservations and declarations to article 4 protocol 7 ECHR. See the updated table of ratification/signature status <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/declarations?p_auth=oZrJ26qz> accessed 20 January 2019
[102] ECtHR, 15 November 2016 *A and B v Norway* 21430/11; 29758/11 para 123.

prosecutions are running hand in hand to the extent that they form one scheme of measures then the process does neither severely or arbitrarily endanger individuals nor affect the essence of *res judicada*. In response, the ECtHR ruled that the duplication is permissible if it is closely connected in time and substance. A closer look at the *A and B* decision as well as the following decision in *Menci* by the ECJ uncovers the pragmatic basis of the ECtHR stance. It further identifies that the rationales of *ne bis in idem* are preserved by cardinal tests on both sides, Luxemburg and Strasbourg.

In my view, the new approaches taken by the ECtHR and the ECJ are tolerant of the diversity of European states' legal systems; they foster effectiveness in the field of financial and economic crime because they aid states to fight financial crimes in a way that fits their internal system; they respect the margin of appreciation and the sovereignty of states by not imposing unjustified formal rules; and they maintain a high level of protection to individuals while not ignoring the financial interests of the EU. As established in this article, both courts have provided tests pertinent to the rationales of *ne bis in idem* as well as descriptions that are virtually counteractive.[103] Formally, the new approaches seem to provide for a leeway to double prosecutions, nonetheless in essence, they show flexibility, protectiveness to the rights of individuals, and maintained collaboration.[104] Yet, the new approach in particular and the courts' collaboration in general will be tested in future national and European cases.

This article perceives no major issue in allowing the double-track procedure as long as the duplication as such is complementary, predictable, connected, necessary and not arbitrary. The substantive crux of this discussion lies in the fact that the rationale of *ne bis in idem* can be interpreted either in a narrow or wide fashion. In other words, there are two ways to perceive the parallel-track inquiry through the *ne bis in idem* rationale lens: either to perceive *ne bis in idem* as a formal norm, exerting a blanket ban on any duplication of prosecutions, or to perceive it as a principle which is adaptive and responsive to the diversity of legal systems. Since the economic and financial criminal law gives a wide margin of appreciation to states to collect taxes or to fight market abuses, it seems plausible to adopt the latter view.

However, various practical and legal considerations persist and must be considered carefully. First, since the *ne bis in idem* does no longer uphold a very low threshold, other states may very well be encouraged to apply more severe or punitive administrative sanctions next to criminal sanctions. Second, there seemed to be a discrepancy in the tests provided by each court in determining the permissibility of parallel prosecution. While the ECtHR approach relies heavily on the amount of complementarity and coordination, the ECJ test rests fundamentally on the consideration of proportionality. Such a variance in focus threatens the future coordination between the two courts and loads the work of national courts. Third, the new approaches do not seem to complement the approach that

[103] Terminologies such as 'overall scheme', 'coordinated' or 'connected in substance and in time'.

[104] Both courts are aware of and serious about convergence of European fundamental rights, see Morana-Foadi and Andreadakis (n 64) 1072.

was taken in *Åkerberg Fransson.* Rather, it appears to be a departure from and a conflict with a landmark ruling. This will indeed create trust issues *vis-à-vis* the future of *ne bis in idem* jurisprudence. The same holds true for legal certainty. Finally, there is a high risk that this reasoning transposes to transnational *ne bis in idem*, especially with a lack of a common methodology for applying *ne bis in idem* at this level.[105]

5 Conclusion

The evolution of *ne bis in idem* is an eye-opener for the difficulties which the two major European courts face when reconciling pluralism and legal coherence. The evolution is also revealing to the tensions between effectiveness and fundamental rights protection within the parameters of the EU. As a result of these challenges, new approaches have emerged from both courts allowing for the duplication of parallel punitive measures under the *ne bis in idem* principle.

This article suggests that even though the new approaches have not fully maintained a chronological legal coherence of *ne bis in idem*, they have, nonetheless, reacted to the pluralism call; it suggestes that the new approaches are more effective given the context. The article further suggests that even though the new approaches permitted a form of double prosecution, they have not essentially lowered the European *ne bis in idem* protection provided for a person or a corporation against multiple prosecutions.

By conducting a doctrinal assessment, this article demonstrated how the procedure of parallel criminal and admirative punitive measures has evolved to become consistent with the *ne bis in idem* principle. The assessment showed that under article 4 protocol 7 ECHR, the procedure of parallel prosecution is consistent with *ne bis in idem* to the extent that prosecutions are sufficiently connected in time and in substance. The duality of prosecutions as such need to be pursuing complementary goals such that they are addressing different aspects of one social misconduct; it must be foreseeable for individuals; and it must display coordination in the collection as well as in the assessment of the evidence; and it must not exceed the objectives it was designed for. The doctrinal assessment further showed that the proportionality test has been deemed fundamental to assess the duplication of proceedings under article 50 CFR. According to the ECJ, the duplication of proceedings shall be restricted to seeking the objectives legitimately pursued, must be based on a balance of what is strictly necessary against the seriousness of the offence committed, and must pursue a general interest or additional necessary objectives. States adopting a double-track system must provide precise and predictable rules on the double-track procedure, and must assert that the proceedings are coordinated.

It has been demonstrated that *ne bis in idem* has various rationales, the main of which tie *ne bis in idem* with the legitimacy of the state. These main rationales are *res judicata* and *ius puniendi*. In light of the above analysis, it appears that both courts have adopted accurate

[105] Regula Echle, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem' [2013] 9(4) Utrecht L Rev 56–67.

tests which can maintain the rationale of *ne bis in idem*; the merged approaches address, *inter alia*, arbitrariness, foreseeability and finality. Although complicated, the contemporary application of *ne bis in idem* does not enfeeble its rationale as long as the application as such meets the requirements both courts have established.

Nonetheless, some concerns were pointed out. First, accepting the double-track procedure runs the risk that the majority of states will follow or will have to follow this approach of dual proceedings, instead of the other way around. This will indeed cause problems to those legal systems which were not familiar with such a duplication. The problem of divergence of interpretation between the ECtHR and the ECJ is larger now than before. Although the alignment between the two courts revives the trust in convergence, the discrepancy in the tests provided is worrying. Finally, it must be considered that *ne bis in idem* is applied transnationally under the CFR. Consequently, there can be risks to transnational *ne bis in idem* if it extrapolates a transnational double-track procedure, because the coordination and methodologies are weaker at this dimension.

Therefore, *ne bis in idem* principle should allow the duplication of both an administrative-punitive and criminal prosecutions against the same person for the same economic or financial illegal act to the extent that they are parallel. Parallel prosecutions shall be those which meet the criteria set forth by the ECtHR and the ECJ conjointly. Nonetheless, the ECJ must be vigilant, and preferably reluctant, to apply transnational parallel prosecution under Articles 50 CFR and 54 CISA, at least as long as national parallel prosecution has not been the norm across the EU Member States.

Selected Literature

Amar AR, 'Double Jeopardy Law Made Simple' (1997) 106(1) Yale Law Journal 1807

Fletcher M, 'The problem of multiple criminal prosecutions: building an effective EU response' [2007] Yearbook of European Law 26

Harbo TI, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158

Lenaerts K, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' [2011] 31(1) Polish Yearbook of International Law 79

Ligeti K and Franssen V (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart 2017)

Luchtman M, 'Transnational Law Enforcement in the European Union and the Ne Bis in Idem principle' (2011) 4 (2) Review of European Administrative Law 5

van Bockel WB, *The Ne Bis In Idem Principle in EU Law* (Kluwer Law 2010)

van Bockel WB, 'The 'European' Ne Bis in Idem Principle: Substance, Sources and Scope' in van Bockel WB (ed), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016)

Vervaele JAE, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU' (2013) 9(4) Utrecht L Rev 211

– 'The transnational ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights' (2005) 1(2) Utrecht L Rev 100

Wasmeier M, 'The principle of ne bis in idem' (2006) 77 (1) RIDP 1 121

CRIMINAL COMPLIANCE, INTERNAL INVESTIGATIONS AND HUMAN RIGHTS

THE AMERICAN WAY OF CONDUCTING INTERNAL INVESTIGATIONS

By Sergio Herra[*]

Abstract

Internal investigations play an important role in criminal proceedings in the United States, especially since the publication of the Yates Memorandum*: it reminds the prosecutors of article 9-28.210 U.S Attorneys Manual, an article that establishes the importance of determining individual responsibility for criminal acts within a corporation. The cooperation of the corporation in establishing individual responsibility should be an important part in the analysis whether the corporation has sufficiently assisted the authorities. The most important way of collaboration and tool to determine individual responsibility is through adequate internal investigations, which corporations conduct following the indications that the government have set. This scenario has generated an important specialization in the world of internal investigations which has to be known not only by American lawyers, but also by lawyers in other countries, due to international internal investigations which have become very common in practice. Therefore, this article will focus, from a practical point of view, on the steps to be taken to conduct an adequate internal investigation according to the 'American way'. In particular, this article will analyze aspects such as why the internal investigations should be conducted by external lawyers, which alerts should lead to start an internal investigation, the planning of an investigation, how to react to the crisis moment, how to secure the information and how to conduct employee interviews. It will also discuss the client-attorney privilege in internal investigations* (Upjohn v United States*) and how to present the investigation conclusions to the corporation.*

1 Introduction

Between April and June 2018 alone, five Foreign Corruption Practices Act (FCPA) enforcement actions took place. These enforcement actions ended up with heavy fines against corporations, amounting for a total of $985 million, two people in jail, and one guilty plea: 1. *Credit Suisse Group Ag* $47 million, 2. Société General S.A $585 million, 3. Legg Mason Inc $64 million, 4. *Panasonic Corporation* and *Panasonic Aviation Corporation* $280 million and 5. *Dun & Bradstreet Corporation* $9 million. The two people who were sentenced served 48 months and 35 months in prison, respectively. In addition, four other corporations started internal investigations related to possible FCPA enforcement: *Transocean Ltd, Archock Inc, Dun & Bradstreet and United Technologies Corporation*.

All five FCPA enforcement actions lead to some kind of agreement between the US authorities and the corporations (NPA or DPA). To be able to reach such an agreement, it is

[*] Member of the Costa Rica Bar Association, Doctoral candidate (PhD/Dr. Ius) in Criminal Law at the University of Barcelona, Spain. Former Associate Visiting Scholar at the University of Pennsylvania Law School, Philadelphia, United States of American, Former Visiting Researcher at the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany.

necessary that the corporation establish to the authorities that an internal investigation was conducted, and that the corporation has an adequate compliance program.

These alleged violations of the FCPA took place in different territories, including China, Hong Kong, Libya, several countries of Middle East and Asia (in the *Panasonic* case), China, Aruba, Brazil. This exemplifies how important internal investigations are worldwide, and how important it is to know how internal investigations should be carried out in comparison to the North American experience. Moreover, there is no doubt that the internal investigations are an essential component of a compliance program, and that they are one of the actions most valued by the authorities when determining whether the company cooperates or not with the government investigation, and therefore whether or not it should be prosecuted. That is why it is so important to perform internal investigations properly.

The main goal of internal investigations is to find out whether a criminal act took place and if so, how and who committed it. In addition, it also serves to achieve compliance with the disclosure rule with the authorities, and to ease the opportunity for the company to negotiate an agreement with the prosecutor's office according to which the corporation will not be prosecuted[1], or that the alleged offense is changed for an offense less severe, such as happened in the *Siemens* and *BAE* cases in which both companies managed not to be charged for corruption offenses, allowing them to continue doing business with the different governments and thus ensuring their economic viability despite the sanctions imposed.

As we can see, the results of adequate internal investigations can achieve important rewards for the corporation. That is why there is a high demand for specialized firms in internal investigations, mainly in the United States of America. This trend continues as government investigations against corporations are growing over the past years, and there is a continuing need to hire specialized advice and to prevent potential conflicts of interest within law firms.[2] Most importantly, the internal investigation procedure is of high importance, as it is one of the aspects that the prosecution gives more emphasis to when deciding whether to (continue) to prosecute a legal person: under the heading 'total collaboration of the company' the prosecution analyzes, among other aspects, how the internal investigation was carried out and whether the results of this investigation were shared with the authorities.[3] This form of 'collaboration' can be considered to be a violation of the right of defense by the company – however, by internal investigations, the company will have a procedural advantage, as will be shown below.

There is no doubt that the United States of America is the global leader in internal investigations, and that American lawyers and government authorities carry out investigations all over the world. Indeed, internal investigations are a big business for two reasons: they represent a great business opportunity for law firms to carry out these

[1] Eugene M Propper, *Corporate fraud investigations and compliance programs* (Ocena 2000) 52-53.
[2] Jesús María Silva Sánchez, *Fundamentos del derecho penal de la empresa* (2nd edn, Edisofer 2016) 347.
[3] Julie R O`Sullivan, *Federal White-Collar Crime. Cases and Materials* (Thomson West 2007) 221-222.

procedures[4], and they present a great deal for the government due to the low cost but provide – at the expense of the corporation – a thorough investigation and a potentially huge fine.

In the business world, it is often said that information is everything. That saying bears some truth relating to internal investigations. Through internal investigation, the company has the management and control of information, and this gives the company two important advantages: the knowledge of the information prior to the beginning of the criminal process, and that it has an information advantage to the authorities[5].

2 The Yates Memorandum and its influence on how internal investigations should be conducted

As mentioned before, internal investigations are an essential part of the compliance program, and they are the next natural step after implementing a whistleblowing system[6], which is considered as the reactive part of the compliance program[7]. Also, internal investigations are a huge step that is considered by the authorities when they determine if the corporations collaborated with the investigation – and this determination has important effects, because it establishes whether corporations may negotiate a DPA of a NPA.[8] But since the *Yates Memorandum*, the situation has changed, as now the authorities require that the corporation hand over vital information that can help to determine who was the employee committing the crime (individual liability)[9]. This change in white-collar crime prosecution is justified by the world economic crisis of 2008, since it must be remembered that only a couple of people faced a criminal trial for this huge world crisis. Also, let us step back to the roots of corporate criminal liability and ask ourselves why it was established in the US: due to the difficulty or impossibility of determining the criminal liability of corporation`s employees in significant transport accidents.

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[4] Siemens paid more than $ 1 billion in legal fees for internal investigations during its scandal that was the largest in history, but for example, other companies with smaller cases such as AVON have paid $ 93.3 million in fees for internal investigations. On this, see The New York Times, *The mounting cost of internal investigations* (5 March 2012) <https://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/> accessed 18 December 2018.

[5] Adán Nieto Martin, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' in Mirentxu Corcoy Bidasolo and Víctor Gómez Martín (eds), *Manual de Derecho Penal Económico y de Empresa. Parte General y Parte Especial. Vol 2* (Editorial Tirant lo Blanch 2016) 4-26.

[6] Robert W Tarun, *The Foreign Corrupt Practices Act Handbook. A practical guide for multinational general counsel, transactional lawyers and white-collar criminal practitioners* (4th edn, American Bar Association 2015) 40.

[7] Jordi Gimeno Beviá, *Compliance y proceso penal. El proceso penal de las personas jurídicas* (Thomson Reuters 2016) 219.

[8] William S Laufer, *Corporate bodies and guilty minds. The failure of corporate criminal liability* (University of Chicago Press 2006) 106.

[9] U.S Department of Justice, Office of the Deputy Attorney General Sally Quillian Yates (Individual Accountability for Corporate Wrongdoing Memorandum) 2-3 <https://www.justice.gov/archives/dag/file/769036/download> accessed 18 December 2018; and Silva Sánchez (n 2) 423.

The *Yates Memorandum* has a great influence on the process of internal investigations: the first step is that corporations must go 'deeper' in the search in order to be capable of handing over the name of the individual culprit employee to the authorities. The second step is securing the employee's collaboration during the investigation. However, now employees are afraid of being prosecuted individually for their actions, so they might keep silent during the interviews.

3 Decision to start an internal investigation?

There are a series of scenarios in which the corporation can receive an alert that indicates that it should initiate an internal investigation. Examples of these alerts include: direct alerts received in the whistleblowing system, reports from the authorities, reports from third parties (as customers or suppliers), a judicial subpoena, receiving a 'visit' by the judicial authorities with a search warrant ('dawn raid'), indications that the judicial authorities have interviewed employees or persons related to the company, failure diagnoses in an audit process, news reports, and receiving a civil lawsuit.[10]

At this point, a differentiation should be established regarding the types of internal investigations: 1. internal investigations for possible criminal offenses, 2. internal investigations for extra-criminal offenses (violation of labor regulations, non-criminal data protection violations, violations of competition or property rights, including intellectual property), and 3. internal investigations for possible breaches of contract. In this article, I will only focus on investigations regarding possible criminal offenses, whether they are consummated, found in commission (continued crimes), attempted or in preparation to be committed.[11]

In cases in which a complaint has been received through the whistleblowing channel, the company must take certain steps before starting the internal investigation: 1. reception of the complaint; 2. obtaining preliminary information from the complaint through an interview; corroboration of the information and analysis of obtained evidence[12]; 3. categorizing the complaint; 4. documenting the report; 5. assigning a code to the complaint; 6. determining the severity of the complaint, 7. preparing statistical reports; 8. sending to the body responsible for carrying out investigations.

In the other scenarios, the reaction should be to start the investigation immediately: time is critical, and the way the corporation reacts to the news may yet make a huge difference. The news or 'gossip' could create a corporate crisis that needs to be contained immediately. The

[10] Propper (n 2) 51; Brian Loughmand and Richard Sibery, *Bribery and corruption. Navigating the Global Risks* (Wiley 2012) 178; Imme Roxin, 'Problemas e estratégias da consultoria de compliance em empresas' (2015) 114 Revista Brasileira de Ciências Criminais 325-326.

[11] Albert Estrada i Cuadras and Mariona Llobet Angli, 'Derechos de los trabajadores y deberes del empresario: conflicto en las investigaciones empresariales internas' in Jesús María Silva Sánchez (ed), *Criminalidad de empresa y Compliance. Prevención y reacciones corporativas* (Editorial Atelier 2013) 201.

[12] Loughmand and Sibery (n 10) 181-182.

recommendation is to start the investigation immediately, by taking a series of rapid steps within hours.

4 Steps to be held immediately

4.1 Securing information

Document preservation is the first step to be taken during an investigation. Securing important documents and files should be conducted within minutes of receiving the news or the alert. Also, copies and digital back-ups of every important document should be done, and any remote access should be blocked during the first hours of the investigation. It is important that the research body has a secure and supported digital storage system. In large investigations, the collection of documents can reach the number of millions of documents, so it will be necessary to have adequate mechanisms and 'big data' professionals.

For physical documents it is recommended that one have a folder where all the collected documents are stored, including an indication where they were found and who drew up said documents, as well as having an electronic backup of it. This is very important since these documents must be presented to the authorities, so it must be guaranteed that they will not be altered, removed or destroyed[13].

An important detail is the corporation`s policy regarding the destruction of documents. Depending on how and when some documents are destroyed, it could be seen as a case of obstruction of justice by the authorities (as it happened in the *Arthur Andersen* case).[14] This is why the corporation has to suspend the document destruction and the erasure of digital files once an investigation has been initiated. One important source of information for internal investigations are emails; therefore, it is important to make secure copies of them and to avoid their erasing by the users.

