

Lukas Staffler

Business Criminal Law

A Primer for Management
and Economics

Recommended
in Germany



Springer Gabler

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A Primer for Management and Economics



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*This book is dedicated to my wonderful wife,
Andrea.*

Preface

The idea for this book goes back to the year 2020 when the “MCI | The Entrepreneurial School” offered me a position to teach “Business Criminal Law.” The course is part of the revised master’s program “International Business & Law” which combines business, management, and digitalization with European business law culture. The head of Department & Studies, Professor Ralf Geymayer, gave me great freedom in designing the content of the course in compliance with the spirit of MCI’s guiding principles, which are, among other things, to provide a meaningful connection between university, *grande école*, business school, and the world of business. What initially seemed to be a great freedom soon turned out to be a great challenge. The audience of this course was a mix of students with a strong emphasis on economics from all continents (and thus from different legal cultures). It soon became clear that a classic approach to “economic criminal law,” as taught in traditional law schools, would not be appropriate for the purposes of this program. The course at the MCI is ultimately not aimed at educating lawyers. Rather, it is intended to sensitise future managers and entrepreneurs to the field of business criminal law, because this area of law is becoming increasingly important for the economy. Therefore, a new approach to this subject had to be developed.

This is the short history of the origins of this textbook. As a textbook with a legal focus, it is intended to provide an overview of the normative culture in business criminal law. However, as it considers the fact that companies are transnationally oriented, the book focuses on the legal situation in several countries which have close cultural, legal, and economic ties, namely the legal systems of Austria, Germany, the Principality of Liechtenstein, and Switzerland. Nevertheless, since important developments also took place outside these countries, the book selectively considers important developments in other legal systems such as the USA and the UK. The reader will find the explanations provided in this textbook backed up by numerous practical examples and will hopefully also find that the book may serve as an inspiration to conduct further research on the respective topics by using references in the footnotes.

Overall, this book is intended to provide a new and innovative approach to a particularly important area of law. It is intended as an integrative contribution to the already established textbooks on economic criminal law. In fact, there is an abundance of high-quality legal textbooks on white-collar crime or economic criminal law. However, they are written specifically for a legal audience like law students, lawyers, or legal practitioners. Thus, this book cannot replace these excellent works, nor does it intend to. With an interdisciplinary approach, the book aims to take a new look at business criminal law from a perspective of a non-law audience. For this reason, on the one hand, specific legal issues are treated without great in-depth or advanced considerations and, on the other hand, more basic aspects of the (criminal) law are explained in more detail. This is intended with the objective in mind to introduce future entrepreneurs to the increasingly important field of business criminal law. Whether or not this is successful will ultimately be decided by the readership.

At this point I would like to express my gratitude to several persons and institutions. First, I would like to thank the MCI | The Entrepreneurial School for taking a new and courageous path by recognizing the practical significance of business criminal law for management studies. This bold step has led to the introduction of legal subjects with an appropriate didactic design to economic practice. Secondly, I would like to thank the University of Zurich, which provides optimal research conditions to turn innovative ideas into reality. Without the vital dialogues with colleagues and professors, this project could not have been realised. Further thanks are due to Springer Verlag, which was immediately supportive of this unconventional book idea and has included the book in its publishing program. Here, my gratitude goes to Mrs Irene Buttkus, who managed the communication for me from the publishing side in the utmost professional manner. I would also like to thank the course participants of Business Criminal Law in Autumn 2020 and 2021 for their active participation in the workshops, which influenced the focus of the book. I would also like to thank all those who helped with words and deeds in the design of the manuscript, namely (in alphabetical order) Odile Ammann, Kathrin Betz, Daniel Degischer, Oliver Jany, Xenia Karametaxas, Bruno Prantauer, Sebastian Pribas, and Dimitrios Tsilikis. I would especially like to thank Emily McNamee for the excellent editing in English, whose constructive and critical comments greatly enhanced the quality of this book. While I owe all of these people—and others—substantial debts of professional gratitude, any errors in the final text remain, of course, my own.

As already explained at the beginning, this book is to be understood as an experiment in bringing the important field of law closer to a non-legal audience of business practice. The first version of the manuscript, which was produced during the first Corona lockdown in early 2020, has been revised several times. These revisions were stimulated by the indispensable exchange I had with practitioners and colleagues. Some of the main points of the content were adapted again after the experiences of the academic years of 2020 and 2021 at the MCI.

Despite the publication of the book, the development is not complete. I am open for the further development of the book and I am grateful for any kind of criticism. This applies in particular to the communication of new cases from practice, as this book draws important added value from the presentation of case studies. Thus, I am happy to receive criticism, or suggestions for improvements, or even suggestions for references to corresponding cases to my e-mail address (lukas.staffler@rwi.uzh.ch).

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Lukas Staffler

Country Code Abbreviations

AT	Austria
CH	Switzerland
DE	Germany
FL	Principality of Liechtenstein
UK	United Kingdom
US, USA	United States of America

Selected Textbooks for Legal Studies on Business and Economic Criminal Law

Austria

Eder-Rieder, Maria (2019): Einführung in das Wirtschaftsstrafrecht, 5th ed., NWV Verlag, Wien.

Köck, Elisabeth (2010): Wirtschaftsstrafrecht: eine systematische Darstellung, 2nd ed., facultas.wUV, Wien.

Sagmeister, Julia/Komenda, Peter/Madl, Patrick/Höcher, Markus (2014): Strafrecht in Fällen und Lösungen. Schwerpunkt Wirtschaftsstrafrecht, Manz, Wien.

Steininger, Einhard (2020): Verbandsverantwortlichkeitsgesetz. Lehrbuch, 2nd ed., Linde, Wien.

Germany

Brettel, Hauk/Schneider, Hendrik (2020): Wirtschaftsstrafrecht, 3rd ed., Nomos, Baden-Baden.

Hellmann, Uwe/Beckemper, Katharina/Stage, Diana (2013): Wirtschaftsstrafrecht, 4th ed., Kohlhammer, Stuttgart.

Kudlich, Hans/Oğlakcioğlu, Mustafa Temmuz (2020): Wirtschaftsstrafrecht, 3rd ed., C.F. Müller, Heidelberg.

Wittig, Petra (2020): Wirtschaftsstrafrecht, 5th ed., C.H. Beck, München.

Tiedemann, Klaus (2017): Wirtschaftsstrafrecht, 5th ed., Franz Vahlen, München.

In addition, the Max Planck Institute for the Study of Crime, Security and Law maintains a free of charge accessible database related to Literature on German Criminal Law (LGCL) in order to make English-language academic literature on German criminal law more visible to the international community of scholars and students of criminal law: <https://lgcl.csl.mpg.de/>

Switzerland

Ackermann, Jürg-Beat (2021): Wirtschaftsstrafrecht der Schweiz. Hand- und Studienbuch, 2nd ed., Stämpfli Verlag, Bern.

Pieth, Mark (2016): Wirtschaftsstrafrecht, Helbing Lichtenhahn Verlag, Basel.

Translations of Legal Codes, Statutes, Ordinances or Other Legal Materials

Generally speaking, translations of legislative materials can be found under the following link:

<https://www.legislationline.org/>

Austria

Schloenhardt, Andreas/Höpfel, Frank/Eder, Johannes (2021): Strafgesetzbuch Austrian Criminal Code, 2nd edition, NWV Verlag, Wien.

Germany

Translations of legal materials can be found under the following link: https://www.gesetze-im-internet.de/Teilliste_translations.html

Switzerland

The publication platform for federal law of the Swiss Confederation (fedlex) offers legal texts not only in the official languages of Switzerland, but also in English: <https://www.fedlex.admin.ch/>

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List of Abbreviations (Selections)

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)
AG	Aktiengesellschaft (joint-stock company)
Art.	Article
BCL	Business criminal law
BGB	Bürgerliches Gesetzbuch (Germany)
cf.	compare with
CHF	Swiss franc
CFR	Charter of Fundamental Rights of the European Union
CSR	Corporate social responsibility
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
ed.	Edition
eds.	editors
e.g.	example
EU	European Union
EUR	Euro
FATF	Financial Action Task Force on Money Laundering
GDPR	General Data Protection Regulation (EU)
GmbH	Gesellschaft mit beschränkter Haftung (company with limited liability)
i.e.	id est
ILO	International Labour Organization
ISO	International Organization for Standardization
mn.	Margin number
MNE	Multinational enterprise(s)
no.	number
OECD	Organisation for Economic Co-operation and Development
OR	Obligationenrecht (Switzerland)
OWiG	Gesetz über Ordnungswidrigkeiten (Germany)
p.	page
para.	Absatz
StGB	Strafgesetzbuch (Criminal Code)

StPO	Strafprozessordnung (Criminal Procedure Code)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VbVG	Verbandsverantwortlichkeitsgesetz (Austria)
VerSanG	Verbandssanktionengesetz (Germany)
UN	United Nations
ZGB	Zivilgesetzbuch (Switzerland)

Part I

Introduction



Approaching the Phenomenon: Business Crimes in Space and Time

1

- This chapter is dedicated to answering the following questions: What is the focus of business criminal law? And how does Business criminal law (BCL) relate to ordinary criminal law? The aim of this chapter is to present the diversity of business criminality in space in time which will provide an overarching view of this phenomenon. Afterwards, the structure of this book will be explained.

1.1 Understanding the Relationship Between Crime and Economics

There are several ways to understand business crime, its regulation and prevention. One could start from a normative perspective and present the totality of regulations that characterise this area of crime. Proceeding this way, a possible focus would be on the distribution of competences in criminal procedural law.¹ According to this approach, business (or economic) crimes would be all crimes that fall within the jurisdiction of specialised criminal courts or public prosecutor's office.

¹Tiedemann K (2017), 27–28.

2 Special Authorities in Economic Crime

In Austria, there is a specialised Public Prosecutor's Office for Economic and Corruption Offences (Wirtschafts- und Korruptionsstaatsanwaltschaft, see § 20a and 20b of the Austrian Code of Criminal Procedure).²

In Germany, there is a Specialised Criminal Chamber for Economic Crimes at the District Court (Wirtschaftsstrafkammer am Landgericht, see § 74c of the German Court Organisation Act)³.

In Switzerland and Lichtenstein, there is no special judicial authority, but there are specialised departments within the Office of the Public Prosecutor that deal with economic crime. However, the Swiss Federal Constitution is committed to cantonal autonomy in court organisation, which is why the cantons can set up specialised courts. Thus, the canton of Bern has established a criminal court for economic crimes [Wirtschaftsstrafgericht] on the basis of its Court Organisation Act.

3 An alternative way would be to define the term via the legal interest (→ mn. 236). The reason⁴ is because business related crimes usually affect not only the legal interests of individuals, but also supra-individual (social) legal interests of economic life, such as “confidence in the functioning of the markets”⁵. In other words, it is about preserving certain values for the individual, for the economy or for society. In this context BCL concerns everything that violates these values. If law is viewed from this perspective, it concerns facts that lie in the past, and law thus becomes a means of state reaction to past crimes (**repressive approach**). But, one could also take a **preventative approach**. In that case, BCL would have to be defined by means of prevention strategies in order to make it clear what enormous demands business crime makes on careful corporate management.

4 In this text, a criminological approach to the subject has been taken.⁶ In fact, the perspective of criminology and the perspective of criminal law on the phenomenon of business crime are basically two sides of the same coin: economic criminology is an empirical science that deals with crime in economy as a social fact, whereas economic criminal law is a normative science. Nevertheless, empirical knowledge of business crime is suitable for an introduction to this legal discipline, in order to gain better access to legal matters. For this reason, this chapter provides a phenomenological overview of business criminality in space and time.

²Hinterhofer H and Oshidari BP (2017), mn. 5.32.

³Heissner S (2015), 39–40; Rettenmaier R (2019), 48, 51.

⁴Tiedemann K (2017), 29–30.

⁵Beckemper K (2011), 318–323.

⁶Tiedemann K (2017), 28–29.

1.2 So Close Yet So Far

Criminal law largely deals with everyday crime, such as intentional property crimes (e.g. theft or robbery) or negligent offences (e.g. bodily injury in road traffic), but also violent crime (e.g. rape or homicide). The daily newspapers bear witness to this. However, in the last years a new phenomenon of crime has been brought to public awareness. For many years the impression was that serious economic crimes, such as large-scale corruption or inhuman working conditions (slavery), take place far away from one's own front door. However, this has changed fundamentally, as one can see considering the VW diesel scandal.

Volkswagen (VW) Diesel Scandal—Case⁷

In 2015, the US Environmental Protection Agency (EPA) revealed that the Volkswagen AG of Germany allegedly had used an illegal shut-off device in the engine management system of its diesel vehicles. The software was able to determine that the car was under scrutiny by the authorities and therefore switched off the appropriate mechanisms in the engine management system to ensure compliance with the legal limits. Outside the test bench and thus in normal operation, the system for cleaning the exhaust gases in the diesel car was switched off. In order to promote sales and increase the market share of its diesel passenger cars, especially in the USA, Volkswagen ran major advertising campaigns to promote them as particularly “clean diesels”. According to Volkswagen AG, the software in question is used in around eleven million vehicles worldwide (→ mn. 1230). ◀

European and US citizens felt first hand what happens when powerful business groups commit offences that affect not only the general public, but also the individual. Though speaking generally, many business crime cases that are related to death or heavy injury don't usually happen in one's own backyard in terms of Europe or the USA.

Collapse of a Textile Factory—Case⁸

On April 24, 2013, five garment factories in the “Rana Plaza” building complex in Sabhar (Bangladesh) collapsed. The building had housed several textile companies, shops and banks. Although cracks had been found in the building the day before the accident and the police had banned access to the building, on 24 April 2013 more than 3000 people were inside the building when it collapsed. The majority of these people were textile workers who had been forced by the factory managers to start working.

⁷ Arbour ME (2016), 4–10; Crête R (2016), 25–31; Führ M (2017), 265–273; Haupt H (2016); Heese M (2021), 887–893; Kanning UP (2019), 42–53; Schneider MC (2016), 277–328.

⁸ Croucher R et al. (2019), 549–570; Hira A and Benson-Rea M (2016), 1, 11–12 mentioning the Rana Plaza building collapse among other events; Kahn Z (2018), 177–197; Rühmkopf A (2015), 213–233; Thiede T and Bell AJ (2017), 25–40; Wittig P (2020), 395, 396.

More than 1000 people were killed and almost 2500 people were injured. The cause of the collapse was the use of substandard building materials. ◀

- 9 Contrary to what one might think, a globalised economy is not an obstacle to uncovering those who are responsible of business crimes even at great distances.⁹

10 **Dam Breach Disaster in Brazil—Case¹⁰**

On 25 January 2019 the dam of Brumadinho (Minas Gerais, Brazil) burst. The dam belonged to an iron ore mine, which was the southern wall of an outlet basin and was intended to collect the muddy, fine-grained residues from ore processing. The mudslide caused when the dam burst destroyed buildings and facilities on the mine site and houses in settlements near the small town of Brumadinho, killing about 250 people. In January 2020, the public prosecutor's office in Brazil not only sued the mining company Vale, which operated the iron ore mine, but also the German company TÜV Süd. TÜV Süd, a certification company, had allegedly classified the plant as safe in September 2018. However, the public prosecutor's office had found internal e-mails from TÜV Süd employees, in which they expressed serious concerns about the stability of the dam. Allegedly, one employee said that the stability could not be confirmed, but as usual, due to massive pressure from the mining company Vale, they would probably confirm it regardless. ◀

1.3 Time (Doesn't!) Heal All Wounds

- 11 It is not only geographical dispersion that makes it difficult to identify criminal responsibility in a globalised economy. Often the consequences of business crime are not immediately foreseeable but develop slowly.

12 **Toxic Building Material—Case¹¹**

From 1973 to 1986, the Eternit SEG company in Italy manufactured asbestos products such as roofing panels, raw materials, window boxes, and façade panels. In 1986 Eternit SEG went bankrupt. Only 6 years later asbestos was banned in Italy. Although it had been known since 1970 that asbestos was classified as a harmful product (i.e.: carcinogenic), it was not fully forbidden until 1992. It took several decades until the production

⁹See also the decision of a Dutch appeals court that held the Nigeria branch of the oil giant Royal Dutch Shell responsible for damage caused by leaks in the Niger Delta, <https://www.bbc.com/news/world-africa-55853024>

¹⁰Redaktion beck-aktuell, July 10, 2019; Wittig P (2020), 395, 397.

¹¹Forti G and Visconti A (2019), 64–80; Handorn B and Holzapfel I (2013), 28–31; Widmer Luchinger C (2014), 460–480.

and use of asbestos was actually banned in European countries. However, many years after the closure of the Eternit plants, and thus after the end of production, numerous cases of poisoning and cancer occurred, which were believed to be related to asbestos production. As a result, in Italy in 2009, the former manager of Eternit SEG was charged with the death of approximately 3000 people because Italian workers allegedly died as a consequence of poisoning by asbestos. The managers and owners were each sentenced to 16 years imprisonment in the first instance but were able to obtain acquittals on appeal due to the defence of limitations. ◀

On the other side, some business-related crimes can immediately show some signs of detrimental harm. 13

Burning Drinking Water—Case¹²

In 2014 the drinking water supply in Flint (Michigan, USA) was changed. Due to the effects of bankruptcy (→ mn. 847) the city was no longer linked to Detroit's drinking water supply. Rather, the water began to be taken from the Flint River. However, the cheap river water proved to contain too many corrosive substances that the sewage plant could not filter out. This led to the corrosive water dissolving lead from the old pipes used to transport it. Soon after the switch, the residents of Flint complained about the bad smell and taste of the water, as well as rust in the water. The water could even be lit on fire with a lighter. Particularly notable in this case was the fact that the lead-containing water was drunk over a long period of time without any intervention of the authorities. A year and a half after the changeover, the responsible governor admitted that the drinking water was not suitable for consumption (→ mn. 946). The lead-contaminated water causes irreversible damage, destroying nerve cells and the brain. The legal reappraisal of possible malpractice and economic crime is still pending. ◀ 14

All in all, the human-caused accidents mentioned above make large parts of the population aware of the concerns of BCL. Public perception of criminality is enlarging by shedding light onto criminal misconduct by companies, as well as by individual managers and employees. As a consequence, economic areas are increasingly subject to state regulations designed to ensure that companies carry out their activities in accordance with the applicable legal rules. 15

What does it mean when criminal law puts the spotlight on business matters, although it normally focuses on criminal activity? What drives criminal law, which usually enacts regulations against drug crimes, violence or property crimes, to suddenly enact specific regulations against businesses? It is difficult to give an answer. In any case, it does not mean that the economy is placed under a general suspicion. Rather, it means that business practice is becoming sensitive to the concerns of business crime. The legislator is already 16

¹²Clark A (2018); Pauli BJ (2019).

aware that “clear-cutting” of the economy by means of tough criminal law regulations is not conducive to the goals of companies and individuals, and moreover, it is even harmful to entrepreneurial creativity. For this reason, criminal law relating to economic offences makes use of a special regulatory model that gives entrepreneurs in particular a great deal of freedom to determine how they can encourage their organisational structure at all levels to behave in a way that conforms to the law in the context of their business activities.

1.4 Purposes and Structure of the Book

- 17 This book aims to provide a comprehensive overview of various areas of BCL in the legal culture of Austria, Germany, Switzerland and the Principality of Liechtenstein. It is expressly aimed at a mixed international audience, which is why it does not go into national peculiarities of legal systems in any depth. This structure is also due to the fact that this book is primarily aimed at practitioners from the business and management sector and thus at non-lawyers. This target audience is to be sensitised to the basics of BCL.
- 18 To this end, a historical overview of the development of business crime is provided in the **first part**. Then an empirical and criminological overview will be offered for a better understanding of business crime.
- 19 However, a book on BCL must also address legal aspects. For this purpose, the **second part** provides the basics of the criminal justice system and criminal law in the light of the law culture of Austria, Germany, Liechtenstein and Switzerland. This foundation serves to clarify more specific aspects of BCL. In particular, models for liability bases and general problems regarding BCL will be discussed.
- 20 The **third part**, however, regards a selection of specific criminal phenomena. The book will provide an overview of the main legal (and criminal) risk areas for practitioners and managers.¹³
- 21 In the **fourth part**, the management perspective comes to the fore again. Strategies of compliance and internal investigations will be discussed. These are the instruments and tools that law enforcement agencies now attach enormous importance to, and which lie very much in the hands and creative power of corporate management.

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- This chapter gives a brief overview of the development of Business and Economic criminal law. The emergence and development of Business criminal law (BCL) has clear parallels with the development of the economy, and thus with economic history. Innovation for the economy is also the driving force behind legal developments.¹ The following historical milestones in particular are decisive for legal developments:

- the industrialisation of the economy
- the emergence of the risk society
- globalisation and digitalisation
- the global economic crisis of 2008
- the global health crisis of 2020

The following subchapters focus on these four milestones, even though the history of business crime is much older.²

The aim of the chapter as a whole is to provide a historical understanding of the subject matter of BCL in order to develop a fundamental understanding of contemporary BCL.

¹Fenwick M and Wrška S (2018), 2–3.

²Anderson JM and Waggoner I (2014), 16–26; Brettel H and Schneider H (2018), 37–47; Heissner S (2015), 14–15; Tiedemann K (2017), 32–38.

2.1 Industrialisation

22 Our starting point of this historical overview is industrialisation. Industrialisation is not a process that only began in the nineteenth century.³ Rather, it is a continuing process of complex development that took place over several centuries and has been characterised by various advances in technology (e.g. letterpress printing).⁴ Nevertheless, the so-called industrial revolution in the nineteenth century appears to be a fundamental milestone in the development of BCL. The invention of steam engines, locomotives and weaving machines led to a complete reorientation of traditional manufacturing methods, which ultimately enabled the **mass production of industrial goods** (coal and steel). This economic reorientation left previous social structures affected, resulting in an increase of social tensions at the time and the impoverishment of the working class⁵ and its politicisation.

23 In general criminal law this development was reflected in the fact that offences against other people's property (e.g. theft) were now subject to more severe penalties, whereas offences against physical integrity (e.g. bodily injury) were punished comparatively more leniently. In commercial law, the changes in the economy associated with industrialisation generated new developments, such as the limited liability company. However, this new development also created new criminal phenomena, such as the so-called founding fraud, deliberate bankruptcies of banks or companies and finally the formation of cartels. At the legal level, attempts were made to tackle these new crimes by reforming company law and taking the first steps towards financial and stock market supervision.⁶

24 Electric Power Theft—Case

An example of the development of new criminal provisions due to technological innovation is electric power theft—Case. Generally, the criminal offence of theft is defined as theft of another person's "mobile object".⁷ Because of the electrification, the question arose whether electric current is an "object" within the meaning of the theft paragraph. Since a strict analogy prohibition is applied in criminal law to the detriment of the accused, this question was of decisive importance in practice. If electric current is not a "object" in the sense of the legal definition of theft, then the withdrawal of electric energy was not punishable by law. At the end of the nineteenth century, the German Reichsgericht decided that electricity was not a "mobile object".⁸ Therefore legislative action had to be taken. This was seen in the year 1900 when the legislative body of

³Tiedemann K (2017), 33–34; for an in-depth study, see Kretschmer B and Zabel B (2018).

⁴Pieth M (2016), 7; Staffler L (2018), 269.

⁵Pieth M (2015), 59–60, 61.

⁶Tiedemann K (2017), 34; Selgert F (2018), 275, 278–282.

⁷In distinction to immovable things, such as real estate cf. Staffler L (2018), 269.

⁸Reichsgericht, Judgment of 20.10.1896, Rep. 2069/96, in: RGSt 29, 111–116; Reichsgericht, Judgment of 1.5.1899, Rep. 739/99, in: RGSt 32, 165–191.

Germany created a specific criminal offence for illegal withdrawal of electrical energy. ◀

During the first half of the twentieth century, the European economy reflected the preparations for and consequences of war, seen in the technological advances of the 1920s.⁹ Then with the great **World Economic Crisis of 1929** the interrelationships between economic creation and the reshaping of the individual's living conditions were made more clear.¹⁰ Thus, the USA tried to take regulatory measures to sanction and prevent the new negative side effects of the economic developments by means of legal deterrent.¹¹ In many cases, these measure concerned crimes against third party assets, such as theft, fraud or embezzlement, but not the phenomenon of corporate crime as such.¹²

25

2.2 Risk Society

After the catastrophe of the century (Second World War) the global economy slowly recovered¹³ and prosperity spread, especially in the countries of the Western World.¹⁴ It was the beginning of the development of the so-called **consumer society**, which was characterised by a (naïve) belief in progress.¹⁵ A progress that was often driven forward vehemently while risks were brushed aside. This sometimes led to great catastrophes.¹⁶

26

Vajont Dam Burst—Case¹⁷

On 9 October 1963 a landslide occurred at the dam in Vajont (Italy). Over the length of 2 km and 270 million cubic meters of rock—twice the volume of the dam—slid from Monte Toc towards the lake, filling the basin. The sudden displacement of the dammed water caused a tidal wave that swept over the dam, destroying small villages out of the valley and cost the lives of about 2000 people. The dam itself remained intact.¹⁸ Investigations revealed that there were already signs of an impending landslide when the dam was built (in 1956). In addition to various small landslides, geological reports at the start of construction revealed that a landslide had occurred in Palaeolithic times and

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⁹Pieth M (2016), 7; Pieth M (2015), 75; Tiedemann K (2017), 35.

¹⁰Gál IL (2019), 100, 103–104; Heissner S (2015), 15–16; Pieth M (2015), 75–76.

¹¹Kubiciel M (2019b), 1116–1121.

¹²Brettel H and Schneider H (2018), 38–40.

¹³Tiedemann K (2017), 35–36.

¹⁴Pieth M (2016), 8.

¹⁵Jameson F (1985), 111–125.

¹⁶Pieth M (2016), 8–9.

¹⁷Canestrini S (2003).

¹⁸Hendron AJ and Patton FD (1985).

that these rock masses were in danger of sliding into the lake as the water level rose to the foot of the previous landslide. These findings were never sent by the operating company to the responsible authority. During construction work, a landslide of 700,000 cubic meters of rock occurred, but without causing any major damage. The expert opinion of the University of Padua, which later proved to be wrong, considered a water level of up to 700 m to be safe. During the damming up, inhabitants of the valley complained of numerous ground movements and earthquakes, while loud noises could be heard from the mountain. The accused civil engineer committed suicide shortly before the criminal proceedings. The other defendants were sentenced to 21 years in prison in the first instance for the disaster and multiple involuntary manslaughter charges. In the second instance some sentences were reduced, and some defendants were acquitted due to lack of evidence. The operating company was also ordered to pay damages. ◀

- 28 However, the belief in progress remained unbroken. Despite the economic crises in the 1970s, such as the oil crisis, industrialisations made great strides, without regard for environmental concerns, which resulted in various industrial disasters. Accidents involving chemical companies, nuclear reactors or the release of asbestos with harmful long-term consequences affected the lives of countless people at home and abroad.

- 29 **Bhopal Gas Accident—Case¹⁹**
- On 3 December 1984, in the city of Bhopal (India), a large quantity of the gas methyl isocyanate (MIC), which is used to produce pesticides, escaped from a defective pesticide tank belonging to the US company Union Carbide. The effect of the gas is comparable to Zyklon B.²⁰ It is estimated that since this incident up to 25,000 people have died as a direct result of the gas. The media reported that substandard material had been used during the construction of the factory and that maintenance had been neglected. Moreover, at the time of the accident itself, the personnel had been overworked. In the end, the US company reached an agreement with the Indian state to compensate a small minority of injured parties with a ridiculously small sum of money,²¹ but the accident had no criminal consequences in either India or the USA. ◀

- 30 Although many industrial disasters could not be prosecuted or were not criminally assessed in the immediate aftermath, the accidents were seen by society as a wake-up call to the unscrupulous aggressive economic growth.²²

¹⁹Bloch K (2016), 3–7; Covell T (1991), 279–307; Muchlinski PT (1987), 545–587; Mukherjee (2010), 17–39.

²⁰For more details, see the analysis in Ganguly, BB (2019), 18,208–18,219.

²¹Shailendra K et al. (2019), 128–132.

²²Pieth M (2016), 9.

It is a coincidence of history that the sociologist ULRICH BECK completed his fundamental work “**The Risk Society**”²³ in the same year in which the nuclear disaster of Chernobyl occurred. Through his analysis, BECK claimed that a change of epoch was taking place. The industrial society was in the process of being replaced by a new macro sociological type: the risk society.²⁴ In the nineteenth century, during the modernisation of the agricultural society, the structural image of the industrial society arose. Today the contours of the industrial society are dissolving and the risk society has taken its place.²⁵ Like no other risk theorist before him, BECK emphasised how uncontrollable the situation truly is. According to BECK, this is expressed in the fact that man is in the position to decide the industrial self-destruction of all life on earth. While the post-industrial society, the **World Risk Society**, is characterised by a feeling of insecurity.²⁶

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BECK also took a look at the **law** and attested to its unsuitability for risk control and risk prevention. Criminal law, in particular, is fixated on the individual, whereas in reality, technological progress and an unrestrained economy create collective dangers and uncontrollable risks. Overall, society is already in the middle of the risk society, yet political systems, legal systems, the economy, science, and also the majority of political actors continue to be shaped by affluent and distribution society.²⁷

32

The aforementioned wake-up call society experienced in the aftermath of industrialisation of the world economies call was reflected in numerous changes in legislation, so that, for example, new criminal offences were conceived in the field of environmental criminal law²⁸ (→ mn. 929) or product liability (→ mn. 875) and liability concepts, such as the liability of companies as legal entities (→ mn. 433) or the liability of the superior (→ mn. 469), were discussed for criminal law purposes. However, the fact that criminal law cannot be a panacea, or even the first means of social control, has been demonstrated in criminal law studies. For example, there was strong criticism of the tendency of legislation to design new offences in such a way that they did not criminalise the violation of legal interests, but rather their purely abstract endangerment.²⁹

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²³ Beck U (1986).

²⁴ Pieth M (2015), 100.

²⁵ Beck U (1986), 14.

²⁶ Beckemper K (2019), 1105, 1112.

²⁷ Beck U (1986), 8.

²⁸ For an overview on corporate climate responsibility, see Weber RH and Hösli A (2021).

²⁹ Prittwitz C (1993).

2.3 Globalisation and Digitalisation

- 34 Another historical milestone in economic development, but also in the development of crime, is globalisation.³⁰ It therefore not only has a significant influence on the development of BCL, i.e. on the specific area of the economy, but globalisation also influences society in terms of political, cultural, ideological, and religious diversity, which in turn affects criminal law.³¹
- 35 In Europe, the end of the Cold War, in particular the fall of the Berlin Wall, marked a significant start to **globalisation**.³² This was followed by a large wave of privatisation, particularly in the Eastern European countries. Then, cooperation between the European states moved in a direction that aimed to abolish internal borders. In this way, the legal economy was to make the free movement of goods, services, finance and people within the European Union a reality (→ mn. 144). However, the resulting potential for the economy also had its downsides, which led to the rise of new crime phenomena. This becomes apparent when one takes a closer look at Europe. It is no coincidence that it was precisely at the time of abolishing internal borders that **organised crime** opened up new sources of income,³³ such as cross-border tax fraud, fraud to obtain state or European subsidies or (in the wake of the refugee crisis)³⁴ human-trafficking. The fact that cross-border cooperation in criminal matters was not yet adequately adapted to the new living conditions was also taken advantage of.
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- 36 **“Operation Paper Castle”³⁵**
An Italian-led consortium of France, Romania and the United Kingdom received EU funds for hovercraft prototypes. The hovercrafts were meant to reach remote areas in the case of environmental accidents. The Italian grantees used accounting artifices to syphon off money, claiming false expenses. Investigations also revealed the UK partner only existed on the paper. A mortgage on a castle facing foreclosure had been repaired with the EU funds. ◀
- 37 However, the reform of criminal law in coordination with several countries is a difficult task. This reluctance to make adjustments in criminal law and prosecution is due in particular to the fact that the exercise of criminal power (in the form of prosecution, but also in the form of penal legislation and design) is seen as a matter of **national identities**

³⁰ Beckemper K (2019), 1105, 1109–1110; McGinty S (2016), 50–67; Pieth M (2019a), 771–774.

³¹ Kubiciel M (2019a), 1115, 1120–1125.

³² Pieth M (2016), 10; Pieth M (2015), 109–112.

³³ Levi M (2012), 595, 612–615.

³⁴ Gratz W (2019), 96–101; Haverkamp R (2020), 199–220.

³⁵ The OLAF Report 2017, 19.

and cultures of the respective states (→ mn. 119).³⁶ The consequence of this special feature of criminal law was that in a common internal market within the European Union (EU) there were and still are very many different criminal laws. Not only are there great differences in the legal systems and thus gaps in criminal liability, but also there is very limited cooperation between states in the prosecution of cross-border crime. As a result, criminal law and prosecution practice lagged behind the real situation, which is why the prosecution of the new cross-border economic crime was very slow and incomplete. It was and still is up to the EU to give new impetus so that the states within the EU, but also the immediate neighbouring states with which the EU maintains relations, can effectively pool their resources in the fight against economic crime. This process is still under way, such as the creation of new offences (e.g. subsidy fraud) or, most recently, the establishment of a European Public Prosecutor's Office operating on a Europe-wide basis, which is particularly dedicated to crimes against the financial interests of the EU (→ mn. 168).

Beyond Europe, the tension release of the Cold War and the resulting international economic interdependence have also had their downsides. This is illustrated in an exemplary manner with regard to **Africa**. Many warlike conflicts on the African continent are not only late symptoms of decolonisation, but ultimately also a **fight for raw materials** (e.g. for oil, diamonds, gold, so-called rare earths) in the respective regions. It is not surprising that the illegal trade in raw materials serves to finance warfare.³⁷ However, this phenomenon does not remain locally in Africa. Occasionally, Western companies exploit (or even promote) existing conflicts in order to obtain certain raw materials at a cheap price. Such dynamics are sometimes accompanied by bribery (→ mn. 599) in order to secure the favour of the respective rulers and to enforce the illegal practice at the expense of the local population.

38

Gold Laundering—Case³⁸

In 2013, a Swiss NGO filed a criminal complaint with the Swiss federal prosecutor's office against the Swiss gold refinery "Argor-Heraeus SA" for alleged money laundering. The NGO claimed that Argor-Heraeus had refined gold that had been pillaged by an illegal armed group (the FNI, Front nationaliste et intégrationniste) from the north-eastern region of the Democratic Republic of Congo. The illegal armed group allegedly used the proceeds from the sale of the gold to finance its operations and purchase arms. In 2015, the Swiss federal prosecutor's office dismissed the allegations against Argor Heraeus. The Office said it could not be proved that the refinery deliberately dealt with shipments of illegally mined gold. Though it was thought to have armed rebels in the area, there was no solid evidence of the company committing money laundering offences, even through negligence. ◀

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³⁶ Staffler L (2019), 173–218.

³⁷ Pieth M (2016), 15–16.

³⁸ Pieth M (2019b), 165–167.

40 Another game changer for business crime is the so-called **digital revolution**.³⁹ Since the 1990s, a significant development has taken place in the field of computer science. At the heart of this development is the technological push that has led to the invention of the computer and finally to the establishment of the internet. This information technology offers new and almost unlimited possibilities for interaction between people, consumption or the processing and production of industrial goods. This can have great advantages for companies, but also considerable disadvantages for legal companies.

41 **Vinci—Case⁴⁰**

In November 2016, the shares of Europe's largest construction group Vinci plunged massively (by as much as minus 18%). In a press release it was said that its figures for 2015 and 2016 would have to be revised and that the CFO would be dismissed. Media, especially online media, had massively spread the news. However, the press release was fake.⁴¹ ◀

42 Digital advantages and disadvantages apply not only to the legal economy but also to the illegal "**shadow economy**".⁴²

43 **Silk Road—Case⁴³**

Between 2011 and 2014, one of the largest illegal black markets called "Silk Road" was firmly established in the Deep Web (Darknet). Here, mainly drugs, but also weapons and other illegal materials, could be traded through digital currencies. The advantage of using the marketplace was the great anonymity. The website Silkroad was finally smashed by the US FBI and the European Europol. Until then the website had about one million users and a turnover of more than 1.2 billion dollars. Apparently, "Silk Road" was maintained by just one single person, who appeared under the user name "Dread Pirate Roberts". ◀

44 Generally speaking, the new technology enables an international networking and integration of economy & society.⁴⁴ Data and data sets now represent a central raw material in economic life.⁴⁵ However, the production of data in people's everyday lives (so-called "big data") also has its dark sides. Initially, the concerns were criminal phenomena, such as

³⁹ Pieth M (2016), 10.

⁴⁰ <https://www.bloomberg.com/news/articles/2016-11-22/vinci-says-builder-isn-t-revising-accounts-cfo-isn-t-fired>

⁴¹ <https://www.vinci.com/vinci.nsf/en/press-releases/pages/20161122-1640.htm>

⁴² Pieth M (2017), 1053–1062.

⁴³ Kremling J and Sharp Parker AM (2018), 143–155.

⁴⁴ Especially from a criminal law perspective: Golla S (2021), 667–672; Rostalski F (2020), 481–488; Staffler L (2020), 21, 46–48; Staffler L and Jany O (2020), 164–177.

⁴⁵ Staffler L (2018), 269–274; cf. Jöns J (2019).

computer fraud, hacking or industrial espionage⁴⁶ (so-called **cybercrimes**, → mn. 683).⁴⁷ But now, new illegal business practices are emerging, such as the business of illegally obtaining data to influence decisive elections (Cambridge Analytica scandal, Brexit, Trump election campaign).⁴⁸

Facebook-Cambridge Analytica Data Breach—Case⁴⁹

Since 2013, millions of Facebook users' personal data were harvested without consent by a company named Cambridge Analytica. They predominantly used the data to build profiles on users and then used this for political advertising. ◀

Today, **disinformation** is no longer regarded just as a lie; it is now perceived harmful to the economy and the society (→ mn. 206).⁵⁰ Furthermore, the dark side also affects the behaviour of authoritarian or even democratic states towards their citizens. As we've seen through such revelations as Wikileaks or whistle-blowers like EDWARD SNOWDEN, secret services have developed enormous capacities and skills through technological progresses to carry out mass surveillance⁵¹ and create personality profiles of citizens. In many cases, **digital espionage activity** allegedly not only influences democratic elections (e.g.: US presidential election campaigns of 2016),⁵² but it is also used by state actors specifically for industrial espionage (→ mn. 864).⁵³ Digitalisation has also achieved enormous progress in the field of **artificial intelligence** in recent times. This poses important challenges for criminal law: On the one hand this progress protects companies from unfair practices within the framework of their legal economic activities, and on the other hand it sanctions illegal activities by companies or, in the best case, it undermines them preventively (→ mn. 901).

⁴⁶ Kilchling M (2020), 57–62.

⁴⁷ Rüdiger TG and Bayerl PS (2020).

⁴⁸ Hill H (2018), 47–54; Pernice I (2019), 101, 115–119.

⁴⁹ Grimm R and Waidner M (2021), 51; Kaiser B (2019); Lubishtani K and Flattet M (2019), 710–723; Polanski PP (2018), 141–146; Söbbing T (2018), 182–188; Wylie C (2019).

⁵⁰ Brauneck J (2020), 89–111; in the context of the Covid-19 coronavirus outbreak, the European Union and the World Health Organisation and other international organisations speak of “infodemic” (see the Speech of Vice President Věra Jourová of June 4, 2020); as the European Union External Action special report update, 1 April 2020 it mentions, “In the EU and elsewhere, coordinated disinformation messaging seeks to frame vulnerable minorities as the cause of the pandemic and to fuel distrust in the ability of democratic institutions to deliver effective responses. Some state and state-backed actors seek to exploit the public health crisis to advance geopolitical interests, often by directly challenging the credibility of the European Union and its partners.”

⁵¹ Baur A (2020), 275, 278–279, 279–281.

⁵² Klaas B (2017), 118.

⁵³ Hannas WC et al. (2013), 230–242; Kim SK (2020), 110–111; Schallbruch M (2021), 94–96.

2.4 Global Economic Crisis of 2008

47 The world economic crisis of 2008 represents another important historical turning point for economic globalisation, whose effects started to be seen in the field of business criminality.⁵⁴ The crisis originated in the USA, where for years mortgage banks had been extremely generous in granting mortgage loans on second- or third-ranking properties (**subprime**). These loans were bundled into derivatives in order to feed them into securities trading.⁵⁵ A complex network of the paper industry and long chains of securities trading meant that liability was increasingly becoming a matter of importance, while the use of equity capital was being dispensed with. Ultimately, the business model was based on speculation and virtual values whose credibility was additionally fuelled by certain rating agencies. These had high pay-outs and therefore had a self-interest in the most optimistic possible representation of credit risks. In the end, this naturally resulted in a very favourable risk assessment.

48 Subprime—Case⁵⁶

The term “subprime” related to mortgage loans with low creditworthiness of the borrowers. The loans were sold in spring 2007 to customers who did not have sufficient funds to repay them. In the USA, it was common practice to lend 100% or even 110% of the cost of the property. As the refinancing of US loans in the form of loan securitisation shifted to the international financial market, the subprime threat ultimately reached other industrialised countries. ◀

49 From today’s perspective, the collapse of the system seemed inevitable once the real estate bubble had burst. After the collapse, the global financial economy and thus major economic players such as banks began to totter. The economic crisis claimed prominent victims (e.g. US investment bank Lehman Brothers) and damaged private investors to a large extent.⁵⁷

50 The national budgets of various states were also massively affected by the crisis. First, they had to spend considerable sums to avert the insolvencies of banks whose decline would have had a significant economic impact on the national economy. The considerable financial outlay, but also the decline of important financial players, made the states fear for their **tax revenues**, which are vital for the state social welfare system.⁵⁸ This led to a fight

⁵⁴Bülte J (2019), 1, 2; Headworth S and Hagan JL (2016), 275–293; Höft K (2018); Jean-Richard-dit-Bressel M (2011), 144–163; Nelken D (2012), 623, 651–655; Ryder N et al. (2017); Schröder C (2015), 357–392; Tosza S (2018), 1–5; for an in-depth study on this subject matter, see Höft K (2018).

⁵⁵Pieth M (2016), 11.

⁵⁶Bloss M et al. (2009), 15–43, 45–65, 67–85 and passim; Sommer R (2009), 10–20, 125–195.

⁵⁷Heissner S (2015), 23–24.

⁵⁸Pieth M (2016), 12; see also Heissner S (2015), 28.

against so-called tax havens, offshore centres etc. (especially the Global Tax Forum of the OECD, G20 states).⁵⁹ Finally, it was recognised that tax havens ultimately promote social inequality. In addition to the classic topics of business crime, such as money laundering and organised crime or corruption, criminal tax law has now also been added to the list.⁶⁰ It was in the interest of the states to **intensify international cooperation** in criminal and tax matters in order to tackle tax-avoiding practices.

2.5 Global Health Crisis (Covid-19 Pandemic)

Although the so-called “Covid-19” pandemic did not have a drastic impact on the development of criminal law as the global economic crisis of 2008 did, it nevertheless has shown which crime phenomena were established as a result of the state of emergency the global economy was thrown into and which risks exist for entrepreneurs in such times.⁶¹

Miracle Cure—Case⁶²

An example of criminal entrepreneurs that appeared during the Covid-19 pandemic is shown by a case in Florida (USA): Federal prosecutors in Miami have charged four Florida residents (father and sons) who allegedly marketed “Miracle Mineral Solution”, a toxic bleach, as cure for Covid-19. ◀

The fundamental changes triggered by the pandemic are putting considerable pressure on companies of all sizes. As a result, board members and managing directors have to make far-reaching decisions within a short period of time. While at the same time there is considerable uncertainty about the forecast, such as how long the corona crisis will last and how severe the consequences will be. Such things are impossible for **political actors** to predict, especially in regard to the economy. Not every decision will have the intended outcome and some decisions may cause more harm than good.

Entrepreneurial activity must be critically examined, especially in the time of a pandemic health crisis. According to practical experience, situations in which **insolvency** (→ mn. 834) is imminent, such as we see with the pandemic situation, can lead to actions that entail a certain risk, especially with regard to the criminal offences of economic criminal law. In such difficult times an entrepreneur has to regularly and carefully assess insolvency and over-indebtedness. Although some legislators⁶³ have obtained an extension

⁵⁹ Herlin-Karnell E (2012), 481–494; Pieth M (2016), 12–13; Ryder N et al. (2016), 55–58.

⁶⁰ Cf. Heissner S (2015), 27.

⁶¹ Esser R and Tsambikakis M (2020); Fahl C (2020), 1058–1065; E. Schönborn (2020); For the impact of the Corona-Crisis on the enforcement of criminal sentences see: Feest J (2020), 113–122.

⁶² <https://www.justice.gov/usao-sdfl/pr/father-and-sons-charged-miami-federal-court-selling-toxic-bleach-fake-miracle-cure>

⁶³ Römermann V (2020), 6–38.

for the filing deadline for insolvency, the majority of business crimes have remained unchanged.

55 While the pandemic did not affect classic criminal offences under economic criminal law, crime was present at the economic level.⁶⁴ Thus, with the pandemic **cybercrime** increased.⁶⁵ Business secrets such as vaccine development data have been the target of multiple cyberattacks (→ mn. 683). For example, vaccine development data from pharmaceutical giants Pfizer and BioNTech was stolen in a December 2020 attack on the European Medicines Agency (EMA). The stolen dataset was then manipulated and subsequently published on the Internet, arguably diminishing confidence in the quality of the vaccine and thus in the work of the companies involved.⁶⁶

Other cyberattacks were aimed at immediate financial gain. Fraudulent websites promised companies immediate state aid which could secure their existence. Forms such as “emergency aid without repayment obligation” enabled fraudsters to obtain the essential data of companies so they could redirect the requested emergency aid from the state to their bank account, while the company in need actually ended up empty-handed. The states have therefore targeted cybercrime.

56 The topic of compliance—i.e. strategies for crime prevention—has also increasingly found its way into the **public health sector**.⁶⁷ In certain situations, the pandemic caused by the corona virus forced doctors to decide who would receive treatment and who would not, a life or death decision.⁶⁸ This decision became necessary when the number of patients requiring an intensive care bed with ventilation exceeded the number of treatment places available. This necessary selection is known as “triage”⁶⁹ (French “trier”: to read, select, sort). Triage originates from wartime, meaning to decide between two human lives, a serious conflict for any medical practitioner.⁷⁰ But unlike war, the pandemic is significantly different. In war or in accidents, just as in a pandemic, the classification of patients and the basis for triage decisions is based on a rough screening and urgency. The criteria of urgency and prospects of success are also relevant. However, in the case of a pandemic, other factors will be taken into account when a decision is made, namely oxygen saturation of the blood, the patient’s circulatory condition, serious health problems or frailty.⁷¹ In this context, compliance means that doctors in a corona emergency need legal certainty in order for a triage decision to be made. In the absence of legally binding guidelines for such

⁶⁴ Kubiciel M (2020).

⁶⁵ Tabrez A (2020).

⁶⁶ <https://www.politico.eu/article/european-medicines-agency-ema-cyberattack-coronavirus-vaccine-data/>

⁶⁷ Cf. Schönborn E (2021), 5–14.

⁶⁸ Ast S (2020), 268–274.

⁶⁹ Jansen S (2021), 155–169.

⁷⁰ Engländer A and Zimmermann T (2020), 1398–1402; Hörnle T et al. (2021).

⁷¹ Tonio W (2020), 656–677.

decisions, physicians are not only moving in ethically but also in legally uncertain terrain. There are considerable liability risks for doctors and hospitals if medically necessary treatment is denied.⁷²

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⁷²Gaede K et al. (2020), 129–138.

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- This chapter explores the question of how to define Business criminal law (BCL). It focuses on the phenomenon and characteristics of business crime, as well as the task and role criminal law has in the regulation and prevention of business crime.

The aim of this chapter is to develop the foundations of economic criminal law from the perspective of the perpetrator or the crime in order to better assess the role of criminal law as a means of social control.

3.1 Terminology

The terminology used here must be explained at the beginning of this chapter. This work is under the guiding concept of “Business Criminal Law”. This term is largely unknown in scientific literature;¹ in fact, other terms are much more commonly used in connection with business crime.²

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¹Exception: Hefendehl R (2004), 51, 55, 56.

²See Heissner S (2015), 38: “The term white-collar crime can be highly misleading.”

- 58 ► **White Collar Crime** Treatises on white-collar crime are often dealt with under the term “**white-collar crime**” (→ mn. 66).³ This term is based on the assumption that white-collar crime committed by the powerful and noble people differs from everyday crime. From this perspective, the term white-collar crime has a certain degree of plausibility.
- 59 ► **Economic Criminal Law** Another term used to characterise this specific area of law is “**Economic Criminal Law**”.⁴ This term covers all crimes that occur in or have to do with the economy. The concept of economy and its links to criminal law is therefore as broad as possible.
- 60 ► **International Economic Criminal Law** Recently, even the international references of business crime have been summarised under the term “**International Economic Criminal Law**”.⁵ This term aims in particular to address the responsibility of corporations for transnational human rights violations. The subject area aims to show that serious human rights violations are also committed by companies (→ mn. 180, 214). However, the field of research is still relatively young.
- 61 ► **Corporate Criminal Law** The term “**Corporate Criminal Law**” appears narrower in the choice of words. Here, special aspects of business crime are considered, which are tailored to the specific problems the company may have as a legal entity.
- 62 However, the work presented here was deliberately tailored to the new term “**Business Criminal Law**”. In order to make the choice of terms understandable, the term “business” should be discussed first before focusing on the term “business law”. The terms “business” and “Economics” are somewhat overlapping notions, yet, their use generally refers to different analytical levels.⁶ On the one hand, the term “business” focusses on firms as specific actors, and their entailed activities. This would for example comprise of firm’s relationship to their consumers, their products or services, or their international activities. On the other hand, the term “economics” refers to a variety of actors and economic entities, resources and allocation dilemmas.⁷ The term is widely used at an aggregate level when systems and interrelations or outcomes of multiple actors are described.⁸ Hence, “business” denotes a distinct domain of economy and refers to activities within companies bounded by

³For example: Ligeti K and Tosza S (2019); Rorie M (2020).

⁴Boursier ME (2017), 465–480; Preuß T (2018), 98–106; Vidlička SR (2017), 851–884.

⁵Ambos K (2018a), 499–566; Ambos K (2018b); Jeßberger F et al. (2015); Vidlička, SR (2017), 851–884.

⁶Cuervo-Cazrarr A et al. (2016), 881–897; Hogarth RM and Reder MW (1986), 185–207.

⁷Backhouse RE and Medema SG (2009), 221–233; Samuelson PA and Nordhaus WD (2010).

⁸Adam C and Gollin D (2015), 1–7.

their organisational structure. Business is thus a sub-concept of economy and refers to the entrepreneur as a person and the organisational structure of the company.⁹

Consequently, “**Business law**” relates to the body of law which governs commerce and business. This branch of law comprises all legal requirements around forming, operating, dissolving and engaging with a business. Furthermore, it encompasses all branches of law concerning employment, agency, business organisations, contracts, property, sales, commercial papers, regulations dealing with creditor and consumer protection, and insurance. Business law encompasses a wide range of law that deals with trading and economy in the broadest sense with a particular focuses on the perspective of entrepreneurs. BCL is thus more far-reaching than Corporate criminal law because it takes into account the aspects of the entrepreneur’s individual responsibility. Consequently, BCL is more specific than Economic criminal law, because the economy is not considered in its entirety. The focus is rather on the specific subject area of entrepreneurship and management.¹⁰ The reference to business is intended to show management strategies for avoiding criminal behaviour. BCL reflects an “**entrepreneurial view**” on Economic criminal law.

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3.2 Defining Business Criminal Law

As already indicated in chapter one, there are different approaches to grasp the concepts of BCL. First of all, however, it should be noted that there is no explicit definition of BCL offered by the legislator. Nevertheless, there are various approaches to defining BCL. From a **legal point of view**, one could understand BCL as a matter that falls under the jurisdiction of a specialised public prosecutor’s office in economic matters (e.g. in Austria) or before a specialised court or chamber for criminal offences (e.g. Germany) (→ mn. 2).¹¹ This definition is, for example, the basis for the statistics of the German police to evaluate economic crime.¹² The reason for setting up specialised units in the field of criminal justice is that complex criminal cases in economic matters usually require special knowledge, competences, and skills (e.g. reading balance sheets). From another legal point of view, namely legal doctrine, one could approach business crime by focusing on the so-called “**protected legal interest**” [*geschütztes Rechtsgut*] (→ mn. 236). This is because the history of economics and criminal law shows that classical criminal law remains very much focused on the individual and his or her crimes (e.g. theft, bodily injury, etc.), while

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⁹Davenport TH (2009), 2–6; Laamanen T et al. (2018), 213–219.

¹⁰Booth RA (2008), 127–145.

¹¹Theile H (2019), 763–768.

¹²Bundeskriminalamt (2019), 2.; cf. Heissner S (2015), 40.

economic crime relates primarily on collective goods and dangers, such as banking, the stock exchange, the market, and state tax revenues.¹³

- 65 For a practical approach to BCL, however, an empirical perspective, or rather a **criminological approach**, offers an interesting definition. Criminology is the study of crime and deviant behaviour from a social and an empirical perspective.¹⁴ Therefore, the criminological approach is used to examine the phenomenon of crime in its empirical form. Criminological research is directed at, among other things, the analysis of the causation of crime and the personality of criminals. Criminology has developed a variety of theories for research on business crime as “deviant behaviour”.¹⁵ For an overview, the most important theories developed during the twentieth century are presented here. Their strengths and shortcomings in explaining business criminality are still being discussed and developed today. It is therefore worth looking at the classical theories. In general, these theories are used to explain business crime by distinguishing between the person of the offender (so-called offender related definition, → mn. 66)¹⁶ and the characteristics of the offence (so-called offence related definitions, → mn. 75).

3.2.1 Offender Related Definitions

- 66 The historical starting point¹⁷ for the approach to white-collar crime is a study by SUTHERLAND conducted in 1940.¹⁸ He developed the concept of “**white-collar crime**”, the most popular term used to describe business criminality, distinct from the criminality of blue-collar workers. His analysis is therefore specifically related to the perpetrator. According to SUTHERLAND, white-collar crimes are committed by a person of respectability and high social status. Thus, white-collar crime has a much lower probability of being discovered, while at the same time the perpetrators have a much better chance of evading responsibility because they have a wide network with those in power. Furthermore, the author showed that the costs of white-collar crime exceed those of everyday crime many times over.¹⁹ Regarding the victims of white-collar criminality (consumers, investors, stockholders), the author argues that unlike the perpetrators, they are usually not organised

¹³ Beckemper K (2019), 1105, 1109.

¹⁴ Kaiser G (1996), § 1 mn. 1: “Kriminologie ist die geordnete Gesamtheit des Erfahrungswissens über das Verbrechen, den Rechtsbrecher, die negativ soziale Auffälligkeit und über die Kontrolle dieses Verhaltens”; cf. Bock M (2008a), § 3 mn. 14–17, 18–26; Kunz KL and Singelstein T (2016), § 1 mn. 2–4.

¹⁵ Cf. Heissner S (2015), 41–42; Schneider H (2008), § 25 mn. 4–15; Theile H (2016a), mn. 6–11.

¹⁶ See Hugendubel J (2016), 47–53.

¹⁷ For further information on the studies of Sutherland see Geis G (2016), 25, 26–28.

¹⁸ Sutherland EH (1940), 1–12; cf. Kaiser G (1996), § 72 mn. 4; Schneider (2008), § 25 mn. 2, 5; Theile H (2016a), mn. 6

¹⁹ Sutherland EH (1940), 1, 4–5.

and, due to a lack of technical and organisational understanding, they might have little chance of protecting themselves against such crime.²⁰ Thus, the crime is less likely to be discovered than the usual “street crimes”.²¹ Ultimately, SUTHERLAND’s view that white-collar crime is real crime was revolutionary for the zeitgeist of the time.²²

It is true that SUTHERLAND’s theory is less empirically based than ideological motivated,²³ because it contains a fundamental social critique of capitalism, as capitalism itself is held responsible for the genesis of these crimes.²⁴ Moreover, the theory falls short because economic crimes are not only committed by business leaders.²⁵ Yet the approach is part of the common criminological repertoire.²⁶ In particular, the term “white-collar criminality” used by SUTHERLAND aptly demonstrated the **connection between crime and power**. In this context, bribery offences are a good example. As we see today, the relationship between crime and power still has its justifications considering that powerful people influence legislation and in turn influence the definition and range of criminal law. Thus, the limitation of power of lobbyists is also one of the important political challenges facing society.²⁷

67

Another classical approach is the definition developed by CLINARD & QUINNEY. They developed a differentiation of white-collar crime which is still widely used today.²⁸ According to this, white-collar crimes can be divided into two categories, namely Occupational Crime on the one hand and Corporate Crime on the other.²⁹

68

► **Occupational Crime:** In **Occupational Crimes** the perpetrator acts in her/his own interest. To this end, she/he exploits her/his professional position and acts to the detriment of her/his own employer (industrial crime) or to the detriment of third parties. An employee stealing company property is an example of occupational crime.

69

► **Corporate Crime:** **Corporate crimes** are crimes committed in the economic interest of a company by members of the company to the detriment of natural persons or another

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²⁰ Sutherland EH (1940), 1, 8–9; cf. Kaiser G (1996), § 72 mn. 3.

²¹ Sutherland EH (1940), 1, 5–8; Sutherland EH (1983), 7.

²² Theile H (2009), 38–40.

²³ Theile H (2009), 35–36.

²⁴ Nelken D (2012), 623, 628–630.

²⁵ Heissner S (2015), 38; Kaiser G (1996), § 72 mn. 1; Kert R (2016), 1, 4; Theile H (2016a), mn. 7.

²⁶ Geis G (2016), 25, 28–33.

²⁷ Pieth M (2016), 18.

²⁸ Clinard MB and Quinney R (1967), 188; cf. Schneider (2008), § 25 mn. 5.

²⁹ Kaiser G (1996), § 72 mn. 15; Schneider (2008) § 25 mn. 5; Theile H (2016a), mn. 8.

company.³⁰ In contrast to occupational crime, from the perpetrator's point of view, corporate crime focuses on the benefit of others, because the crime does not benefit the perpetrator, but the company.³¹ One example of this is the VW diesel scandal (→ mn. 6), in which software engineers developed and implemented manipulation software for the benefit of the VW Group so that the company had a competitive advantage.

71 The distinction between occupational and corporate crimes is very useful for criminological studies, for example, one can implement specific measures in order to prevent and control sets of business criminality.³² However, it seems questionable whether business crime really only belongs in the category of corporate crime which emphasises the connection between business criminality and the phenomenon of the company.³³ Doubts arise because business crimes are also committed outside a company by individuals, such as tax evasion or credit fraud.³⁴ Furthermore, it seems questionable whether such a **sharp dividing line between corporate interests and self-interest** actually reflects reality.³⁵ Are the interests of the company and the employees really complementary?

72 Finally, another approach to explaining business crime that takes the perspective of the perpetrator is the theory of the «**homo economicus**» by Nobel Prize winner GARY BECKER.³⁶ His considerations are based on principles of the French Revolution, that man voluntarily renounces a part of his arbitrariness in order to realise the basic conditions for a free (economic and) social order (BECCARIA, ROUSSEAU, VOLTAIRE, MONTESQUIEU). Accordingly, man abides by the law because violations of the law are not worthwhile. Almost 200 years after the French Revolution, the image of «homo economicus» is rediscovered in the “law and economics” movement. GARY BECKER emphasises the rationality of man (rational choice theory)³⁷ by saying that every human being strives to maximise her/his

³⁰See Schünemann B (1982), 41: Es ist “der Gesamtbereich der Wirtschaftsstraftaten gemeint, bei denen durch ein Handeln für ein Unternehmen externe Rechtsgüter und Interessen einschließlich der eigenen Rechtsgüter und Interessen der Unternehmensmitarbeiter verletzt werden.”

³¹Simpson S (2002); Simpson S et al. (2014), 4: “Corporate crime, therefore, encompasses a wide array of illegal activities that are criminally, civilly, and administratively proscribed and which may be undertaken by individual managers/employees as well as by the firm (as an organizational actor) to achieve organizational goals. Corporate crimes are generally distinguished from other types of white-collar offences by the use of organizational resources and by who gains from the offence. Thus, when Raymond Scott Stevenson, head of Tyco’s tax department, directed a series of transactions designed to reduce Tyco’s state tax liability by back-dating transactions to avoid reporting a \$ 170 million dollar federal capital gain, he used organisational resources to “benefit” the company’s bottom line but not himself.”

³²Theile H (2015), 1219, 1221.

³³Theile H (2009), 38–41.

³⁴Wittig P (2017), 7.

³⁵Theile H (2016a), mn. 9.

³⁶Hugendubel J (2016), 53–55; Kunz KL and Singelnstein T (2016), § 12 mn. 23.

³⁷Tutic A (2020).

individual benefit.³⁸ The starting point of the thesis is that **modern man is oriented towards profit**. As such, a person may become a criminal whenever the expected benefit from the crime is higher than the benefit from a legal activity. The state must therefore ensure that committing a crime is as “expensive” as possible. Only if the punishment is higher than the benefit of the crime does the individual refrain from committing business crime.³⁹ The state must therefore offer a mixture of harsh (abstract) punishment to deter potential offenders with a low willingness to take risks, but at the same time the state has to conduct intensive criminal prosecution to deter potential offenders willing to take a higher risk.⁴⁰

The theory states man seeks to maximise utility according to rational considerations is a plausible basic assumption.⁴¹ With appropriate modifications for specific situations, the theory is viable. However, it has been empirically proven that people only act rationally to a limited extent.⁴² Moreover, this approach has also been criticised because it partly ignores the impact of social issues like unemployment or poverty.⁴³

73

Profile of the Average Business Criminal

What is the profile of the business criminal according to criminology?⁴⁴ The business criminal is predominantly male, about 40 years old, married, has a good level of education, and comes from the middle or upper middle class. He has already worked for about 10 years in the company concerned by his crime. He is often career-oriented, more willing to take risks, assertive and therefore has qualities that also distinguish successful managers.

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3.2.2 Offence Related Definitions

So far, the perpetrators perspective has been discussed. The following focusses on the crime itself. In this regard, academics often develop the definition of business crimes regarding the value and objects that have been attacked.

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The first author who developed such a definition was EDELHERTZ.⁴⁵ He said that business crime is based on the following mission statement: the offence leads to financial advantages

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³⁸ Kunz KL and Singelstein T (2016), § 12 mn. 22–25; Theile H (2009), 45–54.

³⁹ Kunz KL and Singelstein T (2016), § 12 mn. 25–33.

⁴⁰ Becker G (1968), 169–217.

⁴¹ Bock M (2008b), § 10 mn. 95.

⁴² Cf. Bock M (2008b), § 10 mn. 94; Kunz KL and Singelstein T (2016), § 12 mn. 33, 34–36, 37–42.

⁴³ Bock M (2008b), § 10 mn. 95.

⁴⁴ Heissner S (2015), 60–64; Kaiser G (1996), § 73 mn. 3–6; Klenowski P et al. (2016), 101, 107–126; Kunz KL and Singelstein T (2016), § 18 mn. 9; Schneider H (2008) § 25 mn. 11; Wittig P (2017), 6.

⁴⁵ Edelhertz H (1970).

without requiring physical intervention by the perpetrator.⁴⁶ Accordingly, it is essential for business crime that:

- the criminal **intent** is disguised,
- the criminal relies on the **carelessness** of her/his victims,
- the victims ultimately **damage themselves** as a result of having consented to the transfer of the good or service,
- the perpetrator wants to **conceal the negative consequences** of her/his act towards the victim,
- the perpetrator **builds up a facade** to hide the true nature of the events.

This approach has merits, although it cannot comprise the entire phenomenon of business criminality in one single definition.

77 In recent studies, however, the focus of the definition has been turned toward the **damage and victims** of business crime.⁴⁷ Other authors emphasise the criterion of the **abuse of trust** for the purpose of defining business criminality.⁴⁸

78 How Big Is the Damage of Business Crime?⁴⁹

One answer can be seen, for example, in the annual report of the Federal Criminal Police Office in Germany. The current report from 2018 states that business crime has caused damage of 3356 billion euros in Germany.⁵⁰ However, the damage is difficult to quantify. This is because, in addition to the quantified damage in the statistics, there are also damages that must be taken into account but cannot be quantified, such as distortions of competition (e.g. through unfair practices), loss of reputation of companies, and loss of confidence in the functioning of the economic order.⁵¹

⁴⁶Edelhertz H (1970), 3: White-collar crime “will be defined as an act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage”; 4: “The character of white-collar crime must be found in its modi operandi and its objectives rather in the nature of the offenders.”

⁴⁷Shapiro SP (1990), 346–365.

⁴⁸Kaiser G (1996), § 72 mn. 6; see also Heissner S (2015), 42–50.

⁴⁹Heissner S (2015), 64–70.

⁵⁰Bundeskriminalamt (2019), 5.

⁵¹Bundeskriminalamt (2019), 6; Schneider H (2008), § 25 mn. 36.

Generally, it should be noted that the statistics only list and evaluate cases that have been reported.⁵² Yet, many cases of business crime are not reported. This occurs, for example, because victims (e.g. companies) fear damage to their reputation. Therefore, the statement from the annual report, according to which the solving rate for business crime is **90.9%**,⁵³ must be considered with reservation. Overall, it should be borne in mind that business crime accounts for a small proportion of total crime, but that monetary damage accounts for a very high proportion of total crime.⁵⁴

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3.2.3 Interim Result

All of these definitions provide valuable insights into business criminality but cannot fully grasp the phenomenon of business criminality due to its complexity.⁵⁵ In the end, when defining “business criminality” a compromise seems to be appropriate and new aspects should be included. One focus should be that business crime is a specific form of organised crime, namely a form of **organisational crime**.⁵⁶ Unlike organised crime, whose main purpose is illegal activity, organisational crime relates to the offences committed within an organisational structure,⁵⁷ in which crime is not the principal objective of activity. This type of crime unfolds in a context of legal organisation (namely, economic organisation). Again, the VW scandal (→ mn. 6) is a suitable example. It occurred within a legal organisation where certain individuals used criminal methods in order to gain legal business advantages. In this respect, it seems better to see business crime as a separate type of organised crime.

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However, it is difficult to draw the line between organised and organisational crime. This is due to the fact that legal companies sometimes maintain black accounts to commit crimes (such as corruption), as economic crimes are accepted and committed by legally acting companies in the context of globalisation (→ mn. 35), e.g. exploitation of people, fire safety violations. Finally, it seems questionable whether the organisation of several people is even an important element to define business criminality. Digitalisation (and the example of “Silkroad-Case” (→ mn. 46), where illegal goods were offered on anonymous and secure trading platforms) shows that one person alone can commit large-scale economic crime. The organisational effort for committing business crimes is therefore not necessarily bound to a majority of persons.

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⁵² Kunz KL and Singelstein T (2016), § 16 mn. 11–21; Schneider H (2008), § 25 mn. 35.

⁵³ Bundeskriminalamt (2019), 5.

⁵⁴ Kunz KL and Singelstein T (2016), § 17 mn. 9.

⁵⁵ Cf. Bock M (2008a), § 3 mn. 6.

⁵⁶ For an in-depth study on the literature to organisational crime, see, for example, Needleman ML and Needleman C (1979), 517–628; Wong KM (2005).

⁵⁷ Theile H (2016a), mn. 10.

3.3 Characteristics and Motivation

82 Regardless of how one approaches the phenomenon of business crime, i.e. whether one focuses on the perpetrator or the crime, the definitions briefly outlined above show that business crime is driven by its own characteristics and motivations.

This is described in more detail below.

3.3.1 Characteristics

83 Based on the controversial studies of criminologists in the USA in the middle of the twentieth century,⁵⁸ the historical background of business crime shows that there are some peculiarities and characteristics.⁵⁹

84 Characteristics of Business Crime

- Business crime is committed by people in power.
- This type of crime is embedded in a competitive environment, namely the competition of the economy. This ideology of competition, which aims to maximise profits at all costs, sends out strong incentives to achieve the economic goals, by criminal means if necessary.⁶⁰
- The perpetrators often work in a protected environment, which gives them the opportunity to commit the crimes not only inconspicuously but often with impunity. The perpetrators are usually in high positions and have an overall view of the organisation in which they work, which is why they can cover their tracks well.
- The fact that the activities in a company based on the division of labour are often extremely complex plays into the hands of the perpetrators,⁶¹ so that people who have ultimately suffered damage often only become aware of the offences very late.
- Economic crime is also characterised by the fact that the persons concerned are in the networks of acquaintances or relatives, but also in political and business networks. This creates an environment that protects them from criminal prosecution authorities.

(continued)

⁵⁸Nelken D (2012), 623, 628–638.

⁵⁹The following is based on the summary by Pieth M (2016), 21.

⁶⁰Coleman JW (1987), 406–439: “Culture of Competition”; Schneider H (2008), § 25 mn. 23.

⁶¹Heissner S (2015), 31: “Why is complexity a driver of white-collar crime? Because complexity creates a lack of transparency. And this lack of transparency offers fraudsters and manipulators niches of uncertainty that they can utilize for their own purpose.”

- As a result of the globalisation of the economy, economic processes are based on the division of labour and organised internationally. The same applies to business crime, which takes advantage of precisely these international structures. This not only covers up their tracks, but also makes the work of the criminal prosecution authorities more difficult, because criminal prosecution is in principle organised by the state and depends on international cooperation between different authorities.
- In contrast to general crime, business crime is characterised by a large number of victims and/or by considerable damage to foreign or national assets, the environment or health.⁶²
- Sometimes the damage caused occurs only indirectly, such as when pension funds are harmed as a result of stock market manipulation.

3.3.2 Motivation

What is the motivation of criminals working in the field of business crime? There are countless studies and theories on this subject.⁶³ In the following, two theories will be presented in order to gain an insight into the research in field. 85

Probably the best-known theory of the motivation of business criminals is the so-called “**fraud triangle**”.⁶⁴ The fraud triangle explains that business crime occurs when the following three elements come together, as shown in Fig. 3.1: 86

The first factor (“**motivation**”) describes the reason to commit the fraud. It seems interesting that the majority of offenders are not in a personal financial emergency. Rather, motives from the employer-employee relationship are decisive, such as work overload, bullying, lack of recognition, lack of promotion. 87

The second factor (“**opportunity**”) describes the weakness of internal control systems.⁶⁵ However, essential is the knowledge and expertise of the potential perpetrator. The perpetrator knows about the functions of the internal control system and its weaknesses or has special technical skills to actually carry out the crime. 88

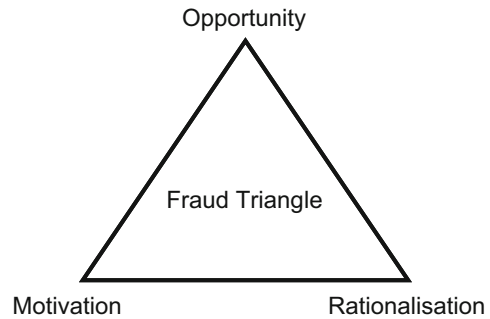
The third factor (“**rationalisation**”) describes personal justification. The perpetrator must be able to justify her/his act to himself/herself before the crime takes place. Typical reasons for such a justification are, for example, “I am entitled to the money anyway” or “I will create justice with it”. 89

⁶² Cohen MA (2016), 78–96.

⁶³ See, for example, Heissner S (2015), 54–60.

⁶⁴ Cressey DR (1950), 738–743; Cressey DR (1953); see also Heissner S (2015), 52–54.

⁶⁵ Madensen TD (2016), 382–408.

Fig. 3.1 Fraud triangle

90 Another explanatory model is the so-called “**Leipzig Course Model of Economic Crime**”.⁶⁶ This model can be used to distinguish between two different types of persons among business criminals: the person who seizes an opportunity and the person who seeks an opportunity.

- The person who **seizes an opportunity** encounters a favourable opportunity for action in working life, characterised by an opportunity for profit and low risk of discovery. The specific act can then possibly be explained exclusively by the opportunity itself, i.e. that someone has succumbed to the corresponding temptations. However, there are also other personal risk factors that favour the act.
- The person who **seeks an opportunity** must first create the opportunity for action by certain manipulations. In the end, she/he must invest more energy in the commission of the crime. In order to explain this, it depends essentially on the personal risk factors.

91 Triggers for such offenders are certain emotional states (**negative emotions**):

- **Frustration** due to backsliding or being offended may create the need to take countermeasures in the form of a criminal act to the detriment of the person responsible for the negative feelings experienced by the perpetrator (for example, the employer).
- **Financial pressures** can act as a trigger. This could happen if the personal level of ambition exceeds monetary goals despite the existing possibilities to fulfil even considerable material wishes. Or if a non-sustainable lifestyle is cultivated or adopted and, in addition, an unrealistic relationship to money and property exists.
- Other **risk factors** are the levels of attachment of the individual. In professional life, job-related subcultures can develop which ultimately encourage crime. The Leipzig model, for example, warns of shifts in the daily routine, especially by extending the performance area into the leisure area and merging the performance area with the leisure area. However, the level of attachment experienced can also include factors that protect

⁶⁶Schneider H (2008), § 25 mn. 26–31; Schneider H (2007), 555–562; Schneider H et al. (2009).

the individual from crime, such as the existence of strong ties to the family of origin and to non-delinquent friends outside and inside professional life.

Such systematic models are important for entrepreneurs and enterprises to know because they can be taken into account when recruiting staff. For example, an appropriate screening for personal risk factors can be carried out in the context of personnel selection, while red flags can be attached to ongoing employment relationships if, for example, there are obvious biographical turning points among employees.

92

3.3.3 Companies as Victims?

One area that has been little researched so far is that of companies as victims of business criminality.⁶⁷ Favourable opportunities for committing crimes are exploited if, for example, there are inadequate internal control systems in the company, missing or incompletely implemented compliance measures or negligent or overburdened members of the supervisory board. Such risks can have disastrous consequences for the top management. If communication between employees and management does not work effectively and there is a lack of a whistle-blower system (→ mn. 872), for example, this can ultimately lead to an **autocratic management style** in the company and encourage crime at management level. Under these conditions, employees see no possibility of reporting suspicions, and they refrain from such important measures because they fear being discovered and repressed by management. All of this ultimately leads to large companies risking considerable financial losses over a long period of time.

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However, there are also risks associated with medium-sized companies. If criminal conduct is attributed to the company, the company is not only hit by the direct financial loss caused by the crime, but also by any **secondary financial losses**, such as the costs of internal investigation (→ mn. 1141), costs for the improvement of structures susceptible to damage, or costs for an employment or company law dispute with the perpetrators. These cost factors can be so high that ultimately a redesign and modernisation of the internal control system or the compliance management structure is no longer possible for reason of high costs.

94

If prevention efforts have already been made by the company management and still have not been able to prevent crimes from happening, the victim status may ultimately lead the company to **accept the occurrence of crimes**. As a result, the further expansion of prevention measures is then omitted because management perceives it as inefficient. Then the phenomenon of so-called “**learned helplessness**” threatens.⁶⁸

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⁶⁷Urbanek J (2016), 43, 66–68.

⁶⁸Schneider H and John D (2013).

3.4 The Role of Criminal Law

- 96 Classical criminal law is basically devoted to the responsibility of individuals for criminal behaviour. The concepts that criminal law science has produced in a long tradition are based on this model of individuality in crime. Business crime (as an organisational crime [→ mn. 80] or corporate crime [→ mn. 70]) is therefore a phenomenon that is difficult to reconcile with the classical means and concepts of criminal law and procedure (→ mn. 226, 373, 500).⁶⁹
- 97 This is clearly shown, for example, in the case of product liability (→ mn. 875). Recall the numerous (civil) legal proceedings against the tobacco industry⁷⁰ (especially in the USA), against pharmaceutical companies for harmful drugs or against companies for the manufacture of asbestos products and the resulting damage to the health of individuals (→ mn. 966).⁷¹
- 98 In criminal proceedings, the principle applies that if there is a reasonable doubt on the criminal liability of the accused, she/he has to be acquitted (*in dubio pro reo*, → mn. 385, 387). Thus the aforementioned proceedings present an enormous challenge to demonstrate the so-called causal connection between the activity of the respective company and the health damages of the individual persons, and to do so beyond reasonable doubt. It is therefore not surprising that in the criminal proceedings in the period after the Second World War, many acquittals against companies were passed for the sole reason that this specific connection between cause and effect could not be sufficiently proven.
- However, there are also cases in which the detection was successful, for example in connection with drugs (thalidomide case, → mn. 889) or in the case of asbestos contamination, → mn. 12.⁷²
- 100 Nevertheless, in the face of large and serious cases of business crime, public opinion sometimes calls for the responsible managers and economic operators to be dragged before the criminal courts.⁷³ This was the case, for example, with the Enron/WorldCom scandal (→ mn. 101), which for the first time brought the crimes of a large commercial enterprise into the focus of media reporting.⁷⁴ This case represents a milestone in BCL,⁷⁵ precisely

⁶⁹Dobrosz N (2020); Hefendehl R (2019), 705–717.

⁷⁰Hippel E (2005), 169–171; Thiele C (2003), 10–61.

⁷¹Cf. Engelhart M (2021), 29–80.

⁷²Corte di Cassazione, Decision of 15.04.2020, No 12151.

⁷³Cf. Theile H (2016b), mn. 429 (“Am Ende stehen daher durchgreifende Zweifel, ob eine Unternehmensstrafbarkeit kriminalpolitisch das Mittel der Wahl darstellt oder ob eine derartige Sanktion nicht ein weiteres Beispiel für ein im schlechten Sinne symbolisch wirkendes Strafrecht bildet”).

⁷⁴Köbel R and Singelstein R (2020), 333, 337–339; cf. Anderson JM and Waggoner I (2014), 42–68.

⁷⁵Schneider (2008), § 25 mn. 3.

because the ground-breaking **Sarbanes-Oxley Act** from the USA (→ mn. 1020) refers to this case.⁷⁶

Enron & WorldCom—Case⁷⁷

101

The major US corporations Enron (energy companies) and WorldCom (telecommunications companies) manipulated their balance sheets for several years. The profits of the groups were artificially inflated and a lower debt ratio was stated. This was intended to maximise the companies' stock market value. It was not until 2002 that the malicious accounting errors were uncovered—at WorldCom, the errors amounted to billions. The head of Enron, Jeff Skilling, was sentenced in 2006 to 24 years imprisonment for fraud and insider trading, while the head of WorldCom, Bernard Ebbers, was sentenced in 2005 to 25 years imprisonment. ◀

However, the phenomenon of major media coverage of corporate crime does not only occur in the USA. There were also several major scandals in Europe around the same time, which were echoed in the media.

102

Parmalat—Case⁷⁸

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Parmalat is an Italian group operating in the food industry, which has employed up to 14,000 people worldwide since 1961 and was active until 2011, when it was taken over by the French dairy group Lactalis. In 2003, the group had to file for insolvency. It turned out that 8 billion euros were missing from Parmalat's balance sheet. The money had disappeared into private pockets through transactions via funds on the Cayman Islands. The head of the company was sentenced to several years imprisonment for the collapse of the company, insolvency fraud and the formation of a criminal organisation. ◀

In light of the media reports against criminal managers, various business representatives warn against excessively strict criminal law and repressive coercive measures, which not only result in the loss of jobs and economic locational disadvantages, but can generally be seen as an obstacle to the development of the business location.⁷⁹

104

It is often pointed out that it is not necessary to resort to criminal law because other areas of law already exist with less invasive sanctions.⁸⁰ This includes for example:

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⁷⁶ Anderson JM and Waggoner I (2014), 51; Hefendehl R (2004), 51–88; Heissner S (2015), 20–22.

⁷⁷ Clikeman PM (2013), 235–255; Fusaro PC and Miller RM (2002); Healy PM and Palepu KG (2003), 3–26; Heissner S (2015), 18–20; Janke G (2008), 31–41; McLean B and Elkind P (2013); Schwercz SL (2002), 1309–1318; Thielemann U (2005), 37–45.

⁷⁸ Clikeman PM (2013), 276–283; Janke G (2008), 41–43.

⁷⁹ Klose B (2020a), 173: the legal infrastructure is an important factor for the production location.

⁸⁰ See, for instance, Stolowy N (2016), 607–623.

- Civil damages: This is about the financial compensation for the damage from the offender to the victim.
- Punitive Damages & Multiple Damages: This type of damages exists mainly in US law, whereas it is largely foreign in the European legal tradition. Here it is not a question of strict compensation for the damage suffered by the specific victim, but rather of a hypothetical assumption of damage (e.g. the damage suffered by a hypothetical number of injured parties as a result of an insider deal on the stock exchange) and the sanctioning nature of the compensation.⁸¹
- Class Actions & Derivative Actions: This is about the possibility for individuals to form a group for the purpose of a class action. The advantage is that, if the lawsuit is successful, not only the specific plaintiff will receive compensation, but any person who has been harmed in the same way as the plaintiff will also receive such a claim—regardless of whether they themselves have sued.

106 It is therefore indisputable that there are legal measures that can sanction misconduct by companies appropriately. However, there are cases where the extent of damage and the extent of “injustice” cannot be dealt with by such civil law instruments, but in fact requires a response in the form of severe sanctions under criminal law.

The question therefore arises: What role does criminal law play in the context of business crime?⁸²

107 The appropriate answer is probably a compromise. Criminal law is fundamentally not suitable as an instrument for the large-scale control of society⁸³ or even the economy. The evidence that criminals are deterred by high sanctions has not been proved either in general crime or in business crime.⁸⁴ Otherwise many societies would be free from homicide, which, as is well known, is punishable by heavy prison sentences. Nevertheless, it seems necessary, not only for the sake of justice, but also from a legal point of view, to take action against the responsible persons and structures of business crime. Although business crime is extremely complex in the practice of business, the accused are well integrated into society and highly respected, and have the financial means to afford an army of lawyers and therefore being confronted with an excellent defence does not excuse lack of prosecution. The state represented by criminal courts must also face up to such proceedings. Not only must they clarify the facts of the case, but they also have to examine criminal liability in accordance with the rule of law.

⁸¹ Möllers T (2019), 279.

⁸² Anderson JM and Waggoner I (2014), 98–107; Dannecker G and Schröder T (2020), 285–320; Klose B (2020b), 41–49; Trüg G (2016), 307–332.

⁸³ Singelstein T (2020), 95, 102.

⁸⁴ Theile H (2016b), mn. 414, 422–424.

Prevention Strategies

What prevention strategies are being pursued by legislators? In general, two strategies of legislators can be distinguished.⁸⁵

1. **Command and control strategy:** this approach essentially assumes that compliance can be achieved through external control, flanked by a massive threat of sanctions. Thus, the focus is on the severity of sanctions. Violations of the law should be subject to heavy penalties. The companies are seen as “snakes in suits”, which must be regulated by the legislator.⁸⁶
2. **Self-regulation strategy:** this approach essentially assumes that companies have the capacity for moral self-regulation. The free market is seen as corrective here and inherently demands compliance with the law. The legislator must therefore seek a cooperative path with companies. This is why the legislator is focusing in particular on compliance as a strategy for self-regulation.

Empirically, the success of each of these strategies to prevent corporate crime is highly questionable.⁸⁷ This is because prevention through control and sanctioning (“command and control”) ultimately depends on the **probability of the sanction**, the severity of the sanction and ultimately the speed of the sanction, so that a deterrent effect is achieved at all. However, studies doubt the effectiveness of this approach because it only weakly reduces crime. The same criticism applies to the self-regulation strategy. A study by RALF KÖLBEL has shown that the **effect of compliance goes in all directions**: compliance produces a good effect for crime prevention, sometimes no effect at all, and finally even an effect for the promotion of crime, if, for example, compliance mechanisms can be deliberately levered out. Compliance is often also seen by certain companies as a mere measure of law enforcement for the authorities to achieve a mitigating reason or reason for exclusion from punishment. In this case, compliance is not really implemented in the corporate culture and thus has no effect.⁸⁸ It therefore seems that the two different strategies cannot be clearly separated but are rather interdependent and perhaps even mutually dependant in order to achieve a positive effect.

What we are looking for, is a criminal law for business crime that makes moderate use of its instruments. Ideally, the legislator does not view economic structures as a legal entity, but actually as a **corporate citizen** who can independently exercise rights and

⁸⁵ Kölbel R (2017), 430–452, especially 432–433 (Command & Control), 433–434 (Self-Regulation).

⁸⁶ Babiak P and Hare RD (2006).

⁸⁷ Kölbel R (2017), 430, 436–438.

⁸⁸ Kölbel R (2017), 430 (especially 440–446); see also Kölbel R (2014), 1424–1447.

obligations.⁸⁹ As the next chapter will show, there are not only different motivating factors for the design of BCL, but also very different models for how BCL can be conceived.

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⁸⁹ Dannecker G (2020), 74, 79–81.

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Part II

Foundations of Criminal Law and Business

- The previous remarks focused on criminological research and empirical views. The study of Business criminal law (BCL) now requires a change to the normative perspective. This section focuses on the fundamentals of Criminal Law & Justice and their relation to the field of Business & Management.

Part II of this book contains three chapters to introduce legal cultural thinking for BCL. First off, in Chap. 4, it is explained where one can find where the law itself. Then in Chap. 5, basic knowledge of criminal law and criminal procedural law will be introduced, with special emphasis on BCL. After the introduction of this basic knowledge, a general focus on criminal liability of individuals and companies will be presented in Chap. 6. In this way, an introduction to the legal culture of criminal law in the countries of Austria, Germany, Liechtenstein, and Switzerland will be given.

- This chapter deals with the legal sources of Business criminal law (BCL). Criminal law cannot be derived solely from the Criminal Code and the law of criminal procedure. It is subject to a variety of influences that may result from different authorities. These may be laws, overarching sources of law or principles, or merely regulations or recommendations.

The aim of the chapter is to classify the sources of BCL and to explain its references to domestic law, but also from law beyond the state. In this way, the foundations will be developed which are essential for the understanding of criminal law and criminal procedural law.

4.1 Preliminary Remarks

What are legal sources? The term “sources of law” refers to the causes of origin of legal norms, i.e. how norms are created and where they can be found. Thus, when working with the law, one must know whether a certain regulation is recorded as law and whether it should be taken into account. The concept of “source of law” therefore shows a strong connection to the concept of law.¹ **113**

It would seem that a few words about the concept of “law” are needed. From a formal perspective, the term “law” describes all norms which are **generally binding** and which are either enacted or recognised by the legislator or applied by courts.² From a substantive **114**

¹Möllers TMJ (2019), 39–47, 75–83.

²Rüthers B et al. (2020), mn. 53, 56.

perspective, the term law describes all social norms whose effectiveness is guaranteed by **organised coercion** (e.g. legal protection through courts), whose application and generation requires authorisation (e.g. an official building permit) and whose claim to binding force requires the conviction of their legitimacy. Law are thus social rules that are enacted or at least recognised by the legislator, applied by courts and can be enforced by means of state coercion.

115 So, what are “sources of law”? **Sources of law** are the manifestations of the normative rules in an objective and general sense. They are all the norms that are made by legislators. Thus, sources of law are the legal norms in the constitution, laws and regulations. In this narrower sense, source of law are only those norms which constitute a binding legal principle for the person applying the law.³ The term can also be used further to refer to all factors that have an influence on the law, e.g. court practice or commercial practice.

116 Legal sources can be displayed hierarchically in two dimensions. The first dimension is **vertical**. The individual sources of law in the state have a certain rank. Higher-ranking norms are applied before lower-ranking norms (*lex superiori derogat legi inferiori*) and thus one can speak figuratively of a **pyramid of norms**.⁴ One can envision this pyramid as follows: At the top of the pyramid (in the narrower sense), from the state’s point of view, is the constitution, followed by the laws (e.g. the Criminal Code) and then the decrees that implement the laws. However, this pyramid is very complex because European law and international law have an influence on the different levels of the state. Moreover, the different levels in federally structured states, which distinguish between a state level [*Bundesebene*] and a federal level [*Länderebene* or *Kantonale Ebene*] in law, are highly complex. Therefore, the imagine of a hierarchically structured legal order is only a simplified illustration, but it is helpful to get a first impression of the hierarchy of the sources of law.

117 The second dimension is **horizontal**, where there is the question of the primacy of legislation at the same level. This dimension has basically two different characteristics:

- *Lex specialis derogat legi generali*: Specific legislation takes precedence over general legislation. An example of this can be found in the offences of fraud. Fraud is a very general norm, → mn. 571. However, some legislators have decided that special variants of fraud (e.g. tax fraud or subsidy fraud) should be punished more severely or more leniently, → mn. 577. The special variants of fraud are therefore a special provision compared to general fraud. In theory, both rules (i.e. tax fraud and general fraud) can be applied to tax fraud. However, the *lex specialis* rule states that only the special rule applies.
- *Lex posteriori derogat legi priori*: A law enacted later takes precedence over an older law. The more recent law therefore takes precedence.

³Rüthers B et al. (2020), mn. 217.

⁴Möllers TMJ (2019), 49–51, 65–69; cf. Bohlander M (2009), 10–13.

The starting point for our consideration of the sources of law is criminal law.

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4.2 Criminal Code

If one searches for the legal sources of BCL as a field of law, the focus falls on the national legal system. Criminal law is generally regarded as a field of law that is particularly influenced by **national cultures, traditions and ideas** (→ mn. 37).⁵ The culture of criminal law thus differs from state to state. This makes it difficult for modern entrepreneurs who are active in global or interregional markets to comply not only with all the circumstances and local customs, but also with the specific legislation of each country. Therefore, the knowledge of the law and the compliance with it are very difficult organisational tasks.

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Thus, when looking for the perspective of BCL, the first place to look is **legislation**.⁶ This main source of criminal law is mainly compiled in codifications with a highly systematic approach, such as the Criminal Code (*Strafgesetzbuch*—StGB).⁷ Thus, the Criminal Code is the first, but not the only source of law to orientate itself towards punishable conduct and sanctions. While criminal codes of modern European states are very different in terms of content, i.e. there are great differences as to which conduct is punishable and how high the respective sanction is, they nevertheless follow a similar structure, which can be seen in the following sections: General and Special.⁸

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⁵See Bundesverfassungsgericht, Judgment of 30 June 2009 - 2 BvE 2/08 et al., para. 355: “Securing legal peace by the administration of criminal law has always been a central duty of state authority. As regards the task of creating, securing and enforcing a well-ordered social existence by protecting the elementary values of community life on the basis of a legal order, criminal law is an indispensable element to secure indestructibility of this legal order [...]. Every provision in criminal law contains a social and ethical judgment of unworthiness on the action which it penalises. The specific content of this judgment of unworthiness results from the constituent elements of the criminal offence and the sanction [...]. To what extent and in what areas a polity uses precisely criminal law as an instrument of social control is a fundamental decision. By criminal law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions on law, is regarded as so grievous and unacceptable for social co-existence in the community that it requires punishment”. In science, this approach is sometimes strongly advocated (see: Satzger H (2020b), 61, 70), but also criticized, see Gärditz KF (2020), 249, 261–266.

⁶Petrig A and Zurkinden N (2015), 13–15.

⁷Kudlich H and Oğlakcioğlu MT (2020), mn. 23–24; Roxin C and Greco L (2020), 1, 5.

⁸Cf. Gropp W (2015), 15–18.

121 Case Law - A Legal Source?

However, the **case law** of the highest courts such as the Oberste Gerichtshof in Austria (OGH), the Bundesgerichtshof in Germany (BGH), the Oberste Gerichtshof in the Principality of Liechtenstein (OGH) and the Bundesgericht in Switzerland (BGer), are seen as a **quasi-source** of criminal law. In fact, since penal provisions are formulated in a general and abstract way, their interpretation is of great importance. Thus, decisions of the highest courts are generally relevant beyond the adjudicated case. However, these decisions are formally not binding upon courts to the same degree as legal norms. Therefore, judges can defy earlier decisions if there are significant reasons to do so.

4.2.1 General Section

122 The General Section of criminal law deal with the requirements for criminal liability, which apply to all individual offences.⁹ Such prerequisites are for example:

- under which local and temporal conditions the criminal law is applicable at all (→ mn. 364);
- the age at which a person may be considered criminally responsible (i.e. criminal age → mn. 274)
- the circumstances in which a person may be held liable as a perpetrator, as a co-perpetrator, as a mere accomplice or an instigator → mn. 333;
- whether a criminal offence is committed intentionally and negligently → mn. 303, 307.

123 In addition to this focus on criminal liability, the General Section also provides information on the various sanctions. Such aspects are for example:

- which main penalties (e.g. custodial sentence) and secondary penalties (e.g. disqualification from driving) there are;
- what measures are available irrespective of penalties (e.g. treatment of mental disorders);
- how the amount of the specific penalty will be assessed;
- when a penalty can be conditionally reviewed by determining a probationary period.

4.2.2 Specific Section

124 The Specific Section of the Criminal Code, in comparison to the General Section, describes single offences.¹⁰ The essential information found in this section is the criminal conduct

⁹Roxin C and Greco L (2020), 7–8; Thommen M (2018a), 369, 375; cf. Bohlander M (2009), 23–24.

¹⁰Thommen M (2018a), 369, 376.

itself (e.g. “whoever kills another human being”) and the respective sanction (e.g. “is punishable by imprisonment for 10–20 years”). Such criminal offences are, for example:

- wilful homicide, murder, assault with intent;
- negligent homicide, negligent physical injury, negligent bodily injury in road traffic;
- theft, fraud, robbery, extortion.

The offences are usually classified according to the criterion of the protected legal interest (→ mn. 236), such as Offences against Life and Limb, Offences against Personal Honour, Offences against Liberty. This means, for example, that the Criminal Code collects all criminal offences against foreign property (e.g. theft, fraud, robbery, extortion) under a uniform title of the Criminal Code.

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4.3 Criminal Law Beyond the Criminal Code

The core of criminal law [*Kernstrafrecht*] is anchored in the Criminal Code, and thus usually provides an important starting point for an overview of criminal liability. However, not all legal interests protected under criminal law are found in the Criminal Code. A large number of criminal provisions can be found in other laws.¹¹ Since business crime is an extremely complex matter, many legislators have anchored the special features of business crime in separate laws outside the Criminal Code. This is referred to as “secondary criminal law” [*Nebenstrafrecht*].¹²

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- Examples: Food Act (→ mn. 897), Copyright Act, Unfair Competition Act (→ mn. 753), Customs Act, VAT Act.

What are the complexities of BCL? Why is it legitimate to investigate BCL as a separate field of law? BCL has many references to regulations outside of criminal law (so-called **blanket norms**). Criminal offences in the area of BCL only become clear in terms of their content once the definitions outside of criminal law are known (e.g. civil law, administrative law, environmental law).

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A simple example: a typical offence that does not require special extra-judicial competence is the prohibition of wilful homicide. In many legal systems, the relevant criminal offence is something like this: whoever kills another human being is punished. In order to apply whether a crime of homicide has been committed, it must therefore be examined

¹¹Roxin C and Greco L (2020), 3.

¹²Gropp W (2015), 19–20; Kudlich H and Oğlakcioğlu MT (2020), mn. 25–30b; Petrig A and Zurkinden N (2015), 14; Thommen M (2018b), 395, 401.

whether “another human being” has been the victim of the crime. This can be done intuitively.

However, a typical criminal offence that has references to regulations outside of criminal law is theft. In many legal systems, the law text reads as follows: “Whoever takes movable property belonging to another away from another with the intention of unlawfully appropriating it for themselves or a third party incurs a penalty of imprisonment for a term not exceeding 5 years or a fine.”¹³ In order to understand the facts of the case, it is necessary to check whether the object is “movable property belonging to another”. The element “another” is central here. In order to understand when “movable property belonging to another” is present, one must define and understand the relationship between possession and ownership. Possession and ownership are categories defined in civil law. It is only when looking at civil law that it becomes clear whether a foreign object is present and, consequently, whether the theft of a foreign object has been committed.

128 The full understanding of criminal offences in BCL can therefore only be identified with regard to the civil or public law matters involved.

A more complex example can be found in criminal tax law, especially in the criminal offence of providing incorrect or incomplete information to the tax authorities.

The text on the criminal offence could read as follows: “anyone who provides incorrect or incomplete information to the tax authorities or other authorities about facts that are relevant for tax purposes is punishable by imprisonment [. . .].”

The central question here is what constitutes a **fiscally significant fact**. This can only be deduced from the tax laws (Income Tax Act, Turnover Tax Act, Tax Code). Only with regard to these specific tax laws can the question be answered as to whether a fiscally significant fact was actually communicated incorrectly or incompletely. The criminal offence in tax law can therefore only be established from tax law (and thus public law) with regard to these special laws.

129 If the legislator were to define all the criminal offences that are considered business crimes in the Criminal Code, she/he would have had to write a multitude of definitions from civil law or public law into the Criminal Code. The consequence of which would have been the formulation of exorbitantly long individual elements of crime.

130 It also holds true that BCL often falls back on general clauses and standards that are not sufficiently precise in their description (e.g. the conscientious manager, principles of proper business conduct). This, of course, is at the expense of legal clarity (→ mn. 264). Considering all this, as well as the fact that BCL does not concern the general public, but rather a smaller circle (namely those who are economically active), many criminal offences were anchored in special laws and thus in secondary criminal law.

131 Criminal law usually applies uniformly throughout the national territory. In Switzerland, however, there are certain special features. Unlike in Austria and Germany, where there is a

¹³ See § 242 StGB-DE.

uniform criminal law for the entire national territory, Switzerland also has Cantonal Criminal Law.

Examples for Cantonal Criminal Law:

- Art. 19 Criminal Code of Appenzell—Indecent Behaviour: “Any person publicly displaying indecent behaviour is liable to a fine”
- § 7 Criminal Code of Zurich: “Any person who in a state of intoxication is publicly displaying indecent behaviour is liable to a fine”
- § 13 Criminal Code of Lucerne—Unwarranted Shooting: “Any person who—without authorization—fires a gun or detonates explosive charges at a wedding is liable to a fine”

Secondary criminal law is structured according to two different aspects, which are defined as general and specific rules. 132

4.3.1 General Rules

Secondary criminal law can represent the **general section** of corporate criminal law, which: 133

- defines the conditions under which a company may be held criminally liable;
- determines the types of penalties that will apply to undertakings;
- specifies the criteria to enable companies to mitigate or avoid punishment altogether.

A Secondary criminal law dealing with the general part of corporate criminal law is the Austrian Act of Responsibility of Collectives (→ mn. 513).¹⁴ This act conclusively regulates the criminal responsibility of collectives, e.g. companies. At the same time, it repeatedly refers to the general penal code, → mn 119. For the sake of completeness, however, it should be noted that not all legal systems follow such a model. In Switzerland, for example, the prerequisite for the criminal liability of the company is not regulated in Secondary criminal law, but in the core criminal law, namely in Art. 102 StGB-CH (→ mn. 505). Nevertheless, many criminal offences that belong to economic criminal law are regulated in special laws (and thus in the secondary criminal law). 134

¹⁴Urbanek J (2016), 43, 48.

4.3.2 Specific Rules

135 While Secondary criminal law can belong to the general section of corporate criminal law, it can also cover **special areas of business law**. As is frequently the case, individual criminal offences are part of a larger body of law and thus flank the actual regulatory matter. For example, the national patent law contains all the provisions for the granting and protection of patent rights. In addition to this primary regulatory matter, however, a small number of criminal offences are also enshrined in the Patent Act. The criminal offences are thus part of the larger body of patent law.¹⁵

136 When Secondary criminal law regulates special areas of economic life, it often contains

- sector-specific regulations of conduct;
- types of sanctions applicable to infringements of the rules;
- recommendations or guidelines, which should be observed on a voluntary basis in addition to the instructions for conduct threatened under criminal law.

4.4 Constitutional Law

137 The constitution is the basic order of a state. If the legislator wants to create laws (such as criminal law), this must be done according to the rules and proceedings set out in the constitution. In this way, laws may not violate the constitution. A constitution itself usually does not have any specific provisions on criminal law, but it contains particular binding, guiding principles for lawmakers and interpreters.¹⁶ These form the basic parameters for the legislature when enacting norms in the field of criminal law.¹⁷

Constitutional Criminal Law Principles

Many of the criminal law principles (→ mn. 250) are either explicitly enshrined in a Constitution, e.g. the principle of “No Punishment without Law” is laid down in Art. 103 para. 2 of the German Constitution, or are derived implicitly from principles of a Constitution, e.g. Art. 5 para. 1 of the Swiss Federal Constitution.

138 In addition, in many countries the constitution also expressly contains a number of fundamental rights (→ mn. 209). **Fundamental rights** are rights that each individual as a

¹⁵Cf. Staffler L (2021), 217–244.

¹⁶Petrig A and Zurkinden N (2015), 40: Limitations and guidance for the legislature.

¹⁷Cf. Berger BL (2014), 428, 432–435; Bohlander M (2009), 12–14; Gropp W (2015), 21–22; Petrig A and Zurkinden N (2015), 12–13; Roxin C and Greco L (2020), 78–79; Thommen M (2018b), 395, 397–398.

member of a society has vis-à-vis the state.¹⁸ The fundamental rights protect the individual from unjustified interference from the state when exercising its power (e.g. through criminal law). Therefore, the legislator must strike a good and fair balance between Criminal Law and fundamental rights.

Along with these fundamental rights, a constitution also contains the power to enact laws and appoints this power to the appropriate institutions (e.g. Parliament).

For example, in Switzerland, the legislative power in the field of substantive criminal law (and criminal procedural law) falls mainly under the Confederation (Art. 123 para. 1 Federal Constitution). However, the cantons retain the power to legislate on minor offences (contraventions) that are not the subject matter of federal legislation, and on sanctions for offences against cantonal administrative law (e.g. violation of cantonal tax law), see Art. 123 para. 1 Federal Constitution together with Art. 335 StGB-CH. Yet, the organisation of the courts and the administration of justice in criminal cases remains within the responsibility of the cantons unless the law states otherwise (Art. 123 para. 2 Federal Constitution). An exception to the cantons' control over the administration of criminal justice is when an offence is subject to federal criminal jurisdiction (notably in white-collar crimes, but also in the field of organised crime, terrorist financing, etc.). In this case, the Federal Criminal Court prosecutes the crime first and then the Federal Supreme Court could prosecute on the appellate level.

In this respect, the constitution's perspective on criminal law is very important.

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4.5 European Law

In a globalised and interconnected world, national legal systems are no longer alone in their power to design laws and penal codes.¹⁹ The reason for this lies in the fact that in a modern society, crime (and especially economic crime) does not stop at national borders.²⁰ This is why especially the Council of Europe and the European Union have recognised the need to find common answers to such problems.²¹ Today, guidelines have been laid down to address issues such as corruption, money laundering,²² insider trading, environmental damage, or computer crimes²³ by the Council of Europe or European Union, which have then been incorporated into national legislation.

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¹⁸ For a good introduction to the topic, see Peters A (2021), 7–22.

¹⁹ Beckemper K (2019), 1105, 1110; Evil M (2016), 88–112; for an in-depth study on this subject matter, see Meyer F (2012).

²⁰ Dannecker G and Bülte J (2020), mn. 36, 37–40.

²¹ Meyer F (2017), 209–213, 249–255; Petrig A and Zurkinden N (2015), 15–18.

²² Staffler L (2019b), 67–70.

²³ Warken C (2020), 435–439.

142 However, criminal law remains primarily within the responsibility of the nation states. Nevertheless, there are important influences beyond the state. This is seen by the states commitment to transnational cooperation through various agreements with the **Council of Europe**.²⁴ For example, the Council of Europe's Convention on Cybercrime spurred several amendments to the national Criminal Codes in European countries in order to bring their cybercrime provisions in line with the convention, → mn. 685.²⁵

► **Note** Although Switzerland lies at the heart of Europe and is a member of the Council of Europe, it is not a member of the European Union. Yet, this does not mean Switzerland isn't interested in good trade relations with the EU. In fact, they are adapting their legal systems to EU standards.²⁶ They also have an interest in combating business criminality across borders. They are therefore involved in many criminal prosecution programs on the European continent (e.g. Schengen-Information-System).²⁷

144 Especially in the **European Union** (EU), it is surprising that there is no uniform criminal law on business and economic crime. This is because the EU was founded in its early days as an economic, transnational cooperation between states. The member states of the "European Community" founded at that time were to bring about an interweaving of economic relations by establishing a transnational internal market.²⁸ They hoped that the intertwining of national economic relations would secure lasting peace and thus limit the possibility of armed conflicts on the European continent. In the further course of events, the European Community became the European Union, and a purely economic (transnational) cooperation turned into a **community of values** (supranational cooperation).²⁹

Art. 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

²⁴Gropp W (2015), 31–34; Satzger H (2020a).

²⁵Dannecker G and Bülte J (2020), mn. 53–54.

²⁶Oesch M (2019), mn. 937–954.

²⁷Ackermann JB and Hecker B (2021), 21, 25–26, 52–53, 58–72; Gless S (2015), 138–139; Petrig A and Zurkinden N (2015), 15–18.

²⁸Staffler L (2020a), mn. 60.

²⁹Court of Justice of the European Union, Opinion of the Court of 18 December 2014, Case Opinion 2/13, ECLI:EU:C:2014:2454, mn. 168: "This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."; Frischhut M (2019), 34–36, 131–135; Oesch M (2019), mn. 104–115.

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the EU as it stands today has a diverse repertoire of tasks in very many different policy areas, upholding and maintaining the economy in a Europe without internal borders remains a core task of the EU, which it wants to realise together with the Member States. It is therefore not surprising that the EU is involved in law making in fields parallel to criminal law, particularly in the field of **competition law** (→ mn. 753).³⁰ The European Commission has powers of investigation in the field of cartel law and can also impose fines (Art. 103 para. 2 TFEU).³¹ Furthermore, the EU has the possibility to impose sanctions of an **administrative nature** in the field of agricultural law and state aid law.³²

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4.5.1 European Integration and Criminal Law

These examples show that Europe is in a progressive process (so-called **European integration**) of bringing European States, European people and their societies closer together.³³ The EU is committed to explicit objectives. They are laid down in the primary treaties of the EU. Art. 3 para. 1 TEU. Here a number of objectives are defined and precede the general objective of the EU to promote peace, its values and the well-being of its peoples. To this end, the EU offers its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Art. 3 para. 2 TEU).