Documents can be secured in two different ways: by requesting the information from the employee, or by sending lawyers to take the information. On the one hand, the first scenario has the disadvantage that the employee may hide or destroy information or may miss important information that he or she believes not to be important. On the other hand, the second scenario means that the lawyer is going to be looking for information in a place that he or she does not know; therefore, his or her task is going to take longer.[15] This is why it is important to work closely with the IT department, or to include IT forensics in the investigating team.

4.2 Crisis management

A corporate crisis can be defined as a negative projection of the image of the brand, which is generated suddenly and quickly diffuses especially due to mass media and social

[13] Propper (n 1) 80.
[14] Paul Cohen, Radke Papalaskaris, 'Conducting internal investigations in connection with allegations of bribery' in Paul Cohen and Arthur Marriott (eds), *International corruption* (Sweet & Maxwell 2010) 269.
[15] ibid 270-271.

networks. Such crises can result in loss of business reputation and income resulting from the commercialization of the product.[16] This may occur when a criminal investigation is conducted against the corporation, or already when there is 'gossip' that something is wrong in the corporation. Crisis management is the mitigation of the effects of a corporate crisis through communication with authorities and/or the media, and the adoption of measures within the company.[17]

While prevention measures should be enough so that there are no facts to concern the company, this is, however, not the case in practice even if prevention measures are adequate: there will always be scenarios that turn on the 'alarms'. Then, the most appropriate thing is that the corporation is prepared to address these events and not be taken by surprise. For preparedness, it will be indispensable to have a crisis committee with people prepared to attend to the alarms, and to have external advisors ready to help. This is especially important when faced with a scenario of criminal acts or government investigations.

The central objectives of the crisis committee are to manage the crisis by minimizing its impact, not losing the trust of the clients, and allowing the company to continue carrying out its economic activity in the most habitual way possible.[18] Among the aspects that must be ensured is the assurance of the economic resources of the company.[19] But the most important thing to look for during the crisis is the preservation or the lesser impact on an intangible element such as the reputation of the brand.[20]

5 Investigation plan

Immediately after taking the decision to initiate the internal investigation, it is recommended to establish a preliminary plan of the investigation where the steps to be carried out during the investigation are established. It must include the following aspects: identify the possible norm that has been violated (code of conduct, criminal compliance manual among others, or directly the criminal laws), the individual investigations steps

[16] Martín Bello, Javier Fernández-Lasquetty and Alba M López, 'Reputación corporativa' in Enrique Ortega Burgos (ed), *Fashion Law*, (Aranzadi 2018) 145.
[17] Thomas Grützner and Alexander Jakob (eds), *Compliance and Governance from A-Z* (2nd edn, Beck 2017) 58.
[18] Carlos Gómez-Jara Díez, 'La atenuación de la responsabilidad penal de las personas jurídicas' in Miguel Bajo, Bernardo Feijoo and Carlos Gómez-Jara (eds), *Tratado de responsabilidad penal de las personas jurídicas* (2nd edn, Thomson Reuters 2016) 225; Bello, Fernández-Lasquetty and López (n 16) 145.
[19] ibid 229.
[20] An example of the above was the *Starbucks* case: the cafeteria company was accused of being racist after the police arrested two black men who tried to use the health service in one of their coffee shops in Philadelphia, United States of America. The incident received attention throughout the country and groups of activists accused the company of being racist. In order to deal with this media crisis the company quickly made a statement indicating that the actions of the manager (who called the police) were incorrect and that these managers stopped working for the company after the incident. Additionally, Starbucks announced that on May 29, 2018 it will close the more than 8,000 stores that it has in the United States to train its employees on racial issues. Business Insider Newspaper, 'Starbucks stores will close nationwide next month in an unprecedented attempt to fix a company crisis' (17 April 2018) <http://www.businessinsider.de/starbucks-stores-are-closed-may-29-2018-4?r=US&IR=T> accessed 18 December 2018.

(document analysis, employee interviews, etc.). It is highly recommended that corporations have a written procedure that regulates the internal investigations.

One important question to be answered at the beginning of the process is who is to conduct the investigation. In cases of simpler complaints or complaints that do not involve critical aspects for the company (for example, when there is no violation of law), the internal investigation may be carried out by trained employees (such as a compliance officer). In contrast, when allegations relate to extremely serious events or have potentially serious consequences for the company, the recommendation is that the investigations be conducted by an outside law firm, with no relationship to the corporation.[21] This will have the benefit of allowing the law firm to give specialized advise, which advise may be more objective if it comes from a firm with no relationship to the corporation. In addition, the law firm can provide experienced and good relationships with the authorities that may help in the negotiations to achieve a DPA or NPA. In cases this being done by an external law firm, a series of steps must be taken to guarantee the preservation of the attorney-client privilege. First of all, the board of directors must formally request the contracted firm to conduct an internal investigation to obtain legal advice and provide that the communications between the law firm and the employees will be confidential.

6 Investigation steps

6.1 Interviews

One of the most important steps during the investigation are the employee interviews, which should be planned prior to their realization. Some important aspects to take in mind are to determine who will be interviewed, how the interview will be conducted, and which questions are to be asked. It is important that the interview is welcoming for the interviewee, and not to apply 'police' techniques: the interviewed person will cooperate more if he or she feels comfortable talking.[22] For this, it is necessary that the interviewer have experience, knowledge of interview techniques and thus can obtain important information quickly. It is recommended that the interviewer use documents that help employees to remember the facts, and that interviews with people who were more related to the case are conducted first, leaving other, more remote witnesses to be interviewed later.

During this process is important to keep in mind the *Upjohn & Adnarim* warnings: that case established that the attorney and client privilege applies to confidential communication between attorney and client if the communication was made for the purpose of obtaining or providing legal advice.[23] The attorney has to be clear and inform the employees that the purpose of the interview is to assist the company in obtaining legal advice.[24] The

[21] Sandra D. Jordan and Kelly Strader, *White Collar Crime. Cases, materials and problems* (Carolina Academic Press 2015) 649.

[22] Gustavo Rodríguez, 'Recepción de denuncias, investigación interna y obtención de evidencias' in Carlos Sáiz Peña (ed) *Compliance. Cómo Gestionar los Riesgos Normativos en la Empresa* (Editorial Aranzadi 2015) 671; Propper (n 1) 63.

[23] ibid 624.

[24] Upjohn Co. v United States 449 U.S. 383, 101 S. CT. 677, 66 L. Ed. 2d 584 (U.S Supreme Court 1981).

communication between the corporate lawyer and the employees of the company are privileged, but the corporation controls the privilege and has the power to waive it.[25] An important aspect that the interviewer should make clear is that he or she is the company's lawyer, and not the lawyer of the person he or she is interviewing – and that therefore the professional secret protecting the interview belongs to the company, so that the company will be able to lift it whenever it wishes (especially for subjects of collaboration with the authorities).[26]

Also, it is recommended that the interviewer not record the interviews. Such recordings could be requested by the authorities, and witnesses may get nervous and not speak openly because he or she is being recorded. Instead, it is recommended that notes be taken and, after the end of the interview, a sworn statement before a notary be taken and be signed by the witness with the most important details if allowed by the country's legislation.

6.2 Data privacy and labor law

One important problem that could arise especially in international internal investigations is dealing with data privacy law, especially in Europe and Latin America where the corporations are not able to access all the information under the employee`s power, such as email or the data kept in the devices given by the corporation to the employee (cellphone and laptop).[27] In some European jurisdictions, accessing the emails of employees requires some formalities; for example, unread email may have special protection from the point of view of the privacy of conversations, and so has to be distinguished from email that has already been read by the user of account. In other, more restrictive jurisdictions, the corporate email accounts cannot be accessed by the corporation. The scenario is very different in the United States, where corporations have almost free access to employee email accounts.

In some international investigations, it will be required that evidence be shared between jurisdictions, but many countries differ in their regulations regarding data privacy law, labor law and criminal procedure law. This means it is important to have legal advice in each country, provided by specialists in these areas[28] who can help to obtain the evidence across jurisdictions as quickly and safer as possible.

6.3 How to proceed in cases of non-collaboration of employees with the investigation?

A controversial issue relates to the measures that the company must take if an employee does not want to collaborate during the investigation – especially in light of the 'message' that these measures can project to the authorities. For example, if a corporation fails to take

[25] Jordan and Strader (n 21) 629.
[26] Tarun (n 6) 243 –244; Laufer (n 8) 651; Jordan and Strader (n 21) 624.
[27] Gimeno (n 7) 228.
[28] Kenyon, Miller and Wilson (n 26) 302.

any measure at all or only applies a minor disciplinary measure, this can project that the corporation does not take the collaboration seriously.

The ideal answer of the corporation to the case of non-collaboration by an employee is to terminate the employment contract. In this way, the corporation can protect itself and demonstrate that it is willing to collaborate with the authorities, and that it has a true commitment on compliance. This kind of decision is allowed, for example, by US courts; in the case *J.P Johnson v Case. Ed Herschler*, the Court ruled that the decision of the corporation of fire an employee for not collaborating with an internal investigation was legal.[29]

However, the scenario may be different if the employee who does not collaborate with the investigation is in another jurisdiction – for example, if he or she is not a national of a European state but is working in an office of the corporation in Europe, where labor law is more restrictive and more employee friendly. In such a case, the corporation may need to hire a law firm in the country where the employee is located, and that law firm may need to write a report to the authorities indicating that according to the laws of that country, the corporation is prohibited from firing an employee for not collaborating with an internal investigation. On the other hand, a different approach may be to terminate the employment contract and deal with the labor law case that will be triggered later – this way, the corporation can demonstrate its commitment to the US authorities, even though, in the end, the employee will recover his or her job.

7 Final Report and recommendations

The logical final step at the end of the investigation is the presentation of a report to the board of directors. This final report should include the complaint or alert, the procedures performed, the information obtained, subjects identified as responsible, control means that failed and possible legal consequences for the company.[30] However, the lawyer must be very careful when drafting this report, as it can be used against the company in the case of a criminal proceeding (and could even lead to new legal proceedings for civil or other claims), and as the report might leak to the public or the press, seriously affecting the reputation of the company. Therefore, it is highly recommended that the final written report be limited to summarizing why the investigation was conducted, the steps taken, the facts discovered, and the evidence obtained, and should reserve the conclusions of the report and recommendations to the corporation for an oral presentation.[31] The other option is to expressly indicate that the report is an expert legal opinion and therefore protected by professional secrecy (attorney-client privilege). However, in cases of FCPA enforcement or where legal consequences in the United States of America may follow, US authorities regularly demand as a requirement that an agreement be reached with the company, that

[29] Court of Appeals of the tenth circuit of the United States of America, J.P Johnson v Case. Ed Herschler 669 F.2d 617, January 21, 1982.
[30] Jordi Gimeno Beviá, *El proceso penal de las personas jurídicas* (Thomson Reuters 2014) 233.
[31] Propper (n 1) 82–83; Tarun (n 6) 259.

the company disclose all documents, including those that are protected under professional secrecy.[32] Moreover, professional secrecy is not a guarantee that it will not go public.

8 Disciplinary measures

The disciplinary regime can be defined as the response of the company through a sanctioning of contractual breaches by employees or acts contrary to business policies or the legislation of a country. This sanctioning must be proportional to the nature and severity of the action of the employee.[33] Disciplinary systems have been highlighted as a very important element to combat the phenomenon of corruption in companies.[34] In addition, authorities' value disciplinary systems highly as a manifestation of the collaboration of a corporation and its commitment to a compliance program. On the other hand, doing a whole process of internal investigation and crisis management to only arrive at a report that does not have major consequences is a clear manifestation of a lack of true commitment to compliance. The message from the company must be clear: do not tolerate acts contrary to business ethics; and any violation will be sanctioned by the corporation, in addition to a possible criminal process.

9 Conclusions

Internal investigations have become a very important tool for the authorities in their fight against white collar crime, assimilated from the model of self-regulation, in which corporations are responsible for the investigation of the factual background of crimes committed by their employees – facts that should be shared with the authorities in order to achieve a mitigation of the sanction the corporation may face. Undoubtedly, in recent years this area of practice has grown significantly, expanding to countries around the world, which requires that lawyers who are not from the United States of America must know about this subject, and especially the specific requirements demanded by the US authorities on how to conduct internal investigations.

Also, more and more countries are including corporate criminal liability in their legislation. Usually, corporate criminal liability systems include the collaboration of the corporation as a form of mitigating the sanction. This means that more and more countries are immersed in the world of internal investigations, for which it would be appropriate to take as a basis the model of the United States of America – so that not each criminal justice system has to implement an internal investigation procedure from scratch.

The internal investigations are an important subject that is closely related with the defense of corporations within criminal procedures, also are an essential component of the compliance – anticorruption programs. Knowing the key elements that characterize internal investigations becomes vital for lawyers who move in the world of compliance and

[32] Propper (n 1) 85.

[33] Grützner and Jakob (n 17) 76.

[34] Silvina Bacigalupo Saggese, 'Prevención de la corrupción en los negocios y en el sector público: buen gobierno y transparencia' in Jordi Gimeno Beviá, Julio Cesar Tejedor and Manuel Villoria (eds), *La Corrupción en España. Ámbitos, causas y remedios jurídicos* (Editorial Atelier 2016) 440.

economic criminal law. Large companies are active in many jurisdictions, and a problem can arise at any time. It is important that a lawyer specializing in criminal law be aware of these issues due to the impact that an internal investigation can have in a criminal proceeding, and it is important to know that only a criminal lawyer knows the procedural formalities required by their jurisdiction. However, being a criminal lawyer is not the only requirement to perform this work: it is necessary to have experience in conducting interviews with employees, in dealing with media crises and in knowing the foreign legislation where a criminal process may take place. All these aspects will allow the company to be adequately advised.

Undoubtedly, the practice of internal investigations has gained much importance in recent years, and it is expected that it will continue to grow in the future. But it is also becoming more and more complex and specialized, with the details being essential elements that cannot be ignored, remembering that 'the devil is in the details'.

Selected Literature

Bacigalupo Saggese S, 'Prevención de la corrupción en los negocios y en el sector público: buen gobierno y transparencia' in Gimeno Beviá J, Cesar Tejedor J and Villoria M (eds), *La Corrupción en España. Ámbitos, causas y remedios jurídicos* (Editorial Atelier 2016)

Bello M, Fernández-Lasquetty J and López AM, 'Reputación corporativa' in Enrique Ortega Burgos (ed), *Fashion Law* (Aranzadi 2018)

Cohen P and Papalaskaris R, 'Conducting internal investigations in connection with allegations of bribery' in Cohen P and Marriott A (eds), *International corruption* (Sweet & Maxwell 2010)

Estrada i Cuadras A and Llobet Angli M, 'Derechos de los trabajadores y deberes del empresario: conflicto en las investigaciones empresariales internas' in Silva Sánchez JM (ed), *Criminalidad de empresa y Compliance. Prevención y reacciones corporativas* (Editorial Atelier 2013)

Gimeno Beviá J, *Compliance y proceso penal. El proceso penal de las personas jurídicas* (Thomson Reuters 2016)

Gómez-Jara Díez C, 'La atenuación de la responsabilidad penal de las personas jurídicas' in Bajo M, Feijoo B and Gómez-Jara C (eds), *Tratado de responsabilidad penal de las personas jurídicas* (2nd edn, Thomson Reuters 2016)

Grützner T and Jakob A (eds), *Compliance and Governance from A-Z* (2nd edn, Beck 2017)

Jordan SD and Strader K, *White Collar Crime. Cases, materials and problems* (Carolina Academic Press 2015)

Laufer WS, *Corporate bodies and guilty minds. The failure of corporate criminal liability* (University of Chicago Press 2006)

Loughmand B and Sibery R, *Bribery and corruption. Navigating the Global Risks* (Wiley 2012)

Nieto Martin A, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' in Corcoy Bidasolo M and Gómez Martín V (eds), *Manual de Derecho Penal Económico y de Empresa. Parte General y Parte Especial. Vol 2* (Editorial Tirant lo Blanch 2016)

O'Sullivan JR, *Federal White-Collar Crime. Cases and Materials* (Thomson West 2007).

Propper EM, *Corporate fraud investigations and compliance programs* (Ocena 2000)

Rodríguez G, 'Recepción de denuncias, investigación interna y obtención de evidencias' in Sáiz Peña C (ed), *Compliance. Cómo Gestionar los Riesgos Normativos en la Empresa* (Editorial Aranzadi 2015)

Sáiz Peña C (ed), *Compliance. Cómo Gestionar los Riesgos Normativos en la Empresa* (Editorial Aranzadi 2015)

Silva Sánchez JM, *Fundamentos del derecho penal de la empresa* (2nd edn, Edisofer 2016)

Tarun RW, *The Foreign Corrupt Practices Act Handbook. A practical guide for multinational general counsel, transactional lawyers and white-collar criminal practitioners* (4th edn, American Bar Association 2015)

CORPORATIONS AS RIGHTS HOLDERS IN CRIMINAL PROCEEDINGS: SPECIAL REFERENCE TO THE RIGHT AGAINST SELF-INCRIMINATION

By Ana María Neira Pena[*]

Abstract

The irruption of legal persons as criminally liable subjects requires rethinking their position in criminal proceedings. It is necessary to reflect on what their procedural legal status should be in order to guarantee their right of defence and their right to the due process of law, but without disregarding their special nature, clearly different from that of human beings. The recognition of the right against self-incrimination to legal persons is especially controversial. On the one hand, this right has a personal nature; it is highly connected with human dignity and aimed at preventing torture. These features provide arguments for denying it to legal persons. However, on the other hand, the connection of the right against self-incrimination with the right of defence and the presumption of innocence, which are structural principles of criminal proceedings, advocate for its recognition to legal persons as criminal defendants. In the search for a balanced solution between the inclusion and the exclusion of legal persons from the scope of protection of this fundamental right, it seems appropriate to establish certain limits to its exercise, taking into account the special nature of corporations but also considering its need of protection within criminal proceedings.

1 Introduction

Criminal proceedings, understood as a system of guarantees for the accused, have historically developed by taking as a reference the human being, whose personal freedom must be protected from state power. In this sense, criminal procedural law forms part of the hard core of state-citizen relationships. In this scenario, the emergence of corporations as subjects liable to criminal punishment represents a true revolution that threatens some equilibriums historically achieved with the aim of establishing a contradictory, but balanced confrontation between the state and the individual.

In an attempt to maintain the essential function of criminal proceedings as a system of guarantees for individual rights, while recognizing the essential differences between natural persons and legal entities, we must reinterpret defendants' procedural rights in light of this new dimension to criminal proceedings. In short, if corporations can be held criminally liable, it must be determined to what extent they should enjoy procedural rights such as the right to defence, the right to free legal aid or the presumption of innocence enshrined in national constitutions and in supranational legal texts, especially in the European Convention on Human Rights.

[*] PhD; assistant professor of Procedural Law, University of A Coruña.

In this context, this paper will address the dilemma of how to ensure a fair trial against the corporation, while recognizing its special nature. To that end, first of all, it will be necessary to establish general decision-making criteria in order to determine which rights are applicable to corporations and to what extent. Secondly, the analysis will focus on the right not to incriminate oneself because the question of whether corporations deserve that fundamental guarantee has become very controversial.

In this paper, we will argue in favour of that recognition for corporations because the right not to incriminate oneself is an instrument of defence rights and is an expression of the right to self-defence which is inherent to the right to a fair trial. However, this guarantee is also aimed at protecting some individual interests, such as the right to privacy and the dignity and physical integrity of the accused, that are not fully enjoyed by corporations. These differences may justify dissimilarities in the level of protection deserved by individuals and companies.