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The assurance of freedom, security and justice are therefore objectives of the EU. But what guides this objective? Art. 67 TFEU puts this concept in concrete terms. This guiding principles outline an **area of freedom, security and justice** in which fundamental rights and the different legal systems and traditions of the Member States are respected.³⁴ The EU also aims to provide a high level of safety by taking measures to prevent and fight crime, to coordinate and cooperate between police and judicial authorities and other competent authorities, to ensure mutual recognition of decisions in criminal matters and, if necessary, to approximate criminal law.³⁵ However, since the EU is a community made up of values committed to fundamental rights, the development of criminal law must still respect

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³⁰ Dannecker G and Bülte J (2020), mn. 166–174; for an in-depth study on this subject matter, see Jansen S (2021).

³¹ Ambos K (2018), 499, 530.

³² Dannecker G and Bülte J (2020), mn. 175–184.

³³ Klip A (2012), 23.

³⁴ Meyer F (2011), 169–195.

³⁵ Gless S (2015), 139–140.

freedom, security, and justice, while developing these rights.³⁶ The EU has a Charter of Fundamental Rights which takes a similar form to the European Court of Human Rights (ECHR). However, while the ECHR represents a European minimum standard, (→ mn. 210),³⁷ the EU Charter of Fundamental Rights goes further to catalogue a community of values (→ mn. 144) within the states.

148 The relevant **competences in criminal matters** of the EU are set out in Art. 82 et seq. TFEU.³⁸ This concern regulations of criminal procedural law and cooperation in criminal matters (Art. 82 TFEU), regulations of substantive criminal law (Art. 83 TFEU), and measures to support the member states in the prevention of crime (Art. 84 TFEU). It also concerns the establishment and development of institutions and forms of cooperation, namely Eurojust (Art. 85 TFEU), the European Public Prosecutor's Office (Art. 86 TFEU), → mn. 168, police cooperation (Art. 87 TFEU), and Europol (Art. 88 TFEU), → mn. 166. A special feature arises with regard to Art. 325 TFEU. This is the provision on fighting fraud against the financial interests of the European Union. In order to fight against fraud affecting the financial interests of the Union, Member States shall take the same measures as they take to counter fraud affecting their own financial interests (Art. 325 para. 2 TFEU). Of particular importance, however, is Art. 325 para. 4 TFEU. To ensure effective and equivalent protection in the Member States and at EU level, the EU may take the necessary measures in the prevention of and the fight against fraud affecting the financial interests of the EU. This is seen as a basic competence of the EU to adopt criminal law standards.³⁹

149 **How Does the EU Involve Itself in Criminal Law Making?**⁴⁰

There are various possibilities, however, in criminal law the EU chooses to use two instruments in particular: regulations and directives. **Regulations** are legal acts that are fully binding in all EU Member States. Even if the Member States adopt laws to implement regulations, the regulations themselves are directly applicable in national law. An example of this is the regulation of the mutual recognition of freezing and confiscation orders.⁴¹ **Directives**, by contrast, are legal acts that define an objective to be achieved at EU level. At the same time, EU Member States are free to take the

(continued)

³⁶ Dannecker G and Bülte J (2020), mn. 292–294; Gless S (2015), 146–147.

³⁷ Petrig A and Zurkinden N (2015), 16.

³⁸ Nieto A (2021), 6, 35.

³⁹ Critically, Roxin C and Greco L (2020), 196–197.

⁴⁰ Kert R (2016), 33–34, 38–41.

⁴¹ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, Official Journal of the European Union of 28 November 2018, L 303/1; cf. Meyer F (2020), 140–170; Staffler L (2019a), 240–247.

appropriate national measures to achieve this objective. In principle, directives do not directly affect national law, but must be transposed into national law by the EU Member States. An example of this is the directive on the protection of the Union's financial interests⁴² or the directive on the protection of whistle-blowers.⁴³ Since the Member States see criminal law as a special regulatory instrument with national implications, most EU instruments in the field of criminal law are directives.

All of this must not, however, hide the fact that the Member States are very keen to keep the control of criminal legislation and criminal justice at a national level.⁴⁴ There is therefore an increasing **potential for conflict** between the EU and the Member States.⁴⁵ As it stands now, EU law does influence criminal legislation in the Member States but does not have a broad range of law-making competences in criminal law.⁴⁶

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4.5.2 European Perspective

How does EU law influence criminal law? During the course of European integration, the European Court of Justice (ECJ) in Luxembourg developed corresponding principles.⁴⁷ According to these principles, Member States have the duty to punish violations of EU law according to rules similar to those for violations of national law. The so-called **assimilation principle** therefore obliges the EU Member States to prosecute and punish infringements of EU law according to criteria equivalent to infringements of their national law.⁴⁸ It is true that EU law does not prescribe any numerical specifications for imprisonment or fines. However, the penalties imposed for infringements of EU law must in any event be **effective, proportionate and dissuasive**.⁴⁹ These three requirements regarding the effectiveness, proportionality and deterrence of sanctions do not only concern the application of

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⁴² 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, Official Journal of the European Union of 18 July 2017, L 198/29.

⁴³ Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union Law, Official Journal of the European Union of 26 November 2019, L 305/17; see Taschke J et al. (2021), 85, 88–92.

⁴⁴ Klip A (2012), 36; Roxin C and Greco L (2020), 196–199; Staffler L (2018d), 613–619.

⁴⁵ Staffler L (2019c), 59–80.

⁴⁶ Staffler L (2019d), 167, 198–200.

⁴⁷ Klip A (2012), 43–46, 150–156.

⁴⁸ Kert R (2016), 32–33; Staffler L (2020a), mn. 62.

⁴⁹ Klip A (2012), 74–77.

penal provisions in legal practice, but must already be reflected in the abstract penal provision.⁵⁰ Sanctions for breaches of EU law must therefore be effective.

152 These obligations derive from EU primary law, in particular from the **general duty of loyalty**, that the Member States have for the EU (Art. 4 para. 3 TEU). Criminal law obligations to impose sanctions can thus be regarded as accompanying measures to the effective implementation of EU policy. In this context, the EU has adopted a number of provisions which have an impact on criminal law in the Member States.⁵¹ Furthermore, the ECJ contributes to continuing developments. For example, the court has called for the use of criminal law for environmental law, even though the EU Treaties do not provide any explicit criminal law competence in this area.⁵² However, for criminal matters that require cooperation among Member States, the EU relies on the principle of **mutual recognition**.⁵³ According to Art. 82 TFEU, mutual recognition means that decisions of national judicial authorities are largely effective in all other member states of the European Union without a thorough examination of the request by the state of destination. For example, a (criminal) court ruling from Germany should also take effect in France without extensive examination. In this way, the EU works towards a harmonisation of criminal law between Member States, because such a harmonisation project has no consensus among the Member States. Thus, mutual recognition means that national rules in criminal law can continue to exist; they are (or, at least, they should) be mutually recognised. It must be borne in mind, though, that this principle also contributes to the establishment of common minimum standards. This is created through mutual trust between the Member States, which is underpinned by this principle of mutual recognition, that is based on the basic shared values regarding the criminal justice system and the level of protection of fundamental rights.

153 In selected areas, however, the duty of loyalty towards the EU becomes more concrete. According to Art. 325 TFEU, the Member States are obliged to combat fraud directed against the **financial interests of the EU** with the same measures they take to protect against fraud aimed at their own financial interests.⁵⁴ In practice, this means that fraud and tax offences that protect the public assets of the State also apply to fraud or criminal offences that attack the assets of the EU.⁵⁵ According to the wording of Article 325 TFEU, the EU could even have the power to adopt criminal law provisions specific to this area. So far, however, it has largely refrained from doing so and continues instead to rely on a

⁵⁰ Court of Justice of the European Union, Judgment of 21 September 2011, 2011-1989, 68/88, mn. 24; cf. Roxin C and Greco L (2020), 141, 144.

⁵¹ Klip A (2012), 211–218.

⁵² Dannecker G and Bülte J (2020), mn. 186.

⁵³ See Böse M (2020), 521–531.

⁵⁴ Dannecker G and Bülte J (2020), mn. 185–189; Kudlich H and Oğlakcioğlu MT (2020), mn. 31–33.

⁵⁵ Cf. Staffler L (2018e), 1147, 1158–1159.

cooperative relationship in which the EU takes precedence (through secondary legislation) over general frameworks which are specifically implemented in the Member States.

4.5.3 National Perspective

Thus, because criminal law remains at largely the national level, EU law has various possibilities to influence national criminal law.⁵⁶ **154**

The starting point for practical involvement at the national level is the principle that Union law takes precedence over national law. The **primacy of EU law** means that national provisions which conflict with European legal standards do not lose their validity but are neutralised by primary or secondary EU law. The national standard of conduct of a Member State is therefore valid, but cannot be applied in cases relevant to EU law. For the legislator and the courts, the primacy of EU law means that no behaviour permitted by EU law may be penalised on national level.⁵⁷ **155**

A second cornerstone for the transposition of EU legislation into national law is the **interpretation of criminal law in conformity with EU law**.⁵⁸ **156** This is because the legal matter covered by national criminal law (e.g. criminal law protection against product piracy) can be the subject of EU law regulations (e.g. EU regulations against product piracy). In this respect, the application of rules within the scope of EU law must be geared to effective implementation. This is done by means of effectiveness-oriented interpretation: the effectiveness principle (*effet utile*) requires an interpretation in conformity with EU law so that the regulatory objective of said law, which is not directly applicable, is nevertheless achieved. The effect of the interpreting criminal law in conformity with EU law is the inclusion of EU legal interests while still protecting national provisions. When elements of a crime have a connection to EU law, criminal courts are obligated, much like in a interpretation that is friendly to EU law, to interpret the national criminal provisions under the concepts and evaluations of EU law. This implementation at the national level is clearly evident in **fraud** (→ mn. 581), **money laundering**⁵⁹ (→ mn. 667), and **environmental criminal law** (→ mn. 939).⁶⁰ There, the EU has issued far-reaching guidelines for the protection of financial interests and of the environment, which must be taken into account when working with national criminal law.

⁵⁶ Ackermann JB and Hecker B (2021), 21, 30–32.

⁵⁷ Kert R (2016), 35–36.

⁵⁸ Dannecker G and Bülte J (2020), mn. 286–287a; Kert R (2016), 36–37; Klip A (2012), 222–223.

⁵⁹ Staffler L (2019b), 67–70.

⁶⁰ Ackermann JB and Hecker B (2021), 21, 40–49.

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Negligence Offences

In practice, European laws play an important role in negligence offences (→ mn. 307). This is because in these offences the breach of due diligence is the decisive factor for fulfilling the facts of the case. European regulations often provide broad guidelines on safety regulations. For example, the EU Directive on the safety of toys has very high standards and detailed safety requirements.⁶¹ If violations of such requirements occur, this could be an indication of criminal liability for negligence.

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However, if the EU sets specific requirements, the national legislator can also implement these requirements through reforms in criminal law. This happens in different ways:

1. The implementation is sometimes ensured by an **explicit legislative addition** to the pre-existing penal provisions. In doing so, the legislator falls back on the regulatory technique of the so-called blanket criminal provisions (→ mn. 127), which refer to the EU secondary legislation. This is also called “reference” technique, which works like this: “It shall be a criminal offence to commit the conduct described in Article XY of the EU Framework Decision YZ.”⁶²
2. Furthermore, supranational EU requirements are included by means of **external legislative expansion clauses**, in which the national legislator determines by means of an explicit legal regulation to expand existing criminal offences. This can result in legislation with elements of EU law requirements. In Germany, for example, the equal treatment of certain foreign and domestic public officials in acts of bribery was achieved through a law that implemented the provisions of the Convention on the Protection of the EU’s financial interests in Germany.
3. Finally, the implementation of EU law by the national legislator takes the form of the **creation of new offences**. The national legislator can use either a “copy and paste” method, copying the wording of the prohibited conduct into a provision of national criminal law, or a “translation” method by translating the obligations deriving from the European legislation into its “own” words.⁶³ In this way, they implement the requirements of secondary EU law in a manner that corresponds to national criminal law traditions. An example of this type of regulatory technique is the criminal offence of misuse of subsidies (§ 153b StGB-AT, → mn. 580), which was created while implementing the provisions for the protection of the EU’s financial interests. This legal provision also makes explicit reference to the relevant supranational legal interest.

⁶¹ Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170/1 of 30 June 2009.

⁶² The example is taken from Klip A (2012), 221.

⁶³ Klip A (2012), 221–222.

4.5.4 Corporate Social Responsibility

It was shown that the EU is using creative ways to influence national criminal law. In addition to the possibilities outlined above, the EU is also taking up new approaches to setting standards for companies and the economy and reacting to any undesirable developments with the tools of criminal law. These approaches go under the banner of corporate social responsibility and, although they do not directly constitute criminal law, they do have implications on criminal law, as will be explained later. But first, what is **Corporate Social Responsibility (CSR)**? This term describes the maxim of responsible action by companies in the context of their own business activities. Companies should voluntarily integrate social and environmental concerns in their activities and in their dealings with those persons (stakeholders) who are of interest to the company (employees, management, customers, suppliers, society, creditors).⁶⁴ In this way, companies assume responsibility for the effects of their activities on society and the environment and thus contribute to **sustainable development**.⁶⁵ This sustainability is structured into three dimensions, namely

- an environmental dimension (impact of the company's activities on natural resources),
- a social dimension (dealing with human rights and internal health and safety), and
- an economic dimension (corporate governance, financial planning, strategic management).

The EU is of course not the only organisation to launch such corporate social responsibility initiatives (e.g. at the international level: UN Global Compact → mn. 192). Such initiatives are mostly a form of **voluntary self-regulation by companies**.⁶⁶ It is problematic, however, that profit-oriented actors such as companies do not directly submit to CSR standards voluntarily. They must also see a concrete benefit in this. This can be seen in “reputation cultivation”, or the voluntary commitment to soft law standards (→ mn. 191) to avoid hard state regulation and civil liability in the course of corporate risk management.

In EU law, there is a tendency for CSR regulations to be cast in binding normative formats and thus designed as hard-law (enforceable regulations, see → mn. 149).⁶⁷ The debate on the standardisation of CSR at EU level was sparked by the **European Commission's Green Paper** (2001)⁶⁸ and have intensified since then.⁶⁹ Sector-specific precursors, for example in environmental protection issues, were successfully launched

⁶⁴ Sabia R (2021), 36–39.

⁶⁵ Staffler L (2020a), mn. 90–91.

⁶⁶ Nieto A (2021), 6, 18; Wittig P (2020), 395, 397–398.

⁶⁷ Spießhofer B (2014), 2473, 2474–2475.

⁶⁸ European Commission (2001).

⁶⁹ European Commission (2011).

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some time ago and have been able to assert themselves in practice as compliance measures despite voluntary self-regulation. The EU is using the attractiveness of a single market to ensure product quality standards through specific CSR regulations and to communicate the political values of the EU to economic actors. For example, the EU is keen to draw up sector-specific regulations to promote sustainability, environmental protection and human rights.

162 An innovative approach to establishing a CSR-inspired corporate criminal law can be seen in the **CSR Reporting Directive**.⁷⁰ In 2014, the EU legislator adopted a directive to expand the reporting of large capital market-oriented companies, credit and financial service institutions and insurance companies.⁷¹ The aim of the CSR-Directive is to promote the transparency of companies in the EU on environmental and social aspects and to introduce **a minimum standard for non-financial reporting by companies**. In this way, the EU hopes to raise awareness of environmental, social and labour issues as well as respect for human rights and the repression of bribery and corruption. In this respect, the CSR-Directive imposes certain reporting obligations on large companies of public interest whose average number of employees exceeds 500 during the financial year. These obligations include a management report on the non-financial situation of the company. In addition, large capital market-oriented companies are required to include the respective diversity policy for performance and control bodies in their corporate governance statement. If no concepts are implemented in the company for individual issues, this choice must at least be justified (so-called “**comply or explain**” model). The Member States were obliged to implement the CSR-Directive into national law by the end of 2016.⁷²

163 Most recently, with the **Conflict Minerals Regulation**,⁷³ the EU legislator launched a further CSR measure to set appropriate standards of due diligence into the supply chains of the minerals processing industry as part of trade policy.⁷⁴ As a directly effective union regulation, it lays down due diligence obligations for union importers of tin, tantalum and tungsten together with their ores and gold from high-risk conflict areas. By establishing these due diligence measures, the aim is to limit the opportunities for armed groups to finance conflicts through trade in the above minerals.⁷⁵ The Regulation creates

⁷⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union of 15 November 2014, L 330/1.

⁷¹ Nieto A (2021), 6, 26; Sabia R (2021), 36, 39–40, 52–57.

⁷² Staffler L (2020a), mn. 93.

⁷³ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Official Journal of the European Union of 19 May 2017, L 130/1.

⁷⁴ Nieto A (2021), 6, 27–28; Vioque LM (2021), 73–87.

⁷⁵ Cf. Ambos K (2018), 499, 561.

transparency and security with regard to supply through imports into the EU and thus affects importers, smelters and refiners.⁷⁶

At the end of 2020, a **supply chain directive with due diligence requirements for the protection of human rights and the environment** was discussed at EU level (→ mn. 982). The European Parliament's Legal Affairs Committee debated the design of these corporate due diligence requirements and called on the EU Commission to draft a corresponding directive.⁷⁷ According to the draft report, very extensive due diligence obligations are planned. In future, not only human rights risks, but also environmental and good governance risks are to be examined. In addition, corporations based in the EU are to be held liable for damages caused by their business partners or subsidiaries in third countries before courts in the member states. It remains to be seen how the EU will implement these requirements.⁷⁸ 164

4.5.5 Recent Developments

Recent history has shown that the EU itself acts as a driving force for criminal legislation in the economic field. Although there is no EU criminal law, or even criminal procedural law, and the EU itself does not have comprehensive involvement in criminal legislation, institutional cooperation in Europe is very advanced. 165

Various institutions are in constant exchange with national authorities.⁷⁹ The European Anti-Fraud Office (**OLAF**), in particular, is an administrative and investigative service responsible for investigating fraud, corruption and other illegal activities detrimental to the European Union's financial interests. It is not a law enforcement agency, but an administrative authority of the EU with investigative powers. Another authority is the European Police Office (**Europol**), which assists the national police, in particular to prevent and combat serious transnational crime and terrorism where two or more Member States or common interests of EU policies are involved. Europol's competence is derived from an extensive catalogue (Art. 3 in conjunction with Annex I of the Europol Regulation), which also includes economic crime. Europol's support lies particularly in the exchange of information and data. Finally, the **European Judicial Network in Criminal Matters** and **Eurojust** must be mentioned as EU institutions which provide support to and are in close contact with the national authorities in the area of criminal prosecution. 166

⁷⁶Staffler L (2020a), mn. 94.

⁷⁷European Parliament, Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11 September 2020.

⁷⁸Sabia R (2021), 36, 61–62.

⁷⁹Ackermann JB and Hecker B (2021), 21, 54–58.

- 167 As has already been mentioned (→ mn. 148, 153), **EU criminal policy** is primarily concerned with the protection of the financial interests of the EU. Indeed, experience has shown that Member States are often not sufficiently able, or simply don't have the interest, to protect the financial interests of the EU in the same way they protect their own financial interests. Fraud involving the financial interests of the EU causes billions of euros in damage, both to the EU's revenue and to its expenditure. In 2017 on the basis of Art. 325 TFEU, the EU adopted a set of rules to quell offences made against the financial interests of the European Union.⁸⁰
- 168 In addition, the project of the **European Public Prosecutor's Office** was launched in the same year and become operational in 2021.⁸¹ The European Public Prosecutor's Office (EPPO) is a specialised EU authority that focuses primarily on offences affecting the financial interests of the EU. The authority consists of a centralised management at European level and a decentralised "executive" level in the nation states. The EPPO can conduct criminal proceedings in the area where it is operational to protect the financial interests of the EU from fraud.⁸² It will, in the future, be important in European business crime prosecution.

4.6 International Law

- 169 In the era of globalisation, companies are not oriented towards a single national territory, but towards an international audience (→ mn. 35). Due to their considerable financial power, companies can exert direct or indirect influence on national economic life. This financial and organisational capacity of globally operating companies sometimes has its downsides. This is because companies are in a position to use their economic power to commit (or at least make possible the commission of) crimes that go beyond what is covered by traditional BCL.⁸³
- 170 **Ogoni Nine—Case⁸⁴**
In the 1990s, the Ogoni, a tribe living in Nigeria, protested against the threat of environmental pollution in connection with the oil production of a multinational oil

⁸⁰ 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, Official Journal of the European Union of 18 July 2017, L 198/29; see Beck T (2019), 1617–1624; Dannecker G and Bülte J (2020), mn. 100b; Kaiafa-Gbandi M (2020), 36–63; Staffler L (2018a), 52–65.

⁸¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), Official Journal of the European Union of 31 October 2017, L 283/1.

⁸² Staffler L (2018b), 589–599.

⁸³ Ambos K (2018), 499, 503 and Herrenfeld et al. (2021) with further references.

⁸⁴ Torres Mendoza FF (2021), 49–51.

company. By 1993, some two dozen villages were torn down for oil-economic reasons; crude oil production polluted water, agricultural land and natural habitats. The Nigerian military responded to the protest with massive severity, including serious human rights violations such as torture, rape and murder. The leader of the protests (Ken Saro-Wiwa) was convicted together with eight men in an unfair show trial and executed in 1995. They became known as Ogoni Nine. The widows of four of these men brought charges against the oil company before the district court in The Hague (Netherlands) in mid-2017 and accused the company of complicity in the killings, because it had contributed substantially to the arrest of the men by becoming entangled with the government apparatus. ◀

In states with weaker authorities that reach their limits more quickly when dealing with the regulation of various actors, companies can often operate unhindered. Either the states then resign or they cooperate with these companies. This gives rise to the phenomenon of “**undesirable business involvement**”,⁸⁵ which describes companies who commit serious human rights violations via other state actors. Because the state is also involved in the crimes, the economic powers involved are often not prosecuted. Reports by independent journalists, NGOs or human rights lawyers, and sometimes also international courts, testify to such abuses.⁸⁶

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Yalisika Case⁸⁷

On the night of May 2nd, 2011, a troop of around 60 Congolese police and soldiers invaded a village in Yalisika (Congo). One villager was killed, others beaten, several women and girls raped, huts and household effects destroyed. The series of events leading to the punitive action was a dispute between the village and the subsidiary of a large Austrian corporation because the latter had refused to pay the compensation originally agreed upon for the deforestation. According to NGO information, the soldiers were paid by the local manager of the subsidiary and the arrested villagers were taken on a company truck to the nearest prison. ◀

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It therefore seems clear that BCL must deal with such cases. At the level of international law, a distinction must be made between two major legal areas. On the one hand, there is the question of the extent to which companies are liable for the most serious crimes of international law (so-called **core crimes** of international criminal law).⁸⁸ On the other

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⁸⁵ International Commission of Jurist (2008), 3.

⁸⁶ Ambos K (2018), 499, 560–563.

⁸⁷ Torres Mendoza FF (2021), 51–52.

⁸⁸ Ambos K (2018), 499, 500–501.

hand, the reach of international law that addresses aspects of (ordinary) business crime must be examined.⁸⁹

4.6.1 International Criminal Law

174 The globalisation of the economy has darker consequences as well, namely the globalisation of crime. This reality shows that companies are also capable of committing enormous crimes and human rights violations.⁹⁰

175 The beginnings of this development can be found in the period immediately after the **Second World War**. After the major criminal proceedings against the main war criminals in Nuremberg, further trials were held before US military tribunals. Some of these proceedings also dealt with the interrelationships of the National Socialist state with German industry and commerce.⁹¹

176 The Court Proceeding Against I.G. Farben

The most famous court proceeding was against I.G. Farben.⁹² I.G. Farben Industrie AG was a leading producer of chemicals for the manufacture of paints and pharmaceuticals and was an important pillar of the war economy. The charge was that the company's management had unjustly enriched itself by exploiting forced laborers and concentration camp prisoners and by plundering and expropriating foreign property. Various company decision-makers were convicted of war crimes and crimes against humanity.⁹³ ◀

177 Not only US military tribunals, but also British and French military tribunals investigated the intertwining of the National Socialist state and the economy.

Two Crimes Against Humanity

The case *France v. Roechling* concerned Hermann Roechling, who was convicted of crimes against humanity.⁹⁴ As a military economy leader, he was responsible for the

⁸⁹ Ambos K (2018), 499, 501–503.

⁹⁰ Kelly MJ (2016), 1–48; Staffler L (2018c), 217–222; Torres Mendoza FF (2021), 44–60.

⁹¹ Ambos K (2018), 499, 506–510; Nieto A (2021), 6, 9.

⁹² Military Tribunal at Nuremberg, Trial of Carl Krauch and Twenty-Two Others (The I.G. Farben Trial), Judgment of 14 August 1947–29 July 1948, in: Law Reports of Trials of War Criminals, Vol. X, 1949, 1; see Kelly MJ (2016), 29–38; Torres Mendoza FF (2021), 135–143; Wittig P (2020), 395, 399–400.

⁹³ Staffler L (2018c), 217, 220.

⁹⁴ General Tribunal of the Military Government of the French Zone of Occupation in Germany, Judgment of 30 June 1948, The Case against Herman Roechling and Others, in: Annual Digest and

exploitation of the occupied territories, for the increase in the war potential of the German Reich and for influencing the deportation of people for forced labor.

In the Trial of Bruno Tesch and Two Others (so-called Zyklon B-Trial), the British Military Court in Hamburg, Judgment March 8th, 1946, sentenced the owner and the authorised signatory of a distribution company of Zyklon B to death. The pesticide was used for mass murder in extermination camps in Auschwitz-Birkenau.⁹⁵ ◀

It is essential, however, that it is not the criminal liability of companies as legal persons that has been considered, but the criminal liability of the physical persons of entrepreneurs.⁹⁶ In the course of time, the globalisation of the economy gained momentum, but the prosecution of companies under international criminal law didn't. As things stand today, international law (e.g. the Rome Statute of the International Criminal Court) does not recognise the **criminal liability of legal persons**.⁹⁷ Nevertheless, this development is being intensively discussed. It is clear that companies can commit crimes under more areas than just international law (e.g. exploitation of state grievances through the establishment of forced labour).⁹⁸

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However, act that can be committed "by a company" relevant to international criminal law can also be:

- Maintaining business relations with unjust regimes or armed groups;
- Supply of arms or other goods to parties to a conflict;⁹⁹
- Purchase of raw materials or licenses to mine resources from dictatorships;
- Financing of dictatorships (through bank lending).

Since the statute of the International Criminal Court does not recognise criminal liability for legal persons, but does recognise criminal liability for individuals, there is a risk for **entrepreneurs as physical persons** to come into the focus of the criminal prosecution authorities through acts of economic support. Criminal liability for aiding and abetting a crime under international criminal law according to Art. 25 para. 3 lit. c of the Rome Statute of the International Criminal Court would then have to be examined.

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Reports of Public International Law Cases, Vol. XV, 1948, 398; see Torres Mendoza FF (2021), 152–159.

⁹⁵ Military Court at Hamburg, Trial of Bruno Tesch and Two Others (The Zyklon B case), 1–8 March 1946, in: Law Reports of Trials of War Criminals, Vol. I, 1947, 93; see Torres Mendoza FF (2021), 159–162.

⁹⁶ Torres Mendoza FF (2021), 112–163.

⁹⁷ Ambos K (2018), 499, 510–511; Torres Mendoza FF (2021), 282–283.

⁹⁸ Jeßberger F (2016), 327–341; Nieto A (2021), 6, 9–15.

⁹⁹ Cf. Ambos K (2021), 181–201.

Art. 25 para. 3 lit. c of the Rome Statute of the International Criminal Court (Individual Criminal Responsibility)

(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person.

[. . .] (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”

In principle, **neutral corporate actions** (e.g. making factory premises available for logistical purposes of a military operation; selling trucks to a military regime; but also passing on personal data of victims) could be considered as acts of support.¹⁰⁰

Whether liability arises for the managing director then depends on various legal criteria. These include whether the company is domiciled in a state party (→ mn. 364) to the International Criminal Court, the extent to which the crimes enumerated in Art. 5 of the Rome Statute of the International Criminal Court (genocide [→ mn. 180], crimes against humanity, war crimes and aggression) are committed by the principal perpetrators, when the crimes were committed and the extent to which national prosecuting authorities have already initiated criminal investigations.

In the case of **acts of assistance** (→ mn. 181), it is necessary to look in particular (at the level of the objective elements, → mn. 292) at the extent to which the assisting acts significantly facilitated the commission of crimes. Furthermore, it must be examined in particular (at the level of the subjective elements, → mn. 302) to what extent the managing director not only has knowledge of the support of the main perpetrators, but is also aware of the supporting act to facilitate the commission of the main offence. This is particularly controversial in the case of neutral corporate acts (e.g. supplying food and civilian logistics to military personnel who are then in a position to commit crimes under international law).¹⁰¹

180 The fact that the criminal responsibility of physical persons (e.g. entrepreneurs, managing directors ...) exists should not obscure the fact that it is precisely in the **entrepreneurial context** that serious crimes are realised. Indeed, companies can even be accomplices in the commission of the most serious crime of all, which is **genocide**.¹⁰²

¹⁰⁰ See <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-the-matic-report-2008.pdf>

¹⁰¹ Torres Mendoza FF (2021), 270–347.

¹⁰² Kelly MJ (2016).

Art. 6 of the Rome Statute of the International Criminal Court:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide in entrepreneurial context can occur when a company helps engineer genocide in order to create a favourable business climate. According to legal scholars, the China National Petroleum Corporation (CNPC) in Darfur (Sudan) has committed such a heinous act.

China National Petroleum Corporation (CNPC)—Case¹⁰³

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In 1997, CNPC acquired a 40% share of the Greater Nile Petroleum Operating Company (GNPOC), a consortium that dominates oil production in Sudan. Through the CNPC’s stake in GNPOC, China transformed Sudan into an oil exporter. These developments coincided with Sudanese military attacks on unarmed civilians to clear a 100-km piece of land around Sudanese oil fields. The company allowed Sudanese military forces to use the companies’ air strips, landing pads and mechanical support. Furthermore, the government of China provided various support to the Sudanese government. China trained Sudanese military pilots and was the main supplier of weapons used in the genocide. ◀

Although as things stand today there is no criminal liability for companies for crimes under international criminal law, this does not mean that such serious crimes go unpunished (→ mn. 179). The efficiency to prosecute macro-offences basically depends on the domestic decisions of the legislators. A lot of countries are implementing penal provisions in such a way that corresponding provisions are created for both, international criminal offences, and the application of domestic criminal law to foreign offences.¹⁰⁴ Nevertheless, developments and discussions among experts show that **corporate criminal liability in international law** is certainly a vision for the future that is already taking shape.¹⁰⁵

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¹⁰³ Kelly MJ (2016), 109–129.

¹⁰⁴ Torres Mendoza FF (2021), 62–64.

¹⁰⁵ Cf. Torres Mendoza FF (2021).

- 183 For example, in the planned criminal chambers of the **African Court of Justice and Human and People's Rights**, Article 46C states that companies can also be held responsible for the crimes.¹⁰⁶

Article 46C: Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

- 184 Yet it is not only the basis of liability for companies that is being discussed related to international law. Experts are working on bringing the **protection of the environment** (→ mn. 929) into the focus of international criminal law.¹⁰⁷ To this end, proposals are being drafted to supplement the Rome Statute of the International Criminal Court (ICC), which has so far been responsible for four macro-crimes (genocide; crimes against humanity; war crimes; aggression) and in this respect intends to protect people. According to the experts, a fifth crime should come under the jurisdiction of the ICC, namely “**ecocide**.” In this way, mass damage and destruction of ecosystems at a global level are to be criminalised.

On 22nd June 2021 the Stop Ecocide Foundation, an international expert panel, announced the completion of a legal definition of ecocide, see <https://www.stopecocide.earth/expert-drafting-panel>. It reads as follows:

Art. 8ter para. 1 ICC-Statute (Draft): Ecocide

For the purpose of this Statute, “ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment being caused by those acts. (Sands et al., 2021).

In addition to these discussions at the international level, appropriate regulations are being created at the national level. Thus, individual countries, as the example of France¹⁰⁸ shows,

¹⁰⁶ Ambos K (2018), 499, 522–524.

¹⁰⁷ Cf. Greene A (2019), 1.

¹⁰⁸ <https://www.france24.com/en/france/20210417-france-drafts-ecocide-bill-to-punish-acts-of-environmental-damage>

create new national criminal provisions to criminalise ecocide. At present, it is not yet possible to predict whether this trend will take hold globally.

4.6.2 Transnational Business Criminality

Apart from the core crimes found in international criminal law, globalisation also shows that cross-border crime affects ordinary business crime. Money laundering (→ mn. 654) and fraud (→ mn. 562) do not stop at national borders. This has made many states realise that cooperation in criminal prosecution is essential. Traditional cooperation of a bilateral nature, i.e. between two states, or at the regional level (e.g. European states, → mn. 141) can indeed make an important contribution to the fight against crime. In some areas, such as the international financial system, large-scale and far-reaching cooperation is needed.

In order to prevent business crime, and for this prevention to become law, agreements have been forged in many international organizations within specific committees and international task forces.¹⁰⁹ Examples include the OECD and the FATF.

The Organisation for Economic Cooperation and Development (**OECD**) is one of the most important international organisations for combating corruption (→ mn. 639). It is, however, also a leading organisation in the development of (anti-corruption-)compliance (→ mn. 643).¹¹⁰ Standards were not the only thing established by the 1997 Convention on Corruption. They also published a number of practical guides for the introduction and implementation of compliance measures in companies, such as the OECD Good Practice Guidance on Internal Control, Ethics and Compliance of 2010.¹¹¹

The Financial Action Task Force on Money Laundering (**FATF**) is a working group that combats money laundering (→ mn. 654) and terrorist financing. The working group was created in Paris within the framework of the OECD (Organisation for Economic Cooperation and Development) at the European level, but now has an international reach, with 39 states joined (including Australia, China, Israel, USA, Argentina) and two international organisations (EU and the Arab Gulf Cooperation Council). As part of its mandate, the FATF has developed principles to combat money laundering and the financing of terrorism and has laid down 40 recommendations as minimum standards to prevent the aforementioned crimes. The extent to which these recommendations are implemented is regularly reviewed. In addition, the FATF publishes a list of so-called non-cooperative countries and territories that do not meet FATF standards. This increases the pressure on these specific countries to adapt their legislation to the FATF standards so that they do not suffer disadvantages in the globalised economy.¹¹²

¹⁰⁹Eser A and Kubiciel M (2005).

¹¹⁰Ambos K (2018), 499, 514; Dannecker G and Bülte J (2020), mn. 58–59.

¹¹¹<http://www.oecd.org/dataoecd/5/51/44884389.pdf>

¹¹²Staffler L (2020a), mn. 51–53.

- 189 Many of the guidelines drawn up by these actors are implemented by the states at the national level. The international actors monitor this implementation on an ongoing basis by installing monitoring procedures. This puts pressure on states to comply with international requirements. The agreements and recommendations often concern specific areas of crime, such as, corruption (→ mn. 599), money laundering (→ mn. 654), organised crime, terrorism or cybercrime (→ mn. 683). Major projects to unify the law, for example in the area of criminal law response companies, usually fail because of political reality and corresponding will.
- 190 Nevertheless, here, too, corresponding obligations of states under international law or recommendations of expert commissions are incorporated in the domestic legislative process. This sometimes leads to areas of tension with the previously established legal standards, as the change of the criminal offence of money laundering shows (→ mn. 654).

4.7 Soft Law

- 191 Since there is a lack of political consensus in many areas to set legally binding and enforceable agreements regarding standards in economic life (considered “hard law”), so-called “soft law” is often used.¹¹³ The best known example is the UN Global Compact.¹¹⁴

192 The UN Global Compact

The UN Global Compact goes back to a speech by the then UN Secretary-General *Kofi Annan* at the World Economic Forum in Davos in 1999. The pact aims to make economic globalisation more ecological and social. In concrete terms, participating companies declare their willingness to comply with appropriate minimum standards in the future and to draw up an annual report on their efforts.

The UN Global Compact was adopted in 2000 and provides **ten principles for corporate culture**, covering human rights (Principles 1 and 2), labour standards (Principles 3 to 6), environmental protection (Principles 7 to 9) and anti-corruption (Principle 10).

This pact states that companies should commit themselves to the following:

Human Rights

1. Businesses should support and respect the protection of internationally proclaimed human rights; and

(continued)

¹¹³Möllers TMJ (2019), 41, 81, 103; Klip A (2012), 29–31.

¹¹⁴Spießhofer B (2014), 2473, 2475.

2. Make sure that they are not complicit in abuses of human rights.

Labour

3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4. The elimination of all forms of forced and compulsory labour;
5. The effective abolition of child labour; and
6. The elimination of discrimination in respect to employment and occupation.

Environment

7. Businesses should support a precautionary approach to environmental challenges;
8. Undertake initiatives to promote greater environmental responsibility; and
9. Encourage the development and diffusion of environmentally friendly technologies. [Anti-Corruption]
10. Businesses should work against corruption in all its forms, including extortion and bribery.

Companies that are committed to the UN Global Compact should support these core values and implement them within their sphere of influence. Several thousand companies and organizations have now signed the pact.¹¹⁵ Criticism of the UN Global Compact is primarily directed at the lack of control over compliance with its obligations: Ultimately, the UN label would degenerate into a **mere marketing instrument**.¹¹⁶ Nevertheless, this worry is countered by the fact that the pact can have a system-building effect through its broad acceptance by contributing to the establishment of a standard customary in the transport sector.

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In contrast to hard law (→ mn. 191), which binds parties legally to corresponding agreements and is legally enforceable, **soft law** represents agreements, guidelines or declarations that do not have a legally binding effect but that are self-binding on a voluntarily basis.¹¹⁷ Soft law thus has a reduced validity because the standards there are not legally binding. Nevertheless, their validity should not be underestimated, because they can, for example, define relevant standards in the area of business life.

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¹¹⁵ <http://www.unglobalcompact.org>

¹¹⁶ Cf. Kathollnig C (2016), 32–33; Thurner GWB (2012), 189–190.

¹¹⁷ Cf. Giersch C (2015); Müller-Graff PC (2012), 18–34; Thürer D (1985), 429–453.

195 Soft law regulations can also be found in the area of BCL, namely in the broader field of corporate governance.¹¹⁸

One example of where soft law regulations can be found in action is the **Swiss Code of Best Practice**.¹¹⁹ This is a recommendation of the “economiesuisse” Association, which is directed at all stock corporations listed on the Swiss Exchange. The recommendations are not subject to legal sanctions, which is why their enforceability is based on “voluntary” action. Nevertheless, they do have an impact on the assessment of a company’s creditworthiness, which is why companies have a strong motivation to actually implement the recommendations.

196 However, soft law regulations can also be found within larger binding laws for specific areas. In these cases, unlike in the other provisions of the law, the recommendations and suggestions cannot be enforced with a sanction. However, soft law regulations often have legal effect because they can be used to interpret legal general clauses, i.e. for the specification of the legal duties of the diligent managing director. The legal regulations are thus concretised with reference to soft law regulations, and soft law thus aids interpretation.

197 One example of this is the **German Corporate Governance Code**.¹²⁰ It contains three different types of provisions, which can be distinguished according to the degree to which they are binding. On the one hand, the German Corporate Governance Code contains statutory regulations which essentially reflect the provisions of the German Stock Corporation Act. On the other hand, the code contains recommendations and suggestions whose implementation is voluntary. Pressure to implement the voluntary commitments is exerted by a declaration that listed stock corporations must make pursuant to § 161 of the German Stock Corporation Act. In addition, they must also declare to what extent they accept the code, either as a whole, not at all, or only parts of the code. In this way, the company and its conduct are presented to the shareholders, which in turn can have an effect on its attractiveness in the capital market.

198 The **Austrian Corporate Governance Code** is a similar example.¹²¹ For a company to be listed on the Vienna Stock Exchange, it must agree to comply with the code. The code itself contains three different types of rules. The category of L-Rules,¹²² which are copied from various laws and are therefore legally binding. The category of C-Rules,¹²³ which contain recommendations from which companies may deviate, but must justify this

¹¹⁸ According to Ambos K (2018), 499, 512, “on the soft law level, there is a clear trend towards the recognition of companies’ human rights obligation since the acceptance of the UN ‘Guiding Principles on Business and Human Rights’ (‘Ruggie Principles’) by the UN Human Right Council.”

¹¹⁹ https://www.economiesuisse.ch/sites/default/files/publications/economiesuisse_swisscode_e_web_2.pdf

¹²⁰ <https://www.dcgk.de/en/code.html>

¹²¹ <https://www.corporate-governance.at/code/>

¹²² L is for Law.

¹²³ C stands for Comply or Explain.

deviation because otherwise, in the worst case, they could lose their listing. The category of R-Rules,¹²⁴ which are recommendations with no particular consequences for a company if they do not comply.

However, the soft law requirements of a certain level (e.g. EU law) can sometimes be reinforced by another legal level (e.g. law of individual EU member states) and in this way even imply legal effects. In this respect, soft law specifications in individual states or in state organisations can play a considerable role in practice.

One example is the **European Code of Conduct for Community Companies** with subsidiaries, branches and representations in **South Africa**, announced by the Foreign Ministers of the European Community in 1977.¹²⁵ This soft law measure required the companies concerned to prepare an annual report providing information on the progress made in implementing the Code of Conduct. The Member States of the European Community were to jointly review the report. Germany decided that the granting of export guarantees for business with South Africa would be conditional upon, among other things, the companies based in Germany making a declaration endorsing the objectives of the Code of Conduct. In order to enforce this measure, Article 4 (1) No. 3 of the Foreign Trade and Payments Act (AWG) is applied - this standard can be used to restrict private legal transactions in order to prevent a significant disruption of the foreign relations of the Federal Republic of Germany.¹²⁶

But even outside of state entities, there are various organisations that deal with the establishment of standards that are also relevant to criminal law.¹²⁷ There are numerous examples of this.¹²⁸

The **International Labour Organisation** (ILO) has published a soft law measure in its Declaration of Principles concerning multinational enterprises and social policy. It contains 59 guidelines for employment, training, working conditions, living conditions and industrial relations.¹²⁹

In 2010, the **International Organisation for Standardisation** (ISO) published a guide to social responsibility, which was also aimed at companies. The core objective of ISO standard 26,000 is to establish sustainability concepts. It contains many different recommendations, such as specifications on management, anti-corruption strategies, compliance management systems or sustainable development and resilience of communities.

¹²⁴R stands for Recommend.

¹²⁵See Bulletin of the European Communities No 9/1977, 46–47.

¹²⁶Hailbronner K (1982), 111–117.

¹²⁷Nussbaum M (2021), 33–45.

¹²⁸See Ambos K (2018), 499, 511–513 for further references.

¹²⁹ILO, Tripartite Declaration of Principles concerning Multinational Enterprise and Social Policy (MNE Declaration), 5th edition, 2017.

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- 204 Furthermore, globally active institutions, such as development banks, also shape norms and standards designed to prevent criminal behaviour such as the financing of terrorism, money laundering (→ mn. 654), tax evasion or corruption (→ mn. 599).
- 205 The **World Bank**, on this count, should be mentioned.¹³⁰ It provides financing instruments for long-term development projects in the real economy. In doing so, it focuses on economic developments to integrate national legal systems into the global economy, to open them to free trade and to make them responsible partners through good governance programs. For example, when the Bank provides general budget support and grants subsidies for a national budget, it regularly requires as a condition for disbursement that certain reforms (e.g. trade liberalisation, liberalisation of procurement regulations, etc.) are granted.¹³¹ At this time, the World Bank is home to a specific sanctions mechanism. Indeed, the World Bank has recognised that it is vital in continuing sustainable development and poverty reduction while focusing on good governance and anti-corruption measures. This work is so crucial because the diversion of funds from World Bank development projects through corruption affects the ability of governments, donors and the World Bank to promote institutional objectives. For this reason, the World Bank has set up its own sanctions system where companies convicted of corruption are blacklisted (“debarment”).¹³²

Lahmeyer International—Case¹³³

In 2003, a court in Lesotho found several companies, including Lahmeyer International, guilty of corruption. According to the court, the company had paid bribes in connection with the Lesotho Highlands Water Project. In 2006, Lahmeyer International was subsequently blacklisted by the World Bank for 7 years and thus excluded from all World Bank contracts. This exclusion was taken up by other development banks, such as the European Development Bank. The company had to fear that other international organisations would follow and blacklist the company (so-called “cross-debarment”). Due to media attention, clients have subsequently withdrawn from the company. However, the development banks offered a reduced period of blocking if the company implemented a credible compliance system. ◀

- 206 Finally, the **age of digitalisation** also brings forth new actors and rules that can be classified as soft law. This can be seen in the example of disinformation and virtual hate speech. Illegal and harmful content on the internet is not only seen as a nuisance by civil society, but increasingly as a (criminal relevant) problem¹³⁴ and even a threat to

¹³⁰See Freiburg-Braun E (2020).

¹³¹Then P (2016), 147–157.

¹³²Judge T (2015), 291–298.

¹³³Pieth M (2007), 99; Polte W (2014), 119, 126; Torres Mendoza FF (2021), 52–55.

¹³⁴Cf. Bung J and Bayer D (2021), 332–337. Forster M (2020), 451–456; Selman S and Simmler M (2018), 248–281.

democracy¹³⁵ and national security¹³⁶ (→ mn. 45, 46). The big tech companies that run social media platforms are increasingly getting into the responsibility of taking action against virtual disinformation and digital hate.¹³⁷ In doing so, the big companies are not waiting for legislators to take action and enact harsh regulations in this regard.¹³⁸ Instead, they are becoming creative themselves in order to avoid hard rules and to deal with the challenges in advance through their own mechanisms (self-regulation strategy, → mn. 110). This is how new soft law approaches are emerging in the law of the digital economy.¹³⁹

The Oversight Board of Facebook and Instagram

The **Oversight Board of Facebook** and Instagram offers an example.¹⁴⁰ It is a board consisting of 20 members that is supposed to make final decisions to delete hate comments and controversial posts on the aforementioned social media platforms. This private Supreme Court, which in this respect is a quasi-judicial institution of a company, became operational in October 2020 and submitted its first decisions at the end of January 2021.

To better assess the impact that decisions by such a private committee can have, consider the case of former U.S. President Donald Trump's suspension in response to the storming of the U.S. Capitol in January 2021. The Oversight Board approved Facebook's decision to ban the former US president from its platforms.¹⁴¹ However, Facebook had to re-evaluate the permanent ban because there was a lack of criteria on how to apply this sanction. The committee therefore decided that Facebook must deliver an assessment within 6 months that takes into account the seriousness of Donald Trump's offences. ◀

Overall, the consequences for the criminal conduct of companies also be felt outside criminal law. A "smart mix"¹⁴² of different legal tools and soft law mechanisms can have a significant impact on the economic activity of the company concerned.¹⁴³

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¹³⁵ Cf. Egli P and Rechsteiner D (2017), 249–258; Mafi-Gudarzi N (2019), 65, 68.

¹³⁶ Sarts J (2021), 23–33.

¹³⁷ Cf. Stöcker C (2020), 129–149.

¹³⁸ Cf. Eifert M (2017), 1450–1454.

¹³⁹ Lüdemann J (2019), 279, 283–284.

¹⁴⁰ Brosch M (2021), 26–29; Klonick K (2019), 2232–2605.

¹⁴¹ <https://www.oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/>

¹⁴² Gless S and Schmidt M (2019), 1–44.

¹⁴³ For an in-depth study on the contribution of business actors to a global constitutional community, see Peters A (2013), 240–262.

4.8 Human Rights Law

208 What are human rights? These are inalienable rights that every human being has simply on the basis of his or her humanity. They protect the dignity of every human being and are equally available to all people regardless of such things as race, gender, or sexuality. They are innate and one cannot lose them.

209 Human rights can be found in multiple sources. Many **constitutions** contain catalogues of these fundamental rights (→ mn. 138),¹⁴⁴ and there are some international documents that contain such rights as well, for example, the **UN Universal Declaration of Human Rights** of December 10th, 1948. This universal declaration in turn formed the basis for the drafting of two other human rights covenants: The **International Covenant on Civil and Political Rights** and the **International Covenant on Economic, Social and Cultural Rights**. These Covenants were adopted in 1966 and entered into force in 1977 after a sufficient number of state parties had ratified them.¹⁴⁵

210 Over time, important human rights treaties were concluded not only at the international level but also at regional. Humans rights recognised at the international level can be seen in particular in the European judicial area. The most important document found within this area is the **European Convention on Human Rights** (ECHR). It represents a binding **minimum standard** of human rights for all European states as members of the European Council (→ mn. 141). The special feature of this document is that the rights before an international court (European Court of Human Rights, ECtHR) can be asserted by any individual under certain conditions. Thus, violations of her/his fundamental rights, which are committed by the state, can be asserted before an international court. This is a very significant development.¹⁴⁶ The most important rights protected by this document are:

- Art. 1: Respecting rights (duty for the States to secure the rights of the Convention)
- Art. 2: Right of every person to their life
- Art. 3: Prohibition of torture and inhuman or degrading treatment or punishment
- Art. 4: Prohibition of slavery, servitude and forced labour
- Art. 5: Right to liberty and security
- Art. 6: Right to fair trial
- Art. 7: Prohibition of retroactive criminalisation of acts and omission
- Art. 8: Right to respect for one's private and family life, her/his home and correspondence
- Art. 9: Right to freedom of thought, conscience and religion
- Art. 10: Right to freedom of expression
- Art. 11: Right to assembly and association

¹⁴⁴Petrig A and Zurkinden N (2015), 37–39.

¹⁴⁵Gless S (2015), 35–37.

¹⁴⁶Gless S (2015), 13–16.

- Art. 12: Right to marry and establish a family
- Art. 13: Right to an effective remedy before national authorities
- Art. 14: Prohibition of discrimination

Important Fundamental Rights in BCL

The most important fundamental rights, from the point of view of BCL, are Art. 6, Art. 7 and Art. 13 ECHR, because they contain important fundamental rights for the criminal justice sector. However, other fundamental rights also have clear relevance for the business sector (e.g. Art. 2 [air or water pollution as an obstacle to a reasonable standard of living], 4 [forced labour] or 8 [duties of environmental protection] or in the judicial sector (e.g. Art. 2 [duty to investigate suspicious deaths], 3 [prohibition of degrading punishment], 5 [obligation of lawful detention of a person affected for the purpose of bringing him/her before the competent legal authorities], 8 [violation by mass surveillance], or Art. 1 Protocol No. 1 to the ECHR [protection of property] and Art. 4 Protocol No. 7 to the ECHR [right not to be tried or punished twice]).

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Although the ECHR is an international document, the national status of the document in the **hierarchy of norms** is crucial. In Austria, the ECHR has constitutional status, while in Germany, the ECHR is ranked below the German Basic Law (the German constitution) at the level of a simple federal law. However, here it has become established in practice that, although it does not have the rank of a constitutional law, it is above the normal law. In other countries, human rights protected by various agreements can be seen. In the Principality of Liechtenstein, the Convention on Human Rights has constitutional status. In Switzerland, the Human Rights Convention even takes precedence over the Federal Constitution.

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How can human rights influence criminal law? This is a layered answer as criminal law is considered the most invasive encroachment on the fundamental rights of human beings.¹⁴⁷ While punishment for a crime can be carried out legitimately by the state, simply by pronouncing the punishment, the state encroaches on human freedom. Human rights specify how such an intervention may be carried out in a legitimate manner. There is then a **close connection between criminal law and human rights**. Many of the principles and structures that we learn about in the next chapter on criminal law and criminal procedural law implement the basic ideas and concepts of human rights.¹⁴⁸ Where this does not happen, it can be challenged before the European Court of Human Rights under appropriate conditions.

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¹⁴⁷Berger BL (2014), 428, 441: "Punishment is one of the most rawly exposed exercises of state sovereignty that remains in contemporary legal systems."

¹⁴⁸Gless S (2015), 21.

214 But there is also another connection to **Business criminal law**.¹⁴⁹ Experience has shown that large corporations operating globally are capable of committing gross human rights violations.¹⁵⁰ Although this is seen as a problem internationally, there is no consensus on how to stop companies from committing human rights violations. For a long time, global initiatives to stop infringements on human rights, such as an agreement at the level of the United Nations, had no chance at all of being implemented. Now, this gap has been filled by various human rights courts, like the ECtHR.¹⁵¹ While it is true that human rights are traditionally understood as the rights of the individual to defend himself/herself against the state, legal developments show that human rights can also have an effect among private individuals and thus in the relationship between individuals and companies. The human rights courts now see states as having a **duty to protect** people from human rights violations through appropriate legislation.¹⁵²

215 **Toxic Emissions (Ilva)—Case¹⁵³**

Numerous applicants complained about the effects of toxic emissions on the environment and on their health, and about the ineffectiveness of the domestic remedies, from a steelwork in Taranto (Italy). The Court presiding over this case held that there had been a violation of Art. 8 (right to respect for private and family life) and Art. 13 (right to an effective remedy) of the ECHR. The Court found, in particular, that the persistence of environmental pollution **endangered the health of the applicants** and, more generally, that of the **entire population** living in the areas at risk. It also held that the national authorities had failed to take all the necessary measures to effectively protection the applicants' right to respect for their private life. Lastly, the Court considered that these applicants hadn't had an effective remedy available to them, which would have enabled them to raise their complaints concerning the fact that it was impossible to obtain measures to secure decontamination of the relevant areas to the national authorities.¹⁵⁴ ◀

216 These duties of the state to protect the rights of their citizens, as established and developed by the human rights courts, will make a significant contribution to setting appropriate standards in economic criminal law in the future. The protection of human

¹⁴⁹ Gless S and Schmidt M (2019), 1–44.

¹⁵⁰ Cathollnig C (2016) Weissbrodt D and Kruger M (2003), 901–922.

¹⁵¹ Staffler L (2020a), mn. 121–122.

¹⁵² Lavrysen L and Mavronicola N (2020); Spießhofer B (2014), 2473, 2475, Staffler L (2020b), 53, 53–61; Torres Mendoza FF (2021), 71–73, 73–78.

¹⁵³ European Court of Human Rights, Judgment of 24 January 2019, Appl. No. 54414/13 and 54,264/15, Case of Cordella and Others v. Italy.

¹⁵⁴ Press Release issued by the Registrar of the Court: The Italian authorities failed to protect the applicants living in the areas affected by toxic emissions from the Ilva factory in Taranto, ECHR 029 (2019).

rights and the responsibility of companies in this regard have ultimately become a compliance issue.¹⁵⁵

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Basic Knowledge on (Business) Criminal Law & Procedure

5

- This chapter deals with the basics of criminal law and justice. It provides an overview of the central definitions of criminal offences from a legal perspective. This chapter is targeted at persons who have never dealt with the fundamentals of criminal law and justice before, while offering an introduction to criminal law and justice from a Central European perspective.

The aim of this chapter is to give a first overview of the legal basis for criminal law & justice in the light of the legal systems¹ of Austria,² Germany,³ Liechtenstein⁴ and Switzerland.⁵

¹One of the most interesting textbooks is by Tiedemann K and Engelhart M (2017), in which they establish references of comparative criminal law.

²See, for example, Fuchs H and Zerbes I (2018); Steininger E (2019); a good introduction to Austrian Criminal Law is offered by Schmoller K (2020).

³See, for example, Jescheck HH and Weigend T (1996); Roxin C and Greco L (2020); a good introduction to German Criminal Law is offered by Bohlander M (2009); for a good introduction to German Economic Criminal Law see Preuß T (2018), 98–106.

⁴See, for example, Jescheck HH (1991), 133–152.

⁵See, for example, Donatsch A and Tag B (2013); a good introduction to Swiss Criminal Law is offered by Petrig A and Zurkinden N (2015).

5.1 Preliminary Remarks

- 217 Dealing with law requires the explanation of some basic definitions. This applies in particular when dealing with the legal matter of criminal law. Once these basic concepts have been explained, the question of how to deal with legal norms must be answered. It is therefore a question of how to read legal norms and how to understand them. This requires a brief overview of the common legal methods of interpretation.

5.1.1 Conceptualising Criminal Law & Justice

- 218 In most European countries, there are different conceptual meanings of “Criminal Law”. It is used to refer to the following branches of law: substantive criminal law, formal criminal law and the law of enforcement of sentences.⁶

► **Substantive Criminal Law** This refers to all provisions of law that threaten certain behaviour with a criminal sanction. Thus, substantive criminal law determines whether specific conduct is criminal and the appropriate sanction. Here there is a distinction is made between general rules and specific rules.

► **General Rules** (→ mn. 122) They describe the general conditions under which specific conduct (i.e. a specific offence) is considered criminal. They are laid down in the so-called General Part of criminal law and often concretised and further elaborated by many unwritten rules, which are developed by case law and doctrine. The General rules lay down, for example, rules on intent and negligence, mistakes and participation and describes the consequences arising from the commission of an offence (i.e. sentencing, sanctions and their execution).

► **Specific Rules** (→ mn. 124) These are the bulk of offences (such as theft, fraud, homicide). They are laid down in the so-called Special Part of the criminal law. The rules of the General Part apply to the specific part of criminal law.

► **Formal Criminal Law** This is the term to describe criminal procedural law and the law of judicial organisation. Criminal procedural law is the body of law which concerns the procedure to be followed when enforcing the punishment imposed by the state. Criminal procedural law enforces the rules of substantive criminal law. The law of judicial organisation contains the provisions governing the organisation, powers and activities of the prosecution’s office and the criminal courts.

⁶Petrig A and Zurkinden N (2015), 9–11.

► **Law on the Enforcement** The law on the enforcement of sentences regulates where and how criminal sanctions are enforced. Thus, it governs the phase following a criminal conviction. Although this branch of law is under the umbrella of criminal law, its rules are mainly of an administrative nature.

5.1.2 Interpreting Law

The interpretation of norms is one of the central activities of lawyers.⁷ This is because lawyers have to examine whether certain facts fall under a certain legal norm. To do this, they must interpret the text of the legal norm, i.e. they must analyse the content of an abstract legal provision.⁸ It should suffice to refer to the four classical types of interpretation. Although scholars of legal methodology have developed other types and techniques that go beyond the four rules of interpretation they will not be presented in greater detail in this introduction.⁹ **219**

As mentioned before, there are basically four different methods of interpreting legal norms according to legal methodology.¹⁰ **220**

► **Grammatical Interpretation** The method of **grammatical interpretation** is based on the wording of the norm. The interpretation strictly adheres to the wording of the law. The wording of the law must therefore not be exceeded in the interpretation.¹¹ **221**

► **Historical Interpretation** The method of **historical interpretation** tries to identify the intention of the legislator behind a given criminal norm. This intention can mainly be deduced from the explanatory legislative materials that are adopted when laws are passed.¹² **222**

► **Systematic Interpretation** The method of **systematic interpretation** is based on the premise that each standard should not be regarded as an isolated issue, but rather must be read in its context. This context can result from the section in which the standard is embedded, but also from the entire body of legislation. The method thus starts from the **223**

⁷Thommen M and Eschle D (2020), 3, 3–8.

⁸Fuchs H and Zerbes I (2018), 38.

⁹See especially Möllers TMJ (2019), 107–364 and passim.

¹⁰Donatsch A and Tag B (2013), 35–41; Fuchs H and Zerbes I (2018), 38–41; cf. also Bohlander M (2009), 15.

¹¹Möllers TMJ (2019), 119–134.

¹²Möllers TMJ (2019), 147–156.

premise that criminal law and the entire legal system form a coherent system of norms that protect values.¹³

224 ► **Teleological Interpretation** The **teleological interpretation** arises from the premise that each standard was created for a specific purpose or aim. So in order to understand the norm, one has to ask about the purpose of the provision. The purpose of a criminal norm thus indicates how the specific norm can be applied to the facts of the case.¹⁴

225 There is **no hierarchy** within these four methods. However, criminal law is based on certain principles that strictly bind the interpretation of criminal provisions to the wording.¹⁵ There are therefore certain limits to creativity in interpretation, particularly in criminal law (→ mn. 256).

5.2 Criminal Law

226 Criminal law provides a legal framework for people living together in a society (i.e.: in a State). Criminal law is intended to protect the most important social values of a community and thus enable people to live together in an orderly and peaceful manner.¹⁶ In this way, criminal law ensures that citizens can live together freely and peacefully in a society, while guaranteeing the fundamental rights (→ mn. 213) laid down in the constitution (→ mn. 137).¹⁷ To this end, the legislature uses criminal law to articulate those forms of behaviour that are considered socially harmful.

227 Looking at criminal law from a temporal dimension, criminal law in its starting point first refers to a prohibited past behaviour to which the state responds with criminal prosecution: A company becomes a victim of fraud and the state reacts to this offence with the means of criminal justice. In other words, the offence to which the criminal law reacts, lies always in the past. However, criminal law not only has this connection to the past, but also to the future. In fact, it communicates to everyone in the society and beyond that violations of criminal law are not tolerated. In this respect, Criminal law pursues both **repressive purposes** (past) and **preventive purposes** (future), both with regard to the individual offender and with regard to the general public.

228 As a field of law, criminal law differs substantially from civil law. **Civil law** is primarily concerned with conflicts between individuals. One may think of disputes arising from a purchase contract, a loan, an inheritance or compensation for damages. The conflict takes place on the same level between essentially equal individuals. **Criminal law**, on the other

¹³ Möllers TMJ (2019), 134–147.

¹⁴ Möllers TMJ (2019), 159–174.

¹⁵ Möllers TMJ (2019), 126–132; see also Kudlich H and Oğlakcioğlu MT (2020), mn. 72–77, 78–81.

¹⁶ Cf. Melissaris E (2014), 355, 365–367.

¹⁷ Cf. Gropp W (2015), 40–41; Roxin C and Greco L (2020), 26.

hand, deals with a conflict between the offender and society (state). Thus, criminal law is not about an equal relationship, rather the state appears with its concentrated power of criminal investigation and prosecution against the individual. For this reason, in criminal law the state assumes a superior position vis-à-vis the citizen and reacts to undesirable behaviour of the citizen with sanctions. Indeed, in heavy crimes, the public prosecutor initiates her/his investigations independently of the initiative of the injured party. Punishment is not expressly about compensation for damages (this is typical of civil law), but about punitive sanctioning of deviant behaviour. Criminal law is thus a strong form of exercising sovereign (punitive) powers that the state holds over individuals. The severity of criminal law is not only expressed through sanctions, which the perpetrator regards as a burden, but also through public pronouncement of criminal responsibility and punishment. This expresses asocial-ethical disapproval of the perpetrator's conduct.¹⁸ In this way, criminal law is to be assigned to public law.¹⁹

However, the imposition of **sanctions** is not unique to criminal law (→ mn. 105).²⁰ This is because sanctions are also imposed by administrative law, e.g. in the case of unauthorised tax reduction through tax surcharges or breaches of building regulations through monetary sanctions. In this respect, criminal law and administrative law have quite similar concerns. However, criminal sanctions, namely fines and imprisonment, are the **most severe state sanctions**. Imprisonments are the most invasive interference in an individual's life that a constitutional state can make in Europe.²¹ In addition, unlike other decisions involving sanctions, criminal judgment expresses the **social-ethical disapproval of society**. Invasiveness and disapproval are thus characteristics that distinguish criminal sanctions from other legal sanctions. For these reasons, criminal law should only be used when other forms of state reaction do not appear appropriate (punishment as *ultima ratio*). At the same time, the legislator recognises different types of criminal law norms. This is to cover the different degrees of severity of social disapproval. Therefore, in addition to "normal" criminal law, there is also administrative criminal law. Thus, criminal law is judgment of ethical unworthiness of an action, whereas administrative criminal law is concerned primarily with disobedience to an administrative order, which, although breaches the society's ethical code, it does so less than a criminal reprimand.²²

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¹⁸Fuchs H and Zerbes I (2018), 3–4.

¹⁹Gropp W (2015), 11–12; see Melissaris E (2014), 355, 365–368 for a in-depth study on the "public nature" of crimes.

²⁰Fuchs H and Zerbes I (2018), 4–9.

²¹The death penalty has been abolished in Europe, see Thommen M (2018a), 369, 379–382. The 6th Additional Protocol to the European Convention on Human Rights (1983) contained the prohibition of the death penalty outside military jurisdiction, the 13th Additional Protocol to the European Convention on Human Rights (2002) abolished the death penalty also for military jurisdiction. In other countries, such as the USA or China, the harshest punishment that the state can impose on an individual is the death penalty. It is even sometimes imposed in connection with economic crime (China and Iran); see Koch A (2013), 165, 187.

²²Roxin C and Greco L (2020), 113.

- 230** In this respect, one must distinguish between (judicial) criminal law and administrative criminal law. While judicial criminal law falls within the jurisdiction of ordinary courts, administrative criminal law is only applicable if the punishment of the offence does not fall within the jurisdiction of the ordinary courts. Infringements of the law are therefore sanctioned either by criminal law before ordinary courts or by administrative criminal law before administrative courts.
- 231** For example, driving a car at 80 km/h in a local area is to be assessed under administrative criminal law. If, on the other hand, a vehicle is driven drunk and another person is injured in traffic, this is to be assessed according to judicial criminal law, in particular according to the criminal law provisions on bodily injury.
- 232** Judicial criminal law should therefore be applied when all other legal possibilities are unsuitable to sanction undesirable behaviour. For this reason, judicial criminal law also has some of the **toughest sanctions** of the state available to it (custodial sentences). The decisive factor for the legitimate use of criminal law in practice regards whether the offence is ascertained by judicial decision within a fair criminal trial and whether the penalty is imposed according to the culpability of the offender.
- 233** Finally, it is important that modern criminal law focuses on the crime as an act perceptible in the real world. It focuses on the sanctioning of **illicit acts**. Criminal law does not therefore focus on character traits or on perpetrator types, but rather on the act.²³ The deed must manifest itself either as an infringement or as a threat to a legal interest worthy of protection. Inner thoughts cannot be punished. It needs the reference to an act.

5.2.1 Structure of Criminal Provisions

- 234** Criminal law describes acts that are defined by society as socially unacceptable. If one of these acts is committed, there is the threat of severe sanctions. In this respect, provisions of criminal law consist of two parts, namely the **description of the offence** and the **threat of punishment**.²⁴
- The offence is the legal description of prohibited conduct and usually consists of several characteristics.
 - The threat of punishment contains the sanction that can be imposed by a court if all the elements of the offence are met.
- See for example § 242 StGB-DE: Theft.

²³Roxin C and Greco L (2020), 271–280.

²⁴Gropp W (2015), 60–61.

§ 242 StGB-DE

Whoever takes movable property belonging to another away from them with the intention of unlawfully appropriating it for themselves or a third party [*description of the offence*] incurs a penalty of imprisonment for a term not exceeding 5 years or a fine [*description of the penalty*].

Criminal law is comprised of a large number of provisions dealing with violations of a legal system. Behind criminal law provisions there are legal interests which are considered by society to be worthy of protection and are thus protected by criminal law, e.g. theft—this provision protects the property of others. **235**

Behind every criminal provision there is (at least one) **legal interest** [*Rechtsgut*].²⁵ The legal interests are the values, institutions and persons (e.g. limb and life, liberty, honour, reputation, property, public safety, environment, sexual integrity, etc.) that are protected by criminal law provisions and that are indispensable for the orderly coexistence of people in society. The significance of legal interests follows the social views behind them. The interpretation of the elements of crime is therefore based on the respective legal interest. **236**

► **Legal Interests** What are legal interests? According to the **definition** of the most famous textbook on criminal law in the German-speaking world, legal interests are “circumstances or objectives that are necessary for the free development of the individual, the realisation of his or her fundamental rights, and the functioning of a state system based on this objective”.²⁶ **237**

In summary, it can therefore be said that if one wants to understand the content, meaning and sense of criminal provisions, one has to look at the protected legal property.

5.2.1.1 Crimes, Offences, Misdemeanours and Contraventions

In the context of criminal law, the words “crime” or “offence” are often used. It has already been shown that offences can only be human acts. Not all harmful acts are declared criminal offences, but rather violations or threats to certain legal interests which the state considers to be particularly worthy of protection. The damaging behaviour is described in the penal regulations. **238**

The Criminal Codes distinguish basically between two types of offences.²⁷ These are “**felonies**” on the one hand and “**misdemeanours**” on the other.²⁸ The criterion for **239**

²⁵ Bohlander M (2009), 18–20; Gropp W (2015), 37–39; Petrig A and Zurkinden N (2015), 43–46; Roxin C and Greco L (2020), 24–90; Steininger E (2019), 82–85.

²⁶ Roxin C and Greco L (2020), 26.

²⁷ Bohlander M (2009), 27–28; however, the Swiss Criminal Code distinguishes between three categories, namely felonies, misdemeanours and contraventions: Petrig A and Zurkinden N (2015), 47.

²⁸ Gropp W (2015), 65–68.

distinguishing between these two types of crimes is basically the amount of the penalty. Furthermore, some legal systems have a third category, namely “**contraventions**” which are minor criminal offences.²⁹

240 In Germany, the distinction is based on the minimum level of imprisonment. Felony crimes are unlawful acts that are punishable by at least (in the lower limit of the sanction) one year’s imprisonment, while misdemeanours are unlawful acts that are punishable by at least one year’s imprisonment or a fine (§ 12 StGB-DE).

241 In Austria, Liechtenstein and Switzerland,³⁰ by contrast, the differentiation is based on other criterias. In these three countries, the law also distinguishes offences and crimes according to the severity of the penalties. Accordingly, felony crimes are offences punishable by imprisonment of more than 3 years. By contrast, misdemeanours are offences that are punishable by imprisonment of up to 3 years or by a fine (§ 17 StGB-AT, § 17 StGB-FL, Art. 10 StGB-CH).

242 The above distinction has several consequences. For example, the attempt to commit a felony crime is always punishable, even if the specific criminal provision is silent on the possibility of the attempt. Yet, the attempt to commit a misdemeanour is only punishable if this is expressly provided for in the specific criminal provision. See, for example, the provision of theft in Art. 242 StGB-DE (and specifically take note of the second paragraph).

Art. 242 StGB-DE

1. Whoever takes movable property belonging to another away from another with the intention of unlawfully appropriating it for themselves or a third party incurs a penalty of imprisonment for a term not exceeding 5 years or a fine.
2. The attempt is punishable.

243 Another consequence of this distinction arises for the jurisdiction of the respective court. Shortened types of proceedings, such as the summary penalty order proceeding [*Strafbefehlsverfahren*] in Germany, are only provided for misdemeanours and not for crimes (§ 407 StPO-DE). In addition, the distinction also has procedural consequences: if a person is accused of a felony crime, she/he is always entitled to representation by a public defender if she/he does not himself/herself appoint a lawyer as her/his defence counsel (§ 140 para. 1 and 2 StPO-DE).

5.2.1.2 Types of Offences

244 In principle,³¹ the provisions in criminal law can be divided according to two fundamental aspects: Harm (or result) offences and endangerment offences.

²⁹Roxin C and Greco L (2020), 375–379.

³⁰Thommen M (2018a), 369, 374.

³¹For further classifications, see Roxin C and Greco L (2020), 427–441.

Harm (or result) offences are structured in such a way that they describe a harm (a result) in the form of an ascertainable effect on the protected legal interest.³² 245

In the case of bodily injury (§ 33 StGB-AT, § 223 StGB-DE, § 33 StGB-FL, Art. 123 StGB-CH), for example, it must be established that the victim has been maltreated or has suffered damage to his or her health and that this injury is causally related to the perpetrator's actions.

In contrast to result offences, endangerment offences focus less on the harm (or the result of an action) and more on the danger of the action itself. In these offences behaviour is already punishable because of its dangerousness. A distinction is made between concrete and abstract endangerment offences.³³ 246

Concrete endangerment offences presuppose that the dangerous act has actually endangered the legal interest. The act must have led to the endangerment of the protected legal property and it must have ultimately depended only on chance whether the legal property was infringed or not. The realisation of this danger (i.e. harm) must therefore not yet have occurred; it is sufficient that a concrete danger was present. 247

A typical example consists in the criminal offences for endangering road traffic, cf. § 315c StGB-DE (→ mn. 967).

Abstract endangerment offences, on the other hand, describe actions that are typically dangerous and therefore must be prohibited. In contrast to concrete endangerment offences, there does not have to be a concrete danger. It is sufficient that the abstractly dangerous behaviour is realised³⁴ 248

A typical example is serious arson (§ 306a StGB-DE).

The distinction between concrete and abstract endangerment offences is supplemented by a further category. This is the category of **potential or concrete-abstract endangerment offences**. They require that a state be brought about or an action be taken which is fundamentally capable of damaging the protected legal property. As in the case of a concrete endangerment offence, the general dangerousness of the concrete act or the means of action must therefore be present. As in the case of the abstract offence of endangerment, however, the occurrence of the concrete danger is not necessary. 249

A typical example is § 130 StGB-DE (incitement of the people). Especially in the age of the Internet (→ mn. 40), this criminal offence is directed against incitement of hatred, for example via platforms such as Facebook. To fit the offence, it is crucial that the act disturbs the protected legal interest (namely: public peace). The specific act must be generally dangerous, but the occurrence of a concrete danger must not.

³²Bohlander M (2009), 30–31; Petrig A and Zurkinden N (2015), 51, 52; Stuckenberg CF (2014), 468, 469–470.

³³Petrig A and Zurkinden N (2015), 52.

³⁴Ackermann JB (2021), 107, 132–134.

5.2.2 No Punishment Without Law

- 250** The principle of “no crime without law” is a fundamental principle of criminal law as well as the general rule of law.³⁵

Article 7 ECHR

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

- 251** Punishment can only be imposed for conduct that has been **expressly** criminalised by the legislature.³⁶ Even if an act is seen as harmful, but is not covered by the wording of the criminal provision, it remains unpunished and no criminal penalty may be imposed. This principle is not only anchored in the core of criminal law (§ 1 StGB-AT, § 1 StGB-DE, § 1 StGB-FL, Art. 1 StGB-CH) and constitutional law in many European legal systems (e.g. Art. 103 para. 2 of the German Constitution), but is also an international standard (e.g. Art. 7 ECHR).³⁷
- 252** The wording and meaning of a legal provision is therefore of central importance. If the facts do not fit the wording of the criminal law, no penalty can be imposed. The example of the Coin-Machine-Case shows how this works in practice.

Coin-Machine-Case³⁸

When the coin-operated machine (e.g. cradle-operated machine, coin-operated telephone) was invented, some people tried to throw shaped metal plates into the slot of the machine instead of real coins in order to use the service of the machine free of charge. Under the criminal law of the time, they could not be punished. This is because, according to the wording of the “fraud”-provision, it is necessary that someone has been subjected (mentally) to a mistake. However, a mechanical vending machine cannot be subjected to a mistake. Falling victim to a mistake is a human characteristic, not a characteristic that machines can have. For this reason, the court had to acquit the

³⁵ Bohlander M (2009), 23–26; Donatsch A and Tag B (2013), 30–34; Fuchs H and Zerbes I (2018), 43–48; Gropp W (2015), 97–116; Roxin C and Greco L (2020), 213–215.

³⁶ Staffler L (2018a), 1147, 1147–1150; Thommen M (2018a), 369, 385.

³⁷ Gless S (2015), 33–34.

³⁸ Roxin C and Greco L (2020), 214.

accused.³⁹ The legislator, however, felt compelled to include the abuse of vending machines in a new criminal offence by stipulating as prohibited behaviour: “anyone who obtains the performance of a vending machine by fraud”. ◀

Penalties may only be imposed for acts that are expressly criminalised. This is an expression of the fact that criminal law is not intended to cover all conceivable undesirable or immoral conduct, but only that which the legislature expressly regards as punishable. This results in some intentional and some unintentional loopholes. In order to close such gaps, the legislature must actively seek to insert a new offence into the law. 253

No crime without law (*nullum crimen sine lege*) is complemented by the principle no punishment without law (*nulla poena sine lege*). This expresses the fact that the legislator must not only define the conduct that is punishable but must also determine before the crime is committed what penalty can be pronounced and how harsh this penalty will be. The legislator is required to define, by means of a law, before the offence is committed, which conduct is punishable, what type of penalty can be imposed and how harsh the penalty can be. 254

The principle of legality can be seen four different ways. Two of the ways affect the judge who is to apply the criminal law. The other two ways affect the legislator, who is to lay down the criminal law. 255

5.2.2.1 No Analogous Interpretation

The aforementioned principles contain the so-called prohibition of analogy in a negative sense for the perpetrator (*nullum crimen, nulla poena sine lege stricta*).⁴⁰ Analogy interpretation means that an existing legal rule is transferred to another case by way of a **conclusion of similarity**, whereby the other case is not regulated by law. 256

Hydrochloric Acid as a Weapon

Criminal law places bodily injury under a more severe penalty if it is committed with a weapon. If hydrochloric acid is used in a specific individual case, the question arises whether hydrochloric acid can be considered a weapon. Weapons are usually mechanical tools. However, hydrochloric acids do not act mechanically, because they are chemical substances. 257

Because a chemical substance has not been explicitly considered by the legislator, hydrochloric acid would have to be regarded as a weapon via analogous interpretation (similarity conclusion). This could work if the acid were to be regarded as a particularly dangerous method of injury, which the legislator would want to take into account accordingly, as there is a more severe punishment of bodily injury by means of a

³⁹RGSt 68, 65.

⁴⁰Gropp W (2015), 102–110; Roxin C and Greco L (2020), 221–238; Petrig A and Zurkinden N (2015), 24–26; Thommen M (2018a), 369, 386.

weapon. If the term “chemical weapon” is taken into account, one could define hydrochloric acid as a weapon by analogy.

What is the solution here? If one takes the wording strictly into account, an analogous interpretation is present. Since this analogous interpretation would have negative consequences for the offender (because acid is considered a weapon and is punished more harshly), it is forbidden. If, on the other hand, one does not rely on the wording but on the meaning and purpose of the provision, the harsher punishment could be permissible. ◀

258 While conclusion by analogy is permitted in other areas of law (e.g. civil law) as a normal procedure for interpreting law, this is prohibited in criminal law by the principle of legality if the interpretation by analogy is to the detriment of the perpetrator.

259 If an abstract case does not fit the concrete case regulated in criminal law, but instead is only similar to the concrete case, it is forbidden to apply an analogous interpretation. Therefore, in the above-mentioned case of the coin-operated machine, a punishment based on analogous application of the fraud provision had to be omitted and the offender acquitted (→ mn. 252). Thus, insofar as the application of law by analogy is concerned, the offender is protected from the burden or negative consequences of a punishment. However, the use of analogy in favour of the perpetrator is permitted.

5.2.2.2 No Retroactivity

260 Of particular importance is the prohibition of retroactivity (*nullum crimen, nulla poena sine lege praevia*). The offence must be punishable at the time it is committed. No one may be punished for conduct that was **unpunishable in the past**. If the offence was not under a criminal provision at the time, then it cannot be punishable retrospectively in the future.⁴¹

261 The prohibition of retroactivity covers various possibilities of retroactive application of laws. For example, it prevents an act that was not punishable at the time it was committed from being made punishable retroactively in the future. It prevents an act that has been deemed punishable in the present from retroactively providing a more severe type of penalty (for example, instead of a fine, a prison sentence is now provided for) or retroactively increasing the amount of the penalty (for example, instead of a 5-year prison sentence, a 15-year prison sentence is now provided for). All these possibilities of retroactive application of criminal laws are inadmissible. This is because punishment was not legally pronounced before the offence was committed.

⁴¹ Eicker A (2021), 77, 99–106; Gropp W (2015), 111–116; Petrig A and Zurkinden N (2015), 29–31; Roxin C and Greco L (2020), 240–252; Staffler L (2018a), 1147, 1153–1155; Thommen M (2018a), 369, 386.

5.2.2.3 No Customary Law

An important effect of the principle of legality is the prohibition of customary law that justifies and aggravates punishment (*nullum crimen, nulla poena sine lege scripta*).⁴² 262

Among the common sources in other fields of law (for example, civil law), unwritten customary law is also included. However, the principle of legality prohibits the establishment of criminal liability or the aggravation of criminal law by customary law. Criminality must be determined by law and cannot be obtained through customary law.

While the establishment of criminal liability or the aggravation of criminal liability by customary law is prohibited, the exclusion or mitigation of punishment by customary law, i.e. effects in favour of the offender, is permissible.⁴³ 263

5.2.2.4 Principle of Certainty

Finally, the principle of legal certainty prohibits indefinite criminal laws and penalties (*nullum crimen, nulla poena sine lege certa*). The elements of a crime and the sanctions which apply need to be **clearly defined**.⁴⁴ This is an important cornerstone for the legislator. Criminal liability must be determined by the legislator and not only by the judge. The principle of certainty thus limits the interpretation of criminal law (→ mn. 220). This applies both to conduct that is prohibited and to the sanction that is threatened. 264

For this reason, a criminal provision that would read: anyone who commits an intolerable violation of the common good is punishable by imprisonment for up to 10 years would be inadmissible.⁴⁵ In fact, such a provision would make many criminal law provisions superfluous. One cannot see from the wording of this provision what the nature of the conduct leading to a penalty must be. Only the judge would determine which behaviour meets the criteria mentioned. 265

For this reason, it is essential that the legislator sufficiently determines and defines the prohibited conduct and also the penalties to be imposed. 266

German Law on Beef Labelling

A concrete example from German case law can explain the above-mentioned concept.⁴⁶

In 2016, the German Federal Constitutional Court declared a criminal provision that regarded the law on **beef labelling** unconstitutional because it was too vague (violation of legal certainty).

The criminal provision read: “Anyone who contravenes a directly applicable provision in legal acts of the European Community or the European Union within the scope

⁴² Bohlander M (2009), 18; Gropp W (2015), 101–102; Roxin C and Greco L (2020), 239–240.

⁴³ Gropp W (2015), 22–25.

⁴⁴ Gropp W (2015), 110–111; Roxin C and Greco L (2020), 252–270; Petrig A and Zurkinden N (2015), 23–24; Thommen M (2018a), 369, 387.

⁴⁵ Example according to Roxin C and Greco L (2020), 216.

⁴⁶ Dannecker G (2016), 723–730.

of application of Section 1(1) shall be punished by imprisonment of up to one year or by a fine, insofar as a regulation pursuant to paragraph 3 refers to this criminal provision for a specific offence. (2) The attempt is punishable. (3) The Federal Ministry shall be authorised, insofar as it is necessary for the enforcement of legal acts of the European Community or the European Union, to designate by statutory order without the consent of the Bundesrat the facts to be punished as a criminal offence under para. 1”.

This legal provision contained a double referral. On the one hand, it referred to unspecified provisions in European Community or EU legislation. On the other hand, reference was made to a regulation of the Federal Ministry of Food and Agriculture which was intended to specify which of these EU provisions were to receive criminal law protection.

The Federal Constitutional Court did not oppose the legislative technique of referring to other standards. However, it emphasised that a regulation can only concretise a criminal offence. The fundamental decision on criminal liability, by contrast, must lie with the parliamentary legislature. On the basis of this provision, however, the institution issuing the ordinance would have been able to decide completely independently which types of conduct would be punishable. For this reason, this provision did not satisfy the requirements of the principle of certainty as a result of the principle of legality.⁴⁷ ◀

267 If one looks at how laws are written, it becomes apparent that the actual criminal provision cannot be determined at all without the content of the norm that it exists within (**referral or blanket norm**, → mn. 127).⁴⁸ One speaks here of a blanket criminal provision, i.e. a criminal offence that is linked to another norm (law, ordinance, administrative act) in terms of content. This regulatory technique is particularly widespread in the area of Business criminal law (BCL), especially in food law and EU law. It certainly lies in the border area of the requirement of certainty. The prevailing view is that it is permissible in principle, but it depends on the form of the blanket criminal provision.

5.2.3 No Punishment Without Culpability

268 The principle of culpability (“*nullum crime sine culpa*”) is also a fundamental principle of criminal law in continental Europe.⁴⁹ It is, indeed, the heart of the criminal justice system.⁵⁰ The objective misconduct of the perpetrator that has been portrayed in the real world is not

⁴⁷ Bundesverfassungsgericht, Judgment of 21.9.2016 - 2 BvL 1/15.

⁴⁸ Ackermann JB (2021), 107, 112–117; Kudlich H and Oğlakcioğlu MT (2020), mn. 46–71.

⁴⁹ Bohlander M (2009), 20–22; Gropp W (2015), 116–120; The opposite concept, namely strict liability (liability without guilt), is therefore not in use or not fully in use in most European legal systems; Hörster M (2009); Simmler M (2018), 54–113, 331–414.

⁵⁰ Simmler M (2018), 447.

sufficient in itself for the imposition of a criminal sanction. Rather, the offender must also have acted culpably.⁵¹ Only if she/he has culpably committed the act, is she/he to be punished. The guilt is the basis for the assessment of the penalty.⁵²

The principle of culpability thus restricts the state's power to punish so that the liberal character of the modern constitutional state is preserved. The principle of culpability, which is determined according to the internal factors of the perpetrator's person, and the extent of the damage caused, ensures that the punishment remains proportionate, even though society's interest in preventing the crimes could be much greater.⁵³ The accused is presumed innocent until proven guilty (Art. 6 para. 2 ECHR, → mn. 387).

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5.2.3.1 Types of Subjective Elements

How is the presumption of guilt implemented in criminal law provisions? The normative text of criminal laws usually refers not only to external features (objective elements) of the offence but also to internal features (subject elements). The internal characteristics refer to the motivation and inner attitude of the offender in comparison to the external characteristics of the crime. Presumption of guilt is therefore a matter of the offender's inner attitude to the crime.

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Example: § 242 StGB-DE: Theft

"Whoever takes movable property belonging to another away from another..." [objective elements].

"... with the **intention** of unlawfully appropriating it for themselves or a third party ..." [subjective elements]. ◀

The subjective element of the offence is the sum of all the characteristics that relate to the internal side of the offence. Some subjective elements of the offence refer to the offender's inner attitude towards the offence. However, most of the subjective elements of the offence must be complementary to all circumstances around the objective element of the offence (→ mn. 292). Thus, the question is asked what the offender's inner attitude is towards each individual element of the external side of the crime.⁵⁴

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Here, the legislator makes a fundamental distinction between intent and negligence. The **essence of intent** is the perpetrator's decision to commit the act, → mn. 303. The greatest form of intent is first-degree *dolus directus*, the weakest form of intent is contingent intent, where the offender accepts the realisation of the crime and considers the realisation of the facts to be seriously possible and resigns himself/herself to it.⁵⁵

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⁵¹ Thommen M (2018a), 369, 387–389.

⁵² Simmler M (2018), 221–248.

⁵³ Roxin C and Greco L (2020), 157; for an in-depth study on this subject matter, see Kaspar J (2014).

⁵⁴ Petrig A and Zurkinden N (2015), 49–50.

⁵⁵ Gropp W (2015), 151–167.

- 273 The **essence of negligence** is the decision of the offender against the act, although the act is nevertheless carried out due to a lack of care, → mn. 308.⁵⁶ The accusation of negligence is therefore based on the fact that the offender was not careful enough and because of this the act was carried out. Central criteria of negligence are therefore careless acts or omission of care, the predictability and whether a result could be avoided → mn. 309.

5.2.3.2 Criminal Capacity

- 274 Punishment presupposes that a person has acted culpably. In other words, criminal responsibility is only present if someone has acted culpably. For this purpose, a person must be able to see the unlawfulness of his or her behaviour on the basis of his or her physical and mental abilities (**insight**) and to behave according to this (**control**). This criminal capacity is presumed for persons who have reached the age of criminal majority.

Minimum Ages of Criminal Responsibility:

- Switzerland: Age of 10 (Art. 9 para. 2 StGB-CH read together with Art. 3 para. 1 Juvenile Criminal Act)
- Austria: Age of 14 (Art. 1 Juvenile Court Act)
- Germany: Age of 14 (Art. 19 StGB-DE)
- Liechtenstein: Age of 14 (Art. 2 para. 1 and 2 Juvenile Court Act)

- 275 Furthermore, there is no criminal capacity if a person has a mental disability, a profound disturbance of consciousness or a mental illness at the time of the crime. However, criminal capacity can be diminished (or missing) if another mental disorder—equivalent to the aforementioned conditions—(e.g. drug intoxication) impairs the ability to see and act. If, at the time of the offence, the person was only partially able to understand the wrongfulness of his behaviour (or if he was able to appreciate but failed to act accordingly to this insight), the court mitigates the sentence. Finally, the rules governing missing or diminished criminal capacity do not apply if a person could foresee that he might commit a crime in a state where he lacked criminal capacity and if he could avoid this state (so-called *actio libera in causa*).⁵⁷

5.2.3.3 Awareness of the Unlawfulness of the Conduct

- 276 Accountability alone is not sufficient for punishment. The person must also act with the **sense of unlawfulness of his conduct**. The person must therefore have the awareness that his or her behaviour is against the law and that the behaviour is forbidden.⁵⁸

⁵⁶ See Staffler L (2015), 230–249.

⁵⁷ Petrig A and Zurkinden N (2015), 85–86.

⁵⁸ Kert R (2016), 16–20; Petrig A and Zurkinden N (2015), 86–88; in the context of business criminal law, see Karami P (2019).

The sense of wrongdoing is absent if a person mistakenly assumes that his or her behaviour in this situation is in compliance with the law. For example, someone supposedly shoots at a scarecrow and does not realise that it is a human being. In this case, there is a lack of knowledge that one's actions potentially constitute a criminal offence. She/he lacks the sense of wrongdoing. If, however, the shooter is not sure whether it is a human being or a scarecrow and shoots nonetheless, she/he acts intentionally—the sense of wrongdoing is apparent.

There is also a lack of awareness of wrongdoing if the person erroneously assumes that his or her conduct is not prohibited at all (mistake of law, → mn. 321) and this mistake cannot be blamed on the erring person because the wrongdoing of the act was not easily recognisable either for the specific person or for someone else and there was no obligation to familiarise oneself with this legal provision. For example, someone records a telephone conversation without asking the conversation partner's consent. At the same time, the person making the recording does not think that recording the call could be prohibited under Art. 201 StGB-DE.

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- In practice, however, such mistakes are rarely recognised: Ignorance is no excuse.

5.2.3.4 Grounds of Excuses

The grounds of excuses relates to the idea that a person's conduct should only be punishable (and culpable) if it is reasonable to require from him or her that she/he acts in conformity with law. Here the question arises as to whether a person who is connected with legally protected values would have acted differently in the place of the person who actually acted. The actual behaviour of the offender is thus compared with the fictitious behaviour of a person who is loyal to the standards in a judgmental manner. If the law-abiding person in the real-life case (taking into account the motives of the real offender) had also set the standard of behaviour prohibited under criminal law, then the real offender is not accused of the behaviour. The perpetrator is excused, the offender has not acted culpably, punishment is not possible.

278

Example: Obstruction of Prosecution or Punishment (§ 258 StGB-DE)

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The provision punishes whoever intentionally (→ mn. 304) or knowingly (→ mn. 305) obstructs, in whole or in part, another person from being punished or being subjected to a measure in accordance with criminal law for an unlawful act.

Para. 5 of this provision, however, contains an exception: Whoever, by committing the offence of § 258 StGB-DE, also intends to prevent, in whole or in part, themselves incurring a penalty or being subjected to a measure, or a penalty or measure imposed on them being enforced, incurs no penalty under this provision. ◀

280 In practice, the grounds of excuses are used in particular when the person in question panics or gets anxious. Culpability can then be completely excluded or reduced. However, this depends on certain conditions, such as the extent to which the concrete behaviour is a reaction to an unlawful attack, if the person concerned could not have fought off the unlawful attack in any other way (e.g. fleeing) or if the reaction was proportionate to the attack. The grounds of excuses thus come into consideration when a person's behaviour was brought about with great psychological pressure and was uttered as a result of self-preservation.

5.2.4 Theory of Elements of Crime

281 With the Principle of Legality (→ mn. 250) and the Principle of Guilt (→ mn. 268), the basic foundations have been laid for dealing with the theory of crime. The theory of crime is the analysis of criminal offences.⁵⁹ As the principle goes it is only actions that can be recorded in the outside world that are relevant to criminal law. Mere thoughts that do not manifest themselves in actions cannot be punishable.

282 However, two aspects should be pointed out here:

1. It should be emphasised that this chapter merely intends to provide a rough and initial overview. In fact, criminal law doctrine in Germany in particular cultivates the reputation of having developed an extremely complex and highly differentiated system for the interpretation, systematisation and further development of criminal law provisions. The subject matter is very complex in the German-speaking world,⁶⁰ which is not only seen as an advantage for a systematic analysis,⁶¹ but is sometimes also criticised.⁶² Anyhow, for an in-depth study of this complex subject matter, textbooks on criminal law should be consulted.⁶³
2. The variety of different legal sources for the regulation of business crime holds some special features in contrast to common criminal law.⁶⁴ This can be illustrated by two examples. Unlike in common criminal law, there are very many offences in BCL that cannot be committed by all persons, but only by a restricted group of persons who have certain company positions (e.g. the employer or the accountant). And while in general criminal law the result of offences (→ mn. 245) play a major practical role, business offences are often structured as endangerment offences (→ mn. 246), ultimately to take

⁵⁹ Roxin C and Greco L (2020), 288–289.

⁶⁰ Ambos K (2007), 2647–2673.

⁶¹ Schünemann B (2016), 654, 665.

⁶² Ambos K (2020), 452, 452–454.

⁶³ Roxin C and Greco L (2020).

⁶⁴ Kudlich H and Oğlakcioğlu MT (2020), mn. 35, 36–40, 43–45, 46–71.

account of the complexity of business crime—thus lowering the requirements for criminal liability so that procedural evidentiary difficulties can be avoided.

5.2.4.1 Introduction

In order to find out whether a person is criminally liable, criminal law scholars have developed a test by linking the rules of the General Part with the descriptions of the individual offences in the Special Part. This test format must be adapted to the type of commission of the offence, i.e. action or omission, or single perpetrator or several participants in the offence.

The test is conducted in such a way that the criminal responsibility is examined for a specific offence in relation to a specific person. To this end, plausible hypotheses of offences are first identified so that the test is carried out on the basis of this specific offence.

If the act or omission in question could potentially fulfil several offences that have different grades of severity, the most serious offence is tested first before the minor offences are tested. If the offences are combined offences, i.e. they provide for a base offence and for more serious acts or results to qualify the base offence, then the base offence is tested first.

According to the test,⁶⁵ conduct is criminal if

- it is a human act
- this act fulfils the characteristics of the described offence (actus reus & mens rea)
- this act is unlawful (Unlawfulness)
- this act is culpable (Culpability)
- if provided for by the norm, there must be other conditions for criminal liability.

The core of this examination procedure is the verification of the fulfilment of all elements of the offence, the unlawfulness and the culpability. This results in the so-called **tripartite structure of the crime**,⁶⁶ as shown in Fig. 5.1.

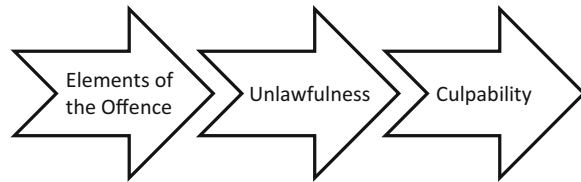
Thus, while the criterion of the human act is only decisive for criminal responsibility in exceptional cases and the further prerequisites of criminal liability are to be examined depending on the respective offence, namely the describing elements of an offence, unlawfulness and culpability, are the central focal points of the examination of criminal responsibility.

As far as **human action** is concerned, this criterion is meant to exclude natural phenomena (e.g. flash of lightning) or animal behaviour as long as it is not prompted by

⁶⁵ Bohlander M (2009), 16–17; Donatsch A and Tag B (2013), 82–83; Fuchs H and Zerbes I (2018), 81–85, 89–95; Gropp W (2015), 125–126; Petrig A and Zurkinden N (2015), 54–61.

⁶⁶ Bohlander M (2009), 16–17; Donatsch A and Tag B (2013), 82; Roxin C and Greco L (2020), 388–392; Staffler L (2019), 173, 186–187.

Fig. 5.1 Tripartite structure of the crime



human beings.⁶⁷ In fact, criminal law is based on a conception according to which all human behaviour is driven by the human will. This means that humans can basically shape and control their behaviour according to their will. Ultimately, the criterion of human action is intended to keep circumstances out of criminal responsibility that are based on reflexes, hypnosis or other force majeure (in the sense of an irresistible force).⁶⁸ For example, someone who falls unconscious and destroys a vase in the fall has not acted in the criminal law sense, which is why the offence of “damage to property” does not even need to be examined.⁶⁹ In practice, the existence of human behaviour is generally presumed, so that in the absence of circumstantial evidence there is no reason to specifically examine this basic prerequisite for criminal liability.⁷⁰

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Probably the most important test for criminal responsibility is the examination of each individual **elements of an offence** [*Tatbestandsmäßigkeit*].⁷¹ As shown above (→ mn. 234), each criminal norm contains, on the one hand, the concrete description of the prohibited conduct and, on the other hand, the designated sanction. Looking at the description of the prohibited conduct, it can be seen that every criminal offence is composed of objective elements (referred to as “actus reus” or the “wrongful act” in Anglo-American literature) and subjective elements (also referred to as “mens rea” or the “guilty mind” in Anglo-American literature).⁷² The description of the offence thus defines the individual characteristics which set out what offence (e.g. theft, robbery, murder) is typically concerned. This definition is very important, especially in view of the *nullum crimen* principle (→ mn. 250), because only the exact fulfilment of each individual characteristic of an offence established by the legislature actually leads to criminal liability.

- The **objective elements** of an offence refer to all characteristics that are perceptible in the outside world, namely the person of the offender, the specific prohibited conduct, the

⁶⁷ Donatsch A and Tag B (2013), 93–97; Fuchs H and Zerbes I (2018), 86–88; Gropp W (2015), 73–91; Roxin C and Greco L (2020), 337–338; Steininger E (2019), 61–68.

⁶⁸ Steininger E (2019), 66–68.

⁶⁹ This example is provided by Roxin C and Greco L (2020), 367.

⁷⁰ Roxin C and Greco L (2020), 335–374.

⁷¹ Donatsch A and Tag B (2013), 9–125; Jescheck HH and Weigend T (1996), 272–289, 316–321; Kert R (2016), 5–15; Roxin C and Greco L (2020), 381–535; Steininger E (2019), 70–144, 166–188.

⁷² Chiao V (2014), 447, 448–465.

prohibited result (consequence) and the connection (causality) between the prohibited conduct and the prohibited result.⁷³

- The **subjective elements** of an offence refer to all characteristics that concern the offender's inner relationship to her/his behaviour.⁷⁴ They are therefore elements that cannot be verified in the external world, but which result from the offender's behaviour. What is decisive for practice here is that the intent refers to all objective characteristics of the offence. The subjective elements must therefore be related to the objective elements of the offence. At the same time, the description of the offence may provide that certain subjective elements must be present. For example, in the case of crimes against property, it is often presupposed not only that the offender intentionally caused her/his actions and the damage, but additionally that she/he acted with the intention of enriching himself/herself or a third party.

If there is a human act which has all the objective and all the subjective characteristics of the described offence, the examination of criminal responsibility is not yet over. It must be examined whether the conduct was **unlawful**.⁷⁵ If certain grounds for justification (e.g. self-defence) are present, then even a conduct that fulfils all the definitional elements of a criminal offence can be justified. For example, reacting to a unlawful attack by harming the aggressor in self-defence may well constitute intentional bodily harm for the defender, which fulfils all objective and subjective elements of the offence—but it is justified by the situation of self-defence.

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The next step in the examination concerns the **culpability** of the person.⁷⁶ This examination step results from the previously mentioned principle of guilt and has three different directions.

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- First, it is a matter of ascertaining to what extent the person was at all capable of guilt at the time of the offence (e.g. whether she/he had reached the age of criminal majority) and that she/he was fundamentally capable of recognising the wrong of his or her act (which may not be the case, for example, with a mentally disturbed person).

⁷³ Chiao V (2014), 447, 448–449: „Actus reus elements typically describe an event either in terms of its consequences (a death, an injury, transference of property, release of pollutants) or in terms of a person's conduct (sexual touching, misrepresentation of a material fact, driving).”

⁷⁴ Chiao V (2014), 447, 449: “Mens rea elements describe a particular type of relationship between the accused and the specified actus reus, typically though not invariably in terms of the accused's mental state, for example that the accused brought about a consequence deliberately, or that he acted with reckless indifference.”

⁷⁵ Donatsch A and Tag B (2013), 217–267; Jescheck HH and Weigend T (1996), 321–403; Steininger E (2019), 191–300.

⁷⁶ Donatsch A and Tag B (2013), 268–299; Jescheck HH and Weigend T (1996), 404–508; Steininger E (2019), 302–401.

- Then it is a question of ascertaining to what extent the person was capable of recognising the unlawfulness of their act (which is not the case, for example, if they are unavoidably mistaken about the legal situation).
- Finally, it is a question of ascertaining to what extent the specific person can be expected to have behaved lawfully in the situation (which is not the case, for example, if the person exceeded the limits of permissible self-defence due to panic).

291 Finally, certain offences require the existence of **additional prerequisites**, which may have to be examined.⁷⁷ Such prerequisites may be objective circumstances, e.g. cessation of payments and opening of insolvency proceedings in the case of criminal bankruptcy under § 283 StGB-DE (→ mn. 847). If these elements are objective preconditions, then they do not belong to the essential defining elements of the offence and therefore do not have to be covered by the subjective elements of the offence. For certain offences, it is also necessary that certain procedural requirements are met, for example that the statute of limitations on prosecution has not yet occurred or that a criminal charge has been filed in due time.

5.2.4.2 Objective Elements

292 As already seen above, most of the objective characteristics of offence are listed in the penal provisions of the specific part (→ mn. 124).⁷⁸ The provisions name the concrete **offender** (e.g. “whoever” or, more specifically a certain group of persons, such as “public officials” or managers), the concrete **act** and the criminally relevant **result**⁷⁹ that is the work of the offender.⁸⁰ There must be a **causal connection** between the act and the result, and the act must be the cause of the result, as shown in Fig. 5.2.

293 In most criminal laws, the causal connection is not explicitly mentioned, but is implicitly anchored in this provision.⁸¹

Example: Embezzlement

The offence of embezzlement (→ mn. 582) requires a connection between financial loss (result) and misuse of authority to manage assets (criminal act). The criminal law norm only addresses the causal connection by the word “thereby”. ◀

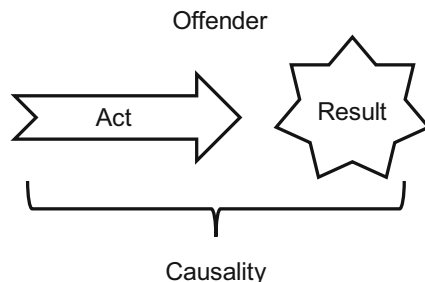
⁷⁷ Donatsch A and Tag B (2013), 110–111, 419–437; Jescheck HH and Weigend T (1996), 551–559; Roxin C and Greco L (2020), 1162–1178; Steininger E (2019), 403–408.

⁷⁸ Bohlander M (2009), 16–17.

⁷⁹ Gropp W (2015), 132–133.

⁸⁰ Fuchs H and Zerbes I (2018), 107–113.

⁸¹ Stuckenberg CF (2014), 468, 469.

Fig. 5.2 Objective elements

How do lawyers now raise **causality**? What criteria are used to establish that there is a connection between cause and effect?⁸² That depends on the specific typology of the crime, but generally the focus is on the presentation of offences of infringement. This is because the actions and the result (success) can be distinguished from each other in a good way. As seen in widespread practice throughout continental Europe, a certain formula (so-called **equivalence formula** or **condition theory**) is used: cause is damage that cannot be eliminated through thought alone.⁸³ An action is therefore the cause of result if what results cannot be ignored without the result in its concrete form being lost. It is sufficient if the action is one of many causes without which the result could not have been achieved. It is important, however, that every condition is seen as a cause without which the damage would not have occurred.⁸⁴

The concept of the condition theory can be illustrated by a simple textbook example: If a drunk driver is unable to control her/his vehicle and drives onto the other side of the road where a collision with another car occurs, then the alcohol consumption is the cause of this accident. Because if you theoretically remove the factor of alcohol consumption, the driver of the car would have continued on the right side of the road and the accident would not have happened.

However, according to the above formula, there is an **extremely wide range of possible causes**.⁸⁵ This is because the victim's behaviour is also one of the conditions that is necessary for the accident to occur. If the victim had not been at that place at that time, the accident may not have occurred regardless of the driver's alcohol consumption. But there is more to it than that: the manufacturers of the two vehicles must also be regarded as

⁸² See Bohlander M (2009), 45–57; Stuckenberg CF (2014), 468–489, and in relation to business criminal law, see Ackermann JB (2021), 107, 126–129; Kudlich H and Oğlakcioğlu MT (2020), mn. 128–146.

⁸³ Stuckenberg CF (2014), 468, 472–475; the name “equivalence formula” is used because each condition is considered equivalent (and thus equivalent) to a cause; Donatsch A and Tag B (2013), 103–105; Fuchs H and Zerbes I (2018), 129–133; Gropp W (2015), 135–143; Jescheck HH and Weigend T (1996), 279–284; Roxin C and Greco L (2020), 452–474.

⁸⁴ Staffler L (2017a), 125, 135–136.

⁸⁵ Stuckenberg CF (2014), 468, 477–482.

a cause of the accident. This is because if the driver and the victim had not both bought cars produced by the manufacturers, then they would not have been in their cars at that time and the accident would not have been possible. But the chain of causality goes much further according to this formula. The parents of the driver and the victim are also partly responsible for the accident. If they had not given birth to the driver, she/he would never have been driving on this road and would never have caused the accident.

297 The causality formula which lawyers can apply is extremely far-reaching and requires appropriate limitations and corrections. Only the causes that are essential for determining responsibility should matter, as the subject of criminal law is whether damage has occurred. Therefore, normative criteria exclude all factors of conduct which are by no means considered legally relevant. These decisive limitations are provided by so-called **limiting principles**.⁸⁶ They are shared by many jurisdictions, but details vary greatly.

The main criteria include proximity, adequacy and “objective imputation”.⁸⁷

► **Proximity:** Generally, lawyers prefer short and obvious causal chains. Therefore, one criterium relies on the legally significant causes that are closest to the harmful effect. The problem with this criterium is, obviously, its vagueness.⁸⁸

► **Adequacy:** Another criterium is focusing on the cognate concepts of adequacy, foreseeability and probability. They operate to restrict the imputation of causation in view of the unavoidably limited causal knowledge of human actors. Therefore, abnormal results or combinations of circumstances will not give rise to legal responsibility.⁸⁹

► **“Objective Imputation”:** This criterium emphasises all factual and legal factors of causation in view of the risk-creating activity and the materialisation of risk.⁹⁰ It asks basically two questions: Did the conduct create an unlawful risk that the relevant harm will ensure? Is the actual harm-causing conduct the materialisation of precisely that risk?