2 Corporations as right holders and the right not to incriminate oneself

Generally speaking, it can be asserted that corporations deserve some fundamental rights. The criterion for deciding which fundamental rights should be recognized also for legal persons is based on the compatibility of the right with the special nature and purposes of the corporation and also on its capacity to exercise that right. In this sense, the German Basic Law establishes that fundamental rights also apply to legal persons based in the country, as long as they are, by nature, applicable to them (article 19 (3) German Basic Law), and where constitutions remain in silence, the courts have established similar rules in case law.[1]

Nonetheless, within criminal proceedings, the fictitious nature of legal persons would allow, at least theoretically, conceiving corporate criminal liability as a tool to expedite and facilitate the investigation of corporate crimes committed by natural persons, and promoting the collaboration of corporations with justice. However, such an instrumental conception of corporate criminal liability is inconceivable in relation to human beings naturally endowed with dignity.

As a starting point for the subsequent analysis, it should be noted that *legal persons and natural persons are different in nature, so their procedural legal statuses do not need to be identical. However, both must be able to defend themselves effectively in a process based on the principles of contradiction and equality of arms, and which meets the requirements of a fair trial*.

The recognition of the right not to incriminate oneself is one of the cornerstones of modern criminal justice systems in which the prosecutor must prove the guilt of the defendant beyond any reasonable doubt without depending on the defendant's cooperation. Moreover, the centrality of this right is emphasized by its relation to the presumption of innocence, the right to defence and the principle of equality of arms, which are standards inherent to every criminal justice system in a democratic society.

[1] Spanish Constitutional Court. Judgment no 135/1987, 17 October 1987.

However, the recognition of this right for corporations is highly controversial. In fact, the lack of unanimity from the point of view of comparative law shows how controversial the recognition of this right to corporations is.[2]

The European Court of Justice[3] recognizes this right to corporations in administrative sanctioning proceedings in antitrust matters, at least when the right of defence is at stake. In this sense, it is provided that, in proceedings held by the European Commission, the company cannot be forced to answer questions that imply a direct self-incrimination. But, at the same time, the Court states that there is no a general principal between European member states recognizing this right to corporations.

In Spain, the law governing criminal proceedings[4] expressly recognizes the right to remain silent and the right against self-incrimination to the procedural representative appointed by the corporation to act on its behalf before the criminal court (articles 409bis and 786bis (1) *LECrim*). But, it also states that whoever has to testify as a witness in the process cannot be appointed as procedural representative (article 786bis (1) (II) *LECrim*).

Italy recognizes this right to the legal representative of the company only if he or she was assuming such legal representation at the time of committing the crime (article 44 (1) (b) Italian Legislative Decree 8 June 2001, n. 231[5]), which, to the contrary, implies that if he or she was appointed as representative after the commission of the crime, they may be called to testify as a witness. This legal rule seems to be aimed at excluding from the obligation to testify only those individuals personally exposed to the risk of self-incrimination.[6] So it can be said that the protection is for the representative, actually or potentially suspicious, and not for the company itself. For their part, the Chilean courts have also denied this right to corporations due to its link to individual liberty and personal security.[7]

Likewise, in common law countries, different solutions can be found. In the United States, this right is denied to corporations arguing that they are state creatures which enjoy their privileges only as long as they obey the law of their creation, so they cannot use their

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[2] A comparative study of the different jurisprudential positions maintained in England, Australia and the United States can be seen in Lynn Loschin, 'A Comparative Law Approach to Corporations and the Privilege against Self-Incrimination' (1996) 30 *University of California* Davis Law Review 247. Another comparative study among England, Canada and the United States, can be seen in Ross Ramsay, 'Corporations and the privilege against self-incrimination' (1992) 15 The University of New South Wales Law Journal 297.

[3] Case 374/87 *Orkem v Commission of the European Communities [1989]* ECR, paras 18-42**.**

[4] Spanish Criminal Procedure Law, 14 September 1882 (hereinafter *LECrim*).

[5] Italian Law regulating the 'Discipline of the administrative responsibility of legal entities, companies and associations also without legal personality, in accordance with Article 11 of the Law 29 September 2000, No. 300'.

[6] Gaetano Galluccio Mezio, 'I diritti fondamentali delle corporations nel processo penale statunitense: lo strano caso del privilege against self-incrimination' (2014) 69 (4-5) Rivista di diritto processuale 1126, 1150-1151.

[7] Judgement of the Constitutional Court of Chile, No. 2381, 20 August, 2013, *Caso Pollos*; commented by Héctor Hernández Basualto, '¿Derecho de las personas jurídicas a no auto-incriminarse?' (2015) XLIV Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 217, 235-238.

privileges to break or abuse the law or to avoid state controls.[8] Canada have also denied this right to corporations;[9] meanwhile, Australia, which had initially recognized it, modified its stance in 1993, to deny, through case-law, that corporations can claim such a right. This denial has been incorporated to the Australian Evidence Act of 1995.[10] On the contrary, England[11] and New Zealand grant the privilege against self-incrimination to corporations.[12]

In short, it can be said that neither a comparative analysis of national laws, nor supranational regulations, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights or the Charter of Fundamental Rights of the European Union allow us to conclude that there is a general principle enshrining the right against self-incrimination for legal entities. Possibly, this is because there are compelling reasons, both to recognize it and to deny it.

2.1 Arguments against extending the right against self-incrimination to corporations

In inquisitorial models, the defendant was treated as a mere source of evidence and not as a holder of rights. In this scenario, confession was considered the best evidence (or the ultimate proof), and the investigation of crimes was aimed at achieving such confessions. In this context, the right against self-incrimination was recognized in order to prevent torture

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[8] Hale v. Henkel (202) U.S. 43 (1906). In this case, the U.S. Supreme Court stated that 'the individual may stand upon his constitutional rights as a citizen. (…) He owes no duty to the State or to his *neighbors* to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. (…) Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. (...) While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges'.

[9] *Amway Corp.* 1989, 1 S.C.R 21, 56 D.L.R. (4th) 309, 322-323.

[10] The Australian Evidence Act, 1995, Sect. 187, under the tittle 'Abolition of the privilege against self-incrimination for bodies corporate' establishes: '(1) This section applies if, under a law of the Commonwealth or the Australian Capital Territory or in a proceeding in a federal court or an ACT court, a body corporate is required to: (a) answer a question or give information; or (b) produce a document or any other thing; or (c) do any other act whatever. (2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving he information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty'.

[11] *Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd.* (1939), 2 KB. 395, 408 (Eng. CA. 1938), where the English jurisprudence indicates that there is no basis to deprive juridical persons of those guarantees that, in accordance with English Law, are even recognized to the less deserving natural persons. This stance is also maintained by Scott A. Trainor 'A comparative Analysis of a Corporation's Right against Self-Incrimination', (1995) 18, 5, Fordham International Law Journal 2139, 2181.

[12] *New Zealand Apple & Pear Mktg. Bd. v. Master & Sons Ltd.* [1986] 1 N.Z.LR. 191, 196 (CA.)

and other inhuman or degrading treatment. In fact, one of the historical foundations of this right is the prevention of torture, both physical and psychological.

Therefore, the first argument against recognizing the right not to incriminate oneself for corporations is that companies cannot suffer physical or psychological harm because they lack body and mind. In other words, the physical and psychological vulnerability of individuals is not present in legal persons, so there is no need for protection. In this sense, we can also argue that personal dignity is an inherent value to humans not extensible to corporations. Therefore, in the case of legal persons, the interest in being protected through the right against self-incrimination must be necessarily different.[13]

Secondly, the right against self-incrimination or the right to remain in silence has a personal nature; therefore, it can be exercised only by the declarant in his or her personal statements. However, corporations themselves do not testify, because they cannot speak, make statements or deliver documents on their own. Given its special nature, corporations can only act through their duly authorized agents. As a consequence, recognizing this right to corporations would mean allowing their representatives to assert the privilege on behalf of the company, which would imply dissociation between the declarant – the representative – and the person at risk of incrimination – the company.[14]

In fact, an effective exercise of the right against self-incrimination by the corporation would mean conceding this right to their representatives, even though these might not become personally incriminated. In this scenario, it is arguable that recognizing this right for corporations leads to its denaturation.

Thirdly, another foundation of the right against self-incrimination concerns the equality of arms. This right would serve to maintain the balance between the state and the individual when they confront each other in criminal proceedings. In this sense, some scholars argue that corporations are generally in a stronger position to confront the state than an individual and, therefore, legal entities do not deserve the protection granted by the right not to incriminate themselves.[15] However this is a double-edged argument. It may be valid for big

[13] Óscar Serrano Zaragoza 'Contenido y límites del derecho a la no autoincriminación de las personas jurídicas en tanto sujetos pasivos del proceso penal' (2014) 8415 Diario La Ley 1, 8.

[14] The Supreme Court held that 'a corporation has no Fifth Amendment right because the privilege against self-incrimination is purely "a personal privilege of the witness" that cannot be exercised by the corporation. The Fifth Amendment applied only when the person may incriminate "himself". Therefore, the witness has no basis for claiming the privilege on behalf of a third party. Under this analysis, the corporation existed apart from its agents, and because the corporation itself did not testify, it could not exercise any claim of the privilege'. 'The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and, if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation' (*Hale v. Henkel*, 201 U.S. 69 (1906)).

[15] In this sense, the Australian High Court, in the case *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500 per Mason CJ and Toohey J, held that 'in general, a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons'.

corporations, because some of them manage more resources and hold more power than some states, but in the case of small and medium enterprises, the confrontation with public prosecution may be as imbalanced as for individuals.

Of course, there are other arguments against recognizing this right to legal persons. For instance, there is a pragmatic argument that the recognition of the right against self-incrimination to corporations would greatly hinder criminal investigations, preventing an effective prosecution of business crimes,[16] given that the state faces unique obstacles to detect and prove wrongdoing whenever it occurs within legal entities.[17] It is also argued that the exclusion of corporations from asserting the right to be free of self-incrimination 'makes sense, since corporations could otherwise evade all kinds of disclosure obligations necessary to make markets work'.[18] Another argument against this recognition is related to the relationship between the right against self-incrimination and other rights, such as human dignity, freedom or privacy,[19] which are alien to the special nature of corporations.

2.2 Arguments for extending the right against self-incrimination to corporations

The right against self-incrimination is deeply linked to the right of defence and the presumption of innocence, which are structural and essential principles of the due process of law. In fact, the right against self-incrimination is an instrument of the right of defence. In this sense, silence must be considered a legitimate defence strategy from which negative consequences regarding the defendant's guilt cannot be drawn. At the same time, the right to remain silent is a consequence of the principle of presumption of innocence, which implies that the prosecution must prove the guilt of the defendant beyond any reasonable doubt, without depending on the collaboration of the accused.

On the other hand, the recognition of the right to defence for corporations is beyond doubt because this right is *conditio sine qua non* to the right to a fair trial and inherent to the condition of being a criminal defendant. In this sense, it can be asserted that, without respecting the right to defence, criminal punishment would not be legitimate. Moreover, in order to preserve the accusatorial nature of criminal proceedings, it is necessary to treat the defendant as a rights holder and not as a mere object or a piece of evidence. This reflection

[16] In this sense, the U. S. Supreme Court states that '[i]f, whenever an officer or employee of a corporation were summoned before a grand jury as a witness, he could refuse to produce the books and documents of such corporation upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers' (*Hale v. Henkel*, 201 U.S. 43, 74 (1906)).

[17] Samuel W Buell 'Criminal Procedure within the Firm' (2007) 59 (6) Stanford Law Review 1613, 1616.

[18] Kent Greenfield 'In Defense of Corporate Persons' (2015) 30 Constitutional Commentary 309, 323.

[19] In this regard, the Australian High Court states that '[t]he modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege' (*Environment Protection Authority v. Caltex Refining Co. Pty. Ltd*., (1993) 178 CLR 477, 405).

on the right to defence is useful here because the right against self-incrimination, as we said before, is considered an instrument of the right to defence. [20]

In addition, the right against self-incrimination is also closely related to the presumption of innocence,[21] which is a key rule of criminal proceedings, and inherent to the right to a fair trial. In this sense, in accusatorial systems, unlike inquisitive systems, it is believed that the prosecution has to prove the guilt of the defendant beyond any reasonable doubt. Therefore, it is the responsibility of the prosecution to build the case without depending on the cooperation or the confession of the accused. In this sense, it must be considered that, in criminal proceedings, the burden of proof is always on the prosecution, so the accused cannot be obliged to provide evidence, nor inculpatory, neither exculpatory.[22] The presumption of innocence is not only a fundamental right, but also an evidentiary rule that informs the procedural activity of the parties and guides the judicial authority in judging a case. In this sense, the presumption of innocence implies a specific conception of truth and a particular way to pursue that truth.[23]

Finally, denying the right against self-incrimination to corporations could affect their representatives' right not to incriminate themselves, who are human beings with dignity and physical and psychological integrity.[24] So if an individual, acting on behalf of the corporation, could be obliged to testify, his personal dignity would be at stake, even if his or her statements were only incriminating for the company. Similarly, if an individual, acting in his or her representative capacity, were required to provide corporate documents, it should be assessed whether such documents could be incriminating for the individual himself and not just the company.[25]

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[20] Xulio Ferreiro Baamonde 'El imputado' [The defendant] (2000) 7 Revista de Derecho de la Universidad Católica del Norte 169, 187-188.

[21] In this sense, in *Saunders v The United Kingdom*, App no 19187/91 (ECtHR, 17 December 1996) the court holds that '[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 2 of the Convention'.

[22] Spanish Constitutional Court. Judgment no 161/1997, 2 October 1997.

[23] According to José Luis Vázquez Sotelo, *Presunción de inocencia del imputado e íntima convicción del tribunal. Estudio sobre la utilización del imputado como fuente de prueba en el proceso penal español* (Bosch 1985) 265-266, the presumption of innocence is a criterion that informs and inspires the Spanish criminal procedure system.

[24] In this sense, in *Braswell v. United States*, 487 U.S. 99, 109-112, 114-115 (1988), the U.S. Supreme Court held that natural individuals possessing corporate business records in a representative capacity may not seek Fifth Amendment protection to avoid producing subpoenaed documents. But, at the same time, the Court recognized the tension between the articulated agency rationale for upholding the collective entity doctrine and the personal self-incrimination of the agent of the collective entity.

[25] Although the risk of incrimination for the corporate representative is evident, the U.S. Supreme Court does not admit this argument claim by the representative, personally charged, to refuse to deliver certain documentation that he possesses in his representative capacity. In this regard, in *Bellis v. U.S*. 417 U.S. 85 (1974), the Court held that '[i]n view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the

Of course, the affection of the constitutional rights of the corporate representatives is more likely to happen when the corporate criminal defendant is a small company or a one-person partnership. In fact, some authors argue that 'in the context of single member LLCs, affording the entity itself an independent Fifth Amendment privilege is the only true answer to securing the constitutional rights of the natural owner'.[26]

2.3 Balancing solution

Thus, in light of the arguments outlined above, we can conclude that, although not all the foundations of this right are applicable to corporations, the close relationship of the right against self-incrimination with the right to defence and the presumption of innocence makes it unavoidable to recognize the first one to corporations as criminal defendants. Otherwise, the fairness of criminal proceedings and the accusatorial nature of the system itself would be called into question.

However, the special nature of corporations, along with the partially different foundations of the right against self-incrimination when it is recognized to corporation in comparison with human beings, allow for modulations in its scope and in its degree of protection. In fact, the concession of this right to corporations will be justified only when denying it, results in infringing the right to defence, the presumption of innocence, or the individual rights of their representatives. In addition, we must bear in mind that an overly broad scope of protection of the corporates' right against self-incrimination could unjustifiably obstruct criminal investigations.

An adaptive work is necessary in order to determine the scope of the corporation's right against self-incrimination, since an automatic and uncritical translation of the scope of protections recognized for human beings to corporations would be inappropriate. Therefore, the key will be to determine the scope of protection of the right enjoyed by legal persons, specifying which subjects may exercise such right on behalf of the entity and what corporate actions are protected by this guarantee.

The answer to those questions will be determined in large part by the instrumental relationship between the right against self-incrimination, on the one hand, and the right of defence and the presumption of innocence, on the other hand.

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organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations'.

[26] Lila L Inman, 'Personal Enough for Protection: The Fifth Amendment and Single-Member LLCS', (2017) 58 William. & Mary Law Review 1067, 1100; By contrary, in the opinion of Ross Ramsay, 'Corporations and the privilege against self-incrimination' (1992) 15 The University of New South Wales Law Journal, 297, 309-310, '[a]n argument in response to this concern is that a denial of privilege to corporations is simply just one of numerous burdens which apply to corporations, irrespective of their size, by virtue of the decision to adopt the status of a corporation with its corresponding advantages'. In this sense, it is argued that 'the decision to adopt that form of business structure with all its privileges entails an acceptance of the other consequences which attach to the corporate structure'.

3 Scope of protection of the corporation's right against self-incrimination

3.1 Which declarants are protected?

The right against self-incrimination, like other procedural rights, would be worthless if it were recognized for companies but denied to their representatives. In this regard, it has been said that the legal status of entities as criminal defendants determines the status of their representatives,[27] because it would be absurd to recognize corporations as holders of the defendant's rights and then treat their representatives as mere witnesses.

Regarding oral statements, it is clear that the right to remain silent and the right against self-incrimination can only be exercised by individuals empowered to declare on behalf of corporations, normally, the legal representatives.

The problem is that corporations usually have several legal representatives, for instance all members of the Board of Directors and even other agents acting by delegation of the Board. In this context, some scholars argue that all the representatives have the right not to testify on behalf of the corporation[28] and this is the legal solution in several countries, such as Switzerland, Austria or Chile.[29] It has even been suggested that employees who remain part of the corporation during the judicial procedure enjoy some kind of exemption from the general duty to testify as witnesses, given that testifying against the entity could cause them serious damage, both economic and personal.[30]

However, in my opinion, only the person (specially) appointed to act on behalf of the corporation within the criminal procedure, who is in charge of exercising corporate self-defence, must be protected by this right and therefore only this procedural representative may remain silent or even lie to the Court without legal consequences. In this sense, it is necessary to remember, once again, that the right analysed, in relation to corporations, must be understood as a way to exercise the right of defence; therefore, only the person in charge

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[27] Fernando Gascón Inchausti, 'Consecuencias procesales del nuevo régimen de responsabilidad penal de las personas jurídicas: la persona jurídica como sujeto pasivo del proceso penal' in Fernando Gascón Inchausti and others (eds), *Repercusiones sobre el Proceso penal de la LO 5/2010, de reforma del Código Penal* (Aranzadi 2010) 19, 35.

[28] Antonio Del Moral García, 'Peculiaridades del juicio oral con personas jurídicas acusadas' in Ignacio Serrano Butragueño and Antonio Del Moral García (eds), *El juicio oral en el proceso penal. Especial referencia al procedimiento abreviado* (2nd edn, Comares 2010) 721, 743.

[29] Swiss law provides that none of the representatives of the corporation will be obliged to testify within the criminal procedure against the company (article 102 (a) (2) *Swiss Penal Code*). Meanwhile, in Austria, the people in charge of the company will declare as defendants, just like any worker who is suspected of having committed the crime (paragraph 17 (1) *VbVG*). Similarly, Chilean law provides that the rights and guarantees of the accused may be exercised by any representative of the legal person, thereby avoiding being forced to testify as witnesses (article 21 (II) *Chilean Law* 20393).