This brief presentation should not divert from the fact that these criteria and especially the “objective imputation” is one of the most complex topics in the criminal law studies. In many textbooks on criminal law, this topic is not only one of the most important, but also one of the most detailed ones. For a more in-depth study of this topic, consulting a legal textbook⁹¹ is recommended.

⁸⁶ Kudlich H and Oğlakcioğlu MT (2020), mn. 129–135.

⁸⁷ Stuckenberg CF (2014), 468, 483–488.

⁸⁸ Stuckenberg CF (2014), 468, 483–484.

⁸⁹ Stuckenberg CF (2014), 468, 484; Roxin C and Greco L (2020), 474–476.

⁹⁰ Stuckenberg CF (2014), 468, 487–488; for an in-depth study of this complex subject matter see Roxin C and Greco L (2020), 476–535; for summary information, see Gropp W (2015), 144–149.

⁹¹ For example, Fuchs H and Zerbes I (2018), 134–144.

Furthermore, it is important to notice that the “equivalency of conditions” formula has a central weakness. The formula only works if you know exactly how the cause works.

298

Example: Decisive Factor

Only when it is known that the consumption of alcohol impairs the cognitive performance of the brain and thus has a negative effect on one’s ability to drive a vehicle, can it be said that the consumption of alcohol was the decisive factor in causing an accident. ◀

While the example of alcoholic opens up a very clear perspective between cause and effect, it is often somewhat more difficult, especially in the economic field.

299

The Charges Against the US Tobacco Companies

Amongst the general public, the criminal proceedings against tobacco companies in the USA, which were charged with causing cancerous tumours, deserve special mention. The problem of sufficiently proving the connection between cause (smoking) and effect (cancer tumours) was difficult on two fronts.

Firstly, because providing direct evidence of the relatedness of the harmfulness of the ingredients in cigarettes to the specific cancer tumours was troublesome.

Secondly, because it was also difficult to declare the causality of cigarette smoking as decisive. People were exposed to various types of damage in their everyday lives, such as air pollution, massive exposure to sunlight, genetic predisposition, etc., although these were fundamentally questionable as alternative causes of the specific cancer, → mn. 97. ◀

Criminal law must therefore perform a tightrope walk between the provability of damaging causes and the impossibility of scientifically investigating the individual causal explanations down to the last detail. This problem will be examined in greater depth in Part Three on product liability, → mn. 875.

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If this direct causal relationship between action and result is missing, no criminal offence could be committed and at best an acquittal could be granted. It is important to note, however, that it is possible that a criminal responsibility for attempting a crime may be considered (→ mn. 323). Only in the case of intentional offences (and not in the case of negligent offences), is the ability to be punished possible on account of the objective elements of an offence. These objective elements are not completely fulfilled, if, for example, no result is yielded or the result is not in a causal relationship with the act.

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Embezzlement

The asset manager abuses her/his authority, but the financial loss is caused by another circumstance alone. The court finds that the asset manager’s misuse of authority was not

the result (cause) of the pecuniary loss. Nevertheless, the asset manager could be held liable for attempted embezzlement (→ mn. 582). ◀

5.2.4.3 Subjective Elements

302 The principle of guilt implies that it is not sufficient for criminal liability that the objective elements of the offence are present. Additionally, the principle of guilt requires the presence of subjective elements of the offence.

303 If the legal description of the offence itself does not specify further details, the principle applies that only intentional conduct is punishable. **Intention** [*Vorsatz*] in criminal law is determined by deliberation to establish facts that correspond to an element of crime under criminal law. Intent, in contrast to negligence, is therefore the decision to commit the offence. The offender understands what she/he is doing and does so willingly.⁹² Depending on the intensity at which the offence is committed, a distinction is made between three levels of intent, some of which are expressly presupposed by certain criminal provisions.

304 ► **First-degree dolus directus** The strongest form of intent is the first-degree dolus directus [*Absichtlichkeit*].⁹³ In this case, the perpetrator is said to bring about a particular consequence with her/his conduct that she/he knows will possibly result in a consequence. The concept can be clearly explained using the example of cybercrimes, → mn. 683. The hacker Tobias wants to damage company XY and launches a bot attack to damage the computer system. All her/his hacking actions are ultimately directed at this damaging event. Looking at her/his intent, it becomes clear that Tobias **intends exactly these consequences that result from her/his actions**. If one looks at criminal law norms, it becomes clear that certain offences require not only general intent, but also the specific form of first-degree intent. For example, the criminal offence of the misuse of sound recording or listening devices (§ 120 StGB-AT) requires the (conditional) intention, to use a sound recording or listening device, but also the first-degree dolus directus to obtain knowledge for himself/herself or another unauthorised person of a non-public statement.

305 ► **Second-degree dolus directus** The **second-degree dolus directus** [*Wissentlichkeit*] describes a form of intent in which the offender is fully aware that the outcomes of her/his actions will certainly cause a particular result.⁹⁴ The example of the time bomb makes the concept clear.⁹⁵ Pablo places a time bomb in a commercial airliner to kill Cesar, who will fly in that plane. The bomb is programmed to detonate 30 min after takeoff. The bomb

⁹² Ackermann JB (2021), 107, 129–130; Bohlander M (2009), 60–63; Donatsch A and Tag B (2013), 111–118; Fuchs H and Zerbes I (2018), 145–148; Roxin C and Greco L (2020), 540–542.

⁹³ Bohlander M (2009), 63–64; Donatsch A and Tag B (2013), 118–119; Roxin C and Greco L (2020), 542–546.

⁹⁴ Donatsch A and Tag B (2013), 119; Roxin C and Greco L (2020), 546–547.

⁹⁵ The following example is based on the Avianca Flight 203 bombing in 1989.

explodes as planned, killing over 100 people, including Cesar. If one now looks at Pablo's intention, it becomes clear that Pablo wanted Cesar dead. So regarding Cesar, it is a first-degree *dolus directus* killing intention. But what about the other passengers? Maybe Pablo did not care about the death of the passengers or perhaps she/he did not want the passengers to die. But in fact, Pablo had **to assume with certainty** that if a bomb exploded on the plane during the flight, all the passengers would die. He was aware that the deaths would occur in the course of the events. It is this certainty of the result that constitutes the second-degree *dolus directus*. This concept is found in the penal provisions, for example, in the case of embezzlement → mn. 582. It is presupposed for the offender's criminal liability that she/he is expressly aware of the abuse of the power of attorney.

► **Dolus eventualis** The weakest form of intent is **dolus eventualis** [Eventualvorsatz]. The perpetrator must at least seriously consider that the circumstance or the result will be possible and accept it.⁹⁶ A typical example like the one that follows can be found in criminal product liability, → mn. 875. After a manufacturer of braking systems learns of complaints that the system they produce is repeatedly failing, an investigation is initiated. During the investigation nothing is found, although more complaints are made. The manufacturer decides to continue production and marketing. Three months later, a bus accident occurs in which several people are killed. The investigations of the public prosecutor's office show that the braking system was defective due to a fault in the manufacturing process. From one look at the manufacturer's decision to continue production and marketing, even after further complaints were made, and although the fault was not discovered, it becomes clear that the manufacturer acted as follows: it is quite possible that something is wrong in our manufacturing process, but we produce and sell anyway. In this way, they **accept the risk and act regardless of the possibility of negative consequences**. However, it cannot be taken for granted that the negative outcome will happen, so there is no second-degree-intent. Yet even with this uncertainty, because the complaints went on and on, the risk of the negative outcome was accepted. With regard to criminal law, the following should be noted: If no special form of intent is prescribed (i.e. no first-degree or second-degree intention), it is sufficient for the offender to have acted with this least form of intent, the conditional intent, for criminal liability to be established.

For some offences, however, the legislator views **negligent conduct** [*Fahrlässigkeit*] as sufficient for criminal liability.⁹⁷ In contrast to intentional offences, one's ability to be punished for negligence must be **expressly** mentioned in the text of the criminal provision, otherwise only intentional behaviour is punishable and negligent behaviour is unpunishable.

⁹⁶ Bohlander M (2009), 64–67; Donatsch A and Tag B (2013), 119–122; Fuchs H and Zerbes I (2018), 145, 158–161; Roxin C and Greco L (2020), 547–588.

⁹⁷ Ackermann JB (2021), 107, 164–165; Bohlander M (2009), 67; Donatsch A and Tag B (2013), 332–374; Gropp W (2015), 513–555; Roxin C and Greco L (2020), 1179–1222; Kudlich H and Oğlakcioğlu MT (2020), mn. 43–45.

Example: Damage to Property (§ 125 StGB-AT)

If the exterior mirror of a car is accidentally damaged when the car is not parked in a designated parking space, property damage has objectively occurred. However, because the damaging action was “accidentally” (and thus negligently) carried out, the property damage goes unpunished. This is because § 125 StGB-AT only punishes intentional damage to property. Irrespective of this criminal law perspective, civil law claims for damages remain. ◀

308 Negligence occurs if the offender has disregarded the **necessary and reasonable care** in the specific case. At the core of negligence lies the accusation that the perpetrator did not actively decide to commit the act, but the act was indeed committed simply because the perpetrator was not careful enough. In this case the offender fails to exercise the care that is incumbent on him/her.

What does the typical perpetrator of a negligent crime look like? A short study on crimes against life and limb (e.g. bodily injury) provides an overview.⁹⁸ According to this study, negligent offenders tend to be female, older and nationals. The offender is inconspicuous and usually only enters the criminal justice system for a short time. Careers in crime are rarely identifiable.

The allegation of negligence in BCL is generally based on

- Infringement of a legal provision (e.g. § 159 StGB-AT: grossly negligent frustration of the satisfaction of creditors),
- Violations of generally accepted rules of conduct (e.g. violation of the Business Judgment Rule,⁹⁹ → mn. 481),
- Disregard of general practice because the perpetrator did not behave as carefully and attentively as it is expected one would have done in this situation.

309 Since the rationale of negligent liability is the lack of care which one has a duty to have, the key defining elements of negligence are the ability to foresee and **to avoid** the harmful result. Thus, a reasonable and diligent person would be able to foresee that her/his conduct might cause harm to another person or value, and therefore has the duty to avoid such harmful results. In addition, it is not enough to show that a fictitious reasonable person could have avoided the harm (→ mn. 311), but it is necessary to prove that the individual defendant also has the concrete capacities to avoid the harmful result.

310 Traditionally, legal scholars distinguish between conscious negligence and unconscious negligence. In the first case (**conscious negligence**), the perpetrator knows that a serious risk of harm is at stake but does not take it seriously; instead, she/he (wrongfully) trusts that

⁹⁸Höffler K (2019), 1036–1068.

⁹⁹Ritz JV (2020).

nothing bad will happen as result from her/his conduct. Here, the perpetrator is intellectually aware of the risk that an offence will be committed, but she/he still decides to act. In the second case (**unconscious negligence**), the perpetrator is unaware of the possible risk that her/his conduct might be harmful. Here, the perpetrator is typically blamed for not having paid sufficient attention to the facts of reality that would warn a diligent person of impending harm to others. Furthermore, some legal systems restrict negligence liability to gross negligence. **Gross negligence** [*Leichtfertigkeit*] means acting in an unusual and conspicuously careless manner so that the forbidden harmful result was foreseeable as probable.¹⁰⁰

A fundamental difference between criminal law and civil law is important here. In civil law, negligence is measured by an objective standard. This standard makes explicit what would have been the necessary and reasonable careful action for each person. In criminal law, by contrast, there is additionally a **subjective standard** where the offender is also scrutinised as an individual. It is therefore not only asked what would have been reasonable for the theoretical ‘person’. Criminal law also takes into account the offender’s individual knowledge and abilities.

In conclusion, the objective and subjective elements of the offence lay the foundation for sanctions under criminal law. But there are other criteria that stem from the principle of guilt that can prevent punishment, even if objective and subjective elements are present.

5.2.4.4 Unlawfulness (Justification)

So far it has been shown that objective and subjective elements are present when a crime is committed. Within the area of objective elements (or external elements of a crime) one has come to know about “acts”, “results” (or danger) and causality. In the area of subjective elements (or internal elements of a crime), by contrast, one has learned about intent and negligence.

However, these are only some of the criteria needed in order to fully analyse the extent to which conduct leads to criminal liability. An additional criterion is the unlawfulness of acts. Unlawful means that the act is considered an “**injustice**” according to the values of the legal system. This is in fact regularly the case when an offence has been committed.¹⁰¹

But there are also exceptional cases, such as **situations of emergency**.¹⁰² This could be a situation such as when a person who intentionally violates the criminal law in order to save herself/himself or someone else from acute danger may deserve the forbearance of the legal system. In this case, the legal system says that the conduct in the concrete case is exceptionally permitted and thus justified. The case par excellence for such justification is “self-defence”.

¹⁰⁰Staffler L (2021).

¹⁰¹Bohlender M (2009), 77–81; Gropp W (2015), 72; in relation to business criminal law, see Lehmkuhl MJ (2021).

¹⁰²See, for example, Kert R (2016), 15–16.

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Self-Defense—Case¹⁰³

A drunk man broke into a strange apartment in the night and attacked the owner of the apartment. The owner of the flat tried unsuccessfully to fend the man off with a walking stick. So, he reached for a knife and stabbed the intruder. Could the owner of the flat claim “self-defense”?

If we take a closer look at the crime, we see that the stabbing objectively fulfils all elements of the offence of assault (or killing). The subjective elements are also present. This is due to the fact that the owner of the flat wanted to stab the intruder to protect himself. Although objective and subjective elements are present, seen through the act of stabbing the intruder which is punishable by law, the court could still conclude that there is no criminal offence. In fact, the unlawfulness could be excluded if the requirements for self-defense are met. We will see that self-defence presupposes the threat of a direct attack, which itself is unlawful and is directed against a legal interest that is capable of self-defence. In order to ward off the attack immediately and finally, the gentlest means of defence among the available means is then permissible. ◀

315 If there is an attack, the victim can defend himself/herself under certain circumstances. From an objective and subjective point of view, the victim then commits an intended crime (i.e.: bodily injury), but the legal system states that this behaviour is permitted because it was necessary for self-defence. Justification therefore means that although objective and subjective elements are present in full, **the act is only unlawful if there is no reason for justification** (such as self-defence or necessity) that precludes the unlawfulness.¹⁰⁴ Thus, in cases of justification, various protected legal interests collide, and the question arises whether the criminal act is trying to achieve a legitimate goal, and whether it is a necessary and appropriate means or even the only possible way to achieve this goal. Thus, the collision of interests is at the centre of the discussion on justification.

316 Reasons for justification sometimes play a role in BCL.¹⁰⁵ In practice, official **permits** and **authorisation** are of particular relevance.¹⁰⁶ In such cases, it is possible for an authority to grant “exceptions” for normally prohibited conduct upon application. Upon application, the requirements for the granting of a corresponding permit are examined and awarded in an administrative procedure.¹⁰⁷

¹⁰³Roxin C and Greco L (2020), 791.

¹⁰⁴Donatsch A and Tag B (2013), 217–223; Fuchs H and Zerbes I (2018), 163–164; Roxin C and Greco L (2020), 718, 757.

¹⁰⁵Late FJ (2016); Lehmkuhl MJ (2021), 167, 168–177.

¹⁰⁶Bohlender M (2009), 89–91; Fuchs H and Zerbes I (2018), 165–180; Lehmkuhl MJ (2021), 167, 176–177; Petrig A and Zurkinden N (2015), 81–82; Roxin C and Greco L (2020), 901–929.

¹⁰⁷Kudlich H and Oğlakcioğlu MT (2020), mn. 71a-71 g.

Foreign Trade and Payments Act (AWG) of Germany

A good example¹⁰⁸ is the Foreign Trade and Payments Act (AWG) of Germany. The Foreign Trade and Payments Act basically assumes that the movement of goods with foreign countries should be free (§ 1 AWG). However, restrictions on the movement of goods can be imposed for various reasons, such as security interests. For instance, trade in certain goods (e.g. arms deliveries) is generally prohibited, which means that the export or import of certain goods and services to or from a certain state is not allowed. The essential norm under criminal law is § 17 AWG, which is intended in particular to criminalise violations of arms embargoes. At the same time, an application for a permit (i.e. a licence) can be made under § 8 AWG—the delivery itself thus remains prohibited, but the prohibited movement of goods is justified by means of the licence. In this example, the German Federal Bank, the Federal Ministry of Economics and Technology in consultation with the Federal Foreign Office, if applicable, is responsible for issuing such a licence. ◀

However, reasons for justifications relating to business criminality are controversially seen in practice and in doctrine.¹⁰⁹ 317

Danger to the Workplace—Case¹¹⁰

An administrative authority had approved a heavy transport vehicle on the condition that the professional driver organise a co-driver. Yet, the professional driver carried out the transport without a co-driver and was fined for negligent violation of the agreed upon condition (§ 16 OWiG-DE). The professional driver lodged a complaint that invoked a state of emergency related to the risk of losing his job.

The Higher Regional Court of Oldenburg recognised the professional driver's complaint and agreed that the threat to the workplace was a situation similar to an emergency. The decisive factor was the fact that the client did not want to reimburse the professional driver for the costs of a co-driver and did not want to provide a co-driver. The court emphasised that a state of emergency can exist in a case like this because the professional driver had to seriously expect a dismissal. The court pointed out that the affirmative answer to the state of emergency can exceptionally exist here due to exceptional circumstances. ◀

In practice, the question of justification in connection with **environmental law** (→ mn. 929) arises more frequently. 318

¹⁰⁸The example is taken from Kudlich H and Oğlakcioğlu MT (2020), mn. 71b.

¹⁰⁹Late FJ (2016), 75–77.

¹¹⁰Oberlandesgericht Oldenburg, Neue Juristische Wochenschrift 1978, 1769; see also Lehmkuhl MJ (2021), 167, 168–169.

Bilge de-oilers—Case¹¹¹

One case before the Bremen Regional Court concerned bilge oilers, i.e. a ship that collects and disposes of oil waste from motor ships, particularly in inland-shipping. The main task of this ship is to pump out the oily bilgewater (water-oil mixture). The bilgewater is then separated into water and waste oil directly on the ship. After filtering, the water is returned to the river water, while the waste oil is collected in tanks and later delivered to collection points for environmentally friendly disposal. In the specific case, a bilge oiler operator had accepted a contract with the responsible office, but due to his activity, the residual oil content in the water was above the permissible limit. However, the oil values achieved by the cleaning process were still lower than the values caused by the wild emptying of bilgewater by normal shipping. The competent state water authority therefore regarded the cleaning as a “lesser evil” and decided to continue a contract with the cleaning company who operated these boats. After a while, the representative of the state water authority was accused of water pollution because of the continued contract with the cleaning boat company. It could be argued that he knew that the company’s oil-removal boat could not achieve the environmentally compatible limit values for residual oil content. However, the court found that a justifiable state of emergency existed. Under the circumstances of the case, the accused had only the choice of either continuing to accept a considerable amount of water pollution by the barges wildly discharging their completely unpurified oily bilgewater, or to enforce environmental protection at least to the extent that it was financially and technically possible. The accused had decided to use the company’s bilge de-oiling boat and thus to keep the water as clean as possible, which would have been otherwise exposed to far greater environmental dangers from the emptying of the bilges by the bargemen. The state of emergency was then proclaimed because if the representative had not continued the contract, the water would have been left without any protections. Without the precaution taken by the state water authority the pollution could not have been averted. ◀

- 319** To sum it up, what matters centrally is the concrete circumstances of the case, but also the objects of protection involved. Possible fields of application of self-defence in the context of BCL include the maintenance of a company’s existence and the associated interests such as assets or jobs. Conversely, various constellations can also arise in connection with BCL in which **whistle-blowers** (→ mn. 572) commit a punishable betrayal of secrets (e.g. by passing on tax data of a foreign company to the state), but are justified in their actions on the basis of weighing the interests of criminal prosecution

¹¹¹Landgericht Bremen, Neue Zeitschrift für Strafrecht 1982, 164–165.

against other objects of protection.¹¹² In practice, however, a case of application of justification will be very rare.

5.2.4.5 Culpability

If an act is characterised as unlawful, that is, if it satisfies the objective and subjective elements, a final element must be examined. This is the concept of culpability (guilt).¹¹³ The principle of culpability, which has been explained above, requires that the act can be blamed on the perpetrator personally. The perpetrator is therefore accused of having acted unlawfully of her/his own free will. Although, the ability to be responsible can be limited (e.g. by mental illness),¹¹⁴ or completely excluded (e.g. severe psychosis).¹¹⁵

The idea that culpability is a separate category in the analysis of criminal liability is shown by the concept of ‘mistake’. Lawyers distinguish two types of mistakes (misconceptions) in criminal law. In the first case, the perpetrator is mistaken about the elements of the facts of the case (so-called **mistake of fact**).¹¹⁶ It is therefore crucial that the perpetrator’s idea deviates from reality. The misconception does not concern the act but the facts underlying the characteristics of the crime, which consequently has a negative impact on the intent (→ mn. 303) of the perpetrator.¹¹⁷ In the second case, the perpetrator knows what she/he is doing but is mistaken in believing that her/his conduct isn’t prohibited and therefore isn’t punishable (so-called **mistake of law**).¹¹⁸ Thus, the offender lacks the awareness of acting unlawfully. There are many possibilities here. For instance, the perpetrator does not know the prohibition norm, she/he considers the prohibition norm to be invalid or she/he misinterprets it in such a way that she/he considers her/his action, which is in fact prohibited, to be legally permissible.

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¹¹²Lehmkuhl MJ (2021), 167, 170–175; Leite A (2021), 129–146.

¹¹³Bohlander M (2009), 115–135; Donatsch A and Tag B (2013), 268–273; Fuchs H and Zerbes I (2018), 225–227; Gropp W (2015), 73; Roxin C and Greco L (2020), 955–1007.

¹¹⁴Cf. Bohlander M (2009), 131–135.

¹¹⁵Donatsch A and Tag B (2013), 273–286; Roxin C and Greco L (2020), 1008–1052.

¹¹⁶Bohlander M (2009), 70–74; Donatsch A and Tag B (2013), 127–131; Fuchs H and Zerbes I (2018), 236.

¹¹⁷Roxin C and Greco L (2020), 591–621.

¹¹⁸Bohlander M (2009), 119–121; Bülte J (2013), 65–72; Donatsch A and Tag B (2013), 286–295; Fuchs H and Zerbes I (2018), 236–242; Roxin C and Greco L (2020), 1053–1091.

Examples for mistake of fact:

- The perpetrator does not realise that the smartphone she/he is taking is not her/his own but belongs to another person.
- The offender does not realise that she/he is hurting an officer when she/he hits another person.

Examples for mistake of law:

- a bank adviser is convinced that lying to retail clients about the risks of their investments is allowed when the existence of her/his branch is at stake.
- a police officer believes that torture of the arrested kidnapper is allowed during police interrogation when the victim has not yet been found and will surely die without help because a lot of time has passed since the kidnapper was caught.

322 In the case of a mistake of law, the perpetrator commits an act (objective element) with corresponding intentions (subjective element) and no justification can be seen. So far, all elements of the crime are present. But the perpetrator is mistaken about the prohibition itself. The perpetrator lacks the awareness that she/he is committing a crime. Is she/he still to be blamed, is the perpetrator responsible for her/his mistake? The legal system differentiates according to the extent to which the mistake was **avoidable** or not. If the mistake was avoidable, e.g. if the offender should have inquired, then there is a possibility that the culpability is milder, and the sanction pronounced is reduced. On the one hand, it is a question of whether the wrongdoing was easily recognisable to the offender as an individual (as well as to anyone else). On the other hand, it is also a question of whether the perpetrator did not familiarise himself/herself with the rules, although she/he would have had a duty to do so because of her/his profession, her/his business activities or other circumstances. If the mistake was unavoidable (which is actually very rare!), then there is the possibility to waive the penalty completely.

5.2.5 Attempt and Preparation

323 A look at the Criminal Code shows that the penal provisions of the Special Part are formulated in such a way that description of the offence has been completed and the language is to be understood in the past tense (e.g.: “Whoever kills another human being” means, strictly speaking, that the other human being has been killed).

However, the provisions of the General Part provide that not only the completion of the offence is punished, but already the **attempt**. A crime is attempted by anyone who, according to her/his own idea of the deed, immediately attempts to carry out the crime.

The attempt is therefore punished because the perpetrator has an idea about the realisation of the offence (in other words: the perpetrator has made a decision to commit the offence) and this idea has already been implemented in reality to such an extent that she/he immediately sets about realising the offence.¹¹⁹

Example: In the Process of Robbing a Bank

The bank robber sits in her/his car in front of the bank, pulls the mask over her/his face and loads the rifle to rush into the bank immediately. Here the bank robber has not yet entered the bank and thus not committed the bank robbery. But she/he has reached a stage in her/his preparations where the crime is about to be realised as she/he is starting the process of robbing the bank. ◀

Criminal law does not only distinguish between completion and attempt: Rather, the attempt itself is examined more closely by distinguishing it from pure **preparatory** acts,¹²⁰ as shown in Fig. 5.3. Preparatory acts are usually not punishable.

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Example: Mere Preparation

The bank robber sits at home and plans her/his bank robbery. She/he buys a gun and fills up the car with gas. All these actions prepare for a later crime. But they are unpunished because they do not immediately lead to a bank robbery. ◀

As a general rule, the planning or preparation of criminal offences is not punishable. Only the attempt, i.e. the immediate implementation of the crime plan that has been drawn up, opens the door to criminal liability. It is decisive that the actor has reached the point of committing the offence (**proximity**). Nevertheless, there are a few exceptions to this principle. Criminal codes also contain so-called preparatory offences. In these cases, the planning or preparation of criminal offences is punished. A typical example of those rare offences are certain terrorist offences.

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5.2.5.1 Criminal Liability of the Attempt

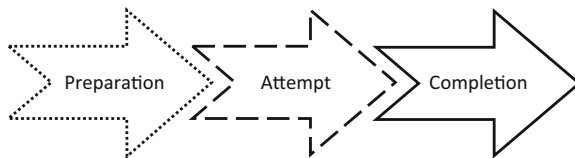
In principle, completed offences are subject to punishment. However, criminal liability can be applied earlier, namely at the attempting stage. What is important here is that the European legal systems only consider the attempt of **intentional offences** (→ mn. 307) to have criminal liability. In order for an attempt to be punishable, it is necessary to intentionally attempt a crime. A negligent attempt is not punishable—and also conceptually

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¹¹⁹Bohlander M (2009), 137–152; Donatsch A and Tag B (2013), 141–151; Fuchs H and Zerbes I (2018), 265–324; Gropp W (2015), 333–355.

¹²⁰Donatsch A and Tag B (2013), 133–141; Gropp W (2015), 375–384.

Fig. 5.3 Preparation, attempt and completion



excluded: negligence (the essence of which is the unintentional nature of the damage) lacks the (intentional) decision to commit the crime.

327 If an offence is only attempted, so that, for example, the concrete result or damage does not occur, is in principle just as punishable as when the offence was completed: the threats of punishment are basically the same.

► Anyone who attempts to bribe an official without the official accepting the bribe is in principle to be punished under the same threat of punishment as the person who succeeds in bribing the official.

328 The fact that the offence has remained at the trial stage can be assessed as a **mitigating factor** within the context of the assessing the amount of the criminal sanction, see § 23 para. 1 and 2 StGB-DE.

§ 23 para. 1 and 2 StGB-DE

An attempt to commit a serious criminal offence always entails criminal liability. If there was only an attempt to commit an offence, a more lenient penalty may be imposed than for a completed offence.

329 How can preparation be distinguished from the attempt? The attempt only begins with an executorial action or an action that is close to the execution (**proximity**). Executorial acts are acts in which the perpetrator initiates an action that fulfils the legal description of a criminal provision (e.g. the perpetrator commits a fraud by deceiving others). An action that is close to the execution is an action that immediately precedes the execution. Such an act is considered to be an attempt if, according to the perpetrator's plan of action, the act immediately (i.e. without further intermediate actions) leads to the executorial act. This is determined by the temporal, local and appropriate proximity to the actual execution of the act. An attempt implies that the perpetrator has overcome the last decisive inhibition threshold, i.e. deciding to commit the crime.

If one analyses the attempt according to the distinction between the subjective and objective elements (internal and external side) of the crime, it becomes clear that the subjective elements of the crime (intent) are already fully developed in attempted crimes. The perpetrator acts with full intent, while the objective elements (i.e.: external actions) have not yet been completed.

Exceptionally, the attempt of a crime may not be punishable. Most European legal orders refrain from punishing an attempt if it is absolutely unrealistic to fulfil a result, i.e. if, due to the nature of the offender, the nature of the act or the object, the offence cannot be carried out under any circumstances. Example: Breaking open a safe with a nail file.

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In this respect, impossible behaviour that makes the act unsuccessful should be excluded from criminal liability.

5.2.5.2 Withdrawal from the Attempt

Since the core concept of making an attempt is the lack of a result, criminal law wants to give the perpetrator a chance to deviate from her/his plans during her/his conduct, see § 24 para. 1 and 2 StGB-DE.

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§ 24 para. 1 and 2 StGB-DE

Whoever voluntarily abandons the further commission of the offence or prevents its completion incurs no penalty for attempt. If the offence is not completed without any action on the part of the person abandoning the attempt, no penalty is incurred if that person has made voluntary and earnest efforts to prevent the completion of the offence.

If more than one person participates in the offence, then whoever voluntarily prevents its completion incurs no penalty for attempt. That person's voluntary and earnest efforts to prevent the completion of the offence suffice for exemption from punishment if the offence is not completed without any action on that person's part or it is committed independently of that person's earlier contribution to the offence.

Thus, if the perpetrator **voluntarily** refrains from further execution of her/his plans because she/he either stops acting or commits an act that is directed against the execution of the offence, the ability to be punished for the attempt is lifted. The voluntary return of the offender to legality is therefore rewarded. However, the perpetrator must still answer for damages that have already occurred.¹²¹

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5.2.6 Perpetration and Participation

Criminal law does not only concern the person who directly committed the offence. Certain forms of participation in the crime are also punishable. In European legal doctrine, a distinction is traditionally made between three forms of participation: perpetration, instigation and aiding & abetting. While the perpetrator is the central figure in the realisation of the acts of execution, which describe a criminal offence, other persons may appear as marginal figures in the commission of the offence. The **instigator** gives

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¹²¹ Bohlander M (2009), 151–152; Donatsch A and Tag B (2013), 144–147; Fuchs H and Zerbes I (2018), 310–324; Gropp W (2015), 355–374.

the perpetrator the idea of committing the crime, thus triggering the decision to commit the crime. The **accomplice** contributes to the offender's deed by providing assistance to the offender. For this reason, a distinction is made between being a perpetrator on the one hand and instigating or aiding and abetting on the other. Participation in crime presupposes that there is an offender who commits an offence. Participation is therefore dependent on the offender's deed.¹²²

334 **Tripartite System vs. Unitary Model**

This **tripartite system** constitutes a differentiated system which is enshrined in most European criminal law systems (§ 25 et seq. StGB-DE).¹²³ The counter model to this tripartite system is the so-called **unitary model**.¹²⁴ According to this model, each participant is equally liable as a perpetrator. This means that participants are also considered to be the perpetrators of the criminal act and, in this respect, the same penalties can be applied as for the direct perpetrator. The unitary model is applied in Austria (see § 12 StGB-AT),¹²⁵ as well as in Denmark and Italy.¹²⁶

335 Although not widely implemented in European criminal law systems, the unitary model is of great importance for BCL because it has an impact on Corporate criminal law—even in those legal systems where the tripartite nature of participation is actually pursued. Germany, for example, § 14 StGB-DE and § 9 OWiG-DE (→ mn. 448) established the liability of organs or representatives which means the responsibility of the perpetrator is transferred to certain other persons who do not actually have the characteristics of the perpetrator.

336 If one takes the perspective of BCL, the following becomes apparent: If through an organisational fault of the company, the commission of an offence was realised to its advantage, it can be held responsible. The company is thus held accountable in the same way as the perpetrator.

5.2.6.1 Perpetrator

337 The perpetrator is the central and key figure in the execution of a crime (→ mn 444). The legislator basically distinguishes between three forms of perpetration:

¹²²Donatsch A and Tag B (2013), 153–200; Fuchs H and Zerbes I (2018), 338–396; Gropp W (2015), 389–457; Kert R (2016), 20–24.

¹²³Bohlender M (2009), 153–155.

¹²⁴Cf. Gropp W (2015), 393–397.

¹²⁵Fuchs H and Zerbes I (2018), 325–337; Kert R (2016), 20.

¹²⁶Tiedemann K (1998), 495, 500–502.

1. The **direct perpetrator (principal)** is the person who commits the offence himself/herself. Example: the offender steals a valuable painting himself/herself.
2. The **indirect perpetrator (proxy)** is the person who commits the offence through another person. In other words, the principal uses another person as an instrument to commit an offence.¹²⁷ Example: the perpetrator forces another person to steal a valuable painting at gunpoint; the perpetrator threatens another person with killing her/his relatives if she/he does not steal the painting.
3. **Co-perpetrators (joint principals)** are those perpetrators who commit the crime collectively.¹²⁸ Example: several partners work together to steal a valuable painting.

Although there are three different manifestations of perpetration, they are only different manifestations of the perpetrator figure. Whether the perpetrator acts alone, through another or in cooperation with other partners, does not change the fact that she/he is the central figure of the executed acts.

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5.2.6.2 Instigation

The instigator is the person who gives the principal offender the idea of the crime in the first place and motivates their decision to carry it out. The perpetrator is therefore not determined to commit the crime of her/his own accord but is compelled by the instigator to commit the crime, see § 26 StGB-DE.

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§ 26 StGB-DE

Whoever intentionally induces another to intentionally commit an unlawful act (abettor) incurs the same penalty as an offender.

The instigator gives the perpetrator the idea of the crime, thus triggering the decision to commit the crime. This can also be of an implied nature. For criminal liability, the instigator must be causal for the perpetrator's decision to commit the crime. If the instigator requests the perpetrator to commit the crime without knowing that the perpetrator has already decided to commit the crime, this may constitute attempted incitement or psychological aiding and abetting, but not instigation.

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5.2.6.3 Aiding and Abetting

An assistant is someone who marginally contributes to the execution of the crime. The central characteristic of the assistant is providing (only) help in the main conduct, see § 27 para. 1 StGB-DE.

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¹²⁷Bohlander M (2009), 156.

¹²⁸Bohlander M (2009), 161–167.

§ 27 para. 1 StGB-DE

Whoever intentionally assists another in the intentional commission of an unlawful act incurs a penalty as an aider.

- 342 The assistance provided must be a part of what caused the damage or result. This assistance can take different forms. The assistance can be physical (aiding, e.g. getting tools) or psychological (abetting, e.g. cheering on or encouraging). Unlike the perpetrator, the aider and abettor has no control over the crime, but only promotes the crime as a peripheral figure.¹²⁹

5.2.7 Commission and Omission

- 343 Many criminal provisions describe forbidden behaviour as actively doing something illegal. Nevertheless, there are also crimes in which “doing nothing”—i.e. “omission”—is punishable.¹³⁰ Criminal norms in which omission is **expressly** described as an act (so-called genuine crimes of omission) are clearly outlined in the Penal Code. For example, see § 323c para. 1 StGB-DE (Failure to Render Assistance):

§ 323c para. 1 StGB-DE

Whoever does not render assistance in the case of an accident or a common danger or emergency although it is necessary and can reasonably be expected under the circumstances, in particular if it is possible without substantial danger to that person and without breaching other important duties, incurs a penalty of imprisonment for a term not exceeding one year or a fine.

- 344 However, the Criminal Code makes it clear that criminal norms that describe prohibited behaviour as active doing also include offenders who fail to avert the result described by the criminal norm. But not every failure to do so leads to punishment. To be punished for omission, the offender must either bear a special obligation according to the legal system (so-called **guarantor position**) and the omission must be equivalent to active doing.

¹²⁹Bohlander M (2009), 167–173.

¹³⁰In general, see: Bohlander M (2009), 36–45; Donatsch A and Tag B (2013), 299–331; Fuchs H and Zerbes I (2018), 397–418; Gropp W (2015), 465–509; Petrig A and Zurkinden N (2015), 50–51; in the context of business criminal law, see Ackermann JB (2021), 107, 134–142; Kert R (2016), 26–32; Kudlich H and Oğlakcioğlu MT (2020), mn. 112–113.

5.2.8 Cumulative Charges and Convictions

Finally, it should be mentioned that criminal law also covers situations where several offences are committed. This does not apply to the case where several persons commit one offence, but rather to the case where one person commits several offences (cumulative charging, so-called “**concursum delictorum**”).¹³¹

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How are such situations regulated? Often a serious offence includes the wrongful content of another (less-serious) offence. In this case, the minor offence is replaced by the serious offence (so-called **improper concursum delictorum**). There are three basic occurrences of *concursum delictorum*, namely speciality, subsidiarity and consumption.¹³²

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► **Speciality** means that a special law covers the other offence because the offence described by the special law fulfils all the characteristics of the other offence (→ mn. 117). An example would be subsidy fraud, which is a more specific offence that supersedes the general fraud offence.

► **Subsidiarity** means that a law is superseded by another norm. A law is only applicable if the offence is not already punishable by a higher penalty under other criminal law. This is often explicitly stated in legal texts. An example is § 265 StGB-DE. Insurance fraud includes actions of the offender in the run-up to committing fraud and subsidiarily resigns as soon as fraud can be assumed, even if only in the form of an attempt. This is expressly stated in § 265 StGB: “unless the offence is subject to a penalty under § 263. . .”

► **Consumption** describes the fact that an offence is already included in another offence; e.g. if a person breaks into an apartment, this burglary usually also includes the offence of damage to property.

Another case of cumulative charges or convictions (so-called **proper concursum delictorum**) is when the perpetrator either commits several offences simultaneously through **one act** (e.g. she/he commits fraud and damages the environment at the same time through the fraudulent act, as seen in the case of the VW scandal) or several offences through several **independent acts** (the perpetrator first commits fraud, then damages property of a company, and then attempts to bribe the investigating police officer). These cases are therefore also about the plurality of different legal interests, different actions or different results. Unlike the above case, here a committed offence is not superseded by another offence: Both offences are charged and punished.

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¹³¹ Donatsch A and Tag B (2013), 407–418; Gropp W (2015), 617–634.

¹³² Donatsch A and Tag B (2013), 416–417; Gropp W (2015), 620–622; for an in-depth study on this complex subject matter, see Burgstaller M (1978), 393–404, 459–470.

5.2.9 Criminal Sanctions for Individuals and Amount of Penalties

- 348 It was shown that criminal offences consist of objective and subjective elements, illegality and guilt. If all these elements are present, the question arises as to how the state should react to this breach of law. The response of the state is to articulate punishment against the perpetrator. The goal of punishment is argued very differently in the sciences. However, the most important guiding principle in the European tradition is the resocialisation of the offender. The aim of the punishment is to reintegrate the offender into lawful society.
- 349 Basically, criminal law offers two main types of sanctions (penalties), namely **imprisonment** and **fin**es.¹³³ In addition to the main penalties, there are also secondary penalties, whose intended application is for certain cases or persons. These penalties can be the loss of capacity to hold office, the loss of the right to vote or a temporary driving ban (→ mn. 967). A professional ban also applies in certain cases (→ 834). It is debatable to what extent the confiscation of funds in response to an offence constitutes a sanction. In any case, it helps to restore peace to a society that has been disturbed by a crime.
- 350 In addition to these sanctions (penalties), there are also measures taken in response to a crime in criminal law. Measures are designed to protect society from dangerous offenders by curing their mental deficiencies (therapeutic measures) or by permanently incapacitating them (indefinite incarceration).¹³⁴ In BCL, however, these measures do not play a decisive role, which is why the topic is not dealt with in greater depth here.
- 351 The upper and lower limits of penalties for each individual offence are expressly stated in the text of the criminal provision. The duration of secondary penalties must also be specified by law. This is required by the principle of legality.
- 352 In certain countries (e.g. Austria and Liechtenstein, § 18 StGB-AT and § 18 StGB-FL), a **prison sentence** must be at least 1 day, while in other countries at least 3 days (e.g. Switzerland, Art. 40 StGB-CH), or even at least 1 month in others (e.g. Germany, § 38 para. 2 StGB-DE). For the most serious offences, life imprisonment for the maximum period is possible. The term “life imprisonment” is actually imprecise, because even a life imprisonment must include the possibility or prospect of early release. Recourse to custodial sentences should be moderate by a state under the rule of law because this is the most severe sanction that the state can impose on the individual. It is generally recognised that custodial sentences remove the offender from her/his social and professional environment and place him/her in a criminal environment along with fellow prisoners. In order to counter the dangers that this criminal environment could bring about, short prison sentences should not be enforced. Instead, short prison sentences are regularly converted into fines according to specific provisions in the criminal code.

¹³³ Gropp W (2015), 637–651; Thommen M (2018a), 369, 377.

¹³⁴ Cf. Thommen M (2018a), 369, 377.

For a **fine**, an assessment is not only calculated on the basis of the realised crime and the extent of guilt of the offender. It is also calculated according to the financial and income circumstances of the specific offender. In Austria (§19 StGB-AT), Germany (§ 40 StGB-DE), Liechtenstein (§ 19 StGB-FL) and Switzerland (Art. 34 StGB-CH), a system of **daily rates** is used for this purpose. The fine thus consists of two factors:

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- the number of daily rates to which the offender is sentenced
- the amount of the individual daily rate.

The number of daily rates is based on the wrongfulness of an offence and the seriousness of an offender's guilt. The amount of the individual daily rate depends on the economic circumstances of an offender.

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How is a penalty calculated? The magnitude of the penalty (imprisonment and fine) is determined according to the realised crime and guilt of the offender. In addition to guilt, other circumstances that speak for or against an offender must also be taken into account. These circumstances must be weighed against each other. Various aggravating and mitigating factors are specified in the penal codes. The aim of punishment is not to retaliate against the act, but primarily to prevent criminal acts with varying degrees of emphasis:

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- According to the idea of **general prevention**, the purpose of imposing a penalty is to deter other subjects and the general public from committing a criminal offence.
- According to the idea of **special prevention**, the concrete offender should be prevented from committing another crime.

If a punishment does not fully serve the objectives (general prevention, special prevention) in a case, then it can be conditionally reviewed after the completion of a probationary period. This is referred to as suspension of the sentence on **probation**. Prison sentences and fines can be reviewed either in full or in part. In principle, however, a mixed form of sanctions as a partial suspended sentence is also possible, for example, if one part of a sanction is a conditional custodial sentence and another part is enforced as an unconditional fine.

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For some offences, the proceedings may be completed by means other than a conviction. If an offence isn't serious, the prosecutor or the court may, by means of a "diversion", under certain conditions, terminate the proceedings. Measures of **diversion** include the payment of a sum of money, charitable benefits, a probationary period and compensation for an offence (→ mn. 398). The advantage for the perpetrator is that she/he is not convicted after the diversion and is therefore not considered to have a criminal record. It can also make strategic sense for innocent people to accept a diversion in order to settle the case and thus avoid the risk of lengthy criminal proceedings with an uncertain outcome.

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Beyond the sanctions mentioned here, in particular imprisonment and fines, **confiscations** should be mentioned as "special" forms of sanctions. They acquire great practical significance, especially in BCL, which becomes apparent when comparing fines

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and confiscation. Whereas fines are based on the economic strength of the individual concerned and the criminal wrong-doing she/he has committed, confiscation focuses solely on the assets obtained as a result of the offence. The confiscation may therefore exceed the fine many times over. In practice, it is not unusual for confiscation orders to be issued in the amount of several million euros, especially in cases of money laundering or corruption.¹³⁵ Confiscation is discussed in more detail in the context of corporate responsibility (→ mn. 547).

5.2.10 Statute of Limitations

359 Statute of limitations means that after a certain period of time, the state's interest in prosecuting a crime or enforcing a pronounced penalty fades. On the one hand, the passage of time creates legal peace, on the other hand, the statute of limitations is intended to require action from the prosecuting authorities to carry out the relevant proceedings and not to be inactive. It is clear that legal peace cannot be established on a general basis simply after the lapse of time but is instead determined by taking into account the severity of the committed offences. The severity of the crime (especially the amount of the threatened penalty) determines when a penalty is time-barred.

A basic distinction is made between the limitation period for prosecution and the limitation period for enforcement.

360 The **statute of limitations for prosecution** states that the offence may not be prosecuted after expiry of the time limit set. This type of statute of limitations is based on the idea that the longer the time between the commission of the crime and the judicial processing of the criminal case, the more difficult it is to prove (because, for example, witnesses' ability to remember events well lessens and therefore the risk of a miscarriage of justice becomes very high). Further reasoning concludes that the general public's interest in punishing a crime after a long period of time lessens. And so too does the need for resocialisation of a perpetrator once a long period of time has passed after the completion of a crime.¹³⁶

In practice, this therefore concerns cases where the judicial processing of damages is very slow. This is particularly the case when the legal proceedings are happening in a country different from where the crime was committed (e.g. → mn. 8, 10, 29, 39).

361 The limitation period for prosecution begins as soon as the offence has ended. Ending means that the acts of the offence have been completed (e.g. abstract endangering offences). While in the case of concrete endangering offences ending means the danger ceases to be present or in the case of successful offences the result has occurred.

¹³⁵Pieth M (2016), 83.

¹³⁶Donatsch A and Tag B (2013), 431–436.

Example: Asbestos Poisoning

The concept is well exemplified in the case of asbestos poisoning, → mn. 12. The damage (e.g. physical discomfort or death) only occurred after the factory had been closed for many years. The legal question in such cases is therefore whether the decisive criterion is the termination of the action that caused the damage or whether it is the damage that occurred. While national courts often use the first criterion, the European Court of Human Rights (ECtHR) has criticised this practice in the light of the lack of guarantee for a fair trial among other reasons of legal uncertainty.¹³⁷ ◀

The time limit can also be interrupted by certain events, for example, a search warrant issued by the public prosecutor's office. However, so that the possibility of interruption does not completely exclude the statute of limitations, there is the absolute statute of limitations, which defines the period of time after which a prosecution is no longer permitted.

The **statute of limitation for enforcement**, by contrast, has the effect that the enforcement of penalties or measures imposed by a court and which have become final (no longer contestable) expire after a certain limit of time laid down by law. The reason for this type of limitation is ultimately that after a certain amount of time has elapsed, the general need to enforce the sentence ceases to exist and cannot be maintained by means of the resocialisation order. The statute of limitations begins with the legal enforcement of the decision.

5.2.11 Criminal Jurisdiction

Last but not least, a fundamental question related to the fact that companies operate in different countries must be asked. They operate not only in one legal system, but in many different legal systems. If crimes are committed in the USA, in Asia or in Africa by members of companies that have their headquarters or subsidiaries in European countries—can they be prosecuted in European countries? Is the public prosecutor's office even allowed to conduct investigations in European countries and is it competent to do so?

¹³⁷European Court of Human Rights, Case of Howald Moor and Others v. Switzerland, Judgment of 11 March 2014, appl. no. 52067/10 and 41072/11.

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Fire in Factory—Case

In 2012 more than 250 people died in a fire at the “Ali Enterprises” textile factory in Karachi (Pakistan). The German textile discounter KIK had production there.¹³⁸ The question arises whether there are enough connecting factors to enable the German public prosecutor’s office to conduct proceedings in Germany, or whether cooperation between the law enforcement agencies of Germany and Pakistan must be used. ◀

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Such cases bring up the following questions: What are the criteria according to which national criminal law is applicable? When is an offence punishable under the relevant criminal law? These questions are answered by criminal law under the term Criminal Jurisdiction.¹³⁹ **Criminal Jurisdiction** describes the criteria for determining when an offence falls within the jurisdiction of the domestic court. This means that it is not only a question of whether a case can be heard in court, but also of whether the public prosecutor’s office is responsible for the investigations at all.

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Some crime-related criteria for determining criminal jurisdiction can be found in the Specific Section (→ mn. 124) of the criminal code. An example is the criminal provision concerning “**foreign bribery**” in § 335a StGB-DE.¹⁴⁰ The provision expands the circle of both active and passive corruption offences by declaring these criminal provisions applicable to judges and certain employees of foreign or international authorities as well as to soldiers and certain employees of troops of non-German states parties to the North Atlantic Treaty stationed in the Federal Republic of Germany who are in Germany at the time of the offence.

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This special regulation in the German Criminal Code itself is not free of manifold criticism. The issue is not only whether the domestic prosecution authorities have the **capacity** and **resources** to prosecute such acts of corruption globally.¹⁴¹ It is also not comprehensible why domestic criminal law should be interested in global acts of corruption even in those states that have **no interest in the rule of law** or even represent correspondingly high anti-corruption standards themselves.¹⁴² Moreover, there are certain frictions with the **principle of non-interference** under international law,¹⁴³ which prohibits states from interfering in the fundamental internal and external affairs of another state.

¹³⁸The case became known in the media because four people affected by the fire sued for damages in a civil case in Dortmund against the Kik supplier in Pakistan. The fire in 2012 was the result of an arson attack by the Pakistani mafia, which wanted to extort protection money.

¹³⁹Chehtman A (2014), 399, 400; Donatsch A and Tag B (2013), 47–64; Eicker A (2021), 77, 80–87; Fuchs H and Zerbes I (2018), 51, 60; Gless S (2015), 40–41; Gropp W (2015), 25–29; Petrig A and Zurkinden N (2015), 137–150; Pieth M (2016), 31–41; Trentmann CHW (2021), 27–45; for an in-depth study on this subject matter, see Glaser S (2018); in relation to business criminal law, see Wegner K (2021), 33–100.

¹⁴⁰For an in-depth study on this subject matter, see Hoven E (2018).

¹⁴¹Cf. Kuhlen L (2017), mn. 15.

¹⁴²Cf. Kuhlen L (2017), mn. 11.

¹⁴³Cf. Kudlich H and Hoven E (2016), 345, 349–351.

However, the General Section (→ mn. 122) of the Criminal Code provides **general criteria** for determining criminal jurisdiction.¹⁴⁴ The most important criterion is the principle of **territoriality**, which is based on the place where an act is committed or the damage (result) occurs. However, the **nationality** of the perpetrator or the location of the company's headquarters in relation to where the crime is committed is also a connecting factor for jurisdiction in the case of foreign offences.¹⁴⁵ The prosecution authorities may also have jurisdiction over foreign offences if the **victim** is a citizen or the victimised company has its headquarters where the prosecution has authority.¹⁴⁶ Furthermore, criminal jurisdiction also exists in specific cases of **extraterritoriality**,¹⁴⁷ such as when an offence is committed in a foreign country against the state's interests or its national security,¹⁴⁸ when there is an obligation to prosecute the offence in terms of an international convention, or, finally, under some conditions, when the offender and the victim are nationals of different states, if the offender is on the national territory or is extradited to the state due to the offence.

The basic points of reference for criminal jurisdiction are therefore:¹⁴⁹

- Place of the act or damage (territorial principle)
- Nationality of the offender or registered office of the enterprise in which the offender was active (active personality principle)
- The nationality of the victim or the registered office of the company where the victim worked (passive personality principle)
- The foreign offence is directed against specially protected interests of the state (principle of protection).
- The offence concerns the whole community of states (principle of universality)

For an overview of BCL, the focus should be on the principle of territoriality. The **principle of territoriality** is a cornerstone of criminal jurisdiction. National criminal authorities are primarily competent to prosecute offences committed within the national territory. An offence is considered to be committed both at the place where the person concerned commits it and at the place where the offence has taken effect.¹⁵⁰ In order to trigger national jurisdiction, it is sufficient that the act is only partially committed in the

¹⁴⁴For an in-depth case study on this subject matter, see Eicker A (2021), 77, 87–98.

¹⁴⁵Chehtman A (2014), 399, 405–408.

¹⁴⁶Chehtman A (2014), 399, 408–409.

¹⁴⁷For an in-depth study on this subject matter, see Jeßberger F (2011); in relation to business criminal law, see Wegner K (2021).

¹⁴⁸Chehtman A (2014), 399, 409–410.

¹⁴⁹Fuchs H and Zerbes I (2018), 60–67; Gless S (2015), 45–47; Pieth M (2016), 34–38, 39–41.

¹⁵⁰Chehtman A (2014), 399, 404–405; in relation to business criminal law, see Wegner K (2021), 46–65.

national territory.¹⁵¹ Usually, the place of commission in cross-border business offences is rather largely interpreted, resulting in a relatively broad interpretation of jurisdiction.

Example: Bribery Offences¹⁵²

Bribery offences are considered as being committed in the national territory as long as:

- The briber or the bribed person is physically in the national territory at the time when the briber offers, promises or gives the bribe; or respectively, demands, secures the promise of or accepts the bribe;
- A bank account within the national territory has been used either to pay the bribe, or to receive it;
- The briber was expecting that the bribed person would act in her/his favour on national soil. ◀

371 Also, the context of **cross-border corporate criminal liability** is rather broadly admitted and may cover situations where the actual offences committed by an individual within a company that is not, itself, subject to the national jurisdiction. In fact, the place of an act in relation to corporate criminal liability is both the place where the initial offence occurred, as well as the place where the lack of adequate compliance organisation in the company is located. Therefore, companies with their seat within the national territory of a state will always be subject to this national jurisdiction, irrespective of where the actual offence was committed. However, companies with their seat outside the national territory will only be subject to national jurisdiction if the offence is committed on national territory, or when the lack of adequate compliance organisation may also be attributed to a department or a branch of the enterprise active in the national territory.

372 The scope for the competence of law enforcement can also be very broadly defined by law. This can be seen in the example of the **UK Bribery Act**. The UK Bribery Act (→ mn. 1030) applies not only to British citizens or companies registered in Great Britain, but also to all legal entities doing business in British territory. What is meant by the term “business” is clarified by the courts.¹⁵³ This wide scope of application has major consequences. Even purely national situations outside the UK may be affected because the UK Bribery Act provides for a special form of liability of legal persons. If a legal entity (GmbH, AG, association, etc.) that conducts business in the UK cannot prove that it has taken appropriate internal measures to prevent corruption (such as an efficient compliance program), it is criminally responsible for crimes committed by its employees or other persons associated with it. This applies regardless of the place where the crime was committed. The

¹⁵¹ Gless S (2015), 52–54, 64–67.

¹⁵² See, for example, Pieth M (2016), 39–41.

¹⁵³ Schalber R (2018), 56, 58, 93–100; Wegner K (2021), 77–78.

fact that an offender belongs to a legal entity that conducts business in Great Britain is a sufficient connecting factor for the British investigating authorities. An additional territorial requirement (such as the commission of the offence on British territory) is not necessary.¹⁵⁴

5.3 Criminal Procedure

While criminal law contains the provisions to either prohibit or order a certain conduct, criminal procedural law contains those provisions that govern the procedure for enforcing the aforementioned provisions. Basically, the Code of Criminal Procedure thus lays down the legal basis for the procedure that handles the responsibility of offenders and, if necessary, outlines how to carry out the punishment of guilty offenders.¹⁵⁵

In most European countries, the law of criminal procedure is regulated uniformly throughout the country. For a long time, Switzerland was an exception here.¹⁵⁶ Before 2011, there were 26 different Codes of Criminal Procedure in Switzerland. At that time, the Federal Supreme Court only laid out a common minimal standard in criminal procedure. Since 2011, by contrast, the Federal Code of Criminal Procedure entered into force, unifying Switzerland under one procedural code. Generally, the cantons of Switzerland are responsible for the administration of justice in criminal cases and for the organisation of the respective courts as well as for the enforcement of sentences (see Art. 123 Federal Constitution of Switzerland).¹⁵⁷

Generally speaking, Criminal proceedings take two opposing viewpoints.¹⁵⁸

- On the one hand, criminal proceedings are intended to establish the **truth** and convict the **guilty person** as quickly and efficiently as possible. For this reason, the criminal prosecution authorities must have appropriate powers against suspected persons (e.g. arrest, house search, search of persons, surveillance).
- On the other hand, the law must prevent **innocent people** from being punished. Suspected persons must therefore have adequate means to defend themselves effectively and to control (to a certain degree) investigating law enforcement authorities.

The criminal proceedings themselves serve neither as deterrence nor retaliation. Because of the presumption of innocence, criminal proceedings must not be a punishment,

¹⁵⁴Schalber R (2018), 113.

¹⁵⁵Birklbauer A (2018), 9–11; Donatsch A et al. (2014), 16–18; Hinterhofer H and Oshidari BP (2017), mn. 1.24–1.30; Jean-Richard-dit-Bressel M (2020), 19–36; Roxin C and Schünemann B (2017), 2–5, 9–12.

¹⁵⁶Thommen M (2018b), 395, 397–400.

¹⁵⁷Thommen M (2018b), 395, 400–401.

¹⁵⁸Cf. Donatsch A et al. (2014), 6–8; Hinterhofer H and Oshidari BP (2017), mn. 1.13–1.23.

even if in reality it is extremely burdensome for the persons involved. However, criminal proceedings do not anticipate punishment. Even if the accused is remanded in custody during the criminal proceedings, this does not mean that the person is punished. In fact, the purpose of remand is merely to ensure that the criminal proceedings are conducted.¹⁵⁹ The execution of the sentence may only begin after a final court decision, even if it is assumed with practical certainty before the decision becomes final that the accused is the perpetrator and will be sentenced for it. A period of pre-trial detention served by the accused is then credited towards the subsequent prison sentence.

377 The interplay between efficient prosecution and effective defence must strike a **fair balance** between conflicting interests.¹⁶⁰ There is therefore a limited objective of criminal proceedings, namely, to establish the truth while maintaining respect for the dignity of the accused and all persons involved in the criminal proceedings.¹⁶¹ In this respect, human rights are of particular importance. Interventions by the state in these fundamental rights (for example, right to personal freedom, right to privacy) must be limited and are subject to the controls of proportionality. This guarantees, not in the least, the fundamental right to a fair trial, as enshrined in Art. 6 ECHR.¹⁶² Ultimately, therefore, the Code of Criminal Procedure limits the state's power of intervention.¹⁶³

378 Minimum guarantees in criminal proceedings are mentioned in Art. 6 ECHR:

1. In the determination of one's civil rights as well as one's obligations, or of any criminal charge against him, everyone is entitled to a **fair and public hearing** within a **reasonable time** by an **independent and impartial tribunal** established by law. Judgment shall be pronounced **publicly** but the press and public may be excluded from all or part of the trial in the interest of morals, public order, national security in a democratic society, or in special circumstances where publicity would prejudice the interests of justice. This also applies to the interests of juveniles or the protection of the private life of the parties that so require. The extent of being kept from the public eye when strictly necessary is decided by the court.
2. Everyone charged with a criminal offence shall be presumed **innocent** until proven guilty according to law.
3. Everyone charged with a criminal offence has the following **minimum rights**:
 - (a) to be **informed** promptly in a language which she/he understands and in detail of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the **preparation of her/his defence**;

¹⁵⁹Morning Star C (2018), 511–520.

¹⁶⁰For an in-depth study on this subject matter, see Jackson JD and Summers SJ (2018).

¹⁶¹Roxin C and Schünemann B (2017), 70–72; Ronc P (2020).

¹⁶²Gless S (2015), 22–30; Summers SJ (2007); Trechsel S (2018), 19–36.

¹⁶³Roxin C and Schünemann B (2017), 1–5, 9–11 (“criminal procedure law as a seismograph of the constitution”); see also Donatsch A et al. (2014), 23–35.

- (c) to defend himself/herself in person or through **legal assistance** of her/his own choosing or, if she/he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined **witnesses** against him/her and to obtain the attendance and examination of witnesses on her/his behalf under the same conditions as witnesses against him;
- (e) to have the **free assistance of an interpreter** if she/he cannot understand or speak the language used in court.

5.3.1 Principles of Criminal Procedure

Criminal proceedings are divided chronologically into three phases: preliminary investigation, main proceedings and appeal proceedings.¹⁶⁴ Various fundamental principles apply to all stages and all types of criminal proceedings.¹⁶⁵ 379

5.3.1.1 Judge and Prosecutor

The **principle of prosecution** [*Anklagegrundsatz*] states that the function of the prosecutor must be separate from that of the judge. This principle is based on historical experience (inquisition process), according to which the danger of one-sidedness would be far too great if investigation, prosecution and judgment were to be executed by one person alone. Under such conditions the accused cannot reasonably defend himself/herself against the charges without at the same time criticising the judge. Therefore, the functions are to be separate. The central authority for prosecution is the public prosecutor's office. It is they who handle the indictment, which must accuse the accused of a specific criminal conduct. The judge may then pass judgment on the accused act (and only on this specific act). What the public prosecutor does not accuse, will not be judged. Generally speaking, no criminal proceedings can be conducted against the will of the public prosecutor.¹⁶⁶ 380

The principle of **ex-officio investigation** [*Offizialprinzip*] states that the criminal investigative department and the public prosecutor's office must investigate crimes of which they become aware of in their official capacity, not only on the initiative of the persons concerned. This means that the state alone has the right to prosecute. The state prosecutes all criminal acts autonomously and (often, under certain conditions) of its own initiative, i.e. without the initiative of the injured party or the victim. Whether a crime is reported or 381

¹⁶⁴Birklbauer A (2018), 193–195, 231–232, 237–240, 247–248, 261; Donatsch A et al. (2014), 1–3; Jean-Richard-dit-Bressel M (2020), 37–52; Roxin C and Schünemann B (2017), 27–28.

¹⁶⁵Birklbauer A (2018), 16–36; Jean-Richard-dit-Bressel M (2020), 9–18; Roxin C and Schünemann B (2017), 67–95.

¹⁶⁶Donatsch A et al. (2014), 35–39; Hinterhofer H and Oshidari BP (2017), mn. 2.46–2.51; Jean-Richard-dit-Bressel M (2020), 116; Roxin C and Schünemann B (2017), 76–78.

not is often irrelevant, because the prosecuting authorities investigate almost all crimes ex officio (official offences). The only exception to this is a few offences, where the legitimization to give competence to prosecution lies with the victim.¹⁶⁷

382 The principle of **mandatory investigation** [*Wahrheitserforschungspflicht*] states that the public prosecutor's office has a duty to clarify all facts that are of importance for the assessment of the offence and the defendant. This could lead to the duty to file an accusation, if the accused person is likely to be convicted by a criminal court. However, certain possibilities remain for the public prosecutor's office to refrain from bringing charges.¹⁶⁸

For example, the Public Prosecutor's Office may discontinue criminal proceedings on the grounds of insignificance (§ 191 StPO-AT). It can discontinue criminal proceedings for the voluntary provision of certain services, so-called diversion (§ 198 et seq StPO-AT).¹⁶⁹

383 The principle of **substantive truth** [*Grundsatz der materiellen Wahrheit*] states that law enforcement agencies (i.e.: police and the public prosecutor's office) and the courts are obliged to investigate the truth objectively and impartially. The police must therefore investigate both incriminating and exonerating evidence, and the public prosecutor's office may only bring charges if the facts of the case have been sufficiently clarified and a conviction is considered likely. In this sense, ex officio investigations (→ mn. 381), should also be conducted in exonerating directions, even if the accused or the defence counsel do not present any substantive evidence.¹⁷⁰

384 A judge must establish the correct factual and legal situation of a case and decide freely on the basis of the evidence. In contrast to civil proceedings in criminal proceedings it is not "true" what an accused person confesses, but only what a judge considers to be true. The principle of **free consideration of evidence** means that a judge decides according to her/his free personal conviction. Judges are therefore not bound by fixed rules of evidence.¹⁷¹

If, for example, three witnesses claim something but another witness claims the opposite, the court may also believe the individual if it considers this statement to be more credible. There are no rules of evidence according to which majority of witness statements are absolutely more credible.

385 The free assessment of evidence gives judges a lot of power (→ mn. 892). For this reason, they must secure their assessment of evidence with a statement of reasons. This enables the public prosecutor's office and the defense to control the judge's assessment of

¹⁶⁷ Donatsch A et al. (2014), 19–20; Hinterhofer H and Oshidari BP (2017), mn. 2.3–2.23; Jean-Richard-dit-Bressel M (2020), 10–14; Roxin C and Schünemann B (2017), 73–76; Thommen M (2018b), 395, 410–411.

¹⁶⁸ Donatsch A et al. (2014), 43–45; Roxin C and Schünemann B (2017), 87–90; Thommen M (2018b), 395, 411–412.

¹⁶⁹ Hinterhofer H and Oshidari BP (2017), mn. 2.33.

¹⁷⁰ Hinterhofer H and Oshidari BP (2017), mn. 2.24–2.39; Jean-Richard-dit-Bressel M (2020), 4–7; Roxin C and Schünemann B (2017), 87–90.

¹⁷¹ Donatsch A et al. (2014), 61–63; Hinterhofer H and Oshidari BP (2017), mn. 2.205–2.213; Jean-Richard-dit-Bressel M (2020), 111–112; Roxin C and Schünemann B (2017), 394–399.

the evidence and, if necessary, to challenge it. The assessment of evidence must be justified in such a way that another judge in the same situation could have arrived at the same result in the assessment of evidence with knowledge of the same results from the trial. The assessment of evidence must therefore be comprehensible. In case of doubt, the judge must always decide in favour of the defendant (*in dubio pro reo*) or the person whose rights are otherwise affected.¹⁷²

Finally, the so-called **principle of legality** [*Legalitätsgrundsatz*] applies to law enforcement agencies and the courts.¹⁷³ This principle has already been discussed in substantive law (→ mn. 250), but it has different twists and has enormous significance in procedural law. Generally speaking, according to this principle, authorities in exercising state powers and taking evidence may interfere with the rights of persons only to the extent provided by law and necessary for the performance of their duties. Thus, law enforcement bodies, when exercising powers and taking evidence, may interfere with rights of persons only to the extent expressly provided for in a legal basis. The strict legal obligation is particularly important in the case of encroachments on fundamental rights that necessarily occur in criminal proceedings (e.g. house searches as an encroachment on privacy or arrest as an encroachment on personal freedom). The higher the intensity of the encroachment on rights, the higher the requirements for the definiteness of the law. This is also accompanied by the **principle of proportionality** [*Verhältnismäßigkeit*].¹⁷⁴ Any exercising of powers by law enforcement bodies that has the effect of impairing legal interests or fundamental rights must be proportionate to the weight of the offence, the degree of suspicion and the intended success of the measure. If there are several target-oriented measures available, the authority must take the measure that has the least impact on the rights of the person concerned (**principle of the least restrictive means** [*Schonungsgrundsatz*]).

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5.3.1.2 Defendant and Defence Counsel

The principle of **the presumption of innocence** [*Unschuldsvermutung*] means that the suspect or defendant is presumed innocent until convicted. While this does not preclude the investigation of a suspicion, the principle protects the accused from the unlimited or disproportionate power of the state. It is therefore forbidden to present the accused in public as convicted or almost convicted before conviction. A preconceived public opinion should not influence the court. All measures taken against the person by the police and the public prosecutor's office (e.g. search, arrest) must be measured against the presumption of innocence. If prosecution authorities wish to take appropriate measures against the person and thus encroach on her/his fundamental rights, they must justify whether such measures

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¹⁷²Hinterhofer H and Oshidari BP (2017), mn. 2.214–2.222; Roxin C and Schünemann B (2017), 399–502.

¹⁷³Donatsch A et al. (2014), Hinterhofer H and Oshidari BP (2017), mn. 2.52–2.58; Jean-Richard-dit-Bressel M (2020), 14–15; Roxin C and Schünemann B (2017), 78–87.

¹⁷⁴Hinterhofer H and Oshidari BP (2017), mn. 2.59–2.62.

are actually necessary in view of the presumption of innocence (so-called principle of proportionality). The court may not anticipate certain results of evidence, such as rejecting requests for evidence because they are unsuccessful. It follows from the presumption of innocence that the court may only impose a conviction if they are convinced of the defendant's guilt. If there are doubts about the accused's guilt, the accused must be acquitted (*in dubio pro reo*). This ultimately means that the state must prove the crime was committed to the accused. The accused, on the other hand, does not have to prove her/his innocence—the state therefore bears the burden of proof.¹⁷⁵

388 The other principles are closely linked to the presumption of innocence. The **right to be heard** means that the accused has the right to participate in the entire criminal proceedings. For this purpose, the accused must be present at the hearing throughout the criminal proceedings; only in exceptional cases are judgments *in absentia* permissible.¹⁷⁶ Those party to the criminal proceedings (e.g. defendant) have the right to make statements at the various stages of the proceedings. To do so, they must be fully informed of their essential rights and of the reason and purpose of the procedural act. In order for this right to be guaranteed, the prosecution authorities must, in certain situations, instruct the person concerned (e.g. informing the person concerned of her/his rights in the event of arrest).¹⁷⁷ This duty to inform applies in particular if the accused is not supported by a lawyer. In certain cases, the accused may defend himself/herself in court without a lawyer. Then the court is obliged to instruct the accused to submit motions for evidence.

389 The **right to defence** states that the accused has the right to assistance from a defence counsel at any stage of the proceedings.¹⁷⁸ Even if the accused is assisted by a defence lawyer, the accused has the right to make statements or applications himself/herself. Of particular importance is that the accused always has the right to remain silent. She/he does not have to participate in the clarification and may not be forced to incriminate himself/herself (*nemo tenetur se ipse accusare*, → mn. 415). In certain main hearings, the accused must be represented by a defence lawyer, even if she/he does not want to be so (so-called necessary defence). This necessary defence applies under certain conditions, e.g. if a suspect is remanded in custody or is threatened with a sentence of more than 3 years imprisonment. If a suspect cannot afford a defence lawyer, she/he will be assigned an auxiliary defence counsel whom she/he does not have to pay.¹⁷⁹

¹⁷⁵Donatsch A et al. (2014), 58–61; Hinterhofer H and Oshidari BP (2017), mn. 2.116–2127; Jean-Richard-dit-Bressel M (2020), 108–112; Roxin C and Schünemann B (2017), 69–70; for an in-depth study on this subject matter, see Stuckenberg CF (1997).

¹⁷⁶Roxin C and Schünemann B (2017), 516–520.

¹⁷⁷Hinterhofer H and Oshidari BP (2017), mn. 2.82–2.105; Jean-Richard-dit-Bressel M (2020), 134–143; for an in-depth study on this subject matter, see Pohlreich E (2016).

¹⁷⁸Hinterhofer H and Oshidari BP (2017), mn. 2.106–2.110; Jean-Richard-dit-Bressel M (2020), 129–133.

¹⁷⁹Neudorfer J (2019).

5.3.1.3 Procedure

The principle of **public access** [*Öffentlichkeit*] basically means that anyone can watch the main hearings in criminal cases. The principle is based on the democratic idea that the people may control the work of the judiciary. Only when the people are aware of the criminal proceedings can they guarantee this control. Furthermore, the accused is also protected by this principle, because public control prevents him/her from being handed over to the judiciary in secret proceedings. Only in exceptional cases may the public be excluded (e.g. in the case of company secrets). However, filming and photographing the main trial is generally prohibited.¹⁸⁰

Two principles relate specifically to the procedure for taking evidence and the use of evidence for the judgment. The principle of **orality** [*Mündlichkeit*] means that only what was heard orally at the trial may be used to decide the judgment.¹⁸¹ The principle of **immediacy** [*Unmittelbarkeit*] goes further and states that directly tangible evidence should not be replaced by indirect evidence.¹⁸² Thus, if a witness is available for the criminal proceedings, the minutes of her/his testimony before the criminal police may not be read out, but the witness himself/herself must testify directly before the court. This principle serves the right of defence (→ mn. 389), so that the testimony of the witness can be critically questioned by the accused or her/his defence counsel. The accused therefore has a right to confrontation with the prosecution witnesses. In this way a judge may see the witness himself/herself in order to get a better picture of her/his credibility. Protocol, on the other hand, can possibly be faulty or poorly documented, which is why it is as valuable for the evaluation of evidence as direct questioning of witnesses.

The **prohibition of aggravation** [*Verschlechterungsverbot*] states that an accused person may not be placed in a worse position by an appeal.¹⁸³ This principle concerns the possibility of appealing against the judgment of the first criminal court and reviewing the judgment before a second instance. The accused should have the possibility of appealing against decisions without having to fear that she/he will be worse off afterwards. However, this principle is limited. It only applies if the appeal is lodged exclusively in favour of the accused. If not only the accused lodges an appeal but also the public prosecutor's office, the prohibition of aggravation does not apply.

Moreover, every accused person has the right to have the criminal proceedings against him/her terminated within a reasonable period of time. The longer criminal proceedings last, the worse the memory of the accused, witnesses and other parties to the crime

¹⁸⁰Donatsch A et al. (2014), 53–58; Hinterhofer H and Oshidari BP (2017), mn. 2.177–2.190; Jean-Richard-dit-Bressel M (2020), 102–106; Roxin C and Schünemann B (2017), 91; see also Tag B (1999).

¹⁸¹Donatsch A et al. (2014), 49–50; Hinterhofer H and Oshidari BP (2017), mn. 2.167–2.176; Jean-Richard-dit-Bressel M (2020), 37; Roxin C and Schünemann B (2017), 91.

¹⁸²Donatsch A et al. (2014), 45–49; Hinterhofer H and Oshidari BP (2017), mn. 2.191–2.204; Jean-Richard-dit-Bressel M (2020), 104 Roxin C and Schünemann B (2017), 403–404.

¹⁸³Hinterhofer H and Oshidari BP (2017), mn. 2.223–2233,

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becomes, and evidence may possibly be lost. Thus, the **right to a speedy criminal trial** [*Beschleunigungsgrundsatz*] is related to the principle of substantive truth (→ mn. 383). However, it should also be borne in mind that the long duration of criminal proceedings regularly leads to a heavy psychological and emotional burden on the accused and the victim of the crime. Therefore, deadlines within which certain procedural phases must be completed also follow from this principle.¹⁸⁴

394 The **prohibition of double jeopardy** means that the accused may not be punished more than once for the same offence and may not be prosecuted more than once (*ne bis in idem*).¹⁸⁵ If a criminal case has been effectively terminated (e.g. conviction, acquittal), then the same accused may no longer be investigated for the same acts, no charges may be brought, and no further criminal main proceedings may be conducted. This principle applies not only in relation to several criminal proceedings, but also in relation to administrative proceedings. Therefore, it is generally forbidden to impose an administrative penalty in addition to a judicial penalty for the same concrete criminal conduct. However, the Code of Criminal Procedure provides for various possibilities to continue a case after it has been discontinued or to reopen the criminal proceedings if new evidence emerges. In such cases, the prohibition of double jeopardy does not apply.

Furthermore, this basic judicial right is of fundamental importance in BCL. This is because many states in Europe follow the criminal policy approach that in certain areas (e.g. tax offences) not only a criminal penalty but also an administrative penalty should be imposed.¹⁸⁶ The purpose of such multiple sanctions should clearly implement the basic idea that “crime should not pay” and act as a deterrent. **Multiple sanctioning** (by criminal law and by administrative law) is permissible in narrow areas and under certain conditions (e.g. close temporal and substantive connection between criminal proceedings and administrative proceedings), as the European Court of Human Rights has declared.¹⁸⁷ The Court of Justice of the European Union also considers multiple sanctions for the same offence to be permissible. This risk of multiple sanctions in criminal proceedings is not to be ignored as a company.

¹⁸⁴Donatsch A et al. (2014), 39–43; Hinterhofer H and Oshidari BP (2017), mn. 2.128–2.142; Jean-Richard-dit-Bressel M (2020), 106–108; Roxin C and Schünemann B (2017), 91–96.

¹⁸⁵Hinterhofer H and Oshidari BP (2017), mn. 1.109, 2.234–2.252; Jean-Richard-dit-Bressel M (2020), 150–152; in relation to business criminal law, see Wegner K (2021), 155–292.

¹⁸⁶Staffler L (2017b), 123–125.

¹⁸⁷Staffler L (2017c), 161–166.

5.3.2 The Course of the Criminal Proceeding

The course of criminal proceedings can basically be divided into three phases, namely the investigation phase, the main hearing and the remedy phase.¹⁸⁸ However, this tripartite division only refers to the so-called main proceeding. In fact, in the legal systems of Austria, Germany, Liechtenstein and Switzerland, there are several types of criminal proceedings in addition to the main proceeding.¹⁸⁹ Such special criminal proceedings can be applied on the basis of certain conditions. Nevertheless, these types of proceedings play an extremely important role in practice. The reason for the establishment of such proceedings is, in particular, to relieve the burden on prosecuting authorities and criminal courts in the area of small and medium-sized crime. The criminal justice system is thus to be relieved of mass crime (such as road traffic offences or drug offences), but at the same time such proceedings should maintain certain minimum guarantees and minimum standards of the rule of law. The special procedures are thus mostly simplified procedures, which are to be concluded in particular within a short period of time. The simplifications do not only benefit the authorities, but also offer advantages for the accused person, who, for example, does not have to suffer certain negative consequences of a public trial. However, since the ideal image of criminal proceedings is based on the ordinary main proceedings, only the basic outlines of these ordinary proceedings will be presented for an initial introduction.

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5.3.2.1 Preliminary Investigation

Criminal proceedings begin as soon as the criminal investigative department (police department) or the public prosecutor's office investigate an initial suspicion.¹⁹⁰ Thus, the preliminary investigation is the beginning of the criminal proceedings. **Initial suspicion** means that on the basis of certain indications it can be assumed that a crime has been committed. Therefore, no concrete suspect is needed to start the proceedings, only the existence of a crime.¹⁹¹ The preliminary proceedings last until the charges are brought or until the proceedings are discontinued; only when the charges are brought does the next phase of the criminal proceedings (the main proceedings) begin.

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Particularly in the area of BCL, company owners and managers are anxious that proceedings should be discontinued as quickly as possible. The criminal procedure offers

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¹⁸⁸ See Hinterhofer H and Oshidari BP (2017), mn. 4.1–4.34; Petrig A and Zurkinden N (2015), 32–35.

¹⁸⁹ Donatsch A et al. (2014), 298–336; Hinterhofer H and Oshidari BP (2017), mn. 1.31–1.35 (ordinary proceeding), 1.36–1.44 (special proceedings); Roxin C and Schünemann B (2017), 542–546; for an in-depth study of this subject matter, see Luef-Kölbl H (2016) and Thommen M (2013).

¹⁹⁰ Donatsch A et al. (2014), 271–278; Hinterhofer H and Oshidari BP (2017), mn. 7.1–7.1129; Jean-Richard-dit-Bressel M (2020), 39–48; Roxin C and Schünemann B (2017), 316–327.

¹⁹¹ Hinterhofer H and Oshidari BP (2017), mn. 4.1–4.6.

different possibilities for managers and companies. For example, § 153a StPO-DE or § 200 StPO-AT offer the possibility of **discontinuing the criminal proceedings** for payment of a fine or other instructions (e.g. payment of money to a charitable institution or victim-offender mediation). The conditions for this discontinuation of a proceeding vary greatly, but a common characteristic is the requirement of a minor offence and that the accused agrees to this discontinuation of proceedings and the conditions (of payment). The guiding principle of this discontinuing criminal proceedings is that, on the one hand, the seriousness of the criminal guilt does not stand in the way of the short conclusion of the proceedings and, on the other hand, that the condition (e.g. payment of money) eliminates the public interest in criminal prosecution in the specific case.¹⁹²

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Bernie Ecclestone—Case¹⁹³

The highest amount of money ever paid for a termination of proceedings (§ 153a StPO-DE) in Germany is 99 million Euros to the state treasury and one million Euros to a foundation for children's hospice. It was paid in 2014 by Bernie Ecclestone, the former head of Formula One racing, to discontinue the criminal proceedings for bribery and incitement to embezzlement before the Munich Regional Court. Ecclestone was accused of bribing the former BayernLB board of directors with 44 million dollars so that the bank would sell its share in Formula One to Ecclestone's investors so that Ecclestone could remain head of the racing series. The public prosecutor's office found it difficult to prove the accusations against Ecclestone, which is why it accepted the offer from the criminal defence to discontinue the proceedings with the imposition of a fine. ◀

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But let us return to the investigative process and its actors. The main actor in the preliminary investigation is the **public prosecutor's office**.¹⁹⁴ The office's task is to ascertain the circumstances of the case in order to determine whether a crime has been committed. For this purpose, the public prosecutor's office draws on the criminal investigative department and its resources. The criminal investigative department is thus under the direction of the public prosecutor's office, which exercises its authority to direct investigations.

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In practice, however, the criminal investigative department investigates largely independently and can take certain investigative measures (for example, questioning suspects and witnesses). If, however, the criminal prosecution authorities wish to intervene in fundamental rights, such as seizing or confiscating objects, monitoring or opening accounts, or searching buildings or persons, then the cooperation of the public prosecutor's office and the court is necessary. This means that if the public prosecutor's office requests

¹⁹²Donatsch A et al. (2014), 278–284; Hinterhofer H and Oshidari BP (2017), mn. 7.884–7.1012, 7.1079–7.1095; Roxin C and Schünemann B (2017), 327–333.

¹⁹³Brüning J (2015), 586; Kudlich H (2015), 10–13.

¹⁹⁴Jean-Richard-dit-Bressel M (2020), 79–80; Roxin C and Schünemann B (2017), 52–66.

coercive measures in court, the court must approve the requested measure and then the criminal investigative department may carry it out. Only in exceptional cases (in case of imminent danger) can the criminal investigative department take coercive measures of its own accord. In addition to these actors of criminal prosecution, the accused, her/his defence counsel and the victim are also involved in the criminal proceedings.¹⁹⁵ The role of the Court of First Instance is basically limited to the function of **judicial protection**. If the law enforcement authorities wish to take appropriate action, an objection against said action can be made in court accordingly. Forced interventions in the rights of individuals are particularly in need of justification. The greatest encroachment on the fundamental rights of the accused is the imposition of remand in custody. This requires not only an urgent suspicion of a crime, but also one of the expressly listed reasons for detention (i.e.: danger of escape; danger of suppression of evidence or collusion with accused persons or witnesses; danger of completion of a crime or a renewed execution of the crime). It is therefore not enough to know with certainty that the accused is the perpetrator for remand in custody to be ordered. It is also necessary to prove one of the reasons for detention mentioned above on the basis of concrete facts. In this way, remand in custody is not a punishment, but only serves to secure the proceedings.

The **aim of the preliminary investigation** is to provide the public prosecutor's office with the necessary information to decide whether to discontinue the proceedings or to bring charges. In order for a prosecutor to have the relevant information, she/he must have evidence to prove the guilt or innocence of the suspect. Evidence is either material evidence (deeds and documents, technical recordings, visual inspection) or personal evidence (interrogation of witnesses, expert opinions). An important piece of evidence can be the questioning of the suspect. However, the accused is not obliged to cooperate with the criminal prosecution authorities. Because the accused has the right not to incriminate himself/herself (→ mn. 415), she/he may also speak falsely. Ultimately, the accused's statement often has only limited significance in the assessment of evidence.¹⁹⁶

Because the accused is not obliged to cooperate with the prosecution authorities in criminal proceedings, the prosecution authorities are allowed to make certain interventions in her/his fundamental rights in order to establish the truth and conduct the criminal proceedings. These encroachments on fundamental rights manifest themselves in the search of premises and persons, medical tests (e.g. blood sampling and blood analysis), the opening of bank accounts, or the monitoring of telephone and e-mail traffic. In addition, the prosecution authorities can prevent an accused person from evading criminal proceedings by fleeing the country or by complicating criminal proceedings by falsifying evidence. To prevent such complications from occurring, the accused may also be (temporarily) arrested and held in custody pending trial. As has already been said, however, such **encroachments on the fundamental right of personal freedom** serve primarily to

¹⁹⁵For an in-depth study of this subject matter, see Bommer F (2005).

¹⁹⁶Hinterhofer H and Oshidari BP (2017), mn. 7.1–7.6.

conduct the criminal proceedings, and not to punish the suspect. This measure is therefore only permissible on the basis of an urgent suspicion of a crime, but also to prevent the commission of further crimes. The criminal prosecution authorities must bear in mind when carrying out these interventions in fundamental rights that they are being carried out against an innocent person. For, as already mentioned above, the presumption of innocence applies. All these encroachments on fundamental rights must therefore be proportionate. If the purpose of safeguarding the criminal proceedings can also be achieved by lenient means (e.g. instead of pre-trial detention, travel documents can be taken away if there is a risk of absconding, or electronically monitored house arrest can be ordered), then these means should be given preference.¹⁹⁷

5.3.2.2 Main Procedure

- 403** Once the investigation is complete, the public prosecutor charges the accused.¹⁹⁸ The charging of the accused marks the beginning of the main trial. The main trial is the center of the criminal proceedings. This is because only what has been orally discussed in the main hearing may be included in the judge's verdict (the so-called **principle of orality and immediacy**, → mn. 391). To avoid secrecy in the process of justice, the main hearing must be public. Only under very narrow limits is it permissible to generally exclude the public (so-called **principle of publicity**, → mn. 390). The courts of first instance are responsible for the conduct of the main hearing.
- 404** Courts do not decide on a case individually, but rather as a panel of judges. This can either be a college of professional judges or a mixture of professional and lay judges (courts of lay judges, jury courts). The **allocation to the respective court** is based on the offence charged, in particular the amount of threatened penalty. Excluded from this deciding factor of the amount of the penalty are some specially defined competences in the criminal law.
- 405** While each type of procedure has its own specificities, they all follow the same principles. The main proceedings are opened when the charges are brought. The indictment is made by means of the bill of indictment or the criminal complaint. Then comes the procedure of taking evidence. This is where the court reviews the evidence needed to make a decision. For this purpose, it can question the accused or witnesses, inspect them, listen to an expert, and read out documents if necessary. The defendant can comment on the results of the evidence, ask the witnesses and experts her/his own questions and submit motions for self-evidence. In order to submit a motion for evidence, she/he must indicate the evidence and its subject. The defendant's request for evidence may only be rejected by the court for a few reasons (e.g. if the request for evidence only serves to delay the proceedings and thus to delay the proceedings). The criminal court will pass the sentence under free consideration of the evidence.

¹⁹⁷Donatsch A et al. (2014), 181–184; Roxin C and Schünemann B (2017), 232–241.

¹⁹⁸Donatsch A et al. (2014), 284–297; Jean-Richard-dit-Bressel M (2020), p. 49–52; Roxin C and Schünemann B (2017), 344–424, 425–444.

5.3.2.3 Legal Remedies

If a judgment is handed down in criminal proceedings, this does not mean the end of the criminal proceedings. Rather, various options can be pursued to challenge the court's judgment. The procedural possibilities differ not only according to the type of proceedings, but also according to which court has pronounced a judgment. In German terminology, the possibilities to challenge are referred to as "legal remedies" [*Rechtsmittel*]. Legal remedies prevent the judgment from becoming final (and to that extent from entering into force) and prevent the judgment from being enforced—it can only be enforced once the judgment has become final. Basically, two types of challenges to judgments are conceivable, namely appeal and revision.¹⁹⁹

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Appeal [*Berufung*] means that a higher-ranking court rehearses the judgment of a lower court and reconsiders the case in its entirety. The higher court is not bound by the judgment and its content of the previous court. It can decide completely a new and it can conduct a new main hearing. Evidence can be admitted again, and questions of law can be clarified. It is therefore a comprehensive legal remedy.²⁰⁰

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► **Revision** More complex is the legal remedy of **revision** [*Revision* (German and Swiss Terminology) or *Nichtigkeitsbeschwerde* (Austrian Terminology)],²⁰¹ which usually serves only as a last resort to challenge a criminal conviction. Unlike the appeal, the revision constitutes a limited possibility of legal remedy. Here, the facts stated by the verdict of the lower court can no longer be challenged before the higher-ranking court. Rather, the revision is used to challenge legal errors [*Rechtsfehler*]. Therefore, the basis for the evaluation of the challenged is thus, on the one hand, the protocol of the main hearing and, on the other hand, the reasons for the judgment. On these two documents, legal errors must be found in order to overturn the challenged judgment. Therefore, it seems clear that this is a particularly technical legal remedy, which reprimands the violation of law that was committed during the criminal proceedings. This violation of law can be

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- a violation of substantive law (e.g. wrong legal assessment of the facts) or
- a violation of procedural law (e.g. violation of the rules of criminal procedure because a request for evidence was wrongly rejected) or
- a violation of the requirements of the criminal procedure (e.g. lack of a criminal complaint or statute of limitations of the offence).

¹⁹⁹Donatsch A et al. (2014), 337–366; Hinterhofer H and Oshidari BP (2017), mn. 9.1–9.14, 9.15–9.27; Roxin C and Schünemann B (2017), 452–462.

²⁰⁰Donatsch A et al. (2014), 352–356; Hinterhofer H and Oshidari BP (2017), mn. 9.281–9.303; Roxin C and Schünemann B (2017), 462–468.

²⁰¹Donatsch A et al. (2014), 356–359, 359–366; Hinterhofer H and Oshidari BP (2017), mn. 9.28–9.280; Roxin C and Schünemann B (2017), 468–492.

409 ► **Res Judicata** Once all legal remedies have been exhausted, the criminal conviction is considered final. Lawyers then speak of *res judicata* [*Rechtskraft*]²⁰²: the verdict can no longer be appealed and can thus be enforced. Enforcement does not only mean that the custodial sentence or fine is concretely put into effect, but also implies certain blocking effects. This means that, in principle, no further proceedings may take place for the same case—the case in question has been settled and renewed prosecution is prohibited (so-called *ne bis in idem*, → mn. 394).²⁰³

410 However, formal legal force does not necessarily mean that the case has been decided correctly. For this reason, there is the possibility of **exceptional reopening** [*Wiederaufnahmeverfahren*].²⁰⁴ This retrial can be to the detriment or advantage of the convicted person. The prerequisite for a retrial is that the judgment was reached by falsification of documents, false evidence, etc. Furthermore, retrial may be admissible if new facts or new evidence have come to light which were not known at the time of the main hearing and therefore had not been discussed.

5.3.3 Reporting an Offence: Right or Obligation?

411 In principle, every person has the right to report a criminal offence of which she/he has knowledge. However, the obligation to report a crime does not apply to everyone, but only to a limited group of persons. The obligation to report exists for a public authority or public office if the person in one of these positions becomes suspicious of a criminal act that affects their area of activity—for example, the head of an authority discovers that one of her/his employees is misappropriating funds from the authority's treasury.

412 Nevertheless, the obligation of the authorities and public services to report a crime is waived if the notification would impair official activity for which a personal relationship of trust is required. Nevertheless, the authority or public service must take all necessary steps to protect the victim or other persons from danger. In exceptional cases, it may still be effective to file a report.

If, for example, a sports teacher discovers injuries to a student's back that are likely to have been caused by physical abuse, she/he may always report this fact. However, she/he does not have to do so if the report endangers the relationship of trust between teacher and student. However, if she/he assumes that the maltreatment will not stop without her/his report, she/he is nevertheless obliged to report it.

413 Within the framework of their reporting obligations, the security authorities have the obligation to always report criminally relevant facts to the public prosecutor's office so that

²⁰²Donatsch A et al. (2014), 265–267; Hinterhofer H and Oshidari BP (2017), mn. 9.4–9.6; Roxin C and Schünemann B (2017), 444–451.

²⁰³Donatsch A et al. (2014), 267–270.

²⁰⁴Roxin C and Schünemann B (2017), 494–500.

the latter can order appropriate steps for criminal prosecution. There are therefore no exceptions to the duty to report for security authorities.

5.3.4 Rights of the Accused Person

The principle of fairness in criminal proceedings requires that the accused be granted a number of rights. The accused must be given a certain degree of possible action permissible by the state against the accusations. 414

A central right of the accused is that she/he may not be forced to incriminate himself/herself by statements or other actions (*nemo tenetur se ipsum accusare*).²⁰⁵ The accused is not obliged to tell the truth or make a confession. In general, she/he is not obliged to testify anything or to actively participate in an investigation.²⁰⁶ She/he may lie to the extent that she/he does not knowingly expose another person to the concrete danger of criminal prosecution by her/his statement. She/he may therefore not slander another person, i.e. accuse him/her of a criminal offence, which would cause the criminal prosecution authorities to follow the other person.²⁰⁷ If, however, the accused does not defend himself/herself against the accusations, she/he may sometimes miss a chance to defend himself/herself or to arrange for appropriate evidence to exonerate him. Silence is also often not particularly conducive because it is seen intuitively or psychologically, but not legally, as an admission of guilt. Therefore, it can sometimes be useful to testify anyway. However, it is advisable to discuss this with the defence counsel. 415

The accused has the right to be informed about the offence of which she/he is accused. Not only must the offence in general be described, but the accused must also be informed of all details concerning the nature and reason for the accusation. This right to information represents a **principle of fairness** in criminal proceedings, because it is only on the basis of such information that the accused is able to defend himself/herself effectively. Under certain condition, this includes also the right to interpretation and translation in criminal procedure.²⁰⁸ 416

The accused has the right to choose a defender in all criminal cases or to receive a defender through the so-called **procedural assistance**. She/he must be informed about this right as well as about all other rights to which she/he is entitled. However, the right to defence counsel presupposes that the person is questioned as the accused. This right does not therefore exist as long as the police questioning concerns an informant who does not have the status of being accused of a crime. However, in order to protect against abuse, the 417

²⁰⁵Staffler L (2018a), 174, 177–181 (emphasising Austrian Law); Teichmann F and Galliker F (2020), 190, 192–196 (with emphasis on the Law in Switzerland and Liechtenstein).

²⁰⁶Thommen M (2018b), 395, 412–413.

²⁰⁷Thommen M (2018c), 313–326.

²⁰⁸Hinterhofer H and Oshidari BP (2017), mn. 1.157–1.182.

law stipulates that the rights of the accused and procreation may not be circumvented by such enquiries of informants. If such inquiries are nevertheless used to circumvent the rights, the information obtained may not be used in criminal proceedings. In this case a so-called **prohibition of exploitation** applies.

418 The accused has the right to inspect all files of the police, public prosecutor's office and court in which the result of the investigation and the main proceedings were recorded. Everything filed can therefore be inspected by the accused. Information that is collected by prosecution authorities in the course of an investigation and that is not included in the file cannot be viewed. In addition, the **right to inspect files** may be restricted during the investigation procedure if special circumstances give rise to fear that the purpose of the investigation would be jeopardised by the immediate taking of knowledge of pieces of the file. The accused may defend himself/herself against such a restriction of the right to inspect files by means of a legal remedy (→ mn. 406). The court will then decide whether the parts of the file were rightly excluded from inspection.

419 The accused has the **right to communicate with her/his defence counsel** during pre-trial detention. In general, however, the accused also has the right to draw a defence counsel during her/his interrogation. This right can also be subject to restrictions. Restrictions are permissible to the extent that they appear necessary to avert endangering investigations or impairing evidence. However, to restrict the accused's right to meet with her/his defence counsel is extremely questionable, because it deprives the accused of the possibility to develop an efficient defence strategy and to discuss it with a person familiar with the law.

420 The accused has the right to be treated decently during an interrogation. This means that the accused cannot be forced to make a confession by promises, training, threats or coercive means. The general **prohibition of torture** applies. If evidence is obtained through torture or other inhuman treatment, its use is strictly prohibited. In practice, however, this is of little consolation, because if a tortured confession gives rise to new evidence, this new evidence may very well be incorporated into proceedings.

421 Admittedly, the accused has basically no **right to be present during the examination of witnesses** in preliminary proceedings. However, if witnesses cannot or will not testify in the main hearing, the right to be heard requires that the accused has a right to be present in the preliminaries. This is because the accused must have the opportunity, at least during preliminary proceedings, to put questions to witnesses and thus **check their credibility**, even if this is sometimes felt to be incriminating for witness. Indeed, this opportunity to ask questions is important for a court's decision if a court has to make an objective assessment of the evidence used for accusations.

422 If a defendant is not able to bear the full costs of defence without affecting the maintenance necessary for her/his subsistence (subsistence minimum), the court must assign him/her a defender whose costs does not have to be borne at all or only partly in part. This requires a request for **procedural assistance** made to the court, which can be granted after examining the necessary requirements.

5.3.5 Rights of the Witness

Companies can (e.g. through the natural person of the managing directorate) have not only the role of the accused or the victim of crimes (→ mn, 93) during the proceedings, but also that of witnesses. 423

A witness is any person who can give factual evidence in criminal proceedings which she/he has perceived, directly or indirectly. It is important, however, that this is a physical person different from the accused. Unlike the accused, the witness must always tell the truth. If she/he does not, she/he is liable to prosecution for **false testimony**. If a witness is to be questioned, she/he is usually summoned in writing. In this summons, the witness is to be informed about the subject matter of the proceedings and thus about the intended content of the interrogation, so that she/he can prepare himself/herself in an appropriate manner. The summons obliges the witness to testify before the designated authority. If the witness unjustifiably fails to comply with the summons, she/he may be compulsorily presented if this was expressly threatened in the summons. If the witness is obliged to testify and nevertheless refuses to give evidence, she/he may be compelled to testify by means of coercion (e.g. imposition of a fine). This is also an essential difference to the accused, who cannot be forced to testify or cooperate. 424

In preliminary proceedings, witnesses are usually heard in the absence of the parties. However, the witness may demand that a person of trust be called in during his or her examination. This right must be pointed out to the witness in the summons so that she/he actually has the opportunity to bring a person of trust with him. In the case of certain persons (e.g. under 14 years of age, mental illness), the involvement of a trusted third party is mandatory. The trusted third party may not make any statement and may only be present in silence in order to support the witness in this way. 425

However, certain persons are excluded as a trusted third party. The persons who may be excluded are those suspected of involvement in a criminal offence, those who have themselves are to be or have been questioned as witnesses, those who are otherwise involved in the proceedings or those whose presence is feared to have an influence over the witness before a free and full testimony is given. The confidant is under an obligation to maintain secrecy. 426

In main proceedings a witness is to be heard in public. This means that the examination of witnesses is conducted in an adversarial manner with the participation of the prosecutor and the accused as well as her/his defence counsel. If a witness is not available for the main hearing of a case, either for factual reasons (e.g. the witness is presumably abroad or no longer alive at the time of the hearing) or for legal reasons (e.g. the witness exercises his or her right not to testify), a witness examination must be conducted in public before the main hearing. 427

The obligation to testify may not apply fully to all individual persons or groups of persons. Certain groups of persons may not be questioned even if they wished to testify. This **limitation of the duty to give evidence** applies, for example, to clergymen who are to be questioned about the contents of a confessional or about facts that have otherwise been 428

entrusted to them under the seal of spiritual official secrecy. Civil servants may only be questioned about official secrets if they have previously been released from the obligation of official secrecy by their superior. Persons with poor physical or mental health, as a result of which they are unable to tell the truth, may not be questioned. If such a prohibition of questioning is established in advance, the persons may not be summoned for questioning at all.

429 In addition to these prohibitions of interrogation, there are also a number of persons who are granted the **strictly personal right to refuse to give evidence** (e.g. wife). However, the persons who have an unconditional right to refuse to testify may still be summoned and must appear in court in compliance with this summons. However, the judge must inform these persons about the possibility of refusing to testify. If a witness decides to waive her/his right of refusal and to testify, she/he must tell the truth. Otherwise, she/he is liable to prosecution for false testimony just like any other witness.

430 According to Austrian Law, the persons who have the right to be **excused** from testifying are:

- persons who are to testify against a relative, whereby this right of exemption also extends to the ex-spouse (but not to the ex-partner)
- persons under the age of 14 years who are potential victims of crime, after the first judicial hearing
- potential victims of sexual offences after the first judicial hearing.

431 Those who have the right to **refuse** to testify are:

- persons who, by giving evidence, would expose a member of their family to the risk of prosecution if the possibility of incriminating him or her goes beyond their previous testimony
- persons belonging to a specific professional category, namely lawyers, defence lawyers, patent agents, notaries, accountants, and all auxiliary staff. However, the right to refuse to give evidence concerns only what has become known to these persons in their capacity.
- Persons assigned to specific health care professions, namely psychiatrists, psychotherapists, psychologists, probation officers, registered mediators and staff of accredited mental health care facilities. However, the right to refuse to give evidence concerns only what has come to the knowledge of these persons in their capacity.

432 In addition to the right certain persons have to refuse to testify in full, the code of criminal procedure provides the right of conditional refusal to testify for other persons. This means that, under certain circumstances, these persons have the basic right to refuse to answer individual questions. However, they may be obliged to testify despite this refusal if this is indispensable for the proceedings if the testimony has special significance. The conditional right to refuse to testify, for example, is granted to those persons who would

otherwise disgrace themselves or their family or risk an immediate and significant pecuniary disadvantage through their testimony. Questions about highly personal aspects of a witness's or another person's life shall only be answered to the extent that they are absolutely necessary.

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Criminal Liability Concepts for Entrepreneurs and Companies

6

- This chapter deals with a core topic of Business criminal law (BCL). It focuses on the two perspectives that are decisive for the legal evaluation of business crime: The view of the individual (e.g. the manager, the decision-maker)¹ and the view of the company as a legal entity (e.g. firm, company, group of companies).

The aim of the chapter is to provide an overview of the different models of responsibility and to show that the criminal evaluation of acts committed by individuals and companies varies greatly.

6.1 Preliminary Remarks

In BCL, the entrepreneur as an individual person and the company as a legal entity are not necessarily on the same side as seen from a strictly legal perspective. This becomes clear if one looks at the historical reasons for the creation of legal entities. 433

- The concept of an enterprise as a legal entity contributes to the legal economy because it gives economic operators the possibility to **transfer liabilities** to the legal entity and thus does not create any risk regarding economic activity.
- The concept also shows that the company as a legal entity can be a **victim of a crime** (→ mn. 93). For example, a company may be victim to crimes such as those committed by employees to the detriment of the company, misappropriation of assets by an

¹For an in-depth study of this complex subject matter see Tosza (2018).

accountant, disloyal management by an organ of the company or speculative losses by investment bankers.

434 The interests of an individual (as employee, as manager) are therefore not necessarily on a part with the interests of a company (as a collective). For a company as a collective, for example, it may make sense and even be necessary to file a voluntary disclosure and fully cooperate with law enforcement authorities in case of suspicion of criminal activities, while in the same situation an employee or a manager should insist on his or her right to remain silent in order to protect himself/herself from criminal liability. In other cases, it may make sense for a company not to confess at all in order to avoid damages and protect its shareholders, and instead to work toward a stay of proceedings. Yet for the employee or manager it may make more sense to confess the misconduct committed in order to obtain a mild penalty. Both examples show what may be the legally wise decision for a company, may not be as equally wise for an individual.

435 However, business crime is often legally perceived as one of corporate crime (→ mn. 70), i.e. crime in service of a company (corporate crime approach). In this respect, a distinction must be made between the different levels within the company, namely

- the role of management and top management, and
- the role of middle management and other employees or agents

436 In order to better understand the business criminal liability concept, it is preliminary important to bear in mind that corporate culture has changed over time. Whereas in the past it was often **family businesses** that were set up in strongly hierarchical and patriarchal structures, today, ultimately due to globalisation (→ mn. 35) and digitalisation (→ mn. 40) companies are organised in a **flatter hierarchical structure** and are **internationally oriented** and diversified.² If one considers the model of the multinational enterprise (MNE), it becomes clear that its legal structure is extremely complex. MNEs are set up as groups (conglomerates) that maintain various foreign branches and economically control foreign subsidiaries. The division of work in multinational companies is based on decentralisation and delegation (→ mn. 452) of competences.

However, this also means that internal structures are complex and (often) non-transparent, which can encourage the commission of business crimes by individuals.³ Criminal acts within a company are even more likely if a criminal culture has been established within the company structure. For example, a company that is supported by the maintenance of black money funds for the purposes of corruption, → mn. 599 (for example, the Siemens-ENEL scandal, → mn. 594) or a company that intends to gain a

²Fenwick M and Wrba S (2018), 189–203.

³Hefendehl R (2019), 705–717.

competitive advantage through fraud, → mn. 562 (for example, the VW diesel scandal, → mn. 6).

Finally, it should also be borne in mind that risks of dangerous activities can often be assessed much better by the companies concerned than by state supervisory authorities. Companies that deal with dangerous activities on a daily basis are better able to identify and assess operational risks that could be damaging to individuals or the general public but can be averted by virtue of their knowledge advantage. In terms of a rational crime policy, it is therefore appropriate to involve the entrepreneur or company in the process of preventing crimes.

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6.2 Perspective of the Individual

In criminal law, the question arises as to which person should be held responsible for criminal conduct. Although some legal systems have a model of responsibility for companies (or legal persons) for criminal offences, legal systems reserve the right to take criminal action against a natural person (e.g. the manager, the CEO, the simple employee) for the same offence. For this reason, another question arises for BCL as to whether and to what extent a natural person who has acted in a company is to be punished (as well as which natural person would be charged). From the perspective of the individual, the following question arises: Will I be punished for my conduct in the company, i.e. will I receive a prison sentence or a fine?

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The answer to this question is extremely complex in BCL, because doing business within a company is usually characterised by the **division of work**. Strictly speaking, company decisions are made between different actors that possess decision-making power. However, lump-sum collective penalties for all members of a decision-making board or for all employees are not possible: In order to respect the rule of law and other fundamental principles of criminal law (for example, the principle of culpability, → mn. 268), the law must determine precisely which individual actors at the various hierarchical levels of the company can be held responsible for criminal misconduct.

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6.2.1 Collective Crime and Individual Responsibility

When business crimes are committed, various individuals (as natural persons) may be subject to criminal liability: they may be employees or managers. This is due the fact that companies generally operate on the basis of a division of work. As a result, areas of responsibility are often divided but sometimes these areas overlap. From a practical point of view, it is then difficult to provide appropriate evidence of the misconduct of each singular individual, as required by the principle of culpability (→ mn. 268).

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441 However, criminal law offers different models for attributing responsibility to the individual for collective crimes.⁴ This is because different considerations arise when assessing criminal behaviour. One aspect is the consideration that a company's management personnel is responsible for certain behaviour of their employees. Another consideration is the fact that some business crimes can only be committed by perpetrators with appropriate characteristics. Certain qualifications are therefore needed to commit such a crime,⁵ for example:

- Criminal withholding of pay can only be committed by the employer.
- Embezzlement (→ mn. 582) can only be committed by the person who has the duty to look after the assets.
- Damage to creditors in the context of insolvency offences (→ mn. 834) can only be committed by the person who is the debtor to these creditors.