[30] José Ángel González Franco, 'contribution published' in Jacobo Dopico Gómez-Aller (ed), *La responsabilidad penal de las personas jurídicas en el proyecto de reforma de 2009. Una reflexión colectiva* (Tirant Lo Blanch 2012) 95, 99.

of defending the corporation at trial may deserve this special protection, while other representatives should testify as witnesses.

That is the Spanish legal solution, which limits the corporation's right against self-incrimination to the representative who is especially designated to act on behalf of the corporation during the pre-trial inquiry and during the trial (articles 409bis and 786bis (1) *LECrim*). The law says nothing with regard to the remaining corporate legal representatives, who may be called as witnesses if the investigating judge, the prosecutor or the corporate defence consider it appropriate. In that case, the legal representatives will be called to testify as witnesses and, in such quality, will have the obligation to testify and to tell the truth, unless they are at risk of becoming personally incriminated.

3.2 Court requirements concerning incriminating documents?

Regarding documentation requirements, the question is whether the corporation that is criminally charged may refuse to deliver any documentation or evidence that could facilitate its incrimination? If the answer is affirmative, it could be asserted that the introduction of corporate criminal liability would hinder the investigation of corporate crimes because any duty to cooperate with the administration of justice would no longer exist. Therefore, to overcome the difficulties of investigating corporate crimes it is necessary, firstly, to establish incentives for collaboration, through leniency programs and attenuations of corporate guilt and, secondly, to limit properly the scope of the right against self-incrimination for corporations.

In order to set appropriate limits to the corporate right against self-incrimination, it needs to be considered that the right against self-incrimination will protect only those documents equivalent to a confession or an admission of guilt, given that in other scenarios the right of defence and the presumption of innocence would not be at stake. This means that the protected documents will be only those directly incriminating for the company, whose existence depends on the corporation's will, excluding those whose existence is legally binding.[31]

Those documents, whose existence is legally binding, and therefore independent of the will of the corporation, must be excluded from the scope of protection of this right,[32] because they are not equivalent to a deposition or a confession. Having these documents is not an option for the company, but a legal obligation. Therefore, obtaining such documents under threat of sanction or drawing negative consequences from the refusal of the company to hand them over does not infringe on the presumption of innocence nor on the right of defence.

It must be borne in mind that the right to defence cannot be used to violate legal obligations of filing and documentation with impunity. For instance, accounting documents, invoices

[31] *Saunders v The United Kingdom*, App no 19187/91 (ECtHR, 17 December 1996); *Jalloh v. Germany*, App no 54810/00 (ECtHR, 11 July 2006).

[32] Spanish Constitutional Court. Judgements no 76/1990, 20 April 1996; no 161/1996, 2 October 1996.

or other commercial documents that the corporation has the legal obligation to keep on file would not be protected. At least, from the refusal to deliver these documents, when they are required, negative consequences may be drawn in order to prove corporation's guilt.

In short, it may be said that the duty to undergo certain controls and checks on the obligation to deliver certain documents does not always violate the right against self-incrimination. This seems to be the case especially when such materials are not produced specifically to be delivered to prosecutorial authorities, but created prior to, and independently of, the will of the accused, particularly under a legal obligation.

Similarly, the legal duty to implement preventive regular checks on certain entities, which operate in highly regulated markets, such as banking and pharmaceuticals, would allow authorities to require some collaboration, more or less active, in the supervision of such controls. Banking regulation aimed at preventing money laundering is a good example. In accordance with the legal obligations envisaged in this area, banks must perform sophisticated risk assessment analysis, as well as collect and maintain certain information about their customers and about certain transactions. If the bank refuses to deliver that documentation that, by law, it must have and keep on file, it seems legitimate that prosecutorial authorities draw negative consequences of such an attitude, punishing the entity that fails to comply with such legal obligations of crime prevention.

However, documents that are directly incriminatory, created and maintained voluntarily by the company, such as reports derived from the whistleblowing system revealing employees' complaints, the results of internal investigations carried out voluntarily by the company, as well as statements made by the company or by any of its members, acknowledging irregularities, need to be protected.[33] Therefore, to the extent that only documents whose existence depends on the corporation's will may be protected by the right against self-incrimination, it can be noted that an effective way of controlling legal entities, and verifying whether their activities are within tolerable levels of risk, could be to establish certain formal obligations by law, which would facilitate the monitoring and control of their activities.[34]

On the other hand, it must be taken into consideration that the right against self-incrimination is essentially waivable, so the corporation can decide to cooperate with justice in its own incrimination. The important feature is that such cooperation is voluntary and not the result of an unlawful coercion. At this point, it is necessary to determine who can legitimately waive the corporation's right against self-incrimination. Regarding oral statements, as we said before, only the procedural representative is entitled to exercise and consequently to waive that right. However, in relation to incriminatory documents all representatives empowered to act on behalf of the corporation can decide whether, or not,

[33] Adán Nieto Martín, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' (2013) 8120 Diario La Ley 1.

[34] Thus, article 25a of the *German Law of the Credit System* (KWG by its German acronym) establishes that Credit institutions must have an orderly business organization to ensure respect for the laws, implying, among other obligations, carrying full documentation of commercial activity (article 25a (1) sentence 6 number 2).

to report incriminating documents to the prosecutorial authorities. But only duly authorized representatives will be legitimated to do so and not any employee. In this sense, if a corporate legal representative, exercising the corporation's right against self-incrimination, refuses to meet some information request, sending new requests to other employees without power to act on behalf of the entity would be unacceptable. In this case, employees may reject the request for corporate information, claiming not to be authorized to provide the requested information, and redirecting the information demand to the duly authorized corporate representatives.

3.3 Burden of proof on the effectiveness of compliance programs

One of the main issues raised in connection with criminal proceedings against legal persons is determining which part bears the burden of proof regarding the effectiveness of compliance programs. Implementing an affective compliance program could lead to exempting the corporation from liability or at least could serve to obtain a more lenient sentence. Moreover, in systems of self-responsibility, where the criminal liability of corporations is based on an organizational fault, the absence or ineffectiveness of compliance programs is the foundation of the corporation's guilt.[35]

In determining whether the burden of proving the effectiveness of such programs lies with the prosecution or the defence, there are various conflicting interests. On the one hand, it would be difficult for the prosecution to prove certain internal aspects of the entity's management. Therefore, the dynamic theory of the burden of proof, which leads to place such burden on the part that has more facilities to prove a certain fact, would place the burden of proof on the corporation.[36] On the other hand, there are the right to silence and the presumption of innocence of the corporation, which means that the prosecution has to prove the guilt of the corporate defendant beyond any reasonable doubt, without counting on the collaboration of the accused.

At this point, we can ask ourselves the following question: does the company have the obligation to deliver its compliance program or other internal documents, such as the results of internal investigations carried out by the company?

The answer to this question will depend on the statutory obligations stablished in each national law. For instance, in Spain there is no legal obligation to have an effective

[35] The concept of organizational fault was developed by Klaus Tiedemann, 'Die Bebußung von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] 41 Neue Juristische Wochenschrift 1172.

[36] The Spanish Prosecutor General's Office points out that the company itself has the resources and the best possibilities to prove that, despite the commission of the crime, its program was effective and met the legally required standards, being in the best conditions to provide in a unique and irreplaceable way this data regarding its internal organization (Circular no 1/2016, on the criminal responsibility of legal persons according to the reform of the penal code carried out by Organic Law 1/2015, <https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/CIRCULAR%201-2016%20-%20PERSONAS%20JURÍDICAS.pdf?idFile=cc42d8fd-09e1-4f5b-b38a-447f4f63a041>, accessed 27 November 2018.

compliance program. Therefore, if the company remains silent or refuses to deliver its compliance program within a criminal procedure against it, negative consequences cannot be drawn from this passive position.

The prosecution will have to prove the corporate failure in fulfilling its duties of criminal prevention through other investigative measures such as calling workers to testify as witnesses, conducting searches and seizures in the premises of the company, intercepting its communications and so on. In fact, according to the Spanish Supreme Court, the prosecution must prove that the company did not have a criminal compliance program or if it did, it has to be proven by the prosecution that the program was ineffective.[37] In short, from the lack of collaboration of the entity cannot be deduced that the corporations failed in its duties of criminal compliance

The aforementioned evidentiary rule, introduced through case-law, is especially respectful of the presumption of innocence of the legal entity. However, in my opinion, it is unrealistic and, in practice, it can greatly hinder the investigations, already complex, of business crimes. Therefore, I propose another solution that I consider sufficiently respectful of the rights of the corporation and, at the same time, more pragmatic.

In my opinion, the best solution is found by considering that, once a crime is committed within the company; there are strong indications that the organization lacked an adequate program for preventing such a crime, so the prosecution may ask the corporation to prove the effectiveness of the program in order to contradict such evidence. In this sense, the European Court of Human Rights holds that 'the question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused calls for an explanation which the accused ought to be in a position to give that a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'.[38]

In short, if the crime commission indicates that the corporation did not exercise its oversight and control measures effectively, the corporation will be responsible for proving that it had adequate crime prevention measures implemented. For instance, when senior management is involved or when pervasiveness of the legal offence is found within the corporation, there are strong indications that the entity's compliance program was not adequate, and therefore the corporation is called forward to give an explanation on the circumstances of the crime and on the preventive measures it has implemented. Otherwise, if the company decides to

[37] According to the Spanish Supreme Court, insofar as the structural defect in the management, surveillance and supervision models constitutes the basis for the corporate criminal liability, the effectiveness of the right to the presumption of innocence requires the Prosecutor to prove the occurrence of a serious breach of the duties of supervision by the corporation in order to get a conviction (Spanish Supreme Court, judgment 154/2016, 29th February 2016, RJ 2016\600, para 8).

[38] *Murray v The United Kingdom*, App no 18731/91 (ECtHR, 27 August 1991).

remain in silence, this lack of a reasonable explanation could serve to confirm the evidence of their guilt.

The previous argument refers to the burden of proof, but says nothing about the standard of proof to be applied. In this regard, if after examining the evidence proposed by both parties the judge has doubts about the pre-existence of an effective criminal compliance program, he or she must acquit the corporation, in accordance with the principle *in dubio pro reo*. Therefore, for the corporation to be acquitted, it will be enough that the judge has reasonable doubts about the diligence of its behaviour.

4 Conclusions

It is clear that legal entities and individuals are different entities that have different realities and, therefore, certain rights, such as physical and psychological integrity or human dignity, make sense only in relation to individuals. The very different nature of individuals and corporations suggests that their legal statuses do not need to be identical. However, at the same time, it needs to be considered that, even when the defendant is a corporation, there are limits for the prosecutorial state power, which have to be respected.

Systems of corporate criminal liability require recognizing corporations as holders of certain rights in order to ensure the right to a fair trial inherent to criminal proceedings. In this sense, it must be taken into account that even when the defendant is not a human being, but a corporation, truth cannot be pursued at any cost, but by respecting the boundary marked by the right to a fair trial. Moreover, accusatorial systems are based on the consideration of the defendant as a right holder, not as an object or a mere piece of evidence.

The right to defence and the presumption of innocence must be recognized for corporate defendants because otherwise we would be punishing corporations and damaging their reputation without guarantees. The right to defence ensures that corporations will be able to contradict the prosecutorial allegations, while the presumption of innocence, as evidentiary rule, ensures that the defendant will be sentenced only after having presented enough incriminating before an impartial judicial authority and after having proven his guilt beyond any reasonable doubt.

Therefore, it must be taken into consideration that the right to defence and the presumption of innocence are necessary to ensure the fairness of proceedings and the correctness of judgments. In turn, legal persons' rights to remain silent and against self-incrimination are recognized, given their close relation to the right to defence and the presumption of innocence. In this sense, it must be noted that the right against self-incrimination is an instrument of the right to defence and is deeply linked with the presumption of innocence.

The state can legitimately preserve certain prerogatives in order to control corporations to a greater extent than individuals. Thus, while the law cannot define the personality of an individual or his or her lifestyle, it can establish how a business should be conducted, determining, for instance, the requirements for operating in a given sector or the internal organizational measures for certain types of organizations. In short, an area of freedom,

neither qualitatively nor quantitatively, similar to that applicable to humans, cannot be given to corporations. For this reason, it is necessary to limit the scope of the protection of corporate procedural rights and to define their form of exercise.

Legal persons' rights to remain silent and against self-incrimination must be recognized only as far as this recognition is required to ensure the right to defence and the presumption of innocence as structural principles of criminal proceedings and also when it is necessary to protect the dignity of their representatives.

Taking into account the relation between the right against self-incrimination and the right to defence, we can conclude that only the representative in charge of exercising the right to defence on behalf of the corporation can remain in silence or even make false statements before the court without legal consequences. Moreover, corporations, through their duly authorized agents, can reject documentation requests when documents are directly incriminatory and not required by law. In this sense, the particularity of corporations in relation to individuals is that the law can be more invasive in the former's case. Thus, the law can establish obligations for corporations, demanding that their activities be documented and their files kept over a certain period of time.

The implementation of an effective compliance program is an exonerating circumstance and the corporation can use it a defence strategy. In fact, the corporation is in the best position to prove the effectiveness of its preventive compliance program. However, according to the Spanish Supreme Court, the absence of measures to prevent crimes is the core of the company's responsibility and, therefore, must be accredited by the prosecution. Anyway, certain circumstances, notably the implication of high positions in the commission of a corporate crime, is a solid indication to understand that the corporation did not act diligently in the prevention of criminal offense and, in such case, the silence of the entity can serve to strengthen such indications

Regardless of how the burden of proof is distributed, it must be considered that, if we recognize the legal entity as holder of the right to presumption of innocence, doubts about any element determining its responsibility, either constituent elements or exonerating circumstances, must be interpreted in favour of the corporation defendant. This is required by the principle *in dubio pro reo* which, in principle, applies to all defendants, both natural and legal persons.

Finally, the collaboration of the company that has been charged must be understood as a self-defence strategy, but never as an obligation, because corporations as defendants must be considered procedural rights holders, and not mere pieces of evidence. Therefore, it is legitimate and appropriate to encourage corporate collaboration through penalty reductions and even force corporation to implement certain controls or preventive measures. However, it is not admissible to force the entity, under threat of sanction, to produce incriminating evidence to be used in criminal proceedings.

Selected Literature

Buell SW, 'Criminal Procedure within the Firm' (2007) 59 Stanford Law Review 1613

Del Moral García A, 'Peculiaridades del juicio oral con personas jurídicas acusadas' [Peculiarities of the trial with accused legal persons] in Serrano Butragueño I and Del Moral García A (eds), *El juicio oral en el proceso penal. Especial referencia al procedimiento abreviado* [The trial in criminal proceedings. Special reference to the summary procedure] (2nd edn, Comares 2010)

Ferreiro Baamonde X, 'El imputado' [The defendant] (2000) 7 Revista de Derecho de la Universidad Católica del Norte 169

Galluccio Mezio G, 'I diritti fondamentali delle corporations nel processo penale statunitense: lo strano caso del privilege against self-incrimination' [The fundamental rights of corporations in the US criminal trial: the strange case of privilege against self-incrimination] (2014) 69 (4-5) Rivista di diritto processuale 1126

Gascón Inchausti F, 'Consecuencias procesales del nuevo régimen de responsabilidad penal de las personas jurídicas: la persona jurídica como sujeto pasivo del proceso penal' [Procedural consequences of the new regime of criminal liability of legal persons: the legal entity as a passive part to criminal proceedings] in Gascón Inchausti F and others (eds), *Repercusiones sobre el Proceso penal de la LO 5/2010, de reforma del Código Penal* [Repercussions on the criminal process of the LO 5/2010, of reform of the Penal Code] (Aranzadi 2010)

Greenfield K, 'In Defense of Corporate Persons' (2015) 30 Constitutional Commentary 309

Hernández Basualto H, '¿Derecho de las personas jurídicas a no auto-incriminarse?' [Right of legal persons not to incriminate themselves?] (2015) XLIV Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 217

Loschin L, 'A Comparative Law Approach to Corporations and the Privilege against Self-Incrimination' (1996) 30 University of California Davis Law Review 247

Nieto Martín A, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' [Corporate internal investigations, whistlebliwing and cooperation: the struggle for information in criminal proceedings] (2013) 8120 Diario La Ley 1

Ramsay R, 'Corporations and the privilege against self-incrimination' (1992) 15 The University of New South Wales Law Journal 297

Serrano Zaragoza O, 'Contenido y límites del derecho a la no autoincriminación de las personas jurídicas en tanto sujetos pasivos del proceso penal' [Content and limits of the right against self-incrimination of legal persons as passive parties to criminal proceedings] (2014) 8415 Diario La Ley 1

Tiedemann K 'Die „Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] 41 Neue Juristische Wochenschrift 1172

Vázquez Sotelo JL, *Presunción de inocencia del imputado e íntima convicción del tribunal. Estudio sobre la utilización del imputado como fuente de prueba en el proceso penal español* [Presumption of innocence of the accused and intimate conviction of the court. Study on the use of the accused as a source of evidence in the Spanish criminal process] (Bosch 1985)

CORPORATIONS IN CRIMINAL PROCEEDINGS: HOW DO INTERNAL INVESTIGATIONS AFFECT EMPLOYEES' HUMAN RIGHTS?

By Ana E Carrillo del Teso[*]

Abstract

The Spanish criminal justice system, where the societas delinquere non potest *principle was traditionally a canon, was gradually being opened up with measures for companies involved in criminal practices, especially incidental consequences of the penalties for individuals. In 2010, the corporate criminal liability was finally fully embraced, with a regulation that was thoroughly revised in 2015 to give more prominence to the role of compliance programmes. It is assumed that these programmes not only seek to ensure that the company itself prevents crimes from being committed within it but also encourage the provision of information in criminal proceedings, information that would otherwise be difficult for the prosecution to obtain and which is therefore rewarded by using the principle of opportunity in the process. The aim of this paper is to expose the risks posed by the internal investigations encouraged by compliance programmes for the fundamental rights of workers, such as privacy, honour, the secrecy of communications or their own right of defence, since the worker has a weaker position in relation to the company than the citizen in relation to the state. Furthermore, the very evidence obtained through this investigation may be excluded from the proceedings because of its collision with the rights of the worker.*

1 Introduction

Criminal compliance programmes are increasingly being imposed by countries, in association with the introduction of criminal liability of legal persons. Since these programmes encourage internal investigations within the company, we wonder how this position of employer/investigator can affect workers' rights. If the purpose is self-regulation by the company, thus facilitating work of the state, the owner of *ius puniendi*, can the guarantees of the relationship between the state and the citizen in criminal investigations be transferred to the relationship between the investigating employer and the investigated worker?

It should be noted that in the first case public law applies, such as criminal law or criminal procedure law; while the second is a private law relationship, by the rules of labour law. It should also be borne in mind that the company does not have a parallel or comparable power to *ius puniendi* and, therefore, the duties that are inherent. In addition, the worker's

[*]Assistant Professor of Procedural Law, University of Salamanca. This work was developed within the framework of the following research projects: DER2016-79895-P La reforma del decomiso y la recuperación de activos derivados del delito (Ministerio de Economía, Industria y Competitividad) [The reform of confiscation and recovery of assets derived from crime (Ministry of Economy, Industry and Competitiveness)]; and SA129G18 La armonización normativa del decomiso y de la recuperación de activos en la Unión Europea (Junta de Castilla y León) [Regulatory harmonisation of confiscation and asset recovery in the European Union (Regional Government of Castilla y León)].

position is sensitive, as his or her livelihood depends on that company/researcher and may suffer the adverse effects of that research beyond the end of the contractual relationship, in terms of poor reputation or employability.