442 To understand these complex models, it is a very useful starting point to look at the concept of participation in crime in general.⁶ The basic starting point for determining criminal misconduct is the distinction between the different forms of participation in a crime (→ mn. 333). As already shown above, a distinction is made between **perpetration** on the one hand and **participation** on the other.

► **Perpetrator** A perpetrator is the one who commits the act himself/herself or through someone else. If a crime is committed by several people together, each person is punished as a perpetrator (co-perpetrator).

443 In the case of participation, a distinction is made between multiple forms, which have different levels of participation in a crime and thus ultimately in the amount of injustice committed. Generally speaking, there are two different forms of participation (→ mn. 339, 341).

► **Instigator** The **instigator** is the person who intentionally designates another person to commit an intentional and unlawful offence (e.g. § 26 StGB-DE).

► **Accomplice** The **accomplice** is a person who has intentionally assisted another offender to commit an intentional and unlawful offence (e.g. § 27 StGB-DE).

444 Now, how can perpetration and participation be delimited? The central criterion here is “**control over the crime**” [*Tatherrschaft*]. According to this doctrine, the offender is the

⁴Achenbach H (2019b), 28, 29–30.

⁵Achenbach H (2019b), 28, 31.

⁶Kudlich H and Oğlakcioğlu MT (2020), mn. 108.

one who, as the central figure, controls the events leading to the realisation of a crime and plays a leading role in it. Thus, the participant is the one who, as a marginal figure without any control over the act, merely initiates or promotes the commission of a crime.⁷

The essential criterion within the field of BCL is the “**control over an organisation**” [Organisationsherrschaft].⁸ The perpetrator must have dominated the organisation of a crime. Domination by virtue of organisation can basically take two forms:

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- it can either be direct, in which the action is controlled, or
- it can be “perpetration by means”, in which it is mediated by the will or the knowledge of the perpetrator.⁹

Controlling the Offence

The managing director of a chemical company instructs her/his employee to discharge the by-products of production into a body of water, thereby contaminating it. In doing so, the managing director wrongly tells the employee that an official permit has been issued. The managing director had superior knowledge (prohibition of the act, possibility of authorisation, absence of authorisation), which she/he used for the offence. ◀

The case of “**perpetration by means**” is fulfilled when an offender has special knowledge or specific characteristics and uses this to commit a crime.

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Perpetration by Means

The managing director instructs her/his employee to withhold the social security contributions of her/his employees. The main actor here is the manager, while the employee only carries out the orders. Therefore, the managing director is primarily liable for withholding remuneration and embezzlement. She/he is the dominant actor in this example. On the other hand, the employee does not have the function of an employer and therefore does not himself/herself have the characteristics that would be necessary to be a perpetrator of this particular crime.¹⁰ ◀

Perpetration by means is thus characterised by the fact that the perpetrator, as the person behind a crime, commits the act through another person whom she/he instrumentalises as a tool.

⁷Achenbach H (2019b), 28, 30.

⁸Beulke W and Witzigmann T (2020), mn. 6; for an in-depth study on this subject matter, see Roxin C (1963), 193-207 and Schroeder FC (1965).

⁹Achenbach H (2019b), 28, 37.

¹⁰Achenbach H (2019b), 28, 38.

447 How can these principles now be applied to BCL? To answer this question, the areas of responsibility of the persons concerned must be clarified. The following sections will therefore provide clarification about:

- how individual liability comes about on the basis of corporate governance;
- the extent to which certain tasks are delegated and thus a transfer of responsibility is legitimately achieved;
- when a superior is liable for criminal offences committed by the employee;
- what exactly is meant by careful organisation of a company in terms of criminal law.

6.2.2 Representative Liability

Sources of Law

- § 9 Austrian Administrative Penal Law
- § 14 StGB-DE and §§ 9 & 130 OWiG-DE
- Art. 111 para. 4 Personen- und Gesellschaftsrecht (PGR-FL)
- Art. 29 StGB-CH
- Art. 6 & 7 Swiss Federal Law on Administrative Penal Law

448 One of the most important provisions in BCL concerns the responsibility for the acts of another person. In other words, when a natural person acts as a representative body or as a member of representative body of a legal person such as a manager, the owner of a holding or an agent to manage a holding, on the basis of a mandate.¹¹ How should this conduct (on the basis of the contract with the company) be assessed under criminal law? How can criminal responsibility be passed on from companies to its organs? The first thing to do is to take a look at the legislation in criminal law. See, for example, the wording of § 14 StGB-DE¹².

§ 14 StGB-DE

(1) If a person acts

1. in the capacity as an organ which is authorised to represent a legal entity or as a member of such an organ,
2. in the capacity as a partner who is authorised to represent a partnership with legal capacity or
3. in the capacity as statutory representative of another

¹¹ Ackermann JB (2021), 107, 122-125; Kudlich H and Oğlakcioğlu MT (2020), mn. 117–121.

¹² For an in-depth study on this subject matter, see Radtke H (2020) and Ceffinato T (2012).

then any law under which special personal attributes, relationships or circumstances (special personal characteristics) give rise to criminal liability also applies to the representative if these characteristics do not exist in the person of that representative but in the entity, partnership or person represented.

- (2) If a person, whether by the owner of a business or somebody delegated by the owner to do so,
1. has been commissioned to manage the business in whole or in part or
 2. has been expressly commissioned to perform autonomous duties which are incumbent upon the owner of the business

and that person acts on the basis of this commission, then any law under which special personal characteristics give rise to criminal liability also applies to the person commissioned if these characteristics do not exist in the person commissioned but in the person of the owner of the business. An enterprise is equal to a business within the meaning of the first sentence. If a person acts on the basis of a similar commission for an agency performing public administrative services, the first sentence applies analogously.

To understand this penal provision, one has to take a step back and look into what is being assumed.¹³ The basic assumption is that each member of management (as a natural person) is the addressee of the duties which are set out in the law for a company or an enterprise. Thus, members of management boards of joint-stock companies, managing directorate or all persons who are members of bodies authorised to represent a company may be held liable for criminal offences committed by their companies. However, the prerequisite for this is that the respective persons have acted in **their capacity as an organ** of the company.¹⁴

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It seems clear that criminal responsibility is first and foremost applied to **decision-making persons** within a company.¹⁵ However, criminal law also takes into account cases in which only a straw man is appointed to the outside world, but the actual management is carried out by other hidden persons. Liability for representation also applies if the assumption of certain functions and tasks in a company is carried out without a formal act of assignment. The *de facto* governing body (e.g. a hidden CEO) can also be held liable.¹⁶ The decisive factor is ultimately the actual power at the disposal of the person concerned, i.e. the extent to which she/he can be held liable as *de facto* managing director as is dependent on the reach of their power within a company.

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¹³Radtke H (2020), mn. 5–7.

¹⁴Achenbach H (2019b), 28, 36–36; Pelz C (2016), mn. 9–13.

¹⁵Radtke H (2020), mn. 3, 58–73.

¹⁶Eidam (2018), 224–225; Radtke H (2020), mn. 119.

451 So, the crucial question is: When is a person considered a *de facto manager*?¹⁷ This question does not only arise at the individual perspective, but also at the level of collective corporate criminal law, because companies as legal entities are also liable for acts committed by de facto directors. The central guiding principle is that a de facto managing director has a paramount influence on the fate of the company or has significant sway in the entrepreneurial decisions.¹⁸ Case law is sometimes satisfied with the fact that a de facto managing directorate can give instructions to the formal managing director (i.e. the straw man) and thus actually co-determines the management of the company.

The former Bavarian Supreme Court has developed eight criteria which concern core areas of management:

1. Determination of company policy
2. Organisation of the company
3. Engagement of new staff
4. Structuring business relationships with contractual partners
5. Negotiations with lenders
6. Decisions on the salary level
7. Decisions on tax matters
8. Control of the bookkeeping

According to the former Bavarian Supreme Court, a “de facto” manager is then a person who meets at least six of the eight mentioned criteria.¹⁹

A distinction must be made between the liability of a representative and liability on the basis of commissioning (i.e. delegated duties). Assignment is centrally concerned with the delegation of competences. This will be discussed in more detail in the next section.

6.2.3 Delegation of Duties

452 As mentioned before, modern companies are structured according to the division of work. The division of work by delegation of duties not only means that the productivity of a company can be increased enormously, it also means that certain persons within a company are relieved of certain duties and are thus free of the corresponding responsibility. In this respect, the delegation of tasks within a company can contribute very effectively to the

¹⁷Beulke W and Witzigmann T (2020), mn. 29; Radtke H (2020), mn. 120–122, 125.

¹⁸Eidam (2018), 225, 256–262.

¹⁹Eidam (2018), 226.

avoidance of liability and can thus be beneficial for a company owner, a company as legal entity and members of different company bodies.²⁰

- The central point here is that formal delegation is carried out in the right way. Furthermore, remember to delegate only those tasks which can be delegated at all.

The starting point to gain an understanding of delegation begins with civil law principles that determine what happens if delegation does not take place.²¹ 453

- Principle of **universal competence** [*Allzuständigkeit*]:²² This principle focuses on the decision-making level of a company like the board of directors of a joint stock company or the managing directorate of a limited liability company. Such position holders are responsible for all a company's affairs, in particular for the execution of the company's business operation.
- Principle of **overall competence** [*Gesamtzuständigkeit*]:²³ This principle focuses on when the decision-making level of a company consists not of one but of several persons. If the board of directors or the managing college is based on a collective of several people, they are jointly competent (as a college) for all the duties. Their duties thus must be fulfilled in parallel.
- Principle of **joint responsibility** [*Gesamtverantwortung*]:²⁴ This principle states that directors and managers are jointly responsible for the fulfilment of their duties and are liable to their company as joint debtors [*Gesamtschuldner*].

It follows from these principles that each individual member of an executive board or management together with their colleagues must ensure that the legal requirements placed upon them are met. If members of a board of directors or managing directors do not fulfil their duties, the company can become liable to pay compensation to a third party (injured party outside the company). However, they are also liable for the internal relationship within their company because the managers can cause a "negative pecuniary position" that burdens the company's assets (i.e. liability for damages). In addition, there is the possibility that management board members and managing directors may be personally liable for damage and thus may be subject to criminal liability.²⁵ 454

²⁰ Schmidt-Husson FG (2016), mn. 2.

²¹ Beulke W and Witzigmann T (2020), mn. 14-16; Dannecker G (2015), 167, 176; Schmidt-Husson FG (2016), mn. 4-5.

²² Moosmayer K (2015), mn. 47.

²³ Schmidt-Salzer (1988), 1937, 1939-1940.

²⁴ Fleischer H (2003), 449-459.

²⁵ Moosmayer K (2015), mn. 47-59, 60-64.

6.2.3.1 Types of Delegation

455 A distinction is made between horizontal, vertical and external delegation.²⁶

456 In practice, one sees the principles of universal competence and overall competence in a company (→ mn. 453) can be modified by their statutes. In these statutes, the tasks and matters of the company are distributed among the various members of the executive board or management. Since the decision-making level of the company appears to be equally ordered, one speaks of a **horizontal delegation**. In certain laws, the legislator has either expressly provided for the possibility of a division of responsibilities (e.g. § 77 para. 1 sentence 2 of the German Stock Corporation Act) or at least implicitly recognised it.²⁷

457 In addition to horizontal delegation, there is also vertical delegation. **Vertical delegation** concerns the transferability of duties that a board of directors or managing directorate outsources to hierarchically subordinate persons, such as authorised signatories and other employees. This vertical delegation is recognised in the legal systems, even if it is not expressly provided for in laws. On the contrary, a corporate structure may require the company director to manage the business in such a way that she/he has to outsource activities and decisions to employees. If she/he fails to involve employees, and is overburdened by supervising, the result can be a liability of the company and the manager.²⁸

458 Recent company practice shows that the internal division of work often takes place by outsourcing certain tasks to external third parties. This is the so-called **external delegation**. The areas of expenditure that are subject to so-called **outsourcing** are often, for example, electronic data handling.²⁹

6.2.3.2 Limits of Delegation

459 In principle, a lot of responsibilities can be delegated within a company. Overall responsibility (→ mn. 453), however, cannot be delegated. It is indivisible, unrestricted and inalienable, and therefore cannot be delegated away from those in charge of a company. Overall responsibility is laid solely upon the management board and management.³⁰

460 However, this does not mean that the board of directors and management are always responsible for the conduct of those who have breached their delegated duties. There is no attribution of third-party fault. Especially in criminal law, the principle of **individual responsibility** (i.e. the principle of culpability (→ mn. 268)) applies. Management can therefore only be held responsible if a member can be accused of an individual and personal negligence (→ mn. 307). In this respect, a member of management is only liable for having

²⁶Pelz C (2016), mn. 14; Schmidt-Husson FG (2016), mn. 6–8.

²⁷Ackermann JB (2021), 107, 150–151; Beulke W and Witzigmann T (2020), mn. 15; Dannecker G (2015), 167, 188–194; Schmidt-Husson FG (2016), mn. 7.

²⁸Ackermann JB (2021), 107, 151; Beulke W and Witzigmann T (2020), mn. 16; Dannecker G (2015), 167, 194–197; Schmidt-Husson FG (2016), mn. 8.

²⁹Schmidt-Husson FG (2016), mn. 9.

³⁰Pelz C (2016), mn. 38–39; Schmidt-Husson FG (2016), mn. 10, 49–54.

delegated the task if his or her own conduct in breach of duty can be accused within the scope of the delegation.³¹

However, to accuse a member of a management board of personal negligence (which would imply individual fault of the member) there must be a **lack of diligence** (→ mn. 308) in the delegation (*negligentia in delegendo*).³² Through delegation, the head of a company can free himself/herself from the obligation to take certain things into her/his own hands. However, her/his direct duty to act morphs into another duty in the process of delegation. She/he now has the duty to adequately supervise the person who acts in her/his place.³³ The duty of supervision consists of a bundle of various individual duties. Through this **duty of supervision** the legal responsibility remains with the executive board or the managing directorate and is reflected in the principle of overall responsibility.³⁴ Delegation never means that the head of a company does not have to oversee the processes she/he has delegated to another employee or that any employee who takes over the tasks has full personal responsibility.³⁵ In this respect, this means that the leadership of a company must continue to exercise the due care needed despite delegation.³⁶

With this in mind, division of work by delegation is certainly a risk factor for criminal liability. However, no board of directors or managing directors need to be constantly suspicious that their colleagues are acting negligently.³⁷ Rather, they may generally rely on the fact that the delegated tasks are duly performed. This **principle of trust** is protected by law as long as company managers are satisfied in their supervisory duties. Management can therefore rely on this principle as long as there is no reason to doubt that the delegated duties are being fulfilled diligently.³⁸

In order to be protected by the principle of trust, there must be a foundation of trust that is maintained in practice. Within company organisation there must be a “**business culture**” that allows a board and managing directorate to rely on those to whom areas of responsibility have been delegated.³⁹ This requires that certain security structures be institutionalised (e.g. the dual control principle), for example within the framework of an efficient compliance structure.⁴⁰

³¹ Schmidt-Husson FG (2016), mn. 11.

³² Schmidt-Husson FG (2016), mn. 12, 36.

³³ Schmidt-Husson FG (2016), mn. 37–38.

³⁴ Dannecker G (2015), 167, 190–193; Schmidt-Husson FG (2016), mn. 12.

³⁵ Cf. Noll M (2018).

³⁶ Dannecker G (2015), 167, 188–193; Pelz C (2016), mn. 38–39, 41.

³⁷ Pelz C (2016), mn. 52.

³⁸ Dannecker G (2015), 167, 196–197; Schmidt-Husson FG (2016), mn. 13–14, 38.

³⁹ Cf. Dannecker G (2015), 167, 194–197.

⁴⁰ See, for example, the Circular 5/2018—Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency under Sections 63ff. of the Securities Trading Act for Investment Services Enterprises, https://www.bafin.de/SharedDocs/Downloads/EN/Rundschreiben/dl_wa_uebersetzung_rundschreiben_052018_

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6.2.3.3 Delegable Tasks

464 This raises the question of which tasks can be delegated. The law defines certain duties which are expressly assigned to the board of directors and the managing director on the basis of their position in the company. These duties are addressed personally to the addressee (board member, member of the management).⁴¹ In this way, the legislator indicates that it is not indifferent to who fulfils the duties in question.

Examples of Non-delegable Duties Expressly Provided for by Law

- certain reporting obligations to the commercial register
- the obligation to audit the establishment
- the obligation to prepare annual accounts
- the obligation to file for insolvency
- the fulfilment of certain tax obligations ◀

465 Since an executive board and management are entrusted with leading the company or enterprise, central management tasks are among the core tasks of these bodies. They cannot therefore be transferred to other staff, whether external or internal.⁴²

- Management duties include those duties which the **law** regulates for management bodies and their relationship with other bodies of the company, such as preparing and executing resolutions for the Annual General Meeting and reporting to their supervisory board.⁴³
- Other management tasks relate to decisions on **key strategic principles**, such as corporate planning, corporate coordination, corporate control and the filling of management positions.⁴⁴
- Another management task concerns the **risk management system**. Management of a company must take appropriate measures to ensure that the developments that ensure the company's continued existence are identified as early as possible.⁴⁵
- Finally, the core of management tasks is the **task of compliance**. The company management must set up a compliance organisation. However, the actual design of the compliance system is something that can be delegated.⁴⁶

466 Thus, although there are non-delegable tasks, this does not mean, conversely, that the head of the company must take alone every measure to fulfil duties. Rather, she/he may be

macomp_en.pdf;jsessionid=AE610F26964DAED1D5EE6B9CE9CD80FE.2_cid370?__blob=publicationFile&v=12

⁴¹ Dannecker G (2015), 167, 187; Schmidt-Husson FG (2016), mn. 15.

⁴² Beulke W and Witzigmann T (2020), mn. 20-23; Moosmayer K (2015), mn. 11-14.

⁴³ Pelz C (2016), mn. 45-46 ; Schmidt-Husson FG (2016), mn. 16-17.

⁴⁴ Schmidt-Husson FG (2016), mn. 18-23.

⁴⁵ Pelz C (2016), mn. 40; Schmidt-Husson FG (2016), mn. 20.

⁴⁶ Schmidt-Husson FG (2016), mn. 23.

assisted in the preparation and execution of company duties through delegation, provided that she/he considers how to delegate them carefully and decides on her/his own responsibility in the end.⁴⁷

6.2.3.4 Performing the Delegation

From a formal point of view, in order for delegation to be legally effective, it is important to ensure that responsibilities are **clearly** and **unambiguously** assigned and that the delegated tasks are clearly attributed to a specific person.⁴⁸ The tasks must therefore be defined and delimited as precisely as possible. To this end, it is highly recommended that the delegation of duties be set out in **writing**.⁴⁹ In the event of ambiguities and gaps, the duty of management as a whole remains in place, so that delegation does not result in an exclusion of liability for management.⁵⁰

In terms of content, the requirements for proper delegation are based on the principles that recur in company law, civil law and criminal law: whoever delegates duties to another person must exercise due care in the selection, instruction and supervision of the delegated persons.⁵¹ For more information, see the chapter on organisational negligence (→ mn. 478).

6.2.4 Liability of the Superior and Guarantor Status

Criminal liability of the superior is the extent to which a supervisor or other manager of a company can be held liable for criminal offence of a subordinate.

At this point, reference can be made to § 357 StGB-DE. According to this provision, a superior is punished if he/she incites or undertakes to incite a subordinate to commit an unlawful act in public office or allows such an unlawful act to be committed by her/his subordinates.

However, at the heart of the model of responsibility of a superior is the criminal liability for **omission** (→ mn. 343).⁵² The liability for omission arises from the fact that the perpetrator has a duty to take action against certain deficiencies in the organisation of a company.⁵³ Such a responsibility model, in which the hierarchically superior person must answer for a crime committed by a subordinate employee, is based on the so-called guarantor position. **Guarantor status** means that somebody has to legally guarantee that

⁴⁷ Schmidt-Husson FG (2016), mn. 24.

⁴⁸ Schmidt-Husson FG (2016), mn. 26.

⁴⁹ Schmidt-Husson FG (2016), mn. 27.

⁵⁰ Achenbach H (2019b), 28, 35.

⁵¹ Schmidt-Husson FG (2016), mn. 28.

⁵² Ackermann JB (2021), 107, 143-144; Beulke W and Witzigmann T (2020), mn. 4.

⁵³ Kudlich H and Oğlakcioğlu MT (2020), mn. 112.

damage or danger does not occur.⁵⁴ The obligation is based on a legal provision that outlines voluntary acceptance of this obligation or of dangerous behaviour.⁵⁵

471 In certain hierarchical relationships, the legislator stipulates that managers have a guaranteed position of supervision. Whether such a guarantor obligation exists and what scope it has, must be examined from different viewpoints.

472 First of all, the question arises as to which superior is a guarantor.

- **Within the company**, a superior has a guarantor position towards her/his subordinates as “protector”. This results, in part, from labour laws, such as an employer’s duty of care towards her/his employees. In criminal law, a guarantor’s duty is also based on the protection of life, human dignity and physical integrity of employees.⁵⁶ After all, employees cannot simply stay away from their workplace in order to avoid certain risks to life and limb. The employer (i.e. the superior) must therefore ensure that the workplace is designed in such a way that risks are minimised. In this way, an employer acts as a guarantor and protector of their subordinates.
- **Outside of the company**, a superior plays a limited role as criminal guarantor vis-à-vis third parties. This is because civil law covers a wide range of guarantor positions (e.g. due diligence rules in the performance of contracts), which tend not to be covered by criminal law.⁵⁷ Therefore, only in rare cases can a guarantor position be considered for third parties. Such a guarantor position can only be established in the case of particularly personal relationships of trust or permanently close business relations.

473 In addition to a guarantor position being defined as “protector”, it can also be for monitoring purposes. A superior has the duty to prevent material and personal dangers that could emanate from the company and its activities.⁵⁸ For this purpose, she/he has to monitor such dangers. She/he does not only need to monitor the product or the service provided by the company, but also her/his relationship to the employees who are bound by instructions. The superior, in her/his capacity as a manager, must ensure that her/his employees do not commit any criminal offences or administrative offences in connection with the company’s activities.

⁵⁴ Achenbach H (2019b), 28, 39; Ackermann JB (2021), 107, 144–150.

⁵⁵ Kert R (2016), 1, 26–30.

⁵⁶ Achenbach H (2019b), 28, 40; Ackermann JB (2021), 107, 145–148.

⁵⁷ Achenbach H (2019b), 28, 40.

⁵⁸ Ackermann JB (2021), 107, 148–149.

The Compliance Officer as Guarantor

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The **compliance officer** has an important role to play in this context. Due to her/his professional position in the company, the compliance officer has a guarantor's duty. Compliance officers are persons deployed within the company to prevent employees or managers from violating legal or company-related obligations. To this end, they are obliged to monitor, but also to train and sensitise company employees. This is intended to reduce the risk of criminal liability and thus to avoid a loss of reputation.⁵⁹ The extent to which a compliance officer actually has a guarantor position must be determined on the basis of her/his specific duties. There are two basic components to a compliance officer's duties. First, she/he must uncover and prevent breaches of duty directed at the company and second, she/he must prevent violations of the law from being committed by the company. If both tasks are within the compliance officer's field of activity, she/he gains a guarantor position.

Now that it has been established that the superior of a company is a guarantor in the sense of being a protector or supervisor, the question arises as to how far this guarantor status actually extends. It is clear that the superior cannot be held responsible for the entire conduct of her/his employees' lives during working hours. Therefore, her/his principal liability is limited to the prevention of **business-related crimes**. Crimes are business-related if they are connected with business activity. This connection can be based either on the type of perpetrator (for example, falsification of invoices by a company's accountant, false statement by the head of a company group) or on the type of business (for example, imminent danger from a product manufactured by a company). However, this connection is not sufficient if the offence is simply committed at the same time as business activity. Although the offence is then committed at the workplace, it does not in itself have any relation to the company. An intrinsic connection between the offence and the business activity is therefore required.⁶⁰

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Basic Responsibilities of a Superior

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- Adequate organisation of the processes within a company (including risk analysis)
- Establishment of appropriate security measures
- Implementation and control of organisational guidelines (to detect breaches of duty)
- Take action in the event of obvious risks.

⁵⁹Moosmayer K (2015), mn. 69–70.

⁶⁰For further information on the termination of the guarantor position: Ceffinato (2021).

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Basic Limits of Liability for a Superior

- Operational relevance
- Guarantor obligation only applies in the own area of competence
- Limitation of liability in regard to offences and persons that can be assigned to the specific scope of the principal duties
- The ability to recognise breaches of duty

6.2.5 Organisational Negligence

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A general problem that arises in various facets of law, particularly in the area of business crime, is the so-called organisational fault. This term describes liability for the violation of organisational duties or for failure to meet legal requirements for operational organisational measures.⁶¹

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Take for example, an entrepreneur is accused of not having taken all necessary and reasonable organisational precautions to prevent the commission of a specific offence. In this context, particular attention must be paid to organisational precautions that are **necessary to prevent** the commission of criminal offences. These precautions must also be **reasonable** for the company in its size and financial strength, but also specific to its field of activity. It is therefore clear to the legislator that requirements for careful organisation within companies can be of very different natures, because there are different sectors of the economy, different sizes of companies and different ways of carefully building up an organisation. Although this awareness on the part of the legislator initially appears to be very positive, in practice, the assessment is somewhat more differentiated. Reality shows that even when good organisational structures are used, crimes are committed. This means that the category of organisational negligence has to be looked at very closely in order to establish criminal liability exclusion of the company even when crimes are committed by employees or managers.

6.2.5.1 Essentials on Due Diligence

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As we have already seen, entrepreneurs, managing directors and board members of companies are obliged to exercise proper supervision over the company or group. The duty of supervision arises wherever the management delegates tasks and duties to others (both to members of the same hierarchy level and to employees at a lower hierarchy level). Management is also subject to these supervisory duties if corresponding tasks of their company are outsourced to third parties (outsourcing). However, certain areas of responsibility cannot be delegated because, for example, the law expressly assigns them to the board of directors, management or the entrepreneur. In this case, the original overall

⁶¹ See, in particular, Jean-Richard-dit-Bressel, M (2013), 185–329.

responsibility remains with management, even if management is supported by employees in the execution of this specific task. In this sense, therefore, management is directly responsible for content and action, while the employees who carry out an action must be monitored accordingly.

The flip side of this due diligence from a criminal law perspective is the violation of corresponding organisational duties. Where can these organisational duties be taken from and what is the standard to be applied here? Many legal systems use the so-called **Business Judgment Rule**.⁶² § 93 of the German Stock Corporation Act can serve as an example, the second sentence of paragraph 1 states: “No dereliction of duties shall be given in those instances in which the member of the management board, in taking an entrepreneurial decision, was within his rights to reasonably assume that he was acting on the basis of adequate information and in the best interests of the company.” This is therefore the “golden rule” for decision-makers. As long as the decision-maker observes the requirements of the Business Judgment Rule, he/she should be granted freedom from liability risks.

In this context, what are the **basics of organisational fault** that are interesting for criminal law evaluation? For this purpose, one must bear in mind the three civil law due diligence obligations of companies:

- *cura in eligendo*—Duty of care in selection. This applies in particular to the selection of employees and agents, who must have the appropriate skills and integrity in order to actually perform and carry out their tasks within the company.⁶³
- *cura in instruendo*—Duty of care during instruction. This applies in particular to the duty to instruct and train employees and agents adequately with regard to the respective task.⁶⁴
- *cura in custodiendo*—Due diligence in monitoring and supervision. This concerns the company’s duty of supervision, not only with regard to its employees and corporate structures, but also with regard to its products.⁶⁵

These three components of entrepreneurial prudence cover broad areas of organisational fault in principle. The aim of these obligations is to prevent violations of a company’s criminal law imperatives and obligations. However, the duties must be formulated differently depending on the structure of the company. There is therefore no standard that can be generalised.⁶⁶

⁶² Kocher D (2009), 215–221.

⁶³ Beulke W and Witzigmann T (2020), mn. 48; Schmidt-Husson FG (2016), mn. 29–30.

⁶⁴ Beulke W and Witzigmann T (2020), mn. 49; Schmidt-Husson FG (2016), mn. 31.

⁶⁵ Beulke W and Witzigmann T (2020), mn. 50–51; Schmidt-Husson FG (2016), mn. 32–35.

⁶⁶ Pelz C (2016), mn. 16.

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Cura in Custodiendo

This can be illustrated well by the example of *cura in custodiendo*. In the case of small and medium-sized enterprises, it may be necessary for management to be in direct contact with employees in order to carry out the necessary monitoring. In the case of large corporations or multinational companies, on the other hand, appropriate communication channels must be set up to ensure that the appropriate level of monitoring is carried out. ◀

484 The requirements for an “efficient organisation” are therefore dependent on a **case-by-case-basis** with regard to the individual needs of a company and its field of activity.

485 In addition, **external circumstances** also determine the extent of organisational duties. While in “normal times” the decision-makers in companies have certain monitoring obligations,⁶⁷ during a global crisis (such as the Covid19 pandemic, → mn. 51) it may be necessary, in the interest of entrepreneurial prudence, to increase the information and monitoring obligations for the decision-makers in a company.⁶⁸ After all, only on the basis of sufficient information and monitoring can decisions be made in the company that are not objectionable from the perspective of criminal law.⁶⁹

486 The three components of entrepreneurial prudence are useful to expose organisational fault at first sight. However, organisational fault goes much further, because depending on the sector, there are specific regulations (professional rules) which are essential for diligent activity.⁷⁰ For example, the financial services sector is exposed to particular risks, which must be covered by corresponding obligations and organisational structures (e.g. reporting requirements).

487 Cornerstones of Corporate Due Diligence, As Shown in Fig. 6.1:

- Identify and analyse risks with regard to internationally recognised human rights, the environment and anti-corruption in relation to its own business activities and network of business relationships
- Take countermeasures against these risks
- Review the effectiveness of these countermeasures
- Establish mechanisms dealing with complaints
- If required by law: Reporting obligations to authorities, publication obligations on activities on the Internet

⁶⁷Capus N (2010), 258–278.

⁶⁸Kubiciel M (2020d), 6–8; Schmidt-Husson FG (2016), mn. 25.

⁶⁹Kubiciel M (2020a), 1249–1252.

⁷⁰Achenbach H (2019b), 28, 45.

Fig. 6.1 Cornerstones due diligence



How exactly organisational culpability is defined from a criminal law perspective, i.e. what the individual requirements are in order to avoid organisational deficits from a criminal law perspective, varies greatly in the practice of jurisprudence and has not yet been examined to any great extent in legal science. However, certain doctrine about the **dogmatics of negligence** provide some clarification. Negligence is essentially a violation of the duties of care (→ mn. 308). Thus, the criminal charge does not concern an intentional violation of criminal norms, but the unintentional violation of them. The unintentional violation comes from a lack of diligence in the implementation of requirements which do not only result from the law or from regulations but are inherent in the activity itself or are measured according to standards which are customary in the industry.

Organisational negligence is thus ultimately based on the concept of criminal negligence. Because negligence is directly related to a **violation of due diligence**, the focus, in the case of business, must be on the careful actions of a company. Careful action in a company must of course be differentiated according to one's level of responsibility in the company. A conscientious employee who is responsible for the development of software has to observe different standards for careful action than the manager or directorate of the same software company. Since the emphasis in this textbook is on the entrepreneur, the entrepreneur's duties of due diligence must therefore be looked at specifically. The three main duties of care have already been mentioned (→ mn. 482).⁷¹ In the following section, **supervisory duties** will be discussed in more detail here, because in practice they are statistically one of the most frequent violation that are taken up by the criminal prosecution authorities and ultimately lead to criminal proceedings. Thus, the supervisory duties will be addressed, with the addressee being the focus of the next section.

6.2.5.2 Addressees of Supervisory Duties and Due Diligence

Sector-specific laws are directed at different addressees who are responsible for maintaining appropriate organisational structures and thus for implementing supervision.

⁷¹For an in-depth study on this subject matter, see Pelz C (2016), mn. 15–31.

⁷²Pelz C (2016), mn. 7–14.

491 The first person to be named as an addressee is the **owner of a holding**.⁷³ In the case of a limited liability or joint-stock company, the holders are managing directors or board members; in the case of European companies, the holders are the board of directors; in a commercial partnership, the holder is the managing partner; or in a civil-law partnership, the holders are the partners themselves. In the above-mentioned cases, the holders are subject to the duty of supervision, which is why possible criminal liability is ultimately examined first with these persons.⁷⁴ But, what happens with business structures that are organised by committees and not by a singular owner? If collegial bodies exist, the duty of supervision is not directed at the body as a whole, but actually at each individual member. This principle, according to which each individual member has the duty of supervision, also applies if she/he is not actively managing the business, for example, because she/he is permanently abroad. The situation is different, however, if within a collegial body tasks are distributed internally and they are laid down in a separate agreement of responsibilities. In this case, each member of the body is only required to perform those **supervisory duties for which she/he is responsible**. Accordingly, board members are not obliged to take supervisory measures for which they are not responsible under the statutory rules. They may then rely on the responsible body to perform properly. However, there is one exception to this principle. If irregularities or breaches by the competent body responsible for duty of care become known or even become apparent, then other members of the executive body are required to take appropriate supervisory measures in place of the executive body member concerned. The same exception applies if the company as a whole is maneuvered into a difficult or dangerous situation.

492 In reality, the holder will assign persons to manage all or part of a given holding. The person assigned may be the manager of a branch, subsidiary, factory or of certain organisational units within a company, such as sales, distribution, engineering or auditing. Therefore, in addition to the holder, the manager is also responsible for supervision, but only for the holding assigned to him/her.⁷⁵ A holding is defined as any **spatially grouped organisational unit** with which an enterprise pursues specific work and for this purpose mobilises people, material and material resources that go beyond covering its own requirements. The determination of responsibility for supervisory violations depends centrally on the authority competence of a plant manager and his or her scope of action in the performance of supervisory duties. Therefore, this scope of authority should be defined as clearly as possible in the written agreement.

493 In addition to the holder and manager of an establishment, **other representatives** may also have appropriate supervisory duties.⁷⁶ They may be, for example, a safety or environmental protection officer. For proper delegation, it is necessary that the representatives are

⁷³ Pelz C (2016), mn. 8–10.

⁷⁴ Achenbach H (2019b), 28, 42.

⁷⁵ Pelz C (2016), mn. 11.

⁷⁶ Pelz C (2016), mn. 12.

entrusted with tasks that concern the owner of an establishment. Outsourced tasks must be delegated tasks directly from the owner of an establishment. This requires an explicit assignment, which is why a tacit appointment or a mere toleration of corresponding powers is not sufficient. The assignment must be explicit enough to ensure that nothing is left unclear, especially the extent of the supervisory duties, which must be recognisable to addressee of the assignment. What does this mean for the concrete transfer of authority? To a certain extent, the addressee must be responsible for her/his actions and have de facto decision-making authority.

Of course, supervisory duties are also incumbent on those persons and bodies who are expressly familiar with the exercise of supervisory powers, such as the **supervisory board** of a company, internal accounting control or financial control. This may also include those ultimately responsible for compliance. In order for these specific bodies to also be able to perform corresponding supervisory duties, it is necessary for the body in question to have a certain management function. For this reason, the organs, such as the head of the controlling department or the head of the internal service department, must be equipped with **appropriate control within the company** to organise and implement the instructions delegated to them. If the corresponding body does not fulfil its assigned responsibility, for example because the supervisory board does not properly manage the company or deliberately pushes aside necessary controls, then there is not only a risk of criminal liability for breach of supervision, but possibly also for other criminal offences (such as embezzlement) connected with the lack of supervision.

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Diesel Emissions Scandal: Duty of Care

In the diesel emissions scandal (→ mn. 6), following a far-reaching internal investigation, Volkswagen claim damages from former Chief Executive Martin Winterkorn (and from former Audi boss Rupert Stadler) on account of breaches of duty of care (under stock corporation law). As Group Board members, they allegedly failed to fully and swiftly clarify circumstances behind the use of unlawful software functions in some diesel engines sold in the North America market.⁷⁷ ◀

The law often provides for the obligation to supervise but fails to state what supervisory measures are actually required. Often the law alone determines that the appointment, careful selection and supervision of supervisors is part of the required task. The specific scope of supervisory measures required ultimately depends on the individual case. The type, size and organisation of the company, the hazardous nature of its activities, the number of employees, the range and significance of regulations applicable to the company, and the risk of violating the regulations (taking into account past incidents) all play an important role.⁷⁸ Due to vagueness in this area, the following principle applies: supervisory

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⁷⁷ <https://www.reuters.com/article/us-volkswagen-diesel-lawsuit-idUSKBN2BI1JB>

⁷⁸ Pelz C (2016), mn. 29.

measures must be **practicable** and **reasonable**.⁷⁹ The rule of law requires that everything that is technically, organisationally or in terms of labour law within the realm of possibility to be ultimately implemented. It is not a question of carrying out comprehensive supervision, but rather of taking only those measures that offer a **high probability of preventing infringements**. Ultimately, the legislator will take into account that safety and legality have a corresponding price. The legislator does not demand maximum level of security but demands a risk-oriented approach based on practical feasibility and economic reasonableness.⁸⁰ Therefore, the organisation and internal processes of the company must be designed in such a way that the necessary monitoring can be carried out effectively.

6.2.5.3 Implementation Strategies (Preview)

496 Ultimately, a company must be organised in such a way that its upper levels constantly monitor the lower levels of the hierarchy. Thus, the aim is to establish a **complete, uninterrupted chain of supervision**.⁸¹ In order to ensure this chain goes unbroken, it is necessary that flowcharts of the organisation and operations are drawn up to identify possible deficits. The individual responsibilities, tasks and powers are to be set out in writing in the job descriptions along with the requirement profiles for the respective employees. Depending on the size of the company, it may also be useful to communicate organisational instructions on work processes and branch responsibilities as well as to oversee tasks within the company and make them transparent to every employee.

497 According to the (employee's) personal and professional qualifications, the supervisors are able to exercise supervision in an adequate manner. It is up to management to ensure that specific risk areas in the company and the main regulations to be observed are identified. The company is also required to continuously monitor the development of all legal situations in order to identify **legal risks**.⁸² Thus, if there are any changes in the legal framework, the employees must be instructed accordingly, whereby it can be useful here to provide written information and, if necessary, to have the employee confirm his or her acknowledgement of the information by signature. For implementation purposes, the instructions should be repeated at regular intervals, for example by periodic training or written briefings in the company's intranet. Furthermore, the company should allow sufficient time for employees to study these regulations and new instructions. In order for implementation to take place, it is necessary that appropriate time is given. An excessive workload may make it necessary to hire additional staff. For employees to implement their specific measures, they must be provided with the appropriate work equipment to cope with their tasks and specifications.⁸³

⁷⁹ Pelz C (2016), mn.25–30.

⁸⁰ Tosza (2018), 205–257.

⁸¹ Pelz C (2016), mn. 32.

⁸² Pelz C (2016), mn. 33.

⁸³ Schmidt-Husson FG (2016), mn. 32–35.

In the area of criminal organisational negligence, it has become established in practice that companies focus on appropriate preventive measures. This is intended to minimise the risk of organisational negligence. These measures fall under the terms of compliance. The integration of effective compliance into the corporate culture and the establishment of compliance management structures can therefore minimise organisational culpability and thus the risks of criminal liability, even if criminal offences are committed.

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6.3 Perspective of the Company

The criminal liability of companies as legal persons (so-called “corporate criminal liability”) is a more recent phenomenon.⁸⁴ The globalisation of economic relations, the possibilities of modern technology and the unforeseeable consequences for the environment have made many legal systems realise that not only natural persons are to be held liable for damages, but also companies. The development started in England and the USA starting with industrialisation in the nineteenth century (→ mn. 22) and spread from the Netherlands to the European countries in the course of the twentieth century.⁸⁵ Increasing globalisation gives this development a further boost.⁸⁶

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However, conceptualising criminal liability of companies and collectives is not free from criticism.⁸⁷ The most important criticism levelled against criminal law regarding companies as legal entities is the principle of “*societas delinquere non potest*”. However, there are also other reasons that stand in the way of criminal liability of companies.⁸⁸

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► **Societas delinquere non potest** means that criminal law concepts are not “suitable” for the legal entity of an enterprise. According to this argument, criminal law should serve mainly preventive purposes, or more precisely, it is intended to prevent crimes from being committed. Natural persons (individuals) have such insight and thus control their behaviour. Legal persons, however, are legal (“fictional”) constructs. They are ultimately a pile of paper that is signed by a notary. Influencing legal persons’ behaviour via threatening sanctions, as intended by criminal law, cannot apply here. Companies as legal entities cannot commit acts at all, but only the natural persons associated with them (decision-makers, employees).⁸⁹

⁸⁴ Dubber M (2013), 203–240; Huber HP (2020), 15–19; Renzikowski J (2019), 149–160.

⁸⁵ Beck S (2014), 560, 561–566; Jean-Richard-dit-Bressel, M (2013), 85–112; Kubiciel M (2020c), 51, 56–88.

⁸⁶ Beran K (2015), 161, 162–164; see Pieth M and Ivory R (2011), 3–53.

⁸⁷ Hilf MJ (2016), 189–193; Kudlich H and Oğlakcioğlu MT (2020), mn. 88–90a.

⁸⁸ Soyer R (2020), 1, 4–6.

⁸⁹ Cf. Soyer R (2020), 1, 5–6, 7.

501 Another reason counting against the criminal liability of companies arises when one thinks of a company from a corporate law perspective. Not only decision-makers and employees belong to a company, but also shareholders and associates. If a company is punished for criminal misconduct by decision-makers or employees and the state imposes a monetary sanction on the company, not only the perpetrators but also the shareholders and partners of the company are indirectly punished. However, shareholders and associates often do not bear any responsibility for misconduct. Nevertheless, they are indirectly punished because the penalty deprives the company of capital.⁹⁰ These examples show that the concept of a corporate penalty can be controversial.⁹¹

502 For the purpose of completeness, however, it should be pointed out that the question of corporate responsibility has many different aspects. It is more than just a question of whether companies are held liable for criminal offences. This focus will be examined in more detail below. However, the discussion about corporate responsibility is more far-reaching and covers many facets. Particularly noteworthy is the question of corporate responsibility in the context of global supply chains.⁹² In Germany, for example, there was a heated debate over a law regarding supply chains [*Lieferkettengesetz*] which contains proposals for the legal formulation of a human right related to the duty of care (→ mn. 978).⁹³ In Switzerland, this was debated under the term Corporate Responsibility Initiative [*Konzernverantwortungsinitiative*], where the duty of care for companies in the area of human rights and the environment is to be provided for. Discussions in EU member states have gained new momentum following the adoption of a reporting obligation in connection with conflict minerals at the EU level (→ mn. 163). Ultimately, the common core of these initiatives can be summed up as follows: people at the beginning of supply chains in production countries of the global south, who suffer most from the lack of human rights protection in the current globalised economic model, should be given the necessary legal protection on top of requiring transnationally operating companies to respect human rights.

6.3.1 Criminal Liability Models

503 As shown in Fig. 6.2, we see that different models for sanctioning companies have emerged over time, as the states relied on different solutions regarding the legal conception of criminal corporate liability during their development.⁹⁴

⁹⁰ Beck S (2014), 560, 568.

⁹¹ For further information, see Beck S (2014), 560, 567–570.

⁹² See Gless S and Schmidt M (2019), 1, 9–10.

⁹³ Wittig P (2020), 395, 398.

⁹⁴ Beck S (2014), 560, 570–573; Niggli MA and Maeder S (2021), 195, 199–200.



Fig. 6.2 Recent Criminal Liability History (Selections)

Different models of criminal liability of companies (i.e.: liability of corporations and liability of collectives) can be seen in Germany, Austria, Switzerland and the Principality of Liechtenstein.⁹⁵ These models are presented below. The order in which they are presented is based on the introduction of the relevant legal bases for the criminal liability of companies. In this way, differences and similarities in the models become clearly visible.

⁹⁵Plum S (2020), 15, 16, 46-47; Soyer R (2020), 1, 2.

6.3.1.1 Switzerland (2003)

505 In Switzerland, the criminal liability of companies is basically⁹⁶ laid down in Art. 102 StGB-CH.⁹⁷ The provision is complex and can be divided according to two major aspects.⁹⁸

506 At the core of the criminal provision in Art. 102 para. 1 StGB-CH is an **organisational deficit**⁹⁹ of a company (→ mn. 478). This means that the focus of this criminal norm is not on the failure to prevent a crime, but on the fact that the complex structures of the company organisation make it difficult to identify and individualise the offender. The company should therefore be subsidiarily liable for the offence because the structure of the company prevents the offence from being attributed to a natural person. In short, organisation deficit means that the offence committed cannot be attributed to any individual. Consequently, if a crime or misdemeanour is committed within business activities and this act cannot be attributed to a specific natural person, Art. 102 para. 1 StGB-CH states that the offence is then attributed to the company. The criminal offences for which a company is liable must therefore be offences or crimes under Swiss criminal law. Furthermore, the liability of a company is subsidiary to that of a natural person within the company, because the company is only liable if the offence cannot be attributed to a specific person due to organisational deficits. However, if a corporate offence can be attributed to a specific natural person, the application of Art. 102 para. 1 StGB-CH is excluded. Art. 102 para. 1 StGB-CH therefore provides for criminal liability for disorganisation within a company.¹⁰⁰

507 Unknown Driver—Case¹⁰¹

A company had rented a vehicle that got checked by a radar on the motorway in the canton of Fribourg. The vehicle had been detected going 55 km/h, which is a gross violation of traffic regulations according to the Road Traffic Act. The company was then asked to provide information about the driver. They responded by stating that, due to the quality of the photographs submitted, the number of its employees (600 employees in France and 100 employees in Switzerland) and the lack of a logbook for company vehicles, they were not in a position to identify the driver. The impossibility of determining which employee was driving the company vehicle at a given time was seen as an organisational deficiency under Article 102 para. 1 StGB-CH. Accordingly,

⁹⁶Niggli MA and Maeder S (2021), 195, 200–202.

⁹⁷Federal Act amending the Criminal Code and the Federal Act on the Interception of Postal and Telecommunications Traffic (Financing of Terrorism), amendment of 21 March 2003, Federal Gazette 2003, 2487, 2488; see Pieth M (2016), 57–59; Soyer R (2020), 1, 4; for a short summary s Zerbe I (2020), 701–715.

⁹⁸Gless S and Schmidt M (2019), 1, 11–12; Niggli MA and Maeder S (2021), 195, 202–207; Pieth M (2016), 61–76.

⁹⁹Niggli MA and Maeder S (2021), 195, 218.

¹⁰⁰Niggli MA and Maeder S (2021), 195, 213–218.

¹⁰¹Niggli MA and Maeder S (2021), 195, 232–233.

the company was sentenced to a fine of CHF 3000 for the offence committed under the Road Traffic Act. ◀

However, Art. 102 para. 2 StGB-CH is different as it is about the **organisational failure** in preventing a certain selection of offences.¹⁰² The criminal provision of Art. 102 para. 2 StGB-CH does not deal with subsidiary liability, but with liability of a company independent of the criminal liability of a natural person. This provision therefore covers cumulative corporate criminal liability. It applies only to certain criminal offences, which are expressly listed in Art. 102 para. 2 StGB-CH. These are: criminal organisation, financing of terrorism, money laundering, bribery, bribing public officials, granting of advantages, bribery of foreign public officials and private bribery. If one of these listed crimes is committed within a company, the company may be held liable under two specific conditions. First, the general conditions for committing an offence under Art. 102 para. 2 StGB-CH must be met: i.e. a crime or misdemeanour must have been committed within business activities within the scope of the company. Second, the company must not have taken all necessary and reasonable organisational measures to prevent such a crime. Unlike in Art. 102 para. 1 StGB-CH, this applies regardless of whether the crime can be attributed to the natural person. The criminal liability therefore exists **independently** of that of the natural person and is based on the accusation that the company has not sufficiently fulfilled its duty to prevent certain selected criminal offences.

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Alstom Network Schweiz AG—Case¹⁰³

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The Alstom Network Schweiz AG Group is active in the construction and maintenance of large infrastructure projects in the energy and transport sectors. In 2011, it was sentenced by the Office of the Attorney General of Switzerland to a fine of CHF 2.5 million for failing to take all reasonable and necessary precautions to prevent the bribery of foreign public officials in Latvia, Tunisia and Malaysia in the course of its business activities. Since the specific offence (Art. 322septies StGB-CH) is part of the catalogue according to Art. 102 para. 2 StGB-CH, this provision had to be applied. The company was accused of deficiencies in the organisation, namely:

- The company's compliance system was not efficiently enforced;
- Employees or consultants did not adhere to the compliance regulations yet the company did not punish them or take appropriate organisational measures to prevent such a behaviour;
- the employee training programs were insufficient;

¹⁰²Lenz S and Mäder W (2013), 33–38; Niggli MA and Maeder S (2021), 195, 219–221; Pieth M (2016), 67–75.

¹⁰³Niggli MA and Maeder S (2021), 195, 231–232.

- compared to the corporate group in France, which has 15 full-time positions in the Compliance Department, the Swiss department was too small with only two full-time positions;
- Employees of the Compliance Department would not have had any relevant professional experience when they joined the company;
- The Compliance Department employees' competencies were insufficient in the implementation of the corruption commission;
- the independence of the compliance department had been compromised because it was involved in sales efforts;
- the shortcomings of the consultancy business regarding their vulnerability to corruption were not sufficiently controlled by the company. ◀

510 Art. 102 para. 2 StGB-CH is therefore the basis for criminal liability in this case, because the company did not do everything possible to prevent the commission of the listed offences.

511 To whom the provisions of Art. 102 para. 1 and para. 2 StGB-CH are directed at can be seen from the exhaustive list in Art. 102 para. 4 StGB-CH. They include legal persons under private law, legal persons under public law with the exception of regional authorities, companies, sole proprietorships and individual enterprises. They are therefore all legal forms of companies in which economic activity can be carried out.¹⁰⁴

512 What are the sanctions?¹⁰⁵ Art. 102 para. 1 and para. 2 StGB-CH lay out a monetary sanction of up to a maximum of **CHF 5 million**. Basically, four criteria are used to determine the specific amount of the sanction, namely the seriousness of the offence, the seriousness of the organisational deficiency, the seriousness of the damage caused and the economic performance of the company.¹⁰⁶ According to Art. 105 para. 1 StGB-CH, monetary sanctions cannot be imposed conditionally.¹⁰⁷ In addition, measures can be imposed under Art. 66 et seq. StGB-CH, such as confiscation or publication of the judgment. The law does not provide an upper limit for the confiscation of whatever pecuniary advantage obtained as a result of the offence (Art. 70 para. 1 StGB-CH) nor for the confiscation of the corresponding compensation claim (Art. 71 para. 1 StGB-CH). Here the discretionary scope of the authorities is quite large, so that confiscation represents a very large penalty for companies.¹⁰⁸ However, norms may also be applied that exempt a company or persons from punishment or discontinue proceedings on the grounds of expediency, namely Art. 52 StGB-CH (lack of need for punishment if the fault and consequences of the offence are minor, i.e. particularly in minor cases of organisational

¹⁰⁴Niggli MA and Maeder S (2021), 195, 209–212.

¹⁰⁵Pieth M (2016), 75.

¹⁰⁶Niggli MA and Maeder S (2021), 195, 222–224.

¹⁰⁷Niggli MA and Maeder S (2021), 195, 224–225.

¹⁰⁸Plum S (2020), 15, 20–21.

fault), Art. 53 StGB-CH (reparation, in particular by covering the damage or by making all reasonable efforts to right injustice), Art. 54 StGB-CH (affectedness of the offender by the act, because the direct consequences of her/his organisational negligence fall back on the company itself).¹⁰⁹

6.3.1.2 Austria (2006)

In Austria, the criminal liability of companies is described in the Austrian Responsibility of Collectives Law (*Verbandsverantwortlichkeitsgesetz*, VbVG-AT) of 2006.¹¹⁰ The prerequisites for punishing a company liable for a crime are mentioned in § 3 VbVG-AT.¹¹¹ This provision contains two different situations of liability. The first possibility of criminal liability¹¹² concerns the decision-maker, the second possibility concerns the commission of a crime by other employees.¹¹³ Overall, the offender(s) must be organisationally integrated in the association (e.g. a company). There are, however, other requirements. It is required that both the actions of the decision-maker and the actions of the employees were for the **benefit of the association** and that the criminal act has violated the **obligations of the association**.¹¹⁴ A company is not liable according to the VbVG-AT if the act is to the detriment of the association, i.e. if the association itself is the victim of the act.¹¹⁵ Furthermore, liability is excluded if acts are committed by decision-makers or employees solely in their own interest (occupational crimes, → mn. 69).

The term criminal offence is defined in § 1 para. 1 VbVG-AT. All federal and regional laws that threaten an act or omission with legal punishment are considered criminal offences.¹¹⁶ However, tax offences are also expressly covered, but only those mentioned in the Tax Criminal Code.¹¹⁷ Administrative offences, which are not financial offences, are not considered offences that can be committed by associations according to VbVG-AT.¹¹⁸

¹⁰⁹Niggli MA and Maeder S (2021), 195, 230.

¹¹⁰Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (*Verbandsverantwortlichkeitsgesetz—VbVG*), Bundesgesetzblatt I Nr. 151/2005; cf. Hilf MJ (2016), 189–193; Jean-Richard-dit-Bressel, M (2013), 180–181; Luef-Kölbl H (2020), 20–31; Steininger E (2020) 4; Soyer R (2020), 1, 2–3; Urbanek J (2016), 43, 46, 49–50; for a short summary, see Kubiciel M (2020c), 51, 64–69.

¹¹¹Soyer R and Pollak S (2020), 29, 33–36.

¹¹²See Lehmkuhl M (2020), 9, 14–15; Urbanek J (2016), 43, 48.

¹¹³Lehmkuhl M (2020), 9, 24–25; Soyer R and Pollak S (2020), 29, 36–37, 53–54; Urbanek J (2016), 43, 51–52.

¹¹⁴Soyer R and Pollak S (2020), 29, 37–43, 43–51; Urbanek J (2016), 43, 52–66.

¹¹⁵Urbanek J (2016), 43, 66–68.

¹¹⁶Lehmkuhl M (2020), 9, 12–20; Soyer R and Pollak S (2020), 29, 51–53.

¹¹⁷Bundesgesetz vom 26. Juni 1958, betreffend das Finanzstrafrecht und das Finanzstrafverfahrensrecht (Finanzstrafgesetz – FinStrG), Bundesgesetzblatt Nr. 129/1958; see Soyer R and Pollak S (2020), 29, 87; Urbanek J (2016), 43, 86–87.

¹¹⁸Lehmkuhl M (2020), 9, 20; Urbanek J (2016), 43, 50–51.

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- 515** § 3 para. 2 of the VbVG-AT provides for the responsibility of a company for criminal offences committed by their **decision-maker**.¹¹⁹ Here the perpetrator commits the offence within the scope of her/his entrepreneurial activity. Furthermore, it is required that the decision-maker commits an intentional or negligent criminal offence. According to § 2 para. 1, decision-makers are the persons in leading positions. They are thus managing directors, board members, authorised signatories or all persons who are authorised to represent the association externally on the basis of an organisational or legal power of representation. However, they may also be members of supervisory boards, administrative boards or other management personnel with controlling powers. Finally, also included are those persons who have a significant influence on the management of the association in any other way. It is important to note that § 3 para. 2 doesn't require an **organisational fault** of the association for criminal liability (as for example in Switzerland in Art. 102 para. 1 StGB-CH).
- 516** The situation is different for criminal acts of **employees** according to § 3 para. 3 VbVG-AT.¹²⁰ Here, by contrast, an organisational fault of a decision-maker is required. Employee actions therefore present two prerequisites, which must exist cumulatively. Firstly, there must be a criminal and unlawful (but not necessarily culpable) commission of a crime by employees within the company. In addition, there must be at least negligent conduct by decision-makers. Thus, the decision-makers must disregard the care that would be reasonable and even necessary under the circumstances. In other words, they failed to take essential technical, organisational or personal measures to prevent such criminal acts.¹²¹ In contrast to the hypothesis of the decision-maker's crime, in the case of employee crimes the existence of an **organisational fault** is required.¹²² Furthermore, the employee's action must be made possible or at least facilitated by this specific organisational negligence on the part of the decision-maker. The perpetrator, namely the employee, is defined in § 2 para. 2 VbVG-AT. An employee is anyone who performs work for an association, namely on the basis of an employment contract, apprenticeship or training relationship, or any other employee-like relationships.
- 517** To whom the VbVG-AT is addressed, can be seen from § 1 VbVG-AT.¹²³ Legal entities under private and public law as well as registered partnerships and European economic interest groups are considered associations. In this respect, sole proprietorships (regardless of size or activity of the company) are not associations and are therefore exempt from criminal liability. This also applies to partnership under civil law (§ 1175 ABGB-AT), where it has no legal personality. Explicitly excluded from the scope of application of VbVG-AT are certain organisations as seen in § 1 para. 3 VbVG-AT.

¹¹⁹Hilf MJ (2016), 189, 192-193; Lehmkuhl M (2020), 9, 25-27; Soyer R and Pollak S (2020), 29, 54-65.

¹²⁰Hilf MJ (2016), 189, 193; Lehmkuhl M (2020), 9, 27-28; Soyer R and Pollak S (2020), 29, 65-79.

¹²¹Staffler L (2016), 500, 502-503.

¹²²Cf. Soyer R and Pollak S (2020), 29, 68-77.

¹²³Lehmkuhl M (2020), 9, 20-24; Urbanek J (2016), 43, 50-51.

As a sanction, § 4 VbVG-AT provides for a corporate fine.¹²⁴ It is calculated according to a daily rate system. The severity of the accusation and the economic performance of the company being fined are taken into account to determine the level of the sanction. The number of daily rates is between 1 and 180 daily rates according to § 4 para. 3 VbVG-AT. The amount of the individual daily rate is between 50 € and a maximum of 10,000 €. This is based on the association's earnings situation. The maximum amount an association can be fined is **1.8 million euros** (maximum number of daily rates is 180, multiplied by the maximum amount of the individual daily rate of 10,000 €). For collectives with non-profit, humanitarian or ecclesiastical purposes, there are significant reductions. In contrast to Switzerland (→ mn. 512), the corporate fine can be imposed, under certain circumstances, entirely conditionally according to § 6 para. 1 VbVG-AT or, at least, partially conditionally according to § 7 VbVG-AT. Further sanctions outline the confiscation of objects that have resulted from an offence or have been used to commit an offence (§ 19a StGB-AT). Also, the profit from an offence can be confiscated via forfeiture according to § 20 StGB-AT.

However, there are two possibilities for the proceedings against a company to be discontinued.¹²⁵ The first option is to use **discretion in terminating** the criminal persecution.¹²⁶ According to § 18 VbVG-AT the public prosecutor's office may use discretion to decide whether a company should be prosecuted or to terminate the prosecution all together. The public prosecutor's office can refrain from prosecution or withdraw if certain factors speak in favour of the decision to refrain from prosecution and sanctioning. These factors include the insignificance of the severity of the offence, the extent of the breach of duty or organisational negligence, the consequences of the offence, the conduct of the company after the offence, the expected sanction amount or other foreseeable disadvantages of the company. In addition, a termination of procedure can be made pursuant to § 18 para. 2 VbVG-AT, if investigations or prosecution requests would involve a considerable amount of effort, which is not in proportion to the importance of the matter or the expected level of sanction.

The second variant is the so-called **"diversion"**.¹²⁷ This is the withdrawal of prosecution in return for a payment of a monetary sum, probation for up to 3 years, or in the case of charitable services (§ 19 para. 1, no. 1-3 VbVG-AT). "Diversion" must not only be made possible by the public prosecutor's office but can also be carried out in court. It is important for this purpose that the facts of a case have been sufficiently clarified and that the public prosecutor's office's assessment of the prosecution and the discontinuation of the proceedings is in accordance with the general rules (§ 190-192 StPO-AT). Furthermore, the crime committed must not be punishable by more than 5 years imprisonment and must not result in the death of a person. The company must also have done reparation for damage

¹²⁴Urbanek J (2016), 43, 72-74.

¹²⁵Urbanek J (2016), 43, 77-80, 81-83; Weratschnig B (2020), 185, 185-186.

¹²⁶Weratschnig B (2020), 185, 187-202.

¹²⁷Weratschnig B (2020), 185, 202-210.

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caused by the offence and have eliminated other consequences of the crime. The company must prove this reparatory conduct immediately.

6.3.1.3 Liechtenstein (2011)

- 521** As the location of business in the heart of the German-speaking region, Liechtenstein is of particular importance in the service sector. Banking in particular is an important and central component of the Liechtenstein economy. The trust business in particular has rendered outstanding services. The so-called “trusts” manage assets of foreign private clients and institutional investors.¹²⁸ However, Liechtenstein’s specialisation in the area of financial services has also brought criticism, for example, when it has been associated with tax evasion¹²⁹ and money laundering, → mn. 654. For this reason, there is a genuine interest in setting clear boundaries and concluding cooperation agreements with authorities from other countries¹³⁰ in commercial and corporate criminal law in order to avoid being considered a “safe haven” for business criminals.
- 522** In this perspective, § 74a-g StGB-FL and Art. 358a-g StPO-FL established the liability of legal persons for criminal offences in 2011.¹³¹ This is a separate model of the criminal liability of legal persons, which is based in particular on the normative models in Austria and Switzerland.¹³² Ultimately, this significantly strengthens the legal possibilities for cooperation in the fight against business criminality.¹³³
- 523** Like the Austrian model (→ mn, 515, 516), § 74a subpara. 1 StGB-FL distinguishes between two forms of corporate responsibility, namely the act of decision-makers and the act of employees. In contrast to the Austrian model, however, the connection of a company to the offence is not based on a breach of duty by the company or the obtaining of an advantage for the company (§ 3 para. 1 no. 1 and 2 VbVG-AT), but rather the offence must be committed “in the exercise of business activities within the scope of the purpose of the legal person”.¹³⁴ This definition thus follows the Swiss model.
- 524** The requirements for criminal responsibility of a company for acts of **decision-makers** are defined in § 74a para. 1 StGB-FL.¹³⁵ Legal persons are then responsible for crimes and misdemeanours (unless they act in execution of laws) which are committed in the exercise of business activities within the purpose of the legal person and by the decision-maker in the exercise of her/his managerial authority. No organisational fault of a legal entity is

¹²⁸Schurr FA (2014).

¹²⁹Hosp T and Langer M (2011), 165–174.

¹³⁰Hosp T and Langer M (2011), 185–283.

¹³¹Giesinger FJ and Maier M (2020), 717–734; Jean-Richard-dit-Bressel, M (2013), 181–182.

¹³²Hilf MJ (2014), 73, 85

¹³³Wenaweser S (2013), 199–236.

¹³⁴Giesinger FJ and Maier M (2020), 717, 725.

¹³⁵Giesinger FJ and Maier M (2020), 717, 723.

required for criminal liability to be established. In this respect, the Austrian model is again followed here (→ mn. 515). A decision-maker is someone who has the authority to represent a legal person to the outside world, who exercises supervisory powers in a managerial position or otherwise exercises a significant influence on the management of the legal person. Here, too, the parallels between § 74a para. 3 StGB-FL and § 2 para. 1 VbVG-AT become apparent.

The responsibility of a legal person for acts of **employees** requires two conditions according to § 74a para. 4 StGB-FL.¹³⁶ On the one hand, an offence must be committed by an employee of the legal person in a criminal and unlawful (but not necessarily culpable) manner. On the other hand, the commission of the act must be made possible or substantially facilitated by the fact that management personnel fail to take necessary and reasonable measures to prevent such acts. In this case, therefore, organisational fault is required.

At whom the regulations are directed, results from § 74a para. 2 StGB-FL.¹³⁷ The provisions are applicable to all legal entities whether they are registered as commercial or not. The provisions also apply to those legal entities which do not have a registered office or place of business or establishment, but which are to be entered in the commercial register under domestic law. Furthermore, the provisions apply to foundations and associations which are not entered in the commercial register or which have neither their registered office nor a place of business or establishment. The addressees of the criminal norms are therefore very narrowly defined.

The central sanction in § 74b para. 1 StGB-FL is the corporate fine.¹³⁸ The fine is imposed according to daily rates (§ 74b para. 2 StGB-FL). In this respect, parallels arise with the Austrian model (§ 4 para. 4 VbVG-AT). The amount of the fine or the number of daily rates imposed is determined by the severity and the consequences of the offence or the seriousness of the lack of organisation. The conduct of the legal person after the offence is also taken into account. The daily rate is determined by the earnings situation of the legal entity and other economic performance. The daily rates have a lower limit of CHF 100 and an upper limit of CHF 15,000 which are lower than the Austrian model (minimum 50 €, maximum 10,000 €). The maximum association fine is therefore **CHF 2.7 million**. As in the Austrian model, special rules apply to legal entities that have non-profit, humanitarian or church purposes or are otherwise not profit-oriented.

Analogous to the Austrian model, a fine imposed may be partially or fully reviewed conditionally, subject to a probationary period of up to 3 years and, when appropriate, subdivision of instructions may apply.¹³⁹ This presupposes that it can be assumed that the legal person will be deterred from committing further offences (§ 74c para. 1 StGB-FL). In contrast to the Austrian model, however, there is no upper limit of daily rates for

¹³⁶ Giesinger FJ and Maier M (2020), 717, 723–725.

¹³⁷ Giesinger FJ and Maier M (2020), 717, 721–723, 725–726.

¹³⁸ Giesinger FJ and Maier M (2020), 717, 728–729.

¹³⁹ Giesinger FJ and Maier M (2020), 717, 729.

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conditional review of the fine, so even a fine of 180 daily rates can be reviewed conditionally. However, common features are again to be found in the confiscation of objects that were produced by an offence or used to commit an offence (§ 19 StGB-FL). Also, the achievement of a profit from an offence can be skimmed off by means of forfeiture according to § 20 et seq. StGB-FL.

529 The Liechtenstein model largely, though not completely, follows the Austrian model because it provides a normative basis for the discretion of termination of persecution (§ 357d StPO-FL) and diversion (§ 357f StPO-FL).¹⁴⁰ According to § 357d para. 1 StPO-FL, the public prosecutor's office may, at its discretion, discontinue proceedings if, overall, the minor nature of an offence argues in favour of refraining from prosecuting the legal person or discontinuing prosecution. The provision thus shows great similarities to § 18 VbVG-AT (→ mn. 519). The diversion in § 357f StPO-FL shows parallels to the Austrian model (§ 19 VbVG), but, is more narrowly defined. On the one hand, the facts of a case must be sufficiently clarified; on the other hand, the level of persecution taken (§ 357d StPO-FL) and the general attitude due to the filing of a complaint (§ 22 StPO-FL) cannot be considered. In contrast to the Austrian model, however, the requirement of a legal person not being seriously culpable must also be fulfilled (§ 357f StPO-FL refers to § 22a StPO-FL, where further requirements are also mentioned). Also contrasting to the Austrian model (§ 19 para. 1 VbVG) is that the full compensation for damages does not have to be provided, but may be waived for special reasons (§ 357f para. 2 StPO-FL). By contrast, analogous to the Austrian model, three types of diversion are provided for, namely the payment of a monetary sum, a 3-year probationary period with or without measures and the provision of unpaid community service (§ 357f para. 1 no. 1-3 StPO-FL). As in Austria, the diversion is not only within the legal ability of the public prosecutor's office but is also applicable in court. If all requirements for diversion are met, it must be applied.

6.3.1.4 Germany (2021)

530 In Germany, there was for a long time no legal basis for the criminal liability of companies in its narrow sense.¹⁴¹ Nevertheless, companies were sanctioned for criminal offences on the basis of administrative law. The legal basis for this was (and is still) the **Law on Administrative Offences** (OWiG-DE), the central provisions being § 30 OWiG-DE and § 130 OWiG-DE.¹⁴²

¹⁴⁰ Giesinger FJ and Maier M (2020), 717, 731–733.

¹⁴¹ Wittig P (2020), 395, 401–402; see also Ransiek A (2015), 337–346.

¹⁴² Achenbach H (2019a), 6, 7–14; Beulke W and Witzigmann T (2020), mn. 44–61, 64–71; Kubiciel M (2020b), 687–700; Kudlich H and Oğlakcioğlu MT (2020), mn. 91–100, 122–123a; Moosmayer K (2020), 1, 2, 5, 6; Pelz C (2016), mn. 3–6, 35–36; Wittig P (2020), 395, 401–402, 406–407; see also Gless S and Schmidt M (2019), 1, 13–15; Soyer R (2020), 1, 3–4.

Ultimately, there seemed to be a turnaround.¹⁴³ With the “**Act to Strengthen Integrity in Business**”, Germany had begun the implementation of its own law against corporate crime, namely the *Gesetz zur Stärkung der Integrität in der Wirtschaft* (*Verbandssanktionengesetz*, VerSanG-DE). It is true, however, that the law was ultimately not passed by the German legislator shortly before the 2021 parliamentary elections. Nevertheless, it is important to look at the legislative draft of the *Verbandssanktionengesetz* because it shows potential tendencies as to which regulatory path Germany will take with regard to the criminal liability of companies. It is therefore important to make companies aware of the details of this draft at an early stage.

With this Act, Germany wanted to compensate for central weaknesses in the current administrative law offences, such as the maximum amount of a **monetary sanction** of € 10 million, which is independent of the size of the company concerned. The draft was therefore meant to tailor sanctions more specifically to a respective company, but also provide concrete and comprehensible incentives for investment in compliance measures and internal investigations to solve crimes committed by companies. It was also meant to enable the prosecution of offences committed by German companies abroad. Compared to the models presented so far, it was the most modern, but also the most rigid model of criminal liability for companies. This is one of the reasons why the draft law received so much criticism that it was ultimately not passed by the German legislator.

The basis of responsibility for associations was provided for in § 3 VerSanG-DE. Accordingly, an act of the collective must be committed. An act of the collective exists, if the collective violates their duties or if they have been enriched by an act or plan to be enriched. A corporate sanction would have been imposed in two cases. The first case of corporate sanction is imposed when someone has committed an act as a **decision-maker** of the collective. In this context, a “decision-maker” may be any member entitled to represent the legal entity, members of the board of directors of an association, partners entitled to legally represent the company, the general agent, the authorised signatory and the authorised representative of the association in a managerial position, as well as any person responsible for the management of the business or enterprise, including the supervision of the management and other supervisory powers in a managerial position. The second case of corporate sanction is when someone (i.e. an **employee**) has committed a collective offence while managing the affairs of the association and the decision-makers could have prevented the offence or made it considerably more difficult by taking appropriate preventive measures.

Thus, the German model followed the Austrian model to a large extent, eagerly distinguishing between decision-makers and employees. While no organisational fault

¹⁴³Beulke W and Witzigmann T (2020), mn. 68; Grützner T et al. (2019), 26–37; Henssler M et al. (2020), 153–176; Kudlich H and Oğlakcioğlu MT (2020), mn 86–87, 90b–90c; Wittig P (2020), 395, 402; for a brief history of this development see Korte M (2018), 393–398.

was required for the criminal acts of decision-makers, the criminal liability of the company for acts of the employee required an organisational fault of the decision-makers.

534 According to § 3 para. 2 VerSanG-DE, there was the possibility that the court may declare a **particularly serious case**, which refers in particular to the nature of the offence and the involvement of management personnel in the commission of the offence. However, sanctions for companies were excluded in three cases (§ 5 VerSanG-DE). The first case concerned the situation when a criminal offence cannot be prosecuted because a penalty is excluded or suspended. Secondly, sanctions were to be excluded if provisions on immunity prevent prosecution. Thirdly, a corporate sanction was not to be imposed if the act is committed in the exercise of official authority.

535 At whom the law was directed, resulted from § 2 VerSanG-DE. There the association was defined as a legal entity under public or private law, but also as an association without legal capacity and a partnership with legal capacity.

536 As a sanction, § 8 VerSanG-DE included the corporate monetary sanction (§ 9 VerSanG-DE), as well as a warning with reservation of a money sanction (§ 10 VerSanG-DE). In addition, according to § 14 VerSanG-DE the conviction of an association was to be made public, if there is a large number of injured parties. The way of publication was to be determined by the court. Furthermore, the Federal Office of Justice was to keep a **register of corporate sanctions**, in which the final court decisions against companies were entered (§ 54 et seq. VerSanG-DE).

537 With regard to the corporate sanction, a basic distinction was made between intentional and negligent acts. For large companies with an average annual turnover of more than 100 million € (§ 9 para. 2 VerSanG-DE), the sanction for intentional acts was at least 10,000 € and at most up to **10% of the annual turnover**. For negligent acts, however, the sanction was at least 5000 € and at most up to 5% of the annual turnover. A different assessment basis applied to companies that generate less than 100 million € in annual turnover (§ 9 para. 1 VerSanG-DE). In the case of intentional acts, the minimum amount was 1000 € and the maximum amount was 10 million € in the case of negligent acts, the minimum amount was 500 € and the maximum amount was 5 million €. So, the amount of the sanction depended centrally on the annual turnover. This was determined according to § 9 para. 2 VerSanG-DE by taking the company's worldwide turnover of the last three business years before the conviction, including all natural persons and associations, which operate within the association as an economic unit. The turnover of associations whose purpose is not directed towards economic business operations was expressly not taken into account. In this respect, it seemed clear that sanctions were very high. This could have led to considerable burdens for a company.

If the payment of the sanction is not immediately reasonable for a collective according to its economic circumstances, § 9 para. 4 VerSanG-DE provided for the possibility to grant a payment deadline or to divide the sanctions into instalments. At the same time, the court could have ordered that the privilege of payment by instalments is forfeited if the association does not pay a partial amount on time. According to § 15 VerSanG-DE, monetary sanctions were calculated according to the significance of the offence,

determined by the severity and extent of the failure to take reasonable precaution in organisation, selection, instruction and supervision. Furthermore, the economic situation of a company was taken into account. In doing so, the court was to weigh the circumstances for and against the company (§ 15 para. 3 VerSanG-DE), namely the accusation of the collective's deed, the motives and objectives of the offender, the extent and duration of the deed, the nature of the statements (with regard to the number of persons involved and the position of the offender within the company), the effects of the deed, past deeds, efforts to uncover the deed and make amends for the damage, and the consequences of the deed for the collective itself.

According to §§ 16 and 17 VerSanG-DE, an **important mitigating factor** of the sanction was the internal investigation provided by a company. Here, the draft law explicitly listed the conditions that were necessary for granting the mitigating reason of internal investigations. § 17 VerSanG-DE specified a total of five conditions, all of which must be cumulative for a company to receive a milder penalty for having carried out internal investigations. Firstly, the internal investigation must make a significant contribution to clearing up the company's crime. A mitigation of the penalty is therefore not possible if the prosecuting authority has already cleared up the crime itself. Secondly, the internal investigation must serve the objective investigation of the facts, including all incriminating and exonerating circumstances. Therefore, if an external service provider takes over the internal investigation, this service provider must not be the defence counsel of the association or of an accused person. Thirdly, cooperation with the prosecuting authority must be uninterrupted and unrestricted, so that essential knowledge of the facts may not be withheld. Fourthly, the results of the investigation, including all essential documents and the final report, must be made available to the prosecuting authority after the investigation has been completed. Fifthly, the internal investigation must have been conducted in accordance with the principles of a fair trial, whereby the law lays down certain requirements for the questioning of employees during the investigation. Provided that all requirements are met, mitigation can be denied only in atypical and exceptional cases. According to § 18 VerSanG-DE, mitigation restricted the sanction framework according to § 9 VerSanG-DE to a considerable extent. The minimum level of the sanction was omitted, the maximum level was reduced by half and the public announcement of the conviction was excluded (§ 14 VerSanG-DE).

The **warning with reservation** of a corporate fee was regulated in § 10 VerSanG-DE. Accordingly, the court can issue a warning to an association and at the same time determine a monetary sanction, whereby the right to impose such sanctions is reserved. This procedure was possible according to § 10 para. 1 VerSanG-DE under three conditions, which must be cumulative. Firstly, it must be expected that the warning is sufficient to avoid the future commission of crime. Secondly, when making an overall assessment of an offence and its consequences, special circumstances must be present, according to which the imposition of a monetary sanction is unnecessary. Thirdly, the imposition of a corporate sanction need not be necessary to defend the legal system. The warning was issued with the stipulation of a probationary period, which may last for a minimum of 1 year and a

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maximum of 5 years. The probationary period was to begin with the legal force of the decision of the warning, subject to the imposition of the corporate sanction. The probationary period may be subsequently reduced to the minimum or extended to the maximum before its expiry. If an act is committed during the probationary period for which the company is responsible and which shows that the expectations on which the reservation of the imposition of a monetary sanction was based were not fulfilled, then the court was to sentence the warned company and set into force the corporate fine. In addition, the court may have sentenced the company to a monetary sanction if they grossly or persistently violate conditions or instructions (§ 10 para. 5 VerSanG-DE). If it was sufficient to issue further instructions or conditions or to extend the probationary period, this was to be applied by the court instead of fining the company. If the three conditions according to § 10 para. 1 VerSanG-DE for the conditional leniency of a monetary sanction under pronouncement of the warning did not exist, then according to § 11 VerSanG-DE the imposition of 50% of the corporate sanction is still to be reserved, if it can be expected that the imposition of part of the sanction is sufficient to avoid future commission of criminal acts within the company.

540 According to § 10 para. 4 VerSanG-DE the court was also to impose conditions (§ 12 VerSanG-DE) and instructions (§ 13 VerSanG-DE) with the warning. This decision was also to be made, changed or cancelled afterwards. Conditions were according to § 12 para. 2 VerSanG-DE either compensation of damage, which was caused by the act, or payment of a sum of money in favour of the treasury. However, the payment in favour of the treasury was only to be pronounced by the court if it does not prevent the company from compensating for the damage. According to § 13 VerSanG-DE, instructions were meant to counteract the commission of corporate offences.

541 However, because the revolutionary bill was not ultimately passed by the German legislature, the central offences from the German Administrative Offences Act (OWiG-DE) remain the basis of corporate liability for criminal offences. Therefore, the most important provisions will be briefly explained.

- § 30 OWiG-DE states liability for legal persons and associations of persons who have committed a criminal offence or a regulatory offence as a result of **failing to fulfil duties** incumbent on the legal person or on the association of persons, or where the legal person or the association of persons has gained or was intended to gain. The law provides for fines as the only sanction.
- § 130 OWiG-DE, on the other hand, provides for liability for the owners of establishments or undertakings who intentionally or negligently fail to take **supervisory measures** which would be necessary to prevent breaches of duty. The breaches of duty relate to duties of the owner and are intended to prevent criminal offences from being committed. Punishment under § 130 OWiG requires that the breach of duties would have been prevented or made considerably more difficult by proper supervision. The

necessary supervisory measures also expressly include the appointment, careful selection and monitoring of supervisors.

6.3.2 Sanctions Against Companies

Criminal law for individuals primarily provides for either imprisonment or a fine (see, for example, § 17 OWiG-DE).¹⁴⁴ However, there are more options when it comes to sanctions for companies. This section deals with this. **544**

6.3.2.1 Monetary Sanctions

The overview above has shown that in the case of corporate responsibility, monetary sanctions are applied as a main punishment against companies. **545**

Especially in the USA, companies are subject to heavy fines based on the Foreign Corruption Practices Act (FCPA). This is shown by the top 10 record fines imposed on the basis of the FCPA up until 2019.¹⁴⁵

- 1. USD 1.78 billion: Petróleo Brasileiros S.A. - Petrobras (2018)
- 2. USD 1 billion: Ericson (2019)
- 3. USD 965 million: Telia (2017)
- 4. USD 957 million: Petrochemical Manufacturer Braskem S.A. (2016)
- 5. USD 850 million: Mobile TeleSystems PJSC (2019)
- 6. USD 800 million: Siemens (2008)
- 7. USD 795 million: VimpelCom (2016)
- 8. USD 579 million: KBR/Halliburton (2009)
- 9. USD 519 million: Teva Pharmaceutical (2016)
- 10. USD 412 million: Och number (2016)

A small detail in passing: 8 out of 10 of the highest penalties were imposed on companies outside the USA.

However, monetary sanctions are not only part of the means of criminal law but can also of other areas of law, such as antitrust law or administrative law.¹⁴⁶ Here, too, sanctions are **546**

¹⁴⁴Beulke W and Witzigmann T (2020), mn. 62–63.

¹⁴⁵The FCPA Cases can be found at: <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>
Moosmayer K (2020), 1, 4.

¹⁴⁶Moosmayer K (2015), mn. 41–45.

sometimes imposed at an extremely high level.¹⁴⁷ Monetary sanctions are therefore not the sole means of criminal law. Criminal law offers further possibilities for sanctions beyond monetary sanctions. On the one hand, it must be considered that in certain industries, in addition to monetary sanctions, trade bans and thus de facto occupational bans can be imposed which threaten the existence of a company. On the other hand, criminal law systems have further instruments at their disposal, namely the confiscation and the forfeiture of assets.¹⁴⁸ In both cases, the aim is to access certain assets or goods.¹⁴⁹

6.3.2.2 Confiscation and Seizures

547 Confiscation is the **deprivation of property** by order of a court or administrative procedure, which transfers the ownership of assets derived from criminal activity to the state. Objects that can be confiscated are those produced, procured or used in an offence. Accordingly, they should be removed from a perpetrator's sphere of influence. Thus, this measure has a purely preventive purpose. The point is that the offender should no longer be able commit a crime with these objects.¹⁵⁰

548 In addition, confiscation regards the deprivation of pecuniary benefits which an offender has unlawfully obtained from an offence. The forfeiture thus implements the motto that **crime should not pay**. Since business criminality in particular is geared towards financial gain, forfeiture has a particularly high practical significance. For example, the forfeiture of illegally acquired pecuniary advantages can exceed the imposed monetary sanction many times over.¹⁵¹

In the case of Alstom Network Schweiz AG (→ mn. 509), for example, a monetary sanction of CHF 2.5 million was imposed. In addition, however, a seizure of CHF 36.4 million was also recovered as profit from the illegal bribery.

549 The law distinguishes between different types of asset forfeiture, which aim at different objectives. The matter is exceedingly complex and is the subject of extremely controversial debate in criminal law theory. For a more in-depth discussion of the topic, it is worth taking a look at the specialist literature.¹⁵²

6.3.2.3 Interdictions and Other Sanctions

550 The overview of legal systems on criminal liability of companies should not hide the fact that other countries in Europe have not only established models of criminal responsibility

¹⁴⁷For information on sanctions in European competition law see <https://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

¹⁴⁸Meyer F (2018), 246–250.

¹⁴⁹Konopatsch C (2020), 179, 214–217.

¹⁵⁰Moosmayer K (2015), mn. 39.

¹⁵¹Beulke W and Witzigmann T (2020), mn. 37–43, 70–71.

¹⁵²Achenbach H (2019a), 6, 21–27 (Germany); Dietrich O (2020), 229–244 (Austria); Pieth M (2016), 85–98 (Switzerland).

for companies but have also developed specific instruments for sanctioning companies.¹⁵³ These include such legal systems as those found in Belgium, Czechia, Croatia, France, Hungary, Italy,¹⁵⁴ Portugal, Romania and Spain.¹⁵⁵

Such sanctions against companies include:

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- Temporary ban on activities
- Temporary ban on advertising
- Temporary ban on participation in public tenders
- Temporary ban on concluding contracts with public institutions
- Temporary withdrawal of concessions, licences or authorisations
- Temporary exclusion from subsidies, financing or aid
- Temporary order for judicial supervision
- Order for dismissal of staff
- Order to change the ownership structure or to exclude shareholders
- Order to issue new company shares
- Requirements and instructions on future conduct
- Temporary or permanent closure of one or more establishments for a certain period
- Business dissolution
- Publication and public notification of judgment

6.4 Professional Conduct and Criminal Liability

A special problem that affects both entrepreneurs as individuals and companies as a collective is the criminal liability of professional conduct.¹⁵⁶ This particular problem has high practical significance. It concerns normal professional activity, such as services provided by banks, which at the same time encourage the criminal activity of others (for example: tax evasion). The problem becomes virulent when, in the normal exercise of one's profession, it is recognised that one's normal, everyday or professional activity enables or assists in the commission of crimes.

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A few examples can be given to illustrate this:

- The client instructs the banker to divide large sums of money into small sums of money by means of a large number of financial transactions and to distribute them to anonymous accounts of banks domiciled in the Cayman Islands.

¹⁵³Trüg G (2016) 307, 318–319.

¹⁵⁴Staffler L (2017c), 76–85.

¹⁵⁵Beran K (2015), 161, 174–190; Staffler L (2017a), 320–325; Staffler L (2017b), 406–409; Staffler L (2020), mn. 4–26.

¹⁵⁶Kert R (2016), 21–22.

- The Internet service provider provides legal server capacity to allow customers to upload records. The customer uploads films to the server in violation of copyright law.
- A textile factory takes over the order the production of shirts from a customer, whose design specifications match the design of well-known luxury brands.

553 In theory, the companies act within their professional framework. But is there a criminal responsibility here for professional conduct, even though normal professional practice is not in itself criminally relevant?¹⁵⁷ The answer to this question must be given in two steps.

554 The first question to be asked is whether, in the normal exercise of the profession, knowledge of criminal plans is actually present or whether it is merely considered possible that a crime is being committed. If there is confirmed knowledge of criminal intentions by a known perpetrator, because, for example, the professional has clear indications of a connection with a crime, then criminal liability is quite obvious. Conversely, the question naturally arises whether there are **alternative explanations** for the motives of a principal offender, i.e. if the support can be explained neutrally (i.e. without a criminal background). If the act of support from a professional cannot be explained without a criminal background, because it seems completely pointless against a purely neutral background, for example from life experience, then the professional cannot exonerate himself/herself. Rather, she/he must accept criminal liability for his or her support. A distancing from the crime is hardly credible even if her/his own behaviour is harmless.

555 The next step in answering this question is aimed at **legal requirements**. Indeed, certain sectors provide not only for monitoring duties but also for duties to report suspicions to the authorities. This is particularly true in the area of money laundering. Banks and financial service providers have far-reaching obligations to identify their customers. In the case of suspicious transactions, financial service providers and banks are obliged to release suspicious transaction reports to the state, who will then investigate these reports. Thus, where legal requirements exist, normal professional practice in some business areas is required and may lead to criminal liability despite these obligations.

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¹⁵⁷ Kert R (2016), 1, 21–22.

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Part III

Main Categories of Business Criminality

- The previous sections have provided a basic understanding of Business criminal law (BCL) and answered questions on criminal liability. The following sections will be directed towards a selection of criminal offences that are related to business criminality. This will allow the reader to apply the acquired knowledge from Part II to specific areas of business crime. In these sections, definitions or principles that have been explained in Part II are now being applied in practice and are repeatedly referenced. When reading Part III, it may be necessary to refer back to Part II.

How is Part III structured? Usually, legal scholars present business criminal offences according to the protected legal interest. Many excellent textbooks on business and economy criminal law bear witness to this, which are highly recommendable if one wishes to familiarise oneself with the legal perspective. In those textbooks, the objective and subjective elements of crime are analysed in detail and are very well presented.

However, in order to get an impression from a management and economic point of view, it may not be so much legal analyses that are needed, but rather a practical approach that describes the phenomena in more general terms. For more in-depth legal analyses, a look into the above-mentioned textbooks would be required. Here, however, an alternative structure is recommended. Inspired by a four-part model¹ from an excellent handbook, a three-part division of the offences is suggested here, namely (1) Operational Risks, (2) Product and Service Risks and (3) Logistics Risks.

¹Weyand R (2018), 450, 452-453.

1. Most criminal provisions on BCL concern **operational risks**. Such risks are related to the administration and operation of the business.
2. **Product and service risks** concern all those risks that are directly related to the production of goods or the provision of services. Therefore, these are inherent risks of the company's respective outputs, namely damage to people, to the society and/or to the environment caused by the product or the service.
3. **Logistics risks** concern all those risks that can occur in the course of transport. This risk area has long been a marginal topic in textbooks on criminal law, but has gained new impetus through topics such as due diligence in the supply chain or self-driving cars.

The three risk fields have overlaps and are in part closely related.² For example, some criminal law norms in relation to employees contain both operational risks and product risks (e.g.: the employee has to work with defective tools). Product and logistics risks are also interrelated. For example, in the case of self-driving transport, there are risks both in the area of the used product or service itself (e.g. self-driving truck) and logistics risks. And such logistical risks in turn have links to operational risks, for example if too little entrepreneurial know-how is invested in the IT security of a self-driving car and therefore risks for cybercrimes arise.

Despite these correlations, a classification into the three risk categories seems didactically reasonable. While the field of operational risks is extremely heterogeneous, product and service risks address the unifying theme of the harmfulness of products or services. Logistics risks, by contrast, concern scenarios that are completely outside the physical sphere and require different kinds of due diligence on the part of companies. Additionally, the advantage of this classification system is that the liability risks of a company can be better assessed, e.g. with regard to the need for insurance.³

For the purpose of this book, this system will provide an overview of the different types of business criminality risks. However, as this book is exactly that: an overview, it only allows selected sub-areas within these risk categories to be addressed. As already mentioned, there are excellent textbooks that deal in depth and comprehensively with the presentation of criminal offences under BCL. This book does not pursue this claim. It must therefore be pointed out that for a complete study of BCL, the legal literature must be consulted. For an introduction to the topic, however, this book is suitable.

²Cf. Weyand R (2018), 450, 454, 838-840.

³Cf. Weyand R (2018), 450, 454.

- This chapter deals with operational risks under criminal law. In comparison to the other categories of Business criminal law (BCL), operational risks contain the majority of penal provisions. This chapter therefore deals with most possible risks in BCL and is thematically very broad. In most textbooks on BCL, these risks are the main focus. Given the scope of this work, it is only possible to present a selective analysis of the individual offences. For this reason, the focus here is on introductions to specific areas of crime and selected questions on the characteristics of crime and legal interests. For more detailed explanations of the various elements of crime, however, reference should be made to standard legal literature.

The aim of the chapter is to provide a sensitivity to the assessment of operational risks by means of a small selection of central criminal provisions. The development of this sensitivity will aid in the strive for profit maximisation but to a degree that is permissible under criminal law. It should also be made clear that, due to the malleability of numerous criminal norms, law enforcement authorities have many different possibilities to formulate criminal law violations against companies.

7.1 Preliminary Remarks

The category of operational risks is based on the concept of entrepreneurial activity within an economic establishment. This category considers the criminal risks associated with this business facility, i.e. all dangers and risks that arise from the operation of the business. It

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seems clear in this respect that the field of facility risks under criminal law is very broad. This is shown in the following overview.

557 First of all, it covers **labour law**, i.e. the employer's criminal law risk for all matters affecting the employee.¹ Such risks relate to the chance of an industrial accident in which an employee or another person is injured or killed. However, such risks also concern illegal activities of the employer, for example, undeclared work or the unauthorised withholding of owed social security contributions.²

558 On the basis of social security contributions, it is easy to move on to the next area where operational risks can be realised, namely **tax legislation**.³ Particularly in the area of tax criminal law, there are innumerable points where a company could make itself liable to prosecution. Since tax criminal law is a field that can only be developed if one has an expert knowledge in general tax law, this again reveals enormous difficulties for the ordinary entrepreneur who depends on legal and accounting expertise to fully understand this risk.

559 The necessary involvement of accountants and lawyers in a company shows that the current reality of companies must exist as divisions of labour. Companies are therefore often founded as corporations. As such, depending on their legal form, they are subject to corresponding **corporate laws**, for example the respective Stock Corporation Act or the Limited Liability Company Act. These laws also contain criminal law provisions that distract from specific risks of corporate law. The criminal offences in special laws are not only related to BCL. Rather, more general criminal offences are also relevant, which relate to situations from company law. One might think here, for example, of embezzlement (a general criminal law provision) to the detriment of the asset interests of a public limited company (a specific provision in corporate laws) or, in the context of a GmbH, the swindle to increase capital or the failure to report capital losses.

560 As companies compete against competitors in the free market (→ mn. 753), they are exposed to certain criminal risks. Criminal law risks arise from the laws against **unfair competition** or antitrust law. Unfair methods in dealing with competitors can also result in criminal consequences via **copyright law**, as the criminal provisions on trademark law, patent law or design law explain in more detail. At the same time, from a criminal law perspective it is not always a question of punishing entrepreneurs, but rather of protecting them. This is evident in copyright law, where companies are to be protected against product piracy by criminal law.⁴ The criminal norms on competition and rivalry thus have a protective or punitive function, depending on the perspective.

561 This small imaginary tour of selected operational risks could be continued by assessing the company, its structure and its purpose. For the purpose of this book, however, it seems clear that only selected risk areas can be presented. To this extent, a few **classic criminal**

¹For more detailed information, see (for example) Gercke B et al (2021).

²Kudlich H and Oğlakcioğlu MT (2020), mn. 537–574.

³For more detailed information, see (for example) Adick M and Bülte J (2019).

⁴Staffler L (2021a).

offences have been selected first, which can give economic practitioners an insight into the legal subject matter. These are a selection of basic criminal offences which lawyers (and in particular public prosecutors, attorneys and judges) are frequently confronted with in practice and therefore have a special status from a legal point of view. These are fraud (→ mn. 562), embezzlement (→ mn. 582), corruption (→ mn. 599), money laundering (→ mn. 654), and the large and very dynamic area of cyber-crimes (→ mn. 683). In addition, some **specific subjects of BCL** are briefly discussed. These are criminal offences which derive their essential references from other areas of law, such as capital market law (→ mn. 732), accounting law (→ mn. 805) or insolvency law (→ mn. 834). As already said, only basic information can be presented.

7.2 Fraud

Sources of Law

- § 146 et seq. StGB-AT
- § 263 et seq. StGB-DE
- § 146 et seq. StGB-FL
- Art. 146 et seq. StGB-CH

Fraud is one of the central offences committed against foreign assets. In addition to the crime of theft, fraud is one of the most frequently committed crime in the crime statistics of many European countries. One must bear in mind that the essence of fraud lies in the **victim's self-harm** to his/her own property. In fact, the victim often does not even notice when she/he has been deceived, which causes a great number of fraud crimes to go unreported.

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However, fraud is not necessarily a business crime. Fraud also covers marital fraud or fraud on goods. In order for fraud to be considered a business offence, other elements are required in addition to simple financial losses, such as the indirect damage to an economy through particularly high financial losses or the damage to institutions in the private or public sector. Even if one includes this limitation in the fraud offence, business fraud still remains one of the most frequently committed offences of today.

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7.2.1 Elements of the Crime

The analysis of the elements of the crime is presented using the example of the Swiss provision.

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Art. 146 StGB-CH: Fraud

(1) Any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretences or concealment

of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his/her or another's financial interests, is liable to a custodial sentence not exceeding 5 years or to a monetary penalty.

(2) If the offender acts for commercial gain, he is liable to a custodial sentence not exceeding 10 years or to a monetary penalty of not less than 90 daily penalty units.

(3) Fraud to the detriment of a relative or family member is prosecuted only on complaint.

565 Fraud is one of the classic property offences. The protected **legal interest** is the property,⁵ not the claim of truth. It is true that in a competition-oriented economy, the right to accurate information is a legitimate concern. However, it misses the point of criminal law to interpret mere deception (as untruth, lies and fraud) as a criminally relevant violation of the property. In Criminal law, different concepts of property have evolved for this purpose. The **legal-economic concept of property** dominates: According to this concept, property consists of the sum of all monetary goods to which a person is legally entitled or which are not legally disapproved of. The starting point is the economic value, but only those monetary items whose realisation is protected under civil law belong to the assets.⁶ As has already been mentioned (→ mn. 562), fraud is a **self-damaging offence**. In contrast to theft, where the thief steals the victim's property, the victim damages himself/herself through fraud by carrying out a direct transfer of property in favour of the offender. This is supposedly voluntary (i.e. it is not forced) because the victim is deceived by the offender.⁷

Structurally, fraud consists of various objective elements that build on each other.⁸

566 First, the perpetrator performs a **deceptive act**. Deception is any behaviour that causes another person to adopt a misconception about facts⁹ on an intellectual level.¹⁰ The deception can, for example, represent entitlements, professional qualifications, solvency, or financial such as income and turnover. Deception can be accomplished proactively or by passive omission.¹¹

⁵BGE 117 IV 139, E. 3d.

⁶Vest H (2021), 313, 357–378.

⁷Pieth M (2016), 104.

⁸Vest H (2021), 313, 323.

⁹BGE 135 IV 76, E. 5.1; Pieth M (2016), 104.

¹⁰BGE 96 IV 145, E. 1.

¹¹BGE 140 IV 11, E. 2.3.2.; Vest H (2021), 313, 323–333.

Special Feature of Switzerland (Art. 146 StGB-CH):

In Switzerland, qualified acts of fraud are required in order to fulfil the criminal provision. The act of deception are characterised by malice [*Arglist*].¹²

For this purpose, the perpetrator must either have created a web of lies [*Lügengebäude*]¹³ or have carried out special machinations [*besondere Machenschaften*].¹⁴ If the perpetrator has used simple lies, then these fulfil the characteristic of malice if they cannot be verified or can only be verified with particular effort, or if the perpetrator prevents the deceived person from verifying the information, or if he/she foresees that no verification of the information will be carried out due to a relationship of trust.¹⁵

Conversely, malice is excluded if the victim has acted particularly recklessly (*leichtfertig*) and has not even used the most elementary precautions.¹⁶

If the perpetration is active, the deception can be explicit, for example by making untruthful statements. However, deception can also be implied-in-fact, in that the perpetrator behaves in such a way that the untruthful fact is inferred from the conduct.

Furthermore, fraud can also be committed by **omission** (→ mn. 344). Here, the deceived person has an incomplete or inaccurate understanding because the perpetrator omits the full information. The special feature of this situation is that in general business transactions, everyone is responsible for himself/herself and cannot expect his/her contractual partner to always rectify any misinformation.¹⁷

Thus, errors due to omission presuppose that there is a certain obligation to provide clarity. In criminal law this is referred to as a guarantor position (→ mn. 344). This position, which includes a duty to inform, only exists if the perpetrator acts dishonestly by disregarding the usual social customs of business transactions and abusing the usual trust placed in him. It can arise, for example, from the law (e.g. for doctors vis-à-vis the health insurance company with regard to the receipt of any reimbursements) or a contract (e.g. contractual partners with whom there is a close personal relationship due to long-standing business relations).

Moreover, the deceptive act causes the victim to be prone to error. **Error** is any incorrect idea about facts. It is decisive for the criminal offence that the deception instigates, maintains or intensifies an error. There must therefore be a causal link between the act of deception and the victim's error.¹⁸

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¹² BGE 142 IV 153, E. 2.2.2; Pieth M (2016), 104–105.

¹³ BGE 126 IV 165, E. 2a; Pieth M (2016), 105.

¹⁴ BGE 122 IV 197, E. 3d; Pieth M (2016), 105.

¹⁵ Pieth M (2016), 105–106; Vest H (2021), 313, 333–336.

¹⁶ Graf DK (2021a), 55–89; Staffler L (2021b); Vest H (2021), 313, 336–351.

¹⁷ Cf. Vest H (2021), 313, 329–332.

¹⁸ BGE 128 IV 18, E. 3b; Vest H (2021), 313, 351–352.

Based upon this error, the victim makes an **asset disposition**.¹⁹ Examples of such dispositions of assets are transfers of ownership, payments of receivables, acknowledgement of debt, conclusion of contracts, work performed or waiver of a claim. Disposition of assets is therefore any legal or factual act that directly leads to a reduction in assets. Therefore, causing the error is not enough for criminal purposes—the error related transfer of assets that damages the victim is the very essence of the fraud: Because of the error instigated by the perpetrator; the victim acts in a self-damaging way.²⁰

569 Finally, through the disposition of assets, the victim's assets are reduced so that he or she suffers a **financial loss**.²¹ A pecuniary loss is deemed to exist if, on the basis of a comparison of the total balance between the assets prior to the disposition and the assets after the disposition, there is an adverse difference (negative balance).²²

570 With regard to the **subjective elements**, intent is required first. The offender must have **intended** the previously described elements of the objective elements of the offence and their characteristic connections, at least in their outlines. *Dolus eventualis* is sufficient here.

In addition, the elements of the offence require that the offender **intended to enrich** himself/herself or a third party. Furthermore, the damage as a pecuniary disadvantage must correspond to the intended enrichment as a pecuniary advantage (so-called: **material equality**).²³ The enrichment is therefore the reverse side of the damage that occurred to the victim. The perpetrator must either want to enrich himself/herself or someone else (but this last hypothesis is very rare in practice).²⁴

7.2.2 General and Specific Cases of Fraud

571 Since fraud covers a wide range of possible life situations, it is not surprising that the offence itself is enshrined in the general penal code in many legal systems. Although, there are also a number of sector-specific special offences, all of which are related to fraud. The reason for the special offences is, in particular, that the elements of deception and error cause problems in practice, especially in the case of mass transactions, because such elements are often very difficult to prove in reciprocal transactions. Furthermore, there is a need for special regulations for certain situations of fraud in which it is not the financial loss that plays a central role but the realised criminal behaviour towards institutions or private individuals.

¹⁹ BGE 126 IV 113, E. 3a; Pieth M (2016), 106–108.

²⁰ Vest H (2021), 313, 352–356.

²¹ BGE 105 IV 104; Pieth M (2016), 107.

²² Vest H (2021), 313, 356–378.

²³ BGE 134 IV 210, E. 5.3.

²⁴ Pieth M (2016), 108; Vest H (2021), 313, 378–380.

The solution to these challenges can take two forms. The first form being that certain acts of fraud, insofar as they are challenging to the classic fraud offence, are subsumed by legal constructions under the general fraud offence. The second being that some selected acts have their own criminal offences.²⁵ 572

Acts that fall usually under the classic or general fraud definition are, for example: 573

- **Employment fraud:** Here, the perpetrator obtains employment by making false statements during the hiring process. In contrast to the classic fraud, the calculation of damages is often missing because the perpetrator, despite the manipulation, still performs the job. The damage is then determined independently of the work performed in terms of the amount of remuneration, which may be based on staff responsibility, seniority or qualifications. 574
- **Insertion fraud:** Here, an offer form for a contract is submitted. In the event of such fraud, the victim is given the impression that it is not an offer they've been given, but an invoice (for services rendered, but actually non-existent). In contrast to classic fraud, there is no deception, because the victim can understand upon closer reading that it is not an invoice but an offer. In practice, however, deception is implied if the offender has deliberately designed his/her offer to be similar to an invoice (e.g. because it is only written in the general terms and conditions that it is an offer). 575
- **Settlement fraud:** Here, the recipient of an invoice is deceived by a cost that is excessive in relation to the (low) service actually provided. Compared to classic fraud, there is often a lack of corresponding factual claims. This is because invoices regularly contain only figures and very generic descriptions, so it is questionable whether this is sufficient evidence for an act of deception. In certain cases (e.g. with panel doctors), an implied declaration is assumed in practice, according to which the panel employee can assume that the invoice presented to him/her is altogether in order. 576

Acts that fall under special offences are, for example 577

- **Credit fraud** (§ 152 StGB-AT, § 265b StGB-DE, § 152 StGB-FL, Art. 148 StGB-CH): 578
Here, the perpetrator takes out a loan from an individual or a financial institution even though he/she is not willing or never able to repay the loan. This case regards criminal law protection of business life, especially the financial service providers who keep the national economy running with their money. Compared with classic fraud, there is no deception, especially when certain documents are not required to be presented or when the documents presented have not been forged. Furthermore, the financial loss is questionable because it is not yet clear that the creditor has suffered damage as a result

²⁵ See, for example, Pieth M (2016), 109–112; Vest H (2021), 313, 381.

of the disbursement of the loan, since the loan agreement does after all give rise to a claim for repayment.

- 579** • **Collusive tendering** (§ 298 StGB-DE)²⁶: Here, several persons or companies coordinate among themselves within the framework of a tender to manipulate the market price, which is actually only supposed to be determined by the tender. This is therefore a matter of the criminal law protection of public procurement.²⁷ In contrast to classic fraud, it is questionable whether a financial loss can be proven because, on the one hand, it is questionable whether an objective market value actually exists and, on the other hand, the service is provided after the contract has been awarded.
- 580** • **Subsidy fraud** (§ 153b StGB-AT, § 264 StGB-DE,²⁸ § 153a StGB-FL)²⁹: Here, the perpetrator makes false statements in order to benefit from a subsidy from the State or the European Union. In some cases, he/she gives completely correct information, but does not use the money for this purpose after the subsidy has been granted. Generally speaking, criminal law protection is afforded to subsidies that the public authorities grant to certain companies or economic sectors without direct market-economy consideration. In contrast to classic fraud, there may be a lack of deception if the perpetrator is actually entitled to the subsidy on the basis of his or her position or assets. Furthermore, the legislator is aware that the subsidy procedure offers only limited possibilities for control and that the proof of an error by the competent authority or the financial loss is very rarely successful. Especially in the Covid-19 pandemic, governments have provided very broad packages of measures in order to protect businesses from negative financial impact. Here, many companies apply for the subsidies, but there were also companies that illegally received subsidies (→ mn. 50). In this context, one should note that fraudulent applications for subsidies are punishable as subsidy fraud, as is the improper use of subsidies.³⁰

²⁶In Austria, this criminal conduct is punishable under §168b StGB-AT in conjunction with §146 StGB. In Switzerland and Liechtenstein, however, this conduct can be covered by the general offence of fraud; cf. Niggli MA and Riedo C (2021), 753, 790–792.

²⁷When the state uses private companies to carry out its public tasks (e.g. building infrastructure such as schools, airports, motorways), it must ensure, in the taxpayer's interest, that it does not favour certain companies when awarding contracts and that public investment is carried out at the lowest possible cost. From the point of view of companies, the state is an attractive client because it not only carries out very complex and expensive projects, but above all it will pay its debts on time.

²⁸Dannecker G and Bülte J (2020), mn. 309–313, 314a–314q; Retemeyer A (2019) 643–662.

²⁹In Switzerland, such conduct is partly covered by Art. 148a StGB-CH, in part by the general offence of fraud, but also by administrative criminal law in Art. 14 para. 1 Federal Act on Administrative Criminal Law (VStrR-CH, S.R. 313.0) and Art. 38 (Federal Act on Financial Aid and Grants (SuG-CH, SR 616.1), see Lehmkuhl MJ (2021), 891, 902–917.

³⁰Schrank C and Stücklberger A (2021), 5–11.

For the member states of the European Union, the offence of fraud can no longer be considered in isolation from national law. The criminal offence is strongly determined by EU law (→ mn. 156).³¹ This applies in particular to the area of tax fraud, because the financial interests of the European Union are strongly affected there.³²

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7.3 Embezzlement

Sources of Law

- § 153 StGB-AT
- § 266 StGB-DE
- § 153 StGB-FL
- Art. 138 and Art. 158 StGB-CH

Embezzlement is one of the most predominant criminal offences that is related to economic crimes. At the same time, embezzlement is one of the most controversial criminal offences because the content of the norm regarding it is extremely vague (→ mn. 593).

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What is the essence of this crime? The criminal offence of embezzlement focuses on economic circumstances, according to which the assets of persons (e.g. private individuals, banks, companies) are entrusted to other persons for administration (such as managers of trust funds) and the **authority to dispose of the other person's assets is substantially abused** by the perpetrator, thereby damaging the owner of the assets.

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However, the cases that can fall under embezzlement are not limited to the examples mentioned above but are extremely far-reaching in practice. This is because the relationship between a company as a legal entity or shareholders of a public limited company and the actual manager of a company can also be evaluated in the light of this criminal offence. The mere misappropriation of company assets by a member of the company falls under this category.

In practice, the criminal offence of embezzlement has been applied to the following circumstances.³³

- the payment of bonuses in corporations to management boards, supervisory boards or works councils (which were not actually justified to that extent);
- the waiver of the right to claim damages (which would have earned the entitled company a sum of money);
- the granting of risky loans by banks;

³¹ Staffler L (2020), mn. 20.76–20.81.

³² Dannecker G and Bülte J (2020), mn. 100a–100b, 309–314q; Kert R (2020), 87–95.

³³ Böttger M (2015), 100–101; Huber N (2016), 129, 131–132.

- the creation of slush funds for the purpose of bribes (whereby money is diverted within the company);
- the payment of bribes;
- the misappropriation of public funds;
- unauthorised granting of corporate donations and sponsoring.

7.3.1 Elements of the Crime

584 The criminal offence of embezzlement exists in many criminal codes in Europe. Although the wording of this penal provision differs from country to country, they have one thing in common: the structure of this crime is very complex. In order to analyse its complexity, the three essential characteristics of embezzlement must be looked into: the group of perpetrators, the criminal relevant acts (breach of duty), and the occurrence of the financial disadvantage, including the causality between the breach of duty and the financial disadvantage.

585 For an analysis of the elements of this offence, the Austrian penal provision will be used.

§ 153 StGB-AT—Embezzlement

(1) Any person who knowingly abuses his or her authority to dispose the property of another or to engage another thus causing a financial detriment to the other person is liable to imprisonment for up to 6 months or a fine not exceeding 360 penalty units.

(2) A person abuses his/her authority if the person violates rules that serve to protect the economic interest of the owner in an indefensible manner.

(3) Any person who causes damages exceeding 5.000 € is liable to imprisonment for up to 3 years; any person who causes damages exceeding 300.000 € is liable to imprisonment for 1 to 10 years.

586 The offence protects the **property**.³⁴ In this respect, the same reasoning applies as has already been explained above with regard to fraud (→ mn. 562). However, since embezzlement results primarily from contractual violations, specific violations of obligations under civil law also come into question as elements of the offence.

587 If one also looks at the structure of the offence, it immediately becomes apparent that it is a criminal offence that cannot be committed by everyone, but only by a specific group of persons. In fact, perpetrators can only be those individuals who have to fulfil a **special duty** of looking after someone else's property.³⁵ In other words, only those persons can be

³⁴ OGH 10.10.2002, 15 Os 85/02; Birklbauer A (2017), § 153 mn. 2; Kirchbacher K and Sadoghi A (2020), § 153 mn. 1; McAllister V (2015), 780, 784–785.

³⁵ OGH 13.12.2005, 11 Os 39/05b; OGH 4.4.2006, 14 Os 96/05; Kirchbacher K and Sadoghi A (2020), § 153 mn. Mn. 2/1-2/2.

perpetrators who have the necessary authority to manage other people's property.³⁶ This will be shown in more detail below.³⁷

After the circle of perpetrators has been roughly outlined, the object of the crime must be determined. As already mentioned, it is the property that is damaged by the perpetrator.³⁸

Property disadvantage is the result of an act against protected property.³⁹ The concept of property in this sense is seen first and foremost as an economic matter. The decisive factor is thus the reduction of the asset value (e.g. in the case of a sale below price or excessive payment for the purchase of goods or an inappropriate remuneration for services).⁴⁰

The criminal acts are described as the **abuse of power**.⁴¹ The perpetrator thereby abuses his/her authority to manage other people's assets in accordance with the actual mandate.⁴² Externally (i.e. in relation to third parties), the offender acts within the scope of his/her permissible possibilities, but he/she exceeds the permissible limits in his/her internal relationship with the beneficiary of the assets.⁴³ Examples are the payment of excessive commissions by the managing director of a limited liability company to himself/herself, the awarding of public funds in violation of the requirement of proper discretionary decisions, or payments to an association chairperson outside the purpose of the association's articles of association.⁴⁴

As already mentioned above, there must be a **duty of care related to assets of another person**. The content and the limits of this duty are generally based on the underlying legal relationship.⁴⁵ This means that a possible violation of duty can only be determined by examining the requirements of general civil law and company law, or in the case of public law relationships, by including public law.⁴⁶ The definition of the crime of "embezzlement" is thus accessory to civil law. Only if a civil law misconduct has been committed, the criminal liability can be examined. Embezzlement is thus bound to the requirements of civil law.

³⁶ Birklbauer A (2017), § 153 mn. 8–9.

³⁷ Huber N (2016), 129, 133–137.

³⁸ OGH 5.12.1996, 15 Os 159/96; OGH 9.3.2020, 12 Os 39/18d.

³⁹ OGH 11.10.2017, 13 Os 55/17p; OGH 8.10.2019, 11 Os 77/19m; Birklbauer A (2017), § 153 mn. 14, 21–25; Huber N (2016), 129, 151–154; Kirchbacher K and Sadoghi A (2020), § 153 mn. 36–41/4; Venier A (2019), 999, 1001–1007.

⁴⁰ OGH 11.10.1990, 13 Os 77/90 ; OGH 23.5.2018, 15 Os 153/17i.

⁴¹ OGH 25.4.2002, 15 Os 16/02; OGH 15.12.2020, 14 Os 115/20y.

⁴² OGH 31.8.1977, 10 Os 61/77; OGH 17.2.2009, 13 Os 186/08x; Bauer R (2020), 250, 251; Huber N (2016), 129, 137–151.

⁴³ OGH 5.10.132/76; OGH 10.7.2019, 13 Os 128/18z; cf. also OGH 26.3.1996, 11 Os 162/95; OGH 12.9.2019, 12 Os 34/18v.

⁴⁴ Birklbauer A (2017), § 153 mn. 15–20; Kirchbacher K and Sadoghi A (2020), § 153 mn. 27–35.

⁴⁵ OGH 29.9.1993, 13 Os 125/82; OGH 28.5.2019, 11 Os 32/19v.

⁴⁶ Birklbauer A (2017), § 153 mn. 11–13; Kirchbacher K and Sadoghi A (2020), § 153 mn. 4–26.

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Duty of Care Related to Assets of Another Person

Examples of such a duty of care include

- the supervisory board vis-à-vis a stock corporation and the shareholders;
- in the case of employees of banks and savings banks, management functions vis-à-vis the bank in relation to the obligation to carry out risk checks when granting loans;
- mayors of a municipality in relation to the municipality;
- tax officials to the tax authorities;
- the manager of a limited liability company with regard to the assets of the limited liability company;
- an attorney with regard to his/her client in relation to the pursuit of the claim in civil proceedings;
- a tax advisor towards his/her client;
- in the case of the members of a management board of a stock corporation with regard to the assets of the company.

However, there is no obligation to provide asset management services in the following circumstances:

- Shareholders in stock corporations;
- Employers to employees regarding the obligation to pay wages;
- Employees vis-à-vis the employer, as long as the activity does not exceptionally involve independent powers of property;
- Members of the municipal council to the municipality;
- Tenants towards their landlord;
- Management consultants in relation to the company, if there is no authority to make decisions affecting the company's assets.

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The **subjective elements** have a complex structure: they must relate to the abuse of the power on the one hand and to the infliction of a pecuniary disadvantage on the other. As far as the abuse of power is concerned, the law requires the intensive type of intent of knowing (*dolus directus* of the second degree, → mn. 305).⁴⁷

In the case of a pecuniary disadvantage caused to the owner of the business any type of intent is sufficient. The intention to harm must be present at the time of the abuse of power. Therefore, there will be no criminal liability for embezzlement if the will to cause damage is only emerging after the abusive act has already been committed.⁴⁸

⁴⁷ OGH 30.6.1986, 10 Os 76/85; OGH 19.4.2018, 12 Os 12/18h.

⁴⁸ OGH 21.8.2012, 11 Os 19/12x; Birklbauer A (2017), § 153 mn. 26–29; Huber N (2016), 129, 154; Kirchbacher K and Sadoghi A (2020), § 153 mn. 42–43.

7.3.2 Flexible Applicability

The following examples are intended to show that the accusation of embezzlement, i.e. the abuse of authority to dispose of another's assets with the result of damaging the other's assets, can be applied liberally and in practice the prosecution authorities are actually very flexible in bringing charges against the person concerned.

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Siemens Enel—Case⁴⁹

In the Siemens-Enel case, Siemens wanted to expand its gas turbine business in the Italian electricity market with the company Enel. To this end, one of the four divisional directors of the Power Generation Division set up a network of numbered accounts at Liechtenstein banks and, between 1990 and 2002, maintained a complex system for the provision of useful expenses, which ultimately amounted to de facto **bribery**. The manager from the German branch had criminal proceedings brought against him/her and ultimately was convicted for **embezzlement**. The courts found that the establishment of a slush fund for the purpose of bribes already constituted a criminal offence of embezzlement, even if the money was to be used in the interest of the company. ◀

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With the offence of embezzlement, the criminal justice system has found an instrument to investigate the areas of economic life to a hitherto unknown extent. The courts and the criminal prosecution authorities can examine corporate decisions relating to the criminal offence of embezzlement with a standard that is reminiscent of the way auditors work. The criminal prosecution authorities thus will ultimately carry out retrospective risk control. This is not, however, carried out according to economic aspects, but according to criminal law aspects. It is therefore not surprising that the impression prevails that embezzlement is used in practice as a **universal weapon of criminal prosecution**, with which almost every handling of money that is perceived as inappropriate and which falls under the area of responsibility of economic or political decision-makers is investigated by criminal law.⁵⁰ It seems that in practice embezzlement has become a catch-all accusation, so that when a conviction for other offences fails for factual or legal reasons (such as bribery), which would actually be more obvious, the charge of embezzlement is used instead.

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⁴⁹Bundesgerichtshof Judgment of 29 August 2008, Case No. 2 StR 587/07; see Satzger H (2009), 297–396.

⁵⁰Perron W (2009), 219, 222.

7.3.3 Black Funds

596 A controversial case of embezzlement is the formation and continuation of **black funds**.⁵¹ A black fund (or slush fund) is understood to be the collection of money, which is formed in violation of obligations under company law, commercial law, accounting view, or public law. The purpose of this secret collection of money is to hold funds for bribery in order to land contracts for the company in question. The funds are therefore collected and used in an illegal manner, even if the purpose of this activity is in itself a legitimate business objective.⁵²

A well-known example is the Siemens-ENEL case discussed above, → mn. 594.⁵³

597 The collection of these funds is always concealed. The secrecy has many reasons, such as:

- Tax reasons, because the availability of these funds must be concealed from the tax authorities;
- Reputation of the company, because the company could be considered corrupt;
- Reasons under company law or company contract law, because company law or the company contract expressly prohibits such payments and collection of funds.

598 For criminal law, the question arises as to the extent to which there is actually a financial disadvantage here. In case law, the legal construction of the threat of damage to assets has been established, because the actual owner of the assets is deprived of the possibility to control the money that is in the black accounts. Furthermore, there is also the risk of losing state subsidies or grants, or of reclaiming subsidies.⁵⁴

7.4 Corruption

Sources of Law

- § 304 et seq. StGB-AT
- § 299 et seq., §§ 331 et seq. StGB-DE
- § 304 et seq. StGB-FL
- Art. 322ter et seq. StGB-CH

⁵¹ Pieth M (2021), 803, 840–842.

⁵² Sünnner E (2009), 937, 938.

⁵³ Rotsch T (2013), 278–283; Satzger H (2009), 297–306.

⁵⁴ See Ransiek A (2007), 1727–1730; Sünnner E (2009), 937–940.

Corruption is probably one of the most discussed topics in BCL. After all, corruption is a social phenomenon. In fact, there is the accepted social network of relationships, friendships and dependencies, which ultimately forms the basis of social order. The creation of a network of relationships, the exploitation of this network, the creation of new relationships and, to a certain extent, crossing boundaries for the purpose of improving the contract constitute a global phenomenon within a state, an economy and among shareholder, which is widespread throughout the world.

Criminal corruption is therefore the **dark and forbidden flip side of social networking** as described above. It marks the boundary between socially necessary or even desirable behaviour in the context of maintaining relations, and the influence on economic decisions, which is subject to complaint under criminal law.⁵⁵ The boundaries between social networking and influence on an economy are fluid and therefore very difficult to define.

But why is corruption seen as harmful, what is so problematic about “give and take”? In fact, many thousands of years ago, corruption was the mechanism for gaining and maintaining power. In the past, the brutal use of force to gain and maintain power was seen as progress when offices were bought. It was precisely at the time of colonisation that corruption was actively and deliberately used according to the motto of *divide et impera*.⁵⁶

According to MARK PIETH, the use of corruption allowed Great Britain, for example, to control a world empire with a relatively small force. Even after decolonisation, the new elites adopted the customs of their former colonial masters and subjected the local economy to corruption in order to maintain power in the former colonies.⁵⁷

7.4.1 Elements of the Crimes

Corruption takes many different forms, which is why there are a number of penal provisions that deal with corruption. When analysing corruption offences, two aspects must be considered first.

An important element in the context of corruption offences is the concept of public officials. Indeed, the classic provisions on corruption concern the influence on public officials, civil servants or other public service workers. At the same time, it must be borne in mind that corruption among private individuals is also a criminal offence (→ mn. 773).

However, the role of public officials is essential for understanding this offence in relation to corruption law. The concept of a **public official** covers the capacity of a person (offender and victim) who has a special connection with a public-law task within a public authority or a public-law position (office). Criminal laws contain norms that explicitly

⁵⁵ Cf. Bülte J (2015), 988–989.

⁵⁶ Pieth M (2021), 803, 808–809.

⁵⁷ Pieth M (2016), 166–167; Pieth M (2021), 803, 808–809.

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define the concept of a public official or the terms relating to the role of public administration. Often, the criterion is based on the fact that the public official is formally committed to the general public and fulfils public administration tasks. The public official therefore has a special relationship with public authority through an employment-based, contract-based, trust-based or service-based relationship. In such a relationship, which is intended to serve the general public, he or she is bound by the corresponding principles underlying the careful management of public interests. For in the final analysis, the public official holds a position that is legitimised and financed by the general public.

The public official may therefore be **authorised to exercise power**. However, his or her exercise of power must be in the best interests of the public good. It is precisely for this reason that corruption is a significant act of infringement, because it impedes the exercise of public interests through acts of bribery. Since the risk of corruption and public officials have a special relationship, it is not surprising that corruption offences require that the public official's executive capacity must exist at the time of the act (corruption).⁵⁸

602 The second essential element of all corruption offences is the so-called **unlawful agreement**. Corruption thrives on the mutual exchange of advantages. This exchange of advantages (e.g. with a company) must be agreed upon explicitly or implicitly. The unlawful advantage is offered so that in return a service is performed, or an official act is carried out.

603 Both aspects seem relatively clear in theory but are incredibly difficult to prove in practice. In order to conceal the corruption process, benefits to a public official are often only allocated after he or she has left office. It is then difficult to prove that the act of corruption took place at the time when the official was still in office.

With regard to unlawful agreement, it seems clear that there is often no written agreement or that lawful agreements are supplemented by unlawful (oral or written) side agreements that remain secret. Most often, however, it will be the case that the mutual benefits are granted as far as possible in a concealed manner and this makes it very difficult to prove the connection.

604 After these common aspects of corruption offences have been set out, it is necessary to outline the basic definitions of criminal corruption. This is illustrated on the basis of German criminal law.

7.4.1.1 Accepting Benefits

605 § 331 StGB-DE: Accepting Benefits

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the discharge of a duty incur a penalty of imprisonment for a term not exceeding 3 years or a fine.

⁵⁸ Kudlich H and Oğlakcioğlu MT (2020), mn. 371–374, 375; cf. Dannecker G and Bülte J (2020), mn. 101.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or a third party in return for the fact that they performed or will in the future perform a judicial act incur a penalty of imprisonment for a term not exceeding 5 years or a fine. The attempt is punishable.

(3) The offence does not entail criminal liability pursuant to subpara. 1 if offenders allow themselves to be promised or accept a benefit which they did not demand and the competent authority, within the scope of its powers, either previously authorised the acceptance or offenders promptly make a report to the competent authority and it authorises the acceptance.

This criminal offence protects the **trust** in the fact that **bearers of state functions** cannot be bought and this in turn protects the **objectivity of state decisions** (or decisions of public authorities).

In the case of this penal provision, it constitutes a punishable offence if a public official allows himself/herself to be promised, demands or accepts an advantage for an act within his/her scope of duties. The public official thus performs an act within his/her legitimate tasks that is **not** in breach of duty as such. However, he/she allows himself/herself to gain an advantage for performing this (lawful) act.⁵⁹

Structurally, the criminal provision is an **abstract endangerment offence**, so that no actual violation or concrete endangerment of the functioning of the public service is required in order to apply this norm.⁶⁰

The circle of **offenders** is described in para. 1 as public officials. This also includes European public officials⁶¹ or a person with special public service functions.⁶² Para. 2 limits the circle of offenders to judges, which also includes arbitrators. In both cases, the perpetrators must be in charge of their public office at the time of the offence.⁶³

The **offence act** in para. 1 requires a specific context: it must relate to the performance of his/her duty in office.⁶⁴ The exercise of official duties is any activity that a public official engages in to perform the duties assigned to him or her. It is therefore a matter of general official activities in the official's field of responsibility, which are carried out in an official capacity. The scope of duties is defined by law, statutes or administrative regulations. However, the private acts of the public official do not fall under the exercise of official duties, even if they are carried out during official hours. The punishable acts of para. 2

⁵⁹ Korte M (2019), § 331 mn. 2–11.

⁶⁰ Korte M (2019), § 331 mn. 12–13.

⁶¹ Korte M (2019), § 331 mn. 59–66.

⁶² Korte M (2019), § 331 mn. 67–70.

⁶³ Korte M (2019), § 331 mn. 43–70, 166–169.

⁶⁴ Kudlich H and Oğlakcioğlu MT (2020), mn. 376–379.

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cover judicial acts. These are all activities that are protected by judicial independence, for example the conduct of trials or arbitration proceedings.⁶⁵

609 The penal provision requires that an advantage be assumed. An **advantage** is any material or immaterial benefit to which the addressee (public official or beneficiary third party, such as a relative) would not normally be entitled to and which improves the personal, economic or legal situation in an objectively measurable way. An advantage can be cash, discounts, debt relief or, under certain circumstances, election campaign donations (material benefits), but also the enhancement of reputation, sexual favours, or a betterment of one's position (immaterial benefits).⁶⁶

610 The offence is referred to as three different **acts**. An advantage is **required** if the offender either explicitly or implicitly indicates that he/she seriously desires an advantage for his/her activity. It is therefore a one-sided desire for advantage.⁶⁷

The perpetrator allows himself/herself to **be promised** an advantage if he/she accepts the conditional offer of a later allowance for his/her activity. Whether the advantage is actually granted is irrelevant. Even if the public official mistakenly assumes that he/she has been given such an offer, the penal provision is applicable. This has to do with the protected interest, because even in such a case no factually sound decision has been made.⁶⁸

The offender **accepts** an advantage if the offered advantage is actually received and is supported by the will to exploit one's own interests or to give the advantage to the other.⁶⁹

Furthermore, there must be a **substantive link** between the granting of the benefit and the official's performance of his or her duties. In the case of the variant in para. 1, it is necessary that the advantage is granted to the recipient with regard to the official's performance of his or her duties. This covers all benefits that are granted in the belief that the public official has performed or will perform some official activity in return. In the case of the variant in para. 2, it is necessary that the benefit will consist of consideration (equivalent) for the concrete judicial act that has taken place or will take place in the future.⁷⁰

611 For the **subjective elements**, intent is required, at least in the form of *dolus eventualis*. The offender must therefore be aware of the objective elements of the offence, namely in particular of the quality of the public official, but also of the circumstances of the quality of the advantage, of the benefit, including the non-existence of a legally justifiable claim.⁷¹

⁶⁵ Korte M (2019), § 331 mn. 104–115; Kudlich H and Oğlakcioğlu MT (2020), mn. 384–386.

⁶⁶ Korte M (2019), § 331 mn. 82–103, 170–175; Kudlich H and Oğlakcioğlu MT (2020), mn. 381–383.

⁶⁷ Korte M (2019), § 331 mn. 72–74.

⁶⁸ Korte M (2019), § 331 mn. 75–76.

⁶⁹ Korte M (2019), § 331 mn. 77–81.

⁷⁰ Korte M (2019), § 331 mn. 116–132.

⁷¹ Korte M (2019), § 331 mn. 176–179.

7.4.1.2 Taking Bribes

§ 332 StGB-DE: Taking Bribes

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(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform an official act, and thereby breached or would breach their official duties, incur a penalty of imprisonment for a term of between 6 months and 5 years. In less serious cases, the penalty is imprisonment for a term not exceeding 3 years or a fine. The attempt is punishable.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform a judicial act, and thereby breached or would breach their judicial duties, incur a penalty of imprisonment for a term of between 1 year and 10 years. In less serious cases, the penalty is imprisonment for a term of between 6 months and 5 years.

(3) If offenders demand, allow themselves to be promised or accept a benefit in return for a future act, then para. 1 and 2 already apply if they have indicated to the other person that they are willing

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Taking bribes represents a **qualified form** of acceptance of benefits. It therefore has great structural similarities to the acceptance of advantage. The essential difference, however, is that the perpetrator has **violated or would violate his/her official duties**. In return for the benefit, therefore, an act is not performed that would still be legitimate within the official's task profile, but that expressly violates official duties. A breach of official duties is deemed to have occurred if the official act violates a commandment or prohibition that is derived from the law, a service regulation or an individual order.⁷²

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The perpetrator therefore performs an official act **in breach of his/her formal duty**. Not only does a person act in breach of duty if he/she performs an act that falls **within the scope** of his or her official duties, but also if he/she abuses his/her official position to perform an act **prohibited by the official regulations**. In the case of bound administrative action (i.e. action without discretionary powers), the public official violates official duties if the official action violates the respective legal or administrative regulations.⁷³

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If, by contrast, there is a margin of discretion, then there is a breach of duty if the decision taken is contrary to the facts or the purpose of the authorising norm.⁷⁴

⁷²Korte M (2019), § 332 mn. 3–4, 34.

⁷³Korte M (2019), § 332 mn. 7–9, 18–23, 35.

⁷⁴Korte M (2019), § 332 mn. 24–27, 35.

Furthermore, it is sufficient if the decision is influenced by the advantage, i.e. is not exclusively guided by factual considerations.⁷⁵

- 615** For the **subjective elements**, intent is required with regard to all objective elements of the offence, whereby *dolus eventualis* is sufficient. It is necessary that the offender recognises the objective breach of duty in the case of past or simultaneous official acts. In the case of future acts, it is sufficient that he/she knows that he/she is prepared to commit a breach of duty.⁷⁶

7.4.1.3 Granting Benefits

- 616** The two offences outlined previously have so far had a specific category of offenders in mind, namely those offenders who accepted benefits or took bribes. However, criminal law also focuses on those who concede benefits or give bribes.

617 § 333 StGB-DE: Granting Benefits

(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the discharge of a duty incurs a penalty of imprisonment for a term not exceeding 3 years or a fine.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they performed or will in the future perform a judicial act incurs a penalty of imprisonment for a term not exceeding 5 years or a fine.

(3) The offence does not entail criminal liability pursuant to para. 1 if the competent authority, within the scope of its powers, either previously authorised the recipient's acceptance of the benefit or authorises it upon prompt reporting by the recipient.

- 618** If the offence of accepting benefits (→ mn. 605) is viewed from the official's perspective, the facts of granting benefits have the opposite side in mind, namely the person who offers the unlawful advantage to the official for his/her legal services.⁷⁷

- 619** In this respect, the relevant acts are the offering, the promise and the granting of the advantage.

⁷⁵ Korte M (2019), § 332 mn. 6, 11–13, 17–27.

⁷⁶ Korte M (2019), § 332 mn. 36–38.

⁷⁷ Korte M (2019), § 333 mn. 1.

- **Offering** is the mirror image of demanding in § 331 StGB-DE. What is required is an explicit or conclusive declaration aimed at the conclusion of an agreement, of which the official must become aware.⁷⁸
- **Promising** corresponds to letting oneself be promised and requires a consensus of the parties.⁷⁹
- **Granting** corresponds to accepting and requires acceptance by the public official, thus presupposes a consensus of will between the giver and the taker.⁸⁰

With regard to the **advantage**, it is necessary that the provider of the advantage acts with the aim of influencing a future official act of the public official and/or to reward his/her past performance of duty. The decisive factor here is the perspective of the person granting the advantage.⁸¹ **620**

For the **subjective elements**, intent is required with regard to all objective elements of the offence, whereby *dolus eventualis* is sufficient.⁸² **621**

7.4.1.4 Giving Bribes

§ 334 StGB-DE: Giving bribes

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(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the fact that they have performed or would in future perform an official act, and thereby breached or would breach their official duties, incurs a penalty of imprisonment for a term of between 3 months and 5 years. In less serious cases, the penalty is imprisonment for a term not exceeding 2 years or a fine.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they

1. performed a judicial act and thereby breached their judicial duties or
2. would perform a judicial act and would thereby breach their judicial duties

incurs a penalty of imprisonment for a term of between 3 months and 5 years in the cases under no. 1, imprisonment for a term of between 6 months and 5 years in the cases under no. 2. The attempt is punishable.

(3) If offenders offer, promise or grant the benefit in return for a future act, then para. 1 and 2 already apply if they attempt to induce others

⁷⁸ Korte M (2019), § 333 mn. 11, 12.

⁷⁹ Korte M (2019), § 333 mn. 13.

⁸⁰ Korte M (2019), § 333 mn. 14, 15.

⁸¹ Korte M (2019), § 333 mn. 18–27.

⁸² Korte M (2019), § 333 mn. 29–30.

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

- 623** If taking bribes puts the perspective on the public official (→ mn. 612), then giving bribes puts the perspective on the person who offers the unlawful advantage to the public official for his/her services. It is therefore the mirror image to §332 StGB-DE. Structurally, § 334-StGB-DE is an **abstract endangerment offence** and a **qualification** for granting an advantage under § 333 StGB-DE.⁸³
- 624** Offering, promising or granting an advantage are named as **acts of offence**. The offences must constitute consideration for a past, present or future official or judicial act in breach of duty. Again, bound decisions as well as discretionary acts of a public official are covered. It is irrelevant whether the public official makes the intended decision, has already made it or is unable to make it.⁸⁴
- 625** For the **subjective elements**, intent is required with regard to all objective elements of the offence, whereby *dolus eventualis* is sufficient.⁸⁵

7.4.1.5 Other Offences (Selection)

- 626** In addition to these four basic offences, the criminal laws of individual legal systems also contain other specific offences which, based on their experience or on international guidelines (e.g. the 1998 OECD Convention on Combating Bribery of Foreign Public Officials or the 1999 Council of Europe Criminal Law Convention on Corruption), are punishable separately. A vivid example of this is the **remuneration of arbitrators** under § 337 StGB-DE.
- 627** **§ 337 StGB-DE: Remuneration of Arbitrators**
Remuneration for arbitrators is only deemed to be a benefit within the meaning of sections 331 to 335 if arbitrators demand it, allow it to be promised to them or accept it from a party unknown to the other, or if one party offers, promises or grants it to them unknown to the other.
- 628** This criminal offence is regulated separately because this is intended to clarify that the concept of advantage in arbitration must be measured according to other criteria. It is in fact common practice that the arbitrator is compensated for his/her activity by the parties. Thus, by definition, he/she already receives a lawful advantage for his/her legal activity. Criminal

⁸³ Korte M (2019), § 334 mn. 1.

⁸⁴ Korte M (2019), § 334 mn. 6–11, 12–13.

⁸⁵ Korte M (2019), § 334 mn. 14–15.

liability should only exist if the remuneration is paid without the knowledge of the other party involved in the arbitration proceeding and with the intent to defraud this other party.⁸⁶

Furthermore, some legislators have adopted penal provisions which no longer concern the relationship between public administration and a private individual, but are aimed at the relationships between private individuals.⁸⁷

In particular, this concerns the protection of fair business relations, that is, the protection of fair and honest competition, equal opportunities for competitors and their financial interests. For this reason, legal systems provide for corruption among private individuals, punishing the taking and giving of bribes in commercial practice (§ 299 and 300 StGB-DE) or in the healthcare sector (§ 299a and 229b StGB-DE)⁸⁸ as an explicit criminal offence.

The offences are thus addressed to a **special target group** which includes independent protected legal interests. Nevertheless, criminal acts such as those briefly outlined above can be applied to these specific corruption offences.

However, corruption offences cannot be considered in isolation but must always be seen in conjunction with other accompanying offences. Indeed, corruption involves **unfair distortion of competition**, which is why corruption offences are regularly linked to competition offences (→ mn. 753).

Corruption also indicates a clear proximity to **embezzlement**, namely when the manager's decision-making power is misused for his/her own benefit and at the same time to the detriment of the company (→ mn. 582).

Furthermore, there are conceivable cases in which acts of corruption are carried out in order to **breach secrecy** and to obtain official secrets, professional secrets or business secrets (→ mn. 850). Then, in addition to the elements of the offence of corruption, the relevant criminal norms for the protection of secrets will also become relevant.

Of course, corruption can also be used to make public officials overlook certain facts (e.g. in tax matters). In this case, the focus is also on (criminal) tax law.⁸⁹

7.4.2 Immoral or Unlawful?

Corruption is particularly harmful because it calls the trust of citizens in their state institutions into question.⁹⁰ This can be seen in the etymology of corruption, which comes from the Latin verb "*corrumpere*", meaning to spoil or to destroy.

Corruption prevents public offices from carrying out their activities according to their institutional mandate. Corruption creates **unjustified, unequal and preferential**

⁸⁶ Korte M (2019), § 337 mn. 1, 2.

⁸⁷ Cf. Staffler L (2016a), p. 236–240.

⁸⁸ Cf. with regard to § 299a StGB: Türke A (2021); with regard to § 299b: Pfohl D (2020).

⁸⁹ Cf. Ermert A (2019).

⁹⁰ Cf. Ceva E and Ferretti MP (2021).

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treatment and leaves the intended beneficiary or needy person considerably disadvantaged. Corruption prevents conscientious control, which in turn opens the door to serious crimes, including human rights violations.⁹¹

633 For example, the granting of unfair advantages in return for money damages the infrastructure sector (in the construction of roads, bridges, tunnels), because it is not the economically and qualitatively best company that wins a tender, but in the end an unfair competitor who saves on materials or demands a higher price and thus damages the taxpayer.

634 In criminological studies (→ mn. 65), corruption is linked with the following elements.⁹² These elements are (1) abuse of a public office, economic function or political mandate (2) that is of its own initiative (3) in order to obtain an advantage for oneself or a third party (4) with the occurrence or expectation of damage or disadvantage (5) for a company or the general public.

635 Criminal law intervenes with corruption very early as well as very far into social relations in order to ultimately prevent any undue manipulation of the state or economic competition. In the absence of sufficiently specific definitions, however, it is extremely difficult to see the borderline between socially accepted behaviour, which is not punishable, and behaviour that is no longer tolerated by society, which is punishable.

It is particularly problematic to deal with situations where the exchange of mutual benefits cannot be directly raised. Here, one is dealing with the cases of so-called **climate care**, in which a public official is to be fed with corresponding benefits in order to provide a corresponding service at an unspecified time in the future. The public official is therefore given benefits as a “precautionary measure”, without any concrete consideration being apparent at the time of the benefit provision.

This is where the criminal law on corruption reaches its limits, because the unlawful agreement and mutual exchange are in fact hardly provable. Yet there is certainly a need for action on the part of the legislators.

636 In the area of corruption, there are a number of national and international legislative initiatives. One of the most important milestones in the development of criminal law against corruption was the US Foreign Corrupt Practices Act (**FCPA**, → mn. 1020).⁹³ The starting points of this landmark legislation was uncovering the Watergate scandal and the Lockheed Aircraft Corp. bribery scandal.

⁹¹ Cf. Pieth M (2021), 803, 812–813.

⁹² See, for example, Bannenberg B (2002), 16: “Korruption ist Machtmissbrauch von Angehörigen besonderer Macht, die sich aufgrund einer Einflussnahme mit an einer manipulierten Leistung Interessen über sachwidrige Vorteile einig werden.“

⁹³ Tarun RW and Tomczak PP (2018).

Lockheed Aircraft Corp.—Case⁹⁴**637**

The Lockheed Aircraft Corp. scandal was one of the biggest bribery scandals in the USA as well as in other countries. The US aircraft manufacturer Lockheed had politicians in Italy, the Netherlands (Prince Bernhard received 1.1 million US dollars in bribes to bring about a decision in favour of the Lockheed F-104), Japan (former Japanese Prime Minister Kakuei Tanaka had received 3 million US dollars in bribes, to support the purchase of the Lockheed Tristar by the Japanese airline All Nippon Airways) and in Germany (apparently DM 1.1 to 1.3 million in bribes were paid by Lockheed) to sell its products. The investigation in the US Senate revealed that a total of 22 million US dollars had been paid to friendly governments to induce the purchase Lockheed aircraft. ◀

In 1977, following the Lockheed scandal, the US Securities and Exchange Commission investigated the question of whether other US companies had also resorted to bribery in order to land orders abroad. The result was shocking: more than 400 companies had to admit that they had resorted to bribery. This ultimately led to the famous law against foreign bribery (FCPA, → mn. 1020).⁹⁵

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However, the background to this regulation was not so much a moral outrage as an economic and political consideration: Companies that win contracts through corruption lose their competitiveness in the long term because they are not competitive in terms of quality and have disadvantages in other countries due to their practices.

In the 1990s, many regional organisations, such as the Organisation of American States (OAS), the OECD, the Council of Europe and the EU supported the Recommendations and Conventions on Foreign Corruption, albeit with different emphases. The OAS wanted to improve cooperation between states, the Council of Europe wanted to bring the norms of the Eastern European states closer to the norms of the Western European states and, if necessary, prepare for the accession of eligible states to the EU, the EU wanted to defend its financial interests.

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All these regional efforts finally culminated in 2003 in a Convention supported by the UN, which brought together all the different approaches.⁹⁶ Leading up to this point, a diverse range of anti-corruption frameworks with the aim of largely harmonising criminal offences came about and thus facilitate cooperation in the fight against corruption.⁹⁷

Ultimately, the fight against corruption is intended to ensure **public confidence** in the integrity of those entrusted with state functions and thus in the objectivity of state decisions. For this reason, the scope of the norms often depends on the content of the term public official, which is why even at this stage there are considerable deviations in criminal law of the European states.

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⁹⁴Badua F (2015), 105–126

⁹⁵Badua F (2015), 105, 116–118.

⁹⁶Pieth M (2021), 803, 811–812.

⁹⁷Pasculli L and Ryder N (2020), 3.

7.4.3 Risk Management

641 As we have seen above, the states themselves are not only subject to the obligations they have to fulfil under international conventions.⁹⁸ Often these international requirements are accompanied by monitoring (evaluation of countries). These monitoring processes are carried out by other **states** in conjunction with the secretariats of the respective international organisations and are published in the form of public reports. This reveals the extent to which certain states fail to prevent corruption—although this does put pressure on states to implement the relevant measures conscientiously.

642 However, monitoring processes are also carried out by **non-governmental organisations** (such as Transparency International) that do not act in accordance with diplomatic practice and thus make an important contribution to the prevention of corruption.

643 At least states oblige business communities to take various measures to fight corruption. What can companies do in concrete terms to prevent corruption risks? Many good manuals provide detailed information about it, for small and mid-sized organisations⁹⁹ as well as for large companies.¹⁰⁰ However, the following list shows a small selection of possible measures to prevent corruption in everyday business life.

- **Identification of work areas** that are at risk of corruption. These determinations must be made at regular intervals or in response to specific events.
- Appoint a contact person for **corruption prevention**. This representative must be independent of instructions from management and must have the right to report directly to management. He/she must be allowed to select employees for the area who are competent, have been selected appropriately, are not involved in other tasks, and have been instructed and trained. There must be concrete regulations for the allocation of tasks, responsibility and authority.
- Appoint a contact person for the **clarification of individual questions**.
- If the company is large enough, it is advisable to set up an **audit department or compliance team**. Only a department with sufficient human and financial resources can be sufficiently effective in fighting corruption.
- Draw up a **code of professional ethics** or code of conduct. The corporate culture, which the code of conduct sets out in a framework, should be recorded in writing and communicated not only internally but also externally. In order for employees to become aware of this corporate culture, instruction and training, as well as practical training, is needed. The individual measures taken to this end must be documented in interim and final reports. These basic principles can be used to carry out appropriate evaluations so

⁹⁸Pasculli L and Ryder N (2020).

⁹⁹Cf. Aiolfi G (2020).

¹⁰⁰Busch M et al (2020); Pieth M (2021), 803, 843–846.

that, if necessary, measures for improvement can be taken. Here it is helpful if training and further training as well as the passing on of information is carried out at regular intervals and appropriate further training plans are communicated.

- The code of conduct must not only be dedicated to the individual company activities but must also be **specifically aimed at managers**. What is needed, therefore, is a guide for managers which also emphasises their responsibility accordingly.
- Writing is an important requirement so that employees and managers can acquire appropriate instructions for conduct. To this end, it has proven to be a good idea to draw up various **guidelines for all areas of the company** and make them available in written format accordingly. Guidelines can concern, for example, documentation (awarding, execution, accounting, bookkeeping, etc.), but also the handling of document storage or the authority to sign.
- Corresponding provisions must be included in **employment contracts** at the beginning of employment. From a compliance point of view, an employment contract should include an obligation to cooperate with the relevant departments (controlling, management, heads of department, commercial department, etc.), but should also contain a written commitment by the employee, for example to inform the internal contact person and management immediately in the event of suspicion. Of course, the employee's declaration of commitment should also include general compliance with legal requirements.
- If new compliance measures are implemented, a corresponding **information letter** must be sent to all employees. In general, the establishment and competencies of compliance management systems should always be made available to employees in written form.

The anti-corruption guidelines of large companies may be broadly the same in terms of content. However, they differ in detail (see below). Furthermore, there are important differences in the scope of such guidelines. While some companies rely on short guidelines (e.g. Apple:¹⁰¹ 4 pages), other companies rely on detailed guidelines (e.g. Volkswagen:¹⁰² 36 pages).

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7.4.4 Thematic Boundaries

Why is the prevention of corruption so difficult in practice? As already mentioned in the introduction, mutual attention is a common practice in economic life. It is therefore extremely difficult to determine when the line of corruption has actually been crossed. A

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¹⁰¹ https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/Anti-Corruption_Policy.pdf

¹⁰² https://www.volkswagenag.com/presence/konzern/documents/leitfaden_antikorruption_englisch_digital_einzelseiten.pdf

few small, special cases are mentioned here, namely gifts (→ mn. 646), sponsoring (→ mn. 649) and lobbying (→ mn. 650).

7.4.4.1 Accepting Gifts

646 Particular difficulties are posed by the practice of small gifts and benefits that are given or accepted out of courtesy and without illegal motives. Yet these would actually already fall under the criminal offence of corruption according to the wording of the law.¹⁰³

647 Legislators and courts certainly do not want to put an end to politeness. That is why efforts are being made to interpret the criminal offences of corruption restrictively. To this end, the criterion of social adequacy is being applied in full.

Social adequacy means that socially accepted behaviour theoretically fulfils all the elements of a criminal offence (e.g.: corruption), but according to public opinion it should be considered normal, socially customary behaviour and not criminal behaviour (e.g. giving a small gift such as a biro or buying a coffee).¹⁰⁴ The definition of what is still socially adequate behaviour is extremely difficult to determine and is particularly case-dependent.¹⁰⁵

648 Differing Guidelines in Large Companies

Large companies have developed different guidelines, as the comparison between Novartis¹⁰⁶ and Tesla¹⁰⁷ shows. While Novartis does not accept any gifts at all, even culturally-appropriate unbranded ones, Tesla accepts non-cash gifts, meals or entertainment of up to 50 USD as reasonable and modest in a normal business context and depending on the specific circumstances. While Novartis prohibits any facilitation payments, even those that would be permitted under local law, Tesla accepts facilitating payments in certain limited circumstances. ◀

7.4.4.2 Sponsorship

649 Sponsorship involves financial contributions from individuals or organisations because they expect to receive advertising for their own company. To a certain extent, this support is also provided by public institutions, where officials may also provide large sums of money in the exercise of their office. Omnipresent and socially accepted sponsoring is of course not to be seen as corruption.

¹⁰³ Cf. Schönborn E (2021), 5, 11–12.

¹⁰⁴ Cf. Ruppert F (2020b).

¹⁰⁵ Kudlich H and Oğlakcioğlu MT (2020), mn. 387–388; Pieth M (2021), 803, 826–827.

¹⁰⁶ <https://www.novartis.com/sites/www.novartis.com/files/anti-bribery-policy-en.pdf>

¹⁰⁷ <https://www.tesla.com/sites/default/files/about/legal/tesla-worldwide-bribery-and-anti-corruption-policy.pdf>

However, in individual cases it may be necessary to check afterwards whether certain unlawful agreements have been made between an advertising company and a public official, which is regularly denied, because most advertising campaigns only deal with a prominent public official and not with the office itself. It only becomes critical, therefore, when an advertising campaign is related to the performance of a service. Then aspects of criminal law on corruption would have to be examined, because the limit of welcome cooperation has been exceeded.¹⁰⁸

7.4.4.3 Lobbying

Lobbying is probably the most difficult way to draw the line between welcome cooperation and illegal behaviour.¹⁰⁹ Within the framework of lobbying, certain influence from interest groups (lobbies) are brought into politics and society. By maintaining personal connections, governments, legislators and other official bodies are influenced by the interest group. Lobbying also includes influencing public opinion. Various actors are involved in this:

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- large, listed and internationally active companies afford their own field offices in national capitals and in Brussels in order to establish direct contact with political institutions.
- large national or regional associations representing different branches or sectors of economic and professional life join forces to attract the attention of political decision-makers.
- various professional consultants such as management consultancies, law firms or public affairs agencies offer advice on communication to access legislative and decision-making processes in order to communicate their interests to political decision-makers.

It is true that lobbying does have legitimate objectives. In fact, companies are part of civil society and participate in public discourse as market participants. Companies pay taxes, provide jobs, supply society with goods and services, create innovation, research and training. For a society to be successful, it is essential that the interests of companies are at least heard and are given appropriate consideration in public discourse when weighing up the legitimate interests within society.

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Nevertheless, there are questionable cases in which legitimate lobbying in itself touches or even exceeds the limits of what is legally permissible:

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- If **inappropriate invitations** to events or fact-finding missions are offered to elected officials, the criminal offence of corruption may be relevant. It is true that not every

¹⁰⁸Kudlich H and Oğlakcioğlu MT (2020), mn. 389–391; Pieth M (2021), 803, 827; cf. Schönborn E (2021), 5, 10–11.

¹⁰⁹Michaelis M (2018).

invitation can be immediately identified as corruption. However, a great deal of tact and sensitivity is required when examining whether a case of corruption is possibly involved. In this light, ancillary income such as paid lecture activities, shareholdings in companies, parallel professional activities of members of Parliament should also be looked at more closely.

- Another phenomenon is the so-called **change of sides**. In recent years, it has become common practice for public officials to work for companies and associations after their term of office in order to lobby them. This is because, due to their mandate, they not only have the relevant political experience, but also have personal contacts with the respective new office holders. In order to engage in illegal activities here, various public organisations (e.g. the EU Commission) have regulated the change of sides accordingly, so that a change to the business world is usually only legally possible after a certain period of time has elapsed.
- The political parties represent the various interests and aspects of society. In order to be perceived accordingly, they are dependent on funds. **Election campaign donations** and other contributions to parties by companies and associations are therefore often welcome, but they may be criminally relevant as cross-border donations. Here, too, the legislature is endeavouring to put a stop to illegality by laying down transparency criteria, for example. Party financing is, however, one of the most controversial issues in national legislative processes and is regularly and rightly criticised by international anti-corruption associations (e.g. Transparency International).

653 In the international debate on transparency requirements of lobbying activities, the **Austrian federal law on ensuring transparency** in the representation of political and economic interests is particularly praised.¹¹⁰ The law recognises in principle that representation of interests is a legitimate and proven way of representing specific interests within the framework of democratic decision-making.

However, lobbying must be carried out transparently and honestly so that not only are unobjective or unilateral decisions taken, but also so that there are no unfounded suspicions or attacks against corresponding interests. The Lobbying Act concerns communication with all Austrian officeholders in all state functions, so that it extends the circle of persons to whom the Lobbying Act applies as far as possible. The Lobbying Act establishes a register with graduated registration obligations, duties of conduct (minimum standards for the performance of the activities covered), incompatibility rules for holders of certain public functions as well as sanctions in case of violation of these rules.

The legal consequences for breaches of these duties are extremely sensitive, because, for example, contracts with unregistered lobbying companies are void under civil law and any

¹¹⁰Bundesgesetz zur Sicherung der Transparenz bei der Wahrnehmung politischer und wirtschaftlicher Interessen (Lobbying- und Interessensvertretungs-Transparenz-Gesetz – Lobby G), Bundesgesetzblatt I No. 64/2012.

agreed contingency fee is forfeited in favour of the state budget. Other sanctions include removal from the register, which is de facto equivalent to a ban on the profession. Furthermore, administrative and financial penalties of up to 60,000 € can be discussed.

7.5 Money Laundering

Sources of Law

- § 165 StGB-AT
- § 261 StGB-DE
- § 165 StGB-FL
- Art. 305bis1 StGB-CH

Money laundering is also one of the central offences of BCL, because it is a concomitant of other offences. This becomes clear when you look at the definition of money laundering. Money laundering is the unlawful transfer of assets of criminal origin, e.g. drug trafficking, corruption (→ mn. 599), fraud (→ mn. 562), embezzlement¹¹¹ (→ mn. 582), into the legal circuit of finance and business for the **purpose of camouflage**. Originally, the criminalisation of money laundering was used to fight organised crime. In fact, organised crime is capable of moving large sums of money. However, the goal is to prevent these funds from being brought into the legal economic cycle and thus from being laundered.

The field of activity of money laundering has expanded over time. Today, not only the fight against organised crime, but also the fight against the financing of terrorism¹¹² and tax evasion¹¹³ is an essential cornerstone in preventing money laundering. These three cornerstones must not, however, hide the fact that at the heart of money laundering lies a **very broad purpose**, namely, to disguise the criminal origin of assets, regardless of where they come from. That is why the rules on money laundering are so broad.¹¹⁴ Various levels (e.g. EU regulations¹¹⁵ (→ mn. 667)) beyond the nation state also shape this offence and its interpretation.¹¹⁶

To analyse the issue of money laundering in greater detail, the Swiss provision is examined.¹¹⁷

¹¹¹Sünner E (2009), 937–940.

¹¹²Staffler L (2016b).

¹¹³Wenaweser S (2013), 153–190.

¹¹⁴Teichmann F (2020), 237, 238–239.

¹¹⁵Dannecker G and Bülte J (2020), mn. 105–107b.

¹¹⁶Ackermann JB (2021), 475, 480–481; Glazier S (2020), 421–423.

¹¹⁷Cf. Ackermann JB (2021), 475, 481–482 for introductory purposes.

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7.5.1 Elements of the Crime

656 Art. 305bis StGB-CH: Money Laundering

(1) Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding 3 years or to a monetary penalty.

(1bis) An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act of 14 December 1990 on Direct Federal Taxation and Article 59 paragraph 1 clause one of the Federal Act of 14 December 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300 000 francs.

(2) In serious cases, the penalty is a custodial sentence not exceeding 5 years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.

A serious case is constituted, in particular, where the offender:

- a. acts as a member of a criminal organisation;
- b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
- c. achieves a large turnover or substantial profit through commercial money laundering.

(3) The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.

657 The penal provision is found in the system of **crimes against the administration of justice**.¹¹⁸ It therefore protects state the criminal justice system in the enforcement of the state's right to confiscation.¹¹⁹ However, because money laundering is linked in particular to organised crime and transnational crimes, not only Swiss but also foreign criminal justice administration is protected.

Because the relevant assets also derive from other criminal offences against the individual (e.g. money gained from theft or embezzlement), protection is also extended to those assets that originate from the person who was harmed by the predicate offence.¹²⁰

658 Structurally, this is an offence that inevitably requires a previously committed offence. This is because the offence of money laundering intends to secure the assets that were obtained through the previous criminal behaviour.¹²¹ In this regard, it is neither necessary

¹¹⁸ Ackermann JB (2021), 475, 482–483.

¹¹⁹ BGE 129 IV 322, E. 2.2.4.

¹²⁰ BGE 129 IV 322, E. 2; cf. Pieth M (2016), 203.

¹²¹ BGE 129 IV 322, E. 2.2.4.

to prove a concrete danger of thwarting nor a successful concealment (risk-based approach of legislation).¹²² It is therefore an **abstract endangerment offence**.¹²³

The penal provision names “anyone” as a **perpetrator**, so that no special qualifications are required to be considered as a perpetrator.¹²⁴ This applies not only to the perpetrator of money laundering, but also to the perpetrator of the predicate offence.¹²⁵

The question arises whether the perpetrator of one money laundering offence is equally eligible as a predicate offender for further money laundering offences. This is denied, as in such cases there is an unpunishable self-benefit.¹²⁶

A special feature of the offence of money laundering is that a **previous offence** is required.¹²⁷ This is because the assets in question must either arise from a crime (pursuant to Art. 10 para. 2 StGB-CH) or from a qualified tax offence. On the one hand, this means that crimes against property are eligible as predicate offences.¹²⁸ On the other hand, tax fraud (Art. 186 DBG-CH¹²⁹ and Art. 59 StHG-CH¹³⁰) are among the possible predicate offences if the evaded tax per tax period amounts to more than CHF 300,000.¹³¹

According to case law,¹³² it is irrelevant whether the previous offence has been completed, provided that illegal assets have accrued as a result of the offence. However, it is necessary that the offence be at least attempted (and that assets accrue).¹³³ If no assets are involved, the hypothesis of an attempted money laundering must be examined.¹³⁴

The **object** of the offence is assets that are subject to confiscation, i.e. they must still be liable to confiscation at the time of the offence of money laundering.¹³⁵ The assets must be causally connected to the previous offence.¹³⁶ They do not have to be a direct and immediate consequence, but can also originate from a legal transaction, which, however, came about by means of corruption.¹³⁷

¹²²Gürkan D (2019).

¹²³BGE 136 IV 188, E. 6.1.

¹²⁴BGE 119 IV 59, E. 2e; Ackermann JB (2021), 475, 484–487.

¹²⁵BGE 144 IV 172, E. 7.2.

¹²⁶Ackermann JB (2021), 475, 485–486; Graf DK (2020), 1599, 1600.

¹²⁷Ackermann JB (2021), 475, 487–500; Pieth M (2016), 207.

¹²⁸Ackermann JB (2021), 475, 487–488, 497–498; Pieth M (2016), 204.

¹²⁹Federal Act on Direct Federal Tax, SR 642.11.

¹³⁰Federal Act on the Harmonisation of Direct Taxes in the cantons and communes, SR 642.14.

¹³¹Abo Youssef (2019), 135–142; Ackermann JB (2021), 475, 492–496; Lutz P and Kern M (2017), 97–106; Pieth M (2016), 204–206.

¹³²BGer, 8.8.2019, 6B_259/2019, E. 1.4.

¹³³Ackermann JB (2021), 475, 489, 490.

¹³⁴Graf DK (2020), 1599, 1601.

¹³⁵BGE 129 IV 238, E. 3.3; Ackermann JB (2021), 475, 500–501.

¹³⁶Ackermann JB (2021), 475, 501–505; Pieth M (2016), 208–210.

¹³⁷Graf DK (2020), 1599, 1601–1602.

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The **act** of the offence is described by the legislator as any act that is suitable for thwarting investigations into the origin, tracing or confiscation of assets.¹³⁸ In practice, the variant of thwarting confiscation dominates.¹³⁹

662 Intent is required for the **subjective elements**. *Dolus eventualis* is sufficient with regard to all objective elements of the offence. Thus, it is sufficient if the offender recognises the circumstances that lead to the suspicion that the money originates from a criminal predicate offence.¹⁴⁰ The perpetrator does not need to know that the act is a crime, but it is sufficient that the act in question represents a serious wrong-doing that entails considerable sanctions (willful blindness).¹⁴¹

7.5.2 How Does Money Laundering Work?

663 Previously, the normative side of the offence was analysed. But the question now arises as to how money laundering works in practice. Money laundering usually takes place in three different steps.¹⁴²

1. The first step is the so-called **placement**. The available cash resulting from common criminal sources (e.g. drug trafficking, human trafficking or other crimes) is exchanged for banknotes or other economic goods. The purpose of this action is to remove traces and to convert conspicuous cash (large quantities of small cash notes) into more readily available economic goods. In practice, this process often involves buying luxury goods (e.g. expensive watches) and then reselling them to obtain the cash. The cash won in this way is deposited in bank accounts to turn it into book money.
2. The second step is the so-called **layering**. The starting point is the money in the various bank accounts. This money is then distributed over the largest possible number of different financial transactions.¹⁴³ The purpose of this action is to blur the paper trail of the money, to conceal the origin (both from the criminal origin of the money and from the specific accounts involved in the placement procedure) as far as possible and ultimately to make it more difficult to find these assets.
3. The third step is the phase of so-called **reinvestment** (or integration). The money is now invested in the legal economy. For example, real estate or shares in reputable companies have been acquired. The purpose of this action is to make the originally criminal assets

¹³⁸ Ackermann JB (2021), 475, 505–517.

¹³⁹ On case law, see Graf DK (2020), 1599, 1602–1607.

¹⁴⁰ BGE 119 IV 242, E. 2b; Ackermann JB (2021), 475, 517–519; Graf DK (2020), 1599, 1607–1608; Pieth M (2016), 213–215.

¹⁴¹ See Schemmel A (2008), 96–100.

¹⁴² Bülte J (2015), 977–978; Diergarten A (2016), mn. 6–15; Tiedemann K (2017), 385–386.

¹⁴³ Dornfeld L (2020), 456–465.

available again for economic activity (both criminal and non-criminal) by integrating them into the legal economy. But there is also another reason for reinvestment. Investment in the legal economy is also intended to make companies dependent on illegal sources of money or simply blackmail them.

According to analysts, virtual currencies (**cryptocurrencies**) play an important role in money laundering. This is because virtual currency offers a high degree of anonymisation, limited identifiability and verifiability of actors involved, global cross-border activities and the absence of a central supervisory body (national banks), which is why it could be used for money laundering (and terrorist financing).¹⁴⁴

Many states have recognised that the fight against money laundering is lost if states exclusively rely on national solutions. After all, crime knows no borders and takes advantage of the loopholes that present themselves when national governments go it alone. It is not surprising, therefore, that the first steps towards a unified strategy against money laundering were taken at the level of international law as early as 1988, when the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and, in 1990, the **Council of Europe** Convention on Money Laundering and Investigations Seizure and Confiscation of the Proceeds from Crime provided for the obligation to criminalise acts of money laundering.

In 1989, the **FATF** (Financial Action Task Force for Money Laundering expert group) was founded in the OECD, to develop strategies and guidelines for the international fight against money laundering. The FATF has issued a list of 40 recommendations to combat international money laundering and various special recommendations to combat the financing of terrorism. The FATF Recommendations are important because they are considered standard practice for many countries around the world and are accordingly integrated into national practice. A further special feature is that the FATF regularly monitors the practice of states in terms of the extent to which they comply with their recommendations. This monitoring is finalised by the publication of periodic reports, in which the weaknesses of states are also clearly identified. There is thus permanent pressure on states to actually comply with the FATF recommendations.

7.5.3 Trends in Legislation

Money laundering is about the introduction of illegally acquired assets into the legal circuit of the economy, either by concealing the true origin of the assets or by isolating (“hiding”) them from the illegal assets. In other words, the person who uses, receives, accepts, invests

¹⁴⁴ <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf?retry=1>

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or holds assets for himself or herself or for another person, which derive from an offence according to the catalogue of offences or, more generally, from criminal activities, is punished. This is the common feature of the quite differently structured elements of crime in the respective legal systems.¹⁴⁵

667 Recently, the **European Union** has adopted an anti-money laundering directive which applies to any EU member state.¹⁴⁶ By late 2020 the member states had to implement the new directive that sets minimum requirements for combatting money laundering by means of criminal law. In this way an EU-wide minimum standard for acts that fall under the crime of criminal money laundering will be established.¹⁴⁷

Despite this measure, there are still great differences in the legal norms of European countries with regard to the offence that constitutes the origin of illicit property, but also with regard to the systematic classification of the offence.

668 In **Austria**, the offence of money laundering is included in the offences against assets of another person. It is therefore a matter of protection and cleanliness of financial and economic transactions and the protection of assets (e.g. private interests). § 165 para. 1 StGB-AT is intended to cover all assets that either result from an offence punishable by more than 1 year's imprisonment or from expressly listed offences under the Criminal Code or the Narcotic Substances Act. However, it is not only the profits from these offences that are relevant to money laundering, but also the assets of criminal organisations or terrorist groups (§ 165 para. 3 StGB-AT). Money laundering in connection with a criminal organisation is also punished under § 278a StGB-AT, although this does not relate to assets from corresponding predicate offences, but to assets from the organisation itself. The difference here is that in the case of § 278a StGB-AT there does not have to be a concrete criminal offence for money laundering to be punished, but it is sufficient that a criminal organisation has been founded and money has been organised.

669 In **Germany**, by contrast, the criminal norm (§ 261 StGB-DE) is to be found in the system of penal provisions on preferential treatment and receiving stolen goods. This means that the norm is not only intended to protect and ensure the cleanliness of financial and economic transactions as well as private assets, but also to protect public legal interests such as the good administration of justice.

For a long time, German legislators considered it sufficient to enumerate an ample catalog of norms that could be considered predicate offenses to money laundering. However, the legislator decided on a fundamental reform in 2021.¹⁴⁸ Accordingly, the legislator is pursuing the so-called “**all-crime approach**”, so that now all offences (more than 300 in

¹⁴⁵Cf. Maillart JB and Vogel B (2020).

¹⁴⁶Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, Official Journal of the European Union 12.11.2018, L 284/22.

¹⁴⁷See Staffler L (2019), 67–70.

¹⁴⁸Gercke B et al. (2021), 330–341; Schindler J (2020), 457–469.

number, from the Criminal Code alone) can be considered preliminary offences for money laundering. Consequently, Germany has one of the world's most rigorous criminal law statutes on money laundering. In practice, this means that law enforcement agencies are likely to investigate money laundering more frequently. This is because it is now only important that money flows indicate any kind of criminal background. While this will simplify the burden of proof for law enforcement, the reporting requirements for suspected money laundering will tie up more resources in companies. Furthermore, the risk of violating the strict requirements for reporting suspected money laundering is higher, which means additional liability risks for companies.¹⁴⁹

In **Liechtenstein**, the penal provision is structured according to the Austrian model (→ mn. 668) and classified as an offence against property of another person. The above-mentioned explanations therefore apply. At the same time, the catalogue of offences where illegal assets are generated is broader, because the offence in § 165 para. 1 StGB-FL additionally refers to legal passages in various legal acts such as the Tax Act and the Market Abuse Act. Furthermore, Liechtenstein follows the Austrian model when it also includes the handling of assets of criminal organisations or terrorist groups in the offence of money laundering (Art. 165 para. 1 StGB-FL).

As seen above, in **Switzerland**, as in Germany, money laundering is systematically classified as a criminal offence, that also involves public interests. With regard to the relevant predicate offences, Art. 305bis StGB-CH refers to assets derived from a crime punishable by imprisonment for up to 1 years or a fine. It is therefore a very generic reference to corresponding predicate offences.

However, there are certain exceptions with regard to tax criminal law. According to these, not all, but only qualified tax offences are to be considered predicate offences to money laundering. Furthermore, Swiss criminal law also provides for serious cases of money laundering, which are sanctioned with a higher penalty. This applies in particular to crimes connected to a criminal organisation. However, organised crimes which have come together for the continued practice of money laundering or which generate a large turnover and substantial profits through commercial money laundering are also considered serious cases of money laundering.

In addition, there is a separate money laundering offence for financial transactions and reporting rights. According to Art. 305ter StGB-CH, anyone who professionally accepts, stores, invests or assists in the transfer of illegal assets belonging to others is punished and is prohibited from taking the necessary care to establish the identity of the beneficial owner.

A connecting element is the fact that the offender knew or carelessly failed to recognise the illegal origin of the assets at the time of the request for the assets. At the same time, the legal systems (e.g. § 165a StGB-AT and § 165a StGB-FL) provide for possibilities according to which the offender is not punished in case of corresponding “**active remorse**”. For example, no one can be accused of money laundering who voluntarily

¹⁴⁹For a critical analysis, see Gercke B et al. (2021), 330–341.

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notifies the authorities before they learn of his or her guilt, and causes the seizure of significant assets from money laundering. If the money laundering assets are seized without the offender's intervention, the offender is not to be punished if, in ignorance of this, he or she has voluntarily and seriously sought to have them seized. In Switzerland, there is no corresponding ground for suspending the penalty, but there is a ground for mitigating the penalty in connection with criminal organisations (Art. 260ter para. 2 StGB-CH).

7.5.4 Anti-Money Laundering Strategies

673 The basic principles of anti-money laundering will be briefly explained here.¹⁵⁰

In the original concept, not all areas of the economy were covered by anti-money laundering legislation, but only selected industries. These included above all banks, financial service providers, insurance companies and investment companies. However, developments in the economy have shown that the financial sector is not the only economic sector affected by money laundering.

For this reason, specific money laundering laws with corresponding **due diligence obligations** have been introduced for many professions, particularly in recent years. These include lawyers, tax consultants, business consultants, real estate agents, casinos and the wide range of people who trade in goods commercially. In fact, money laundering legislation now covers very broad areas.¹⁵¹

674 An essential component of the anti-money laundering strategy is the principle “**Know your Customer**”.¹⁵² Anti-money laundering legislation thus provides for identification obligations for economic operators. Anyone who falls within the scope of anti-money laundering legislation is therefore obliged to identify their economic partner or principal (excluding an arbitrary representative or messenger). To do so, he/she must be provided with documents (e.g. identity card or extract from the commercial register) which can also be used to prove the identity of the principal. In addition to identification, verification must also be carried out. The duties of identification and verification correspond simultaneously with the information duties of the customer, who not only has to provide his/her information, but also has to notify changes to his/her data.

After all, this is how any suspicious financial transactions can be tracked down. The determination of the **true beneficial owner** must be carried out with appropriate means.¹⁵³ For this purpose, it is not necessary to actively seek out doubts as to the correctness of a

¹⁵⁰Bülte J (2015); Diergarten A (2016).

¹⁵¹Bülte J (2015), 993–1026; cf. Teichmann F (2020), 237–245.

¹⁵²Bülte J (2015), 993–994; in Switzerland, the violation of the duty of identification is even a criminal offence under Art. 305ter StGB (“Lack of due diligence in financial transactions and the right to report”).

¹⁵³Bülte J (2015), 994–997; Diergarten A (2016), mn. 78–84, 197–233.

transaction, but to act within the framework of a risk-oriented approach. This means that a more precise clarification must be carried out depending on the purpose and nature of the transaction. If the transaction is self-explanatory, no further clarification is generally necessary, as it can be assumed that it is a standard mass transaction. With more complex business relationships, on the other hand, it is necessary to take a closer look, especially if they are not self-explanatory. Here the structure and economic sense of the business must be made understandable.¹⁵⁴

In this sense, it is also clear that, depending on certain persons or certain transactions, enhanced due diligence obligations apply. In money laundering standards, for example, there is the obligation to take a closer look at so-called **politically exposed persons**. Politically exposed persons are former holders of important offices and persons known to be close to them, such as family members or close business partners. Since this gives rise to particular risks of criminal conduct (e.g. corruption, → mn. 599, abuse of office, etc.), companies have greater duties of care when dealing with such persons.

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Furthermore, money laundering standards generally include the obligation to pay particular attention to **certain transactions**, such as long-distance transactions (business relationships without personal presence). Here, legislators often rely on increased documentation requirements (e.g. certified photo identification or the existence of certified electronic signatures).¹⁵⁵

Additionally special duties of care apply to circumstances that are in any way conspicuous (doubtful or even unusual). A particularly **suspicious circumstance** exists, for example, if transactions or unusual business relations are economically unreasonable. In this case, there is a suspicion that money laundering or terrorist financing is involved. In order to identify and clarify such suspicions, the relevant employees must be trained.¹⁵⁶

Of course, the measures mentioned above can only be implemented if companies are appropriately prepared in terms of **organisation**. For example, many anti-money laundering laws stipulate that the data collected on a business relationship or person must be recorded and kept for a certain period of time.¹⁵⁷

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In addition, companies must be organised by internal measures in such a way that they are able to carry out an **appropriate risk assessment**.¹⁵⁸ This includes, for example, that companies and professionals are required to provide internal training and that policies and procedures are in place for exchanging information.

In some business sectors, it is even envisaged that there should be **anti-money laundering officers**. The role would be meant to identify any structures of risks and sources of

¹⁵⁴Diergarten A (2016), mn. 45–48, 138–196.

¹⁵⁵Bülte J (2015), 998–999; Diergarten A (2016), mn. 250–272.

¹⁵⁶Bülte J (2015), 999–1001; Diergarten A (2016), mn. 244–249.

¹⁵⁷Diergarten A (2016), mn. 85–97.

¹⁵⁸Bülte J (2015), 1002–1004; Diergarten A (2016), mn. 98–111, 112–117.

danger in a timely manner and to ensure that the company is able to act against such risks and dangers.¹⁵⁹

677 The internal processing of anti-money laundering measures is flanked by “external” obligations. This is because in the event of suspicion of money laundering or terrorist financing, the obligated party must make a report to the competent authority (so-called **Financial Intelligence Unit**, FIU) in the respective country and not execute the suspicious transaction.¹⁶⁰

678 A **suspicious case** is deemed to exist if the facts are available which indicate that the assets are items that are connected with money laundering or terrorist financing. In many cases, no suspicion of a crime is required, nor is any certainty as to whether a transaction is related to money laundering or terrorist financing.¹⁶¹ It is sufficient if facts indicate the existence of a business relationship or transaction which

- serve to finance terrorism, or
- the action is intended to prevent illegal funds from being accessed by law enforcement authorities, or
- the action is intended to conceal the origin of illicit assets.¹⁶²

679 No specific legal expertise is provided here. Rather, it is required that the facts of the case be assessed according to **general experience** and **existing professional knowledge** from the perspective of what is unusual or conspicuous in the respective business context.¹⁶³

Ultimately, the legislator must take a risk-based approach, as they often do not require certainty, but only indications of suspicion. These indications may be based on the nature and purpose of the transaction, particularities in the person of the customer or beneficial owner, the financial or business background of the customer, or the origin of the assets contributed or to be contributed.¹⁶⁴

680 This will be illustrated with some examples.¹⁶⁵

¹⁵⁹Bülte J (2015), 1004–1006.

¹⁶⁰Bülte J (2015), 1008–1011; Diergarten A (2016), mn. 377–380.

¹⁶¹Bülte J (2015), 1008–1009; Diergarten A (2016), mn. 385–396.

¹⁶²Bülte J (2015), 1018–1023.

¹⁶³Bülte J (2015), 1009; cf. Diergarten A (2016), mn. 68–77.

¹⁶⁴Bülte J (2015), 1024–1026.

¹⁶⁵The following examples are taken from Bülte J (2015), 1016–1023.

Suspicious and Suspicious Facts

Suspicious may arise from a **specific business sector**. Examples of particularly endangered business sectors are:

- nightclubs, bars and other locales related to red-light districts (because of the possible proximity to organised crime)
- restaurants in general (because high amounts of cash are exchanged there)
- travel agencies and transport companies (because of possible links with illicit arms, drug or human trafficking)
- exporters and importers of goods subject to trade restrictions (because the business model allows for the realisation of substantial profits when goods are exported or imported without licences)
- construction (because of high contract values, but also because of corruption)

Suspicious facts may arise from the **circumstances of the person** or the **behaviour** of a client. Examples are:¹⁶⁶

- unclear financial circumstances
- the demand for special discretion or even anonymity without comprehensible reason
- the attempt to avoid personal contact with a company or its employees
- an ongoing investigation against the customer for money laundering or a predicate offence to money laundering
- the transaction is not consistent with the other information about the customer
- cash payments of large sums, especially with small banknotes
- the withdrawal of assets shortly after crediting to another account
- customers with considerable fluctuations in turnover without a comprehensible reason.

Suspicious may arise from the **circumstances of a specific transaction**. Examples are:

- the construction of a shop is economically nonsensical
- the client is engaged in the transaction outside of his/her usual field of activity for no apparent reason
- transactions are carried out in order to channel assets through additional customers without any economic necessity

(continued)

¹⁶⁶Diergarten A (2016), mn. 392, 393.

- transactions are issued to unknown third parties without any discernible connection to the company
- numbered accounts or also pseudonyms are used for processing business transactions

681 Usually, such suspicions are checked by the companies with preconceived dragnet investigations and marked with so-called “**red-flags**”. If such indications are present, the company obliged by anti-money laundering legislation must submit a report to the competent authorities.

In practice, a very large number of reports are submitted, so that the authorities are sometimes overburdened with the task of clarifying concrete suspicious activity reports. Nevertheless, companies still have to fulfil their legal obligations.¹⁶⁷

682 In any case, it can be said that the anti-money laundering sector is **dynamic** and is developing very rapidly. In recent years it can be observed that legislators (especially on EU level) are very active in prescribing concrete measures against money laundering. This includes a large number of documentation obligations.

The central issue is therefore the risk assessment done by a company. This is because it is the pivotal point to have the authorities assess a reported suspicious activity. Money laundering can only be curbed if the business community cooperates. Here it is absolutely necessary to obtain legal advice in order to comply with the current status of the respective money laundering legislation. Failure to combat money laundering is usually punished severely. Money laundering compliance is therefore essential for many companies, even if it is not directly required by law for the specific business sector.

7.6 Cybercrimes

Sources of Law

- § 118a et seq, 126a et seq StGB-AT
- § 202a et seq., 263a StGB-DE
- § 118a et seq. StGB-FL
- Art. 143 et seq. StGB-CH

683 Using a computer is part of everyday life for many people and also part of everyday life for many companies. The digital revolution is progressing at a tremendous speed. People are voluntarily (e.g. via social media) or involuntarily (by using digital means that leave a digital footprint) producing a huge amount of data that can also be used economically.

¹⁶⁷ Bülte J (2015), 1016–1017

One example is the business model of many health insurance companies, which promise their customers economic benefits by using trackers to record and transmit health data, so that the insurance company can better target its clientele and optimise recognising economic risks.

Data is therefore among the most valuable **raw materials** economically speaking and those involved in the economy want to make use of them.¹⁶⁸ Additionally, companies are developing computer systems that are capable of learning and are now able to make autonomous decisions (Artificial Intelligence). This opens up areas of application for new technologies and economic sectors, such as self-driving cars, → mn. 987.

However, the new ways of technology, information (via the internet) and communication (e.g. e-mail) also provide many new opportunities for criminals.

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7.6.1 Shaping the Crime Context

In the early days of the computer age, it was mainly hackers who gained access to foreign data systems. Cybercrimes were therefore thought of from the perspective of **cyber security**. This idea of security is still reflected today in various criminal offences. Yet, due to the increasing spread of the internet, electronic means of payment have also rapidly become common place on trading platforms, such as payment by credit card or online banking. Criminals have in turn developed various methods to collect credit card data and unlawfully enrich themselves.

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For example, the development of so-called **trojans**, which are designed to cause viruses and worms to disrupt the operation of computers, not only spy on passwords or codes. They are also designed with the goal of blackmailing the company by essentially holding the computer hostage. In this way, they hope to force the company to pay a sum of money to get the computer released.

The above example is intended to show that cybercrime can be divided into two groups. There are cybercrimes that are **classic crimes** but are committed via a computer, such as theft, extortion or fraud. In their essence, they are classic property crimes committed in new ways (namely through digitalisation). The effort required to commit such offences is much less than that required for the classic variants of these crimes.

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In addition to specific skills, a hacker only needs a powerful computer and the internet to gain access to a large company's data to paralyse them digitally.

But then there are cybercrimes that do not fit into the classic offences because they don't necessarily have to be committed with a computer. While robbery or extortion can be committed at gunpoint (and not necessarily via computer), the damage to computer systems by a cyber-attack **can only be done with digital media**. In this perspective, cybercrime is crime that is connected to the internet (e.g. cyber-grooming, i.e. deliberately influencing

¹⁶⁸Staffler L (2018), 269–274.

people on the internet with the aim of initiating sexual contact—in short, online sexual harassment).¹⁶⁹

Legislators worldwide have had the experience here that the fight against digital crime can hardly be won with the classic means of criminal prosecution. For this reason, the need to combat cyber-crimes beyond the classic means of the law has emerged.¹⁷⁰

687 There are various international approaches taken against cyber-crimes. One of the most important conventions in Europe is a 2001 **Council of Europe Convention against cyber-crime** (the so-called “Cyber Crime Convention” or “Budapest Convention”). Not only did it set a standard for European countries, but convinced many other important non-European industrial countries to join the convention.¹⁷¹

In terms of content, the Convention covers different types of cyber-crimes, namely both crimes against the integrity of data and data systems and offences committed using computer systems. The categories are:

- Crimes against the confidentiality, integrity and availability of computer data and computer systems.
- Classic property offences (computer-related offences) committed through the manipulation of machines.
- Content related offences such as child pornography or online hate speech.
- Violation of copyright protected positions on the internet.

7.6.2 Typology

688 Cyber-criminals apply a wide variety of attack methods.¹⁷² In the following section, computer fraud, hacking, phishing and computer viruses will be examined in more detail.

689 The basic characteristic of computer fraud is that the computer is used as a tool to commit the crime. Unlike most cyber-crimes, the integrity of hardware or software is not compromised, but something is done via computer, which ultimately results in financial loss. Examples include the misuse of access data on the internet, the manipulation of computer-assisted accounting or the more recent phenomenon of CEO fraud.

In **CEO fraud**, the perpetrator pretends to be part of the managing directorate of a company and convinces an employee of the company to transfer a large sum of money abroad. It is essential that the perpetrator appear credible. For this purpose, the perpetrator makes use of information that he can obtain, for example, from economic reports or commercial registers on the company’s homepage or advertising brochures. The

¹⁶⁹Cf. Stoibler C (2020).

¹⁷⁰Graf DK (2021b), 1015, 1020–1021.

¹⁷¹Graf DK (2021b), 1015, 1022.

¹⁷²See Graf DK (2021b), 1015, 1054–1076.

perpetrator then acts via e-mail with an address that sound similar to those in the company in order to initiate the fraudulent payment. Perpetrators usually ask the employee for special reasons to keep the transfer strictly secret, which often makes the employee feel flattered because of the special trust. This scam works particularly well in companies with strong authoritarian leaderships, where contradictions and doubts about the decisions from management are undesirable.¹⁷³

More sophisticated methods of CEO frauds are carried out by **deep fakes**. Deep fakes are photo, video or audio recordings that are generated or modified with the help of artificial intelligence. Algorithms make it possible to create entirely new photos, audios or videos based on existing material. This makes it possible to carry out CEO fraud in an even more sophisticated way using new technologies.¹⁷⁴

In the meantime, so-called **carding** has also become an increasingly popular phenomenon in internet fraud. In carding, a perpetrator orders goods, usually under a false name, with stolen credit card or account data from an account holder with an online internet mail order company. They then receive the ordered goods at an address that differs from the billing address, while the mail order company seeks to collect the invoice amount from the legitimate account holder.¹⁷⁵

Another form of cyber-crime is that of hacking. **Hacking** in the classical sense refers solely to the act of intruding into a foreign IT system by electronic means. The criminal relevant element already lies in the fact that a password-protected and thus locked system is penetrated without authorisation. After all, the security measures are designed to protect against unauthorised intrusion. A hacker overcomes this safety net and penetrates a secure data system.¹⁷⁶

In certain legal systems, this act alone is already punishable, whereas other legal systems do not consider this to be a criminal offence in itself. This is because in this form the data intrusion is neither economically relevant nor does it result in direct damage. Therefore, most criminal acts only take effect when further steps are taken by the hacker and their intentions are known. If the hacker wants to copy data or steal content for his/her own use, he/she is guilty of spying on data. If the data is trade secrets and he/she wants to use them in any way to his/her advantage, further criminal offences may possibly apply. If the hacker's goal is to manipulate data or software, the criminal offence of data modification must be examined. If the hacker wants to proceed with the intention of disturbing or destroying an IT system, then computer sabotage has to be checked. If the hacker wants to use documents obtained from the data modification or computer sabotage in order to emphasise deception in legal transactions, further elements of crime are to be examined.¹⁷⁷

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¹⁷³Bus S (2017), 410–416; Graf DK (2021b), 1015, 1073; Weyand R (2018), 720–721.

¹⁷⁴Lantwin T (2020), 78–82. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690046/EPRS_ATA\(2021\)690046_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690046/EPRS_ATA(2021)690046_EN.pdf).

¹⁷⁵Ceffinato T (2016), 464, 467; Ullenboom D (2018), 26–28.

¹⁷⁶Ernst S (2003), 3233.

¹⁷⁷Graf DK (2021b), 1015, 1054–1055.

In the context of advancing technology and artificial intelligence, it seems appropriate to complement the previous concept of hacking by a broader definition. According to a study by the Belfer Center (Harvard Kennedy School),¹⁷⁸ **hacking by artificial intelligence** is defined as the detection and exploitation of vulnerabilities and exploits of our social, economic and political system at computer speed and scale. It entails new risks that are inadequately covered by the norms on cybercrimes. It is to be expected that legislators will become active on a national and international level in the future to address this issues.

691 Next on the list is the cyber-crime of phishing. **Phishing** is an invented word that comes from password and fishing and it mainly affects the online banking sector. Phishing occurs when a perpetrator attempts to intercept online foreign access data to use this sensitive information to his/her advantage. Websites or emails are created for this purpose, which are made to look like the official website or email of the credit institution concerned. With the website or emails the targeted victim is asked to enter their account details.¹⁷⁹ In itself, pure phishing for data is unpunishable,¹⁸⁰ but because it is regularly committed with the intention of accessing online accounts to steal their contents, phishing often falls under the criminal offence of computer fraud.¹⁸¹

There is also more sophisticated phishing methods such as a kind of damage software that infiltrates a victim's computer to redirect the user to a fake website when they are trying to reach the authentic one. Such damage software secretly changes the data on the victim's computer. Therefore, in addition to computer fraud, data alteration is also a possibility here.¹⁸²

692 Last but not least are **computer viruses**, which are as old as IT systems themselves. This form of cyber-crime can occur in completely different forms and modes of action. The common denominator is that they make the network of the computer world their own and damage interconnected systems. For example, there are computer viruses that multiply themselves or useless data in such large numbers that the affected computer or computer network is overloaded. In this way the system slows down considerably or comes to a complete standstill.

Other computer viruses modify or delete data on the target computer, thus affecting the computer's operation. Damage is not only to the software on the infected computer, but sometimes also to the hardware. More sophisticated computer viruses infect the computer completely unnoticed, in order to secretly send data to the perpetrator or to allow him/her to access the system from outside. The perpetrator can then also control the system remotely. These viruses include keylogger programs or Trojans.

¹⁷⁸Schneider B (2021).

¹⁷⁹Popp A (2014), 3517.

¹⁸⁰Count JP (2007), 129–132.

¹⁸¹Kögel A (2007), 206.

¹⁸²Ceffinato T (2016), 464, 465–466; Graf DK (2021b), 1015, 1063–1066.

Ransomware is a new form of computer virus. These are damage programs that encrypt all the data on the target computer. The hijacked computer data is then used as blackmail because the victim is told they can only get the decoding key for a sum of money.¹⁸³

The class of computer viruses also includes **spam**, which is the mass sending of unsolicited emails in order to place a considerable load on the computer network or individual components of the computer system. Such messages are often sent in combination with other computer viruses. The targets of these computer attacks are manifold and, depending on their mode of action, different criminal offences of cyber-crimes may also be applicable.¹⁸⁴

In addition to the above-mentioned offences, cybercrime can include many others which cannot be described in detail here. This applies in particular to general internet crimes or questions of liability under data protection law.

Internet crimes affect the criminal liability of internet service providers. The practical significance of these provisions must be seen against the background that the digital presence of every company or content distributor on the internet must be measured according to these provisions. The corresponding criminal liability bases of service providers are regulated by special laws, such as the Telemedia Act in Germany or the Telecommunications Act in Austria.

Criminal data protection law, on the other hand, refers to how a company must process data with the proper and prescribed methods, but must also protect sensitive data, such as personal data. In order to minimise the corresponding liability risks, not only must the appropriate permits for processing data be obtained, but also the measures for proper data processing specified by law must be observed. Criminal offences here particularly concern the unauthorised disclosure or collection of protected data, especially if it is passed on for a fee or are carried out with the intention of enrichment or compensation.

Special criminal phenomena in connection with criminal data protection law are so-called **doxing**. This is understood to mean internet-based research (sometimes also by hacking, → mn. 690) and subsequent publication of personal data, which is carried out with malicious intent towards the persons concerned.¹⁸⁵ Such a procedure is usually only successful if data is provided in an illegal manner.

In the following, based on selected criminal offences under Austrian law, some provisions will be analysed.

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¹⁸³ Ceffinato T (2016), 464, 466–467; Graf DK (2021b), 1015, 1056, 1057.

¹⁸⁴ Graf DK (2021b), 1015, 1056–1061

¹⁸⁵ Kubiciel M and Grossmann S (2019), 1050–1055.

7.6.3 Damage to Electronic Data

695 § 126a StGB-AT: Damage to Electronic Data

(1) Any person who causes a detriment to another by way of altering, deleting, rendering useless, or suppressing any data that has been electronically processed, transmitted, or conveyed and that the person is not authorised to use or is not authorised to use on his or her own is liable to imprisonment for up to 6 months or a fine not exceeding 360 penalty units.

(2) A person who causes damage exceeding 5.000 € to the data is liable to imprisonment for up to 2 years.

(3) Any person who through the offence interferes with many computer systems by way of using software, computer passwords, login, or similar data that have been made, adapted, or by their particular nature are able to enable access, in whole or in part, to a computer system, is liable to imprisonment for up to 3 years.

(4) The person is liable to imprisonment for 6 months to 5 years if:

the offence caused damage exceeding 300.000 €;

the offence interferes with essential elements of critical infrastructure (§ 74 para. 1 subpara. 11); or

the person commits the offence as a member of a criminal association.

696 The **protected legal interest** of the penal provision is, on the one hand, the property and, on the other hand, the interest in the continued existence and availability of data. Not every damage to data is covered by the provision, but only a certain type and manner of damage, namely damage by altering, deleting, otherwise rendering unusable or suppressing data.¹⁸⁶

Since concrete success is achieved by the act, it is an **offence of result**. Because no specific characteristics are required as perpetrators, it is a general offence.¹⁸⁷

697 Two different reference values are named as the **object of the offence**. On the one hand, another person is named as the object of the offence, on the other hand, the automatically processed, transmitted or transferred data, which the offender is not or not alone allowed to dispose of.

According to its definition in § 74 StGB-AT, the term **data** refers to personal as well as non-personal data and programmes. In the context of this penal provision, it is about computer data, i.e. also data that is already on a data carrier—the mere storage is already sufficient to fulfil the definition of data processing.¹⁸⁸

The link drawn in § 126a StGB-AT between people and data indicates that only computer data can be objects of harm that have a certain value for the victim (e.g. exchange value or utility value, but also an affective value such as holiday photos).¹⁸⁹

¹⁸⁶Birklbauer A (2017), § 126a mn. 1–4; Rebisant G (2019), mn. 12–14.

¹⁸⁷Rebisant G (2019), mn. 15, 17.

¹⁸⁸Rebisant G (2019), mn. 20–21, 23–26.

¹⁸⁹Birklbauer A (2017), § 126a mn. 5; Rebisant G (2019), mn. 28–30.

In order for the penal provision to be fulfilled, the perpetrator must not be solely authorised to dispose of the data. The authorisation is measured by the allocation of the data and the right to dispose of the data. Therefore, for example, the operator of a cloud service for storing third-party data may be liable to prosecution if he/she intentionally deletes the data of his/her users that are processed on his/her servers.¹⁹⁰

The **acts of the offence** are explicitly described. On the one hand, this involves interventions in the data substance, i.e. changing, deleting or rendering it unusable, and on the other hand, it involves preventing access to data.¹⁹¹

Because data consists of certain character sequences, **changing** data means adding, modifying or deleting individual virtual characters.¹⁹²

Deletion, by contrast, is the physical, irretrievable removal of data from a data carrier. Furthermore, deletion also covers technical modification on data references so that the operating computer system releases the specific memory area of the data and it can be occupied by new data. Consequently, no access to the previous data is possible. Only when the data is irretrievably deleted, the variant of deletion is fulfilled (otherwise suppression or rendering unusable would have to be examined)—moving data to the recycle bin is therefore not yet sufficient because it is only a preliminary stage to deletion.¹⁹³

Making data unusable is linked to all actions that make the intended use of the computer data impossible.¹⁹⁴

Suppressing data is the permanent or temporary prevention of access to data, such as the unauthorised encryption of data.¹⁹⁵

The **success of the offence** is the financial loss resulting from damage to another person's data. However, the protected legal interest in the continued existence and availability of data, by contrast, is intended to limit the application of the criminal provision.¹⁹⁶ The interest no longer exists if a reasonably thinking person would no longer make an effort to restore the data, or if the person entitled no longer has any interest in the data, or if the reconstruction of the data would not involve any noticeable effort.¹⁹⁷

As far as the **subjective elements** of the offence are concerned, the offender must show intent with regard to all objective elements of the offence, whereby *dolus eventualis* is sufficient. If the offender knows that the victim has up-to-date and comprehensive backup copies, then he/she lacks the necessary intent to harm.¹⁹⁸

¹⁹⁰Birklbauer A (2017), § 126a mn. 6; Rebisant G (2019), mn. 27.

¹⁹¹Rebisant G (2019), mn. 31–33.

¹⁹²OGH 14.12.1995, 15 Os 131/95; Birklbauer A (2017), § 126a mn. 7; Rebisant G (2019), mn. 35.

¹⁹³Birklbauer A (2017), § 126a mn. 8; Rebisant G (2019), mn. 36.

¹⁹⁴Birklbauer A (2017), § 126a mn. 9; Rebisant G (2019), mn. 37.

¹⁹⁵Birklbauer A (2017), § 126a mn. 10; Rebisant G (2019), mn. 38.

¹⁹⁶Birklbauer A (2017), § 126a mn. 11; Rebisant G (2019), mn. 39.

¹⁹⁷Birklbauer A (2017), § 126a mn. 12; Rebisant G (2019), mn. 40.

¹⁹⁸Birklbauer A (2017), § 126a mn. 15; Rebisant G (2019), mn. 41–42.

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7.6.4 Fraudulent Misuse of Data Processing

701 § 148a StGB-AT: Fraudulent Misuse of Data Processing

(1) Any person who causes a financial or other material loss to another by interfering with the results of electronic data processing through design of the program, or through the entry, manipulation, deletion, or suppression of data, or through interference with the processing of data and who has the intention to gain an unlawful material benefit for himself, herself or a third person is liable to imprisonment for up to 6 months or a fine not exceeding 360 penalty units.

(2) Any person who commits the offence commercially or who causes damages exceeding 5.000 € is liable to imprisonment for up to 3 years; any person who causes damages exceeding 300.000 € through the offence is liable to imprisonment for 1 to 10 years.

702 The **protected legal interest** of this penal provision is property.¹⁹⁹

703 Two reference elements are named as the **object of the offence**, namely another person and the result of computer-assisted data processing. Such data processing is the sum of the steps of use connected in their sequence, which are ordered to achieve a result with regard to content, such as online banking systems.²⁰⁰ In contrast to the previous offence, it does not matter here whether the offender is allowed to dispose of the data processing or not.²⁰¹

704 Similar to § 126a StGB-AT, this is a penal provision which punishes explicitly enumerated conduct.²⁰² As **acts of the offence**, the provision mentions the influencing of an automatised data process. This influence must have been exerted by one of the behaviours explicitly enumerated in the penal norm.²⁰³

On the one hand, it is about the manipulation of the computer program or the manipulation of the data input or other influences. The input, modification, deletion or suppression of data to influence the result of data processing is oriented towards the definitions given above.²⁰⁴

On the other hand, a broad category summarises all other unlawful changes and effects on the data processing operation. This involves manipulating output functions of data processing, but also influencing the process while the programme is running (in real time).²⁰⁵

¹⁹⁹ OGH 3.4.1990, 15 Os 25/90; OGH 17.10.2019, 15 Os 104/19m; Birklbauer A (2017), § 148a mn. 1; Kirchbacher K and Sadoghi A (2020), § 148a mn. 2.

²⁰⁰ See OGH 1.6.2006, 12 Os 45/06v.

²⁰¹ Birklbauer A (2017), § 148a mn. 6.

²⁰² Cf. Kirchbacher K and Sadoghi A (2020), § 148a mn. 4–5 and 6–7.

²⁰³ Kirchbacher K and Sadoghi A (2020), § 148a mn. 9–10.

²⁰⁴ Birklbauer A (2017), § 148a mn. 7–11; Kirchbacher K and Sadoghi A (2020), § 148a mn. 13–20/1.

²⁰⁵ Birklbauer A (2017), § 148a mn. 12; Kirchbacher K and Sadoghi A (2020), § 148a mn. 21, 22–23.

The **result of the offence** is the direct damage to another person's property resulting from the influence exerted on the data processing process.²⁰⁶ **705**

For the **subjective elements**, intent is required, whereby at least *dolus eventualis* is required. This must extend to all objective elements of the offence. **706**

Furthermore, the penal provision requires that the offender must have the intention to unlawfully enrich himself/herself or a third party. Unjust enrichment exists basically if the offender has no claim to the increase in assets.²⁰⁷

7.6.5 Unlawful Use of a Computer System

§ 118a StGB-AT: Unlawful Use of a Computer **707**

(1) Any person who gains access to a computer system which the person is not authorised to use or not authorised to use by himself or herself, or who partially gains access to a computer system by overcoming specific security settings for the purpose of

1. Acquiring knowledge for himself, herself, or another unauthorised person of personal information, knowledge of which violates confidentiality interest worthy of protection, or
2. Causing a detriment to another by using the information to which the person gained access that is saved in the computer system and that is not for his or her attention or by using the computer system,

Is liable to imprisonment for up to 6 months or a fine not exceeding 360 penalty units.

(2) The person is liable to imprisonment for up to 2 years if the offence involves a computer system that is a significant component of critical infrastructure (§ 74 para. 1 subpara. 11).

(3) The perpetrator may only be prosecuted with the authorisation of the victim.

(4) The perpetrator is liable to imprisonment for up to 2 years if the offence under para. 1 is committed in connection with a criminal association; the person is liable to imprisonment for up to 3 years if the offence under para. 2 is committed in connection with a criminal association.

This penal provision is a computer offence intended to protect against indiscretions. The **protected legal interest** is therefore privacy, which is evident from the systematic classification under violations of privacy and certain professional secrets. Furthermore, in addition to privacy, data secrecy, safeguarding confidentiality, integrity and availability of computer data and computer systems are also mentioned. **708**

²⁰⁶Birklbauer A (2017), § 148a mn. 13.

²⁰⁷Birklbauer A (2017), § 148a mn. 14; Kirchbacher K and Sadoghi A (2020), § 148a mn. 24–26.

- 709** The criminal norm names the computer system or a part of such a computer system as the **object of the offence**.²⁰⁸ In addition to hardware and software, electronic products such as networks, chip cards (e.g. ATM cards), digital cameras, multifunctional devices and even washing machines and refrigerators are protected. Even the USB stick and other digital data carriers are covered because they can be considered part of such a computer system.
- 710** With regard to the **perpetrator**, it depends on whether he or she is either not allowed to dispose of this system or is not allowed to do so alone.²⁰⁹ What matters here is who has the right of disposal over the computer system.²¹⁰
- 711** The **offence act** is defined as gaining access to a computer system. It is about the offender obtaining the possibility to act within the computer system or with its resources. This is not about physical access to the hardware (e.g. someone gains access to the switched-off computer and its keyboard), but about having the possibility to use the automation-supported use of data and programmes.²¹¹
- However, the penal provision requires the perpetrator to overcome **specific security measures**. Only if such security precautions are in place, which are attached to the computer system and are sufficiently suitable to ward off a concrete attempt to misuse the system, is it possible to fulfil the offence.²¹² For example, password controls, firewall programmes or virus protection programmes are required—a locked door to the server room, by contrast, is not sufficient in order to fulfil the penal provision.²¹³
- The security measures are overcome if the perpetrator has to deal directly with defeating the device and devises a plan to overcome it. A minimum of “criminal energy” is needed here, e.g. phishing or coercing passwords.²¹⁴
- 712** The criminal act is **successful** when the perpetrator overcomes the security measures and thus has access to the computer system, which he/she is not allowed to dispose of or not alone.²¹⁵
- 713** The **subjective elements** of the offence are extremely complex. First of all, intent is required with regard to all objective elements of the offence.²¹⁶ In addition, numbers 1 and 2 establish certain requirements of intent.²¹⁷

²⁰⁸Reindl-Krauskopf S (2017), mn. 6–8.

²⁰⁹Reindl-Krauskopf S (2017), mn. 10, 12, 13.

²¹⁰Reindl-Krauskopf S (2017), mn. 14–18.

²¹¹Reindl-Krauskopf S (2017), mn. 20–21.

²¹²Reindl-Krauskopf S (2017), mn. 22–24, 25.

²¹³Reindl-Krauskopf S (2017), mn. 24.

²¹⁴Reindl-Krauskopf S (2017), mn. 26–29.

²¹⁵Reindl-Krauskopf S (2017), mn. 31, 33.

²¹⁶Reindl-Krauskopf S (2017), mn. 34.

²¹⁷Reindl-Krauskopf S (2017), mn. 35.

Number 1 requires that at the time of the offence, the offender must intend to obtain knowledge of personal data for himself/herself or another unauthorised person. The gaining of knowledge must violate interests in secrecy of the person concerned that are worthy of protection.²¹⁸

Number 2, on the other hand, does not refer to personal data alone, but to all data. Here, it is required that the perpetrator, at the time of accessing the computer system, acts with the intention of causing disadvantage to another person, either by using data stored in his/her system and not intended for him, or by using the computer system. The legislator intends here to criminalise the use of bot networks.²¹⁹

7.6.6 EU Data Protection Law (GDPR)

The General Data Protection Regulation (GDPR) creates another starting point for criminal conduct that can be committed by companies.²²⁰ The data protection law of the GDPR focuses on the processing of data, in particular of personal data.²²¹ While **data** is any information that serves the purpose of data processing, the **personal reference** (Art. 4 No. 1 GDPR) is present when the information relates to “an identified or identifiable natural person”.²²²

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Such data is **processed** (Art. 4 No. 2 GDPR) if it is collected, stored, modified or otherwise used automatically or manually. A special subset of these personal data is covered separately by Art. 9 GDPR, because they are particularly sensitive. These are e.g., health data or data relating to a person’s sexual orientation, for which more stringent requirements apply to permissible processing.²²³

The GDPR is based on the principle that all data processing is prohibited unless the data subject consents or a statutory authorisation applies (Art. 6 para. 1 GDPR and Art. 8 of the EU Charter of Fundamental Rights).²²⁴

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Art. 8 of the Charter of Fundamental Rights of the European Union:

(1) Everyone has the right to the protection of personal data concerning him or her.

²¹⁸Reindl-Krauskopf S (2017), mn. 36–38/1.

²¹⁹Reindl-Krauskopf S (2017), mn. 38/2–38/4.

²²⁰Cf. Dannecker G and Bülte J (2020), mn. 109f–109h; Dannecker G and Schröder T (2020) mn. 327–329.

²²¹Esser R (2020) mn. 36.

²²²Janicki T and Saive D (2019), 251, 252.

²²³Cf. also Art. 10 GDPR (Personal data relating to criminal convictions and offences): Esser R (2020) mn. 241.

²²⁴Esser R (2020) mn. 38.

- (2) Such data must be processed fairly for specified purposes and on the basis of the **consent** of the person concerned or some other **legitimate basis** laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
- (3) Compliance with these rules shall be subject to control by an independent authority.

In addition to legal authorisations, the **consent** of the individual affected by data processing of his or her personal data is therefore at the core.²²⁵ For a voluntary agreement to come into being, there are numerous prerequisites. According to Art. 4 No. 11 GDPR, consent is any freely given specific, informed and unambiguous indication of wishes in the form of a statement or other unambiguous affirmative act by which the data subject signifies his or her agreement to personal data relating to him/her being processed. Genuine voluntariness only exists if the data subject actually has a choice. This is only the case if he or she does not have to fear any disadvantages in case of refusal of his or her consent.

716 The GDPR defines some **guiding principle for data processing**. Data processing may only take place within the framework of a defined, clear and legitimate purpose (Art. 5 para 1 lit. b DSGVO). Furthermore, data processing must be aimed at minimisation (Art. 5 para 1 lit. c DSGVO). It must therefore not only be relevant to the purpose pursued, but also necessary and proportionate. Consequently, the type, scope and duration of processing must be limited, at best with the help of technical design (**privacy by design**, cf. Art. 25 para. 2 GDPR).²²⁶

In addition to superfluous data, inaccurate data must also be deleted or corrected without delay (Art. 5 para. 1 lit. d GDPR). The limitation of storage is also linked to this (Art. 5 para. 1 lit. e GDPR): the data processing company must independently review the achievement of the purpose in relation to the interest of the data subject at regular intervals in order to be allowed to continue storing the data.

Finally, the data processor (or company) must take all technical and organisational measures to ensure the integrity (freedom from manipulation) of the data and protection against unauthorised access and processing by third parties (confidentiality) (Art. 32 GDPR).²²⁷ At the same time, the GDPR gives individuals affected by data processing various rights in Art. 12 to 23 GDPR, including the right of access (Art. 15), rectification (Art. 16) and erasure (Art. 17).²²⁸

717 The possibility of imposing **sanctions (fines)** in the course of data protection law is provided for in Art. 83 GDPR. The supervisory authorities for data protection matters are thus to be given a directly usable sanctioning instrument in order to ensure a uniform level of data protection and to effectively enforce data protection law.²²⁹ While prior to the

²²⁵Cf. Uecker P (2019), 248–251.

²²⁶Cf. Janicki T and Saive D (2019), 251–256.

²²⁷Esser R (2020) mn. 37; Leeb CM and Liebhaber J (2018), 534, 536–538.

²²⁸Esser R (2020) mn. 39; Leeb CM and Liebhaber J (2018), 534, 538.

²²⁹Cf. Behr N and Tannen F (2020), 120.

GDPR, the obligation of EU Member States to introduce sanctions in case of infringements of the provisions of this Directive and to ensure compliance with data protection provisions was already laid down in Art. 24 of Directive 95/46/EC,²³⁰ practice showed that this was handled very differently in the EU countries and often insufficiently in practice. Therefore, the legal framework in the EU should now be made uniform.²³¹ This political sub-question was also politically sensitive because the EU member states did not transfer any criminal power to the European Union. Therefore, the EU could only use administrative sanctions.²³² Practice shows that the sanction possibilities of the GDPR are being used actively.²³³

The GDPR Enforcement Tracker provides an overview of fines and penalties imposed by data protection authorities within the EU under the EU General Data Protection Regulation: <https://enforcementtracker.com/>

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In order to effectively implement the GDPR standard on data protection in the EU,²³⁴ the EU legislator relies, among other things, on sanctions. They are only one of the possible consequences of violations of the provisions of the GDPR, especially since Art. 82 of the GDPR provides for the possibility of damages.

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The level of sanctions under Art. 83 GDPR is quite hefty. Art. 83 para. 4 GDPR provides for up to **2% of the annual worldwide turnover** in the preceding business year or 10 million €. Article 83 para. 5 GDPR, on the other hand, provides for the possibility of sanctions of up to **4% of the worldwide annual turnover** in the preceding business year or 20 million €. ²³⁵ At the same time, Art. 84 GDPR makes it clear that Art. 83 GDPR is merely a minimum standard and that EU Member States must provide for harsher sanctions if necessary.²³⁶

All in all, this is a very strong regulation with harsh sanctions. It is not surprising, that during the European legislative process there was a lot of lobbying (→ mn. 650) against this regulation. Ultimately, however, the **strong approach to regulation** could prevail over vague and weak regulatory proposals. This result would not have been possible without the revelations by EDWARD SNOWDEN (→ mn. 46) and the mobilisation of NGOs as well as the commitment of the EU Parliament.

²³⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities 23.11.1995, L 281/31.

²³¹ Cf. Leeb CM and Liebhaber J (2018), 534–538.

²³² Cf. Bülte J (2017), 460–470.

²³³ Behr N and Tannen F (2020), 120; Ebner SM and Schmidt A (2020), 84–88.

²³⁴ Leeb CM and Liebhaber J (2018), 534–536.

²³⁵ Behr N and Tannen F (2020), 120, 122.

²³⁶ Dannecker G and Bülte J (2020), mn. 109g.

720 Art. 83 GDPR:²³⁷ General Conditions for Imposing Administrative Fines

- (1) Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.
- (2) Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58 para. 2. When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:
 - a. the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
 - b. the intentional or negligent character of the infringement;
 - c. any action taken by the controller or processor to mitigate the damage suffered by data subjects;
 - d. the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;
 - e. any relevant previous infringements by the controller or processor;
 - f. the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
 - g. the categories of personal data affected by the infringement;
 - h. the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;
 - i. where measures referred to in Article 58 para. 2 have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;
 - j. adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and
 - k. any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.
- (3) If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total

²³⁷Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union 4.5.2016, L 119/1.

amount of the administrative fine shall not exceed the amount specified for the gravest infringement.

- (4) Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 10.000.000 €, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher:
 - a. the obligations of the controller and the processor pursuant to Articles 8, 11, 25 to 39 and 42 and 43;
 - b. the obligations of the certification body pursuant to Articles 42 and 43;
 - c. the obligations of the monitoring body pursuant to Article 41 para. 4.
- (5) Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20.000.000 €, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher:
 - a. the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;
 - b. the data subjects' rights pursuant to Articles 12 to 22;
 - c. the transfers of personal data to a recipient in a third country or an international organisation pursuant to Articles 44 to 49;
 - d. any obligations pursuant to Member State law adopted under Chapter IX;
 - e. non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 58 para. 2 or failure to provide access in violation of Article 58 para. 1.
- (6) Non-compliance with an order by the supervisory authority as referred to in Article 58 para. 2 shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20.000.000 €, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.
- (7) Without prejudice to the corrective powers of supervisory authorities pursuant to Article 58 para. 2, each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.
- (8) The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.
- (9) Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt

pursuant to this paragraph by 25 May 2018 and, without delay, any subsequent amendment law or amendment affecting them.

721 Structurally, the provision consists of several parts. First, it establishes the competence to sanction companies by the supervisory authority. For the description of the prohibited conducts, the GDPR uses the legislative technique of so-called **blanket offences**. In other words, the “penal” provisions refer to other (non-criminal-law) provisions and flank the conduct instructions with corresponding sanctions. Furthermore, the provision establishes uniform standards for the imposition of monetary sanctions on non-public bodies. According to the facts and the respective sanction frameworks (paras. 4 to 6), it provides uniform criteria for assessing the amount of the fine. The sanctioning of authorities and public bodies is addressed in para. 7.

722 The **circle of perpetrators** is named in Art. 83 para. 3 GDPR. The fines apply to the persons responsible or the controller/processor of the data processing. In connection with Art. 58 para. 2 of the GDPR, it is clear that offenders can be natural persons as controllers or processors (Art. 4 no. 7 and 8 GDPR).²³⁸ Legal persons or other institutions or bodies, which may also be controllers or processors and appear as undertakings, may also be the addressees of fines on the basis of EU law provisions.

EU law is based on a **functional concept of an enterprise** (→ mn. 787). Accordingly, an undertaking is any entity engaged in an economic activity, regardless of its legal form, the number of individual persons belonging to it and the way in which it is financed.²³⁹

- The provisions of the GDPR are also relevant for companies based outside the EU if these companies obviously intend to offer services (within the meaning of the GDPR)²⁴⁰ to persons in one or more EU countries.²⁴¹

²³⁸Venn N and Wybitul T (2021), 204, 206.

²³⁹Cf. Dannecker G and Schröder T (2020) mn. 329.

²⁴⁰See recital no. 23 GDPR 2016/679: “In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment. In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.”

²⁴¹Bühlmann L and Reinle M (2017), 8–12; Koloß S (2020), 791–818.

Art. 83 para. 1 GDPR contains the requirement to ensure effective fines. The supervisory authorities must ensure that the fines imposed are **effective, proportionate and dissuasive** (so-called minimum triad). In order to be dissuasive and effective, the actual economic capacity of the company must be taken into account.

Art. 83 para. 2 GDPR contains the **requirements** for the imposition of fines and the **assessment criteria**.²⁴² First of all, the provision provides the competence according to which supervisory authorities have the discretion to impose fines instead of or in addition to measures pursuant to Art. 58 para. 2 lit. a-h and j GDPR.²⁴³ This is intended in particular for minor infringements and to provide appropriate leeway, especially in the case of minor violations or in specific cases where a sanction would be disproportionate. The amount of the sanction itself is also at the discretion of the authorities. Due to the link to the amount of the global annual turnover, the upper limit may well be in the single-digit billion range.