The debate on internal investigations within companies and organisations is well known in the Anglo-Saxon world, especially in the United States, where since the 1970s, major economic investigations have relied on the cooperation of companies themselves. First, in the administrative-sanctioning area of the SEC (Securities and Exchange Commission). Later, they were used in the criminal field, as set out in the US Sentencing Guidelines since 1991.[1]

The eighth chapter of the Guidelines, focused on sentencing of organizations (text in effect, 2016[2]), 'is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct'. In this regard, in contrast to the factors that increase the punishment of organizations, such as (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice; there are two factors that may mitigate it: (i) the existence of an effective compliance and ethics programme; and (ii) self-reporting, cooperation, or acceptance of responsibility.

While in the United States the strategy was already being changed in relation to crimes committed by large companies, refocusing on individuals with the collaboration of companies;[3] in Spain, within the framework of the continental tradition and with a strong attachment to the principle *societas delinquere non potest*, the relevance of recognizing the criminal liability of legal persons in the Criminal Code was still under consideration.[4] The introduction of corporate criminal liability in Spain finally happened in 2010, with a model that revolves around the implementation of compliance programmes by companies and organizations. Only five years later, the regulation was reformed to give an even greater role to these programmes.

Currently, in article 31bis (2) Spanish Criminal Code (CP), it is established that, when the legal person could be criminally liable, it is exempt if a series of conditions are met, including the fact that the administrative board has effectively adopted and executed, prior to the commission of the crime, organisational and management models that include the

[1] John C Coffee, 'Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response' (1977) 7 Virginia Law Review 1099; Albert Estrada i Cuadras and Mariona Llobet Anglí, 'Derechos de los trabajadores y deberes del empresario: conflicto en las investigaciones empresariales internas' (2014) 108 Revista Brasileira de Ciências Criminais 151, 152-153.

[2] United States Sentencing Commission, *Guidelines Manual* (November 2016) §3E1.1 525.

[3] Harry First, 'Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions' (2011) 24 North Carolina Law Review 42-50.

[4] The controversy on this subject is still alive today, just see Luis Gracia Martín, 'Crítica de las modernas construcciones de una mal llamada responsabilidad penal de la persona jurídica' (2016) 18 Revista electrónica de ciencia penal y criminología 1.

appropriate supervision and control measures to prevent crimes of the same nature or to significantly reduce the risk of their commission.

In addition, mitigating circumstances are contemplated, which are (a) to confess the infringement to the authorities before knowing that the legal proceedings are being brought against them; (b) to have collaborated in the investigation of the act by providing new and decisive evidence, at any time during the process, to clarify the criminal responsibilities arising from the acts; and (c) to have established, prior to the commencement of the oral trial, effective measures to prevent and detect crimes that may be committed in the future with the means or under the cover of the legal person.

For the Spanish Attorney General's Office, when interpreting these requirements,[5] given that any prevention programme, however effective it may be, will bear a certain residual risk of crime, the ability to detect non-compliance will look like a substantial element of the validity of the model. For this reason, special value will be placed on the discovery of crimes by the corporation itself, so that once the criminal conduct of the legal person has been detected and the authority has been informed, it will be necessary to request the legal person's exemption from punishment, since not only the effectiveness of the model but also its consistency with a corporate compliance culture will be demonstrated.

2 Internal investigations: methods and risks for the workers' rights

At this point, it is clear that a certain privatisation of criminal investigation is intended.[6] Moreover, this inquiry is not limited by the frontiers of public investigation, established by the sovereignty of each state. In the case of transnational cases, while states must rely on costly and time-consuming international cooperation procedures, the multinational company can operate simultaneously in all its headquarters.[7] This is a major advantage in corruption cases similar to the *Odebrecht* case, which involved bribery throughout the Americas.

These investigations are not exempt from risk.[8] In many cases, such as in the *Thompson Memorandum*, in order to benefit from the rewarding use of the opportunity principle, the company must cooperate fully, renouncing the principle of confidentiality and discarding

[5] Fiscalía General del Estado, Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por la Ley Orgánica 1/2015 [Attorney General's Office, Circular 1/2016, on the Criminal Liability of Legal Persons under the Reform of the Criminal Code Effected by Organic Law 1/2015], 53-54.

[6] Lothar Kuhlen, 'Cuestiones fundamentales de compliance y derecho penal' in Lothar Kuhlen and others (eds), *Compliance y teoría del Derecho penal* (Marcial Pons 2013) 70; Ana María Neira Pena, 'Sherlock Holmes en el centro de trabajo. Las investigaciones internas empresariales' (2015) 37 Derecho y Proceso Penal 49, 53-56; Juan Pablo Montiel, 'Sentido y alcance de las investigaciones internas en la empresa' (2013) XL Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 251, 252-254.

[7] Adán Nieto Martín, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' (2014) 8120 Diario La Ley 1, 7.

[8] See William McLucas, 'Ethical Considerations in Internal Corporate Investigations' (2003) 11 The Corporate Governance Advisor 32, 35-36.

any option of joint defence with individuals.[9] For its part, the Spanish Attorney General's Office acknowledged that it facilitates the generation of procedural tension between the interests of the defence of the natural person and those of the legal person, both of whom are accused, with the aim of facilitating the investigation of crimes and optimizing the efficiency and prompt resolution of criminal proceedings. [10]

As said at the beginning, the status of the citizen before the public criminal investigation is not the same as that of the employee before the internal investigation.[11] It has been said that they experience the transformation of their procedural rights of defence into rights and obligations arising from their employment contract.[12] The vulnerability of their rights will depend on the type of research carried out.

For example, interviews or personal investigations may be used in internal investigations.[13] In this context, the person under investigation is contractually obliged to report on his or her work and is therefore not covered by the right not to testify against himself or herself. Not only that, but failure to comply with this obligation to provide all the information available to them as a result of their contractual relationship may lead to their dismissal (talk or walk).[14] Here they face the dilemma of not talking, and being fired, or collaborating with their information to their own conviction.

Solutions to this conflict have been sought, such as prior information to the employees on their legal situation, their rights and the destination that the company can give to the information, in a similar way to a *Miranda* warning[15] (called, in this field, *Upjohn* warnings after the 1981 U. S. Supreme Court opinion *Upjohn v. United States*[16]). An alternative solution that the company can adopt is to commit itself not to dismiss the employee who openly collaborates or not to hand over the information in a criminal proceeding, if the employee has not played a significant role in the criminal behaviour.[17]

Another point of friction arises with the access to communications or information of the worker through the productive means supplied by the company to carry out the work, such

[9] An evaluation of *Thompson* and *McNulty memoranda* in Thomas A Hemphill and Francine Cullari, 'Corporate Governance Practices: A Proposed Policy Incentive Regime to Facilitate Internal Investigations and Self-Reporting of Criminal Activities' (2009) 87 Journal of Business Ethics 333, 338ff.

[10] Fiscalía General del Estado, Circular 1/2011, relativa a la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por la Ley Orgánica número 5/2010 [Attorney General's Office, Circular 1/2011, Regarding the Criminal Liability of Legal Persons under the Reform of the Criminal Code made by Organic Law number 5/2010] 54.

[11] An in-depth approach to this subject in Bruce A Green and Ellen S Podgor, 'Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents' (2013) 54 Boston College Law Review 73.

[12] Nieto Martín (n 7) 9.

[13] Michael D Farber, 'Interviewing Company Employees in Internal Investigations: Navigating the Minefield' (2006) 14 The Corporate Governance Advisor 28-32; Michael Missal and others, 'Conducting Corporate Internal Investigations' (2007) 4 International Journal of Disclosure and Governance 297, 301-302.

[14] Nieto Martín (n 7) 9.

[15] Green and Podgor (n 11) 115.

[16] *Upjohn Co. V. United States* 449 U. S. 383 (1981).

[17] Nieto Martín (n 7) 11.

as computers or mobile phones.[18] In this case, the European Court of Human Rights (ECtHR) has established a criterion for observing possible infringements of workers' fundamental rights: the reasonable expectation that their privacy will be respected when, in an occasional and moderate manner, they have made personal use of these productive means, provided that the employer has not expressly prohibited it.[19]

According to the Spanish Constitutional Court, within the scope of article 20.3 ET[20] (Statute of Workers) control measures for these ICT means can be established provided that they comply with the principle of proportionality, which means that they are appropriate measures for the proposed objective, that they are necessary and essential, and that they derive more benefits for the general interest than harm to the worker.[21] For this reason, the Spanish Supreme Court makes some requirements: the rules for the use of these means of production must have been established beforehand, workers must have been informed that the proper use of these means of production will be controlled, and the specific control measures; and the adoption of other measures of a preventive and less harmful nature will be taken.[22]

Another possible method of investigation is the use of private detectives, as long as they use legitimate means to control workers. Their use is common when it comes to finding out contractual breaches, not so much for the verification of the commission of crimes. In any case, they must also meet certain parameters: that there is a well-founded suspicion and that there are no other effective, less invasive means of verifying the facts. While recourse to private investigators is not criminal *per se*, if they exceed their powers, they may commit crimes such as discovery and disclosure of secrets, or threats and coercion.[23]

Apparently, there are two guidelines that must not be lost sight of:

- If the purpose of implementing compliance programs is to foster a culture of commitment to ethics and legality within the company, internal investigations should not be allowed to fall short of the standards of the rule of law and infringe the rights of its employees.

[18] Estrada i Cuadras and Llobet Anglí (n 1) 163; Neira Pena (n 6) 80-84.

[19] See ECtHR, *Copland v. The United Kingdom*, 62617/00, judgement 03/04/2007, § 42; *Halford v. The United Kingdom,* 20605/92, judgement 25/06/1997, § 45.

[20] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE núm. 255, de 24/10/2015) [Royal Legislative Decree 2/2015 of 23 October 2015 approving the consolidated text of the Statute of Workers Act (Official State Gazzete no. 255, 24/10/2015)]. According to article 20.3 ET, the employer may adopt the measures he deems most appropriate for surveillance and control to verify compliance by the worker of their obligations and duties at work, keeping in its adoption and implementation due consideration to their dignity and considering, where appropriate, the real capacity of workers with disabilities.

[21] See generally STC 186/2000 de 10 de junio.

[22] STS, Sala de lo Social, 8 de marzo de 2011 (ROJ: STS 1323/2011), with reference to SSTC 98/2000 de 10 de abril and 186/2000 de 10 de junio.

[23] Estrada i Cuadras and Llobet Anglí (n 1) 179-180.

- As said by the Spanish Constitutional Court,[24] these employees do not lose their fundamental rights as citizens because they are in a contractual relationship. However, these rights must be weighed against the interests at stake, as well as against the employer's duty to control and monitor work activity, and his or her position as guarantor in preventing company criminality.

3 A different risk: the exclusion of the illegally obtained evidence

What happens in terms of admissibility of the proof in the criminal proceeding? According to article 11.1 LOPJ[25] (Spanish Organic Law of the Judiciary), evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall have no effect. This should imply that if a fundamental right of a worker is infringed during an investigation carried out by the company, even if evidence of a crime committed by him was found, it could not be used. However, in light of European[26] and Spanish jurisprudence on illicit evidence, this reasoning seems simplistic. Given the Spanish Supreme Court's arguments in the judgement 116/2017, February 23,[27] on the admissibility of the well-known *Falciani* lists, the key to solving this dilemma lies in the nature of the actor who obtains the evidence and the context in which it is obtained.

In this case the Second Chamber of the Supreme Court ruled on the appeal against the decision of the Provincial Court of Madrid, 280/2016, of 29 April,[28] in which the appellant had been convicted of a crime against the Treasury, which had confronted the judges with the duty of determining whether the famous lists of tax evaders drawn up by Mr. Falciani were suitable to constitute evidence of a tax offence.

There are two main characteristics of this evidence when assessing its unlawfulness: its acquisition from foreign authorities through cooperation channels and its obtaining at source by a private individual in breach of their duties and data protection rules. However, we would like to emphasize that this judgement, among its more than interesting considerations on illicit evidence, begins by valuing the *casuistic criterion* for its determination, when it says that one must 'avoid rigid interpretations, subject to stereotyped rules that prevent the indispensable adaptation to the specific case'.

Nevertheless, the Second Chamber disregards the 'international' element of the *Falciani* lists in order to focus on the circumstances in which they were obtained and the concept of illicit evidence in our legal system. The Chamber invokes the *deterrent effect* intended by the exclusionary rule: 'the power of the State to prosecute and try unlawful acts cannot use shortcuts'. The principles governing the due process of law are therefore a barrier to state activity. The following argument could be summed up as follows: when it is not a state activity, there would be no such deterrent effect and there is no need to exclude the evidence.

[24] STC 88/1985 de 19 de junio.
[25] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE núm. 157, de 2 de julio de 1985).
[26] See generally ECtHR, *K.S. and M.S. v. Germany*, 33696/11, judgement 06/10/2016.
[27] STS, Sala de lo Penal, 116/2017, de 23 de febrero (ROJ: STS 471/2017).
[28] SAP Madrid, 280/2016, de 29 de abril (ROJ: SAP M 3742/2016).

Thus, the Chamber maintain that 'the violating action of the agent of the authority that personifies the interest of the State in punishing criminal infractions can never be artificially equated to the action of the individual who, without any connection with the exercise of *ius puniendi*, is done with documents that later become sources of evidence that come to result, for one reason or another, decisive for the formulation of the authorship trial'.

A contrario sensu, when that individual does seek to obtain evidence for its inclusion in a criminal case, that evidence would be affected by the exclusion ('the citizen seeking to collect evidence for inclusion in a criminal case has to perceive the message that he will not be able to avail himself of what he has obtained through the conscious and deliberate infringement of the fundamental rights of a third party').

But this question is intertwined with the mechanism of balancing interests: 'they cannot receive the same treatment, once they have been properly contextualized, the peripheral lesions versus those that reach the very core of the material content of a fundamental right'; therefore, it will be necessary to analyse the scope and intensity of the affectation of the impaired right, and the meaning of the activity of the individual, being decisive that it acts consciously as support to the organs of the state.

The reference to the fact that the individuals should not act as a camouflaged piece of the state at the service of the criminal investigation in order to admit the evidence obtained by them is more than relevant regarding the criminal liability of the corporation. As it has been said through this work, compliance programmes, on which this responsibility is largely dependent *ex* article 31bis CP, encourage internal investigations. In practice, this implies a kind of privatisation of the criminal investigation, so that the company does act in the service of the State. The solution of STS 116/2017 would mean the exclusion of the evidence provided by the legal person or its compliance officer[29] if workers' rights have been violated in the course of the internal investigation.

The issues raised throughout the paper are reflected in STS 489/2018, October 23,[30] which annuls the judgment appealed for the unlawfulness of the evidence. Such evidence consisted in the examination of the employee's computer by the company, specifically his correspondence, by means of a computer program that made it possible to select e-mails based on their content without having to open them.

According to the court, in view of the existing and predominant case law at the time of the corporate action whose lawfulness was at issue, extreme caution could and should have been taken: there was not a warning that the computer had to be used exclusively for the purposes of the company and the employee did not know that the company reserved the power of examination. No matter how little invasive and selective computer methods were used, it was a certain boldness (a failure of diligence) not to seek the consent of the user or,

[29] A comprehensive analysis of this issue in Ignacio Colomer Hernández, 'Régimen de exclusión probatoria de las evidencias obtenidas en las investigaciones del compliance officer para su uso en un proceso penal' (2017) 9080 Diario La Ley 1.

[30] STS, Sala de lo Penal, 489/2018, de 23 de octubre (ROJ: STS 3754/2018).

failing that, of the judicial authority. There was already a body of jurisprudential doctrine that warned about the dubious legality of this action. Therefore, the evidence was not redeemable; it could not be used.

Besides, even though it is not a state power, the company carried out the investigations with the purpose of using the data collected as evidence in a judicial process, which makes it impossible to escape from the scope of article 11 LOPJ. Furthermore, the court recognizes that in the employer-employee relationship, there is a differential nuance that introduces some imbalance and does not allow to speak of full horizontality.

4 Conclusions

As has been shown throughout these brief pages, the main problem of the possible collision of internal investigations with the fundamental rights of workers is the lack of a specific regulation of these in the criminal field. Appealing to the solutions of labour legislation and jurisprudence is not enough, since the evidentiary standards of the criminal justice are different, according to the serious legal consequences that can be imposed after the trial. There is a total absence of legal certainty for the worker, but there is also a risk that the evidence derived from the investigation carried out by the company may be excluded from the trial. There are cases that can give us some key, such as the aforementioned STS 116/2017, but it does not even refer to the specific area of criminal liability of corporations, although it is being used in judgements about internal investigations, like STS 489/2018. On the other hand, in a civil law system (such as the Spanish one), we cannot rely on tangential jurisprudential solutions to resolve a dilemma as transcendent as the search for material truth in crimes committed in or by the company and the due protection of individual rights. Therefore, we defend the need for a specific regulation of workers' rights in relation to the main methods used in internal investigations which, at least, establishes the duty to inform them of the possible legal consequences; as well as a detailed regulation of the rules of exclusion of the evidence, since the succinct article 11.1 LOPJ has long been overwhelmed by the practice of the courts.

Selected Literature

Coffee JC, 'Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response' (1977) 7 Virginia Law Review 1099

Colomer Hernández I, 'Régimen de exclusión probatoria de las evidencias obtenidas en las investigaciones del compliance officer para su uso en un proceso penal' (2017) 9080 Diario La Ley 1

Estrada i Cuadras A and Llobet Anglí M, 'Derechos de los trabajadores y deberes del empresario: conflicto en las investigaciones empresariales internas' (2014) 108 Revista Brasileira de Ciências Criminais 151

First H, 'Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions' (2011) 24 North Carolina Law Review 42

Green BA and Podgor ES, 'Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents' (2013) 54 Boston College Law Review 73

Hemphill TA and Cullari F, 'Corporate Governance Practices: A Proposed Policy Incentive Regime to Facilitate Internal Investigations and Self-Reporting of Criminal Activities' (2009) 87 Journal of Business Ethics 333

Missal M and others, 'Conducting Corporate Internal Investigations' (2007) 4 International Journal of Disclosure and Governance 297

Montiel JP, 'Sentido y alcance de las investigaciones internas en la empresa' (2013) XL Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 251

Neira Pena AM, 'Sherlock Holmes en el centro de trabajo. Las investigaciones internas empresariales' (2015) 37 Derecho y Proceso Penal 49

Nieto Martín A, 'Investigaciones internas, whistleblowing y cooperación: la lucha por la información en el proceso penal' (2014) 8120 Diario La Ley 1

COMPLIANCE PROGRAMS AND LEGAL ENTITY'S SAFEGUARDS IN CRIMINAL PROCEEDINGS*

*By Silvia Massi and Anna Salvina Valenzano***

Abstract

This essay deals with the legal entity's safeguards in criminal proceedings, with special reference to its rights of defense. It is based on the assumption that, in the Italian legal system (as in other similar legal systems), liability 'ex crimine' of legal entities is based on the idea of a so-called 'organizational fault', which emerges where there is an organizational defect in the preventive model. Therefore, the topic of the entity's 'exposure' to liability risk and to the prejudice of its rights of defense emerges with reference to the so-called 'risk mapping' in drafting the model, where the sensitive elements emerged have the natural consequence of exposing the entity to possible incriminating exceptions. The same problem of the prejudice of the entity's rights of defense is also highlighted with reference to the institution of 'whistleblowing', where the need to protect the legal entity could emerge from the 'whistle' of the whistleblower. We conclude that both the legal entity's sensitive documents and the whistleblower report should be used to improve the preventive model, while their use as a possible instrument of prosecution in the criminal trial against the same entity should remain excluded.

1 The procedural safeguards of the legal entity. Introduction

The topic we address in this contribution relates to legal entity's rights in criminal proceedings, with special reference to the rights of defense for the legal entity. In this regard, several aspects can be considered, which pertain to the formation of evidence in the criminal process, since it is always a question of determining whether the guarantees normally recognized to the physical person can be also recognized to the legal person. We should deem that, when the European Court of Human Rights (ECHR) considers the guarantees provided for by article 6 of the Convention, they should apply both for natural and legal persons. For example, this happens with reference to the right to an independent and impartial tribunal[1], the right to an oral and public hearing[2], the right to the equality of the instruments (fair trial)[3] and the right to be judged in reasonable time. In our opinion, in any case, the procedural guarantees should be considered effective for the legal entity as a rule, where it is part of the criminal trial. The procedural safeguards should apply even if it is a collective entity without legal personality.

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** Silvia Massi, PhD, is Professor of Criminal Law at the International Telematic University Uninettuno in Rome; Anna Salvina Valenzano, PhD, is Post-doc Researcher in Criminal Law and Professor of Criminal Law at the School of Specialization for Legal Professions, at Sapienza University of Rome.

[1] *San Leonardi Band Club v Malta* App no 77562/01 (ECHR, 29 July 2004).

[2] Coorpland-Jenni GmbH and Hascic v Austria no 10523/02 (ECHR, 27 July 2006).

[3] *Dombo Beheer B.V. v The Netherlands* no 14448/88 (ECHR, 27 October 1993).

2 The right of defense and reversal of the burden of *proof* in Italian law

Among the different aspects that require analysis of the regulation's appropriateness with regard to the recognition of the legal entity's right of defense, it should be considered that the right of defense of the corporate body[4] would be unavoidably compromised by the burden of 'exposure' ascribed to the legal entity. It is based on a procedural anomaly, which in the Italian system has for a long time led to recognize a reversed burden of proof against the entity, required to demonstrate its extraneousness to the crime committed by a person in an 'apical' position (article 6 Legislative Decree No. 231/2001). This reversed burden of proof has been first admitted when the offender holds one of the highest offices within the legal entity, playing 'functions of representation, administration or direction of the same entity or of an organizational unit with financial and functional autonomy', or carrying out 'even *de facto*, the management and control of the same'[5].

In the perspective of the reversal of the burden of proof, the extraneousness to the crime committed by a subject in 'top' position must be proven by the legal entity by demonstrating the 'suitability' of its organizational model to prevent a crime of the same kind as the one committed by a person in a leading position. More precisely, article 6 Legislative Decree No. 231/2001, which establishes corporate liability for offences committed by a person in an apical position, was initially interpreted as if it started from the idea of a sort of 'organic identification' between the subject in top position and the entity. From this identification, the conclusion of the automatic attribution to the entity of the apical criminal conduct was drawn, with a 'presumption' that could be overcome only by proving otherwise, that is, by demonstrating the 'suitability' of its organizational model to prevent the offence. If this were the correct interpretation of the aforementioned article 6, it would have also derived a form of 'strict liability' for the legal entity, at least in the sense of a responsibility ascribed to the corporate body solely because of the lack of proof to the contrary – even if the public prosecutor would have never proved the entity's liability. Therefore, it would have resulted in an accusation without proof.

In any case, the reversal of the burden of proof, in itself considered, has generated serious doubts about the compatibility of this model with the principles established by the Italian Constitution and the ECHR for the non-recognition of fundamental rights of defense in the criminal process[6]. The fundamental reason is that, in the perspective of criminal law, a

[4] For the definition of the sphere of legal entities addressee of the Italian regulation, also in a comparative perspective, See Silvia Massi, *'Veste formale' e 'corpo organizzativo' nella definizione del soggetto responsabile per l'illecito da reato* (Jovene 2012) 25 ff.

[5] This according to the combined provisions of art. 6, para. 1, and art. 5, para. 1, letter a) of the Italian L.D. No. 231/2001.

[6] Among those who have made critical comments about the reversal of the burden of proof, see Alessandro Bernasconi, 'Sub art. 6' in Adonella Presutti, Alessandro Bernasconi and Carlo Fiorio (eds), *La responsabilità degli enti* (Cedam 2008) 148 ff.; Federico Cerqua, 'Sub art. 6' in Alberto Cadoppi, Giulio Garuti and Paolo Veneziani (eds), *Enti e responsabilità da reato* (Utet Giuridica 2010) 137 f.; Antonio Fiorella, 'Principi generali e criteri di imputazione all'ente della responsabilità amministrativa' in Antonio Fiorella and Gianfranco

'guilty liability' cannot be based on the scheme of the so-called 'organic identification' between the entity and its apical, which, according to the 'identification principle', automatically identifies the corporate body with its representative, in a perspective that, more correctly, belongs to civil law. An entity's criminal (or para-penal) liability must instead be based on the 'culpability' of the same legal entity, which has to be ascertained with regard to the specific offence committed by the apical[7].

In response to these doubts, Italian case law questioned whether it indeed constituted a reversal of the burden of proof: the prosecutor still needs to prove that the offence has been committed by a person in a leading position, in the interest or to the advantage of the entity.[8] Thus, it may not be a 'reversing mechanism' (of the burden of proof), but more properly a different mechanism to entrust the entity with the completion of the evidence in criminal proceedings, and therefore a constitutionally legitimate mechanism[9]. However, this exception cannot be accepted since the proof, for the attribution of criminal (or para-penal) responsibility, lies entirely with the prosecution, with regard to each and every one of the elements of the unlawful act[10].

The first position – in favor of the reversal of the burden of proof – was overcome after the criticism raised by Italian legal doctrine and the Supreme Court's jurisprudence, which recognized that the burden of proof lies with the public prosecutor, who has also the burden of proving that the preventive models are inadequate, thus ascribing the 'organizational guilt' to the entity. The same Joint Sections of the Supreme Court, in the *Esphenhan* judgment, have reached the latter conclusion, thus overcoming the idea of a reversal of the burden of proof in case an offence has been committed by a person in apical position[11].

Unlike the aforementioned article 6, article 7, in regulating corporate liability for offences committed by subordinates[12], does not use the formula 'the entity is not liable if it proves that' it has adopted and effectively implemented a preventive model before the offence was committed. Therefore, with regard to this hypothesis, a problem of inversion of the burden

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Lancellotti, *La responsabilità dell'impresa per i fatti di reato* (Giappichelli 2004) 13 f.; Giovanni Paolozzi, *Vademecum per gli enti sotto processo* (Giappichelli 2006) 195 ff.

[7] In this sense, see Antonio Fiorella, 'From 'macro-antrophos' to 'multi-person organisation'. Logic and structure of compliance programs in the corporate criminal liability' in Antonio Fiorella (ed), *Corporate criminal liability and compliance programs* (Jovene 2012) vol II, 373 ff., especially 416 ff., where the author deems that it is necessary to establish actual 'dominability' and 'reproachability' of the same legal entity with regard to the specific offence committed.

[8] See, for example, Cass. Pen., Sez. II, 20/12/2005-30/1/2006, n. 3615, in Riv pen, 2006, 814.

[9] See, Cass. Pen., Sez. VI, 18/2/2010, n. 27735; Cass. Pen., Sez. VI, 9/7/2009, n. 36083, in Cass. pen., 2010, 1938.

[10] As known, it is derived from the fundamental principle of the 'presumption of innocence' established by art 27 para 2 of the Italian Constitution.

[11] See, Cass. Pen., S.U., 24.4.2014 (dep. 18.9.2014), n. 38343.

[12] On the relevance of the functional sphere of the subordinate, or better, of the 'para-apical' subject, in the system of *ex crimine* corporate liability, also in a comparative perspective, see Anna Salvina Valenzano, ''Triggering Persons' in 'Ex Crimine' Liability of Legal Entities' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 95 ff.

of proof has never been raised by the interpreters, thus returning the proof to the general mechanism for which the public prosecutor will have to ascertain all the conditions for the entity's liability, among which the inadequacy of the preventive model.

3 Can compliance programs be considered as a defense instrument or as a means of prosecution of the legal entity?

A different and important profile of the problem we deal with lies in the analysis of the instruments guaranteed to *the legal entity that wants to defend itself in advance without being accused* (before a crime is committed by one of its members), in the framework of logic and regulation of the formation of proof, according to the well-known principle of *nemo tenetur se detegere*. The right against self-incrimination does not find explicit recognition in the jurisprudence of the ECtHR[13]. And, more generally, it emerges that European national legal systems recognize a right against self-incrimination only to natural persons and not to legal persons, with the exception of the United Kingdom[14] (within the EU countries) and New Zealand[15] (outside the EU), where a right against self-incrimination is also recognized for legal persons. In practice, this can pose several problems, including the question whether and which legal representatives of the entity may exercise the right to remain silent on behalf of the corporation.

In this paper, we will discuss a particular aspect within the framework of the legal entity's rights to defense in the criminal trial, which concerns important practical problems related to the preparation of organizational models. In the Italian legal system (as in other similar legal systems) liability *'ex crimine'* of legal entities is based on the idea of a so-called *'organizational fault'*[16], which emerges where there is an organizational defect in the preventive model, that is an inadequate setting (adoption or implementation) of the model required by law to prevent the risk of commission of crimes. The assessment of liability in criminal proceedings is therefore based on the organizational model, which is inspired by American *'compliance programs'*, and may carry with it the risk of a breach with regard to the legal entity's rights of defense.

In this context, the dual nature of the preventive model, substantive and procedural, needs to be emphasized. From the substantive point of view, the organizational model, if adequate, can have an effect of exemption from the entity's liability, as an element that highlights the

[13] With reference to the jurisprudence of the Court of Justice of the European Union, it should be noted that, already in the Orkem case of 1989 (Case 374/87 *Orkem v Commission*), the Court itself recognized a broad right against self-incrimination for the legal person, including the right to remain silent and not to cooperate, and only if accepted a right to deny an open confession.

[14] In particular, in the United Kingdom the right against self-incrimination for the legal entity was recognized already in the case *Triplex Safety Glass Co. v Lancegaye Safety Glass Ltd* [1934] and then followed by the subsequent jurisprudence. Unlike in the United States, the Supreme Court denied the legal person protection against self-incrimination, based on the fifth amendment of the Constitution.

[15] In the New Zealand, see article 60 of Evidence Act 2006 on "Privilege against self-incrimination".

[16] On the relevance of the 'organizational fault' in the Italian legal system, also in a comparative perspective, see Antonio Fiorella and Anna Salvina Valenzano, *Colpa dell'ente e accertamento. Sviluppi attuali in una prospettiva di diritto comparato* (Sapienza Università Editrice 2016) 53 ff.

correct behavior of the entity, therefore as a cause of exclusion of the legal entity's 'culpability', or it may work as a mitigating factor.

From the procedural point of view, the organizational model can be useful to provide the proof of the entity's innocence ('not guilty'). Under this second profile, on the one hand, the interest of the same entity emerges to follow a procedure for recognizing the risks of crime and at the same time developing the organizational models, thus preparing the related preventive safeguards. But, on the other hand, in the absence of legal recognition of its rights of defense, the entity's interest may emerge to implement some operating procedures that do not reveal any materially emerged or current criticalities, although that would be required in a process of effective correction. This interest reflects that otherwise the entity's procedural position could be compromised in imminent or future proceedings. It therefore can be seen as managing the organizational phase to prepare the premises for its own acquittal.

In other words, from the perspective of the legal entity's defense in criminal proceedings, the procedure for drafting the model represents a very delicate activity, where the sensitive elements emerged have the natural consequence of exposing the entity to possible incriminating exceptions. Since in carrying out the so-called *'risk mapping'* (i.e. the preliminary examination of its concrete activities involving the risk of commission of crimes), sensitive data about its internal activities, from which an organizational gap emerges (even though it is being overcome), could be made public.

We must consider that a correct and effective regulation, which guarantees the realization of the goals of legality, should consider, in favor of the proof of the legal entity's 'not -guilty', exactly the fact that it collects and transmits information that, in pointing out any organizational gaps, pursue the purpose of overcoming them; in short, it is an expression of a *virtuous corporate policy* based on transparency and therefore on the proper business ethics.

4 Risk assessment and 'sensitive' information

Thus arises the issue of increasing tension at the time the preventive model is built or whenever it is updated to determine whether all critical issues that have emerged in the concrete functioning of the organizational procedures have to be considered. The reference is, in particular, to those internal documents – also related to the relations between the audit and the internal supervisory body[17] – which may indicate risks or criticalities, and which could, for reasons of convenience, be hidden or not taken into account by the legal entity.

In the preparation of the model (the first stage), risk mapping reveals operational criticalities in certain areas with regard to certain crimes. In the application of the model (the second stage), through the information flows to the supervisory body, which can also lead to the

[17] For the role of the supervisory body on the organizational model in the Italian system of *ex crimine* corporate liability, see Anna Salvina Valenzano, 'Control over Organizational Models in the Italian Legal System' in Yvetta Turayová and Jozef Čentéš (eds), *Penal Policy of the State and Liability of Legal Entities* (Comenius University in Bratislava 2013) 1100 ff.

updating of the model, critical issues may emerge in practice, that the entity may have an interest in hiding to avoid providing evidence in criminal proceedings, even if it is actually useful data to improve the preventive model.

It should be noted that in the practical application of the principles expressed by Legislative Decree No. 231/2001, for the correct processing of the organizational model, the legal entity should not limit itself to detecting criticalities that in abstract result from the organization. Instead, the aim should be an overall assessment, where it may be helpful to look at what normally happens for organizations of the same type. It should start from precise procedures set by its organization, also checking the way they are actually implemented in practice. In this perspective, the mapping of risks resulting from the way in which the legal entity operates in practice should be defined, also taking into account the division of powers through its delegation system. It should be established whether even concrete behaviors, resulting in practice, may integrate new procedures, which are actually applied by the entity in the daily practice.

The only correct way to prevent the risk of crimes requires us to observe that in the specific situation, and with regard to specific members of the entity, there might be some mechanisms or some behaviors that could get beyond any control of legality and proper action by the entity. Needless to say that under this profile the risk mapping should become more precise and concrete, in order to be able to detect specific and concrete anomalies that, when documented in control procedures usable against the entity in criminal proceedings, would produce serious risks of establishing corporate criminal liability. With the consequence of discouraging actions aimed at making transparent an appreciable and virtuous path of reparation of the procedural gaps of the specific organization.

5 The use of 'risky' information and incentives for the legal entity

To prevent such distortion, and in any case to avoid the loss of an important tool for the improvement of the model, it could be useful to set a system that exploits such alerts, in accordance with the principle of correct conduct 'legally owed'. From this point of view, the law should facilitate a positive evolution of the preventive model, excluding any sensitive information emerged in the operational phase of the drafting or virtuous update of the procedures could be used against the legal entity.

In this regard, from the substantive point of view, an exemption from *ex crimine* liability for the entity that has taken account of sensitive information which revealed criticalities, with a view to improving the model, could be provided. This would be a sort of 'restorative conduct', according to the schemes that under Italian law are already provided for in Legislative Decree No. 231/2001, for example by articles 12, 17 and 78, which promote the so-called *'repaired model'* (or '*post factum*' model), even if such provisions establish only an effect of simple mitigation of the penalty and no exemption from liability.

As known, articles 12 and articles 17 provide for cases of mitigation of the penalty, respectively with reference to the pecuniary sanction and the disqualification, where, prior to the opening statement of the trial of the first instance, the legal entity has 'adopted and

implemented' an adequate organizational model, thus eliminating the organizational deficiencies that led to the offence[18]. Article 78, on the other hand, provides for the hypothesis in which the conduct referred to in article 17 has been carried out belatedly, since it has been accomplished after the irrevocable sentence of conviction. In any case, the 'restorative conducts' presuppose the commission of the predicate offense, thus limiting the scope of the restorative conduct to a mitigating effect of the sanctioning treatment in favor of the entity[19].

The hypothesis that we want to develop here is instead that of a 'restoration' (i.e. a revision) of the organizational model as a result of the gaps that emerged from documents that also represent the evidence of a predicate offense. To encourage the entity to use such evidence in order to improve the preventive model, it does not seem enough to recognize a mere effect of mitigating the sanction, while a full exemption from liability appears more appropriate.

The same effect of exoneration from liability should be recognized even where the legal entity has already taken action to 'repair' the model, and in the meantime an offence has been committed. When the entity, rather than hiding this circumstance, uses it to repair the model, it should still produce an exemption effect, having to consider that a different conduct on the part of the same legal person could not be required, as the entity cannot do more than 'batten down the hatches', through the revision of the preventive model[20].

In this perspective, the exemption from liability could appear both as a cause of exclusion of culpability and as a cause of exclusion of mere punishment, however always in a perspective of substantive law. If the exclusion of sanction were recognized by law, the entity would have a strong interest in revealing those sensitive and 'risky' documents, which, however, promoted the elimination of organizational deficiencies, within the framework of a virtuous attitude of the entity, which would, however, bring out a divergence between the entity's will and that of the author of the predicate offense.

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[18] In particular, article 12 provides for a mitigation of the pecuniary penalty from one third to one half if, before the opening statement of the trial of the first instance, the legal entity has, among other possible obligations, 'adopted and made operational an organizational model suitable to prevent crimes of the same kind as the one occurred'. The same content is found in article 17, entitled 'Repairing the consequences of the offence', which provides for the exclusion of the disqualification penalty as a result of this fulfillment. In particular, it excludes this kind of sanction where, prior to the opening statement of the trial of the first instance, the legal entity has fully refunded the damage, eliminating the harmful or dangerous consequences of the offence and has eliminated the organizational deficiencies that led to the offence by adopting and implementing organizational models suitable to prevent crimes of the type that occurred; as well as having provided any profits achieved for purposes of confiscation. On the structure of the sanctioning system against the legal entity, also with reference to the scope of articles 12 and 17, see Carlo Piergallini, 'I reati presupposto della responsabilità dell'ente e l'apparato sanzionatorio' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (Giuffrè 2010) 222 ff.

[19] See, on this topic, Enrico Gallucci, 'L'esecuzione' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (Giuffrè 2010) 738 ff.

[20] See, on this subject, Antonio Fiorella and Nicola Selvaggi, *Dall'«utile» al «giusto». Il futuro dell'illecito dell'ente da reato nello 'spazio globale'* (Giappichelli 2018) 216 ff.

The proposal could in this regard harmonize with the figure of the so-called '*reactive corporate fault*', which was elaborated by the Australian doctrine[21], as a new conception of the guilt referred to the system of the *'accountability model'*, allowing 'self-management and self-control mechanisms internal to the legal person'[22]. In particular, using the *accountability agreements*, internal investigations to the legal entity could be initiated, while new future initiatives could be promoted through *accountability assurances*[23]. It would therefore be a system of 'private justice' from the phase of the investigation to that of the implementation of remedies internal to the entity.