Sanctions are imposed according to different aspects, which are explicitly explained. It is about

- the type, severity and duration of violations (lit. a).
- intentional or negligent commission of the violations (lit. b); intent requires knowledge and intention of the commission of the offence. Negligence, on the other hand, means the violation of the required duty of care despite individual foreseeability. This is therefore about the breach of the duty of care. This is assessed individually for the company concerned, taking into account its size, economic activities and data processing procedures.
- Measures to mitigate the damage caused to affected persons (lit. c), positive post-offence behaviour and compensation for damage can reduce the fine.
- Degree of responsibility taking into account technical and organisational measures taken pursuant to Art. 25 and 32 (lit. d); compliance programmes can be positively taken into account here. This is intended as an incentive to ensure that data processing complies with the law.
- Previous similar or identical breaches (lit. e); such breaches may be taken into account in an aggravating manner.
- Extent of cooperation with supervisory authorities to remedy or mitigate adverse effects (lit. f): This is particularly about the provision of evidence (e.g. from internal investigations).
- Categories of personal data (lit. g): the unlawful processing of special categories of certain personal data is taken into account as an aggravating factor (Art. 9 para.1; Art. 10 GDPR).

²⁴² Behr N and Tannen F (2020), 120, 122–126; Dannecker G and Schröder T (2020) mn. 332–334; Venn N and Wybitul T (2021), 204, 206–208.

²⁴³ Dannecker G and Schröder T (2020) mn. 335.

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- Manner in which the breach became known (lit. h): data protection breaches which the controller does not report or does not report correctly to the supervisory authority despite the obligation to report under Art. 33 and 34 DS-GVO) may be taken into account adversely.
- Compliance with previous measures ordered under Art. 58 para. 2 lit. i.
- Compliance with approved conduct or certification procedures under Art. 40 and 42 (lit. j): to the extent that such should be complied with.
- Other aggravating or mitigating circumstances (lit. k): this could be, for example, active obstruction to clarify the facts of the case, which has an aggravating effect.

726 If several infringements are committed, Art. 83 para. 3 GDPR provides for a **limitation of the amount of the fine** if several identical or interrelated processing operations are affected by the infringements.

727 Art. 83 para. 4, 5 and 6 GDPR contain a **catalogue of offences** in which sanctions may be imposed. In essence, these are references to the obligations that the GDPR imposes on controllers and processors, certification bodies and supervisory authorities. In addition, violations of the principles of processing, the rights of the data subject, transfers to third countries and international organisations, and instructions from the supervisory authority can also be sanctioned. In the legal literature, a distinction is made between formal and material violations. **Formal violations** concern breaches of administrative obligations, while **material violations** concern breaches of substantive principles of data processing.²⁴⁴

728 Art. 83 para. 7 GDPR, by contrast, provides for a national opening clause with regard to the imposition of fines on authorities and public bodies.

729 In order to impose sanctions under the GDPR, EU Member States must provide for **adequate procedural safeguards** in accordance with EU and national law, according to Art. 83 para. 8 GDPR. They must be granted not only to natural persons but also to legal persons. These include the fundamental judicial rights under the ECHR²⁴⁵ and the Charter of Fundamental Rights of the Union, namely in particular:

- a fair and public hearing within a reasonable time frame (Art. 6 para. 1 ECHR and Art. 47 para. 2 CFR),
- an effective right of appeal and defence (Art. 13 ECHR and Art. 47 para. 1 CFR),
- the presumption of innocence and the prohibition of self-incrimination (Art. 6 para. 2 ECHR and Art. 48 CFR),
- the principles of legality and proportionality (Art. 49 CFR),
- the prohibition of double jeopardy under Article 4 of Protocol VII to the ECHR and Article 50 of the CFR.

²⁴⁴Behr N and Tannen F (2020), 120, 122; Dannecker G and Schröder T (2020) mn. 326.

²⁴⁵Leeb CM and Liebhaber J (2018), 534, 535.

The procedural law for imposing sanctions is only fragmentarily specified in EU law. Therefore, national legislators use the opportunity to implement these requirements in national law.²⁴⁶ It should be noted, however, that EU law enjoys **primacy** of application.

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The fundamental measures to work in compliance with the GDPR and avoid sanctions are:

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- Art. 30 GDPR: Directory of processing activities
- Art. 37 GDPR: Appointment of a data protection officer
- Art. 28 GDPR: Recording and regulation of processing operations
- Art. 12 et seq. GDPR: Enforcement of possible data subject rights
- Art. 33 and 34 GDPR: Notification of breaches of protection

7.7 Capital Market-Related Offences

Sources of Law

- § Art. 154, 163 of the Austrian Federal Act on the Securities and General Commodities Exchange 2018
- § 298 et seq. StGB-DE
- Art. 23 et seq. Of the Law-FL of 24 November 2006 against abuse in trading with financial instruments
- Art. 40 et seq. of the Swiss
- Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading [former Att. 161 et seq. StGB-CH]

7.7.1 Shaping the Crime Context

The term “economy” is often associated first and foremost with shares or stock exchanges and thus with elements of the capital market. But what is the capital market? The **capital market** is the totality of all institutions and legal acts that serve to bring together the supply and demand for medium and long-term financial capital. In the capital market, goods, commodities and money are converted into other capital by purchasing shares or investing in other currencies or goods.

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Capital markets (stock exchanges or other trading systems) serve the economy to obtain cheap and longer-term debt capital. Companies seeking capital do not have to resort to

²⁴⁶Venn N and Wybitul T (2021), 204, 207–208.

credit institutions to generate debt capital but can issue securities for this purpose. Furthermore, they allow institutional investors and a broad public to invest money in expectation of the highest possible amounts.

The capital market therefore represents an **important component of the extended economic cycle**. Thus, it is a legitimate concern to prevent manipulation of the capital market, to maintain equality of opportunity between investors and to ensure the best possible functioning of the market.²⁴⁷

733 In order for the capital market to exist as an economic factor, it is regulated by a number of public and private law provisions. These regulations are collected in capital market law and include the rules for borrowing and trading investments, the individual protection of investors and the protection of the capital market or economy as a whole.

It is not surprising that this area of law combines a great many different legal matters (e.g. Stock Exchange Act, Securities Trading Act). In comparison with other legal matters, capital market law is **one of the most heavily regulated areas** of economic life. In addition to numerous regulations, specialised supervisory authorities examine the regular functioning of the capital market. As one can see, capital market law is a very dynamic subject that must be constantly updated and developed.²⁴⁸

734 Finally, it should be noted that the capital market offers globally operating companies the opportunity for debt financing. From a legal point of view, it therefore appears necessary to create the appropriate framework of conditions to be able to cooperate with foreign authorities in case of criminal misconduct.

For example, the stock exchange offences in Switzerland were precisely created in order to enable foreign (in particular US) criminal prosecution authorities to cooperate within the framework of international legal assistance in cases of insider trading and price manipulation.²⁴⁹

735 The high level of regulation and complexity of capital market law is also reflected in its offences. Offences under capital market law are generally very similar to the offences of fraud and embezzlement. However, at the same time they represent specific challenges of the capital market, which result from its complexity, lack of clarity and constant development, but also from the high degree of risk affinity investment business inherently has. When large sums of money circulate, there is a strong temptation for criminal forces to intervene in the market.

Crime in this sense can therefore affect financial markets. One example is the economic crisis of 2008 (→ mn. 47). Here, not only individual investors suffered financial losses, but the stock market crash even caused large-scale collapses in the stability of entire states or complexes of states.

²⁴⁷ Wohlers W (2021), 423, 426–427.

²⁴⁸ Wohlers W (2021), 423, 426–429

²⁴⁹ Wohlers W (2021), 423, 430–432.

Against this background, it is clear that criminal law is intended to regulate certain fraud-like (→ mn. 562) cases at the capital market level. Stock exchange offences are thus intended to ensure **equal opportunities for investors** and the **functioning of the capital market**. Market participants must be able to rely on the functionality of the market for the economy to function accordingly.²⁵⁰

Criminal law measures to protect capital markets provide for different types of offences. For example, two major criminal offences, namely insider trading and price manipulation, should be mentioned here. In the following, the penal provisions will be analysed on the basis of the Swiss legal system.

7.7.2 Exploitation of Insider Information

The first important criminal offence is the exploitation of inside information, which concerns the exploitation of confidential knowledge. While the offence was originally provided for in the StGB-CH (namely in former Art. 161 StGB-CH) and was only envisaged there as a special offence, in the course of a reform a new norm was introduced in the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FinMIA), which is now a general offence.

Art. 154 FinMIA-CH

- (1) A custodial sentence not exceeding 3 years or a monetary penalty shall be imposed on any person who as a body or a member of a managing or supervisory body of an issuer or of a company controlling or controlled by them, or as a person who due to their holding or activity has legitimate access to insider information, if they gain a pecuniary advantage for themselves or for another with insider information by:
 - f. exploiting it to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities;
 - g. disclosing it to another;
 - h. exploiting it to recommend to another to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.
- (2) Any person who through an act set out in paragraph 1 gains a pecuniary advantage exceeding one million francs shall be liable to a custodial sentence not exceeding 5 years or a monetary penalty.
- (3) Any person who gains a pecuniary advantage for themselves or for another by exploiting insider information or a recommendation based on insider information disclosed or given to them by a person referred to in paragraph 1 or acquired

²⁵⁰Wohlers W (2021), 423, 426–436.

through a felony or misdemeanour in order to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities shall be liable to a custodial sentence not exceeding 1 year or a monetary penalty.

- (4) Any person who is not a person referred to in paragraphs 1 to 3 and yet who gains a pecuniary advantage for themselves or for another by exploiting insider information or a recommendation based on insider information in order to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to securities shall be liable to a fine.

740 It must be clarified what inside information exactly is, when the information is relevant to the share price and what is meant by exploitation. But first, the circle of perpetrators must be defined in more detail.

Who is to be considered an **insider**? The term is very diverse. In total, three different groups of insiders are named in the law, namely primary insiders, secondary insiders and other persons.²⁵¹ First of all, insiders are those persons who, as a member or officer of management or a supervisory body of a company listed on the stock exchange, have access to insider information (so-called insider of management or supervisory body). They are thus persons who are at the management or decision-making level of a company, including actual management bodies which decisively shape the decision-making of the company's shareholders.²⁵²

Reality shows, however, that the term must be interpreted more broadly. For this reason, the relevant laws also include in the definition of insiders those persons who have access to internal information due to their activities. Thus, advisory professions such as lawyers, notaries, business consultants or tax advisors, but also financial institutions are included in this term.²⁵³ Furthermore, other persons are also included as insiders because they have access to corresponding insider information in the course of their work, such as employees of rating agencies or employees involved in designing or printing formation brochures or financial analysts. Of course, officials and members of a public authority (e.g. federal competition authority) must also be mentioned.²⁵⁴ Finally, the founders of a public limited company and its shareholders are also sometimes covered by the term insider.

What all these different groups have in common that insider information does not come to their attention by chance, but precisely because of **their nature in or their relationship with the company in question**. The characteristic of an insider is therefore functionally related to how the information comes to the knowledge of the respective person.²⁵⁵ In the

²⁵¹Leu N (2013), 261, 263–267; Pieth M (2016), 121–122; Wohlers W (2021), 423, 437.

²⁵²Pieth M (2016), 122; Wohlers W (2021), 423, 438.

²⁵³Wohlers W (2021), 423, 439–440.

²⁵⁴Wohlers W (2021), 423, 440–441.

²⁵⁵Wohlers W (2021), 423, 441–442.

following, the criminal liability of the primary insider is considered, i.e. those persons who fulfil the offence in Art. 154 para. 1 FinMIA-CH either as a corporate body, due to their activity and due to a participation, while the variant of the secondary insider (Art. 154 para. 3 FinMIA-CH) and the variant of other persons (Art. 154 para. 4 FinMIA-CH) are not considered in detail even if they are linked to the concepts and elements of the facts.²⁵⁶

The offence requires that the insider exploits or discloses inside information to another person. But what is inside information? In essence it is confidential information about companies. The **information** can be facts, i.e. provable events or occurrences in the past or present. It can be internal company information (e.g. application for patents, a chairman of the supervisory board), but it can also be information that is outside the company (e.g. a shortage of raw materials, threat of nationalisation). Future occurrences or events, such as forecasts or evaluations, are not covered by the term information. However, the term does cover the circumstances on which such future forecasts are based. The same basic idea applies to rumours and speculation. Although they are not covered by the concept of information, the circumstances on which they are based constitute information within capital market criminal law.²⁵⁷

An essential characteristic of insider information is confidentiality. **Confidentiality** means that the information is only known to a limited circle of people. In this respect, there is some overlap with the concept of secrecy (→ mn. 850). For the criminal offence of insider information, it is crucial to what extent information is available on the market. For example, information is no longer confidential if third parties can gain knowledge of it. In general, the interpretation of this criterion is subject to fierce debate. It seems clear that confidentiality is no longer given if it is accessible to a wider circle of investors or if it has been made public on the usual electronic information systems or in newspapers.²⁵⁸

For the application of criminal law, however, the information must be relevant to the share price. **Price relevance** means that the disclosure of information is likely to have a significant impact on the price of shares and other securities. This criterion is also difficult to grasp. It is debated, for example, that materiality is present if the independence of the company is compromised or if the company's legal or economic structures are significantly affected (e.g. by building up substantial minority shareholding). An additional difficulty arises from the fact that the price materiality must have been foreseeable or recognisable by the offender.²⁵⁹ It is notable that in this regard, for example, US law has developed the Reasonable Investor Test and the Probability Magnitude Test for this purpose. A price is considered to be significant if a reasonable investor would be likely to use the information as part of his/her decision to invest. The lower the probability of a circumstance occurring, the greater the significance of the circumstance must be.

²⁵⁶Wohlers W (2021), 423, 454–457.

²⁵⁷Leu N (2013), 261, 262–263; Pieth M (2016), 122–123; Wohlers W (2021), 423, 442–445.

²⁵⁸Leu N (2013), 261, 263; Pieth M (2016), 123; Wohlers W (2021), 423, 445–446.

²⁵⁹Pieth M (2016), 123; Wohlers W (2021), 423, 446–450.

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- 743** The aim of insider trading must be to **exploit**. Exploitation means that the perpetrator uses the knowledge of information to either carry out transactions himself/herself, to make a corresponding recommendation to someone else or to disclose the inside information as such to someone else. Here the point in time the act is committed is crucial, namely whether the inside information was still confidential at the time of the crime.²⁶⁰
- 744** To commit the crime, the perpetrator must create a **pecuniary advantage** either for himself/herself or for a third party. The pecuniary advantage can consist in the fact that the perpetrator makes a profit by the rising share price or avoids a loss when the share price falls. It is important that the pecuniary advantage is directly attributable to the exploitation of the knowledge gained from the insider information. The advantage can of course also be that the tipster sells the insider information. If the insider information has been passed on free of charge, the offender may be liable to prosecution if the information is subsequently exploited by the recipient of the tip leading to a financial advantage. If, on the other hand, the expected advantage does not materialise, an attempt may still be punishable.²⁶¹
- 745** With regard to the **subjective elements** of the offence, intent is required. The intent must relate to the intended pecuniary advantage and the objective elements of the offence, here *dolus eventualis* is sufficient. With regard to the confidentiality of the fact and with regard to the price relevance, it is disputed whether *dolus eventualis* is sufficient here as well, or whether certain knowledge is required.²⁶²

7.7.3 Price Manipulation

- 746** The second important criminal offence is the **manipulation of prices** and thus any attack on the unadulterated formation of prices.
- 747** **Art. 155 FinMIA-CH: Price Manipulation**
- (1) A custodial sentence not exceeding 3 years or a monetary penalty shall be imposed on any person who substantially influences the price of securities admitted to trading on a trading venue in Switzerland with the intention of gaining a pecuniary advantage for themselves or for another if they:
 - a. disseminate false or misleading information against their better knowledge;
 - b. effect acquisitions and sales of such securities directly or indirectly for the benefit of the same person or persons connected for this purpose.
 - (2) Any person who through activities set out in paragraph 1 gains a pecuniary advantage of more than one million francs shall be liable to a custodial sentence not exceeding 5 years or a monetary penalty.

²⁶⁰Wohlers W (2021), 423, 450–452.

²⁶¹Pieth M (2016), 124; Wohlers W (2021), 423, 452–453.

²⁶²Pieth M (2016), 124; Wohlers W (2021), 423, 453–454.

Unlike insider trading, price manipulation is an offence that any person can commit, including investors and journalists.²⁶³ Price manipulation is punished on the one hand because someone disseminates false or misleading information against his/her better judgment. On the other hand, it is punished if purchases and sales are made which are both directly or indirectly related to the account of the same person or persons for the purpose of manipulating a price. Price manipulation therefore distinguishes between **information** (false or misleading information) and **transactions** (purchases or sales related to the account of the same person).

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In the case of **information manipulation**, the perpetrator disseminates false or misleading information. The definition of information has already been given above, i.e. facts that relate to past or present events or occurrences and that are open to evidence. Information is false if it does not correspond to the real facts. It is therefore untrue information.

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Information is considered misleading if it is likely to lead to a misconception about facts. Irrespective of whether the information is true or false in itself, it is misleading if it is likely to cause the investing public to draw false conclusions. This is particularly the case if a relevant fact is presented in an ambiguous or incomplete manner. The dissemination of information is subject to criminal law if it reaches the market and has a certain effect there. It is irrelevant how information is disseminated.²⁶⁴

Transactions are in this case fictitious, in particular “wash sales” or “matched orders”. A wash sale is a sale of a security with loss followed by the repurchasing of the same or substantially identical security shortly before or after. A matched order is the purchase and sale of the same security by an individual or organised group of individuals with the intention of giving the impression of unusual trading activity in this security.

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The core issue is therefore **fraudulent behaviour**. In essence, these are real transactions. However, these transactions are made with the sole purpose of feigning trading activity.²⁶⁵

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With regard to the **subjective elements**, it is necessary that the offender acts with intent with regard to all features of the objective elements of the offence. In principle, *dolus eventualis* is sufficient. However, direct intent is required in the case of manipulation by information to the falsity and the misleading effect.

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The subjective elements are even more complex. At the time of the offence, the offender must have the intention of significantly influencing the prices. The intention must therefore concern the substantial distortion of prices. In addition, the offender must have the intention of gaining a pecuniary advantage either for himself/herself or for a third party.²⁶⁶

²⁶³Wohlers W (2021), 423, 458.

²⁶⁴Pieth M (2016), 125; Wohlers W (2021), 423, 458–460.

²⁶⁵Pieth M (2016), 125–126; Wohlers W (2021), 423, 460–461.

²⁶⁶Pieth M (2016), 126–127; Wohlers W (2021), 423, 461–463.

7.8 Competition Offences

Sources of Law

- § 309 StGB-AT
- § 1 et seq. UWG-AT
- §§ 298 et seq. StGB-DE
- §§ 16 et seq. UWG
- § 309 StGB-FL
- Art. 3 et seq., 22 et seq. UWG-FL
- Art. 3 et seq., 23 et seq. UWG-CH

7.8.1 Shaping the Crime Context

753 Competition law is designed to ensure fair and undistorted competition in the interest of all parties. But what would unfair and distorted competition look like? It would be any **deceptive or incorrect behaviour or business practice** that affect the relationship between economic competitors or between the supplier and buyer. In order to fulfil this purpose, competition law provides for a large number of rules, including civil law rules, but also some penal rules. These penal provisions vary considerably from one legal system to another. Yet, the legal systems of EU member states contain provisions which are of relevance to competition criminal law. The legal field is therefore extremely complex. At the same time, it is an area of law which is accompanied by considerable risk in terms of sanctions. Sanctions under competition law are regularly calculated on the basis of turnover under economic power of companies, which is why the amount of such a penalty can be extremely considerable.

754 In order to approach criminal law for the protection of competition thematically, it is advisable to take a look at the **protected legal interests**. In the literature,²⁶⁷ the view is held that criminal offences protect the property-related interests of individuals (e.g. protection of the freedom of choice of customers against particularly aggressive sales methods) and the protection of the general public (e.g. protection of an efficient economy). The latter also comes in the form of protection of certain institutions (e.g. protection against corruption). Even this brief introduction shows that criminal law in the area of competition law makes certain practices of economic life punishable, but falls back on concepts of criminal law that are already known from other contexts (corruption, protection of secrets). For an first insight into the criminal law for the protection of competition, the prototype of a criminal offence of unfair competition can be used, namely **misleading advertising**.²⁶⁸

²⁶⁷ See Brammsen J (2020), § 16 UWG mn. 11–13.

²⁶⁸ Cf. Brammsen J (2020), § 16 UWG mn. 19.

7.8.2 Criminal Relevant Advertising

§ 16 UWG-DE: Advertising Incurring Criminal Liability

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- (1) Whoever, with the intent of creating the impression of a particularly favourable offer, misleadingly advertises while using false statements in public announcements, or in communications directed towards a wider audience, shall be liable to imprisonment not exceeding 2 years or to a fine.
- (2) Whoever in the course of trade operates to cause consumers to purchase goods, services or rights by holding out the prospect of consumers obtaining specific benefits from the promoter himself/herself or from a third party if they cause other persons to conclude equivalent transactions where, in terms of this kind of advertising, these other persons are, in turn, to receive such benefits for corresponding advertising directed towards further purchasers shall be liable to imprisonment not exceeding 2 years or to a fine.

§ 16 UWG-DE contains two different penal provisions in connection with advertising, namely misleading advertising (para. 1) and criminal progressive customer advertising (para. 2).²⁶⁹

7.8.2.1 Misleading Advertising (Para. 1)

At first glance, it is noticeable that the provision in para. 1 is a special case of fraud (§ 263 StGB-DE, → mn. 571), but dispenses with the pecuniary loss of the addressee of the advertisement and with the error. In this respect, the offence basically protects **business competitors** in competition as well as the **freedom of disposition of the consumer**. The second para. in § 16 UWG, by contrast, regulates progressive customer advertising.

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Since this provision must be seen in the context of the law against unfair competition (systematic interpretation, → mn. 223), the purpose of the criminal provision is thus to **protect competition**, as already emphasised above. In this respect, it can be seen that the aim of the provision here is first and foremost to protect **consumers** against disposing assets on the basis of unfair advertising.

However, this is not enough, because the legal context is also intended to protect **competitors** from competitive disadvantages and, even further, to protect the **general public** in order to maintain effective competition.²⁷⁰

This provision is formulated as an **abstract endangerment offence** (→ mn. 248). This means that no proof of financial disadvantage to the advertised customer is required for liability, nor is it necessary to prove that the competition was influenced by the disadvantage of other competitors. At the same time, the proximity of this offence to fraud is evident, → mn. 562, which is also about deceiving and misleading the victim. While fraud

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²⁶⁹Brammsen J (2020), § 16 UWG mn. 10; Ebert-Weidenfeller A (2019), 460, 464.

²⁷⁰Ebert-Weidenfeller A (2019), 460, 464–465; Hohmann S (2019), mn. 1–3.

is a result offence, misleading advertising is already effective in advance because it represents an abstract offence of endangerment.²⁷¹

758 Central to the fulfilment of the criminal offence are advertisements or information that the offender makes available to a larger circle of people in a public announcement. **Advertising** means any statement made in the course of trade, business, craft or liberal professions which serves the purpose of promoting the sale of goods or the provision of services.²⁷²

In the law against unfair competition, the legislator does not use the term “factual claims”, as is known, for example, from fraud (→ mn. 562), but uses the term “**statements**” here. This refers to all statements that relate to specific external or internal events or conditions in the past or present.²⁷³ Evaluations or forecasts are only included in the scope of application if they have a verifiable circumstance.²⁷⁴

759 In this respect, there is a functional relationship between

- the term “fact” from criminal fraud (→ mn. 562),
- the term “information” from insider trading, and
- the term “statement” in competition law.

760 The statements must contain **serious assertions**. The form of expression of a statement is irrelevant. The statement may be made in writing or orally, by image, sound or print, explicitly or conclusively, and also by gestures.

Practical difficulties arise in competition law in the case of sales appeals, **exaggerations** and recommendations. Such activities do not belong to the category of factual claims, but to evaluations, and yet are associated with product descriptions. In practice, however, there are difficulties in making a clear distinction between fact-based statements and purely subjective evaluations.

Why is this important? If the advertising statement is an expression of an evaluation, then it is considered as an expression of opinion, which is why they enjoy corresponding protection as a fundamental right. Conversely, if the ad statement is a pure statement of fact, there is no protection from fundamental rights and in this case, it is solely a matter of whether the factual assertion is true or untrue. One must therefore always first clarify whether a statement in question is a statement of fact or an expression of opinion. Depending on this classification, the company has various options to react to unfavourable or even unfair advertising.²⁷⁵

²⁷¹Ebert-Weidenfeller A (2019), 460, 465; Hohmann S (2019), mn. 5

²⁷²Brammsen J (2020), § 16 UWG mn. 3–42; Ebert-Weidenfeller A (2019), 460, 465; Hohmann S (2019), mn. 27–28

²⁷³Hohmann S (2019), mn. 15.

²⁷⁴Hohmann S (2019), mn. 16.

²⁷⁵Ebert-Weidenfeller A (2019), 460, 466, 467.

Unlike for the acts under civil law (in § 3 and 5 UWG-DE), criminal liability under § 16 para. 1 UWG-DE requires that the offender misleads by making **false statements**.²⁷⁶ The falsity of the statements must be measured against an objective standard. A statement is untrue if its actual content does not correspond to the objective facts. Therefore, the question of whether the claims are untrue does not depend on the perceptions of the public to which the advertising is addressed.

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How is untruthfulness determined? When examining and assessing the truth of a claim, the wording of the claim must be taken as a basis. It must be assumed that the claim corresponds to its literal meaning and is also understood in this way by the public. The definition must therefore be made in an objective, generally valid manner. The decisive factor is whether the group of persons addressed by the advertisement understands the claim uniformly in a defined sense. The fact that a few persons understand it differently does not prevent this.

A statement that **conceals** material circumstances is also untruthful if these circumstances first reveal the true content of the business circumstances. Therefore, the advertiser may be obliged to clarify the facts. The concealed statement is given if the public can be deceived in an essential circumstance that is capable of influencing the business decision if the information is omitted. However, a prerequisite for the criminal liability of concealing material information for the addressees is that the omission corresponds to the realisation of the offence by doing, in this case by making untrue statements. The offender must therefore have a criminally relevant duty to disclose the material fact.²⁷⁷

Furthermore, the facts of the case require the **ability to mislead**. The question of whether an advertisement is misleading depends on how the addressees understand it on the basis of its overall impression. In assessing whether the withholding of information is misleading, the nature of the means of communication is also important. Consideration of the importance of the means of communication serves above all to limit the information requirements to a reasonable extent in the case of low-value objects of daily use. The scope of the information must be appropriate to the means of communication used in terms of subject matter, space and time. After all, the suitability to mislead will have to be oriented towards the average consumer.²⁷⁸

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Because this is a criminal provision in the context of competition law, the misleading advertising must be capable of **noticeably impairing** the interests of competitors, consumers or other market participants. This is intended to exclude petty cases from the scope of application of the criminal provision.

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²⁷⁶Brammsen J (2020), § 16 UWG mn. 51–53; Ebert-Weidenfeller A (2019), 460, 465–466; Hohmann S (2019), mn. 20–23.

²⁷⁷Ebert-Weidenfeller A (2019), 460, 466; Hohmann S (2019), mn. 24–25.

²⁷⁸Brammsen J (2020), § 16 UWG mn. 43–46; Ebert-Weidenfeller A (2019), 460, 466–467, 468–469; Hohmann S (2019), mn. 29.

The extent to which unfair conduct is capable of noticeably distorting competition must be assessed according to objective and subjective elements, taking into account all circumstances of the individual case. This includes the assessment of the nature and gravity of the infringement, the expected effects on competition as well as the protective purpose of competition law. An advertisement is liable to mislead if it can cause even a part of the public addressed by the advertisement to believe it to be true.²⁷⁹

764 Misleading advertising by means of untrue statements must have a **certain public reach**. For the offence to be committed, the advertising must be provided for in public announcements or in particulars in communications intended for a wider circle of persons.²⁸⁰ Public announcements reach the general public and are deemed to exist if a medium is used in which the user of the medium can no longer determine the circle of addressees himself/herself. What matters is the indefiniteness and indeterminability of those whom the advertisement is intended to reach.²⁸¹ In the case of **communication intended for a larger circle of persons**, it is not required that the information is addressed to the general public. The communication must merely be addressed to a larger circle of persons. In order to determine this circle of persons, one has to look at the case law—individual advertising and advertising in smaller groups shall in any case not fall under this criminal provision.²⁸²

765 As far as the **subjective elements** are concerned, intent is generally required with regard to all objective elements of the offence.²⁸³ In addition, there must be the intention to create the **appearance of a particularly favourable offer**. The offender must be proven to have this purposeful striving. Since it is only a matter of the appearance of favourability, it is not important whether the offer is actually favourable or not. The offender is concerned with creating the appearance of a “particularly” favourable offer. Generally customary advantages are not sufficient. The wording requires a clear increase of the effect the offender wants to achieve by his/her advertising with regard to his/her offer by adding the word “particularly”. Finally, there must be the intention that the offender wants to evoke the link between the false statement and the offer through the advertising.²⁸⁴

7.8.2.2 Criminal Progressive Customer Advertising (Para. 2)

766 Progressive customer acquisition systems are characterised by the fact that the recruited persons are offered the prospect of amortising (and multiplying) a service that they initially

²⁷⁹Hohmann S (2019), mn. 30–31.

²⁸⁰Brammsen J (2020), § 16 UWG mn. 54; Ebert-Weidenfeller A (2019), 460, 469; Hohmann S (2019), mn. 33.

²⁸¹Hohmann S (2019), mn. 34–35.

²⁸²Brammsen J (2020), § 16 UWG mn. 55–57; Hohmann S (2019), mn. 36–41.

²⁸³Brammsen J (2020), § 16 UWG mn. 59; Hohmann S (2019), mn. 42, 43.

²⁸⁴Brammsen J (2020), § 16 UWG mn. 60–63; Ebert-Weidenfeller A (2019), 460, 469–470; Hohmann S (2019), mn. 44–50.

have to provide by recruiting further persons who do the same. In other words, the profit is supposed to come from the fact that the recruiter benefits from the services of those directly or indirectly recruited. This has two different consequences. Firstly, the number of recruits may increase enormously because each recruit in turn recruits a large number of people for the system. At the same time, the chance for the newly recruited to recruit the required number of new persons themselves decreases, which ultimately causes the collapse of the system. In essence, therefore, this is about the prohibition of “**pyramid or ponzi schemes**”.²⁸⁵

The provision states that this offence is basically aimed at protecting the consumer. A **consumer** in this sense is any natural person who acts in business transactions for private purposes and thus for purposes that are not attributable to his or her commercial or independent professional activity. As already mentioned, the **protected legal interest** is therefore the property, but also the protection of competitors from competitive disadvantages and, ultimately, the protection of the general public in order to maintain effective competition.²⁸⁶

Structurally, the provision is an **abstract endangerment offence**. The penal provision is limited to the description of a (legally undesirable) offence, i.e. inducing consumers to accept goods, services or rights by means of promises of benefits, if they in turn induce others to accept them through similar transactions. With the initiation, the offender has already completed the offence. It is therefore irrelevant whether the recruited person was actually deceived, enticed by aleatory inducements or whether his/her assets were damaged.²⁸⁷

The elements of the offence are linked to a specific **act**, but not to specific systems (such as snowball systems, pyramid schemes, gift circles, chain letters and the like). According to the description in the penal provision, the criminal acts set systems in motion that are described as snowball systems, pyramid or ponzi schemes (etc.), without this categorisation itself being part of the offence.²⁸⁸ The wording presupposes that the offender undertakes an activity in the **course of business**. This means any independent activity pursuing economic purposes in which participation in gainful activity is expressed. The offence must take place in this context.²⁸⁹

The criminal acts can be summarised under the expression “inducing”. **Inducing** is to be understood in broad terms. The act itself must be aimed at inducing the person addressed to purchase goods, rights or services. The realisation of the next advertising stage, namely the

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²⁸⁵Brammsen J (2020), § 16 UWG mn. 82–102; Ebert-Weidenfeller A (2019), 460, 472–474; Hohmann S (2019), mn. 60, 68.

²⁸⁶Ebert-Weidenfeller A (2019), 460, 472; Hohmann S (2019), mn. 60.

²⁸⁷Ebert-Weidenfeller A (2019), 460, 473–474; Hohmann S (2019), mn. 63–64.

²⁸⁸Brammsen J (2020), § 16 UWG mn. 107–114; Ebert-Weidenfeller A (2019), 460, 476–477; Hohmann S (2019), mn. 69–72.

²⁸⁹Brammsen J (2020), § 16 UWG mn. 116–116a; Ebert-Weidenfeller A (2019), 460, 474, 475; Hohmann S (2019), mn. 74–77.

advertising aimed at further customers, is not a prerequisite for the offence.²⁹⁰ The nature and content of the **offender's promise** is the central core of this criminal provision. Without the promise, the offence would be distribution via laypersons or advertising with benefits, which in each case does not constitute prohibited behaviour. The promise is directed to granting an advantage in the future. A further prerequisite of the provision is the link between the victim and the promise, so that victim of the crime was or can be motivated by the promise of the offender. The criminal conduct must hold out the prospect of an advantage to the recruited person. An **advantage** is any benefit of a material or immaterial nature that improves the recipient of the advantage and to which he/she has no legally justified claim.²⁹¹ The promise of benefits is only punishable if the consumers addressed are themselves to engage in advertising in such a way that they induce other consumers to conclude similar transactions. It is therefore a question of this **repetition phenomenon**, since the recruitment should in turn have as a condition that the recruited persons should acquire further recruiters in accordance with this type of advertising.²⁹²

771 The penal provision names the **consumer** as the victim of the offence. The decisive point in time for the consumer status is the moment when the advertising addressees are confronted for the first time with by the sales concept of the organiser in such a way that the advertising is to lead directly to the purchase of the product (etc.).²⁹³

772 As far as the **subjective elements** are concerned, the offence can only be committed intentionally, whereby *dolus eventualis* is sufficient. All prerequisites of the offence involve intent.²⁹⁴

7.8.3 Bribery in Commercial Practice

773 Criminal law norms for the protection of competition are not only found in Unfair Competition Acts. A large number of norms can also be found in the Criminal Code itself. These include private bribery, bribery in health care. In the following, bribery between private individuals in commercial practices will be examined in greater detail.²⁹⁵

774 § 299 StGB-DE: Taking and Giving Bribes in Commercial Practice

(1) Whoever, in commercial practice in the capacity as an employee or agent of a business,

²⁹⁰Ebert-Weidenfeller A (2019), 460, 474; Hohmann S (2019), mn. 78–80.

²⁹¹Ebert-Weidenfeller A (2019), 460, 474–475; Hohmann S (2019), mn. 81–84.

²⁹²Brammsen J (2020), § 16 UWG mn. 130–131; Hohmann S (2019), mn. 85–91.

²⁹³Ebert-Weidenfeller A (2019), 460, 475; Hohmann S (2019), mn. 92–96.

²⁹⁴Brammsen J (2020), § 16 UWG mn. 132–133; Ebert-Weidenfeller A (2019), 460, 477; Hohmann S (2019), mn. 97.

²⁹⁵Cf. Teixeira A (2018).

3. demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for giving an unfair preference to another in the competitive purchase of goods or services in Germany or abroad or
4. without the permission of the business demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for performing or refraining from performing an act in the competitive purchase of goods or services, thereby breaching the duty incumbent on them towards the business,

incurs a penalty of imprisonment for a term not exceeding 3 years or a fine.

(2) Whoever, in commercial practice,

1. offers, promises or grants a benefit to an employee or agent of a business or a third party in return for giving that person or another an unfair preference in the competitive purchase of goods or services in Germany or abroad or
2. without the permission of the business offers, promises or grants an employee or agent of a business or a third party a benefit in return for performing or refraining from performing an act in the competitive purchase of goods or services, and thereby breaches the duty incumbent on them in relation to the business,

incurs the same penalty.

The implementation of this provision in the Criminal Code—previously it was even provided for in the Law against Unfair Competition (§ 12)—should raise awareness that corruption in business transactions is not only a wrong in the economy, but is even generally to be disapproved of from a social-ethical point of view.²⁹⁶ Structurally, the provision serves the domestic implementation of European²⁹⁷ and international legal acts, namely

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- EU Joint Action on corruption in the private sector;²⁹⁸
- EU Framework Decision **on combating corruption in the private sector**;²⁹⁹
- Council of Europe Criminal Law Convention on Corruption.³⁰⁰

²⁹⁶Dannecker G (2017), mn. 1–3; Krick C (2019), mn. 1–14.

²⁹⁷Dannecker G and Bülte J (2020), mn. 102–104.

²⁹⁸Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, Official Journal of the European Community 31.12.1998, L 358/2.

²⁹⁹Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Official Journal of the European Union 31.7.2003, L 192/54.

³⁰⁰Art. 7 and 8 of the Criminal Law Convention on Corruption, 27.1.1999.

- 776 The **protected legal interest** of the provision is first and foremost the general interest in fair conditions of competition. In this way, the provision protects competition from unfair influence, which is likely to promote unlawful decisions in the market. In addition to this general interest in fair conditions of competition, the interest in the assets of the principal is also protected, as well as—with regard to individual provisions—the interest in the assets of competitors. The protected interest is not limited to German competitors and competition in Germany—foreign competitors and foreign competition are expressly included.³⁰¹
- 777 Structurally, the norm is conceived as an **abstract endangerment offence**. Thus, neither the occurrence of a pecuniary advantage nor a concretely dangerous condition is relevant.³⁰² Because the penal provision was designed in accordance with the general bribery provisions, the penal provision mentioned here fundamentally distinguishes between passive bribery in para. 1 and active bribery in para. 2.³⁰³
- 778 The following is about passive bribery (para. 1). The circle of **perpetrators** is described in detail, i.e. they are employees or agents of companies.³⁰⁴ The concept of a company is very broad and covers any regular participation in economic transactions by means of the exchange of services that is intended to last for a certain period of time. Purely private (non-economic) activity is not covered, nor is illegal business activity (e.g. prohibited activity such as drug trafficking).³⁰⁵ An employee is someone who is in a service relationship, contract relationship or work relationship with the owner of a business and must follow the owner's instructions.³⁰⁶ The owner of the business, by contrast, is not a suitable offender, because he/she is basically free in his/her decision on the purchase of goods and services.³⁰⁷ An agent is someone who, by virtue of his or her position, is entitled and obliged to act on behalf of the enterprise and can influence the operational decision without being a business owner or employee himself or herself.³⁰⁸
- 779 The offence occurs in a **business context**. Therefore, all measures that serve to promote any business purpose are covered. Purely private activities, e.g. acquisitions for personal use, are excluded.³⁰⁹
- 780 The **acts** of requesting, promising and accepting an advantage for oneself or a third party are referred to as acts of the offence. Analogous explanations apply to corruption

³⁰¹ Dannecker G (2017), mn. 5–20; Krick C (2019), mn. 15–16.

³⁰² Dannecker G (2017), mn. 21'; Krick C (2019), mn. 17.

³⁰³ Krick C (2019), mn. 18.

³⁰⁴ Dannecker G (2017), mn. 28–45; Krick C (2019), mn. 19–53.

³⁰⁵ Dannecker G (2017), mn. 40–45; Krick C (2019), mn. 52–53.

³⁰⁶ Dannecker G (2017), mn. 29–33; Krick C (2019), mn. 23–30.

³⁰⁷ Dannecker G (2017), mn. 31; Krick C (2019), mn. 20–22.

³⁰⁸ Dannecker G (2017), mn. 34–39; Krick C (2019), mn. 31–51.

³⁰⁹ Dannecker G (2017), mn. 47–49; Krick C (2019), mn. 54.

offences.³¹⁰ An **advantage** is any gratuitous benefit of a material or immaterial nature that objectively improves the recipient's situation in economic, legal or personal terms and to which the recipient is not entitled per se. The advantage must be demanded, promised or accepted as consideration in the purchase of goods or services for a future unfair advantage (No. 1) or the performance or omission of an act and a related breach of duty towards the trader (No. 2).³¹¹

The objective of the **unlawful agreement** (→ mn. 602) must be a preferential treatment in domestic or foreign competition in the future (no. 1) or an act or omission that violates obligations towards the entrepreneur (no. 2). In competition according to variant no. 1 means that the intended preferential treatment exists within an economic competitive relationship between the beneficiary or the provider of the advantage and the competitors. The preference must relate to the purchase of goods or services. The intended preferential treatment must be objectively suitable to be at the expense of competitors. In this context, any intended favourable position of the perpetrator or a third party favoured by him, to which he/she or the third party is not entitled, is to be regarded as preferential treatment. The preferential treatment is considered unfair if it is not based on objective criteria, measured by "free" competition, but is guided by the demanded advantage. Since no. 1 protects the principal, he/she can declare "consent", so that the offence is excluded.³¹² The breach of duty according to no. 2 means that the agreement is aimed at an act or omission that violates duties. These can be based on law, contract, but also on the right of direction under labour law. Since no. 2 protects the principal, he/she can declare "consent", so that the offence is excluded.³¹³

The offence in para. 2, by contrast, is not limited to employees or agents. Competitors or persons acting on their behalf may be considered as **perpetrators**.³¹⁴ Offering, promising or granting an advantage to an employee or agent of the enterprise for the purchase of goods or services in return for a future preference or for an act or omission which violates obligations towards the entrepreneur are named as **acts** of the offences. This is therefore the mirror image of para. 1 no. 1 and 2.³¹⁵ The unlawful agreement is again directed at a future unfair advantage in competition.³¹⁶

In all **subjective elements** of the offence, the offender must act at least with conditional intent with regard to all characteristics of the objective elements of the offence. This includes in particular the perpetrator's position and the context of the wrongful agreement.

³¹⁰Cf. Dannecker G (2017), mn. 50–53; Krick C (2019), mn. 62–66.

³¹¹Dannecker G (2017), mn. 54–63; Krick C (2019), mn. 55–61.

³¹²Dannecker G (2017), mn. 65–89; Krick C (2019), mn. 67, 68–77.

³¹³Dannecker G (2017), mn. 90–97; Krick C (2019), mn. 78–91.

³¹⁴Dannecker G (2017), mn. 105–106; Krick C (2019), mn. 95.

³¹⁵Dannecker G (2017), mn. 107–110; Krick C (2019), mn. 96–100.

³¹⁶Dannecker G (2017), mn. 110–113; Krick C (2019), mn. 101–108, 109.

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In para. 1 no. 2 and para. 2 no. 2, the intent must in particular be that the entrepreneur has not consented.³¹⁷

7.9 Cartel Offences

Sources of Law

- Art. 101, 102 TFEU, Directive 1/2003 [EU]
- Austrian Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (KartG-AT)
- German Gesetz gegen Wettbewerbsbeschränkungen (GWB-DE)
- Gesetz gegen den unlauteren Wettbewerb (UWG-FL)
- Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (KG-CH)

In Liechtenstein, there is no national cartel law. The Liechtenstein Office of National Economy is responsible for the implementation of the competition rules in the European Economic Area, unless the courts have jurisdiction.

7.9.1 Shaping the Crime Context

784 Another area of law that also deals with the protection of competition is antitrust law. Like the other fields of law dealing with competition, this particular field is also intended to protect the pursuit of **economic activity** for profit under the model of **free competition**.³¹⁸ Free economic competition sets the framework conditions for achieving the highest economic efficiency and the greatest possible freedom for participants in the economic market. Indeed, historical experience has shown that competition, which can prevent monopoly power positions, is the most likely way to achieve the goal of optimal economic prosperity.³¹⁹ Because threats to free competition can take very different forms, for example through recourse of unfair means, but also through secret agreements between companies, different areas of law have developed. Antitrust law is one of them and is becoming increasingly important in a globalised economy.

³¹⁷Dannecker G (2017), mn. 98–100, 114, 116–117; Krick C (2019), mn. 92–94, 110–112.

³¹⁸See Art. 119 para. 1 TFEU: „[...] For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is [...] conducted in accordance with the principle of an open market economy with free competition.“

³¹⁹Dannecker G and Dannecker C (2020), 485, 496–497.

What is antitrust law about? Antitrust law is about the control of competition and thus about competition policy.³²⁰ In particular, it aims to combat restrictions to competition.³²¹ This is probably best illustrated by the central elements of antitrust law, which are defined at the European Union level. These main elements are about prohibiting an agreement that restricts competition, using a dominant position to abuse and exploiting market power, which distorts fair and free competition. The attentive reader will notice that this is an area of law that emanates centrally from the European Union, even though the European Union has no (or only very limited) competence in criminal law. This shows that antitrust law is generally not understood as being associated with criminal law, even though it involves the imposition of substantial sanctions (up to 10% of a company's annual turnover).³²² Therefore, antitrust law as a **system of administrative sanctions** (with very harsh sanctions against companies!) is discussed in the context of BCL.³²³

Antitrust law also has certain special characteristics because the regulations are supposed to extend across several states due to the concept of a common internal market. The European Union and its member states therefore try to prevent distortions of competition with a mixture of centralised and decentralised elements. An important actor in this endeavour is the **European Commission**. The European Commission has the competence under Art. 103 TFEU to independently introduce corresponding offences against companies in order to achieve its own sanction system.³²⁴ The Commission has made use of this power and developed a system that uses high fines to deter distortions of competition and to seize unfair profits. With Regulation 1/2003, a new legal basis (in contrast to the old Regulation 17/62)³²⁵ was developed at the European level to decentralise antitrust law.³²⁶ It was hoped that the (now high number of) member states would act accordingly to implement deterrent and effective sanction systems.³²⁷ Experience showed, however, that this led to inconsistent standards and that the protection of competition only worked unsatisfactorily.³²⁸ Therefore, the Regulation was supplemented

³²⁰Cf. Niggli MA and Riedo C (2021), 753, 760.

³²¹Dannecker G and Dannecker C (2020), 485, 498–499.

³²²Dannecker G and Dannecker C (2020), 485, 512–513, 530; cf. also Niggli MA and Riedo C (2021), 753, 760–761.

³²³Cf. Dannecker G and Bülte J (2020), mn. 168a.

³²⁴Dannecker G and Dannecker C (2020), 485, 499.

³²⁵Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal of the European Communities 21.2.1962, 204/62.

³²⁶Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of the European Communities 4.1.2003, L1/1.

³²⁷Dannecker G and Bülte J (2020), mn. 168.

³²⁸Dannecker G and Dannecker C (2020), 485, 499–500.

by Directive 1/2019, which now gives the national competition authorities the guarantees to effectively apply the requirements in Art. 101 and 102 TFEU (Art. 1 para. 1).³²⁹

787 First, however, the question arises as to who the addressees of these antitrust provisions are? First and foremost, these are **companies** and associations of companies. Companies are accordingly any legal entity that carries out a commercial and economic activity, even if this entity consists of several natural or legal persons.³³⁰ They must be market actors, but the intention to make a profit is not required. Rather, it is a question of the independent exercise of an economic activity and the actual possibility of influencing the conditions of competition on the market. In the literature, this is referred to as the **functional concept of an enterprise**.³³¹ This understanding of enterprise is intended to avoid a situation where the application of competition rules is obstructed solely on the basis of formal criteria.³³²

788 After all, in antitrust law, even large-scale investigations and searches can happen. In any case, it is clear that companies must deal with questions of cartel law in order to clearly avoid corresponding risks. To start off, the central elements of EU antitrust law will be explained. The prohibition norms are laid down in Art. 101 and Art. 102 TFEU. Accordingly, agreements, decisions and concerted practices (Art. 101 para. 1 TFEU) as well as abuse of a dominant position (Art. 102 TFEU) are prohibited. In addition, Regulation no. 1/2003 should be read. For example, Art. 23 para. 2 states that the infringement must have been committed intentionally or due to negligence.

7.9.2 Competition Restricting Agreements

789 Art. 101 TFEU

- (1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - a. directly or indirectly fix purchase or selling prices or any other trading conditions;
 - b. limit or control production, markets, technical development, or investment;
 - c. share markets or sources of supply;

³²⁹Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Official Journal of the European Union 14.1.2019, L 11/3; Dannecker G and Dannecker C (2020), 485, 500–502.

³³⁰Säcker FJ and Steffens J (2020), mn. 8–21.

³³¹Säcker FJ and Steffens J (2020), mn. 4–7.

³³²Dannecker G and Dannecker C (2020), 485, 513–520; Säcker FJ and Steffens J (2020), mn. 1–66.

- d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
- (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Art. 101 para. 1 TFEU³³³ names some examples and the most common manifestations of cartel violations, but remains open to other types of conduct. First of all, coordinated conduct between undertakings that is capable of restricting trade is presumed. In this context, undertakings are any entity engaged in an economic activity, irrespective of the legal form and the way in which it is financed. The economic activity is any activity involving the offering of goods or services on a given market.³³⁴

The **prohibition of agreements restricting competition** concerns explicit agreements or decisions made by or between associates of businesses or through their concerted behaviour. Practice shows that it covers not only contracts, but also general terms and conditions and gentleman's agreements, which create economic, social or even moral ties.³³⁵

In practice, such agreements between businesses on price, quantity, customer groups or the target area in which a company is to operate are common. In this way, the position of competitors on the market is weakened.

Thus, while the first form of prohibited measures is corresponding agreements, the second form is concerted **practices**. This concerns any form of coordination of corporate

³³³For an in-depth study on this complex subject matter, see Säcker FJ and Steffens J (2020).

³³⁴Dannecker G and Dannecker C (2020), 485, 504–505.

³³⁵Säcker FJ and Steffens J (2020), mn. 87–138, 139–151, 298–426.

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behaviour in the market without any factual or legal binding force. Typically, these are mutual exchanges of information between companies about future behaviour on the market or even conscious practical cooperation.³³⁶

793 It is essential that the measures mentioned lead to a restriction of competition on the European market or affect trade between EU Member States.³³⁷ Case law requires that the restrictions of competition have an **appreciable effect** on third parties.³³⁸ In addition, the restriction of competition must either be intended or caused.³³⁹

794 However, the prohibition in Art. 101 para. 1 TFEU is not absolute. According to Art. 101 para. 3 TFEU, companies can apply for an administrative exemption, either individually or as a group (Art. 288 TFEU).³⁴⁰ In order for companies to assess the extent to which they can obtain an administrative authorisation, it is helpful to look at the European Commission's guidelines, which have been developed for numerous commercial sectors.³⁴¹

795 The immediate consequence of a prohibited agreement or conduct under Art. 101 para. 1 TFEU is its **nullity**. It therefore has no effect, but can conversely lead to significant civil sanctions (Art. 101 para 2 TFEU) and, of course, monetary sanctions imposed by the European Commission.³⁴²

7.9.3 Abuse of a Dominant Position

796 Art. 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b. limiting production, markets or technical development to the prejudice of consumers;

³³⁶ Dannecker G and Dannecker C (2020), 485, 506; Säcker FJ and Steffens J (2020), mn. 152–196, 427–513.

³³⁷ Säcker FJ and Steffens J (2020), mn. 197–252.

³³⁸ Dannecker G and Dannecker C (2020), 485, 506–507; Säcker FJ and Steffens J (2020), mn. 285–297, 452–453, 764–780.

³³⁹ Dannecker G and Dannecker C (2020), 485, 507–508; Säcker FJ and Steffens J (2020), mn. 253–284, 436–451.

³⁴⁰ Säcker FJ and Steffens J (2020), mn. 965–1267

³⁴¹ Dannecker G and Dannecker C (2020), 485, 508–509; Säcker FJ and Steffens J (2020), mn. 1065–1066.

³⁴² Dannecker G and Dannecker C (2020), 485, 509.

- c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Art. 102 TFEU³⁴³ sets out three conditions for the application of the provision. There must be a dominant position, abuse of that position and the possibility of trade between EU Member States being affected. In the second sentence, the provision gives some examples of abuse of a dominant position.³⁴⁴

In order to prove **dominance**, the market must be defined objectively and geographically according to economic criteria.³⁴⁵ This means that it is first necessary to define the relevant market, and secondly, to determine the degree of dominance the company has in this market. Dominance is defined as when a company has a market share of at least 40%.³⁴⁶

In order for the offence to be punishable, the **abuse of this dominant position** is required.³⁴⁷ The abuse can first take the form of prevention, in which prices are offered with the intention of destructive or predatory pricing, loyalty rebates or other forms of tying between companies. Here the prevention concerns the competitive fatigue of another company without any objectively justified reason.³⁴⁸ However, the abuse can also take place in the context of exploitation, in that the dominant company demands fees or other business conditions that deviate from those that would most likely have existed under effective competition.³⁴⁹ In practice, abuse in the setting of prices is particularly worth mentioning.³⁵⁰ Furthermore, a dominant position is also exploited, for example, if access to networks or infrastructure facilities is denied to the dominant company's competitors when their shared use is necessary in order to operate properly on the market. Other cases of abuse include investments or innovation aimed at closing off the market permanently, mergers aimed at eliminating the last competitor, or limiting production to the detriment of consumers.³⁵¹

According to Art. 102 TFEU, a dominant position can also exist in the case of **relative market power**. This is the case when suppliers or customers are economically dependent

³⁴³For an in-depth study on this complex subject matter, see Bien F (2020).

³⁴⁴Dannecker G and Dannecker C (2020), 485, 510.

³⁴⁵Bien F (2020), mn. 197–264.

³⁴⁶Bien F (2020), mn. 71–196.

³⁴⁷Bien F (2020), mn. 265–336.

³⁴⁸Bien F (2020), mn. 442–635, 636–766.

³⁴⁹Bien F (2020), mn. 337–441.

³⁵⁰Bien F (2020), mn. 372–392.

³⁵¹Dannecker G and Dannecker C (2020), 485, 510–511.

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on a certain company. In particular, such dependence exists if the enterprise is so geared to a very specific product through long-term contracts or substantial investments that a change in production or distribution would lead to great and incalculable risks. It is irrelevant for the determination of market power if the dependence is self-inflicted

801 **Concept of Dominance**

This concept also applies to national cartel law. In **Germany**, for example, not only the abuse of a dominant position is prohibited, but also the abuse of a strong market position, where companies have relative or superior market power. Dominant position means that the company has a monopoly position or dominates a certain market due to a lack of substantial competition. In addition, dominance may also be due to the market position of a few large companies.

802 Following a popular ballot initiative (Fair Price Initiative) in 2017, the **Swiss parliament** has introduced new far-reaching regulations on market power. First, the rules on abuse of dominant position will be extended to companies with relative market power. A company has **relative market power** if another company economically depends on it because it does not have sufficient and reasonable possibilities of switching to other companies (e.g. cases of exclusive agreements). The concept of relative market power exists not *erga omnes*, but only in relation to an individual counterparty and to a specific product or service. Secondly, a new type of abuse of dominance has been introduced to Swiss competition law. This new offence will prohibit restrictions to purchase goods and services abroad at local prices and conditions. In other words, Swiss companies have the right to purchase abroad at (more favourable) prices and conditions.

803 The **principle of non-discrimination** prohibits dominant companies from unfairly hindering another in a business transaction which should, in principle, be accessible to similar companies, or from treating similar companies differently without any objectively justifiable reason. In practice, this different treatment would take the form of price undercutting, fidelity rebates and exclusive ties by the dominant company.

804 In order to realise this principle of non-discrimination, the European Union has issued its own **Geoblocking Regulation**,³⁵² which applies to companies that offer products or services to end customers online within the EU. This regulation is intended to prevent companies from restricting or even blocking cross-border access to country-specific

³⁵²Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, Official Journal of the European Union 2.3.2018, L 601/1.

content of web shops or other commercial online offers. This will allow customers in the EU to find greater choice and improved shopping conditions in online commerce.³⁵³

Similarly, the **Swiss parliament** has introduced a new provision (Art. 3a Unfair Competition Act) on geo-blocking. Accordingly, it will be prohibited to discriminate Swiss consumers in distance and e-commerce with regard to prices and payment terms, to restrict their access to an online portal or to redirect them without their approval.

7.10 Accounting Offences

Sources of Law

- § 163a et seq. StGB-AT
- § 17 et seq. Publizitätsgesetz-DE
- § 331 et seq. Handelsgesetzbuch-DE
- Schlussteil § 66 et seq. Personen- und Gesellschaftsrecht (PGR-FL)
- Art. 116, 152, 251, 325 StGB-CH

7.10.1 Shaping the Crime Context

Criminal accounting law deals with the incorrect certification of balance sheets and thus concerns a core area of entrepreneurial activity. It is a major driving force for the development of BCL. Spectacular cases such as the Enron/WorldCom scandal (→ mn. 101) or the Parmalat scandal (→ mn. 103) have not only become known to the broader public through media coverage, but have actually led to significant milestones in the legislation of BCL, as the US-Sarbanes-Oxley Act (→ mn. 1024) shows.

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FlowTex—Case³⁵⁴

One of the largest cases of balance sheet criminal law in Germany concerned the company FlowTex Technologies GmbH & Co KG. The company dealt in the underground laying of pipes. In contrast to the classic laying of pipes, where the surface of the earth is opened up for the pipes to be laid there, FlowTex wanted to do this underground. In this context the company dealt with machines for horizontal drilling. In the balance sheet FlowTex stated a large number of drilling machines as being sold. But, upon inspection FlowTex had sold 3142 machines that did not really exist. The company had actually traded the machines with leasing companies and banks, and then listed the machines to demonstrate the market need for credit financing. In the end, the fraud

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³⁵³ Hoffmann J and Bombe B (2020), 131–140.

³⁵⁴ <https://www.manager-magazin.de/unternehmen/artikel/a-511446.html>

gained the company loans that were granted for the purchase of the non-existent drilling machines. In the balance sheets, serial numbers were forged on the registration of drilling machines by affixing new registration plates with new serial numbers on the same machines. ◀

- 807** In order to understand which protected legal interests are at the centre of accounting criminal law, one must first take a look at accounting law. Accounting law protects the trust in the correctness and completeness of information used to prepare a balance sheet. It is therefore first and foremost a matter of a **company's self-information** and, in this respect, a matter of the interests of its employees. In addition, a balance sheet also represents an important prerequisite for **shareholders** in companies organised as corporations to be able to exercise various protective rights. In this respect it is also clear, that the duty to provide complete information falls within the competence and responsibility of the board of directors of a company, who are accountable to their shareholders and who fulfil this duty by preparing the balance sheet. The protection of accounting law also applies to a **company's creditors**, who should have confidence in the correctness of the accounting and auditing. Since the establishment of capital markets, the protection of creditors has of course been extended to investors. To summarise these thoughts, accounting law is all about providing truly sufficient information, which on the one hand should protect the individual participants in the economic cycle, but on the other hand should also keep the entire cycle functioning.
- 808** This overview showed that many concepts and definitions of the law on accounting *offences* start from the concepts and definitions of accounting law.³⁵⁵ The law on accounting offences provides a protective shield under criminal law to flank the accounting law requirements that apply to companies. It is therefore not surprising that the relevant acts under criminal accounting law only become clear once the concepts of bookkeeping and accounting in accounting law or civil law have been understood. Therefore, a small overview of definitions from these areas is needed.
- 809** The first main concept that arises is why commercial accounting is involved. Commercial accounting is a systematic record of business transactions expressed in monetary units. The aim of criminal law relating to financial statements is therefore to protect the truthfulness of the documents, books, and accounting statements relating to accounts, balance sheets, and income statements. When can the truthfulness of these be affected? This can be assumed if, for an expert observer, the facts as they appear in the books differ from the actual facts in essential points. It is significant that here lawyers create a scope for judgement with the criterion of "differentiation in essential points" in a field of work that is expressed in mathematical figures and thus would actually be accessible to an absolute evaluation between right and wrong. However, this takes into account the right that

³⁵⁵In Austria, the Accounting Criminal Law 2016 was unified. Before this reform, it was scattered over eight different laws, cf. Wess N and Machan M (2016), mn. 8.2.

companies also need a scope for assessment and discretion when they are economically active.

This is expressed by the **Business Judgment Rule** (→ mn. 1013), which was developed in the USA and is found now in various laws (e.g. in Germany in § 93, 116 of the German Stock Corporation Act) or is recognised by court practice (e.g. in Switzerland). According to these laws, diligence is considered negated under certain circumstances. These conditions are:

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- if conflicts of interest were excluded
- if sufficient information was available
- whether the action was taken in the best interests of society
- whether the actions appear to be justifiable from an entrepreneurial point of view and no mandatory legal requirements have been violated.

It is precisely in this last argument, namely that no mandatory legal provisions were violated, that the basic idea is revealed: companies have a certain leeway for assessments, but in certain areas the legislator draws sharp red lines. The law on accounting offences therefore only concerns serious inaccuracies. The state does not want to react to every inaccuracy with the harshest means at its disposal. Of course, it is very difficult to draw the line between window dressing without punishment and the criminal falsification of balance sheets.

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Essentially, the criminal law of accounting offences distinguishes between various criminal norms, namely, the actual falsification of a balance sheet and offences related to balance sheets (such as: false statements about commercial activities and failure to keep accounts). It seems clear that the perpetrator of such offences can only be a limited group of persons. These are persons who are responsible for keeping balance sheets or those who have delegated such tasks (in particular the members of management or the board of directors).

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7.10.2 Trends in Legislation

The falsification of balance sheets can be seen as a special case of a general falsification of documents. The special feature of the falsification of balance sheets is that the falsified document is intended to enhance a **company's credibility** in business transactions. The criterion of increased credibility is criticised because the document in question is produced by the companies themselves and not by an independent authority. Nevertheless, a functioning economy requires protection for the correct content of documents. In this respect, it is not surprising that the provisions of fiscal criminal law that govern the provision of essential information of a company's assets, financial position and earnings are ultimately also necessary for assessing development. The falsification of a balance sheet is therefore structured as an **endangerment offence**, which is why the occurrence of a loss (result) is

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not necessary. The criminal court must determine the extent of the false or incomplete information on a case by case from the perspective of the perpetrator, who is capable of perpetuating a risk of considerable damage.

814 The legal systems in various countries show considerable differences in balance sheet criminal law. In **Austria**, a differentiated system of offences has been in place since 2016. Punishable offences include not only the misrepresentation of material information about a company, but also the failure to prepare a special report if the company is threatened with financial liquidity (Art. 163a StGB-AT). A specific criminal offence can only be committed by balance sheet auditors if they produce unjustifiable reports, for example by presenting incorrect or incomplete material information or by issuing an audit opinion that is incorrect in content (Art. 163b StGB-AT). Furthermore, the Criminal Code provides for the possibility of exemption from punishment or reduction of a penalty if the false information is voluntarily corrected or the missing information is added (Art. 163d StGB-AT).

815 **Germany** also has an extremely complex system of provisions that are considered to be part of the law on accounting offences that are not only about the incorrect presentation of the financial circumstances of a company (especially in the annual financial statements of corporations). Instead, criminal offences are provided for, which are intended to uphold the correct auditing of annual financial statements, as well as the independence of auditors. In practice, this involves punishing false information given to auditors. Complementary to this violation is an auditor's reporting obligation. In this area, criminal offences are therefore committed by an auditor or his/her assistants. Finally, German law also contains breaches of the duty to keep accounts. What is striking in comparison to other legal systems is that the elements of criminal offences are laid down as secondary criminal law in special laws (e.g. Stock Corporation Act, Commercial Code) and can be found in core criminal law. However, it is to be expected that in the course of dealing with the Wirecard scandal, a number of tightening legislative measures will be taken.³⁵⁶

Wirecard—Case³⁵⁷

Wirecard was a German FinTech company and as such a service provider in payment transactions. It had long been suspected of falsifying its balance sheets by deceiving deals and business partners. In 2020, the company's auditor announced that it could not certify Wirecard's annual report because a bank balance of 1.9 billion € was missing. ◀

816 A similar approach is taken in **Liechtenstein**, where special laws contain criminal offences against balance sheet obligations (e.g. Stock Corporation Act).

³⁵⁶ Cf. Voß T (2020), 11, 23–24.

³⁵⁷ <https://www.spiegel.de/wirtschaft/unternehmen/worum-es-im-wirecard-skandal-geht-a-96c88437-bdd5-4613-87dc-6f6360868fcc> ; see Voß T (2020), 11–24.

In **Switzerland**, however, the majority of criminal provisions are found in core criminal law and thus in the Criminal Code. For example, the criminal offence in Art. 152 StGB-CH is counted among “balance sheet criminal law”. It punishes untrue information about commercial activities and protects shareholders, creditors and potential investors from damaging asset dispositions. Failure to keep accounts (Art. 166 StGB-CH) violates the obligation to keep accounts, as is the case for certain types of companies (in particular, public limited companies, banks, insurance companies or forms of investment). Furthermore, Art. 325 StGB-CH contain the violation of accounting law obligations.

For an analytical reflection on selected criminal offences, the criminal norms of Austrian law in § 163a StGB-AT and § 163b StGB-AT are considered. Both relate to corporate entities, which are defined by § 163c StGB-AT.³⁵⁸

§ 163c StGB-AT: Corporate Entities

§§ 163a and 163b apply to the following corporate entities:

1. limited liability companies;
2. public limited companies;
3. European companies (*societas europaea*—SE);
4. cooperatives;
5. European cooperative societies (*societas cooperative europea*—SCE);
6. mutual insurance companies;
7. large companies within the meaning of § 22 para. 2 of the Societies Act [Vereinsgesetz 2002];
8. open companies and limited partnerships within the meaning of § 189 para. 1 no. 2 lit. a of the Corporations Act [Unternehmensgesetzbuch];
9. saving banks;
10. private foundations;
11. the foundation under the Austrian Broadcasting Corporation Act [Bundesgesetz über den Österreichischen Rundfunk];
12. any foreign corporate entities similar to those listed in no. 1 to 11 whose transferrable securities may be lawfully traded in a regulated domestic market or which have a branch in Austria that is listed in the commercial register (§ 12 Corporations Act).

³⁵⁸Rohregger M (2018), § 163a mn. 70 and § 163b mn. 8.

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7.10.3 Untenable Representation of Fundamental Information Concerning Certain Corporations

820 § 163a StGB-AT: Untenable Representation of Fundamental Information Concerning Certain Corporations

- (1) Any person who as a decision maker (§ 2 para. 1 VbVG-AT) of one of the corporate entities listed in § 163c or otherwise as a person assigned by a decision maker to present information in
 1. an annual report, consolidated financial report, management report, group management report, or another report addressed to the general public, shareholder or company members, supervisory board or its chairperson,
 2. a public invitation to participate in the corporate entity,
 3. a presentation or statement to the shareholders' meeting, general meeting, or members' meeting or in another meeting of the shareholders or members of the corporate entity,
 4. explanations and verifications (§ 272 para. 2 Corporations Act [*Unternehmensgesetzbuch*] or other explanations that are to be given to an auditor (§ 163b para. 1), or
 5. an entry into the commercial register concerning the making of deposits into the corporate capital,

falsely or incompletely represents the financial position of the corporate entity or the results of its operations and cash flows or essential information for the assessment of the future development of the financial position of the corporate entity or the results of its operations and cash flows (§ 189a para. 10 Corporations Act [*Unternehmensgesetzbuch*], including those circumstances that concern the relationship between the corporate entity and other related enterprises in an untenable manner, is liable to imprisonment for up to 2 years, if this is capable of creating a serious detriment for the corporate entity, its shareholders, members, creditors, or investors.

- (2) The same penalty applies to any person who as a decision maker fails to provide a special report which due to the imminent insolvency is required by law.
- (3) A person is liable to imprisonment for up to 3 years if the person commits an offence under para. 1 or 2 in relation to a corporate entity whose transferrable securities are approved to be traded in the regulated market of a member state of the European Union or in a state party to the Agreement on the European Economic Area within the meaning of Art. 4 para. 1 no. 21 of Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Official Journal no. L 173 of 12.6.2014, p. 349.
- (4) A person is not liable for participation (§§ 12, 14), if his or her conduct is also criminalised by § 163b.

As already explained, the norms presented here sanction non-compliance with information obligations under company law, market law or contract law, which are imposed on certain persons (including decision-makers) in the area of entrepreneurial activities. This protects the **correctness and completeness of information** and **its communication** to internal persons, such as the organs of a company or the shareholders themselves, but also to external persons, such as creditors, capital markets and the public. The protected legal interest is the **property**. In this way, the functioning of processes in the economy and the capital market is guaranteed.³⁵⁹

§ 163a StGB is structured as an offence of activity and thus as an **endangering offence**. It is sufficient that the offender in question realises the acts provided for in the norm (false or incomplete representation) without the substantial damage actually occurring. The norm itself distinguishes between two different types of conduct, namely on the one hand the false or incomplete representation of material information (para. 1) and on the other hand the non-reporting of a special report (para. 2).³⁶⁰

The **circle of perpetrators** is described in § 163a para. 1 StGB-AT as decision-makers and those commissioners who have to make the information representation.³⁶¹ On the one hand, this is therefore a conceptual borrowing from the Corporate Liability Act [*Verbandssanktionsgesetz*], which already defines the term decision-maker (§ 2 para. no. 1 VbVG-AT, → mn. 515).³⁶² On the other hand, persons who are commissioned by a decision-maker to present the information also come into question as offenders. Such persons are, for example, analysts or consultants such as lawyers or accountants.³⁶³

The **offence acts** are described as false or incomplete representations.³⁶⁴ A representation is **false** if the information contained therein is incorrect, non-existent circumstances are asserted or their existence is denied contrary to the truth. In this respect, the concealment of information also belongs to a false representation.³⁶⁵ On the other hand, a presentation is **incomplete** if certain information is concealed, although it should have been disclosed on the basis of the applicable accounting law.³⁶⁶ At the same time, it must be **significant information** that is misrepresented or incomplete. Information is significant if it is reasonable to expect that the exclusion of the information or the misstatement will influence persons who consider the information to be the basis for making decisions.³⁶⁷ The incorrect or incomplete information must either relate to the company's financial position, financial

³⁵⁹ Hilf MJ and Konopatsch C (2017), § 163a mn. 1–3; Rohregger M (2018), § 163a mn. 1.

³⁶⁰ Hilf MJ and Konopatsch C (2017), § 163a mn. 3, 4, 5; Rohregger M (2018), § 163a mn. 2–4.

³⁶¹ Hilf MJ and Konopatsch C (2017), § 163a mn. 8–10; Rohregger M (2018), § 163a mn. 2–4.

³⁶² Rohregger M (2018), § 163a mn. 5–6.

³⁶³ Rohregger M (2018), § 163a mn. 7–8.

³⁶⁴ Rohregger M (2018), § 163a mn. 11–16.

³⁶⁵ Hilf MJ and Konopatsch C (2017), § 163a mn. 12; Rohregger M (2018), § 163a mn. 17–24.

³⁶⁶ Hilf MJ and Konopatsch C (2017), § 163a mn. 13; Rohregger M (2018), § 163a mn. 25–26.

³⁶⁷ Hilf MJ and Konopatsch C (2017), § 163a mn. 15; Rohregger M (2018), § 163a mn. 36–42.

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performance or cash flows, or be significant for the assessment of the future development of these focal points.³⁶⁸ At the same time, not every false or incomplete representation triggers criminal liability. Rather, this false or incomplete representation must be made in an **unreasonable manner**. Whether a reasonable representability exists depends on the individual statutory provisions (such as the Corporate Code) or recognised standards.³⁶⁹ The false and incomplete presentation of the information must also **be capable of causing significant damage** to the association or its shareholders, members, creditors or investors. This criterion is extremely vague, but is measured according to the type, intensity and scope and significance for the legal interest at risk.³⁷⁰ In order to trigger protection under criminal law, the information must be contained in **certain media of representation**. These media are explicitly enumerated in paragraphs 1 to 5 of the law.³⁷¹

825 As far as the **subjective elements** are concerned, intent is presumed, whereby *dolus eventualis* is sufficient. The intent must refer to all objective elements of the offence, i.e. in particular to the materiality of the information, the unreasonableness of the representation and the suitability to cause damage.³⁷²

826 The offence in § 163a para. 2 StGB-AT punishes the failure to submit a special report, which is legally required in view of the threat to the company's liquidity. Therefore, only the decision-maker can be considered a **perpetrator**, because he or she has a legal or corporate duty to submit the special report. This obligation to submit the **special report** is determined by company law, such as § 81 (1) of the AktG-AT (or also § 28 GmbHG-AT, § 22 para. Genossenschaftsgesetz-AT). Thus, corresponding obligations under company law are sanctioned with punishment in the event that an extremely critical situation exists to endanger the liquidity of the company.³⁷³ For the subjective elements, intent is required, whereby *dolus eventualis* is sufficient. In this respect, the offender must seriously consider it possible and accept that he/she will not submit a special report, which is actually legally required in view of the imminent liquidity danger.

7.10.4 Untenable Accounts of Auditors of Certain Corporations

827 § 163b StGB-AT: Untenable Accounts of Auditors of Certain Corporations

- (1) Any person being an auditor of annual accounts, of formations of companies, a special auditor, an auditor of mergers, of spin-offs, a controller, an auditor of foundations, a member of the ORF board of examiners (§ 40 Austrian Broadcasting

³⁶⁸ Hilf MJ and Konopatsch C (2017), § 163a mn. 16; Rohregger M (2018), § 163a mn. 32–35.

³⁶⁹ Hilf MJ and Konopatsch C (2017), § 163a mn. 17; Rohregger M (2018), § 163a mn. 27–31.

³⁷⁰ Hilf MJ and Konopatsch C (2017), § 163a mn. 20–21; Rohregger M (2018), § 163a mn. 43–54.

³⁷¹ Hilf MJ and Konopatsch C (2017), § 163a mn. 18; Rohregger M (2018), § 163a mn. 55–68.

³⁷² Hilf MJ and Konopatsch C (2017), § 163a mn. 22; Rohregger M (2018), § 163a mn. 80–82.

³⁷³ Hilf MJ and Konopatsch C (2017), § 163a mn. 19; Rohregger M (2018), § 163a mn. 69–73.

Corporation Act [*Bundesgesetzes über den Österreichischen Rundfunk*], or another auditor appointed on the basis of corporate regulations to exercise functions for one of the corporations listed in § 163c falsely or incompletely presents essential information (§ 163a para. 1) in an untenable manner in

1. his or her auditing report, or
2. a presentation or statement to the shareholders' meeting, general meeting or members' meeting or in another meeting of the shareholders or members of the corporate entity

or conceals that the annual report, consolidated financial report, management report, group management report, or another audit of the financial statement, contracts or falsely reports or incompletely presents essential information (§ 163a para. 1) in an untenable manner is liable to imprisonment for up to 2 years if this is capable of causing a significant detriment to the corporate entity, its shareholders, members, creditors, or investors.

- (2) The same penalty applies to any person who being an auditor (para. 1)
 1. issues in an untenable manner an incorrect audit certificate, if this is capable of causing a significant detriment to the corporate entity, its shareholders, members, creditors, or investors;
 2. fails to produce a report that is required by law because of imminent threats to the continued existence of the corporate entity.
- (3) A person is not liable under para. 2 no. 1 if the false or incomplete representation is also criminalised under para. 1. A person is not liable under para. 1 if the failure to produce a report is also criminalised under para. 2 no. 1.
- (4) Any person who being an auditor of one of the corporate entities listed in § 163a para. 3 commits one of the offences under para. 1 or 2 is liable to imprisonment for up to 3 years.
- (5) A person is not liable for participation (§§ 12, 14) if his or her conduct is also criminalised by § 163a.

With a legal reform in 2015, the Austrian legislator created a criminal offence that can only be committed by auditors. Accordingly, it is a criminal offence to issue an auditor's report with incorrect content or to fail to issue a report that would be legally required in view of the imminent threat to the association's existence. Again, the protected legal interests is the **property**.³⁷⁴

Structurally, this is an **endangerment offence**. Therefore, only the realisation of the described act is sanctioned, the occurrence of a harmful result is not necessary.³⁷⁵ Overall,

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³⁷⁴Hilf MJ and Konopatsch C (2017), § 163b mn. 1; Rohregger M (2018), § 163b mn. 1.

³⁷⁵Hilf MJ and Konopatsch C (2017), § 163b mn. 4, 15.

the offence contains two different offence variants, namely, on the one hand, the false or incomplete presentation of material information, the concealment of the false and incomplete presentation in the audited medium (para. 1), and on the other hand, the issuing of an incorrect auditor's report and the failure to report in the event of an imminent threat to the existence of the association (para. 2).³⁷⁶

830 In both cases, the **circle of perpetrators** is limited to persons with certain characteristics. The perpetrators are auditors, foundation auditors, special auditors and other persons who hold corresponding functions. The enumeration in the offence is solely demonstrative. The auditors can only be perpetrators if they carry out an audit in terms of content and structure in accordance with the respective law, regardless of whether the audit is mandatory or whether the audit was ordered by the auditor voluntarily.³⁷⁷

831 The **offence act** under para. 1 is the misrepresentation or incomplete representation of an audit report (no. 1) or a presentation or information at a general meeting, general assembly or general meeting of members (no. 2). The offender unreasonably misrepresents or incompletely misrepresents material information or conceals that such misrepresentation or incompleteness was made in the audited contract, financial statements or report. In order for the act to be criminally relevant, it must be capable of causing substantial damage to the association or its shareholders, members, creditors or investors. Only those representations that are explicitly and exhaustively enumerated in the law are relevant.³⁷⁸ As far as the **subjective elements** are concerned, the auditor must act with intent with regard to all objective elements of the offence.³⁷⁹

832 The **offence act** under para. 2, by contrast, is the issuance of an audit opinion with incorrect content that is capable of causing significant damage to the association or its shareholders, members, creditors or investors. § 163a para. 2 StGB-AT does not specify when the audit opinion is incorrect. In this respect, reference must be made to the regulations on the auditor's report in the special laws, in this case specifically to § 274 of the Commercial Code [*Unternehmensgesetzbuch*]. Accordingly, the auditor's report is incorrect in content if incorrect comments are made in the audit opinion on the annual financial statements or consolidated financial statements or in statements on the management report or group management report. The duty of correction is violated and criminally relevant if this occurs in the course of the audit of the financial statements or equivalent audits and immediate reporting would be appropriate due to the imminent threat to the company's existence (§ 273 para. 1 first case of the Commercial Code).³⁸⁰

³⁷⁶ Hilf MJ and Konopatsch C (2017), § 163b mn. 2.

³⁷⁷ Hilf MJ and Konopatsch C (2017), § 163b mn. 6–8; Rohregger M (2018), § 163b mn. 2–8.

³⁷⁸ Hilf MJ and Konopatsch C (2017), § 163b mn. 9–11; Rohregger M (2018), § 163b mn. 9–22.

³⁷⁹ Hilf MJ and Konopatsch C (2017), § 163b mn. 16.

³⁸⁰ Hilf MJ and Konopatsch C (2017), § 163b mn. 12–14; Rohregger M (2018), § 163b mn. 23–26 and 27–29.

As far as the **subjective elements** are concerned, the auditor must act with intent with regard to all objective elements of the offence.³⁸¹

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7.11 Insolvency Offences

Sources of Law

- § 156 et seq. StGB-AT
- § 283 et seq. StGB-DE
- § 156 et seq. StGB-FL
- Art. 163 et seq. StGB-CH

7.11.1 Shaping the Crime Context

Economic crises and weak economies put enormous strain on entrepreneurial activity. Different factors in social and economic life can bring enterprises into existential distress. The corona virus crisis (→ mn. 51) has shown that health risks in particular can also lead to economic crises.³⁸² However, **existential crises of companies** can also be attributed to management errors, delayed reaction to market changes, underestimation of cost developments, incorrect assessment in mergers of companies, but also strokes of fate (such as destruction of the company by force majeure, loss of regular customers). In some cases, cash injections, restructuring or new management can help certain companies. Yet in other cases even such measures will not solve the crisis. In these cases, it will be necessary to close down the business or liquidate the company.

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In practice, a company is often on the brink of closure when it no longer has any financial resources and is therefore no longer able to meet its creditors' claims. In practice, an insolvent company usually has a large number of creditors who are interested in at least partially satisfying their claims on the basis of the remaining assets. For this purpose, the state provides the enforcement order. The principle of priority applies to enforcement, i.e. those creditors who first have access to the remaining assets with an enforcement order are at an advantage. If a creditor has no title or does not even know about the insolvency, his/her claim could remain unfulfilled and he/she could end up with nothing. If, on the other hand, the creditor has particularly good relations with the debtor, he/she could be given preference.

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With the criminal insolvency law,³⁸³ the legislator wants to prevent the **race of creditors**. The insolvent debtor is to carry out asset liquidation in an orderly manner within

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³⁸¹ Hilf MJ and Konopatsch C (2017), § 163b mn. 16.

³⁸² Cf. Heinrich J (2020), 346–368; Ruppert F (2020a), 130–135.

³⁸³ For an in-depth study on this subject matter, see Dannecker C and Knierim T (2018).

the framework of insolvency proceedings. Within this framework, a joint and equitable distribution of the company's assets is achieved.³⁸⁴

The practical relevance of criminal insolvency law should not be underestimated. According to certain authors, 50% to 80% of all business collapses are also criminal offences in insolvency.³⁸⁵

837 Two conditions are needed to achieve an equitable distribution of debtors' assets:

- There must still be an asset mass that can be distributed.
- There must be insolvency proceedings that can enable fair distribution.

838 The criminal insolvency law is thus intended to ensure that certain **responsible and dutiful conduct** is observed even in an economic crisis. Ultimately, the criminal provision is not only aimed at protecting creditor's claims, but also at protecting the economy as a whole.

Against this background, it is not surprising that in the case of insolvency offences, an ancillary penalty of a ban on activity is imposed. If the offender is convicted of an insolvency offence, this final conviction has the consequence that the convicted person (in Germany) may not be the managing director of a GmbH (§ 6 para. 2 second sentence GmbH-Gesetz-DE) or a member of the board of directors of a stock corporation (§ 76 para. 3 second sentence Aktiengesetz-DE) for a period of 5 years.

839 The protection of the equitable distribution of a debtor's assets is of central importance in insolvency criminal law. For this reason, criminal insolvency law is based on three different points of reference:

1. It aims to make it a criminal offence for a company to be obliged to file for insolvency but fail to do so (dilatory bankruptcy).
2. It aims at criminalising a company if it unduly reduces the insolvency assets.
3. It aims to criminalise a company if it fails to satisfy creditors properly or evenly and thus violates the principle *par condicio creditorum* under insolvency law.

840 On the one hand, the insolvency criminal law makes use of special laws to the respective insolvency code, on the other hand, it uses norms from core criminal law. In the following, typical characteristics of some of the insolvency offences are discussed with regard to German criminal law.

³⁸⁴ Kudlich H and Oğlakcioğlu MT (2020), mn. 495a.

³⁸⁵ Kudlich H and Oğlakcioğlu MT (2020), mn. 496.

7.11.2 Delaying the Commencement of Insolvency Proceedings

§ 15a Insolvency Statute: Obligation to Request in the Case of Legal Persons and Associations Without Legal Personality 841

- (1) Where a legal person becomes illiquid or overindebted, the members of the board of directors or the liquidators shall file a request for the opening of proceedings without culpable delay, at the latest, however, 3 weeks after the commencement of insolvency or overindebtedness. The same shall apply to the organ representatives of the partners authorised to represent the company or the liquidators in the case of a company without legal personality where none of the general partners is a natural person; this shall not apply if one of the general partners is another company in which a general partner is a natural person.
- (2) In the case of a company within the meaning of para. 1 second sentence, para. 1 shall apply correspondingly if the organ representatives of the partners authorised to represent the company are, in turn, companies in which none of the general partners is a natural person, or the grouping of companies continues in this way.
- (3) Where a private limited company lacks a management, each partner, in the case of lack of management of a public limited company or a cooperative each member of the supervisory board, is also obligated to file a request, unless that person is not aware of the insolvency or overindebtedness or the lack of management.
- (4) Whoever, contrary to para. 1 first sentence, also in conjunction with the second sentence or para. 2 or para. 3, does not file a request for the opening of proceedings, does not correctly file a request or does not file a request in good time shall be punished with imprisonment for not more than 3 years or a fine.
- (5) If the perpetrator under para. 4 acts negligently, the punishment shall be imprisonment for not more than 1 year or a fine.

Typically, the criminal offence of **delaying the commencement of insolvency proceedings** is anchored in the insolvency code.³⁸⁶ It punishes breaches of the statutory duty to file for insolvency under certain conditions. This duty results from the fact that in most European countries, insolvency proceedings are not opened ex officio. Rather, it is common law that insolvency proceedings are only opened at the request of the debtor or creditor (see: § 13 of the German Insolvency Code).³⁸⁷ As soon as the application is filed, the respective court examines the admissibility and merits of the insolvency application and can, if necessary, also take protective measures to preserve the assets, for example by issuing a prohibition of disposal of individual assets or by appointing a provisional

³⁸⁶Cf. Kudlich H and Oğlakcioğlu MT (2020), mn. 495.

³⁸⁷Ruppert F (2020a), 130, 131–133; Heinrich J (2020), 346, 352–353; Kudlich H and Oğlakcioğlu MT (2020), mn. 521.

insolvency administrator. In addition to civil liability, the penal provision is intended to encourage **timely filing for insolvency**. The threat of punishment is in principle (cf. para. 7) not linked to a legal form and, according to the express intention of the legislator, should also cover foreign company forms.³⁸⁸

843 The **protected legal interest** is the pecuniary interest of the present and future creditors of the company. Delaying the commencement of insolvency proceedings is typically an offence of omission. This also applies to the variant of not filing the correct petition, because the focus of the wrong lies on the failure to file the correct petition.³⁸⁹ Structurally, it is a special offence, since only certain decision-makers in the executive bodies can be considered as perpetrators.³⁹⁰ Furthermore, insolvency delay liability is to be classified as an **abstract endangerment offence**, because the realisation of the offence is content with the failure to file a timely and correct application. A further concrete infringement or endangering effect need not have occurred.³⁹¹

844 The objective facts of the criminal offence of delaying insolvency require that a party obliged to file an application for commencement of insolvency proceedings does not file this application, does not file it in time or does not file it correctly. The **offender** is the person obliged to file an insolvency petition. This also applies to the de facto managing director.³⁹²

845 The **acts** of the offence are described as “not”, “not in time” or “not correctly” filing the application related to open an insolvency proceedings.³⁹³ Therefore, the company must be over-indebted³⁹⁴ or insolvent.^{395,396} In particular, the running of the application period is independent of the knowledge of the person obliged to make the application. The **3-week period** according to § 15a para. 1 of the Insolvency Code is therefore the maximum period here.³⁹⁷ The obligation to file an application does not expire until the application is rejected for lack of assets.³⁹⁸ If new assets accrue to the company that are expected to cover the costs of new insolvency proceedings, the obligation to file an insolvency petition shall not be revived.

³⁸⁸ Himmelreich T (2019), 1167, 1169–1171; Hohmann O (2019), mn. 17–24; Kudlich H and Oğlakcioğlu MT (2020), mn. 519, 520.

³⁸⁹ Himmelreich T (2019), 1167, 1169–1170.

³⁹⁰ Hohmann O (2019), mn. 1–2.

³⁹¹ Hohmann O (2019), mn. 3–4.

³⁹² Heinrich J (2020), 346, 351; Himmelreich T (2019), 1167, 1175–1179; Hohmann O (2019), mn. 5; Kudlich H and Oğlakcioğlu MT (2020), mn. 524, 525–528.

³⁹³ Heinrich J (2020), 346, 353–354; Himmelreich T (2019), 1167, 1180–1181.

³⁹⁴ Himmelreich T (2019), 1167, 1179; Hohmann O (2019), mn. 41–49.

³⁹⁵ Himmelreich T (2019), 1167, 1180; Hohmann O (2019), mn. 26–40.

³⁹⁶ Kudlich H and Oğlakcioğlu MT (2020), mn. 522.

³⁹⁷ Himmelreich T (2019), 1167, 1182–1183; Hohmann O (2019), mn. 80–84.

³⁹⁸ Himmelreich T (2019), 1167, 1183–1184; Hohmann O (2019), mn. 91–94.

For the **subjective elements**, intent is required in principle, with regard to all objective elements of the offence. Intent is regularly present if the person liable to file the application did not obtain information about the economic situation despite signs of a crisis and therefore did not know about the over-indebtedness.³⁹⁹ However, para. 5 clarifies that the offence may also be committed due to negligence.⁴⁰⁰

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7.11.3 Other Offences

Norms from core criminal law, which are typically related to insolvency criminal law, are bankruptcy and the preferential treatment of creditors or debtors. The criminal offences have an extremely complex structure, as the example of bankruptcy under § 283 StGB in Germany shows.

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§ 283 StGB-DE: Bankruptcy

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- (1) Whoever, in the case of overindebtedness or existing or imminent insolvency,
 1. secretly removes or hides, or, in a manner contrary to regular business standards, destroys, damages or renders unusable parts of their assets which in the case of the opening of insolvency proceedings would belong to the insolvency estate,
 2. in a manner contrary to regular business standards, enters into loss-making or speculative ventures or futures trading in goods or securities or consumes excessive sums or becomes indebted through uneconomical expenditures, gambling or wagering,
 3. procures goods or securities on credit and sells or otherwise sells them or things produced from these goods substantially below market value in a manner contrary to regular business standards,
 4. feigns the existence of another's rights or recognises fictitious rights,
 5. fails to keep account books which they are obliged by law to keep, or keeps or modifies them in such a manner that a survey of their current asset status is made more difficult,
 6. secretly removes, hides, destroys or damages, before expiry of the archiving periods for those obliged to keep books, either account books or other documentation which a merchant is obliged by commercial law to keep, and thereby makes a survey of their current asset status more difficult,
 7. contrary to commercial law,
 - (a) draws up balance sheets in such a manner that a survey of their current asset status is made more difficult or

³⁹⁹Himmelreich T (2019), 1167, 1185–1186; Hohmann O (2019), mn. 96–100.

⁴⁰⁰Himmelreich T (2019), 1167, 1186–1187; Hohmann O (2019), mn. 101–103.

- (b) bfails to draw up a balance sheet of their assets or an inventory in the prescribed time or
- 8. in another manner which grossly contravenes regular business standards diminishes their net assets or hides or conceals their actual business circumstances

incurs a penalty of imprisonment for a term not exceeding 5 years or a fine.

- (2) Whoever causes their overindebtedness or insolvency by one of the acts referred to in para. 1 incurs the same penalty.
- (3) The attempt is punishable.
- (4) Whoever,
 - 1. in the cases of para. 1, negligently fails to recognise their overindebtedness or imminent or existing insolvency or
 - 2. in the cases of para. 2, recklessly causes their overindebtedness or insolvency

incurs a penalty of imprisonment for a term not exceeding 2 years or a fine.

- (5) Whoever,
 - 1. in the cases of para. 1 no. 2, 5 or 7, acts negligently and at least negligently fails to recognise their overindebtedness or imminent or existing insolvency or
 - 2. in the cases of para. 2, in conjunction with para. 1 no. 2, 5 or 7, acts negligently and at least recklessly causes their overindebtedness or insolvency

incurs a penalty of imprisonment for a term not exceeding 2 years or a fine.

- (6) The act only entails criminal liability if the offender has suspended any necessary payments or if insolvency proceedings have been opened against the offender's assets or the request to institute proceedings has been refused for insufficiency of assets.

849 The criminal offence of **bankruptcy** (§ 283 StGB-DE; § 156 StGB-FL) can be committed by anyone who, in the case of over-indebtedness or imminent or actual insolvency, puts aside or conceals, for example, components of his/her assets that actually belong to the insolvency assets as stated according to the insolvency proceedings or destroys, damages or makes them unusable. In addition to this offence, other possible

variants are listed.⁴⁰¹ The **preferential treatment of creditors** becomes relevant under criminal law if a company, being aware of its inability to pay, grants a creditor a security or satisfaction which the creditor has not claimed and ultimately favours him/her over other creditors (§ 283c StGB-DE; §§ 157 et seq. StGB-FL).⁴⁰² The **preferential treatment of debtors** is relevant under criminal law if a company in crisis is exploited in such a way that the assets of the crisis-ridden company are set aside, concealed, destroyed, damaged or rendered unusable with the consent of or for the benefit of the company itself (§ 283d StGB-DE; §§ 162 et seq. StGB-FL).⁴⁰³

7.12 Secrecy Protection

Sources of Law

- § 122 et seq. StGB-AT
- § 203 et seq. StGB-DE
- § 122 et seq. StGB-FL
- Art. 162 StGB-CH

7.12.1 Shaping the Crime Context

Companies have a vital interest in keeping certain information secret. This applies not only to the capital market (mn. → 732), but at a much more elementary level of business life. After all, secrecy is intended to ensure that products or services developed by a company at their expense are also used by it. Other unauthorised persons should therefore not be able to gain access to this knowledge and thus benefit from it without having to invest their own capital and labour. The protection of secrets can, however, be understood from a wider perspective. It can be significant for a company that competitors do not learn about certain information because they could, for example, infer concrete plans to expand product ranges from detailed information about the company's liquidity.⁴⁰⁴ The handling of customer data and the relationship with this customer can also be affected by the interest of confidentiality.⁴⁰⁵ Ultimately, in practice, the offences are of great significance in cross-border and international contexts.⁴⁰⁶

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⁴⁰¹ Heinrich J (2020), 346, 356–361; Kudlich H and Oğlakcioğlu MT (2020), mn. 510–516.

⁴⁰² Kudlich H and Oğlakcioğlu MT (2020), mn. 517.

⁴⁰³ Kudlich H and Oğlakcioğlu MT (2020), mn. 518.

⁴⁰⁴ Cf. Trallero Ocaña T (2021), 29–128.

⁴⁰⁵ Schwarz J (2021), 669, 672–673, 674–675; cf. Trallero Ocaña T (2021), 279–284.

⁴⁰⁶ Graf DK (2016), 193, 195–200.

851 The protection of secrets is not an exclusive field of activity in criminal law.⁴⁰⁷ Even civil law gives every person a certain degree of protection against the dissemination or disclosure of personal information.⁴⁰⁸ The protection of secrets is also a priority in public law. One thinks here of official secrets or secrets in connection with espionage activities (→ mn. 46). With regard to the economy, criminal law, as the state's most stringent means of dealing with the individual, is only partially devoted to the protection of secrets.⁴⁰⁹ In this respect, the protection of criminal law extends only to private secrets that are considered especially important. This applies in particular to business and trade secrets.

852 Offences that violate trade or business secrets are to be considered as criminal offences against property. In this respect, secrets are initially considered to be **assets of company**. However, if one looks at information that is subject to the protection of secrets, it becomes clear that the protection of secrets is ultimately also a protection of the **self-determination of a company**. After all, companies should be able to decide for themselves what information they want to use internally or externally to communicate to third parties. In this respect, there are overlaps, but also differences with competition law, which has certain references to secrecy law (for Switzerland: Art. 6 in conjunction with Art. 23 of the Unfair Competition Act). Competition law is concerned with maintaining the competitiveness of a company by not exploiting trade or business secrets that have been unlawfully obtained or bringing them to the attention of others. Competition law intervenes at a later stage in relation to criminal law. According to competition law, it is prohibited to disclose a secret to an unauthorised third party against the will of its holder. Criminal law protection, on the other hand, intervenes at an earlier stage.

853 So, what is a secret from a criminal law perspective? According to criminal law, a secret is a confidential information that is neither obvious nor generally accessible. In the case of trade or company secrets, the information must naturally be narrowed down. Criminal law distinguishes between two different types of trade secrets.

- A **company or manufacturing secret** [*Betriebsgeheimnis*] is technical information such as the structure of a company, details about the manufacturing of products or the description of storage procedures.
- A **business, operational or trade secret** [*Geschäftsgeheimnis*] is data with a business or commercial background, such as vendor lists, details on the company organization, and the basis for a price calculation.

854 It is essential for the protection of secrets that the protected information may only be known to a limited or definable circle of persons. It is therefore a matter of delimiting this group of persons, whereby the size of the group of persons is irrelevant. The decisive factor

⁴⁰⁷ Cf. Ackermann-Blome N and Rindell J (2018), 78–87.

⁴⁰⁸ See, for example, Sebulke P (2021).

⁴⁰⁹ Schwarz J (2021), 669, 672.

is that the holder of the secret must be able to control and limit its dissemination, either factually or legally.⁴¹⁰ Regarding criminal law, it is decisive that the holder of the secret has the will to limit the knowledge of information about it that is not generally known or not generally accessible to a certain circle of persons. If the holder of the secret no longer has the **will to keep it secret**, it is not a secret in the sense of criminal law. The definition and scope of criminal law protection of secrets thus depends crucially on the person who can be considered the holder or master of the secret. This is the person in whose interest the legislator protects a secret. Nevertheless, this will to secrecy on the part of the secret holder is not sufficient in itself for criminal law to extend its protection. It requires an **interest worthy of protection** that certain information remain within a set circle of persons. This condition is expressed by the legitimate interest in secrecy.⁴¹¹ The will of a secret holder to maintain secrecy is only protected if he/she can point to higher and legitimate interests. In this way, the legislator tries to prevent illegal secrets from being protected. Thus, Criminal law is not intended to protect an **illegal secret**, i.e. when a trade secret consists of a company's counterfeiting of products or illegal activities such as money laundering (→ mn. 654) or corruption (→ mn. 599).

Illegal Secrets

Of course, in practice it is very difficult to exempt **illegal secrets** from the protection of secrets. Because first a violation of the protection of secrets and the disclosure of the facts is needed to assess whether an illegal secret existed at all. The legislator tries to solve this dilemma by, for example, making the disclosure of illegal secrets a justification. In this logic, the objective and subjective elements of the protection of secrets are thus realised, but the perpetrator is justified in his/her action if it was an illegal secret. This idea is expressly laid down in § 122 para. 4 StGB-AT, for example.

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The offences relating to the protection of economic secrets are very diverse.⁴¹² The analytical consideration here is based on the example of some of the Swiss penal norms. Protected economic secrets are covered by Art. 162 (breach of manufacturing or trade secrecy), Art. 273 (industrial espionage), Art. 320 (breach of official secrecy) and Art. 321 (breach of professional confidentiality)⁴¹³ of the Swiss Criminal Code, while special laws are provided for in Art. 47 of the Banking Act,⁴¹⁴ Art. 43 of the Stock Exchange and

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⁴¹⁰For an in-depth study on this complex subject matter, see Trallero Ocaña T (2021), 279–416.

⁴¹¹Pieth M (2016), 235–238.

⁴¹²Pieth M (2016), 238–239.

⁴¹³Pieth M (2016), 240–242.

⁴¹⁴Pieth M (2016), 242–249.

Securities Trading Act and Art. 4 lit c and 6 of the Unfair Competition Act. For a general and rough overview, it is sufficient to contrast Art. 162 and 273 StGB-CH.

7.12.2 Breach of Trade Secrecy

857 Art. 162 StGB-CH:⁴¹⁵ Breach of Manufacturing or Trade Secrecy

- (1) Any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract not to reveal,
- (2) any person who exploits for himself/herself or another such a betrayal, is liable on complaint to a custodial sentence not exceeding 3 years or to a monetary penalty.

858 It is recognised in case law that the **protected legal interest** of this provision is the protection of trade secrets and industrial secrets belonging to an economic enterprise that is in competition with other enterprises.⁴¹⁶

859 The penal provision distinguishes between two variants, namely the betrayal of relevant secrets and the exploitation of such secrets.⁴¹⁷

First, the betrayal of such secrets (para. 1) is analysed. The breach of secret occurs when the **perpetrator**, who would be obliged to keep the secret on the basis of a **legal** or **contractual obligation**, betrays it, or takes advantage of the betrayal for himself/herself or another.⁴¹⁸ The perpetrator can therefore only be someone who is obliged by law or on the basis of a contract to maintain secrecy.⁴¹⁹ Regularly, such obligations are created from a professional relationship (e.g. an external management consultant to a consulting company), a social relationship (e.g. a partner to a company), but also the employment relationship.⁴²⁰ Thus, in order to determine the scope of the protection of secrets from an employment relationship, it is necessary to consider the basic features of labour law. This is because the employee, through his/her service for the employer, naturally acquires knowledge of trade or company secrets that are of vital interest to the employer. During the term of the employment relationship, he/she may not exploit these secrets or disclose them to others. After termination of the employment relationship, the protection of secrets is generally loosened, but there is a certain degree of **obligation to maintain secrecy**. The legislator is aware of the fact that the former employer has a strong interest that the information remains secret. However, the former employee has an interest in being able to make use of his or her professional experience in their further professional life.

⁴¹⁵ See also Art. 6 UWG-CH.

⁴¹⁶ BGE 118 Ib 574, E. 5a; Schwarz J (2021), 669, 678–679.

⁴¹⁷ Pieth M (2016), 240.

⁴¹⁸ Schwarz J (2021), 669, 683–684.

⁴¹⁹ BGE 141 III 119, E. 5.4.

⁴²⁰ BGE 103 IV 283, E. 2b; Hug D (2013), 1, 11–12; Schwarz J (2021), 669, 683.

Therefore, in many legal systems there are compromises in the obligation of secrecy. The parties involved are free to stipulate corresponding confidentiality obligations in a contract because without them there are no legal provisions for a duty of confidentiality.⁴²¹

As far as the **object of the offence** is concerned, the common characteristic of fabrication and trade secrets is that they are facts which have several features.⁴²² The facts must be neither generally known nor generally accessible.⁴²³ The owner of the secret must have a legitimate **interest** in keeping the facts secret,⁴²⁴ but must also manifest the **will** to keep them secret.⁴²⁵ At the same time, only true information is protected.⁴²⁶ Additionally, it must be of economic value.⁴²⁷ The secret facts must therefore have an influence on the operating result, which is why the disclosure is likely to increase competition from competitors or harm one's own company. **Manufacturing secrets** are all secret facts that are part of the manufacturing process as technical matters, such as recipes⁴²⁸ or descriptions of the construction of machines.⁴²⁹ **Business secrets** are all secret facts concerning commercial or business aspects. This therefore concerns secret facts about the company's sales and investments.⁴³⁰

As far as the **act of offence** is concerned, it is understood to mean any disclosure of such secrets in breach of duty.⁴³¹ It is irrelevant how this is done (orally, in writing). A breach of secrecy is, incidentally, already assumed if the person bearing the secret passes on the information to be kept secret to an unauthorised third party, even if no damage is caused under civil law. For the purposes of criminal law, only the fact that the unauthorised third party has taken note of the secret counts. The secret is betrayed if the unauthorised person gains knowledge of it, or even has the possibility of gaining knowledge of it, although the knowledge should be excluded according to the will of the owner of the secret.⁴³²

Intent is required for the **subjective elements**. The offender must know or at least consider it possible that the facts are a secret or that there is a duty of secrecy, which is why the unauthorised person must not gain knowledge of the secret.⁴³³

⁴²¹Schwarz J (2021), 669, 683–684.

⁴²²Pieth M (2016), 239–240.

⁴²³BGE 80 IV 22, E. 2a.

⁴²⁴BGE 88 IV 22, E. 2a.

⁴²⁵BGE 118 Ib 537, E. 5a.

⁴²⁶BGer, 16.12.2014, 6B_56/2014, E. 5.3.1.

⁴²⁷BGer 25.3.2015, 6B_65/2015, E. 1.3.3.

⁴²⁸BGE 103 IV 283, E. 2b.

⁴²⁹BGE 80 IV 22, E. 2a.

⁴³⁰Schwarz J (2021), 669, 684–685.

⁴³¹Schwarz J (2021), 669, 685.

⁴³²BGer 8.8.2016, 6B_1403/2017, E. 1.2.2.

⁴³³Schwarz J (2021), 669, 686.

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- 863** This brings into focus the exploitation of secrecy contained in Art. 162 para. 2 StGB-CH. This is an independent offence,⁴³⁴ which, however, requires the betrayal of the secret according to para. 1 (→ mn. 859). Anyone can be the **perpetrator** of this variant. However, anyone who is already a perpetrator under Art. 162 para. 1 StGB-CH cannot at the same time also be a perpetrator under para. 2.⁴³⁵ The **acts** of the offence covers any use of the secret for one's own benefit or for the benefit of a third party. However, the mere dissemination of the secret is not sufficient. As soon as the secret has been revealed, the offence has been committed.⁴³⁶ Again, intent is required as a **subjective element**. This means that the offender must know or at least consider it possible that he/she has gained knowledge of the secret due to an intentional breach of a duty of secrecy, and he/she must want to use the information for his/her own benefit or for the benefit of a third party.⁴³⁷

7.12.3 Industrial Espionage

864 Art. 273 StGB-CH: Industrial Espionage

- (1) Any person who seeks to obtain a manufacturing or trade secret in order to make it available to an external official agency, a foreign organisation, a private enterprise, or the agents of any of these, or,
- (2) any person who makes a manufacturing or trade secret available to an foreign official agency, a foreign organisation, a private enterprise, or the agents of any of these,
- (3) is liable to a custodial sentence not exceeding 3 years or to a monetary penalty, or in serious cases to a custodial sentence of not less than 1 year. Any custodial sentence may be combined with a monetary penalty.

- 865** Systematically, the offence is located in the misdemeanours and crimes against the state and national defence. Therefore, its purpose is to protect the economic aspects of the state, namely the preservation of the national economy,⁴³⁸ and to ward off espionage activities in this regard. This provision relates to the protection of **collective interests**, which is why the penal provision is not suitable for the protection of individual interests.⁴³⁹ Individual economic interests, by contrast, are protected by Art. 162 StGB-CH.

⁴³⁴BGer 25.3.2015, 6B_65/2015, E. 3.4.

⁴³⁵BGE 118 Ib 547, E. 5a.

⁴³⁶Schwarz J (2021), 669, 685–686.

⁴³⁷BGer 25.3.2015, 6B_65/2015, E. 1.3.4.

⁴³⁸BGE 141 IV 155, E. 4.2.1; Pieth M (2016), 253.

⁴³⁹BGE 71 IV 217.

Structurally, it is an **abstract endangerment offence**.⁴⁴⁰ It is therefore not necessary for there to be a concrete threat or even a violation of private or state interests for the offence to be fulfilled.⁴⁴¹ It is sufficient if the perpetrator opens up the possibility of access for a foreign beneficiary, without any further success being necessary.