This different conception of the culpability of the legal person looks both to the entity's behavior prior to the offence and to its subsequent behavior. The latter may have a compensatory value, but also be of value for the improvement of the model. The so-called *reactive fault*, better defined as fault for non-virtuous reaction of the legal entity, could be a useful frame of reference right in the direction of confirming the correctness of a dynamic approach to the model and to the entity's 'culpability'. It is useful to point out that the lack of entity's 'fault' can indeed result from the entity's overall behavior (antecedent, concurrent or subsequent to the fact attributable to it), which is such as to demonstrate a significant behavior that as a whole indicates a constant path towards legality.

From a different perspective, an instrument of procedural nature could be set, providing for a sort of 'non-usability' (by the courts) of sensitive acts discovered by the entity against the same corporate body, regardless of whether these acts were deemed 'secretive' or not. This 'non-usability' would refer solely to the legal entity and not also to the possible responsibility of natural persons.

6 Insights from the system in a reform perspective

An inspiration in this sense can be derived from new regulations in the Italian legal system in the field of health risks within hospitals, with profiles of individual and collective responsibility. We are referring to the paragraph 539 article 1 of the Law of 28 December 2015, No. 208, which provides for the 'non-usability' in criminal proceedings of 'organizational acts for recognition of health risks'.

The rule, which refers in general to the proof of any responsibility profiles, also partially concerns the entity's liability. In any case, this rule introduces into the system a principle of non-usability of the said evidence, concerning critical issues encountered in the organization and reported by the bodies responsible for 'repairing' an imperfect model; a principle that,

[21] We refer, in this regard, to the contribution of the Australian doctrine and in particular of Brent Fisse and John Braithwaite, 'The allocation of responsibility for corporate crime: individualism, collectivism and accountability' (March 1988) 11 Sydney L Rev 468 ff., and, more recently, Brent Fisse and John Braithwaite, *Corporations, crime and accountability* (Cambridge University Press 1994), as a contribution that, as noted by Cristina De Maglie, *L'etica e il mercato* (Giuffrè 2002) 163 ff., would be considered in the tendency of Australian doctrine to abandon traditional approaches and practice innovative choices.

[22] See, Cristina De Maglie, *L'etica e il mercato* (Giuffrè 2002) 166 ff.

[23] On this point, more widely, see Cristina De Maglie, *L'etica e il mercato* (Giuffrè 2002) 170 ff.

from a reform perspective, could be expanded with a general effect in defining the regime of proof of *ex crimine* corporate liability. In this way, it would be possible to relieve the entity from the risk of self-denunciation (i.e., self-incrimination), naturally only with regard to the entity's liability and not also to the individual's responsibility, which must be confirmed.

We have to reaffirm that this kind of measure is part of a system that promotes virtuous actions, which may push the entity itself to bring out critical issues in order to improve the organizational model.

To reform the legal system, this measure is a possible instrument that might be provided for by the national legislators, more in general, to give to the legal entity a chance to 'react virtuously', according to the dynamic approach of the organizational model and also to guarantee the legal entity's right against self-incrimination in the criminal proceedings.

7 '*Whistleblowing*': a mere tool of complaint or a system to review the preventive model?

The topic of the entity's 'exposure' to liability risk and to the prejudice of its rights of defense also emerges with reference to the new institution of *'whistleblowing'*, laid down by the recent Italian law No. 179/2017 to provide evidence of corporate's infringement also in private corporations (for public entities it was introduced by Law No. 190 of 2012[24]). The reform law has amended the article 6 of Legislative Decree No. 231/2001, which now provides for the possibility for the apical and subordinate persons to report 'illicit conducts' through dedicated channels, immune from retaliatory actions and dismissal.

This institution, which was already provided for by other European and non-European legal systems, has now found further extension with the recent 'Proposal for an EU Directive, concerning the protection of those who report violations of EU law in particular matters' of 23 April 2018[25].

Despite the popularity of such institution, there are still strong doubts regarding the validity and implementation of this mechanism. First of all, for the subjective limitations, the new article 6 refers only to persons in top positions and subordinates, who are internal to the corporation, and not also to third parties external to it, who can report facts they have come to know on the basis of the employment relationship.

The choice to incardinate such mechanism in the systematic of the organizational model makes it optional and not properly in accordance with the purpose of the model, that is to prevent crimes and not to report misconduct or irregularities already carried out. But above all, it should be clarified whether 'whistleblowing' is a mere tool of complaint or it can be

[24] In particular, the Law No. 190 of 2012 in its single article, at paragraph 51, provides for the insertion of a paragraph 54 bis, entitled 'Protection of the public employee who reports illicit', in the law on public employment, Law No. 165 of 2001.

[25] Reference is to the recent 'Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law', 23 April 2018.

understood in a 'constructive' perspective with a view to stimulating the review of the preventive model, without any further procedural consequences.

Bearing in mind that, as noted in the Confindustria's explanatory note of January 2018[26], the legal framework appears to protect the reporting agent and not the subject reported; thus Confindustria advocates a system that avoids 'excessive imbalances in the application stage'. In this regard, it should be stressed that the need to protect the confidentiality of the identity of the reporting person should be reconciled with that of safeguarding the rights of defense of the subject reported, especially if the reporting is not founded. It is in fact evident that the rights of defense of the reported can be fully exercised only after having clarified the identity of the complainant and ascertained the possible abusive nature of the report. Needless to say that, pending the definition of the judgment, the position of the reported subject is likely to be compromised, at least on the reputational level. These aspects will therefore have to be examined in relation to the concrete applicative experiences that will emerge.

It should be kept in mind that the 'whistleblowing' institution, with all its implementation limits, aims anyway to overcome a system of opacity in the entity's organization and thus to encourage the emergence of criticalities in a system that does not seem to be able to react by itself. In practice, this institution could still pose problems in terms of company management and interpersonal relationships. From this point of view, the same remarks already expressed with reference to the use of sensitive documents in criminal proceedings, apply to the whistleblowing institution. They should be treated in the same way as useful tools, which could be used virtuously by the legal entity, but only with a view to revising and improving the preventive model, while their use as a possible instrument of prosecution in the criminal trial against the same entity should remain excluded.

8 Conclusive remarks

In conclusion, it must be considered that one of the goals that inspire the Italian regulation on *ex crimine* corporate liability is the need for a continuous updating of the preventive model, also with a view to its improvement. That is to say that the changes can be particularly effective where, in addition to an update that takes into account the regulatory changes, the entity tries to overcome the critical issues that may emerge in the concrete application of the organizational procedures. In particular, one should not ignore the risk of criminal proceedings in which the entity could incur for the 'boomerang effect' of the disclosure by the same of sensitive and 'compromising' data, made in order to improve its organization.

In our opinion, to avoid the possibility that the entity, to overcome this risk, may hide data useful for the improvement of its preventive model, a mechanism to incentivize the same entity to 'expose itself' should be provided for. In this regard, in a substantive perspective, a 'cause of exclusion of punishment' for the legal entity that uses sensitive documents for virtuous purposes might be provided for, or, in a procedural perspective, the 'non-usability'

[26] See Confindustria, 'La disciplina in materia di Whistleblowing. Nota illustrativa' (January 2018), 2 <https://www.confindustria.it> accessed 28 December 2018.

of the documents in question by the courts, during the criminal trial, might be provided for. This 'non-usability' should refer solely to the legal entity and not also to the possible responsibility of natural persons.

The issue of the information to be used for the improvement of the preventive model, and of the consequent need to protect the legal entity, could also emerge from the 'whistle' of the whistleblower. The legal system, in addition to protecting the complainant, should also be better developed in the perspective of safeguarding the rights of defense, also with a view to protecting the person reported. This at least in the sense that, beyond the ascertainment of the responsibilities of the natural person, the whistleblower report could contribute to the improvement of the organizational model. Therefore, if it were used in this sense, it should be recognized a merit for the legal entity, with consequent benefits, taking into account the instruments previously proposed both in the substantive and in the procedural perspective.

Selected Literature

Bernasconi A, 'Sub art. 6' in Presutti A, Bernasconi A and Fiorio C (eds), *La responsabilità degli enti* (Cedam 2008) 148 ff

Cerqua F, 'Sub art. 6' in Cadoppi A, Garuti G and Veneziani P (eds), *Enti e responsabilità da reato* (Utet Giuridica 2010) 137 ff

De Maglie C, *L'etica e il mercato* (Giuffrè 2002)

Fiorella A, 'Principi generali e criteri di imputazione all'ente della responsabilità amministrativa' in Fiorella A and Lancellotti G (eds), *La responsabilità dell'impresa per i fatti di reato* (Giappichelli 2004) 13

– 'From "macro-antrophos" to "multi-person organisation". Logic and structure of compliance programs in the corporate criminal liability' in Fiorella A (ed), *Corporate criminal liability and compliance programs* (Jovene 2012) vol II, 373 ff.

Fiorella A and Valenzano AS, *Colpa dell'ente e accertamento. Sviluppi attuali in una prospettiva di diritto comparato* (Sapienza Università Editrice 2016)

Fiorella A and Selvaggi N, *Dall'«utile» al «giusto». Il futuro dell'illecito dell'ente da reato nello 'spazio globale'* (Giappichelli 2018)

Fisse B and Braithwaite J, 'The allocation of responsibility for corporate crime: individualism, collectivism and accountability' (March 1988) 11 Sydney L Rev 468

– *Corporations, crime and accountability* (Cambridge University Press 1994)

Gallucci E, 'L'esecuzione' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (Giuffrè 2010) 738

Massi S, '*Veste formale' e 'corpo organizzativo' nella definizione del soggetto responsabile per l'illecito da reato* (Jovene 2012)

Paolozzi G, *Vademecum per gli enti sotto processo* (Giappichelli 2006)

Piergallini C, 'I reati presupposto della responsabilità dell'ente e l'apparato sanzionatorio' in Lattanzi G (ed), *Reati e responsabilità degli enti* (Giuffrè 2010) 222

Valenzano AS, 'Control over Organizational Models in the Italian Legal System' in Turayová Y and Čentéš J (eds), *Penal Policy of the State and Liability of Legal Entities* (Comenius University in Bratislava 2013) 1100

– '"Triggering Persons" in "Ex Crimine" Liability of Legal Entities' in Brodowski D, Espinoza de los Monteros de la Parra M, Tiedemann K and Vogel J (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 95

SEARCH AND SEIZURE OF DOCUMENTS GENERATED IN INTERNAL INVESTIGATIONS – LESSONS TO LEARN FROM EUROPEAN LAW

By Anne Schneider[*]

Abstract

In 2018, the German Constitutional Court decided that the search of the Volkswagen company's law firm and the seizure of documents generated in an internal investigation undertaken in order to defend against US charges did not violate the company's constitutional rights. In the following paper, this decision is analysed from the point of view of EU Law. The main focus of the analysis is the EU law on legal professional privilege. It will be shown that EU legal professional privilege is applicable in national criminal procedure law under certain circumstances. Accordingly, it has a large impact on the question of the seizure of documents generated in internal investigations in national criminal procedure law and ought to have been taken into account in the Constitutional Court decision.

1 Introduction

Companies participate in criminal proceedings in myriad ways. They can be the victims of a crime, they can be witnesses, but they can also be the addressee of criminal proceedings, i.e. the defendant against criminal charges. Often, it is not clear how a particular infraction has occurred and which natural person is responsible. In these cases, corporations might undertake internal investigations in order to find out what happened. Usually, these investigations are undertaken by external law firms who are mandated by the company. The result of the internal investigation is of huge interest to the prosecution services who basically are trying to find out the same facts as the company. Accordingly, the prosecution services would like to get hold of the documents generated in internal investigations by means of search and seizure. In contrast, companies usually want to decide on their own what to do with the results gathered in internal investigations. This conflict between the interests of the prosecution service and companies has led to a number of court proceedings.[1]

2 The *Volkswagen* Case

The *Volkswagen* case is one example that illustrates this conflict. *Volkswagen* is a big German car manufacturer which is organized in the form of an *Aktiengesellschaft* (private company limited by shares). In the past couple of years it has come to light that the emissions of *Volkswagen* diesel cars were higher than had been shown during tests, due to a manipulation of the emission control program. This so-called *Abgasskandal* (emissions scandal) has led to criminal investigations for fraud against the company and its employees in many countries.

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[*] Dr. Anne Schneider LL.M. is Professor for German, European and International Criminal Law, Criminal Procedure and White Collar Crime at the University of Mannheim in Germany.

[1] See, e.g., LG Mannheim [2012] NZWiSt 424; LG Gießen [2012] BeckRS 15498; LG Bonn [2013] NZWiSt 21; LG Braunschweig [2016] NStZ 308; LG Hamburg [2016] StraFo 463; LG Stuttgart [2018] BeckRS 8717.

It has also raised a number of interesting legal issues in various fields, including the question of under which circumstances documents generated in internal investigations can be seized.

2.1 Facts

The facts of this event have been summed up in the press release:

In connection with a criminal investigation conducted in the USA relating to manipulated emissions of diesel vehicles, the Volkswagen AG tasked the international law firm Jones Day in September 2015 with carrying out internal investigations, providing legal advice and representing it vis-à-vis US law enforcement authorities. In order to investigate the facts, the lawyers of Jones Day examined many documents within the Volkswagen group and conducted interviews with employees throughout the Volkswagen group. Lawyers from the Munich Office of the law firm were also involved in the case.

The Munich II public prosecution office opened an investigation based on suspicion of fraud and illegal advertising relating to events in the context of the 3.0-litre diesel engines of the Audi AG, a subsidiary of the Volkswagen AG, which itself did not employ the Jones Day law firm. At first, the investigations were initiated against persons unknown and, as of 29 June 2017, against several specific persons charged with criminal offences (*Beschuldigte*). On 29 June 2017, the Munich II public prosecution office also initiated regulatory fine proceedings against the Audi AG itself pursuant to § 30 of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz – OWiG*). The Braunschweig public prosecution office is conducting another criminal investigation against several persons charged with criminal offences concerning a 2.0-litre diesel engine built by the complainant.

Upon application by the public prosecution office, the Munich Local Court (*Amtsgericht*) ordered the search of the Munich offices of the Jones Day law firm on 6 March 2017. During the search on 15 March 2017, numerous files as well as a large number of electronic data containing the results of the internal investigations were secured.[2]

Having exhausted all regular remedies, the Volkswagen AG, the law firm and three individual lawyers each filed a constitutional complaint before the German Federal Constitutional Court (*Bundesverfassungsgericht*), claiming a violation of their constitutional rights.

2.2 The Decision of the German Federal Constitutional Court

The Court rejected all three complaints.[3] The reasons given were all different. In the case of the law firm Jones Day, the Court did not recognize its right to file a constitutional complaint because the German fundamental rights did not apply to the American law firm. This was because article 19 (3) Basic Law (*Grundgesetz*) states that the fundamental rights only apply

[2] Taken from BVerfG Press Release No. 57/2018 of 06 July 2018, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-057.html> accessed 11 November 2018.

[3] BVerfG [2018] NJW 2385; BVerfG [2018] NJW 2392; BVerfG [2018] NJW 2395.

to *domestic* legal persons.[4] In the case of the three individual lawyers, who as natural persons have fundamental rights, the Court dismissed a violation because the rights invoked served to protect either the law firm or the clients, but not the individual lawyers.[5] Though it is doubtful whether these decisions are altogether convincing, they will not be discussed further in this paper.[6]

The constitutional complaint of the company *Volkswagen* was also rejected. Nonetheless, in this case, the Court held that a violation of the company's right to privacy and data protection (*Recht auf informationalle Selbstbestimmung*) had occurred.[7] *Volkswagen* had a fundamental right not to suffer the seizure and sifting of documents generated in internal investigations by their law firm. However, a violation of data protection rights can be justified by written law if proportionate. In this case, the lower courts had interpreted the German Code of Criminal Procedure (*Strafprozessordnung* – StPO) in a way that allowed the search and seizure of documents generated in internal investigations, the details of which will be explained below. The Constitutional Court upheld this interpretation: it complied with the constitution and did not cause a disproportionate violation of data protection rights.[8]

It should be noted, however, that this does not mean that any other interpretation would be contrary to the constitution.[9] Generally, Constitutional Law gives a margin of discretion to the legislator and the courts, which often leaves room for different interpretations. Because the Constitutional Court is only asked to decide on whether a specific decision complies with the constitution, it does not usually name the boundaries within which the legislator may operate.

2.3 The German Law on search and seizure

What is the interpretation of the district court that allows for the seizure of documents generated in internal investigations, even if the documents are filed at a law firm? German Criminal Procedure Law contains two provisions that could potentially offer protection of

[4] BVerfG [2018] NJW 2392, 2393.

[5] BVerfG [2018] NJW 2395.

[6] For criticism, see Alexander Baur, 'Neues zum strafprozessualen Schutz interner Ermittlungen? Zugleich Anmerkung zu den Entscheidungen des BVerfG vom 27. Juni 2018, Az.: 2 BvR 1405/17, 2 BvR 1287/17 und 2 BvR 1562/17' [2018] NZG 1092, 1093ff.; Astrid Lilie-Hutz and Saleh Ihwas, 'Ein Ausblick auf Internal Investigations nach den VW/Jones Day-Entscheidungen – zugleich Besprechung der BVerfG Entscheidungen 2 BvR 1405/17; 2 BvR 1780/17; 2 BvR 1287/17; 2 BvR 1583/17; 2 BvR 1562/17' (2018) NZWiSt 349ff.; Carsten Momsen, 'Volkswagen, Jones Day und interne Ermittlungen. Zur Zukunft strafrechtlicher Vertretung von Unternehmen in Deutschland' [2018] NJW 2362, 2364f.; Christian Pelz, 'Die Beschlagnahmefähigkeit von Unterlagen aus Internal Investigations – zugleich eine Besprechung von BVerfG, Beschluss vom 27.06.2018, Az. 2 BvR 1405/17, 2 BvR 1780/17' [2018] CCZ 211, 211ff.; Thomas Wostry, 'Kritische Betrachtung ausgewählter Aspekte der Entscheidungen des BVerfG zur Beschlagnahme von Dokumenten aus internal investiagations' [2018] NZWiSt 356.

[7] BVerfG [2018] NJW 2385, 2386.

[8] BVerfG [2018] NJW 2385, 2387ff.

[9] Momsen (n 6) 2363.

documents that stem from a lawyer-client relationship. § 97 StPO excludes certain objects from seizure. § 160a StPO restricts investigative measures against privileged witnesses, i.e. witnesses who have the right to refuse testimony for professional reasons. Both provisions have a different scope. In this context, § 160a StPO would offer broader protection of documents.

The reasoning of the district court can be gathered from the Constitutional Court decision.[10] It relies on three positions which are controversially discussed in German legal doctrine:

First, the district court considers § 97 StPO to take precedence over § 160a StPO. This is because § 97 StPO applies to seizure only, while § 160a StPO applies to any investigative measure. Moreover, § 160a (5) StPO states that § 97 StPO shall remain unaffected. Therefore, many scholars take the view that § 160a StPO is not applicable to seizure.[11] This view is strongly supported by the Constitutional Court.[12] The same applies to searches that take place in order to prepare for seizure.[13]

Secondly, § 97 (1) (Nr. 3) StPO is only applied to objects that come from the relationship of the lawyer, a privileged witness, and the accused. In order to understand this thesis, one has to have a look at the text of § 97 (1) StPO:

§ 97 StPO

(1) The following objects shall not be subject to seizure:

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[10] The decision of the district court has not been published.