The **object of the offence** are manufacturing or trade secrets. First of all, this is about the same type of secrets as in Art. 162 StGB-CH, but the concept of secrecy in Art. 273 StGB-CH is much broader, because it covers all facts of economic life in which there is an interest in secrecy worthy of protection.⁴⁴² Secrets are thus economically significant facts that are relatively unknown and in whose secrecy there is an interest worthy of protection as well as a corresponding will to maintain secrecy.⁴⁴³ **Relatively unknown** within the meaning of Art. 273 StGB-CH means that the fact is not known to the beneficiary, even if it is “known in a certain circle” in Switzerland.⁴⁴⁴ The objective elements of the offence also include the intention to maintain secrecy, i.e. that a Swiss business enterprise wants to keep the relevant trade secret undisclosed.⁴⁴⁵ Not all secrets are protected by Art. 273 StGB-CH, but only those in which there is **an objectively justified interest** in secrecy worthy of protection.⁴⁴⁶ Because of the reference to the protection of supra-individual interests of Switzerland, for the offence of Art. 273 StGB-CH it is necessary that the fact that was discovered or made accessible has a connection to Switzerland (“internal relations with Switzerland”).⁴⁴⁷

The **addressee of the betrayal of a secret** is any non-Swiss authority, but also any foreign organisation or private company, but not a private person.⁴⁴⁸ The foreign agent referred to in the penal provision is any person who acts with or without a mandate in the interest of a foreign authority or company.⁴⁴⁹

The penal provision mentions two different offences, namely spying in para. 1 and making accessible in para. 2. The **act of spying** is an action that is directed towards finding out the secret. It is not necessary that the spying actually succeeds. If a person with a secret has lawful knowledge of the secret, he or she cannot be a perpetrator under para. 1.⁴⁵⁰ **Making accessible** means that the unauthorised person is given the opportunity, in the

⁴⁴⁰BGE 111 IV 74, E. 3, 4.

⁴⁴¹BGE 141 IV 155, E. 4.2.1.

⁴⁴²BGE 141 IV 155, E. 4.2.1; Schwarz J (2021), 669, 709.

⁴⁴³BGE 141 IV 155, E. 4.2.1; Schwarz J (2021), 669, 710.

⁴⁴⁴BGE 104 IV 175, E. 1b; Pieth M (2016), 253.

⁴⁴⁵BGE 104 IV 175, E. 4a.

⁴⁴⁶Cf. BGE 104 IV 175, E. 2.

⁴⁴⁷BGE 141 IV 155, E. 4.2.3; Pieth M (2016), 254; Schwarz J (2021), 669, 710–711.

⁴⁴⁸BGE 104 IV 175, E. 2a; Hug D (2013), 1, 18–19; Pieth M (2016), 254; Schwarz J (2021), 669, 713–714.

⁴⁴⁹BGer 13.2.2015, 6B_580/2014, E. 2.4.1.

⁴⁵⁰Schwarz J (2021), 669, 712.

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broadest sense, to gain an insight into secret Swiss economic circumstances. Again, it is not necessary for gaining insight to be successful.⁴⁵¹

870 As far as the **subjective elements** are concerned, intent is sufficient for both types of offence.⁴⁵² Among other things, the perpetrator must have the intention to reveal the secret and the awareness that it is a secret. The fact that state interests are also affected in the case of betrayal is irrelevant. Para. 1 requires that the perpetrator acts with the intention of making the information accessible.

871 If the offender spies on or betrays private economic secrets, the preservation of which is also in the state's interest because of their great importance or considerable industrial value, and thereby puts national security in the economic sphere in even an abstract danger.⁴⁵³ This constitutes a **serious case** under Art. 274 para. 3 StGB-CH.

7.12.4 Whistleblowing

872 A central problem in the protection of secrets under criminal law is the disclosure of criminal offences within a company through whistleblowing.⁴⁵⁴ In whistleblowing, a person who belongs to the company organisation draws attention to wrongdoing or even criminal offences by reporting them. Whistleblowing does not cover deliberate false accusations. Rather, it draws attention to grievances in the interest of third parties (such as the company or external persons) or in the interest of the general public. The whistleblower therefore does not act solely in his/her own interest, even if certain motivations (e.g. frustration, etc.) may be a motive.⁴⁵⁵ If one analyses the behaviour of the whistleblower according to the test set out above, there is a risk that the objective and subjective characteristics of criminal offences such as betrayal of secrets will be committed. A differentiation must be made here.

873 If criminally prohibited (or otherwise unlawful) conduct is disclosed by the whistleblower, the elements of the offence are not met because there is a lack of an objectively justified interest in secrecy worthy of protection. In practice, of course, this case is rare because the information disclosed often involves not only criminal offences, but possibly also non-criminal conduct that must be disapproved of in other ways. Then, at most, an examination of unlawfulness comes into consideration. The betrayal of secrets may therefore be justified on the basis of the protection of legitimate interests. However, this is only possible under strict conditions, namely if the perpetrator is not concerned with the

⁴⁵¹Schwarz J (2021), 669, 712–713.

⁴⁵²Pieth M (2016), 255; Schwarz J (2021), 669, 714.

⁴⁵³BGE 108 IV 41, E. 3.

⁴⁵⁴Hug D (2013), 1–27.

⁴⁵⁵Hug D (2013), 1, 4–6.

protection of his/her own private interests, but with public interests worthy of protection.⁴⁵⁶ Of course, this depends on the individual case, but in principle, the report should first be made to the responsible internal bodies in the company organisation before approaching external bodies. Basically, going public is only the very last resort if the other ways or other milder means of remedying the grievance have not been successful. The betrayal of secrets is therefore justified if there was no suitable or reasonable means within the organisation, so that external disclosure was the only (and thus also the mildest) means in the specific case.⁴⁵⁷

Recently, the **European Union** issued a directive on whistle-blower protection in order to encourage potential whistle-blowers to speak up and to provide effective protection once they do.⁴⁵⁸ EU member states are obliged to adapt their national law (labour law, criminal law and criminal procedure) by the end of 2021. This will provide an EU-wide minimum standard for whistle-blowers reporting breaches of EU law. However, member states are free to provide broader protection. It is expected that the effect of this directive will go far beyond that limited scope, because many companies will create practical solutions that extend the protection to all whistle-blowers (including those reporting violations of national law).

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⁴⁵⁶Cf. Redder JP (2020).

⁴⁵⁷Hug D (2013), 1, 22–26.

⁴⁵⁸Directive (EU) 2019 1938 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Official Journal 26.11.2019, L 305/17.

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- This chapter deals with basically with product liability law¹ and environmental law from a criminal law perspective. From the perspective of product liability, the problem of causality is at stake. Therefore, for a better understanding, it is necessary to repeat the basics on causality (→ mn. 294).

Causality is decisive here because in the case of product liability, it is scientifically very difficult to prove the distinction between cause and damage. However, causality is also a key issue when collective board decisions must be attributed to individual members of a board. In the last focal point, the problem of careful organisation is addressed—a topic that affects classic corporate governance but brings with it some special features in criminal law.² From the perspective of the offences against the environment, the overview provided will show the difficulties criminal law has in protecting the environment and how challenging it is from a criminal law perspective to develop appropriate definitions that satisfy the classic principles of criminal law (i.e.: principle of certainty, → mn. 264).

The aim of this chapter is first and foremost to raise awareness of product, service and environmental risks under criminal law. Here, essential questions arise which are answered by knowledge of general criminal law. The reading should impart the fact that these risk areas are undergoing a very dynamic development and that the assessment of risks under criminal law is particularly dependent on the aspect of due diligence.

¹Fenwick M and Wrba S (2018), 33–53.

²Fenwick M and Wrba S (2018), 114–137.

8.1 Criminal Product Liability

- 875** What is Criminal Product Liability about? This can be seen in the fictitious example of the bus case.

Bus—Case³

A bus is driving at high speed on a Spanish country road. At a certain point the driver can no longer brake the vehicle. Both the gears and the braking system fail. The bus races into a village and crashes into a house. Several people are killed and injured. The public prosecutor's office directs its investigations first against the bus driver and his employer, the travel company, and accuses them of negligent homicide and negligent injury. The accused defend themselves and claim that the brakes failed. Since the public prosecutor's office must conduct its investigations in such a way that it must also take into account exculpatory materials, the braking system must now also be examined more closely. To this end, the company that manufactured the braking system will be investigated. In practice, this means that all stages of production of the braking system, i.e. from the basic design to production, are examined by the public prosecutor's office. This also includes any recall actions already carried out. In the specific case in question, it could emerge that there were already several customer complaints about the sudden failure of the braking system before the accident. In that case, the company may have investigated the incidents, but has not found the source of the fault. It therefore continued production and developed new technical standards for the braking system only after several years, after defects had also been complained about and accidents had occurred. In such a hypothetical case, the public prosecutor's office will accuse the managers responsible for development, production and sales of not having taken the necessary countermeasures in time after the incidents became known. The public prosecutor's office will then charge them with negligent homicide and bodily injury. ◀

- 876** Product liability basically describes the **manufacturer's liability** for damages caused by a defective product.⁴ If one assumes a legal approach, it becomes clear that the legislator usually does not provide for a punishable general criminal offence of placing defective products on the market.⁵ Thus, there are general elements of crime such as negligent bodily injury which are used in legal practice for criminal product liability. However, there are also specific regulations for each industry respectively. For example, special laws provide for criminal offences in the regulation of foodstuffs (→ mn. 866), medical products,⁶

³The example is found in Eidam (2018), 197.

⁴Gless S and Wohlers W (2019), 366, 380–384.

⁵Kuhlen L (2019), 113, 120; cf. Gless S and Wohlers W (2019), 366, 376–380.

⁶Hilgendorf E (2015), 310, 339–340.

chemicals, genetic engineering, or motor vehicle safety.⁷ The general and specific regulations are not mutually exclusive but may apply cumulatively. For example, a defective product (e.g. placing spoiled foodstuff on the market) which causes physical pain to the consumer can be charged with both bodily injury (general elements of the offence) and disregarding the Food Act (special act).

Glycol Wine Scandal of 1985

In the diethylene glycol wine scandal of 1985, the perpetrators had mixed wine with sweet-tasting antifreeze glycol and put the resulting product on the market, which was dangerous to health. However, the Austrian courts did not convict the perpetrators of bodily injury, but of fraud. ◀

How is product liability designed? The starting point is the **(civil) product liability**. For a company as a manufacturer, product or manufacturer responsibility is always realised when its products cause personal injury or damage to property to third parties. However, this only applies if the product was already capable of causing the damage at the time it was put into circulation (i.e. at the time of the market release) due to its defectiveness and the third party used the product as directed. A special feature of product liability under civil law is the burden on the injured party to prove the damage. In civil proceedings, the injured party must prove all facts that support his or her claim (e.g. for damages). In civil product liability, the burden of proof is considerably eased in that, on the one hand, the injured party only has to prove that the legal infringement was caused by a defective product, while the manufacturer then has to prove that he/she is not at fault with regard to the defect.⁸

Criminal product liability has some parallels here, but also some differences. In principle, in the case of defective products or services, criminal proceedings are initiated first and only then civil proceedings, because in criminal proceedings it is not the victim but the state (public prosecutor's office and police) that collects the evidence, which may later also be taken into account in civil proceedings.

Nevertheless, there are some key differences. Unlike in civil law, there is no strict liability and no reversal of the burden of proof in criminal product liability. Criminal law, unlike civil law, also begins its protection earlier because it does not wait until a damage occurs but it sanctions an attempt to violate a protected legal interest (→ mn. 323). The penalty as a consequence of criminal proceedings often has a much higher loss of reputation for companies than, for example, the payment of damages. With regard to the individual, the application of criminal law norms results in risks of imprisonment and fines, which appears to be the much more serious legal consequence compared to monetary compensation for damages. In this respect, criminal proceedings are definitely a more serious burden for those responsible for product liability cases than civil proceedings.⁹

⁷Hilgendorf E (2015), 310, 315–317.

⁸Hilgendorf E (2015), 310, 317–318; Kuhlen L (2019), 113, 120–121.

⁹Hilgendorf E (2015), 310, 318–319; Kuhlen L (2019), 113, 121–127.

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879 If one recalls the basics for analysing criminal liability (→ mn. 281), it is clear that criminal product liability presupposes that an individual, by placing a product on the market, has fulfilled a legally established criminal offence in its objective (→ mn. 292) and subjective (→ mn. 302) elements, and in doing so has acted unlawfully (→ mn. 313) and culpably (→ mn. 320).¹⁰ This criminal liability can affect anyone who has contributed to causing the damage by any conduct, e.g. the manufacturer, supplier, intermediary, consultant or seller of a product.

In principle, intentional or negligent bodily harm or homicide can be considered as criminal offences if damage to the legal interest of physical integrity is involved. Other criminal offences, such as fraud, may also be possible.¹¹

Coburg Meat—Case¹²

The Coburg meat scandal was about the sale of several tons of rotten meat that ultimately ended up on the plates of unsuspecting consumers. The meat trader had sold meat that was not approved as food because the best-before date had already expired. The responsible owner of the meat processing company had wanted to do business with rotten meat and slaughterhouse waste and thereby deliberately deceived his customers. He was convicted of commercial fraud in more than 15.000 cases and violation of food law. ◀

880 Product liability can be divided into four different categories.¹³

881 1. Liability for **design defects**: the manufacturer is responsible for ensuring that the product which they have placed on the market offers the required level of safety in terms of its design. The time for assessing whether this safety level exists is the time when the product is placed on the market. However, it is possible that the manufacturer does not produce everything for the product on their own, but is dependent on suppliers. In this case, the manufacturer of the final product must ensure that the supplier's parts meet the requirements necessary for the safety of the final product and that the supplier's parts do not contain any hazards after installation.¹⁴

882 2. Liability for **manufacturing defects**: the manufacturer has duties of care, which are intended to prevent an unplanned deviation from the intended final product during the

¹⁰ Kuhlen L (2019), 113, 128–129.

¹¹ Kuhlen L (2019), 113, 127–128.

¹² Hilgendorf E (2015), 310, 323; Kuhlen L (2019), 113, 124.

¹³ Hilgendorf E (2015), 310, 331.

¹⁴ Hilgendorf E (2015), 310, 331.

manufacturing process. The plan for the manufacture of the product must therefore be adhered to, and the manufacturer must ensure that this is implemented.¹⁵

3. Liability for **instructional defects**: the manufacturer is responsible for ensuring that the user of the product is instructed in its proper use. Furthermore, the manufacturer must ensure that the user is warned of any possible dangers of the product, including the foreseeable misuse of the product through misappropriation. This obligation is intended to cover residual risks of the product, but not to compensate for design or manufacturing defects. Therefore, warnings may be useful to avoid instructional errors, whereas the affixing of warnings for design or manufacturing errors does not relieve the manufacturer of his/her responsibility.¹⁶ 883
4. Liability for **product monitoring**: the manufacturer is responsible for the product even if the user has bought it. The manufacturer must therefore continuously check whether there are any dangers arising from the practical handling of the product which are not yet known—and then react accordingly. In order to fulfil the obligation to monitor the product, for example, customer complaints or the relevant scientific or technical journals can be collected and evaluated.¹⁷ 884

An example of **criminal product liability** is provided by the Monza Steel case from Germany. This example is intended to show that different conducts of various individuals can occur in combination to contribute to a specific product defect. 885

Monza Steel—Case¹⁸

The so-called Monza Steel case concerned defective steel belted tyres. It came to be known that the treads of the tyres came off after long journeys at high speed. This resulted in numerous accidents with serious injuries and deaths. Criminal proceedings were instituted before the Munich Regional Court against the chairman of the board of management, two other members of the board (technical and sales divisions) and the head of the department responsible for technical development. The accusation of bodily injury or negligent homicide was based on the **design defects** (→ mn. 881). This was because the head of department and the board member responsible for “technology” were accused of having approved the production of the maximum speed tyre series although no tests had been carried out to measure the duration they could be maintained at maximum speed. The other board members were accused that they should not have continued to rely on the head of department and the technology board member after the damage cases became known and nothing was done. They should have taken the necessary measures themselves to prevent further accidents. The proceedings ended

¹⁵Hilgendorf E (2015), 310, 331.

¹⁶Hilgendorf E (2015), 310, 331.

¹⁷Hilgendorf E (2015), 310, 331.

¹⁸Hilgendorf E (2015), 310, 321; Kuhlen L (2019), 113, 123–124.

with a conviction of the head of department to one year's suspended prison sentence for negligent homicide and bodily injury. One of the accused members of management died during the trial and the other members of the board were declared incapable of standing trial.¹⁹ ◀

- 886** Another example of criminal product liability in the broadest sense is the ice rink case. This example is intended to show that design or manufacturing defects can be taken up by the courts even many years after the work has been completed and can lead to convictions.

Ice Rink—Case²⁰

In January 2006, the Bad Reichenhall ice rink collapsed during opening hours and during ongoing operations. The collapse had been preceded by a heavy snowfall, and the accident occurred a few minutes before the ice sports hall was to be closed precisely because of this heavy snowfall. The collapse killed 15 people and seriously injured six others. During the clarification of the facts of the case, it was proven that the flat roof of the ice rink, which had been faultily constructed in 1971 (i.e. 35 years before the collapse), had been damaged. The competent court sentenced the engineer who had constructed the roof in 1971 to 1 year and 6 months suspended sentence for multiple negligent homicides.²¹ However, the trials against the engineer who was responsible for inspecting the hall ended in an acquittal after several trials.²² ◀

- 887** The examples and the systematics of the defects are intended to show that companies are bound by the legal system to standards so that they produce and offer their goods and services with care. It is of fundamental importance that companies exercise the necessary care. They must ensure that the mandatory regulations of their respective industry are observed. However, they must also comply with non-mandatory regulations, such as norms or standards (accident prevention regulations, DIN standards), and communicate these standards within the company. After all, technical standards (such as the DIN standards) can be a measure of action as case law is based on these standards. A comprehensive risk analysis, which is periodically updated or reassessed when a new product line is opened, is essential for companies to act with care. Not only the mandatory

¹⁹ Munich Regional Court II, ES, IV.28.

²⁰ Hilgendorf E (2015), 310, 323–324

²¹ Bundesgerichtshof Judgment of 12 January 2010, 1 StR 272/09.

²² Landesgericht Traunstein Judgment of 27 October 2011, 6 KLs 200 JS 8 65/06 (3)

regulations must be included in this examination, but also the usual industry and technical standards.²³

8.1.1 Questions on Causality and Negligence

But back to the main legal focus: causality. As already mentioned before, it is a decisive challenge to connect the effect (damage occurred) with the result (defect of the product) in view of causality and to prove this connection sufficiently before a court from the point of view of the injured party or company. To do so one must look at specific characteristics of the product and the damage. This is because the challenge of proving causality in criminal product liability lies in the fact that cause and effect cannot easily be proven by scientific means.²⁴ Examples from a continental European perspective, especially leading cases from Germany, are the so-called thalidomide and leather spray case.

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Contergan—Case²⁵

In the so-called thalidomide (or Contergan) case, the company “Chemie Grünenthal” was accused that its sleeping pill would cause severe malformations of embryos because of the ingredient thalidomide. The criminal proceedings were directed against the three members of the management board, three department heads (“medical-scientific department”, “research and production”, “sales”) and a clerk of the pharmaceutical company. The persons were charged with bodily injury and negligent homicide. In the 1950s and 1960s, many new-borns suffered severe physical deformities after the expectant mothers had taken the drug during pregnancy. The head of research and production was accused of an instructional deficit. His statements to management, which had no special knowledge of natural sciences, had been incorrect, as he had claimed that the thalidomide was not toxic and was completely harmless. The other defendants were accused of having made mistakes in monitoring the product. For they should have known from February 1961 at the latest that taking the drug would cause severe nerve damage. On the basis of their own knowledge, they should have recognised the increasingly clear danger and acted accordingly. They would have had to take countermeasures, such as stopping distribution temporarily, warning doctors and consumers, and recalling the product. In the judicial review, the Court of Aachen assumed that the impact on the embryo could constitute bodily injury or death, even if the specific malformations did not develop until after birth. However, many decisive causal questions of cause and effect were not finally

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²³ Hilgendorf E (2015), 310, 325–333; Kuhlen L (2019), 113, 131–143.

²⁴ Hilgendorf E (2015), 310, 335; Kuhlen L (2019), 113, 143–144.

²⁵ Hilgendorf E (2015), 310, 320–321; Kaufmann A (1971), 569–576; Kuhlen L (2019), 113, 123; Kuhlen L (1994), 1142–1147.

decided by the regional court because the case was ultimately dropped in favour of compensation to the victims.²⁶ ◀

890 In the following, we shall now show what objections have been raised to the assumption of causality between the intake of thalidomide (cause) and the occurrence of harm (effect). These objections are typical for cases of product liability under criminal law, because they are intended to cast doubt on causality in the scientific sense. The objections to the assumption of causality can be summarised as follows:²⁷

- The fact that more precise effects of thalidomide are still unknown is an obstacle to reliable statements about the cause of the malformations.
- Other causes are possible or at least cannot be completely excluded.
- The new malformations mainly occurred in children whose mothers had often watched television during pregnancy. The radiation of the television tubes had possibly caused these malformations.
- The new malformations may have been caused by radioactive fallout after nuclear bomb tests.
- The malformations were due to unsuccessful abortion attempts.
- It could have been special biological factors of the mothers concerned or special psychological situations during pregnancy.
- The same malformations had already existed before the development of thalidomide, so that the causality of the new drug must be questioned.
- Quite a few similar malformations were also observed in the years 1958-1962 in some countries where thalidomide had not been on the market for 9 months or not at all.
- There were also mothers in the Federal Republic of Germany who had given birth to a child of the new type of deformity in the years 1958-1962 but at the same time had not taken thalidomide.
- There have been isolated cases of similar deformities even after thalidomide was withdrawn from the market for more than 9 months.
- Some mothers taking thalidomide during pregnancy would have given birth to perfectly healthy and normally developed children.
- Possibly, thalidomide does not cause malformations, but only prevents premature loss of embryos already disturbed by other factors in their development.

891 However, the Court of Aachen considered that the doubts did not ultimately stand in the way of an affirmation of the causal link. For causality in the legal sense was by no means to be understood as scientific proof, which presupposed a mathematical certainty excluding any possibility of the contrary and thus absolutely certain knowledge. For the criminal-law

²⁶Landgericht Aachen, Juristenzeitung 1971, 507–522 (on causality: 510–514); Tiedemann K (2017), 127.

²⁷Beyer C (1989), 18–19.

assessment alone, it is decisive if the court is **fully convinced** in the course of the main hearing.²⁸

Why can the court act like this? This is related to the **principle of free consideration of evidence** (→ mn. 384), which is a central principle of criminal procedure in many legal systems. Most legal systems on criminal proceedings do not have strict rules of evidence that determine the value of evidence from the outset (such a rule of evidence could be: the content of a substantiated document is considered irrefutably proven). Rather, courts freely establish facts, such as the connection between cause and effect, in criminal proceedings. Free conviction means that the judge can determine the value of evidence according to all general principles of experience, thought and natural laws. Free conviction also means, however, that it is possible for him/her to break through general principles of experience if special circumstances of the individual case indicate that the opposite is the case. The judge must therefore apply and weigh up all available principles of experience against each other. However, free conviction does not mean that the judge is free to consider facts as proven at his/her own discretion and in complete arbitrariness. Free conviction obliges the judge to give detailed reasons for the formation of his/her conviction and thus make it intersubjectively comprehensible and plausible. The judge must therefore explain why he/she considers the fact to be proven and why the counterevidence does not convince him. The judge must therefore not base his/her conviction on prejudices, or even verifiable impressions or intuition, but must provide comprehensible and plausible reasons. This obligation to give reasons is the guarantee that the judge may not decide completely arbitrarily. In order for the judge to form his/her conviction that certain facts are present or not, he/she needs support, such as from experts. The experts can bring different expertise into a criminal case and support the judge in the assessment of evidence. Nevertheless, it should be noted that the judge is not bound by the expert opinion. He/she may deviate from it if he/she can also give sufficiently plausible reasons for these deviations. The involvement of an expert witness in criminal proceedings therefore does not mean that the judge outsources the determination of facts (e.g. the relationship between cause and effect) to an expert. Rather, the judge obtains expert knowledge, which he/she can subject to the principle of free assessment of evidence and either follow the expert opinion or take a different path.²⁹

The court was therefore not necessarily dependent on a generally accepted scientific hypothesis about the drug, even if natural sciences were invited to present empirically accepted statements in the context of criminal proceedings. The court was not obliged to conduct or question medical or biological research on its own responsibility, but rather allows expert knowledge from various sectors to be brought in while ultimately retaining the competence to decide to what extent the causal connection could be convincingly proven in this individual case.³⁰

²⁸ Hilgendorf E (2015), 310, 335.

²⁹ Kuhlen L (2019), 113, 144–145.

³⁰ Kuhlen L (2019), 113, 145.

- 893 Another case, which was decided with various verdicts for negligent and dangerous bodily injury and earned the defendants heavy fines and imprisonment, is the so-called “Erdal leather spray case”.³¹

Leather Spray—Case³²

The so-called **leather spray case** concerned the criminal liability of the managing director of a GmbH. The shoe polish distributed by the company, specifically the propellant gas cans, was responsible for serious damage to health. When this information became known to the company, it called in an expert. However, it was not possible to ascertain exactly which active ingredients provoked the harmful effects. In view of this result, the company management decided not to launch a recall campaign and merely had warning labels affixed to the cans. In its decision, the German Federal Supreme Court considered this measure to be insufficient and sentenced the members of management to bodily injury.³³ ◀

In its ruling, the court stated that the necessary measures (for example, a sales stop or recall) could only have been taken jointly by all the group’s managing directors. In May 1981, the managing directors were informed by the company’s own chief chemist (who had also been charged but was acquitted by the Supreme Court) in a special session about the search for the substance that was the cause of the poisoning. But the managers did not react at first and did not recall the leather spray until the end of 1983. The court found that the managing directors had to take the appropriate measures at the said special meeting because of the numerous damages.³⁴ From May 1981 onwards, the managing directors could no longer plead that they did not want further health impairments to occur. The conviction of the directors for intentional grievous bodily harm was pronounced for those damages that occurred after the May 1981 meeting.

- 894 A similar case was decided in Spain in the same way as in Germany.

Spanish Oil—Case³⁵

In May 1981, a new and hitherto unknown disease appeared in various regions of Spain, which caused damage to the bloodstream and thus led to serious health problems. More than 15,000 people contracted the disease, 330 of whom died. Epidemiological studies identified the consumption of informally (unbranded) distributed cooking oil as the

³¹ Kaspar J and Reinbacher T (2020), 19–28; Doll I (2019), 32–34.

³² Hilgendorf E (2015), 310, 321–322; Tiedemann K (2017), 128.

³³ Bundesgerichtshof, judgment of 06.07.1990, 2 StR 549/89.

³⁴ The court examined this in a three-stage procedure. First, the court asked whether the recall would actually have taken place if the managing directors had acted carefully. Then the court examined whether the recall would have reached the dealers in time. Finally, the court examined whether the recall could have prevented the damage that actually occurred.

³⁵ Gelpi E et al. (2002), 457, 457–459.

cause. The investigations revealed that the edible oils in question had been produced by blending rapeseed oil imported into Spain for industrial purposes and with denatured aniline in accordance with administrative regulations. A whole network of medium-sized and small firms had imported the rapeseed oil and introduced it into the food distribution system; the attempts made by the distributors to eliminate the aniline and its compounds from the oil had been unsuccessful. ◀

The Spanish Supreme Court (Tribunal Supremo) decided on causality in a similar way to the German Federal Court: It is not necessary to know the exact mechanism by which a result is achieved in order to determine causality. It is sufficient if a connection between the relevant events could be established and other causes of result could be excluded.³⁶

The numerous practical examples described above are intended to show:

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- There are different types of errors that can lead to criminal liability for product liability.
- The occurrence of damage and suspicion that such damage is related to products should prompt the company to take appropriate precautions.
- Internal indications of possible risks must be presented in a technically competent manner and specifically checked by management.
- Taking preventive measures can mitigate the risk of liability from a criminal law perspective, provided that these measures are effective in the specific case and are not merely used for alibi purposes.

8.1.2 Criminal Food Law

While a large number of products and services are covered by the general regulations of core criminal law, some specific economic sectors, such as the food or pharmaceutical industries, have received direct regulation. In the following, a brief analysis will be given on the basis of the German criminal law on foodstuffs.³⁷

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Criminal food law covers not only foodstuffs for human consumption, but also foodstuffs used in cosmetic products and consumer goods, but also animal feed.³⁸ It has the following four characteristics in particular:

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- Food law in European states is strongly permeated by **European regulations** (in particular Regulation (EC) No. 178/2002) and characterised by landmark decisions of the **European Court of Justice** in this regard.³⁹ The provisions of European law are

³⁶Tribunal Supremo, Judgment of 23.04.1992, 3654/90.

³⁷Cf. Hilgendorf E (2015), 310, 339.

³⁸Dannecker G and Bülte J (2019), 154, 159–161.

³⁹Hecker B (2014b), 525–528.

characterised in particular by the precautionary principle (see Art. 7 of Regulation (EC) No. 178/2002). It establishes increased due diligence measures in dealing with **(scientifically unknown) risks** and the consequences for **future generations**. This results from the practical necessity that the circulation and sale of foodstuffs should cross the borders of the nation state and in this respect provide as uniform a standard as possible within Europe. Conversely, European law prohibits far-reaching national restrictions on the circulation of food and feed because this would contradict the guiding idea of an economic internal market without borders for services and goods in Europe.⁴⁰

- Criminal food law contains a large number of **blanket norms**.⁴¹ This means that it refers to regulations outside criminal law and only reveals its full content when the regulations outside criminal law are examined in greater detail. This places criminal food law in a field of tension with the *nullum crimen sine lege* principle and in particular the requirement of certainty (→ mn. 264).⁴² This is because the legislator not only uses references to other legal provisions, but also, for example, references to official decrees and orders, which could undermine the stabilising character of the principle of legality, because the criminal law must in particular clearly define the content, subject matter and purpose of prohibitions under criminal law.
- Many provisions of criminal food law are structured as prohibition provisions, but the prohibition could fall resulting from an **official authorisation**. Due to the legislative technique of the blanket provisions and the authorisation reservations, the criminal provisions in the Food and Feed Code are highly technically structured, because reference is always made to the respective conduct (e.g. use of a food additive without official authorisation) from the Food and Feed Code (cf. § 58 et seq. LFGB-DE).⁴³
- Finally, many provisions of criminal food law are **abstract endangerment offences**. This means that there is no need for concrete damage or a concrete danger. It is sufficient for criminal liability if the incriminated act is carried out. However, some provisions are also structured as **potential endangerment offences** (→ mn. 249). In this case, a concrete danger is not required, but a concrete aptitude to cause damage as a result. In this respect, the mere commission of the offence is not sufficient, but this suitability must also be examined.⁴⁴

898 Before going into the criminal law provisions, it is necessary to make a few general remarks on criminal food law. What are **foodstuffs**? This is stated in § 2 para. 1 LFGB-DE,

⁴⁰ Dannecker G and Bülte J (2019), 154, 164–167; cf. Hecker B (2014a), 385, 388.

⁴¹ Bülte J (2015), 769, 770–771; Dannecker G and Bülte J (2019), 154, 167–172.

⁴² Satzger H (2004), 943, 947–948.

⁴³ Dannecker G and Bülte J (2019), 154, 173; Hecker B (2014b), 525, 529.

⁴⁴ Dannecker G and Bülte J (2019), 154, 172; Hecker B (2014b), 525, 529.

which in turn refers to Art. 2 para. 1 of the “Basic Principle”-Regulation (178/2002).⁴⁵ According to this, food is any substance or product intended to be, or reasonably expected to be ingested by humans in a processed, partially processed or unprocessed state.⁴⁶

Feeding stuffs are substances or products, including additives, which are processed, partially processed or unprocessed, intended for oral animal feeding (Art. 3 no. 4 Regulation (EC) No. 178/2002).⁴⁷ **Cosmetic products** are (§ 2 para. 5 LFGB-DE) substances or mixtures of substances which are exclusively or predominantly intended to be applied externally to the body of humans or in their oral cavity for cleansing, protection, maintenance of good condition, perfuming, alteration of appearance or to influence body odour. Cosmetic products do not include substances or mixtures of substances intended to influence the shape of the body.⁴⁸ Finally, **essential goods** are all articles that come into contact with food or are a component of food, but also packaging, clothing and cleaning products.⁴⁹

What are the **major guiding principles** of food law? On the one hand, the entrepreneur may place foodstuffs on the market on his/her own responsibility without authorisation if the products are safe. However, in the case of certain substances, there is preventive protection due to the hazards (e.g. to human health). This protection is realised by means of official authorisation. Because potentially dangerous substances are to be regulated, production involving such substances must be approved by the authorities beforehand.⁵⁰ These brief premises make it clear what the purpose of the criminal law regulations is here. It is primarily a matter of protecting the consumer from harm (and danger), from deception and disinformation.⁵¹ In the case of feed, it is particularly about protecting the health of animals and protecting nature (which is polluted by unsafe feed).⁵²

This can be seen, for example, in § 58 LFGB-DE, the **central provision for the protection of individual and public health**.⁵³ The protected legal interest is human health. However, it is not only about the health of the individual, but also about public health. Ultimately, the concept of health is to be understood broadly; in the context of the Food and Feed Code, it has in view not only the absence of disease, but also mental and psychological health (but not social or spiritual well-being). National and EU laws are mentioned as

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⁴⁵ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Official Journal of the European Union L 31/1.

⁴⁶ Dannecker G and Bülte J (2019), 154, 159–161; Hecker B (2014b), 525, 528–529.

⁴⁷ Dannecker G and Bülte J (2019), 154, 161.

⁴⁸ Dannecker G and Bülte J (2019), 154, 161–162.

⁴⁹ Dannecker G and Bülte J (2019), 154, 162.

⁵⁰ Dannecker G and Bülte J (2019), 154, 162–163.

⁵¹ Hecker B (2014b), 525, 530–531.

⁵² Dannecker G and Bülte J (2019), 154, 163–164.

⁵³ Dannecker G and Bülte J (2019), 154, 205–209; Hecker B (2014b), 525, 530.

acts of the offences and reference is made to them. The damage to health does not actually have to exist—rather, the suitability to damage health is sufficient (e.g. due to the substance used, due to contamination by pests such as listeriosis, but also due to foreign bodies in the food such as glass splinters). In order to determine **suitability** [*Eignung*], the focus is on the appropriate consumption behaviour, i.e. on the normal conditions of use of the food as well as the observance of the information available for this purpose. To examine the suitability, what is looked into is whether a healthy person (or the typical addressee for consumption) could consume the food without potential danger. The relevant point in time for determining the suitability to harm health is not the time of production, but the time of ingestion by the consumer.⁵⁴ The individual provisions in § 58 para. 1 LFGB-DE concern food that is harmful to health, misuse of substances with pharmacological effects, food, feed, cosmetics or consumer goods that have been manufactured in violation of a legal provision.⁵⁵ The provisions in § 58 para. 2 LFGB-DE, on the other hand, sanction violations of prohibition norms from European Community law or EU law, in particular violations of the Flavourings Regulation⁵⁶ or Plastics Regulation.^{57,58} The provisions in § 58 para. 3 LFGB-DE, by contrast, concern violations of mandatory or prohibitive standards of Community and EU law that correspond to national regulations.⁵⁹ With regard to the subjective elements, intent is required.⁶⁰ In this context, the mistake of law and the duty to obtain information, for instance via legal advice or official advice, play a major practical role.⁶¹ However, § 58 para. 4 LFGB-DE provides for a lesser penalty for the negligent commission of the offences.⁶²

900 Overall, many efforts are made to combat violations of the Food and Feed Code in order to protect human (and animal) life. However, some blind spots still remain, for example, combating food waste.⁶³ Here, the creation of new sanctions regimes (including a very restrained use of criminal law) or the reform of already existing regulations⁶⁴ could be effective.

⁵⁴ Dannecker G and Bülte J (2019), 154, 209–210.

⁵⁵ Dannecker G and Bülte J (2019), 154, 210–216.

⁵⁶ Regulation (EC) no 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC, Official Journal of the European Union 31.12.2008, L 354/34.

⁵⁷ Commission Regulation (EU) No 10/2011 of 14 January 2011 on plastic materials and articles intended to come into contact with food, Official Journal of the European Union 15.1.2011, L 12/1.

⁵⁸ Dannecker G and Bülte J (2019), 154, 216–218.

⁵⁹ Dannecker G and Bülte J (2019), 154, 218–219.

⁶⁰ Dannecker G and Bülte J (2019), 154, 177–178.

⁶¹ Dannecker G and Bülte J (2019), 154, 178–182.

⁶² Dannecker G and Bülte J (2019), 154, 185–197.

⁶³ Cf. Wirbel C (2021).

⁶⁴ Cf. Wirbel C (2021), 44–48.

8.2 AI Product and Service Risks

Technological progress in the field of artificial intelligence (AI) gives rise to new business models as well as to new opportunities for products and services, which in turn are associated with certain risks. From a purely legal point of view, these innovations do not move in a legal void, but are covered to a certain extent by existing regulations.

Nevertheless, new major risks arise that are not adequately covered by the existing regulations.⁶⁵ In the EU, concrete steps are being taken for strong regulation in order to adequately steer the **development of AI** in certain directions. To this end, in spring 2021 the European Commission proposed the world's first draft bill on the regulation of artificial intelligence.⁶⁶ The EU hopes to achieve a similar effect with the AI regulation as with the tough regulation of the GDPR, which has now become a standard for companies that want to do business in the EU. The proposal is also interesting for the purposes of corporate criminal law, especially as fines of up to **30 million €** or **6% of companies' annual worldwide turnover** are envisaged for violations of the prohibitions (Art. 71 of the draft regulation). For this reason, a brief overview of this regulation will be given here.

The first question that arises is what is covered by the term "artificial intelligence". This is because it is a generic term that is used in different contexts and therefore needs to be defined for the purposes of a uniform legal framework.⁶⁷ Art. 3 of the proposed regulation contains a definition that provides for a **very broad material scope of application**.

Accordingly, AI system is software that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with, and is developed with one or more of the following techniques and approaches:

- Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;
- Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;
- Statistical approaches, Bayesian estimation, search and optimisation methods.

⁶⁵ Cf. Behring RF and Golia A (2020), 740–744; Gless S and Wohlers W (2019), 366, 367–376; Jorzig A (2019), 3–12.

⁶⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, COM/2021/206 final; the proposal follows the European Commission's 'White Paper on Artificial Intelligence – A European Approach to excellence and trust', COM/2020/65 final see also COM(2021) 346.

⁶⁷ See Staffler L and Jany O (2020), 163, 163–167.

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The **personal-territorial scope of application** of the AI Regulation is also broad. The Regulation applies to

- providers placing AI systems on the market or putting them into service in the EU, whether those providers are established in the EU or in a third country;
- users of AI systems established in the EU;
- providers and users of AI systems established in a third country where the output generated by the system is used in the EU;

903 With the regulation, the European Commission wants to create a legal framework under which the **trust in artificial intelligence** can be strengthened.⁶⁸ This does not only concern the economic sector, but also a broad field of general use of AI, for example in the area of public administration, leaving out only isolated areas (for example AI applications in the military sector). The aim of the EU regulation is to improve the development, marketing and use of AI in the European Single Market in line with EU values.

On the one hand, this means **ensuring the cross-border movement of AI-based goods and services** and preventing EU Member States from restricting the development, marketing and use of AI systems in ways not provided for in the Regulation. On the other hand, general interests (e.g. health, safety) and in particular **fundamental rights** are to be protected to a high degree by regulation. Ultimately, the citizens of the European Union are the focus of the AI regulation. They should be able to trust that AI technologies are safe and are used in accordance with the law. At the same time, the European Commission must ensure that it does not restrict technical innovations too much.

To achieve these goals, the European Commission is taking a **risk-based approach**. It analyses the security risks of AI systems and links certain ban contents to them. The higher the possible dangers, the higher the requirements for the AI system should be. The European Commission does not shy away from completely banning certain fields of AI application.

904 According to Art. 5 of the draft regulation, the use of AI will be **prohibited in certain areas**:

- Use of real-time remote biometric identification systems in publicly accessible spaces for law enforcement purposes, unless strictly necessary for specific purposes (such as searching for victims of crime or prosecuting an offender);
- Use of an AI system that employs subliminal techniques outside a person's awareness to substantially influence a person's behaviour in a way that causes or is likely to cause physical or psychological harm to that person or another person;

⁶⁸ Cf. Staffler L and Jany O (2020), 163, 172–174. Complementary to this, Europe wants to assure its industry more independence in the face of global competition. Thus, the European Commission announced the intention to present a European Chips Act meant to boost Europe's semiconductor capacity and reinforce its new drive for strategic autonomy.

- The use of certain AI systems that exploit a person's weaknesses due to age or physical or mental disability;
- Certain forms of prejudicial or unfavourable treatment of persons in connection with social affiliation or social behaviour.

An important category is formed by the so-called **high-risk AI systems**. Such high-risk AI systems include all systems that are used in the following areas: 905

- Critical infrastructure (e.g. transport) where the life and health of citizens could be endangered;
- Education or occupational training, where a person's access to education and professional life could be affected (e.g. assessment of exams);
- Safety components of products (e.g. an AI application for robotic assisted surgery);
- Employment, human resource management and access to self-employment (e.g. software to evaluate CVs for recruitment processes);
- essential private and public services (e.g. credit scoring, denying citizens the ability to obtain a loan);
- Law enforcement that could interfere with people's fundamental rights (e.g. assessing the reliability of evidence);⁶⁹
- Migration, asylum and border control (e.g. verifying the authenticity of travel documents);
- Administration of justice and democratic processes (e.g. application of legislation to concrete facts).

These high-risk AI systems must fulfil **strict requirements** before they can be approved for the market in the EU. The list of requirements and obligations (Art. 8-51) are of abstract technical content. Most of them are already known from the area of "compliance" (→ mn. 1002) and must ultimately be further specified through practice and case law, but above all also from a technical perspective. The requirements include:

- adequate risk assessment and risk mitigation systems (Art. 9);
- high quality of the data with which the AI system is operated, especially to avoid discrimination (Art. 10);
- technical documentation of the AI system and its purpose (Art. 11);
- documentation and logging of operations, in particular to enable traceability of AI results (Art. 12);
- clear and appropriate information for users (Art. 13);
- adequate human supervision to minimise risks (Art. 14);
- high levels of robustness, safety and accuracy (Art. 15).

⁶⁹Cf. Staffler L and Jany O (2020), 163–177.

906 Other AI systems whose **risks** are considered **low or minimal** (Art. 52) must merely fulfil transparency obligations. This applies, for example, in the area of communication between human users and AI systems. In certain cases, the user must be informed that he or she is interacting or communicating with an AI system. The EU is also targeting the use of chatbots in particular, if they pose a risk of manipulation of the human user.

The draft regulation contains provisions for the establishment of EU databases (Art. 60) as well as a European Artificial Intelligence Board and national authorities (Art. 56-59, 63-68). At the same time, providers are required to establish and document a **post-market surveillance system** for AI systems in a manner appropriate to the nature of the AI technologies and the risks of high-risk AI (Art. 61).

Providers of high-risk AI placed on the EU market shall report to national market surveillance authorities, where an incident or breach has occurred (Art. 62).

Such monitoring obligations of products and services are already known from traditional product liability law (→ mn. 884) and are similar to the monitoring obligation of medical products and devices.

According to Art. 69, the drafting of **codes of conduct** is to be supported, with which the voluntary application of the requirements of Art. 8 to 15 related to high-risk AI is also to be promoted for other (low-risk) AI systems, as well as other requirements (e.g., environmental sustainability) for AI systems that are not contained in the regulation.

Here, the European Commission is relying on well-established mechanisms known from compliance management. Such codes of conduct can be drawn up by individual providers of AI systems or also by organisations representing them.

907 With EU-wide regulation, the European Commission is taking into account the fact that AI gives certain companies power over countries (for example, companies can influence elections, as the Facebook Cambridge Analytica scandal shows, → mn. 45), but also, conversely, that technology gives governments power to rule over people (and companies). The risk assessment of the EU proposal depends on factors such as the extent to which humans are involved in the use of AI and, in particular, how vulnerable areas are affected in this human-machine interaction.

The EU clearly states in its proposal that **fundamental rights** must be preserved. To ensure that this objective is not undermined by empty words and laws, a very broad scope of application is needed. It seems courageous that the EU even prohibits the use of innovative technology in certain areas. This raises basically two questions.

908 First, it must be asked whether regulation is stifling **innovation** here. In fact, it seems that regulation can steer innovation in an appropriate direction. Conversely, non-regulation and thus the state of uncertainty is detrimental to innovation. A very practical and economically oriented legislative approach is the approach of so-called “regulatory sandboxes” or “regulatory laboratory”, which are to be used especially for start-ups in the area of financial technologies (FinTech). According to this new legislative method, existing supervisory authorities (e.g. financial market supervisory authorities) are

mandated by law to examine innovative business models for compliance with supervisory requirements under certain framework conditions. The explicit goal is to ease the regulatory requirements for these start-ups without completely taking control of the business model out of the hand. The supervisory authority thus gets in touch with the individual start-up and tries to find the appropriate regulatory framework for the company. In this way, the authority develops a regulatory framework for the start-up to test its business model. Especially start-ups from the FinTech sector are then temporarily not subject to the same requirements as fully regulated market participants (e.g. banks), so that organisational and financial burdens remain low, especially at the initial phase of the new company. After a certain period of time, the business model is evaluated by the authority in order to develop the start-up company into a fully-fledged market participant. Such legislative trends already exist in Austria, Liechtenstein and Switzerland, while they are currently being discussed in Germany. Finally, the Regulatory Sandboxes can also be found at the level of the European Union, namely in the draft AI Act in Title V. These tools are understood as an innovation-promoting measure that contributes to the goal of creating an innovation-friendly, future-proof and disruption-resistant legal framework.

Secondly, the question arises whether Europe suffers **disadvantages in global competition** as a result of the strict regulation of AI. This is certainly possible. Nevertheless, the question can be asked whether AI systems that are hostile to fundamental rights are at all economically viable in the long term. After all, they cannot be sold as a business model in free countries in the long term, as the example of Huawei shows. Corresponding trends are currently emerging in China, where private investors are avoiding AI systems that are hostile to fundamental rights and the state of China is also increasingly intervening in the development of such AI systems. Finally, the economic power of the European Single Market should not be underestimated. The European Single Market has great appeal for international companies that want to succeed. Its market power could lead to EU regulation on AI systems setting a global standard here that puts people and their fundamental rights at its centre.

Overall, it is becoming apparent that the regulation of AI poses new legal challenges, especially in the business sector. It seems quite opportune to subsume these topics under a new term, namely tech law. It appears as an interdisciplinary legal field of technology law and business law in order to provide technological innovations in the economic sector with adequate legal regulations. Thus, tech law is the sum of all law that affects the tech industries (such as FinTech, HealthTech or LegalTech) and professions that deal with these industries.

This new term takes into account the complexity of the risks caused by the new AI technology, which are not covered by traditional risk spheres of product liability, but by new risks (e.g. dangers to democratic societies). Compliance in tech law requires in particular a great sensitivity towards human rights whenever business ideas in the digital economy are to be subjected to legal assessment.

Furthermore, tech law is an extremely complex field of legal research because it is very open to innovation. The above mentioned example of so-called “regulatory sandboxes”

serves as an illustration. One wants to give innovative business models as much regulatory freedom as possible, but not relinquish control completely. Therefore, low-threshold entry possibilities are needed, but also transition processes to transform the start-up into a fully regulated market participant. How such innovation processes are to be legally mapped is one of the many research questions of the new tech law. In this regard, it is also exciting to see to what extent criminal law is affected by such developments. Established legal standards, such as the criminal law assessment of risky decisions in the context of embezzlement, are put to the test when the legislator explicitly allows innovative (and at the same time risky) business models to operate for a limited period of time by means of regulatory sandboxes. After all, it will not be in the interest of society (and thus of the legislator) to issue innovative start-ups a blank cheque under criminal law and exclude them from any criminal liability - conversely, criminal law must not measure entrepreneurial actions of start-ups (e.g. FinTechs) with the same yardsticks as those of established companies (e.g. banks), but must arguably show tolerance and acceptance of risks to a certain extent. Research must show ways to allow innovation, but at the same time prevent massive misconduct (as in the Wirecard scandal).

8.3 Collective Board Decisions

910 Decision making in a company often takes place in a collective form. While in small companies it can be the case that only one managing director makes the essential decisions, even in structures such as family businesses several members are often involved in decision-making processes. It is already common practice at the level of small and medium-sized companies, but also at the level of large corporations, that both smaller and ground-breaking decisions are made by committees.⁷⁰

From the perspective of Business criminal law (BCL), this raises a fundamental question that is relevant to each individual member of the panel. Do I make myself liable to prosecution if I find a member of a committee and get involved in the decision-making process? Am I also liable if I abstained from voting or even voted against the decision but was ultimately in the minority? These and other questions are being examined in Criminal law from the point of view of the causality of decisions taken by a committee.⁷¹ A rough overview of this will be given here. In order to better understand the problem, it is important to repeat the above-mentioned fundamentals of causation and in particular the theory of conditions and equivalence before continuing (→ mn. 294).⁷²

⁷⁰Hilgendorf E (2015), 310, 336; Kuhlen L (2019), 113, 146–147 for an in-depth study on this complex subject matter, see Cornacchia L (2021).

⁷¹Kert R (2016) 1, 24–26.

⁷²Hilgendorf E (2015), 310, 336–337.

When it comes to the problem of concrete decisions, various cases are discussed.⁷³ The classic initial case is based on the leather spray case mentioned above (→ mn. 893),⁷⁴ but focuses on the committee decision and not on the harmfulness of the product. The initial case is as follows:

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Majority Decisions

In the company, resolutions are generally passed by simple majority (50% + 1). The five managing directors (A, B, C, D, E) of a company decide to put the leather spray they produce on the market, although they know that this leather spray poses potential health risks. Shortly after using the leather spray, a consumer suffers a serious respiratory disease caused by the contents of the spray.

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Variant 1:

the decision to place the leather spray on the market is taken unanimously: A, B, C, D and E vote in favour.

Variant 2:

the decision to launch the leather spray on the market is only possible with a wafer-thin majority: A, B and C vote in favour, D and E vote against.

Variant 3:

the decision to place the leather spray on the market is taken by a large majority: A, B, C and D vote in favour, E votes against. ◀

If one looks more closely at the causality of the decision, one must first distinguish between two different contexts, which are of course closely related.⁷⁵

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1. There must be a **causal link** between the collective decision of the committee and the damage that has occurred. The determination of this specific causality has no particularity. If the formula of the equivalence theory is applied, then the question must be asked whether the decision of the committee can be overlooked without the damage that has occurred being eliminated in its concrete form? The answer can be given relatively unproblematically: only because the committee took the decision to put the product on the market, the consumer could suffer a serious respiratory disease. If the panel had decided not to market the product, the consumer would not have bought the product and would not have contracted the disease. The link between the collective decision of the panel and the damage suffered is therefore not problematic.
2. There is, however, another upstream question. Is the voting behaviour of each individual committee member a (**necessary**) **cause** for the committee's decision to come about?

⁷³Hilgendorf E (2015), 336–337; Knauer C (2001); Kuhlen L (2019), 113, 147–148; Satzger H (2014), 186–195; Tiedemann K (2017), 129–131.

⁷⁴Doll I (2019), 30–32.

⁷⁵Hilgendorf E (1994), 561, 565; Satzger H (2014), 186–191.

The problem becomes particularly clear when the voting behaviour of managing director E is disregarded in all variants. For in all variants, E's vote was ultimately without effect because the board's decision was always made with a majority. So, what is the situation here from a criminal law perspective?

To develop the answer to this crucial question, each variant must be examined separately.

8.3.1 One-Vote Majority

- 914 The simplest possible situation is that of variant 2:

Variant 2

The decision to launch the leather spray on the market is only possible with a wafer-thin majority: A, B and C vote in favour, D and E vote against. ◀

- 915 If you apply the equivalence formula ($\rightarrow$ mn. 294), you get a clear and correct result. Accordingly, all committee members who voted in favour of the resolution are responsible for it. Because of the majority of only one vote, no vote in favour of putting the product on the market can be disregarded without the positive result being lost. So, if not only D and E, but also, for example, C had voted against the resolution to launch the health-endangering leather spray on the market, the majority decision would not have been reached. As a result, consumers would not have bought the product or used it and therefore would not have suffered any damage.⁷⁶
- 916 For causality, therefore, all votes in favour are required here—they must be cumulative in order for causality to be affirmed. The result of variant 2 is therefore as follows: A, B and C are causally responsible for the resolution because of their voting behaviour and thus also for the damage to consumers.

8.3.2 Majority of More than One Vote

- 917 Much more problematic for determining the causality of the individual board members are those cases in which the collective decision is adopted by a large majority. This is variant 3.

Variant 3

The decision to place the leather spray on the market is taken by a large majority: A, B, C and D vote in favour, E votes against. ◀

⁷⁶Satzger H (2014), 186, 191–192.

Why is this more problematic? It is obvious that, for example, committee member A would object here: if I had not voted in favour, the resolution would have come about in the same way with the other votes of my colleagues. So, if the equivalence formula is applied, it will not produce any result. Keep in mind that the cause is any condition of damage that cannot be ignored without the actual damage being eliminated.⁷⁷ If the voting behaviour of A is now removed, the decision is still taken because of an existing majority of B, C and D, so that the consumer still suffers damage. This objection by A could also be raised by B, C and D. If the equivalence formula were strictly applied here, nobody would be responsible for the damage, because there would always be a (different) majority.

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Lawyers are well aware of the weakness of the equivalence formula. They have therefore developed two concepts for dealing with such causality problems, namely cumulative causality and alternative causality:

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► **Cumulative Causality** means that two or more independently performed actions are cumulatively causal if the result is only brought about by their interaction. Each action on its own appears harmless, but with regard to the damaging event it is important that both are cumulative. For the purpose of teaching, the example of the lethal dose of sleeping pills can be given here. A and B each have a plan to put the victim into a deep sleep by administering a sleeping pill so that they can rob him or her. Completely independently of each other, they put a small, non-lethal dose of the sleeping pill into the victim's coffee. The victim dies only because the sum of the two doses of sleeping pills was lethal. Both the dose of A and the dose of B were the cause of death, because none can be thought away without the victim's death from poisoning also becoming irrelevant. If a dose is overlooked, the amount of sleeping pill is no longer lethal. The combination of both doses is necessary for the lethal result to be realised.

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► **Alternative Causality** means that two or more independent actions are alternatively causal if both factors cause the harmful result completely independently of each other. Each action in itself is fatal. Applied to the previous example: A and B each add a lethal dose of the sleeping pill to the victim's coffee. The victim dies. This is an enormous problem if the causality is tested according to the equivalence formula: if the dose of A is not taken into account, the victim dies because of the lethal dose of B. If the dose of B is not taken into account, the victim dies because of the lethal dose of A. The strict application of the equivalence formula thus leads to the contradictory result that no action of the two perpetrators was necessary to cause the damage. One of the actions can be ignored and the result is nevertheless achieved. Since this case outcome is not tenable, the test method for causality must be adapted: It is therefore crucial to determine how the damage manifested itself in its concrete form. In the case of poison, therefore, result is due to the double lethal dose. This is the concrete form of the deadly poison. If one starts out from this

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⁷⁷ Satzger H (2014), 186, 192–193.

concrete form of result, then again both actions of A and B are needed for the lethal result to occur.⁷⁸

- 922** When considering majority decision-making with more than one vote, the concrete form of majority decision-making is important. In variant 3, the concrete majority decision is four votes in favour and one vote in objection. A's argument that his approval would be irrelevant runs empty because A's vote is needed for the concrete committee decision to be made by four yes-votes and one no-vote. Without A's vote, there would be no committee decision with four votes in favour, which is why A's vote proves the causal connection.⁷⁹
- 923** The same applies to the first variant of unanimous board decisions. For a unanimous decision, every single vote of the committee members is required. Only if all committee members vote for it is a unanimous decision. Therefore, the voting behaviour of each individual committee member is very decisive.⁸⁰
- 924** In summary, it can be said that even if decisions are taken by a large majority, all votes in favour are to be considered as a necessary cause for the result. They cannot be disregarded without the majority decision in its concrete form (e.g. 4 yes-votes, one no-vote; 5 yes-votes, no dissenting votes) being omitted. Only the theory of equivalence needs to be supplemented by these concrete parameters. It depends on the result in its concrete form, as it was historically conceived. If this corrective is applied, all yes-votes remain causal in the legal sense.

8.3.3 Abstention from Voting

- 925** In committee decisions, there are often not only votes in favour with no votes in objection, but sometimes there are also abstentions. How are these abstentions evaluated? This is fundamentally disputed.
- 926** For the purposes of criminal law assessment, it depends on how abstentions are counted. If the abstention is equated with a yes-vote, so that the person abstaining was in agreement with the content of the resolution, then the abstention is in fact also a cause of the resolution. This view was expressed, for example, by the German Federal Court of Justice in the Mannesmann case.⁸¹
- 927** However, this solution has been strongly criticised, as it does not do justice to the importance of abstention. By abstaining, the person concerned is not expressing his or her agreement. Rather, he/she declares that he/she does not wish to support the decision of the others, whatever it may be (the person concerned usually does not know what the decision

⁷⁸ Roxin C and Greco L (2020), 455–456, 466.

⁷⁹ Satzger H (2014), 186, 191–193; cf. Roxin C and Greco L (2020), 462–464.

⁸⁰ Satzger H (2014), 186, 191–194.

⁸¹ Satzger H (2014), 186, 194.

will be at the time of his/her abstention). Abstention is therefore something completely different from agreement to the resolution. If the equivalence formula is applied here again, including the corrective of the committee decision in its concrete form, the result does not change. The number of votes in favour remains the same, regardless of the number of abstentions. The abstentions can vary arbitrarily: as long as the necessary majority of votes in favour is obtained, the abstentions are not considered to be causal.⁸²

The solution proposed here is partly advocated in theory but is more strictly applied in legal practice. Nevertheless, in practice it is not convincing when one counts abstentions among votes in favour. In the practice of committee decisions, it will therefore be necessary to explicitly regulate the meaning of abstentions. In this sense, abstentions should not be counted as either 'yes' or 'no' votes. If such details are clearly regulated from the outset, problems of interpretation and ultimately unpleasant surprises in the determination of criminal liability can be avoided.⁸³

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8.4 Environment, Business and (Criminal) Law

Mankind and the environment have an ambivalent relationship. The environment represents the central living conditions for maintaining human health. At the same time, humans represent the greatest threat to the environment. This is especially true when human activity is seen from an economic perspective. Actors in the global economy destroy natural resources, as is unfortunately demonstrated by the large-scale deforestation of forests or the overfishing of the seas or the poisoning of the soil (→ mn. 29, 932, 933). This process not only has a major impact on **future generations** but is already evident today. In a world where scientifically proven climate change is fundamentally questioned by leading industrial nations, environmental protection must be constantly justified for fear of being overlooked by those in power.⁸⁴

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Although there is currently little evidence of any trend towards seeing environmental protection as a priority and a driver of economic growth, the law has contributed to environmental protection in many ways.

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For example, environmental protection as a state objective was expressly anchored as a state objective in Germany's highest legal document, namely in Art. 20a of the German Constitution, with the amendment to the Basic Law of 27 October 1994.

Criminal law cannot exclude this subject area.⁸⁵ Various cases in the past have shown that there is a need for action.

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⁸² Satzger H (2014), 186, 194–195.

⁸³ Satzger H (2014), 186, 194–195.

⁸⁴ For an overview on the so-called "climate criminal law" see Satzger H and von Maltitz N (2021), 1–34.

⁸⁵ For an overview on the so-called "green criminology" see Lynch MJ et al. (2016), 137–160.

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Major Fire at Schweizerhalle—Case⁸⁶

On November 1, 1986, a major fire broke out in the warehouse of the former chemical company Sandoz (now Novartis) in the “Schweizerhalle” industrial estate near Basel (Switzerland). The fire brigade had to extinguish the fire at a considerable expense. Some 30 tons of crop protection products (especially insecticides) that were in the burning warehouse were discharged into the Rhine River as a result of the water runoff. The chemicals caused massive fish mortality in the Rhine, although the ecological system was able to recover from the disaster after only a few months. However, long-term effects on the ecological system can be seen. For example, it strongly favours the immigration of exotic animal species. In addition, the fire-fighting water contaminated with pesticides and toxic chemicals caused a high level of soil and groundwater pollution. As there was no criminal liability basis for companies at that time, the company itself was not held responsible. After an investigation lasting 7 years, the head of the company fire brigade was sentenced to a fine of CHF 200 for ordering water pollution. ◀

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Cases such as the nuclear disaster in Fukushima (Japan),⁸⁷ the environmental disaster at the Deep Water Horizon oil platform (Gulf of Mexico) show that the population is sensitised to the concerns of environmental protection. After all, a company cannot afford to make the headlines today because of alleged or actual environmental violations. This would have a negative impact on its market standing.

This was shown concretely by the example from Shell.⁸⁸ Shell announced in 1995 that it wanted to sink the oil platform Brent Spar in the Atlantic. Millions of motorists have subsequently boycotted Shell’s petrol stations.

8.4.1 Trends in Legislation

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In this respect, there are various incentives for companies to contribute to environmental protection. One of these incentives is certainly the threat of criminal environmental law. Criminal environmental law includes all norms that persecute acts against the environment with criminal penalties. Environmental offences are found in core criminal law, i.e. the StGB (→ mn. 120), but above all they are found in numerous provisions of secondary criminal law. Some areas of environmental protection are also conceived as administrative offences and are covered by these sector of the law (e.g. §§ 1 and 17 OWiG-DE). Environmental criminal law criminalises various types of offences, namely

⁸⁶ Achenbach H (2018), 42.

⁸⁷ Consorte F (2020), 16.

⁸⁸ Stadler C (2004), 154–157.

- Pollution of water, soil and air caused by noise, vibrations and non-ionised radiation,
- the unauthorised handling of waste,
- the unauthorised operation of installations,
- the unauthorised handling of radioactive substances or other hazardous substances and goods,
- the harm or damaging of threatened habitats and conservation areas
- the illegal trade in protected wild animals and wild plants.⁸⁹

There are thus many efforts to combat harmful conducts against the environment with the means of criminal law.⁹⁰ Nevertheless, blind spots still remain in the prosecution of economic crime. One example is animal cruelty in the context of intensive animal farming.⁹¹ Here, great efforts are still needed in practice to ensure effective protection.

But back to an analytical view. It is true that there are crimes in the area of environmental criminal law that are structured as result or success offences. This means that criminal liability is dependent on the achievement of a corresponding result (such as contamination or adverse change in the properties of water bodies or soil). However, the majority of environmental crimes are conceived as **concrete and abstract endangering offences** (→ mn. 247, 248). This circumstance takes account of the fact that in the environmental field, concrete results and damages are either difficult to prove or show an immense and hardly assessable development of damage, so that the dangerous act itself must already be prohibited.

Another characteristic of environmental criminal law is the dominance of **negligence offences** (→ mn. 307). Almost all criminal offences in environmental criminal law have negligence variants, which is why not only intentional acts, against the environment, but also negligent acts, against the environment are punishable. For companies, this means that they must be particularly astute in complying with the due care laid down by law. In addition, companies must be aware that they are operating in a field of activity that is permitted but very risky. For this reason, assessments of dangerous situations and corresponding evaluations must be carried out very conscientiously in day-to-day operations. In fact, case law is very strict in assessing criminal liability for breaches of due diligence in the area of environmental crime.

Finally, environmental criminal law is highly influenced by other areas of law. These include in particular EU law and administrative law.

Protecting the environment does not stop at the borders of a nation state. On the contrary, environmental damage can have transnational dimensions. Against this background, it seems clear that a common response to environmental protection concerns must

⁸⁹ See Mascha B and Molterer J (2020), 962–974; Schnichels D and Seyderhelm J (2020), 829.

⁹⁰ Cf. Esser R (2021), 209–227.

⁹¹ Cf. Bülte J (2019), 19–23.

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be found in Europe. In 2019, the European Commission defined the so-called **European Green Deal** as an essential guiding goal of its policy.⁹²

940 However, environmental protection has been a focus of activity at EU level for some time and has implications in criminal law already. This can be seen in the example of the so-called REACH regulation.⁹³ This regulation on the registration, evaluation, authorisation and restriction of chemical substances is intended to harmonise and simplify European chemicals law. The regulation came into force on 1 June 2007. One of the main tasks of this regulation is to create an internet database so that the data sent to the European Chemicals Agency is available to the public. From this database it is possible to extract not only data on chemical and physical properties, but also information on toxicity to humans and the environment. This data is the basis for managing chemical substances. This is because chemical substances may only be placed on the market if sufficient data is available. Data must be available for all chemical substances that are produced in the EU in quantities of 1 tonne per year or are imported into the EU. The manufacturers of the chemicals are obliged to prove the safety of their products and to demonstrate that the products are not harmful to the environment, to one's health during further processing or to the end user. The information must be passed on by the manufacturer and importer to further recipients of the products. The regulation also contains an explicit authorisation for sanction standards in case of violations of the requirements, as shown in Art. 126 REACH-Regulation.

941 **Art. 126 REACH-Regulation (Penalties for Non-compliance):**

Member states shall lay down the provisions on penalties applicable for infringement of the provisions of this regulation and shall take all measures necessary to ensure that they are implemented. The **penalties** provided for must be **effective, proportionate and dissuasive**. The member states shall notify those provisions to the Commission no later than 1 December 2008 and shall notify it without delay of any subsequent amendment affecting them.

942 This pattern, namely the obligation for EU member states to adopt effective, proportionate and dissuasive sanctions, has already been presented in Part Two. In this respect, the REACH Regulation contains a standard of environmental criminal law with a European background.

⁹²European Commission (2019); see Frenz W (2020), 605–621; Schnichels D and Seyderhelm J (2020), 829–830.

⁹³Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, Official Journal of the European Union 30.12.2006, L 396/1.

In 2008, the EU also issued a **directive on the protection of the environment through criminal law**.⁹⁴ The directive contained a minimum number of serious environmental offences that should be classified as criminal offences throughout the EU, provided that they were committed either intentionally or at least with gross negligence (Art. 3). Not only direct perpetration, but also aiding and abetting and inciting such acts should be classified as criminal offences. With regard to sanctions, effective, proportionate and dissuasive criminal sanctions should be implemented against natural persons for environmental offences (Art. 6), while either criminal or non-criminal sanctions should be provided for legal persons (Art. 7).

Overall, it can be said that EU law provides important guidelines for criminal law, which extend to the environmental sector.

However, **administrative law** also exerts a major influence on environmental criminal law. Many activities that entail certain dangers to the environment must be regulated and are therefore subject to administrative permits. The authorities check whether the necessary conditions, such as safety measures, are in place or whether any conditions must be imposed to enable a company to carry out its activities. Criminal law then accompanies these regulations of administrative law. This can be seen in the fact that criminal law refers to breaches of administrative obligations, lack of the necessary permit or authorisation, and breaches of legal provisions (e.g. see § 324 et seq. StGB-DE).

Because environmental criminal law has its foundations in many definitions and references from administrative law, the provisions in this area are naturally characterised by these references. As already explained above, four of them conflict with the principle of legality and the principle of certainty. Nevertheless, there are various decisions from the highest court level according to which standards of environmental criminal law meet the requirements of the principle of certainty. To this extent, special legal expertise is required, particularly when dealing with cases involving environmental criminal law.

8.4.2 Water Pollution

Sources of Law

- § 180 StGB-AT
- § 324 StGB-DE
- § 180 StGB-FL
- Art. 234 StGB-CH
- Art. 70 Gewässerschutzgesetz-CH (SR 814.20)

⁹⁴ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, Official Journal of the European Union 9.12.2008, L 328/28.

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946 The criminal provision for the protection of waters is one of the most important practical norms of environmental criminal law. The purpose of this provision is to secure and maintain humane living conditions (→ mn. 14) for present and future generations. In this respect, waters are not protected for their own sake, but to protect the environment as the elementary living space for humankind.

From the perspective of legislative technique, it is apparent that standards on environmental criminal law can be formulated very simply. For a closer, analytical insight, the Swiss provision is examined in greater detail here.

947 Art. 234 StGB-CH: Contamination of Drinking Water

- (1) Any person who wilfully contaminates drinking water intended for people or domestic animals with substances that are damaging to health is liable to a custodial sentence not exceeding 5 years or to a monetary penalty of not less than 30 daily penalty units.
- (2) If the person concerned acts through negligence, the penalty is a custodial sentence not exceeding 3 years or a monetary penalty.

948 At first glance, it becomes apparent that para. 1 punishes an intentional variant of the offence and para. 2 a negligent offence. The **legal interests** protected are on the one hand the life and limb of humans and on the other hand, because of the reference to the health of animals, also the assets of animal owners.⁹⁵ This is why people like to talk about so-called agrarian criminal law in this context.⁹⁶ However, it is disputed whether the life and limb of the animal as such is protected by this provision. Since the offence systematically belongs to the offences against public health, protection of legal interests is primarily related to human health, i.e. to the life and limb of humans. In this respect, the protection of the property of animal owners must be regarded as a legislative mishap.⁹⁷ It is important to note that this is an **abstract endangerment offence**. It is not necessary that there is a concrete danger to the protected legal interests. However, since it is about drinking water and about actions that lead to a contamination of drinking water, it is seen as an offence of success and at the same time as an abstract endangerment offence.⁹⁸

949 The term “**waters**” is to be understood in a very broad sense.⁹⁹ This term covers not only surface waters but also ground water.¹⁰⁰ In this respect, this broad term protects many facets of water, which are regulated in individual cases by special administrative standards. The protection under criminal law thus extends uniformly to different types of waters. The object of attack is drinking water intended for humans or domestic or farm animals. The

⁹⁵ Demarmelis M and Vonwil A (2020), 1274.

⁹⁶ Jürg N (2019), 119, 125.

⁹⁷ Ackermann JB (2019), mn. 3–5

⁹⁸ BGE 78 IV 170, E. 1.

⁹⁹ BGE 98 IV 205.

¹⁰⁰ BGE 102 IV 186.

well and the small pond, which serve to water domestic animals or livestock, but are not used by humans as a drinking water “source”, are therefore also objects of attack. The water does not need to be accessible to the public; it is sufficient if a limited circle of persons, e.g. the members of a certain family, drink it, provided that, in the ordinary course of events, other third persons who happen to be present could also have drunk the water. Therefore, the water from a private person’s spring and even the water from one’s own spring can be the object of attack.¹⁰¹ However, the contamination of a glass of water that one drinks oneself is not covered. Only contamination of larger containers, wells, etc. causes a danger that people and animals (the general public) could drink water that is harmful to health.¹⁰²

The acts that fulfil this penal provision are those that contaminate and negatively alter waters. The definition of **contamination** depends largely on the individual case. However, the starting point for each assessment is the natural condition of the waters affected. If the affected water has already been polluted, criminal liability may still apply if further deterioration is brought about. In this case, the current status of the water is relevant. An assessment is based on the external appearance of the water, comparing the situation before the offender’s intervention with the situation after the offender’s intervention. The concept of **negative alteration** is of course much broader than contamination. This is why the concept of negative alteration is very important in practice. This term covers all impairments which, although they cannot be regarded as impurities, cause a deterioration of the physical, chemical, thermal or biological quality of the water. This term is thus concerned with the quality of the water and how negatively it has been affected.

Negative effects on the quality of water can occur, for example, when a company legitimately uses water to cool machines and returns the water to a river. Even if the water is treated appropriately, it could be the case that the water is returned to the river at a higher temperature, which ultimately leads to a warming of the river water. Higher water temperatures cause a reduction of the oxygen content in the water. This can be seen as a negative alteration to the water.¹⁰³

The central issue is that drinking water is contaminated by substances that are **harmful to health**. It is not necessary that the substances are toxic (destructive to health), but only harmful to health. If the substances are not harmful to the health of humans or farm animals, but only to other living organisms (insects, snails, etc.), they are not recorded. The mixture of water and harmful substance must be capable of causing significant damage to the health of humans, domestic animals or livestock.

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¹⁰¹ BGE 78 IV 170, 175.

¹⁰² Ackermann JB (2019), mn. 9–12.

¹⁰³ This example is found in Weyand R (2018), 481.

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Germany: "Without Authorisation"

In **Germany**, an additional characteristic is required, namely the absence of a corresponding authorisation to contaminate water. This is where questions of justification come into play. Thus, the pollution or adverse change must have occurred **without authorisation**. The characteristic "unauthorised" indicates, in principle, that the offensive act to the environment could be justified. On this basis, it would be conceivable that water pollution is tolerated through an officially granted permit, authorisation or licence.¹⁰⁴ It is also conceivable, however, that a general justification could make a sanction unnecessary. One might think in particular of a justifiable state of emergency, which could apply in exceptional situations.

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If one considers the **subjective elements**, it becomes apparent that the offence can be committed intentionally or possibly intentionally (para. 1) as well as out of negligence (para. 2). With regard to the intentional variant, the perpetrator must know of the considerable harmfulness of the substance to the health of humans or domestic animals and intentionally carry out an act of contamination with this substance. Furthermore, he/she must intend to cause the contamination of drinking water. However, a further intent to harm or endanger humans and farm animals is not required.¹⁰⁵

In the negligence variant, the perpetrator contaminates drinking water with corresponding substances due to carelessness in breach of duty. For this purpose, the corresponding duties of care are partly specified in special regulations, such as the Chemicals Ordinance.^{106,107}

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Overall, the pollution of (drinking) water is a classic environmental criminal offence, which in similar variants also concerns soil and air pollution. In Austria and Liechtenstein, water, soil and air pollution are treated together as a single criminal offence, whereas water pollution in Germany is a separate criminal offence. In Switzerland, a distinction is made between water pollution, which is regulated by secondary legislation, and drinking water pollution, with the contamination of drinking water being expressly provided for in the penal code.

¹⁰⁴Tiessen T (1987).

¹⁰⁵Ackermann JB (2019), mn. 18–21.

¹⁰⁶Verordnung v. 5.6.2015 über den Schutz vor gefährlichen Stoffen und Zubereitungen, SR 813.11.

¹⁰⁷Ackermann JB (2019), mn. 22; cf. BGE 120 IV 300, 308.

8.4.3 Illegal Handling of Waste

Sources of Law

- § Article 181b et seq. of the StGB-AT
- Article 326 StGB-DE
- Article 181a et seq. of the StGB-FL
- Article 60 et seq. of the Environmental Protection Act (SR 814.01).

Among environmental offences, the environmentally dangerous disposal of waste constitutes the largest group. In police statistics, waste offences dominate the area of all possible environmental offences.¹⁰⁸ But often one also sees criminal law offences in the headlines with references to waste.¹⁰⁹ Waste crime in particular can reach extremely large dimensions. Newspaper reports about illegal waste disposal by organised crime in Italy provide an insight into this issue. But legal companies can also be involved in waste crime. One such international example is the so-called Trafigura case.

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Trafigura—Case¹¹⁰

Trafigura is one of the largest independent oil dealers in the world. In 2005, the company decided to buy lower quality raw petrol to use as a base for fuel. This process leads to highly toxic waste products. Therefore, very few companies worldwide carry out this processing technique. However, after the processing was started at a port facility in Tunisia, it had to be discontinued because the local authorities prohibited it due to the toxic emissions. Trafigura then transferred production to a ship called the Probo Koala. The toxic waste was stored there for the time being, while months were spent at sea around Europe and West Africa to find a place to store the toxic waste. On 18 August 2006, Trafigura commissioned the newly licensed company “Compagnie Tommy” in Cote d’Ivoire to dispose of the waste. The company had neither the experience nor the necessary infrastructure to handle hazardous waste. On August 19, 2006, the Probo Koala arrived at the agreed location, the waste was transferred to trucks and deposited at a waste dump near populated places (Abidjan). By 20 August 2006, tens of thousands of people in Abidjan were already suffering from nausea, skin irritation and other health problems. In 2007, the Ivorian government and Trafigura agreed on a settlement. In return for a payment of USD 195 million, arrested Trafigura managers were released on bail and the government waived its right to prosecute Trafigura or bring legal action against Trafigura parties. In 2008, the criminal proceedings were dropped due to insufficient evidence. ◀

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¹⁰⁸ Alt R (2019), 6.

¹⁰⁹ Frenz W (2016), 1510.

¹¹⁰ Harrow KW (2013), 84–92.

957 In contrast to the criminal offence of water pollution, it can be seen that standards for general environmental criminal law are usually formulated in a very complex manner. For a closer, analytical insight, the German provision is examined in more detail here.

958 § 326 StGB-DE: Unauthorised Waste Management

- (1) Whoever, without being authorised to do so, outside a facility which is authorised therefor or in substantial deviation from the prescribed or authorised procedure, collects, ships, treats, utilises, stores, deposits, discharges, disposes of, trades in, brokers or otherwise commercialises waste which incurs a penalty of imprisonment for a term not exceeding 5 years or a fine.
 1. contains or can produce poisons or disease agents which constitute a public danger and can be communicated to humans or animals,
 2. is carcinogenic, mutagenic or toxic to reproduction in humans,
 3. is prone to explode, is spontaneously combustible or of more than merely minor radioactive quality or
 4. because of its nature, composition or quantity is capable of a) permanently contaminating or otherwise negatively altering a body of water, the air or soil or b) endangering an animal or plant population
- (2) Whoever, contrary to a prohibition or without the required permit, ships into, out of or through the area of territorial scope of this statute waste within the meaning of para. 1 incurs the same penalty.
- (3) Whoever, in breach of duties under administrative law, fails to deliver radioactive waste incurs a penalty of imprisonment for a term not exceeding 3 years or a fine.
- (4) In the cases under para. 1 and 2, the attempt is punishable.
- (5) If the offender acts negligently, the penalty
 1. in the cases under para. 1 and 2 is imprisonment for a term not exceeding 3 years or a fine,
 2. in the cases under para. 3 is imprisonment for a term not exceeding 1 year or a fine.
- (6) The act does not entail criminal liability if harmful effects on the environment, in particular on humans, bodies of water, the air, the soil, livestock or agricultural crops, are obviously ruled out on account of the small quantity of waste involved.

959 The purpose of this legal norm concerns the protection of plants and animals as well as water, soil and air, but also the protection of human health.¹¹¹ In the definition of the offence, the legislator has refrained from making a connection between the act and its results. Rather, it describes a multitude of dangerous actions and thereby makes it clear that even the mere act itself represents a clear danger. To this extent, this crime is an **abstract endangerment offence**,¹¹² which is based on a legal presumption of danger.

¹¹¹ Alt R (2019), mn. 1, 3.

¹¹² Alt R (2019), mn. 5.

It is probably a curiosity of criminal law and scholarship that the term waste is one of the most difficult terms in criminal law.¹¹³ There is no separate definition of the term in the provisions of the StGB-DE. To give the concept of **waste** context, reference is made to the definitions of administrative law.¹¹⁴ Accordingly, waste can be all substances or objects which their owner discards, intends to discard or is required to discard. However, the criminal law definition of waste covers only movable property and is therefore narrower than the administrative law provision. The word "disposal" is central to the meaning of waste. Disposing of waste is when the holder takes a movable item for recovery or disposal or gives up the actual control of the material and abandons it. Thus, waste can be all objects that have served their original purpose and which, due to their hazard potential, must be disposed of in accordance with waste disposal law. The decisive factor for criminal law is therefore whether the owner wants to dispose of an object (voluntary waste) or must dispose of it (compulsory waste).¹¹⁵

A few examples explain the idea:

- If an automobile leaks oil as a result of an accident, the contaminated soil is not considered waste until the contaminated soil is excavated.
- Horse manure that should have been used as fertiliser, but which has already contaminated the underlying soil through prolonged deposition, has been classified as waste by jurisprudence.
- If a road company uses a defective asphalt for cost-saving reasons and the road surface is covered with the same asphalt as the road excavation, there is a risk of groundwater contamination. In principle, the tarred road excavation would be classified as waste. However, once it has been firmly laid with the road surface, it no longer falls under the definition of waste.¹¹⁶

The examples of waste as defined by criminal law clearly show how difficult it can be for the legislator to give a sufficiently specific and unlimitable definition of everyday terms, as required by the principle of legality (→ mn. 250), and in particular the principle of certainty (→ mn. 264). Ultimately, the general meaning of the word (→ mn. 221), draws a line that must not be crossed in criminal law. This means that the concept of "waste" in criminal law is narrower and the concept of "waste" in administrative law is broader.¹¹⁷ The same term is therefore used, but the content of the term is to be interpreted more or less

¹¹³ Alt R (2019), mn. 19–34; Krell P (2014), 14, 15–17.

¹¹⁴ Frenz W (2016), 1510, 1511–1513, 1516.

¹¹⁵ Krell P (2014), 14, 15–16.

¹¹⁶ All these examples are taken from Weyand (2018), 507.

¹¹⁷ Ransiek A (2017), mn. 7.

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broadly depending on the area of law. The legal treatment of the concept of waste is more complex because the handling of waste is influenced by many provisions of EU law.¹¹⁸ For this reason, criminal law provisions must be interpreted in conformity with EU law, → mn. 156.

963 Looking more closely at the analysis of the **objective elements**, it can be seen that the first paragraph deals with the unauthorised handling of particularly hazardous waste, while the second paragraph relates to the prohibited and unauthorised transboundary shipment of waste. The first paragraph, as previously explained, depends on the complex waste definitions that form the object of the offence. The offence enumerates very different acts of “collecting waste”, which concern the complete process of the proper handling of the waste. These acts must be carried out in a specific context, either outside an authorised facility or in substantial deviation from an intended or authorised procedure. The second paragraph, by contrast, is dedicated to combating illegal **waste tourism**. It deals with cases in which highly toxic waste is transported to a country where safe disposal is not possible (for example, because the necessary specialised facilities are not available). The main offences relate to the transport of the waste, if this transport violates a prohibition or takes place without the necessary authorisation. Transport means any movement in the sense of a change of location. It is irrelevant who carries out the transportation and with which means of transport is used. The act is therefore criminalised because it is carried out in contravention of a permit or consent procedure.¹¹⁹ This again shows that criminal law makes its protective mechanisms available to other areas of law. The third paragraph deals with the non-delivery of radioactive cases, which would be required by law. This is an offence of omission that is linked to the violation of the obligation to deliver particularly hazardous waste. The legal obligation to deliver radioactive waste is laid down in § 9a para. 2 of the German Atomic Energy Act for the holder of such waste.

964 The analysis of the **subjective elements** is no less complex, but will only be summarised here. Intent is required for all three offences, whereby conditional intent is sufficient.¹²⁰ Para. 5 of the provision, however, states that the negligent commission of the offences under para. 1 to 3 may also be considered. This means, for example, with regard to para. 2, that the perpetrator, exercising due care, should have realised that the waste to be transported was waste for which a permit had not been granted.¹²¹

965 In order not to overburden criminalisation in connection with waste, para. 6 contains a minimum clause with a factual ground for **exclusion of punishment**.¹²² It is a legislative technique to break the general criminalisation (in this case of abstract endangerment offences) in certain minor cases: *de minimis non curat praetor*. The central element is

¹¹⁸ Ransiek A (2017), mn. 10–12; Schnichels D and Seyderhelm J (2020), 830–831, 831–833.

¹¹⁹ Alt R (2019), mn. 109–110; Krell P (2014), 14, 20.

¹²⁰ Alt R (2019), mn. 97–102.

¹²¹ Alt R (2019), mn. 103–108.

¹²² Alt R (2019), mn. 112.

the small amount of waste. Thus, if the harmful effect on the environment can be excluded because of the small amount of waste, impunity occurs despite the fulfilment of all characteristics of the offence. It is necessary for this that the harmful effect is obviously excluded due to the small quantity. Obvious means that this is readily recognisable in advance, whereby it depends on the specific circumstances of the case. Doubts about this obviousness are at the risk of the offender.¹²³

Example: Asbestos

The criminal provisions on waste also have references to other risks of BCL. This is shown by the example of asbestos. Whereas asbestos used to be an established building material (and would thus be analysed in particular under the concept of criminal product liability), after the discovery of its toxicity, asbestos is treated in many constellations as “toxic waste” and thus falls under environmental criminal law.¹²⁴ ◀

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¹²³ Laufhütte H and Möhrenschrager M (1980), 912, 960.

¹²⁴ Kuchenbauer K (1997).

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- This chapter deals with logistical risk in light of criminal law. It takes into account the fact that in a networked European economy, traffic volumes are increasing significantly and are therefore subject to appropriate regulation. As these regulations are central for companies and their employees that govern professional participation in traffic, this target group primarily concerns all companies in the rail, shipping or air transport sector. In addition, all professional drivers, fleet managers and transporters of dangerous goods are of course among the addressees of the standards. However, all employees who participate in road transport with private or company cars also fall into this risk category. The subject area of Transport Law and Transport Industry Law appears in any case to be a side issue for Business criminal law (BCL), but it should be briefly mentioned in the context of the four major risks.

The aim of this chapter is to show that in the field of transport risks not only the directly performing road user may be subject to liability, but also the companies behind the transport risk.

9.1 Road Traffic Liability

The starting point for dealing with this risk area is road traffic law. Road traffic law is made up of various legal sources, namely

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- Road Traffic Acts
- Road Traffic Regulations
- Road Traffic Licensing Regulations

968 If one wishes to draw up a risk map for road traffic law, one must include all risk variants that could occur in daily road traffic and, under certain circumstances, look up appropriate sanctioning procedures. In addition, all professional and transport-related regulations that cover corresponding risks (e.g. transport of dangerous goods) must be included.¹

Examples can be found in the daily press. The cases deal with such related topics as truck driving at excessive speed, inadmissibly exceeding the maximum load weight, or even driving without a seat belt on.

969 From the perspective of a company it is important to consider that not only the driver acting directly can be held responsible for offences, but that other members of the company are also affected. This can be seen in the example of § 22 StVO-DE, which lays down the rules on how to ensure safe loading. In order to comply with the regulations on how to load a vehicle, this provision stipulates that, in addition to the vehicle owner and the driver, all other persons responsible for loading a vehicle are liable. This therefore also applies to the consignor and the person in charge of loading.

With this kept in mind, it is, however, important not to forget that the owner of the vehicle has a great responsibility, which is regularly emphasised by courts.

For example, in a court decision, the head of a motor vehicle company was sentenced to a monetary sanction for negligently exceeding the permissible gross weight load because he had failed to carry out the relevant checks. In another case, a haulage company with 14 lorry trains was accused of allowing a company to operate a trailer of a lorry whose handbrake was not functional. The road safety of the vehicle was thereby considerably impaired.²

970 The question therefore arises as to who the keeper of a vehicle is and what the keeper can actually be accused of. The **keeper** of a vehicle is the person who uses the vehicle for his/her own account and has the power of disposal to carry out this use. In the case of vehicles belonging to legal persons or companies, the holder of a vehicle is the company itself. In addition to the company (as the entity who is responsible for the vehicle), its legal representative is also the keeper of the vehicle (the main driver) as such is responsible for the road safety of the vehicle.

971 In doing so, he/she has duties of **supervision** regarding the selection, instruction and control of drivers. The keeper of the vehicles must also check that a driver has the necessary unrestricted driving licence. This applies in particular at the time of hiring the driver. The owner of the vehicle must take special care if the driver has a foreign driving licence. In large companies, this duty of supervision is delegated to appropriate employees. This delegation is accepted in principle by the courts, whereby the relevant requirements for

¹ Schröder M (2016), 268–301; Portmann C (2010), 69–88.

² All examples are taken from Weyand (2018), 821.

expertise, experience and proven reliability must be fulfilled, but the assignment must also be made on an explicit basis and for filling in on one's own responsibility.³ Here the principles that we have already seen with delegation apply.

It should be noted, however, that in addition to the owner of the vehicle, the **driver** of the vehicle is of course also responsible for road safety. In addition, he/she is responsible for ensuring that his/her vehicle complies with the legal requirements regarding equipment and design. Professional drivers in particular are required to carry out an increased duty of inspection with regard to the vehicles they drive, so that the vehicle parts that are so important for safety, such as brakes, tyres, lighting and steering, are checked regularly before each journey. However, drivers and owners may assume that the vehicles are properly maintained by workshops.

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9.2 Transport Industry Liability

Logistical risks do not directly affect only road traffic. Rather, there are also specific risks relating to the transport sector. This is because it is an economic sector in which companies offer services to change the location of goods, persons or communications.⁴

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The corresponding penal provisions are spread over different laws and can be distinguished according to the respective transport medium (road traffic, shipping, air traffic). Due to its practical relevance, only a section on road traffic will be examined here.

If the transport sector is considered as an economic sector, a major risk concerns **the road safety rules** on driving times and rest periods for mobile workers. These were regulated uniformly at the European level at an early stage and are still significantly regulated today via the EU.⁵ This applies not only to social law, but also to the Europe-wide uniform introduction of recording equipment. All these references have been integrated into the corresponding legislation on driving personnel in order to ensure that road safety and the protection of the health of driving personnel is correspondingly uniform.

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Criminal law risks then relate in particular to infringements of the **driving time regulations**, which are expressly not only the responsibility of the individual driver, but are also attributed to the entrepreneur if, contrary to the regulations, the latter has not ensured that the driving times are observed. There are also obligations to use a **tachograph** in certain areas. At the request of the police or administrative authorities, the company must provide the tachograph record sheets to the driver on a compulsory basis, even if the tachograph disc reveals traffic offences. These two central obligations in the field of transport economics, namely compliance with the permitted driving times and the

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³Weyand R (2018), 822.

⁴Level C (2019), mn. 16.

⁵Cf. Lüdemann V and Knollmann D (2020), 403–409.

recording obligations, are an important link in the chain of corporate responsibility. In practice, companies have been held liable in case law, for example, when a driver, in order to deliver his/her load on a certain date, breaches the driving time regulations, as this date would not have been possible to meet without doing so. Another example of company responsibility is when it imposes a behaviour on the driver which prevents the driver from complying with his/her own obligations.

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Semi-Trailer—Case⁶

The driver of a 36-ton articulated lorry had been set for a trip. Both the driver and the scheduler, who was responsible for scheduling the tour, as well as the company's authorised signatory assumed that the route from Stuttgart to Paris was to be driven in a time that could only be managed if the permitted maximum speed was exceeded and the statutory rest periods were not observed. The driver arrived in Paris at noon. In the evening, he was instructed by telephone to return to Stuttgart with his truck by noon the following day. When this order was placed, it was clear to the dispatcher that the return trip could not be completed within this period without exceeding the speed limit. The driver had covered more than 1300 km within 37 h.

Shortly before the truck driver arrived at the company premises in Stuttgart, he drove his truck into another truck that caused it to skid onto the sidewalk and hit several pedestrians. A woman and two small children died, and three other people were injured.

The Court of Stuttgart sentenced the driver to an unconditional prison sentence of 1 year and 9 months and the dispatchers of the freight forwarding company to an unconditional prison sentence of 1 year and 3. The court assumed that dispatchers had been responsible of negligent homicide and negligent bodily injury because they had accepted in their order for immediate prosecution that the driver was not fit to drive due to overtiredness and could therefore cause a traffic accident with obvious consequences. They were guilty of negligence in that they had done nothing to prevent an unfit driver from taking part in public road traffic. ◀

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It is thus evident that areas of business not only have to respect specific laws, but that the general rules and principles of BCL are fully applicable.

9.3 Supply Chain Risks

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If one takes a bird's eye view of logistical risks, supply chains come into focus. They are a prerequisite for smooth business operations. Not least the Covid-19 pandemic has shown that supply chains are exposed to specific risks.⁷

⁶Weyand (2018), 832.

⁷Dietrich N (2020), 257–260.

Ever Given—Case

On 23 March 2021, the container ship Ever Given was passing through the Suez Canal when it ran aground and turned sideways, blocking the Suez Canal. Evergreen Marine said the cause of the accident was unexpectedly strong winds. The ship could only be freed on 29 March 2021 with the help of dredgers and tugboats. By then, the ship had blocked the passage of other ships through the Suez Canal for several days. This caused damage to global supply chains, because punctual ships and the availability of containers and transport capacities are vital, especially in manufacturing industry. ◀

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Supply chain risks are manifold. They do not only concern disasters, strikes or financial losses, but also risks to reputation or compliance. In a globalised economy, companies are required to assume their responsibility towards society. Violations of this so-called corporate social responsibility, which can extend to serious human rights violations, are picked up by the news and can lead to enormous reputational losses as well as severe economic damage.⁸

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9.3.1 Current Trends in Legislation

Legislators in Europe are increasingly addressing this challenge by creating liability bases through legislation to hold companies accountable for certain damages (e.g. against the environment or due to precarious working conditions) in their supply chains.⁹

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- In 2015, the **UK** passed the Modern Slavery Act. It is a law against modern forms of slavery and provides not only measures against forced labour but also reporting obligations for companies.¹⁰
- In 2017, **France** passed the Loi de vigilance. This is a law to establish corporate due diligence for human rights. According to it, French companies must identify and prevent human rights risks both in subsidiaries and along their supply chain.¹¹
- In 2019, the **Netherlands** passed the Child Labour Due Diligence Law. This is a law that requires companies to conduct due diligence on child labour. Violations of the law can lead to corresponding sanctions.¹²
- In 2020, a corporate due diligence law was debated in **Switzerland**. A federal popular initiative named “For responsible companies—to protect people and the environment” supported by more than 120 organisations was narrowly rejected, so a counter-proposal

⁸Rudkowski L (2020), 352, 353–355; for further information, see Thomale C and Mukro M (2021), 40–60.

⁹Nieto A (2021), 6, 24–25; cf. Hübner L (2020), 1411, 1413–1417.

¹⁰Gernand IW (2016), 102–107; Nieto A (2021), 6, 25; Sabia R (2021), 36, 39, 40–46.

¹¹Kutscher-Puis F (2020), 174, 175–178; Nieto A (2021), 6, 24; Sabia R (2021), 36, 39, 46–52.

¹²Sabia R (2021), 36, 52 (Footnote 64)

prepared by the Swiss parliament before the vote went into implementation. It is expected that the draft law will enter into force at the end of 2021.

- In 2021, **Germany** has enacted the Supply Chain Act. It provides for reporting obligations for companies of a certain size with regard to human rights and environmental concerns.¹³
- In **Austria**, various civil society actors are active and calling for a supply chain law. At the end of 2020, an independent citizens' initiative for such a supply chain law was launched. Concrete results are still emerging.¹⁴

982 Finally, regulation on corporate due diligence is also being debated at **EU level**. In October 2020, the European Commission opened a public consultation on this topic under the title “sustainable corporate governance”. At its core, the EU aims to avoid negative impacts on human rights and the environment.

983 The look at the laws shows that the states certainly resort to criminal law measures to enforce the **reporting obligations**. Many drafts and laws contain sanctions whose upper limit is linked to the company's turnover. Such calculations of sanctions related to turnover can be found in EU law—just think of European antitrust law or Art. 83 GDPR (→ mn. 720). However, this approach is quite questionable because such forms of sanctions are not common in national law. Turnover-based sanctions are thus often harsher than established forms of sanctions in corporate law.

9.3.2 Concerns Related to These Legislative Trends

984 So, while legislators adopt various corporate due diligence obligations in supply chains to sensitise companies to matters in the environment and human rights, legal scholars raise legitimate questions of principle,¹⁵ such as the following:

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- Are companies, like states, even (suitable) addressees for human rights obligations? Looking at official human rights documents, it is clear that the human rights standards are addressed to the states. They must create the appropriate framework conditions to ensure that human rights are respected. The approach of the supply chain laws, that legislators now want to oblige private companies to ensure that human rights are respected in their supply chains, appears problematic here. First of all, it must be considered that states (with their political mandate to care for the common good) pursue **other interests** than commercial enterprises (with their financial and economic interests). At the same time, it must also be considered that states have **other**

¹³ Gehling/Ott/Lüneborg (2021), 230–241. Vesper-Gräske M (2021), 63–72.

¹⁴ Gstöttner S and Lachmayer K (2020), 203–212.

¹⁵ The following reflections are taken from Kubiciel M (2016), 574–576.

instruments (such as sanctions) at their disposal to induce those subject to the law to respect human rights whereas companies can only (but at least also) work with market power.

- Can human rights now be enforced in a way, despite cultural, religious, political and economic differences, when international organisations and many states have failed in the transfer of human rights so far and are now imposing duties on corporations to fulfil under threat of sanctions? In fact, the debate on the **universality of human rights** originated in the Western world. Since the universal declaration of human rights in 1948, many Western states (especially the USA and the European states) have not really succeeded in establishing human rights standards worldwide. This raises the question of whether it is at all permissible for companies to be obliged by supply chain legislation to monitor human rights violations in foreign states and thus enforce a political programme that actually belongs to the sphere of action of states. It is doubtful whether new political controversies about the universality of human rights should be fought on the backs of transnationally active companies.

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9.4 Self-Driving Vehicles

The risks associated with road traffic are taken to a new level by digitalisation and the developments in artificial intelligence (→ mn. 871). Autonomous driving, i.e. the movement of vehicles without human intervention, seems to be only a matter of time from today's perspective.

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Six Categories of Automated Driving

In view of the technical progress, up to **six different categories** are mentioned that classify automated driving.

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1. Driver Only: The driver performs all driving tasks (especially braking, acceleration and steering) during the entire journey.
2. Assisted Driving: Technology relieves the driver of a certain driving task in certain situations, while the other tasks remain with the driver (e.g. parking assistance: the vehicle steers while the driver operates the accelerator and brake).
3. Semi-autonomous driving: The technology relieves the driver of all driving tasks in certain situations. However, the driver must react immediately when asked to take over and take control of the vehicle. The human must therefore permanently monitor the vehicle and be constantly ready to intervene.
4. Highly autonomous driving: In certain situations, the technology relieves the driver of all driving tasks. However, the system itself also recognises those

(continued)

situations in which it can no longer function and thus reaches its technical limit. It then requests the driver to intervene with a certain time buffer. This means that the human driver does not have to monitor the vehicle continuously, but must be prepared to take control of the driving within a short period of time.

5. Fully automated driving: The technology takes over all driving tasks from the driver in certain situations. The system recognises the limits where it does not work and then asks the driver to intervene. If the driver does not intervene, however, then in all situations the technology is able to return the vehicle to a risk-minimised state (e.g. slow down to a standstill).
6. No Driver: The vehicle operates without a human driver. There is no possibility of intervention outside the input of a target.

9.4.1 Current Trends in Legislation

989 For the law, this development brings with it a number of questions and challenges. In the debate so far, the main focus has been on aspects of civil law, insurance law and public licensing law,¹⁶ but the development also raises ethical questions.¹⁷ But why is this so? The current regulation of road traffic is based on the **Vienna Convention on Road Traffic of 1968** and its updates and amendments. On the basis of the previous legislation, semi-automated driving systems are indeed considered in principle. However, the guiding principle of the current legislation is based on the responsibility of the driver. He/she must be able to take control of the vehicle at any time. This legal situation requires that he, as the driver, is obliged to monitor and intervene even if the technology could actually realise full automation and make the driver obsolete.

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California

California has very progressive legislative initiatives with regard to autonomous driving. In April 2019, for example, vehicles without steering wheels or pedals were approved for road traffic.¹⁸ Shortly thereafter, the California DMV overturned the previous requirement that a human behind the wheel must intervene at all times in an emergency. There are still certain conditions under which manufacturers of autonomous

¹⁶Ex multis: Gless S and Janal R (2016), 561 and Joerden JC (2017), 73.

¹⁷<https://www.bmvi.de/SharedDocs/DE/Publikationen/DG/bericht-der-ethik-kommission.html?nn=12830>

¹⁸California Department of Motor Vehicles, Driverless Testing and Public Use Rules for Autonomous Vehicles Approved, <https://www.dmv.ca.gov/portal/news-and-media/driverless-testing-and-public-use-rules-for-autonomous-vehicles-approved/#:~:text=Under%20the%20new%20regulations%2C%20vehicle,to%20use%20their%20autonomous%20technology>

vehicles are allowed to test. But the way seems to be paved for completely driverless vehicles on public roads. ◀

The potential of autonomous vehicles is huge, not only in passenger transport but also in freight transport. Nevertheless, there are certain risks. This is shown not only by theoretical examples, but also by the first traffic accidents with autonomous vehicles.

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Autopilot Requires Driver's Full Attention

In May 2016, a driver of the Tesla Model S with autopilot switched on, drove into an articulated truck that crossed his lane. The Tesla driver died in the collision. The US National Highway Traffic Safety Administration (NHTSA) had exonerated the technology in the investigation report, citing human error as the cause of the accident because the driving system, as it is explicitly written in the manual, requires the driver's constant attention. ◀

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Autopilot Relies on Driver's Control

In March 2018, an autonomous vehicle had hit and fatally injured a woman who was pushing her bicycle across the road beyond the pedestrian lane in the dark. The investigating agency's report found that the technology registered the woman 6 seconds before the collision and determined 1.3 s before the collision that the emergency brake would have to be applied to avoid the accident. However, the emergency braking system is not activated when the self-driving car is in autopilot mode to avoid erratic vehicle behaviour. The vehicle relies on the driver's control and intervention in these cases. ◀

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It is therefore hardly surprising that legislators in different countries are regulating autonomous driving. After all, the concrete question is who will ultimately bear responsibility if damage or injury is caused by the new technology. In fact, legislators do not yet dare to regulate the highest level of automation ("no driver"), but set rules for semi-autonomous or fully autonomous vehicles, precisely on the legal areas of civil law, insurance law and registration law.

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- In 2016, the **amendment to the Vienna Convention on Road Traffic** entered into force. In principle, every vehicle that finds itself in motion should have a driver. This is to guarantee that the person is in control of his or her vehicle at all times. However, the amendment provides for the permission of vehicle technology that has an influence on the driving of the vehicle. For this to be the case, the technology must comply with the technical regulations of the United Nations or it must be possible at any time for the driver to switch it off or for the human being to take control of the driving.
- The example of the **UK** (Automated and Electric Vehicles Act 2018) suggests that civil liability lies with the insurance companies or, if there is no insurance, with the owner of the vehicle.

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- In **Germany**, it was decided in 2017 that the operation of highly or fully automated vehicles is permissible if they are driven as intended. Here, too, the law states that the user must be able to take back control of the vehicle at any time. The driver must therefore continue to sit behind the steering wheel, but is allowed to take his/her hands off the wheel in certain cases. He/she may distract himself/herself, but he/she must remain alert to take control of the vehicle if the technology prompts him/her to do so or if the human driver recognises a borderline situation for the technology.

9.4.2 Questions of Responsibility

996 Who bears **responsibility** for damage or injury from self-driving vehicles?¹⁹ The clarification of this question is of enormous economic importance.²⁰ This is because the manufacturers of **autonomous vehicles** want to know which standards are to be programmed, what is to be monitored, when a product defect occurs, when criminal liability results from this and to what extent autonomous driving still belongs to the general risk of life.²¹

The starting point on the discussion related to the responsibility of autonomous driving is the so-called “**trolley dilemma**”, which is a classic of such ethical dilemmas.²² Imagine that a single freight wagon is speeding towards a passenger train. If the freight car stayed on the previous track, it would hit a passenger train and kill a large number of people. But a railway official could avert disaster and direct the train onto the only siding. There, some workers are unloading a freight car and would be killed by the impact. Thus, the railway official must ultimately decide whether to avert the danger to the lives of the people on the passenger train and cause the killing of the workers by diverting the goods train.²³

In the course of automated road traffic, new but similar emergency situations and **dilemma** arise.²⁴ For example, the autonomous vehicle may detect that the sudden running into five teenagers onto the roadway will result in a collision that is fatal to all five teenagers. The vehicle might determine that this scenario could only be avoided by diverting the vehicle to oncoming traffic, but then it would collide with another vehicle, sacrificing at most the occupants there or its own occupant. In fact, product manufacturers (and programmers) have to anticipate such situations and provide the vehicle with a solution.²⁵

¹⁹See, ex multis, Hilgendorf E (2017), 171–194 and Haagen C (2021).

²⁰See Gless S et al. (2016), 412–436.

²¹Gless S and Janal R (2016), 561–574.

²²Hörnle T and Wohlers W (2018), 12–34.

²³Gless S and Janal R (2016), 561, 574–575; Joerden JC (2017), 73, 74–81.

²⁴Joerden JC (2017), 73, 82–96; Neumann U (2018), 393, 395–397.

²⁵Cf. Neumann U (2018), 393, 402–406.

Traditionally, civil law and criminal law assumes three different conceptions of responsibility in traffic cases. It focuses on the car driver, the producer and the owner of the car.²⁶ However, digitalisation could also lead to the addition of other persons or companies with new starting points for liability,²⁷ such as the liability of the internet provider who makes the cloud technology available for connected autonomous vehicles.²⁸

Basically, criminal responsibility (and thus liability) of the **car driver**, even when using automated systems, can only be considered if he or she can at least be accused of negligence. It is therefore necessary, on the one hand, that the driver could have foreseen a legally relevant outcome (e.g. death or bodily injury) and, on the other hand, that he/she did not apply the necessary care to avoid this outcome. The problem with autonomous driving is now that motorists use autopilot for traffic precisely because they want to rely on the driving assistant to move the vehicle safely. Yet people know that there is definitely a residual risk when using the technology. For example, the vehicle's sensors may be dirty or fail to recognise certain colours/objects correctly. However, abstract knowledge of this residual risk is not sufficient for liability for negligence to apply. Rather, the legal allegation requires that the driver is either responsible for the error himself or should have recognised the technological error. This requires an analysis of the specific circumstances of the case.²⁹ According to the current state of the law, however, the question to be asked for an accusation of negligence is whether the driver should have been allowed to use autopilot at all in the specific situation. Legislators will have to make decisions on this in the near future.³⁰

The liability of **manufacturers** and **operators** of automated vehicles is more complex. Here, a more precise distinction must be made between civil and criminal liability.³¹

As far as **product liability under criminal law** is concerned, the question is whether product defects already occur in the manufacturing process (e.g. in the programming of highly automated vehicles). With regard to product liability under criminal law, the question is whether the individual persons in the manufacturing process and at the decision-making level have behaved in a manner contrary to their duty of care, i.e. whether they have not observed the caution to which they would be obliged under the circumstances and according to their personal circumstances.

Thus, the question of the foreseeability of the possible occurrence of damage is at the centre of the liability assessment.³² This question is very difficult to answer, because in the development and operation of the product of smart machines, one cannot rule out with

²⁶Valerius B (2017), 9, 11–15; Ringlage P (2021), 39–120.

²⁷Ringlage P (2021), 111–119.

²⁸Schuster FP (2017), 49–64.

²⁹Gless S and Janal R (2016), 561, 563–564.

³⁰Thommen M (2018), 22, 26–29.

³¹Ringlage P (2021), 53–111.