[11] For example Christoph Buchert, *Die unternehmensinterne Befragung von Mitarbeitern im Zuge repressiver Compliance-Untersuchungen aus strafrechtlicher Sicht* (Duncker & Humblot 2017) 179ff.; Volker Erb, in Volker Erb and others (eds), *Löwe-Rosenberg StPO* (26th edn, De Gruyter 2008), § 160a addition para 55f.; Matthias Jahn and Stefan Kirsch, 'Keine Beschlagnahmefreiheit für Unterlagen eines mit internen Ermittlungen beauftragten Rechtsanwalts – Anmerkung zu LG Hamburg, Beschl. v. 15.10.2010 (608 Qs 18/10)' [2011] StV 151, 154; Ralf Kölbel, in Hartmut Schneider (ed), Münchener Kommentar – StPO (C.H. Beck 2016) § 160a para 8; Carsten Momsen and Thomas Grützner, ´Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?´ [2017] CCZ 242, 244ff.; Jörg Oesterle, *Die Beschlagnahme anwaltlicher Unterlagen und ihre Bedeutung für die Compliance-Organisation von Unternehmen* (Duncker & Humblot 2016) 187ff.; Jürgen Wolter and Luis Greco, in Jürgen Wolter (ed), *Systematischer Kommentar – StPO* (5th edn, Carl Heymanns 2016) § 160a para 48a. For the different view, see Dennis Bock and Sönke Gerhold, ´Die Rechtsstellung der internen Ermittler´ in Thomas Knierim and others (eds), *Internal Investigations: Ermittlungen im Unternehmen* (2nd edn, C.F. Müller 2016) ch 5 para 68; Oliver Sahan, ´Die Beschlagnahmefreiheit von Rechtsanwaltskorrespondenz´ in Thomas Rotsch (ed), *Criminal Compliance vor den Aufgaben der Zukunft* (Nomos 2013) 133, 142ff.; Philipp Scharenberg, Der Schutz des Vertrauensverhältnisses zu Berufsgeheimnisträgern gemäß § 160a StPO (Nomos 2016) 93f.; Alexander Schmid and Lenard Wengenroth, ´Keine Beschlagnahmefreiheit für Compliance-Ombudspersonen´ [2016] NZWiSt, 404, 406ff. (note); Frank Schuster, ´Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank´ [2012] NZWiSt 28, 30 (note).

[12] Gerhold points out that the Court's position on this point of law is much stronger than on the other points in question, Sönke Gerhold, ´Erfolglose Verfassungsbeschwerden gegen Ermittlungsmaßnahmen im „Dieselskandal"´ [2018] DStR 1943, 1944 (note).

[13] BVerfG [2018] NJW 2385, 2387f.

1. written correspondence between the accused and the persons who, according to Section 52 or Section 53 subsection (1), first sentence, numbers 1 to 3b, may refuse to testify;
2. notes made by the persons specified in Section 53 subsection (1), first sentence, numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify;
3. other objects, including the findings of medical examinations, which are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 to 3b, to refuse to testify.

As can be seen, No. 1 and 2 refer to the accused, i.e. the defendant in criminal proceedings. Such a reference is missing in No. 3. Accordingly, a large number of scholars argue that No. 3 includes objects that stem from the relationship of the lawyer and other clients who do not (yet) face criminal proceedings.[14] In the case of *Volkswagen*, there is no doubt that *Volkswagen* was a client of Jones Day law firm, but it can well be doubted whether *Volkswagen* was accused.

This leads to the third argument of the criminal courts. According to them, *Volkswagen* is not (yet) accused in the sense of § 97 StPO. In this context, it should be noted that companies cannot be criminal defendants in the strict sense of the word because they are not criminally liable under German Law. However, the German Code of Criminal Procedure grants certain rights to companies that are pursued under § 30 OWiG (see § 444 (2) sentence 2 StPO). These rights include the right to an effective defence (§ 148 StPO), which, in turn, demands further restrictions to the possibility of seizure. The problem is to determine from what point a company can rely on these defence rights: Is it necessary that formal proceedings under § 30 OWiG have been initiated? This would exclude *Volkswagen*, because the company as such was not (yet) under investigation by the German Prosecution Service at the time of seizure.[15] If formal proceedings are not necessary, what are the requirements for treating the company to defence rights? The Munich court has adopted objective criteria such as the sufficient suspicion (*hinreichender Tatverdacht*) that the requirements for applying § 30 OWiG are fulfilled.[16] According to the court, this was not the case because the investigations against *Audi* and *Volkswagen* were separate.

It is not the purpose of this paper to go into further detail on the German law on search and seizure. Instead, it will be discussed which solutions European Law has to offer on the problem of the protection of documents generated in internal investigations. This requires

[14] See, for instance, Knut Amelung, ´Grenzen der Beschlagnahme notarieller Unterlagen´ [1984] DNotZ 195, 206f.; Werner Beulke and others, *Unternehmen im Fadenkreuz* (C.F. Müller 2009) 62ff.; Bock and Gerhold (n 11) ch 5 para 31ff.; Buchert (n 11) 181ff.; Ken Eckstein, *Ermittlungen zu Lasten Dritter* (Mohr Siebeck 2013) 122ff.; Matthias Jahn, ´Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO´ [2011] ZIS, 453, 455 ff.; Oliver Sahan (n 11) 137f.; Schmid and Wengenroth (n 11) 405ff.; André-M. Szesny, ´Beschlagnahme von Unterlagen beim Ombudsmann?´ [2017] CCZ 25, 26f.

[15] By now, Volkswagen has received a fine of one billion Euro, which includes the maximum penalty of five million Euro for negligent conduct and the confiscation of 995 million Euro.

[16] See BVerfG [2018] NJW 2385, 2390.

an overview on the protection of the lawyer-client privilege, i.e. legal professional privilege (LPP), in EU competition law.

3 The Protection of Legal Professional Privilege in EU Competition Law

EU competition law allows corporations to be fined for violations of competition law. In that respect, it is a good example of how corporations' rights are protected in sanctioning proceedings. The ECJ has developed the protection of LPP in a number of decisions over the course of several decades.[17] In the following, an overview will be given over the scope of the European LPP on the basis of these decisions.

The first thing to note is that European Law only protects the relationship between the client and independent lawyers.[18] Correspondence and other documents shared with in-house lawyers do not fall within the scope of LPP.

Apart from that, the LPP covers documents that have been generated 'in the context and interest of the client's right to a defence'.[19] These documents include correspondence between the lawyer and the client which has occurred after the proceedings under Competition Law have been initiated, but also correspondence from before the proceedings have started.[20] Moreover, the protection includes internal notes about the correspondence with the lawyer.[21] Furthermore, documents that have been generated explicitly in order to obtain legal advice on defence matters are also protected, regardless of whether they were part of correspondence or not.[22] In these cases, it should be clear from the documents themselves that they were drafted with this purpose in mind.[23] The last aspect is particularly relevant when considering that the LPP protects the documents not only from being used as evidence, but also from being read at all.[24]

Another important question is when the protection is activated. Obviously, the LPP applies during proceedings that are directed against the client. However, it can also apply to preliminary proceedings if these proceedings might otherwise produce evidence that hampers the defence:

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[17] Case 155/79 *AM & S Europe Ltd. v Commission* [1982] ECR 1575; Case T-30/89 *Hilti v Commission* [1990] ECR II–165; Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* (CFI, 26 February 2007); Case C-550/07 P (GC) *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* [2010] ECR I–08301.

[18] Case 155/79 *AM & S Europe Ltd. v Commission* [1982] ECR 1575 para 21; Case C-550/07 P (GC) *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* [2010] ECR I–08301 paras 27ff.

[19] Case 155/79 *AM & S Europe Ltd. v Commission* [1982] ECR 1575 para 21.

[20] Case 155/79 *AM & S Europe Ltd. v Commission* [1982] ECR 1575 para 23.

[21] Case T-30/89 *Hilti v Commission* [1990] ECR II–165 paras 16ff.

[22] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* (CFI, 26 February 2007) para 123.

[23] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* (CFI, 26 February 2007) para 123.

[24] See Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* (CFI, 26 February 2007) para 123.

Therefore, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable […].[25]

Accordingly, LPP protection is not limited to sanctioning proceedings, but can be invoked at an earlier stage of time. However, the documents must be connected to the criminal proceedings and the lawyers to which the LPP refers must later be mandated to defend the client in these proceedings.[26] This shows that the protection before criminal proceedings have started serves to prevent the undermining of later existing defence rights.

4 The Relevance of EU LPP Protection in National Criminal Law

Having explained how LPP is protected in EU Competition Law, the question remains what this has to do with German or other National Criminal Procedure Law. In the following paragraphs, it will be shown that the EU LPP must be taken into account in national criminal proceedings. This will be demonstrated in five theses (4.1-4.5):

4.1 LPP has been recognized in EU Competition Law

This has been explained further above and is, in principle, not disputed, although many details remain unclear.

4.2 The interpretation of LPP in Competition Law shapes the rights in articles 47 (2), 48 (2) CFR

In EU Law, defence rights are regarded as fundamental rights. Apart from article 6 ECHR, articles 47 (2), 48 (2) Charter of Fundamental Rights (CFR) grant the right to defend oneself. It has been shown above that case law plays an important role in shaping the LPP protection in Competition Law. The question, now, is whether this case law is only applicable in competition law cases or whether it can be regarded as the Court's interpretation of the fundamental right to defence as laid down by the Charter.[27]

A closer look at the case law reveals that the LPP is regarded as a 'principle and concept common to the laws of those states [the EC Member States]'[28]. Advocate General Kokott makes this point very clearly in her opinion to the Akzo Nobel case:

'In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: legal professional privilege is currently recognised in all 27 Member States of the European Union, in some of which its

[25] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* (CFI, 26 February 2007) para 120.
[26] LG Bonn, dec. of 27.03.2002 – 37 Qs 91/01 = [2011] BeckRS 8005. On these restrictions, see Anne Schneider, *Strafprozessuale Ermittlungsmaßnahmen und Zeugnisverweigerungsrechte* (forthcoming) ch 7 D. II. 3.
[27] See, on this, Schneider (n 26) ch 5 B. II. 6. b).
[28] Case 155/79 *AM & S Europe Ltd. v Commission* [1982] ECR 1575 para 18.

protection is enshrined in case-law alone, but in most of which it is provided for at least by statute if not by the constitution itself. On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defence).'[29]

It follows that the case law of the ECJ and the General Court does not only apply in competition law, but also shapes the general principle.

4.3 Articles 47 (2), 48 (2) CFR apply in the Member States when they are implementing EU law

This thesis repeats the provision on the scope of the Charter of Fundamental Rights, article 51 (2) CFR. It does not require further explanation.

4.4 Criminal Prosecution is the implementation of EU Law if the criminal sanction constitutes an effective, proportionate and dissuasive sanction in the sense of *Greek Maize*

The crucial question for the application of Charter rights is whether the Member States are implementing EU law. The ECJ favours a broad interpretation of 'implementing EU law'.[30] EU law is implemented when the application of a national law provision is part of the fulfilment of an obligation under EU law.[31] There are few explicit obligations concerning criminal procedure law.[32] However, there is a general obligation to provide for effective, proportionate and dissuasive sanctions when EU law is violated. If EU law has been implemented in criminal law provisions, the implementing Member State must make sure that these sanctions are applied effectively. This, in turn, requires an effective criminal procedure.[33] Accordingly, criminal procedure law must enable effective sanctioning.

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[29] Case C-550/07 P (GC) *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission* [2010] ECR I–08301, Opinion of AG Kokott, para 47.

[30] This point is discussed controversially in literature, see, for more details, Julian Nusser, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte* (Mohr Siebeck 2011) 9 ff.

[31] See, e.g., Case C-206/13 *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo* (ECJ, 6.3.2014) paras 24ff.

[32] The most important in this context is Art. 4 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.

[33] See, on this point, Schneider (n 26) ch 5 B. II. 1. a) aa).

The ECJ argued similarly in its *Taricco* decision.[34] The *Taricco* case was about an Italian law provision that had the effect that the limitation period of tax fraud provisions was usually expired before the perpetrator could be convicted. The ECJ considered this result to be contrary to the obligation to provide for effective sanctions. Although the limitation periods are part of substantive law in the Italian legal system, it is clear from the decision that the same applies to procedural rules.

This shows that criminal procedure law is part of the effective sanctioning system. Accordingly, criminal procedure law is an implementation of EU law whenever EU law requires an effective sanction and the Member State has chosen to use criminal law to this end.

4.5 It is impractical to provide a different regime for EU law *de lege ferenda*

This last thesis is more an appeal to the legislator. Considering that criminal procedure law is sometimes an implementation of EU Law and sometimes not, there is a risk that two different regimes of criminal procedure are developed. This is because criminal procedure law must be applied in conformity with EU law if it is implementing EU Law. If not, it is applied according to the rules of national law. This could lead to a dissociative criminal procedure system, which would be chaotic. Accordingly, it would be advisable to adapt the whole national criminal procedure law to the EU standards.

5 Consequences for the *Volkswagen* Case

Having argued that the EU LPP can be relevant in national criminal law, it remains to be seen whether this is true for the *Volkswagen* case and, if so, to what extent.

In order to apply the EU LPP, the German criminal procedure law must be an implementation of EU law in this particular case. This means that the procedure must be based on criminal law provisions that, in turn, implement EU law. In case of *Volkswagen* and *Audi*, the manipulation of the diesel engines could classify as fraud, but also as ecological crimes which are heavily influenced by EU emission law.[35] Moreover, it is discussed whether *Volkswagen* is liable under the Market Abuse Regulation.[36] Accordingly, the criminal statutes in question constitute an implementation of EU law.

Even if the EU LPP is applicable, documents are only protected if they were explicitly prepared for the purpose of defence, if there is a connection to criminal proceedings and if the same lawyers later are mandated to defend the company. The crucial point is whether the documents generated in the internal investigations were prepared for the purpose of the defence. In *Akzo Nobel*, the ECJ said that documents were usually generated in internal

[34] Case C-105/14 *Criminal Proceedings against Ivo Taricco and Others* (ECJ, 8 September 2015) para 47, confirmed in Case C-42/17 *Criminal Proceedings against M.A.S. and M.B.* (ECJ, 5 December 2017) paras 31ff.
[35] See, in more detail, Martin Führ, ´Der Dieselskandal und das Recht´ [2017] NVwZ 265, 265ff.
[36] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1.

investigations for general purposes and thus lacking the specific connection to criminal defence.[37] On the contrary, this means that these documents can be protected if they were explicitly prepared for defence purposes.

In the *Volkswagen* case, the internal investigation was part of the defence against US charges for the same facts. This raises the question of whether it suffices if the documents were generated for the purpose of defending oneself against foreign proceedings or if the defence must be directed against national proceedings. A similar question has recently been raised by *Geis*, who asks whether the notion 'accused' in § 97 StPO includes accusations under foreign law.[38] Similarly, the German Constitutional Court ought to have considered whether the constitutional right to defence forbids the seizure of documents that were prepared for a foreign defence.

The question of to what extent foreign criminal proceedings invoke national defence rights merits further discussion than is possible here. Nonetheless, there is room for some comments. First, it should be noted that parallel criminal proceedings are common within and without the EU.[39] This is because criminal jurisdictions generally overlap. There is still no pre-emptive EU mechanism on solving conflicts of jurisdiction in criminal law.[40] Therefore, the defendant who has been accused in one state knows that other states might follow suit.

The *Volkswagen* case is a good example: did anyone imagine that German authorities would not initiate proceedings against the German company after US authorities had started proceedings? From the beginning, it was likely that the US proceedings would be followed by German proceedings. Who is to say that the internal investigations were exclusively undertaken in order to defend against the US proceedings? The company certainly knew that the U.S. proceedings would not remain the only ones. So far, nobody has suggested that documents that were generated for the purpose of defence must indicate against whose charges the defence was directed. It is likely that documents that were generated for one defence are meant to serve for any defence unless otherwise indicated.

On a more general note, a limitation of the protection of documents to specific legal orders would diminuate the value of defence rights. Imagine a case when the defendant confesses in full to his or her lawyer in order to discuss defence strategies in the light of looming criminal proceedings in one Member State. If this document could be used in other criminal

[37] Joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* [2007] ECR II-03523 para 127.

[38] Mark Geis, ´Auslandsvermittelte Beschuldigtenstellung der juristischen Person´ [2018] wistra 200.

[39] See, on challenges for the defence, Karl Sidhu and Alexander von Saucken, ´Grenzüberschreitende Verteidigung von Unternehmensmitarbeitern´ [2018] NZWiSt 126.

[40] For the discussion, see Martin Böse, Frank Meyer and Anne Schneider, *Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. I* (Nomos 2013) *and II* (Nomos 2014); European Law Institute, Katalin Ligeti and others (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press, expected for 2018).

proceedings, it becomes much riskier to do so, especially as it is unclear which state is finally going to prosecute.

In this context, it should be noted that the defendant must not be aware of the possibility of there being different criminal proceedings. According to the majority opinion, an error about the applicable criminal law has no consequences.[41] If that is so, it follows that the defendant cannot be expected to know the applicable criminal procedure law in order to be protected by it.

According to this argument, the documents generated in internal investigations in order to defend *Volkswagen* against U.S. proceedings are documents prepared for the purpose of defence and therefore protected under EU LPP. However, it must be admitted that the issue raises complex problems which cannot be discussed here. For example, a closer look at defence rights in the context of Mutual Legal Assistance and the European Investigation Order is required.[42] Moreover, one could argue whether defence rights must be interpreted differently for companies than for natural persons.[43] Nonetheless, the strict separation of criminal proceedings by different states and its impact on defence rights should be questioned.

6 Conclusion

The EU Legal Professional Privilege as interpreted in EU Competition Law has a much greater impact on national law than has been previously thought. All criminal proceedings that are implementing EU Law by making sure that criminal sanctions are effective fall within the scope of EU LPP. It is likely that this protection also applies to the documents generated in internal investigations in the *Volkswagen* case.

This EU dimension has so far been overlooked by the German courts. The District Court ought to have put the preliminary question to the ECJ if EU Law was indeed to be interpreted in the way explained above. It remains to be seen if this road will be taken in the future. One thing is certain: the discussion will go on.

[41] See the comparative overview by Martin Böse, Frank Meyer and Anne Schneider, 'Comparative Analysis' in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. I* (Nomos 2013) 426ff.

[42] See the similar approach in Geis (n 38) 202ff.

[43] See on this question, in detail, Oesterle (n 11) 86ff.

Selected Literature

Geis M, ´Auslandsvermittelte Beschuldigtenstellung der juristischen Person´ [2018] wistra 200

Jahn M, ´Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO´ [2011] ZIS, 453

Lilie-Hutz A and Ihwas S, 'Ein Ausblick auf Internal Investigations nach den VW/Jones Day-Entscheidungen – zugleich Besprechung der BVerfG Entscheidungen 2 BvR 1405/17; 2 BvR 1780/17; 2 BvR 1287/17; 2 BvR 1583/17; 2 BvR 1562/17' [2018] NZWiSt 349

Momsen C, 'Volkswagen, Jones Day und interne Ermittlungen. Zur Zukunft strafrechtlicher Vertretung von Unternehmen in Deutschland' [2018] NJW 2362

Oesterle J, *Die Beschlagnahme anwaltlicher Unterlagen und ihre Bedeutung für die Compliance-Organisation von Unternehmen* (Duncker & Humblot 2016)