³²Gless S and Wohlers W (2019), 366, 384–387, 390–395.

100% certainty that the car will react differently than desired in the specific circumstances of a given traffic situation. So far, the law states that the programmer must not program in a solution that sacrifices third parties uninvolved in an accident.³³ However, not every life-like situation can be programmed in advance. Therefore, the standard of due diligence will have to be taken into account. Were the manufacturer and operator sufficiently careful in developing the product? Here, the law has an established pool of solutions for potentially dangerous products at the ready, but these approaches appear quite questionable due to the machine learning and self-learning potential that such machines have. In the event of unexpected damage or risks, manufacturers and operators would be obliged to warn users and recall the product. However, it is problematic that there are currently no fixed technical standards (e.g. for the obligation to monitor such intelligent products) according to which manufacturers and operators can orient themselves. Therefore, there is a desire on the part of the industry to exempt manufacturers and operators from liability so that innovative products can come onto the market at all. In fact, the law must find a way here to allow innovation on the one hand and to set appropriate standards on the other, so that certain risk spheres remain permitted.³⁴

999 Product liability under civil law is fundamentally easier to establish than product liability under criminal law. Unlike in criminal law, for example, no proof of (individual) fault is needed here, and the addressee of a civil law claim (e.g. the company as such) is also much easier to identify.³⁵ Nevertheless, the question also arises here as to what standards must be met in order for the smart vehicle to be designed and manufactured safely. What are the requirements for product monitoring on the market? And how is it to be assessed that the development of computer programmes is certainly prone to errors? Here, of course, one can expect higher quality standards, but the question remains what standards of care can be demanded here, especially when machines optimise themselves.³⁶

1000 Finally, the owner (keeper) of the smart vehicle also becomes the focus of responsibility.³⁷ In civil law, the decisive factor here is that the owner can freely dispose of the vehicle and is therefore held liable. Under both criminal and civil law, the decisive factor is the extent to which the owner has intentionally or negligently failed to adequately maintain the vehicle or has violated corresponding duties of supervision or traffic safety. Here, it must first be examined whether the owner has regularly updated the data. Furthermore, however, this type of liability is likely to be expanded, because in the case of fully automated vehicles, the driver himself is no longer involved and the owner of the vehicle comes more to the fore. The concepts of liability provided for in the Road Traffic Acts must be adapted here.

³³ Cf. Wörner L (2019), 41, 45–48.

³⁴ Gless S and Janal R (2016), 561, 564–567.

³⁵ Valerius B (2017), 9, 15–18.

³⁶ Gless S and Janal R (2016), 561, 567–570.

³⁷ Gless S and Janal R (2016), 561, 570–572; Ringlage P (2021), 39–51; Schorro A (2017), 81–109.

Overall, today's law does not give a satisfying answer to the question of responsibility.³⁸ The law is called upon to develop a solution here.³⁹ Would conceivable approaches be the use of random generators, a clear attribution of responsibility to the manufacturer, vehicle owner or driver or, finally, the establishment of a new legal "e-person"?⁴⁰ All such solutions have advantages and disadvantages, but must ultimately be carried into society by the sciences in order to arrive at a legally anchored solution within the framework of a broad debate that provides clarity for the economy.⁴¹

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³⁸ Gless S and Janal R (2016), 561, 564–567.

³⁹ Teichmann F and Falker MC (2020), 89, 90–93.

⁴⁰ Riehm T (2020), 42–48; Ringlage P (2021), 207–221.

⁴¹ Cf. Wigger D (2020).

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Part IV Prevention and Disclosure

- ▶ As the general and specific normative requirements for Business criminal law (BCL) have been disclosed in Part II and Part III, a change of perspective will be carried out in Part IV. This perspective will focus on how a corporation is organised to deal with criminal offences. The first focus is on prevention. This therefore deals with the question of how crimes can be effectively prevented (Chap. 10). The second focus is on the corporate organisation responsible for what happens after crimes have occurred. It deals with the extent to which companies themselves should be involved in investigating crime (Chap. 11). This change of perspective between normative regulations and corporate organisation is illustrated by practical examples.

- This chapter is dedicated to selected aspects of compliance. It thus sheds light on structures that a company implements in its organisation in order to prevent the commission of criminal offences by decision-makers and employees. Compliance is hence of a preventive nature. This chapter therefore concerns the measures taken by companies even before an offence is committed.

The aim of this chapter is to provide an overview of the development, goals and risks of compliance. Based on this, the principles for the development of a compliance management system that is specifically tailored to the company in question will be given.

10.1 Introduction

Compliance is a key concept for the prevention of business criminality, although, some people think it is only a magic word¹ or a marketing trick to sell legal advice. Beside polemic dispute, it is a fact that lawyers are developing different forms of legal services as well as offering complementary services in the general field of business consulting.² However, compliance plays an important role for a company as a strategy to prevent business crimes. This will be introduced by giving an overview of compliance from a legal perspective. At the end, a sketch of a compliance management structure for small and

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¹ See Lewisch P (2012); cf. Soyer R and Pollak S (2013), 1013–1047.

² Rotsch T (2010), 614–617; Saliger F (2013), 263–291.

medium-sized enterprises (→ mn. 1108) and one for a large, established company (→ mn. 1115) will be provided.

10.2 Terminology

1003 The term “compliance” means adherence, agreement or observance. It originates from the medical field, where it describes the loyalty of a patient during therapy. This means the patient’s willingness to follow the instructions of his/her doctor. If this understanding of the term is transferred to the legal field, the term “compliance” ultimately means “to be in compliance with the law”, i.e. **acting in accordance with the applicable law**.

But one could argue that this is taken for granted. In principle, all participants in economic life who act within a legal system are legitimately expected to comply with the applicable laws. However, it is challenging for economic players to be aware of all the regulations within a company while at the same time being careful not to violate the law. This is where the legal concept of compliance comes in. Compliance thus refers to all **strategies for promoting and ensuring a culture of lawful conduct** within a company. In this respect, the term compliance is related to the complexity of legal requirements.³ Whenever regulations are clear, unambiguous and the addressees of these regulations can easily implement them internally, specific compliance measures are not really necessary.⁴ Compliance as an internal mechanism within a company becomes particularly necessary when legal requirements are not comprehensible and therefore need to be built into the corporate culture as part of a strategy for internalising compliance with the law.⁵

10.2.1 Compliance and Business Organisation

1004 How does compliance as a field of expertise fit into the area of business organisation? From a structural perspective, compliance is part of the larger collective term of corporate governance. **Corporate Governance** describes the regulatory framework for the management and supervision of an economic enterprise.⁶ From a legal perspective, corporate governance is the constitution of a company, according to which the company organises its concrete actions. Within this corporate governance system, compliance is a means of monitoring the company and its individual members. While corporate governance describes all measures for the good and responsible management of a company,

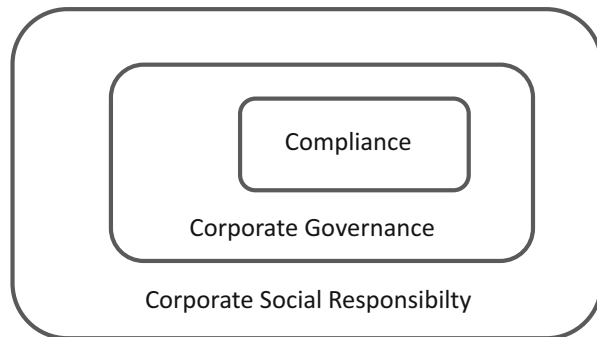
³Bock D (2011), 27–245 on the theoretical foundation of criminal compliance.

⁴Rotsch T (2015), 31, 41–42.

⁵Bock D (2011), 19–27.

⁶Mann RA and Roberts BS (2018), 20–23.

Fig. 10.1 Compliance and business organisation



compliance is the subdivision that is intended to ensure that the company carries out its activities in accordance with the law.

Even more far-reaching than compliance and the larger collective term Corporate Governance is the concept **Corporate Social Responsibility** (CSR, → mn. 159), as shown in Fig. 10.1. This is a voluntary contribution by companies to sustainable development that goes beyond the legal requirements (compliance). The aim of Corporate Social Responsibility is to act responsibly in a company's respective field of activity. However, it also includes ecological and social perspectives, such as commitment to science and society, environmental and climate protection, as well as to the company's own employees.

Back to the concept of compliance. If the term compliance is aimed at a company's fundamental adherence to legal rules, then **criminal compliance** concerns the specific area of criminal law regulations. Criminal compliance refers to the adherence to specific regulations to avoid criminal responsibility and thus ultimately to avoid criminal sanctions. Since the term focuses on avoidance, it is therefore oriented towards prevention. At the same time, it is a special feature when compared to criminal law because criminal law and criminal justice are generally oriented towards past criminal behaviour. While criminal judgment deals with crimes that have already been committed, the verdict is also a statement for the future. The judgment tells the public: Look here, violations of the rules will not be tolerated but punished (→ mn. 227).

However, criminal compliance focuses mainly on the future. The goal of compliance is to avoid criminal conduct altogether. The focus is consequently on a preventive control system that is intended to anticipate whether or not certain conduct is criminally relevant. In this respect, compliance assumes a change of perspective and is oriented towards the future where strategies are applied to avoid criminal liability.

- In a nutshell: Criminal Compliance is a measure that management takes to avoid risks in the area of criminal law.

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- 1008** The desired outcome of using a compliance strategy is to **anticipate** criminal responsibility, detect potential sources of risk and actively counteract them with concrete measures to ensure that no criminal responsibility is incurred.
- 1009** The concept of compliance is certainly not free of fundamental criticism. By promoting compliance measures, such as the statutory obligation to create appropriate control bodies, the state outsources supervisory competences to private companies. Since the state is not in a position to diligently supervise all actors and actions in Business criminal law (BCL) itself, it gives companies this obligation and thus outsources certain activities to them. If a breach of the rules occurs, however, the state subjects the company to extensive monitoring to ensure the effectiveness of the compliance culture.

10.2.2 Legal Background

- 1010** Compliance measures are based on varying legal sources. The most important legal sources are not criminal⁷ or public law,⁸ but company law.⁹ **Company law** envisages different rights and obligations for the different structures and organs in a company.¹⁰ To give a concrete example, one can look at the Austrian Stock Corporation Act. It states that a Management Board is responsible for managing their company and must apply the diligence of a prudent and conscientious manager (see Austria: § 70 para. 1, § 84 para. 1 AktienG-AT). Similar obligations apply to the managing directorate of a limited liability company (§ 25 GmbHG-AT). However, duties of care and corresponding attribution of responsibility also affect supervisory board members.¹¹
- 1011** The laws provide a framework for what is expected of an orderly and conscientious manager. However, what an orderly and conscientious manager is and how such a manager behaves has to be interpreted according to individual situations. For the purpose of assessment, the usual practices in fair business dealings are taken into account, but also the particular circumstances of the actual company involved are taken into account. Thus, good corporate governance depends in particular on a company's size, the assets they use, the nature of their objective and their economic and competitive situation. It is very important that this requirement of a prudent and conscientious manager is not a liability for success. Good corporate governance means that the question is not whether or not success will occur, but whether **all reasonable measures** have been taken to manage a company in a (potentially) successful way. This basic idea has the consequence that in the event of corresponding failures (e.g. the discovery that a criminal offence has been

⁷For the criminal law principles of compliance, see Bock D (2011), 277–436.

⁸Rathgeber C (2012), 97–144.

⁹Rathgeber C (2012), 145–251.

¹⁰Vetter J and Harting A (2020)

¹¹Ruthmannseder F (2020), 277–280.

committed in the company) liability is not automatically triggered. In particular it must be asked whether the managing director was careful (e.g. by establishing a functioning compliance management system) and whether, despite the care of the prudent and conscientious managing director, a crime was committed (e.g. because the employee fraudulently circumvented the mechanisms of compliance management).

Company law follows the basic principle that a company's management board must oversee and guide their company on their own in a responsible way that is in the best interests of the company, taking into account the interests of shareholders and employees, but also public interest. The management board is therefore at the head of the company and is not bound by instructions. In order to fulfil its management duties, they may use discretion in the running of the company. If management makes its decisions within the lawful exercise of its discretion, these management decisions cannot be controlled by the court (so-called **Business Judgement Rule**).

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See§ 93 para. 1 of the German Stock Corporation Act:

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In managing the affairs of the company, the members of the management board are to exercise the due care of a prudent manager faithfully complying with his/her duties. *No dereliction of duties shall be given in those instances in which the member of the management board, in taking an entrepreneurial decision, was within his/her rights to reasonably assume that he/she was acting on the basis of adequate information and in the best interests of the company.*¹² [. . .].

Various provisions of company law set the standards for management and executive management with regard to due diligence. Accordingly, a member of a board of directors or a managing director acts with the diligence of a **prudent and conscientious manager** if he or she is not guided by extraneous interests when making a business decision and may assume, on the basis of appropriate information, that he or she is acting in the best interests of their respective company.

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Because a management board is responsible for applying the diligence of a prudent and conscientious manager, they also have a responsibility for the organisation of the company. Careful corporate management calls for an equally **carefully organised company**. This organisation must be structured in such a way that it optimally fulfils the tasks and goals of the company while complying with the law. The establishment of an appropriate corporate structure is a first step for the diligent management board. In addition, the management board has to ensure that lawful conduct is implemented at all levels of the company. Thus, if a company also operates across borders or is listed on a foreign stock exchange, it has to observe domestic and foreign legal standards. This shows that the board of directors and its members have a great supervisory duty, which they have to exercise carefully. This includes taking appropriate and reasonable protective measures to ensure that members

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¹²Emphasis added.

of the company do not violate the law. While setting up such a preventive management system, the decision-makers have a great deal of discretion.

1016 Compliance Management Structure: Defining Features

The compliance management structure of a company depends on how they are embedded into their specific sector of the economy. Defining features of this are as follows:

- Size of the company
- Structure of the company
- Organisation of the company
- Business model and field of activity of the company
- Industry standards
- Stock exchange listing
- Degree of internationalisation
- Importance and diversity of the regulations to be observed
- Existing monitoring facilities
- Previous instances of maladministration and irregularities in the company

1017 All these factors must be considered in a comparison of costs and benefits. The individual compliance measures must therefore be specified according to suitability, necessity and reasonableness. Thus, management must also implement an efficient monitoring system in the company's organisation. In this way, management may get an overview of the essential legal requirements that have to be observed in the context of entrepreneurial activity. Only then can management carry out an appropriate risk analysis in order to determine which concrete measures need to be taken for compliance. Thus, if careful organisation and monitoring are ensured, risks for the company, including individual company bodies and employees, can be minimised.

10.3 History of Compliance

1018 Different stages in the development of compliance and criminal compliance have to be addressed. The following section gives a limited overview of developments in the USA, Great Britain and continental Europe.¹³

¹³Rathgeber C (2012), 70–85; Tabbert H (2020), 46–48.

10.3.1 The United States of America

The concept of compliance has existed for a long time, but it was only recently that it clearly established itself scientifically and practically in Europe, while the starting point of compliance development was in the USA.¹⁴ There, compliance was already in development from the 1930s onwards as a mechanism of self-regulation to secure or enhance the reputation of companies. In the 1950s and 1960s, major antitrust proceedings led to the implementation of fully fledged compliance programs. In this sense, compliance programs have an important preventive function.

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In criminal law, the Watergate scandal marks the starting point for criminal compliance. In the course of the investigation of Watergate, the US Securities and Exchange Commission (SEC) initiated a disclosure program that offered companies the prospect of reduced penalties for reporting internal bribery. The Watergate scandal and the ensuing economic crisis were brought to a close by the **Foreign Corrupt Practices Act (FCPA)** of 1977.¹⁵ The FCPA required companies to implement internal controls to prevent further cases of bribery.¹⁶ At the same time, the FCPA called for the establishment of a compliance culture to prevent corruption:

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An effective compliance program promotes an organizational culture that encourages ethical conduct and a commitment to compliance with the law.¹⁷

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a ‘culture of compliance’ and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business.

A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.¹⁸

In order to implement these legal requirements, many companies reacted by issuing so-called codes of conducts, which, in addition to seeking to cooperate with authorities, have become an essential element in determining civil law sanctions: moreover, to closely

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¹⁴ In detail Engelhart M (2012), 57–317.

¹⁵ <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>

¹⁶ Ruthmannseder F (2020), 281–282; cf. Huck W (2013), 344–351.

¹⁷ U. S. Department of Justice/U.S Securities and Exchange Commission, FCPA—A Resource Guide to the U. S. Foreign Corrupt Practices Act, 2012, 56.

¹⁸ U. S. Department of Justice/U.S Securities and Exchange Commission, FCPA—A Resource Guide to the U. S. Foreign Corrupt Practices Act, 2012, 57.

cooperate with authorities, the maintenance of a code of conduct is considered a mitigating factor in the assessment of (civil) law sanctions.

1022 Economic scandals in the 1980s led to further compliance-building measures. For example, the **Insider Trading and Securities Fraud Enforcement Act** (ITSFEA) of 1988 was enacted,¹⁹ which prescribes measures for companies in the securities trading sector to prevent insider deals. There were also allegations of bribery within the defence industry that came to the attention of the public, which led to recommendations by the Department of Defence that companies should maintain internal control systems. These control systems are articulated in the establishment of written standards, regular reviews, reporting offices, audits, and disciplinary measures as well as cooperation with authorities. If companies establish such measures internally, the prospect of reduced penalties has been held out. These measures are now part of the standard repertoire of sentencing guidelines. Additionally, the **Defense Industry Initiative** on Business Ethics and Conduct (1986) was launched in response to the allegations of corruption in the defence industry,²⁰ which is still extremely active today and reflects the growing importance of business ethics.

1023 In the mid-1980s, the discussion about state and criminal control of companies flared up again. This trend was taken up and resulted in the reform of the penal law in the criminal law consideration of compliance programs. The breakthrough for compliance concerns came in 1991, when the **Sentencing Guidelines** explicitly referred to compliance measures.²¹

§ 8 B 2.1. Effective Compliance and Ethics Program: (a) To have an effective compliance and ethics program (...), an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.²²

1024 Following the terrorist attack of September 11, 2001, the so-called Patriot Act was enacted in the USA, which obliged certain companies to introduce new compliance measures. Following the collapse of major economic players (WorldCom and Enron), the **Sarbanes-Oxley Act** was enacted in 2002,²³ which tightened company regulations by combining civil, administrative and criminal law regarding control of companies.²⁴ The aim of this law was to improve the reliability and accuracy of company reports produced in compliance with their legal obligations. The provisions of Sec. 404 are of particular importance here. According to this, in addition to the annual financial report, a report on the internal control systems of a company has to be given. Furthermore, the responsibility of management is

¹⁹ <https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg4677.pdf>

²⁰ <https://www.dii.org/home>

²¹ <https://www.uscc.gov/guidelines/archive/1991-federal-sentencing-guidelines-manual>

²² *United States Sentencing Commission, Guidelines Manual*, 497.

²³ <https://www.govinfo.gov/content/pkg/PLAW-107publ204/pdf/PLAW-107publ204.pdf>

²⁴ Frank-Fahle C and Ebner SM (2020), 58–63; Hefendehl R (2004), 51–53.

pointed out, which lies in the area of financial reporting for establishing and maintaining appropriate internal control systems. In addition, the auditor of a company has to issue an assessment of the extent to which the company maintains effective internal control over its financial reporting and provide a certificate. This follows suit as Sec. 301 contains the obligation for companies to maintain an independent “Audit Committee” and provides for employees to make confidential, anonymous reports to this committee about questionable behaviour in accounting and auditing. If companies fail to comply with reporting requirements, the Sarbanes-Oxley Act provides for severe sanctions and penalties by the NYSE, NASDAQ, AMEX or SEC.²⁵

Another important milestone for the legal recording of business criminality is the **Yates Memorandum** of 2015.²⁶ This is an internal decree from the then Deputy Advocate General at the US Department of Justice, Sally C. Yates. According to this memorandum, US attorneys prosecuting crimes in the USA are obliged not only to conduct investigations into violations of social legal norms, but also to investigate the personal responsibility of company managers. Members of the highest levels of corporate management (especially members of the board of directors or supervisory board) are threatened with criminal prosecution and civil liability in almost unlimited amounts. Although former US President Donald Trump dismissed Deputy Attorney General Yates in February 2017, the memorandum remained in place. This means that the personal responsibility of managers sets new standards for corporate governance and compliance, which is reflected in the ethical and professional qualifications of entrepreneurial leaders.²⁷

All in all, from today’s perspective, America’s compliance regulations appear to be an extremely complex landscape with different approaches. There is no holistic system of compliance, but rather it is articulated in different regulatory areas.²⁸ Nevertheless, the guidelines issued by the Ministry of Justice are of great importance in practice for aligning compliance management systems.²⁹ This also corresponds to the practical demands made on companies. A characteristic feature of compliance in the US is the cooperation between the state and businesses. In order for compliance programs to have a positive effect in the defence of companies, they must cooperate to a large extent with the state authorities. If compliance programs are effectively implemented in companies, they can expect a reduction in penalties for criminal offences.

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²⁵ Ruthmannseder F (2020), 282.

²⁶ <https://www.justice.gov/archives/dag/file/769036/download>

²⁷ Ruthmannseder F (2020), 283.

²⁸ Willms N (2020), 57–65.

²⁹ Pasewaldt D and Wick K (2020), 55–59.

1027 Evaluation: Central Issues

According to the U.S. Department of Justice (as of June 2020),³⁰ the central issues in the evaluation of Corporate Compliance Programs are

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation's compliance program work in practice?

1028 If compliance programs are missing from a company's organisation, the penalty will be increased. In practice, it is evident that compliance is of enormous importance.

10.3.2 The United Kingdom

1029 The concept of compliance also has a long tradition in Great Britain in corporate governance. As early as the 1990s, numerous commissions were set up to extend recommendations for corporate conduct. The main driving forces behind this were the most important auditing companies, which, following corporate collapses, were confronted with claims for damages due to unrecognised maldevelopments. The auditing companies therefore drew up proposals to enable companies to improve their self-regulation. From this the UK has the milestone regulation of the "**Combined Code on Corporate Governance**" of the London Stock Exchange of 1998, which goes so far as to impose fines for breaching the code and to deny companies a listing if they failed to act again.³¹

1030 Another important milestone in the development of compliance is the so-called **UK Bribery Act** of 2010,³² which is sometimes regarded as the strictest articulation of penal law in the world and as such its importance should not be underestimated.³³ After all, the law applies not only to British companies, but also to leading companies from all over the world, if they do business in the United Kingdom (Sec. 7 para. 5 subpara. 2 lit. b). Furthermore, the UK Bribery Act determines the criminal liability of a company if a person located anywhere in the world who is associated with the company commits an act of bribery in the interest of said company. The term associated person is understood very

³⁰ Vgl. U.S. Department of Justice, Criminal Division: Evaluation of Corporate Compliance Programs (June 2020): <https://www.justice.gov/criminal-fraud/page/file/937501/download>

³¹ <https://www.frc.org.uk/getattachment/53db5ec9-810b-4e22-9ca2-99b116c3bc49/Combined-Code-1998.pdf>

³² <https://www.legislation.gov.uk/ukpga/2010/23/contents>

³³ Engelhart M (2016), 882–930; Johnen S (2020) 55–77; MacIntyre E (2018), 687–689; Ruthmannseder F (2020), 282–283.

broadly. A person is associated with the company if he or she provides services for the company or in the name of the company. In this respect, employees of the company are considered associated persons, but also persons from other companies if they have or have had a one-time business relationship with the UK company. The UK Bribery Act punishes not only companies that engage in acts of bribery, but also companies that have failed to prevent acts of bribery.

From the Criminal Compliance point of view, it is particularly significant that in the UK Bribery Act, Sec. 7 para. 2 allows a company to be discharged for those cases in which the company can prove the establishment of an adequate compliance system.³⁴ This is found within the section on corporate compliance culture:

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Principle 2 Top-level commitment: **The top-level management** of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. **They foster a culture within the organization in which bribery is never acceptable.**³⁵

The maintenance of an adequate and efficient compliance system is therefore of major importance. The British Ministry of Justice laid down **guidelines** on what such a system should look like.³⁶ This is intended to ensure that the objective of the UK Bribery Act, namely the systematic fight against corruption, can be achieved. The package of measures, which are provided for in the guidelines of the Department of Justice and which are rewarded in criminal proceedings, consists of the following cornerstones.³⁷

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Cornerstones of Compliance Measures According to the Guidelines of the UK Department of Justice

1. Risk Assessment: the company must carry out a risk analysis to identify potential corruption risks in the company. The company must then identify measures to minimise precisely these risks.
2. Top Level Commitment: Management is in the best position to create a corporate culture in which corruption is not accepted. This commitment must be exemplified by management, but it must also actively participate in key decisions with a high risk of corruption. The management has to communicate a clear rejection of

(continued)

³⁴ Johnen S (2020), 133–158.
³⁵ Ministry of Justice UK, The Bribery Act 2010. Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), 23.
³⁶ <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>
³⁷ Schalber R (2018), 252–266.

corruption internally and externally and actively participate in the implementation of anti-corruption measures.

3. Due Diligence: To ensure that corruption risks are detected and combated preventively, the company is required to introduce measures to examine the risk of associated persons. Depending on the business area, country and type of associated persons, a different risk assessment may have to be carried out.
4. Clear, Practical and Accessible Policies and Procedures & Effective Implementation: the anti-corruption strategy of the company is to be implemented and adhered to through training measures and internal and external communication. The training concerns knowledge and skills regarding anti-corruption policy within the company. The adoption of a code of conduct is recommended as an external means of communication.
5. Monitoring and Review: companies are required to constantly monitor and review their anti-corruption measures. Behind this mandate is the idea that corruption risks and the requirements for prevention continue to change with the company's field of activity and its business development. The company must therefore constantly review its measures and, if necessary, adjust them in order to adequately monitor the risk of corruption. The guidelines of the Ministry of Justice not only propose the evaluation of financial control mechanisms, but also employee surveys, feedback after training measures and, if necessary, whistleblower systems, but also third-party certification of the company's own compliance system.³⁸

10.3.3 International Developments

1033 The discussion about compliance has also reached the European Union.³⁹ In Central Europe, the compliance idea has its starting point in securities law. Major scandals involving insider trading made the legal systems aware that the voluntary implementation of measures and guidelines was not very effective. For this reason, various obligations for control bodies and supervisory duties were implemented through laws such as the Securities Trading Act or the Stock Corporation Act. Compliance was thus an **industry-specific phenomenon** for getting a grip on regulatory deficits. Starting in these industries, the legal system has opened up further sectors in which appropriate control bodies must be implemented or has provided incentives for the active implementation of voluntary supervisory mechanisms.⁴⁰

³⁸Traudes O (2017), 195–235 (specifically on the UK Bribery Act: 207–209).

³⁹Engelhart M (2015), 1104–1120.

⁴⁰With regard to the Austrian legal situation, see Tipold A (2016), 90–101.

The current picture of the legal situation is as follows. There are a number of different special standards that provide for corresponding regulations and compliance requirements for all companies from a certain area. This applies in particular to special areas such as credit institutions (money laundering compliance, → mn. 673). However, legal entities, such as stock corporations, are also required to introduce compliance organisations, for example through so-called corporate governance codes. Whereas such codes were previously only intended as a recommended guideline, a *de facto* obligation to organise compliance systems in large companies is slowly but surely emerging. This is because the introduction of a compliance system is rewarded within the framework of criminal law standards (for example, through reduced sentences or complete exemption from punishment), while potential waivers offered by a compliance system can be taken into account to aggravate the penalty. All in all, there is no direct legal obligation for all companies to implement a compliance organisation. Nevertheless, companies are urgently recommended to implement compliance according to appropriate standards of corporate organisation in order to reduce the corresponding liability risks.

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10.4 Aims and Effects

The fundamental goals and effects of compliance can be summarised as follows.⁴¹

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10.4.1 Prevention of Crime

The main objective of criminal compliance within a company is to avoid any criminal liability. From this perspective, compliance measures are therefore preventive measures. The aim is to **anticipate and identify potential risk areas** in order to initiate specific countermeasures before criminal acts are committed. Compliance measures are intended to prevent suspicion that crimes have been committed in a company. By implementing compliance measures, the company wants to clarify from the outset that it is undertaking adequate efforts to ensure that no crimes will be committed. This certainly applies to business crimes in the narrower sense, such as money laundering (→ mn. 654), corruption (→ mn. 599) or product liability (→ mn. 875). In reality, however, the mandate of compliance goes beyond the mere prevention of business criminality. Indeed, it is true that it is precisely BCL that covers certain risks that are typically seen as a source of danger to people and the environment. Nevertheless, it is not only due to new technologies that fundamental uncertainties of facts and assessments exist and that the risks are often very difficult to anticipate. It is often difficult to anticipate the access of courts and law enforcement authorities to certain facts, as the example below shows.

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⁴¹ Bay KC and Hastenrath K (2016), 127–137; Ruthmannseder F (2020), 275–276.

1037 Earthquake—Case⁴²

In 2009 a major earthquake occurred in the L'Aquila region of Italy. The earthquake had been preceded by many smaller ones over several months. The local population was therefore very worried, which caused uncertainty and panic in many places. One week before the major earthquake, the National Risk Commission met to assess the ultimate risk. According to the current state of scientific knowledge, it stressed that earthquakes are fundamentally unpredictable, which is why it is scientifically impossible to assess a lower or higher earthquake risk. One member of this earthquake commission, who did not have any scientific expertise, gave a reassuring interview after the meeting. A week later the violent earthquake shook the area and killed numerous people leading to action from the public prosecutor's office. They charged various members of the Risk Commission with negligent homicide and bodily injury. In the end, all convictions were overturned, except for the conviction of the member who had given the interview. ◀

- 1038** Risks such as unknown effects of an ingredient (e.g. the leather spray case, → mn. 864) or unsubstantiated statements in public can have serious consequences. Because the law is often very complex, especially for those in business roles as well as for lawyers, criminal liability is often very difficult to anticipate. It may therefore be essential to establish a fundamental compliance culture in companies in order to be able to deal with uncertain risks appropriately. This is especially important in companies that act as organisations (long-term with a structured majority of persons). Above all, in such organisations, it is important to establish clear procedures and allocation of responsibilities that demonstrate risk awareness.

10.4.2 Avoiding Criminal Liability

- 1039** However, it would be a mistake to reduce compliance to pure prevention. After all, the objective/goal of compliance is to avoid any criminal responsibility. This means that compliance measures play an important role even when a crime has been committed. The goal is to examine and question one's own compliance culture in order to achieve greater efficiency and ultimately an improvement in the compliance system.

⁴²Staffler L (2017), 125–138.

How can a compliance system be improved after a crime has been committed? Many examples are worth considering, such as:

- Identification and elimination of deficits in the compliance system
- Intensification of surveys independent of the occasion by extending or shortening the intervals
- Intensification of external consulting
- Recruitment of additional compliance staff
- Establishment or improvement of internal guidelines for compliance
- Establishment of a whistle-blowing system or an ombudsman service

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From a compliance point of view, it can be useful for a company to **voluntarily disclose any irregularities**⁴³ or, despite an ongoing investigation, to make efforts to improve the compliance system and thus to react to the irregularities in a concrete way. In many legal systems, this has a mitigating effect and can even lead to complete impunity (→ mn. 397).⁴⁴ Criminal compliance should therefore not be limited to simply avoiding the commission of criminal offences. Criminal compliance is ultimately intended to avoid criminal responsibility of companies or persons associated with the company. Court (and criminal) proceedings should be avoided as far as possible as they are always associated with incalculable risks.⁴⁵ This is because criminal proceedings regarding business criminality not only take a very long time and can incur considerable costs, they are also often damaging to the company's reputation.⁴⁶ When a case is tried in court, there is always a risk that one's own presentation of the facts in court may not be convincing, witnesses may not be reliable in the actual questioning in court, or the opposing party may be more likely to convince with better arguments and evidence.

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⁴³ Feil T (2020), 35–64, 65–260.

⁴⁴ Günther T (2019); Luef-Köbl H (2020), 363, 375–378, 381–382.

⁴⁵ As the ancient Romans already know: In court and on the high seas you are in God's hand ("Coram iudice et in alto mare in manu dei"), see Staffler L and Jany O (2020), 164, 170; cf. Kämpfer S (2020), 161–180; Niemz J (2020).

⁴⁶ Gercke B (2012), 291–297.

10.4.3 When and Why Do Businesses Deal with Compliance?

- 1042** The above-mentioned objectives to prevent the commission of crimes are generally very laudable. However, from the perspective of companies, the question arises as to what the added value of a compliance organisation is. When does a company exactly deal with compliance?
- 1043** Interest in compliance measures naturally arises primarily when **new laws or political** orientations make it necessary for a company to take further steps. This is illustrated by the example of the UK Bribery Act (→ mn. 1030), which prompted companies with operations in the UK to adapt their corporate culture to the new requirements.
- 1044** Concrete **incidents and violations** in a company can also trigger an interest in compliance. This is because these events reveal weaknesses in the corporate structure in which the offences were or could have been committed. The commission of crime shows a need for action by the company. For example, in the event of a breach of food law by a company (→ mn. 899), it could be revealed that the company's employees concerned are not sufficiently aware of the necessary regulations.
- 1045** Additionally, a company may also be concerned with compliance if their **public presence increases**. This is because the company can suffer enormous financial losses as a result of media publicity, which is focused on damage claims or the commission of crimes. To better cover this risk, the company can opt for introducing compliance measures.
- 1046** However, compliance is not a topic that only concerns large companies. **Small and medium-sized companies** are primarily concerned with compliance when they are made aware of it by business partners. Business partners can thus exert quite considerable pressure on small and medium-sized companies if they demand that the company further develop its own compliance organisation and commit itself to conduct in conformity with compliance. For example, a medium-sized company that works as a supplier for a large corporation may be required by these business partners to recognise the group's Code of Compliance and confirm this in writing. If the supplier is not prepared to do so or does not take appropriate measures to implement compliance, this may ultimately reduce or even eliminate its chances of winning or upholding business deals.
- 1047** While certain industries, such as the banking industry, are forced by the legislator to implement compliance systems, companies operating in other sectors of the economy may choose to take up compliance measures to improve their **public image**. The construction industry in particular, has often had to deal with a bad reputation as a result of media scandals involving fraud, embezzlement, bribery or networking with criminal organisations. A further loss of reputation can be avoided by implementing compliance measures to counteract negative consequences of its own economic activity (e.g. exclusion from the award of contracts). Also, the real estate industry, which has been in the media for a long time following major corruption scandals, is making efforts to implement compliance measures in order to improve its public image and to secure its economic activities.

If companies have adopted corresponding compliance systems in their business activities, they ultimately hope for the **mildest possible liability** in the event of damage. Depending on the legal situation, the establishment of compliance organisations can even lead to a complete exemption of liability. This incentive to implement compliance measures is flanked by the fact that companies and entrepreneurs are afraid of high fines or imprisonment. If there is a lack of appropriate compliance measures and compliance structures, and damage occurs, the company leaders may be subject to high fines and imprisonment. In certain cases, it can be essential to prove in court that the company on trial has a Compliance System in place.

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10.4.4 Creating a Compliance Culture

The ultimate goal of the discussion on compliance is to establish a company compliance culture that is supported not only by a company's employees but also by management.⁴⁷ For this reason, it is of key importance to motivate employees to adhere to compliance regulations.⁴⁸ To this end, it is essential that management is clearly committed to compliance and that employees perceive this effort as credible. Managers from all company levels must assure that they stand united behind the goal of preventing systematic misconduct within their company and towards business partners. Management and executives should unreservedly and unrestrictedly set out to combat existing grievances. A **mission statement** is to be issued to communicate that systematic violations of rules are not a tolerated means of achieving corporate goals.⁴⁹

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Clearly, it is not enough for management to send clear and unambiguous messages to the employees. In order to win employees over to a compliance culture, decision-makers need to **continuously communicate** their basic attitude, while also behaving accordingly and consistently implementing their own guidelines. Only then will they be able to live up to their function as role models. In addition to these minimum measures, various structures and organisational procedures have to be defined within the company to minimise the risk of illegal behaviour.

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⁴⁷ Kark A (2019), 227–254; Ruthmannseder F (2020), 277, 284–285.

⁴⁸ Bussmann K (2016), 50–57; Dittmers C (2018), 68–104.

⁴⁹ Schieffer A and Wauschkuhn A (2020), mn. 40–41.

1051 What Are the Five Major Sins of Compliance?⁵⁰

- Compliance culture tone is missing from management
- Delegation of compliance tasks is ineffective
- Official channels do not align with compliance norms
- The compliance system is a paper tiger because it does not include a risk-oriented approach
- Compliance is understood as a fashion trend

10.5 Compliance Risks

1052 A key objective of compliance is therefore to clarify the corresponding risks of criminal offences in the course of business activities in advance and to create appropriate organisational structures as a preventive measure. Hence risk mapping is of enormous importance. It is the first step on the way to an effective compliance management system.⁵¹

1053 Risk mapping or **risk assessment** is a comprehensive, systematic identification and evaluation effort of existing legal risks. In practice, corresponding risks will be in the foreground, especially in the area of criminal tax law, antitrust law and labour law, i.e. many areas of secondary criminal law (→ mn. 126). However, corresponding risks must also be considered in core criminal law, for example in the areas of fraud (→ mn. 562), embezzlement (→ mn. 582), corruption (→ mn. 599), criminal insolvency law (→ mn. 834) or money laundering (→ mn. 654). Outside these areas of criminal law, protection of intellectual property, capital market law and acquisition law must be mentioned, where there are severe sanctions for corresponding violations. Finally, risk mapping also concerns the area of proper internal and external accounting (→ mn. 805).⁵²

1054 Risk analysis depends not only on the respective entrepreneurial activity and behavioural sector, but especially on the **size** and **structure** of the respective company and business model. The legislator is well aware that entrepreneurial activities are always associated with the bearing of risks. Breaches of the law cannot be completely ruled out. Nevertheless, the legislator expects companies to establish appropriate preventive measures to avoid systematic misconduct. Legally disapproved behaviour by members of a company (decision-makers or employees) cannot be completely eliminated, but it can be minimised.

⁵⁰ Bay KC and Hastenrath K (2016), 151–153.

⁵¹ Bay KC and Hastenrath K (2016), 101–104; cf. Pauthner J and Stephan HJ (2016), mn. 145.

⁵² Ruthmannseder F (2020), 276–277.

10.5.1 What Is Risk?

An essential question that arises when discussing compliance is how the term “risk” can be defined in the context of entrepreneurial activity. In terms of compliance management, risk can be described as an **uncertain future event** that has **potentially negative consequences**.⁵³

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Top 12 Compliance Risks

KPMG recently conducted a benchmark study on compliance risks in companies. Here are the top 12 rankings:⁵⁴

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1. Corruption and bribery by own employees
2. Violation of data protection and IT security
3. Infringements of antitrust law
4. Fraud by own employees
5. Labour law infringement
6. Property damage
7. Violations of the integrity and accuracy of financial reporting
8. Unethical or reputation-damaging, but not illegal behaviour
9. Product liability
10. Breaches of sector-specific regulation
11. Environmental offences
12. Violation of occupational safety and security

Risk is something other than a damaging event. While **risk** belongs to the area of preventive compliance measures, **damage** belongs to the area of reactive measures, where the company must react to damage that has already occurred.

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10.5.2 Identification of Risks

The identification of risks is a key starting point for the structure of compliance management.⁵⁵ The aim is to determine the extent to which a company’s activities lead to damage or loss of reputation if an activity is partly or entirely accused of **violating law**. In other

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⁵³ Glage D and Grötzner M (2016), mn. 1, 8–15; Haberhauer S (2017), 78–83; Ruthmannseder F (2020), 287; cf. Hilgendorf E (2020), 9–28 and Zwick M (2020), 29–54.

⁵⁴ <https://www.tecchannel.de/i/detail/artikel/2037748/1/689418/d2e245-media/>

⁵⁵ Jüttner M et al. (2019), 225–229; Kämpfer S (2020), 161, 167–168; Pauthner J and Stephan HJ (2016), mn. 23.

words, the risk of violating (criminal) law in the course of corporate activities is at stake.⁵⁶ However, compliance measures can also go beyond this, for example to cover risks relating to accepted **ethical values**, internal company standards or damage to the internal compliance culture.⁵⁷

1059 An initial distinction between risks depends on the extent to which they can be influenced by the actions and decisions of a company. A distinction can be drawn between internal and external risks.

Internal Risks

can result from organisational deficits or financial or strategic positioning. Such risks can be limited by suitable countermeasures taken by the company responsible.

External Risks

cannot be directly influenced by the actions and positions of the company because they cannot be anticipated by the development of the business environment. The company can only react to such risks or take countermeasures to limit their effects.⁵⁸

1060 Risks According to Their Causation

In classifying risks according to their causation, the following groups in particular have emerged as requiring risk assessment.⁵⁹

- Strategic risks have a long-term impact on the achievement of corporate goals. The compliance strategy is designed to prevent extensive damage to reputation⁶⁰ or assets. For this reason, the compliance strategy applies to the classic tasks of strategic management.
- Legal and regulatory risks relate to the violation of laws and also cover risks arising from changes in the legal framework. This applies in particular if the digital transformation of business areas (e.g. in the automation of vehicles⁶¹ or in

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⁵⁶Cf. Glage D and Grötzner M (2016), mn. 16–19.

⁵⁷Cf. Leyk W (2016).

⁵⁸Ruthmannseder F (2020), 287; cf. Moosmayer K (2015), mn. 71–72; Pauthner J and Stephan HJ (2016), mn. 36 (“endogene and exogene risk groups”).

⁵⁹Pauthner J and Stephan HJ (2016), mn. 31; cf. Glage D and Grötzner M (2016), mn. 9–15.

⁶⁰The issue of damage to reputation is dealt with in particular in the legal field under the topic of “Litigation PR”, see Staffler L (2019), 498, 505.

⁶¹Teichmann F and Falker MC (2020), 89–93.

the handling of virtual currencies⁶²) or other parts of companies cause economic reality to collide with a new regulatory environment.^{63,64} Data protection law is a major area, especially in connection with the monitoring of employees.⁶⁵ If such risks become reality, this has negative consequences not only in financial terms, but also in legal terms (e.g. the risk of possible professional bans) and reputational risks.

- Operating risks relate to the behaviour of members of a company or third parties involved in shaping the company's activities. The VW diesel scandal is an example of this (→ mn. 6). Compliance systems serve to prevent product-related deception.⁶⁶
- Financial risks are found in very different parts of a company or accompanying business transactions. Here as well, a corresponding risk analysis with regard to economic damage (e.g. through sanctions with financial consequences) has to be considered.
- Personnel risks relate to the misconduct of company employees. The compliance risks extend not only to possible disciplinary measures, but also to the selection of competent personnel and their ongoing training. In this respect, a culture of dialogue is of particular importance.
- Furthermore, risks are also classified according to the effect they have, i.e. whether they represent asset, liquidity or earnings risks.⁶⁷

In addition to these categories of risks, there is another aspect to consider. Each individual risk is in fact attributable to certain responsible parties or risk owners. The **risk owner** is the person or entity in a company whose actions have the authority to prevent a risk.⁶⁸ The risk owner is largely responsible for identifying, prioritising, assessing, controlling and monitoring the risk area under his/her control. In practice, these are the respective roles within a company that are able to manage the risks concerned in the best possible way and thus to structure risk management actively and effectively.⁶⁹

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⁶²Wirth J (2018), 139–141.

⁶³Pyrcek A (2017), 939–941.

⁶⁴Klaas A (2019), 280–464.

⁶⁵Jörg E (2012), 18–75; Kreß S (2018), 64–65.

⁶⁶Grützner T et al. (2018), 50–63.

⁶⁷Bendrich L (2019), 145–147; Ruthmannseder F (2020), 285–287.

⁶⁸Ruthmannseder F (2020), 288.

⁶⁹Pauthner J and Stephan HJ (2016), mn. 49–56.

10.5.3 Dealing with Risks

- 1062** Entrepreneurial activity is prone to risks. Therefore, before the specific process of risk management begins (i.e. identification, evaluation, control and ongoing monitoring of risks in a company, which can also be carried out with the aid of automated programs⁷⁰), a risk strategy must first be clearly defined by company management and the implementation of this risk strategy has to be established by means of organisational measures.⁷¹
- 1063** A **risk strategy** not only depends on the strategy from company management (business strategy), but on any changes in said company management. This kind of dynamic situation means a risk strategy must be adaptable. The risk strategy that a company pursues serves as a guideline for dealing with risks. Not only economic but also legal risks (compliance risks) must be taken into account. The definition and development of a risk strategy is one of the core tasks of corporate management.⁷²
- 1064** A risk strategy and the related framework of conditions, objectives and risk definitions should be **regularly reviewed and adjusted**, paying particular attention to a coherent alignment between the business strategy and the risk strategy. Key elements of a risk strategy are the definition and types of risks, the carrying capacity and tolerance of risks, risk assessment, risk reporting and the management and monitoring of risks.⁷³
- 1065** The ability to bear risks is the ability of a company to bear the damages, losses or penalties arising from risks without directly endangering the continued existence of the company. To this end, the question arises whether a company has sufficient financial resources for running the business even when a maximum loss occurs (i.e. the largest and thus most catastrophic loss in its dimension, even if it is not probable).⁷⁴
- 1066** The **tolerance of risk** quantifies the dimension of maximum loss within which risks are taken on by the company management. In practice, therefore, management sets a maximum amount of loss where it would still be prepared to take corresponding risks. However, it should be borne in mind that risk tolerance also includes consequential losses that are not directly qualified.⁷⁵ This applies to damage of reputation, for example.

⁷⁰Krisor J (2019), p. 25–27.

⁷¹Glage D and Grötzner M (2016), mn. 47, 48–49; Ruthmannseder F (2020), 288–289; cf. Kämpfer S (2020), 161, 169–171.

⁷²Pauthner J and Stephan HJ (2016), mn. 73–76.

⁷³Glage D and Grötzner M (2016), mn. 47–55.

⁷⁴Pauthner J and Stephan HJ (2016), mn. 118–126.

⁷⁵Glage D and Grötzner M (2016), mn. 56–67; Pauthner J and Stephan HJ (2016), mn. 38, 76; Ruthmannseder F (2020), 289.

A Risk Strategy Can Be Built Like This⁷⁶**1067**

- Avoidance of risks. In the case of very serious risks that exceed the tolerance of the compliance strategy, risk avoidance must be applied. This means that certain projects are waived in whole or in part. For instance, the waiver affects certain parties or departments within a company, certain business partners, certain business areas, certain business activities or geographic markets (For example, Google did not bid for the US Department of Defence's massive cloud treaty because it could conflict with its Artificial Intelligence principles against weapons development).
- Reduction of risks. Risks have to be identified and analysed to determine the extent to which a risk is likely to occur and the extent of the possible damage. Based on this analysis, compliance strategies for risk mitigation will be determined. Risk reduction is thus the most important starting point for compliance management.
- Transfer of risks. Risks can also be managed by taking out appropriate insurance (e.g. Fidelity Trust Insurance). Although this approach is justified for certain areas, not all risks can be transferred to third parties. This applies, for example, to reputational risks, which are very difficult to quantify and therefore difficult to transfer. However, the same applies to the case of damage caused by an intentional breach of criminal law, which cannot be insured.
- Acceptance of risks. If an appropriate analysis of compliance risks leads to the conclusion that none of the previously mentioned strategies are satisfactory, the management team could conclude that certain (residual) risks are legally permissible and should therefore be borne.

Once the risks have been identified accordingly, the main thing is to assess the risks in terms of their occurrence and damage. Such an assessment thus depends on the probability of the risk occurring as well as on the extent of damage.⁷⁷

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Example of risk gradation according to probability.⁷⁸

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- Very low: risk is very unlikely to occur
- Low: risk is unlikely to occur
- Possible: risk will occur in less than half of the cases
- Probable: risk will occur in more than half of the cases
- Very likely: risk will probably occur

⁷⁶Ruthmannseder F (2020), 290; cf. Pauthner J and Stephan HJ (2016), mn. 111–115, 212–220.

⁷⁷Ruthmannseder F (2020), 290.

⁷⁸Ruthmannseder F (2020), 290.

1070 Example of risk gradation according to quantitative damage:⁷⁹

- Insignificant: up to 50,000 €
- Low: 50,000 € to 100,000 €
- Budget: 100,000 € to 500,000 €
- High: 500,000 € to 5 million euros
- Existential: from 5 million euros

1071 However, assessing risks for damage can have qualitative as well as financial aspects.

1072 Example of risk gradation according to qualitative damage (reputational damage).⁸⁰

- Insignificant: no damage to reputation
- Low: low coverage for a few days in local media; low stakeholder involvement
- Medium: intensive coverage over several weeks in local media; coverage over a few days in national media; intensive stakeholder engagement;
- High: intensive coverage over several weeks in national media; low coverage over a few days in international media
- Very high: intensive coverage over several weeks in national and international media

10.6 Essentials on Compliance Management

1073 The identification of risks and their assessment forms the basis for reducing risks and promoting compliance with the legal obligations of companies. This is ultimately the basis of an appropriate compliance organisation. Only if risk areas are clearly identified, can resources and tools for the development and implementation of compliance structures be adequately undertaken and a corresponding organisation with clear responsibilities be established. The implementation of compliance is intended to create a **corporate culture** that essentially ensures that a company's business activities comply with the law.

1074 Thus, **compliance cultures** depend on companies themselves.⁸¹ By contrast, the government guidelines on the structuring of compliance risk management are often formulated in very general terms and contain few concrete instructions for companies. Frequently, government guidelines merely provide a framework within which companies can structure their compliance systems. In this way, states take into account the fact that every economic activity is accompanied by specific risks. The guidelines also remain rather general because risks also depend on the respective corporate structure in each individual case.

⁷⁹Ruthmannseder F (2020), 291.

⁸⁰Ruthmannseder F (2020), 291; cf. Pauthner J and Stephan HJ (2016), mn. 108.

⁸¹Moosmayer K (2015), mn. 96–104; Schieffer A and Wauschkuhn A (2020), mn. 8.

So how should companies build their compliance organisation? The starting point for this is a **compliance risk analysis**.⁸² The aim of this risk analysis is to identify the danger of misconduct in the company at an early stage, to assess the possible effects of this misconduct in relation to the legal corporate objectives and to take appropriate countermeasures. If the analysis is not carried out conscientiously, for example because it does not cover all processes in the company and all company locations, the incompleteness of the analysis can lead to the ineffectiveness of risk analysis and thus ultimately to the ineffectiveness of the compliance management system. It is therefore up to companies to search for risks within their own business activities in the framework of legal and business management requirements in order to then implement appropriate structures and procedures.

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10.6.1 Distribution of Competences

The maintenance of a compliance management system is the joint responsibility of the members of an executive board.

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See the provision in the Swiss Code of Obligations (OR), according to which compliance is one of the core tasks of corporate management.

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Art. 716a No. 5 OR Switzerland: The Board of Directors has the following non-transferable and irrevocable duties [...] 5. the ultimate supervision of the persons entrusted with the management of the company, in particular with regard to compliance with the law, the Articles of Association, regulations and directives.

In the chapter on delegation, it has already been explained that the managing director is responsible for all of a company's affairs (principle of **universal competence**, → mn. 453). If the managing directorate consists of several persons, i.e. if he/she acts as a collegiate body, he/she is responsible as a collegiate body (principle of **overall responsibility**, → mn. 453). Therefore, the college is also jointly responsible for the fulfilment of legal obligations and is mutually and severally liable to the company as joint and several debtors (principle of **joint responsibility**, → mn. 453). The actions of company management must be in accordance with the applicable legal situation (duty of legality). Ultimately, this means that a management board must ensure that business activities are carried out in compliance with and in accordance with the applicable law.⁸³

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At the same time, management bodies can be supported by employees through **delegation** of tasks. In this case, however, they must exercise appropriate care in selecting, instructing and monitoring the new task holders (so-called: care in delegation, → mn. 467). Responsibilities, task areas and accountabilities must be assigned clearly and

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⁸²Bock D (2011), 585–763; Wiedmann M and Greubel M (2019), 88–94.

⁸³Ruthmannseder F (2020), 294–295.

without overlap. The task bearers must be appropriately educated, but also have appropriate competencies within a company's structure (e.g. right to issue instructions to employees in other areas).⁸⁴

1080 In practice, the compliance department is delegated to a single member of management, who must, however, report to the entire body appropriately and regularly (→ mn. 459). This often requires that the responsible member of management is familiar with the relevant specialist knowledge. The compliance task is therefore assigned to a member of the corporate management body (**horizontal delegation**, → mn. 456), but overall responsibility remains with all members of a management body, without prejudice to this allocation of duties. For this reason, decisions taken by a management body as a whole on the basis of legal requirements or the articles of association cannot be delegated to individual members of the management body.

1081 It is clear that the concrete structure of a compliance organisation and the associated division of processes and areas of responsibility within a compliance management system depend on the characteristics, fields of work and structures of the individual company. Despite these different starting points, effective implementation of the main functions of compliance management systems, namely prevention and compliance with legal regulations, as well as detection and appropriate response in the event of compliance violations, must be ensured in every case.

1082 Organisation and Delegation of Compliance Related Tasks

To this end, there are various models for how compliance-related tasks are organised and delegated by management to subordinate employees.⁸⁵

- A common practice is the appointment of a central compliance officer, often referred to as the (Chief) Compliance Officer.⁸⁶ The compliance tasks are thus delegated to a member of the company. This is the central figure of the compliance system, which is why the selection of the candidate is not only about skills,⁸⁷ but—as empirical studies show⁸⁸—also about personality. In addition to this central figure, other compliance officers are often (depending on the structure of the company) appointed who act specifically in individual areas of the company and are obliged to report to the Chief Compliance Officer or, conversely, receive instructions from him/her.

(continued)

⁸⁴ Schieffer A and Wauschkunn A (2020), mn. 20.

⁸⁵ Ruthmannseder F (2020), 295–296.

⁸⁶ Groß NFV (2012).

⁸⁷ Groß NFV (2012), 96–100

⁸⁸ Dimmers C (2018), 207–255, 366–383; cf. Groß NFV (2012), 92–96.

- In larger companies, compliance tasks are assigned to a group of employees who then form the so-called Compliance Board. This group can then be set up as a central office responsible for compliance tasks. However, it can also be located in existing departments (such as the legal or finance department).
- In some companies, compliance tasks are not carried out internally, but are outsourced to external third parties.⁸⁹ However, it should be noted here that the complete outsourcing of compliance management is illegal because management is always in a position to make important decisions about the design of the compliance system itself and, if necessary, to take back responsibility for compliance. For this reason, just individual compliance tasks are often outsourced to external service providers, such as risk analysis, employee training or the maintenance of a hotline for a whistle-blower system.

Within the performance of compliance tasks, two basic models of organisational structures have been established with regard to the cost-benefit calculation of compliance, namely the autonomous compliance organisation and the matrix compliance organisation.⁹⁰

- **Autonomous compliance organisation is characterised** by the fact that all compliance tasks (prevention, detection, reaction) are the responsibility of the Compliance Office. In addition to this central office, local compliance offices or compliance officers are implemented in the various business units and geographical subdivisions of the company, depending on the requirements.⁹¹
- In a **matrix organisation**, the compliance office primarily performs the task of prevention, while the tasks of detection and response are performed by other departments (e.g. Internal Audit, Controlling, Finance and Human Resources). Within this organisational model, it may even be the case that prevention is not performed by a separate compliance office, but rather by a corresponding specialist department. Although the compliance tasks are thus divided among different specialised departments, all the departments involved must exchange information on the compliance focus in addition to communication in day-to-day business.⁹²

⁸⁹Pyrczek A (2018), 310–313.

⁹⁰Moosmayer K (2015), 31–35; Pauthner J and Stephan HJ (2016), mn. 46–48.

⁹¹Moosmayer K (2015), mn. 106–107; Pauthner J and Stephan HJ (2016), mn. 47.

⁹²Moosmayer K (2015), mn. 108–111; Pauthner J and Stephan HJ (2016), mn. 48.

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1086 The two typologies of compliance organisations have certain advantages and disadvantages. The **matrix organisation** is certainly less intensive in terms of resources, but there is a greater need for coordination and communication between departments. Fragmentation also means that compliance strategies may not be enforced efficiently because the division of labour between strictly separated specialist departments decreases the organisation's overview and reach. The central and **autonomous compliance organisation**, on the other hand, may be more cost-intensive, but is better organised due to specialisation and autonomous communication. Therefore, an autonomous compliance organisation will often be found in larger, more complex companies. Which specific form of organisation is economically sensible, as well as legally necessary, depends not only on the structure of the company and its financial resources, but also on the specific risk field in which the company is active.⁹³

10.6.2 Compliance Programs and Measures

1087 What do compliance measures look like in concrete terms? Reality and practice⁹⁴ show that there are different measures needed to establish a compliance culture.⁹⁵

1088 A central component of a compliance management system is a **code of conduct**.⁹⁶ This code forms the cornerstone for implementing compliance requirements. A code of conduct contains binding rules for how all company employees must act.⁹⁷ It expresses the company's mission statement, to which economic, social and ethical values the company is committed. It also refers to the company's legal requirements and specifies the demands on conduct of all employees. Ideally, the code should also contain references to more detailed explanations of regulations relating to the individual areas of law.

1089 Written Rules of Conduct

By explicitly writing down rules of conduct, not only do employees have a clear understanding of the desired behaviour in the company, there are also some advantages for the employer. Through a code of conduct, the employer makes an important contribution to the welfare of the employees. It also allows the employer to enforce existing obligations. The code of conduct helps to maintain a **positive corporate culture** and peace within the company. As a result, the work process can be ensured without disruption.

⁹³ Pauthner J and Stephan HJ (2016), mn. 48.

⁹⁴ Cf. Moosmayer K (2015), mn. 212–225.

⁹⁵ Bay KC and Hastenrath K (2016), 138–148; Pauthner J and Stephan HJ (2016), mn. 153–157.

⁹⁶ Moosmayer K (2015), mn. 155; Ruthmannseder F (2020), 297.

⁹⁷ Moosmayer K (2015), mn. 157–163.

Table 10.1 System of compliance related measures

Cluster of measures	Related compliance measures
External risks for deviation (behaviour that does not comply with applicable standards and values)	• Analysis of the compliance risks of the entrepreneurial field of activity (global, but also area and country specific) • Analysis of compliance risks of individual transactions and business partners • Analysis of compliance risks of individual employees
Corporate Culture	• Tone from the top • Mission statements • Establishment of an appropriate error and failure culture • Speak-Up Culture • Generic Code of Conduct
Training and consulting	• Solidified behavioural guidelines • Manuals • Training and education measures • Counselling services (also for individual cases)
Organisational design	• Clear and comprehensible assignment of responsibility and areas of responsibility • Documentation of decision-making processes • Dual control principle • Job rotation • Compliance-promoting incentive structures
Reporting system	• Open reporting along the hierarchical level of the company • Escalation routines • Protection systems for whistle-blowers
Monitoring and evaluation	• Systematic search for misconduct by employees (occasion-related and random; internal and external) • Continuous evaluation of the compliance organization
Case-related prevention and repression	• Clarification of suspicious facts • Rectification of identified legal infringements • Punishment of misconduct by employees (for the purpose of prevention)

1090 Solid base regulations may be sufficient for general employees. However, certain areas of a company will require more far-reaching regulations. It would therefore make sense to issue more concrete compliance **guidelines** that further specify the code of conduct. These guidelines should clearly indicate which areas of the company they apply to. However, they should also indicate when they were created. In this way, it can be ensured that employees adapt to current circumstances accordingly.⁹⁸

1091 **Managing Compliance Related Documents**

For the multitude of guidelines and rules of conduct, it is clearly unavoidable that a plan to manage documents must also be set forth. This guideline should regulate the creation, transfer and storage of documents as well as their proper disposal. Clearly stated guidelines on how to manage documents in compliance with legal requirements not only create a transparent culture of corporate activity, they also counteract disadvantages (e.g. of a criminal, tax or civil law nature) for the company's management.

1092 A selection of **measures** can be systematised from the annual reports of large listed groups. This is shown in Table 10.1:

1093 The tasks of corporate management in the area of compliance organisation can be summarised as follows:⁹⁹

- Corporate management has to define, continuously communicate and support the **principles of compliance**. To this end, it must disclose the extent to which compliance measures are part of the company's values, business ethics, the principles of corporate governance and the company's overall objectives.
- Company management has to set out the **compliance strategy** in writing, not only disclosing the compliance policy principles, but also defining all compliance management structures, ensuring an appropriate personnel and financial basis, defining milestones and implementation strategies and incorporating the compliance objectives into the company's overall strategic goals.
- The management will focus on the definition, implementation and support of compliance management and the allocation of **clear responsibility structures**.
- In order to keep the compliance organisation appropriately operational, the compliance strategy has not only to be **periodically reviewed**, but also updated accordingly.
- Management is also obliged to **plan preventively** for the occurrence of compliance-related crises in the company. This involves defining behaviour and procedures, namely, how to deal with the authorities (e.g. during police searches), media (e.g. press

⁹⁸Ruthmannseder F (2020), 297–298.

⁹⁹Schieffer A and Wauschkuhn A (2020), mn. 21.

statements), business partners and employees. This also includes how decision-making powers should be perceived in times of crisis and how compliance violations should be clarified within the company.

10.6.3 Communication

Communication is a key element for implementing a compliance culture.¹⁰⁰ In practice a compliance management system can only be effective if the employees or third parties concerned are actually aware of it, as well as their roles or areas of responsibility in it. **1094**

The flow of information within a company and vis-à-vis third parties is an essential component of a compliance management system.¹⁰¹ **Effective information management** requires that all relevant information reaches all levels of a company. Therefore, a reporting system that properly communicates essential information is needed. A reporting line has to be established between the compliance officer and management, so that management is able to fulfil its mandate of running their company as a whole.¹⁰² **1095**

The best regulations for compliance and the most sophisticated codes of conduct are of no use if the compliance message from company management does not reach their employees. It is therefore essential that companies provide **advice** and **information** about its compliance culture.¹⁰³ Employees can only be expected to adhere to legal and internal rules if they are aware of their content and their significance for the company and its activities. This in turn requires that employees receive intensive and continuous training. Such training ensures that employees and managers understand the importance and functioning of compliance in the company. It does make sense for employees to receive specialist training. The training can be provided either by the company's internal compliance officer or by experts from outside the company. In addition to classic classroom training, online training is also possible.¹⁰⁴ **1096**

Training courses should cover not only compliance culture, but also training for exceptional situations, such as unannounced official investigations ("dawn raids"). If employees are not trained for this, mistakes can happen, which would lead to extensive liability risks for management and the company as a whole. For this reason, employees must also be trained for crisis situations so that an appropriate chain of communication can respond effectively.¹⁰⁵ **1097**

¹⁰⁰ Bay KC and Hastenrath K (2016), 155–202; Moosmayer K (2015), mn. 210.

¹⁰¹ Beckmann EM (2018), 137–139.

¹⁰² Kämpfer S (2020), 161, 173–177, 178–180; Ruthmannseder F (2020), 298–299.

¹⁰³ Cf. Moosmayer K (2015), mn. 172.

¹⁰⁴ Schieffer A and Wauschkuhn A (2020), mn. 35–37.

¹⁰⁵ Ruthmannseder F (2020), 299–301.

For example, employees have to be trained in the extent to which they are obliged to cooperate with state authorities, what they need to do specifically when officers are searching a company's premises, who in the company they should contact and what rights they are entitled to exercise while being searched. It is helpful if each department is trained according to their specific guidelines. For example, staff in the company's reception area will be the first point of contact for authorities, which is why efficient crisis management and clear reporting structures are essential for this department.

1098 When communicating a compliance strategy, it is important to offer **employees opportunities to learn** about the company's compliance culture in addition to regular training and education. To this end, it will be necessary to ensure that leaflets and information sheets are available to employees and communicated via appropriate channels (e.g. employee newspaper, brochures, circulars ...).¹⁰⁶

1099 In addition to these written communication channels, it is also prudent to set up an **advice centre** so that employees or members of management can obtain information in confidence beyond the training offered. This gives a company an overview of the compliance topics that are currently of particular interest, where compliance weaknesses may lie or where the practical application of compliance measures has not yet been sufficiently understood.¹⁰⁷ Outside of this consulting offer, which answers questions about the respective compliance program, it is useful to set up a system for receiving indications of possible compliance violations (**whistle-blower system**).¹⁰⁸

1100 In addition to this internal communication culture, it makes sense for compliance officers to work closely with the communications department. This ensures efficient management of **external communication**, i.e. with customers, business partners and regulatory authorities. Indirectly, such communication management will signal that the company has a functioning compliance structure.¹⁰⁹

10.6.4 Monitoring

1101 An efficient compliance system requires more than just transparent guidelines on a compliance culture. Also, training and education measures on compliance can help, as they can reduce the frequency of violations that could occur due to ignorance. However, it is not possible to prevent individual employees from deliberately ignoring or disregarding the compliance rules or from committing violations of international regulations. For this reason, a compliance organisation must contain control elements so that deliberate

¹⁰⁶Ruthmannseder F (2020), 300–301.

¹⁰⁷Moosmayer K (2015), mn. 175–180; Ruthmannseder F (2020), 301.

¹⁰⁸Moosmayer K (2015), mn. 181–195; Ruthmannseder F (2020), 303; Schieffer A and Wauschkuhn A (2020), mn. 56–57.

¹⁰⁹Moosmayer K (2015), mn. 196–207; Ruthmannseder F (2020), 301–302.

violations of rules only occur as outliers and can be detected as early as possible. Therefore, there is a need for **constant internal control** to adequately comply to changing circumstances and factors within a company. Only then will a compliance system be effective at adapting to changes and thus improve and ultimately eliminate weaknesses and deficiencies at central points.¹¹⁰

Management must regularly assess the extent to which compliance rules are actually observed. To this end, a company may resort to informal controls in the form of **unannounced spot checks**. These would be carried out by a compliance officer or the respective department head in charge.¹¹¹ In addition to these informal controls, a regular and systematic compliance audit should examine individual risk areas.¹¹² However, it is of central importance for a good corporate climate that the internal control mechanisms are handled in a **moderate manner**. Any impression that there is no trust in the personal responsibility of employees and in the abilities of managers has to be avoided. A climate of mistrust should not be created.

In addition to regular audits and spot checks, it may be useful to establish an integrated and functional **whistle-blowing system**. The aim of such a whistle-blower system is for a company to be informed of irregularities or control deficiencies at an early stage by means of internal reports, so that management can take appropriate countermeasures. If such a system is put into place (and ensures the whistle-blower's anonymity), company employees can be encouraged to report possible breaches of compliance. In practice, it has been shown that compliance information should be distributed verbally as well as in writing, whereby external persons should be particularly considered, in addition to company employees. If such information of a compliance violation is passed on, it is important that a company's management initiates internal investigations.¹¹³

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10.6.5 Documentation

Finally, an important component of compliance management is the documentation of all relevant processes. This serves not only to ensure the availability of tasks within the framework of compliance and thus to facilitate **self-monitoring**, but can also be seen as a step to **reduce liability** by providing records of company activity. Furthermore, this documentation enables management to be regularly and sufficiently informed about compliance-relevant measures. Thus, they are able to further develop their company's

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¹¹⁰Ruthmannseder F (2020), 302.

¹¹¹Pauthner J and Stephan HJ (2016), mn. 165; Ruthmannseder F (2020), 302–303.

¹¹²In detail: Jakob A (2013), 142, 157–158.

¹¹³Ruthmannseder F (2020), 303.

corporate organisation. It is therefore also very important that decisions on compliance are carefully documented at the managerial level.¹¹⁴

1105 In addition to documenting individual processes and measures of compliance, it can be more efficient for a compliance system if it is formed according to **certified standards**. Since in court it is important that a compliance program is suitable and effective, it can be attractive for management to have itself audited and certified by an external provider according to accepted auditing standards. The audit certificate should enable management to prove that it has fulfilled its organisational obligations of the respective compliance program.¹¹⁵

1106 Various standards for compliance management systems have become established internationally and nationally. This can be seen in the following selection of corresponding standards.

International Standards (Selection)¹¹⁶

- ISO 19600:2014, Chapter 4.6. on Compliance Management Systems¹¹⁷
- ISO 31000:2014 on risk management¹¹⁸
- Anti-Corruption, Ethics and Compliance Handbook for Business of the UNODC, OECD and the World Bank¹¹⁹
- Guide “Competition Law Compliance” of the European Commission.¹²⁰

National Standards (Selection)

- USA: CPA Resource Guide of the U. S. SEC and the U. S. Ministry of Justice.¹²¹
- UK: UK Bribery Act, guidelines issued by the UK Department of Justice in March 2010.¹²²
- Canada: CAN/CSA Q850 Risk Management Guideline for Decision Makers.

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¹¹⁴Ruthmannseder F (2020), 308.

¹¹⁵Pauthner J and Stephan HJ (2016), mn. 197–204.

¹¹⁶Cf. Pauthner J and Stephan HJ (2016), mn. 68; Ruthmannseder F (2020), 283–284; Stan J (2019), 44–63.

¹¹⁷http://www.iso.org/iso/catalogue_detail?csnumber=62342

¹¹⁸<http://www.iso.org/iso/home/standards/iso31000.htm>

¹¹⁹<http://www.unodc.org/documents/corruption/Publications/2013/Anti-CorruptionEthicsComplianceHandbook.pdf>

¹²⁰<https://op.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a>

¹²¹<http://www.justice.gov/criminal-fraud/fcpa-guidance>

¹²²<https://www.justice.gov.uk/legislation/bribery>

- Germany: Guidelines for anti-corruption measures of the Federal Ministry of the Interior, prepared by the “Initiativkreis Korruptionsprävention Bundesverwaltung/Wirtschaft”, volume 2.¹²³
- Austria: ONR 49000:2008 ff. Risk management for organizations and systems—Terms and principles—Application of ISO 31000 in practice.

10.7 Two Final Examples

Implementing compliance requirements can affect companies differently. Many of them will see it as a hindrance to business or as an annoying duty. However, it has been shown to be a relevant managerial task as the effort is often rewarded in court in the event of a claim.

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The aforementioned theoretical explanations will now be illustrated by two examples of implementation.

10.7.1 Compliance for Small Businesses and Start-Ups: The Hamburg Model

Small and medium-sized companies or newly founded start-ups are especially sceptical about compliance requirements or compliance recommendations because their introduction is often associated with high costs.¹²⁴ These costs place a heavy burden on entrepreneurs who are just starting out.¹²⁵

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The so-called Hamburg Compliance Model was developed¹²⁶ with this target group in mind, namely **family businesses** and **medium-sized companies**.¹²⁷ Due to its modular structure, it is not only a practical and easily adaptable model for compliance, but also a cost-effective way for a company to have its own compliance organisation certified according to a recognised standard.¹²⁸

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¹²³ <http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2013/praktische-hilfestellungen-antikorruptionsmassnahmen.html>

¹²⁴ Schieffer A (2018), 93–95.

¹²⁵ Ebner S and Leone S (2020), 7–12.

¹²⁶ However, small companies with fewer than ten employees and an annual turnover of up to a maximum of two million euros can also be certified according to the Hamburg Compliance Model.

¹²⁷ The entire compliance model can be found in the description in the Hamburg Compliance Model, Certification Handbook, available at: <https://www.hk24.de/blueprint/servlet/resource/blob/4123550/8088e31ec2f7160254b166520f3e6d51/handbuch-zertifizierung-data.pdf>

¹²⁸ The costs are shown in the manual on page 19.

The certification is awarded by the Hamburg Chamber of Commerce for a period of 3 years. It can be repeated at low cost. The certification is carried out by an independent institution with many years of experience in dealing with law enforcement agencies and business.

The Hamburg Compliance Model consists of five elements.¹²⁹

1110 1. Risk analysis

1110 When setting up a compliance organisation, a comprehensive risk analysis must be carried out and the corporate structure of the company implementing the Hamburg Model must be recorded. Risk posed to the company must be analysed on an ongoing/regular basis in order to meet their changing demands by updating the compliance measures taken. The analysis should identify specific risks (structure of the company, industry, regional focus, or special nature of the products). National and international legal requirements must also be taken into account. The risk analysis must be documented and recorded in annual reports.

1111 2. Compliance organisation and its documentation

1111 When setting up and presenting the compliance organisation, the size and structure of the company has to be taken into account. Therefore, particular emphasis is placed on manuals, guidelines, work instructions, process descriptions and the description of the compliance organisation as a whole. Furthermore, compliance efforts must be documented accordingly. It must be ensured that regular, or at the very least, annual reporting on the functioning of the compliance organisation is carried out. If there are no relevant incidents, this report can also be held in a brief and appealing manner.

1112 3. Compliance Officer

1112 In order for the compliance organisation to be implemented, a compliance officer has to be appointed. This position must have clearly defined powers and responsibilities. It is not necessary for the person concerned to have an independent department at the level of the legal department or internal audit. Various positions and means of organisation are conceivable. What is crucial is that the person responsible for compliance has all the necessary **knowledge, powers and resources** not only for establishing but also for maintaining the compliance organisation. This includes in particular the authority to report to management on an ongoing basis and without restriction. It is essential that the

¹²⁹The following contents are taken from the Certification Manual, 10–12.

compliance officer is independent in the performance of his/her duties and not subject to any instructions.

4. Whistle-blower’s Office **1113**

Establishing a whistle-blower system has been mentioned as an important element of the compliance organisation. Ideally, this should be an external contact point. It is crucial that the system allows for the whistle-blower to remain anonymous. Furthermore, it is indispensable that the body receiving the information can invoke a professional duty of confidentiality. In the manual, the certification body “Pro Honore” is mentioned as an independent and external whistle-blower body that can be commissioned by companies. However, other equivalent bodies may also be appointed. Internal solutions are also possible according to the Hamburg model, but will be carefully examined during certification. For efficiency it is necessary to communicate the stents and the confidentiality of the whistle-blower system. It has to be communicated in a sustainable way so that a report would not lead to negative but legal consequences. **1113**

5. Training and exchange of experience **1114**

For compliance to be implemented in the corporate culture, the employees’ knowledge of the compliance organisation is crucial. Therefore, appropriate training opportunities must be created. This can be done, for example, through traditional training courses or by internal or external persons. It also makes sense to hold group discussions to exchange experiences. The concrete measures are at the discretion of the company. Nonetheless, it is crucial that these training courses are sustainable and documented accordingly. **1114**

10.7.2 Compliance for Large Companies: The Siemens Model

For large companies, there are fundamentally different requirements and challenges for compliance. This is because large companies not only have a widely diversified structure based on the division of labour, but also operate internationally. To present a practical example, the Siemens Compliance System will be briefly outlined.¹³⁰ The following **1115**

¹³⁰Desimoni U and May S (2019), 143–145; Schieffer A (2016), 113–134.

presentation of the compliance system is based on the ground-breaking book¹³¹ by KLAUS MOOSMAYER.¹³²

- 1116** Siemens' compliance structure was created in response to a number of different criminal investigations by the U.S. Department of Justice, the U.S. Securities and Exchange Commission, the Munich Public Prosecutor's Office and other authorities around the world. The U.S. law firm Debevoise & Plimpton, which was commissioned to conduct internal investigations, had uncovered long-standing and systematic violations of accounting rules as well as anti-corruption laws in numerous Divisions and Regional Companies and Siemens. The deficiencies were described in detail in the documents that were handed over to the U.S. authorities in the course of the proceedings' conclusion on December 15, 2008. The U.S. authorities expressly stated that the conclusion of the proceedings against the company was only possible because Siemens had developed and implemented a new and comprehensive compliance system worldwide in less than 2 years (2007–2009), in addition to internally dealing with the past and cooperating fully with the authorities.¹³³
- 1117** The new compliance system that was developed has a clear structure in which all can be systematically presented. In the overview, the compliance architecture follows the three measures: **Prevent—Detect—Respond**, which are based on the notion and willingness of continuous improvement. Since 2008, the compliance structures and measures have been continuously developed, which is why the compliance system is proving to be very dynamic and evolutionary.¹³⁴

10.7.2.1 Commitment from the Top and from the Middle

- 1118** The architectural starting point of the Siemens compliance model was the recognition that the culture developed by management had failed in the area of compliance and had thus made systematic corruption possible in the first place. For this reason, in the course of the investigations between 2007 and 2009, an initial reaction (namely in 2007) was to **reassign central positions** in the company, including the chair positions of the Supervisory Board, the Management Board, the General Council, the Chief Compliance Officer and the Chief Audit Officer. Compliance was seen as a priority and part of corporate responsibility.¹³⁵
- 1119** To spread this message throughout the company, a special "**Compliance Roadshow**" was organised in 50 countries by the end of fiscal 2008 for the members of the Board of Management, Chief Compliance Officers and senior employees of the compliance organisation. In addition, the importance of compliance was repeatedly communicated at

¹³¹Moosmayer K (2015).

¹³²Klaus Moosmayer was a lawyer in Germany specialising in business crime, litigation and commercial law. He played a major role in setting up the globally recognised compliance system of Siemens. He was then Chief Counsel Compliance at Siemens before becoming Chief Compliance Officer at Siemens in 2014. In 2018 he joined Novartis as Chief Ethics, Risk and Compliance Officer.

¹³³Moosmayer K (2015), mn. 362.

¹³⁴Moosmayer K (2015), mn. 363, 403; cf. Klasen V (2020).

¹³⁵Moosmayer K (2015), mn. 366.

employee meetings and in discussions with local management. As part of a communication plan defined by management, compliance and its implications were systematically and sustainably disseminated to subsequent management levels in the company. In order to assess the impact, compliance perception surveys were conducted in 2008 and 2009 among a representative selection of employees worldwide on an anonymous basis. This survey was integrated into the new “Engagement and Compliance Survey” in 2010, which is directed at all Siemens employees worldwide and is evaluated at regular intervals.¹³⁶

To ensure that the compliance culture is spread not only by top management but also by **middle management**, so-called integrity dialogues were introduced company-wide in 2012. In these dialogues, employees discuss practical issues of compliance and dilemma situations in small groups. These cases and discussion rounds are prepared by the compliance organisation and updated every year, while the discussion is chaired by the respective manager to ensure that he or she is actively involved in the compliance work.¹³⁷

To ensure that management assumes its responsibility for compliance, Siemens has introduced a “**Compliance Review Process**” throughout the company. To this end, management and the compliance organisation discuss the status of the compliance system, including significant developments and cases, on a quarterly basis. The findings are intended to be sent directly to the top of the corporate hierarchy. At the same time, it is communicated in such a way that compliance and the work of the compliance organisation is seen as a career step. Consequently, the “**Compliance Academy**” was established in 2015 to systematically and continuously train and promote employees in compliance organisation.¹³⁸

10.7.2.2 Organisation

Even at the beginning of the investigation in 2007, Siemens had a small number of lawyers at its headquarters and a total of 60 compliance officers throughout company divisions, who performed their function on the side. In 2014, it was restructured so that around 450 full-time employees work within a **uniform compliance organisation**, of which around 100 are at headquarters and the remaining employees work in regional or specific divisions of the company.¹³⁹ Resources are allocated to the respective divisions and regions of the company according to their compliance risk profiles. The compliance organisation is concerned with an appropriate division of responsibility. Compliance officers are responsible for introducing and implementing the compliance system. The regional compliance heads manage the compliance organisations in the respective global regions of the company.¹⁴⁰

¹³⁶Moosmayer K (2015), mn. 367.

¹³⁷Moosmayer K (2015), mn. 144–153, 370.

¹³⁸Moosmayer K (2015), mn. 368–369.

¹³⁹Moosmayer K (2015), mn. 371–378.

¹⁴⁰Moosmayer K (2015), mn. 374–377.

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1123 The compliance organisation is headed by the **Chief Compliance Officer**, who reports directly not only to the Management Board and the Compliance Committee of the Supervisory Board, but also to the General Counsel of the company. He/she makes decisions not only for the head office but also for the external compliance units on the assessment, career and remuneration of his/her compliance officers, who are obliged to report to him/her.¹⁴¹ The Chief Compliance Officer heads four departments:¹⁴²

- Compliance Case Handling
- Compliance Policies and Legal Advice
- Compliance Discipline and Remediation
- Compliance M&A

Ultimately, the organisation of Chief Counsel of Compliance covers the entire compliance process, namely from the handling of indications of possible compliance violations to the investigation and prosecution of labour law violations or the follow-up of identified deficiencies.¹⁴³

1124 Compliance risk analysis is at the heart of the organisation and an important focus of work. It forms the basis of the entire compliance strategy. The evaluation is carried out in two ways, namely through workshops in the company units (“bottom up”) and through evaluations of external factors (“top down”). Compliance Strategy & Risk works closely with the Enterprise Risk Management (ERM) department responsible at Siemens.¹⁴⁴ However, the compliance risk assessment is carried out **independently by the compliance organisation**. Only the relevant results are reported to the company’s ERM process. Against this background, the Chief Compliance Officer is also a permanent member of the highest risk committee of Siemens AG.

10.7.2.3 Prevent

1125 The central and most important measure in the area of prevention at Siemens is probably the development and publication of “**Business Conduct Guidelines**”.¹⁴⁵ These guidelines outline key business behaviours. These not only address measures against corruption, but also have a comprehensive claim for the company. For this reason, the guidelines not only deal with compliance in M&A transactions, but also with the permissibility of donations or questions of sponsorship.¹⁴⁶

¹⁴¹Moosmayer K (2015), mn. 371–377.

¹⁴²Moosmayer K (2015), mn. 375.

¹⁴³Moosmayer K (2015), mn. 374–377.

¹⁴⁴Klasen V (2020), mn. 6–8.

¹⁴⁵<https://assets.new.siemens.com/siemens/assets/public.1580482594.5c242542-e991-4b97-af63-090ad509be74.2019-sag-bcg-en.pdf>

¹⁴⁶Moosmayer K (2015), mn. 379–383.

The guidelines are the result of a revision. In 2008, it was recognised that a flood of regulations is not a help to employees, but rather makes them feel insecure. A formalistic approach to compliance was thus seen rather as a bureaucratic obstacle.¹⁴⁷ 1126

(Old) Business Partner Policy¹⁴⁸ 1127

When dealing with irregularities, it was seen that sales support consultants were key players in channelling money out of the company and using it for corruption. In 2007, the response was therefore that the Chief Compliance Officer had to approve payments and contracts with the consultants centrally in Germany, even though the representatives had already been audited in a lengthy process by management and the responsible compliance officer. As a result, the procedure was lengthy and bureaucratic and entailed hardly any advantages because funds and irregularities could also be diverted with other business partners (commercial agents, customs agents, partners in a consortium).

The compliance organisation has therefore attempted to bring the compliance regulations up to a **higher standard** on the one hand, and to make them **less complex** and integrate them into business processes on the other. 1128

(New) Business Partner Policy¹⁴⁹ 1129

A new approach was adopted in 2008. According to this policy, all business partners who act as intermediaries between Siemens and the customer must be subjected to a risk analysis, which is carried out electronically and is uniformly designed throughout the company. Using elaborate risk indicators (e.g. risk of corruption in the country of assignment), a risk class (high, medium, low) is determined for the business partner. The procedure is further determined on the basis of this determination (approval requirement, mandatory contractual clauses, due diligence).

Scorecards 1130

Gifts and invitations are always on the borderline between the socially accepted behaviour and the criminal wrong of corruption. A scorecard has been developed so that employees can check for themselves whether an invitation or gift may be accepted, must be declined, or whether prior approval by a manager or compliance officer should be obtained. Initially, employees had to use this score card without value limits and without distinguishing between the public and private sectors. In 2010, it was decided to give employees greater personal responsibility based on experience. The score card was then only obligatory for gifts and invitations to or from public officials, while the use of this card in other areas was left to the discretion of employees and their managers. Donations, memberships and gifts are also recorded and approved using an electronic tool (e.g. an app) in accordance with uniform company-wide criteria.

¹⁴⁷ Moosmayer K (2015), mn. 381–383.

¹⁴⁸ Moosmayer K (2015), mn. 381.

¹⁴⁹ Moosmayer K (2015), mn. 381–382.

Compliance measures are therefore continuously developed and tested for their practical suitability.

- 1131** The **training measures** in compliance matters are also linked to sustainable development. After all, any compliance rule is worthless if its application is not known. For this reason, all employees, including the top management, are trained in compliance either personally or electronically (e.g. interactive case studies). Depending on their role in the company, specific training and education courses are created for the respective functions of Legal, Purchasing, Sales and Project Management. In addition to these training sessions, there are recurring integration dialogues in which compliance-relevant topics and developments are communicated on an ongoing basis. The training is conducted internally by Siemens, i.e. without outside support, solely by the compliance organisation. The compliance officers receive specific and intensive training at the Compliance Academy. As part of a major communications strategy, information on appropriate measures and training in compliance is already communicated in advance.¹⁵⁰
- 1132** Numerous compliance functions were **centralised** and **standardised** to ensure the quality of the compliance strategy. For instance, payment transactions are controlled centrally and the number of bank accounts within the Group is greatly reduced. The holding of cash is prohibited with a few, strictly monitored and documented exceptions. If payments are made, depending on the risk indicator (e.g. payment in countries with a high risk of corruption), a check is carried out by the head office.¹⁵¹
- 1133** To implement a certain compliance culture, compliance aspects were integrated into the **remuneration system for senior management**.¹⁵² In the early years (2008–2010), 20% of the annual bonuses were linked to the achievement of compliance targets.¹⁵³ As of 2011, the system was changed because the compliance system was fully implemented.¹⁵⁴ Thereafter deficits arose in the areas of responsibility of senior managers and they were reprimanded with yellow cards. If the deficits were not remedied, this could result in a reduction of the performance-related part of the annual bonus down to 0%. From 2014 on, however, compliance was integrated as a key factor in the regular remuneration and boni of management.¹⁵⁵
- 1134** Finally, the prevention strategy also includes **compliance screening of employees** to be hired for key functions within the Group or for work in auditing, legal or compliance functions. Before being selected, candidates are checked by the compliance organisation to see if there are any indications of misconduct (internal or official) that could stand in the

¹⁵⁰Moosmayer K (2015), mn. 385–387.

¹⁵¹Moosmayer K (2015), mn. 388.

¹⁵²Moosmayer K (2015), mn. 278–285.

¹⁵³Moosmayer K (2015), mn. 389.

¹⁵⁴Moosmayer K (2015), mn. 390.

¹⁵⁵Moosmayer K (2015), mn. 390.

way of promotion. This screening is communicated to the candidates in advance as a preventive measure.¹⁵⁶

10.7.2.4 Detect

At Siemens, the detection of compliance violations is done in three different ways, namely the reporting of violations, compliance investigations and compliance controls.

When reporting violations, Siemens relies on two different sets of measures. The first measure is the **whistle-blower system** called “Tell Us”. Using this system employees and third parties can report possible compliance violations worldwide.

The system itself is operated by a provider that is independent of Siemens. This allows for anonymous and protected submission of reports. Although the information is then forwarded to the Siemens Compliance Organisation in the form of a report, it is not possible for Siemens to follow up on the information against the will of the person providing it. The reports are recorded and reviewed by specialised compliance attorneys to determine the extent to which an initial suspicion exists that requires action or investigation.¹⁵⁷

In addition to the possibility of providing anonymous information, Siemens has also established an independent and attorney-client **ombudsman** so that personal contact can also be established.¹⁵⁸

Compliance investigations in response to the reporting of possible violations are commissioned centrally within the company by the Chief Compliance Officer, who is also responsible for them. The reports go via the “Tell Us” system, the ombudsman or the state investigative authorities to the Chief Compliance Officer, who then hands over the investigations to the Compliance Case Action Department. An investigation is carried out there accompanied by specialised compliance attorneys. The investigation is subject to guidelines laid down by the compliance organisation, which prescribe clear and respectful treatment of employees while it takes place.¹⁵⁹

In addition to the whistle-blower system and investigations on specific occasions, the implementation of the compliance system is **regularly audited**. This falls under the responsibility of the audit organisation. Furthermore, independently of the compliance audit, all systems operated by the compliance organisation (e.g. the Business Partner Tool) are also continuously evaluated in order to identify developments, but also to monitor the functionality and range of applications in the company. All this is done under the guiding principle of continuous improvement. In this way, employees are encouraged to communicate corresponding suggestions.¹⁶⁰

¹⁵⁶Moosmayer K (2015), mn. 391.

¹⁵⁷Moosmayer K (2015), mn. 392.

¹⁵⁸Moosmayer K (2015), mn. 393.

¹⁵⁹Moosmayer K (2015), mn. 394–396.

¹⁶⁰Moosmayer K (2015), mn. 397.

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10.7.2.5 Response

- 1139** Since the reorganisation of the compliance organisation, Siemens has been focusing on effective punishment of violations. To this end, the **Central Disciplinary Committee** was established, which assesses misconduct identified by members of management and makes binding recommendations for action. Cases are prepared by the Compliance Discipline and Remediation Department, which also monitors the implementation of the recommendations for action by the human resources departments. In order to give prestige and reputation to the Central Disciplinary Committee, it is **staffed at a high level**: The Chairman is the member of the Board of Management responsible for Human Resources, other members are the Chief Financial Officer, the Head of Human Resources and the Chief Compliance Officer. The response spectrum ranges from informal admonition to termination without notice. In addition, the Committee also keeps statistics on the labour law measures taken in the event of compliance violations that are not dealt with by the Committee (no member of senior management is affected).¹⁶¹
- 1140** Reported compliance violations are recorded company-wide by a uniform “**case tracking tool**” in the Compliance Case Handling department or by the responsible compliance officer. All transactions entered into the system are reviewed with the finance and tax department or by the company’s auditors to determine their relevance for the balance sheet. They are included in the compliance reports to the Management Board and the Compliance Committee of the Supervisory Board.¹⁶²

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¹⁶¹Moosmayer K (2015), mn. 398–399.

¹⁶²Moosmayer K (2015), mn. 401.

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- This chapter is devoted to internal investigations triggered by the suspicion that a criminal offence has been committed in companies. The chapter thus focuses on the perspective from which suspicions arise that a compliance organisation—and thus the measures to prevent crime in the company—has failed. For companies and their liability perspectives, it is crucial to make strategically wise decisions during this period (after the crime has been committed and before the police investigation) that minimise the liability risks for individual persons in the company and the company as a whole. Since the focus lies on the entrepreneur and the company, only an overview of how internal investigations work can be given here. On the other hand, the problem of criminal procedural law, the extent to which private investigations are transferred to state investigations and where the limits of admissibility lie, is not dealt with.

The aim of this chapter is to disclose the basis for the structure and conduct of internal company investigations. It intends to provide management with a basic understanding of how state investigations differ from internal investigations and which conflicting interests must be weighed up in the course of an internal investigation.

11.1 Introduction

1141 Even the best compliance systems are not capable of providing 100% protection against crime. Compliance systems can either be inefficient or can be deliberately circumvented. This finding applies in particular to decision-makers who can bypass the usual reporting and business channels, as well as the compliance departments. Especially in large companies with many branches in different countries, compliance measures reach their legal and factual limits.

1142 So, when crimes are committed, it may make sense for a company to react at a stage where no law enforcement agency has yet intervened. The company may have an interest in keeping the commission of the crime confidential. However, this interest runs counter to the interests of state law and law enforcement authorities. In some cases, specific injured parties or perhaps even people from within the company itself will have an interest in bringing their damage to light by filing a criminal complaint.¹ Internal investigations of the incident may ultimately lead to the company filing a voluntary report.² Instead of sweeping the matter under the rug and ultimately hoping that what happened will never come to light (a vague hope!), many companies decide to take action and deal with what happened on their own initiative. The central measure for this is so-called internal investigations.³

1143 Although such a measure generates considerable costs, it has many **strategic advantages**.⁴ First, impunity or mitigation by the authorities will depend largely on the extent to which companies cooperate. Thus, if companies have already conducted investigations of their own initiative (e.g. questioning employees) and have made it much easier for the authorities to clarify the facts of the case, they will be rewarded in many cases.

1144 Zero Tolerance Policy

A company signals to employees that misconduct will be detected and that violations will be sanctioned. In addition, the company signals that it will support the state in prosecuting the offenders.

1145 A second strategic advantage of internal investigations is that companies remain in control of the facts and their presentation. A company's information policy within the framework of a corresponding **PR strategy**, can outline how the facts of a violation are communicated to the public and which strategies can be applied in advance to keep damage to a minimum. When a scandal suddenly becomes public, "information sovereignty" slips

¹On the various interests see Kölbel R (2015), 281–304.

²Feil T (2020), 35–64, 65–260.

³Zerbes I (2013), 551–572.

⁴Hille A (2020), 42–46.

away from the company and throws it into the storm of public opinion. In such cases, appeasing statements may look like flimsy excuses. It is precisely for this reason that internal investigations seem to make sense, also in the light of damage reduction.

Finally, companies can **identify structural weaknesses** and **risk factors** through internal investigations. On this basis, it can adapt its systems and minimise the corresponding risks. 1146

The legal framework conditions vary considerably from country to country. It is therefore advisable, depending on the location of the particular company, to obtain information on the admissibility and scope of internal investigations from Austria,⁵ Germany,⁶ Liechtenstein or Switzerland.⁷ However, this collection of information is particularly important when companies operate transnationally.⁸ 1147

11.2 Admissibility

As already mentioned in the introduction, investigations are usually a task of the state. Prosecuting authorities that investigate criminal matters have the appropriate repertoire to uncover facts and bring those responsible to justice. This brings up questions of whether the investigative activities of private individuals (e.g. companies) are even permissible. 1148

The legal admissibility of private investigations is actually undisputed.⁹ In civil proceedings, investigative activities are part of the immanent tasks of private parties. In criminal proceedings, it is up to the criminal defence lawyer to clarify the facts of the case himself/herself.¹⁰ However, there are very **strict limits** to the admissibility of internal company investigations. Generally speaking, they are within the limits of the rule of law, but investigations must not be carried out involving deception, threats or manipulation. 1149

There are also many differences between state and private investigations.¹¹ For example, in contrast to the state criminal prosecution authorities, private investigations are not subject to coercive measures (confiscation or search). However, there are also numerous points of contact for cooperative behaviour, where the public prosecutor's office cooperates with private investigations.¹²

Usually, internal investigations are not legally regulated in many jurisdictions. However, the draft of the German *Verbandssanktionengesetz* (→ mn. 531) contained provisions related to internal investigations (§ 17) and employee surveys. Accordingly, employee surveys must be carried out in 1150

⁵Dangl K (2019); Madl P (2018); Madl P (2016), 815–859; Pollak S (2020), p. 311–372.

⁶Knierim T et al. (2016).

⁷Götz Staehelin C (2019).

⁸Gronke AM (2019), 186–267.

⁹Wilkens R (2020), 63–65.

¹⁰Wilkens R (2020), 67–72.

¹¹Gropp-Stadler S and Wolfgramm C (2018a), 19–50.

¹²Bittmann F (2015), 74, 77–87.

accordance with the principles of a fair trial. § 17 para. 5 of the draft act names three important prerequisites for this.

1. The interviewee must be informed before the interview that the information may be used in criminal proceedings against them.
2. The interviewee must be granted the right to have a lawyer or a member of the work council present during questioning, and the interviewee must be made aware of this right before the questioning.
3. The respondent must be given the right to refuse to answer questions which, if answered, would put himself/herself or a relative at risk of being prosecuted for a crime or an administrative offence.

Finally, the respondent must also be made aware of this right before the interview.

1151 However, it is sometimes pointed out that internal investigations may also be **obligatory for a company**.¹³ Such obligations derive from various principles. One of the first principles that could give rise to an obligation to conduct internal investigations is the **employer's duty of care** towards their employees under **labour law**. Within the scope of their duty of care, an employer is obliged to protect the employee's mental and physical well-being as well as their property. Thus, the employer must always intervene when conflicts between employees (e.g. bullying, harassment at work) endanger their health. If an employer does not comply with this obligation, a claim for damages may result. Therefore, if the employer learns of criminal acts, in certain (complex) situations there may be an obligation to conduct internal investigations.

Furthermore, there is no general obligation for companies to introduce a compliance system. Nevertheless, various special laws, especially in the area of **money laundering** (→ mn. 654),¹⁴ **tax law**,¹⁵ **securities law** and **stock exchange law**,¹⁶ require the establishment of a system to deal with compliance issues. If one views the area of internal investigations from the more comprehensive area of compliance, one can see that an obligation to carry out internal company investigations can result. All in all, there is no general obligation to conduct internal investigations.

Finally, the need to carry out internal investigations can also be derived from **company law**. Company law provides for the duty of the organs of a company to clarify irregularities in their interest and to pursue the claims made by them. The company as a corporation must therefore ensure that any irregularities are investigated. To this end, it will be necessary to launch internal investigations in certain cases.¹⁷

1152 In practice, this means that internal company investigations are generally permissible. However, the limits that the law draws to protect those affected by encroachment on

¹³ Hartwig N (2018), 7–17; Wilkens R (2020), 83–223.

¹⁴ Wilkens R (2020), 107–108.

¹⁵ Wilkens R (2020), 90–98.

¹⁶ Wilkens R (2020), 99–112.

¹⁷ Wilkens R (2020), 156–221.

fundamental rights must be observed. In the case of internal company investigations, care must be taken to ensure that the company or specialist agency does not itself become a criminal liability for damages to the persons concerned.

The risk of becoming criminally liable in the course of an internal company investigation often has to do with the following criminal offences:¹⁸ **1153**

- Trespassing
- Impersonation
- Misuse of titles, professional titles and badges
- Violation of intimate, personal life
- Offences against physical integrity
- Coercion
- Theft
- Obstruction of justice

It is precisely the **personality right** that protects the persons concerned from inadmissible assaults.¹⁹ **1154**

Examples of inadmissible assaults in the context of internal company investigations are **1155**

- Publication of a secretly taped telephone conversation
- unauthorised opening of mail
- Constant monitoring of an employee at the workplace by a hidden camera
- Publication of a letter or private notes with changes and omissions
- Sweeping and incomplete assertion of facts which give the recipient an incorrect picture of the subject
- Not involving the works council

11.3 Terminology

The term internal investigation refers to investigations within a company and is thus distinct from state investigations. Particularly from a legal point of view, internal investigations are not seen as independent investigations. This is because in a constitutional state, investigative powers are part of the competences of state criminal prosecution authorities. Internal company investigations, on the other hand, are investigations by **private individuals**. Accordingly, special regulations apply here.²⁰ **1156**

¹⁸Wilkens R (2020), 489–498.

¹⁹Cf. Häger D (2018).

²⁰See Gercke B (2020), 122–138; Staffler L (2018), 174–182; Wilkens R (2020), 54–63.

- 1157** Not every private investigative measure falls under the definition of “internal investigations”. Investigative measures within a company can be related to a wide range of activities, such as internal monitoring or managing of employees, suppliers, lenders or insurance companies, assess risks, control data stocks. Furthermore, audit firms or rating agencies conduct investigations in order to evaluate companies. All these activities are carried out internally or externally by other companies, but they do not belong to the term “internal investigation” in the narrower sense.
- 1158** Generally speaking, internal investigations are initiated and carried out by private individuals. By their very nature they are investigations that are initiated **without any explicit impulse** from the state. Nevertheless, there are also internal investigations of companies that are initiated by the state.
- An example of this is regulatory investigations ordered by the Financial Market Authority:
- 1159** **Art. 36 Federal Act on the Swiss Financial Market Supervisory Authority (FINMA):**
- “(1) FINMA may appoint an independent and suitably-qualified person to investigate circumstances relevant for supervisory purposes at a supervised person or entity or to implement supervisory measures that it has ordered (an investigating agent).
- (2) It specifies the duties of the investigating agent in the appointment order. It determines the extent to which the investigating agent may act in the place of the management bodies of the supervised person or entity.
- (3) The supervised person or entity must allow the investigating agent access to its premises and provide him or her with all the information and documents that the investigating agent requires to fulfil his/her duties.
- (4) The costs of the investigating agent are borne by the supervised person or entity. It must, if necessary, be instructed by FINMA to make an advanced payment to cover costs.”
- 1160** Internal investigations of companies consist of activities initiated for a specific reason, such as to clarify the facts of a case (e.g. to uncover possible criminal misconduct). Here it is not a question of regular audits, but rather of **investigative activity to clarify the facts of damage** within a company. It is irrelevant whether the investigations are carried out by the company itself or whether the company commissions external third parties (e.g. specialised law firms) to investigate. Internal investigations do not only take place if the police approach with a search warrant or if persons are taken into custody. Rather, the company is already acting on the basis of vague suspicions. After all, the assignment of an internal

investigation is ultimately also aimed at ridding the suspicion that crimes are being committed in the company. For this reason, the threshold for internal investigations should be set very low, so that even slight or vague suspicions are dealt with. Suspicions can be prompted by information of any kind (e.g. reports by employees, media reports and media enquiries) that may substantiate the suspicion of a breach of rules.

The **purposes** of internal investigations are manifold and varied.²¹ The primary purpose of internal investigations is to clarify facts that may be of criminal relevance. This primary purpose is complemented by various indirect purposes. Such indirect purposes are the examination of compliance systems for their efficiency, preparation for cooperation with the authorities and thus ultimately the mitigation of criminal charges, if criminal responsibility is established and also clarification of future options for action in view of the extent of damage is provided. In public perception, the primary purpose of internal investigations are to ensure that a company is interested in a full investigation and thus to restore the confidence of the public including customers and business partners. A willingness to investigate shows that a company wants to communicate that misconduct will not be tolerated but sanctioned (zero tolerance principle, → mn. 1144).

However, the procedure of internal investigations is also ultimately designed to **impose internal sanctions** (e.g. disciplinary measures) and take action under labour law. Furthermore, internal investigations are also aimed at **preparing claims** for damages and identifying the relevant facts and responsible parties. Management responds to suspected cases by conducting internal investigations, thereby communicating to the general public (or stakeholders) that it takes violations seriously and does not stand idly by. Internal Investigations can thus realise strategic corporate goals.

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11.4 Limits of Internal Investigations and Legal Background

In practice, internal investigations raise a variety of questions regarding the admissibility of measures, which cannot be addressed in depth in the context of this overview. Internal Investigations is a field of work that requires a great deal of legal expertise. Therefore, in practice, internal investigations are often outsourced to specialised law firms, which are not only able to clarify the facts of the case but also ensure that the company remains compliant with the rules to avoid committing any legal violations regarding proper conduct in this area.

To this extent, while companies can carry out internal investigations themselves, in practice, it is common for **external (forensic) service providers** to be mandated by the company to carry out investigations. This approach is not only very helpful in complex cases, but also prevents the risk of bias or economic dependence. Nevertheless, external mandating also has disadvantages. The external investigators are often not familiar with the company structure and operations, and their investigations may not be driven by the same

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²¹ Kraus PA (2016), 71–79.

goal of efficiency. Another important disadvantage is the cost intensity of external investigators.²²

1164 Before discussing a selection of individual investigative measures, it is necessary to point out the **conflicting interests** involved in internal investigations. Interests pursued by the company in the course of internal investigations often do not directly coincide with the interests of the persons affected by the internal investigations.

11.4.1 Civil Law

1165 In the context of criminal investigations by law enforcement agencies, the relationship between the state and the citizen is at stake. By contrast, investigations within companies are conducted by private individuals. These are therefore about the relationship between citizens and themselves. For this reason, measures relating to internal investigation must above all be measured against the provisions of private law (especially labour law).

1166 Thus, the first limits for internal investigations are based on the **personality rights of employees**. According to various central laws and constitutional principles, every person has innate rights and must therefore be considered a 'person' as defined by law. This is where the principle of human dignity is anchored. As a guiding principle, human dignity permeates all constitutional systems and laws. This applies in particular to labour law. In the context of an employment relationship, the employee is personally dependent on the employer. Because of this personal dependence, the protection of his/her personality is of particular importance in labour law. The other side of the protection of personality is the employer's duty of care towards the employee. Accordingly, the employer is obliged to respect the employee's right to privacy and the respect of his/her human dignity, even during working hours.

1167 Therefore, the employer is not allowed to monitor the employee at the workplace without limitations. Nevertheless, the employer must have certain **possibilities to monitor the employee** for work purposes. Permissible are, for example:

- the control of presence and observance of working hours
- the control of the employer's corporate communication
- the monitoring of work processes and behaviour in the workplace
- control of the extent to which private things are done at the workplace

1168 Monitoring employees is not in itself a violation of personality rights, because this control of work performance owed is an essential part of every employment relationship. The extent to which the employee's personality rights are affected or even violated, however, depends on the **intensity of the controls** and the individual case, in particular

²²Cf. Rabl Susanne and Hartwig N (2018), 145–154.

on the type, duration and scope of the control. The more intensive the controls are, the more likely it is that the employee's personality rights will be infringed by exceeding the extent of a typical employment relationship. For this reason, in internal investigations, personality rights must be weighed against the employer's interests in monitoring and control.

11.4.2 Labour Law

If one looks at labour law,²³ the area of conflict arises between the rights of the employer (information and clarification of the wrongdoings and control of his/her employees) and the employee's right to protection of privacy. Structurally, a distinction has to be made between different legal provisions, namely individual labour law²⁴ and collective labour law.²⁵

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11.4.2.1 Individual Perspective

There is no separate provision in individual labour law governing the control of employees. Nevertheless, there are numerous duties of the employee that protect the employer's sphere of activity, which is why appropriate powers of investigation may be based on them. The starting point for this consideration is the **employee's duty of loyalty** to his/her employer. See, for example the express provision in the Swiss Code of Obligations (OR), according to which the **employee has duties of care and loyalty**, in Art. 321a OR:

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Art. 321a OR

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“(1) The employee must carry out the work assigned to him/her with due care and loyally safeguard the employer's legitimate interests.

(2) He/she must use the employer's machinery, work tools, technical equipment, installations and vehicles in the appropriate manner and treat them and all materials placed at his/her disposal for the performance of his/her work with due care.

(3) For the duration of the employment relationship the employee must not perform any paid work for third parties in breach of his/her duty of loyalty, in particular if such work is in competition with his/her employer.

(4) For the duration of the employment relationship the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets; he/she remains bound by such duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests.”

²³ Majer C (2018a), 51–68.

²⁴ Majer C (2018a), 60–68.

²⁵ Majer C (2018a), 51–60.

1172 According to the duty of loyalty, the employee has to respect the employer's interests by refraining from any conduct which threatens or impairs the activities of the company, its organisation and its opportunities. The specific duty of loyalty depends on the type of company and the employer's position in the company. As a matter of principle, it is only effective in the case of an upright employment relationship, although in exceptional cases it may continue to be effective beyond this.

1173 The employer can only carry out an internal investigation if he/she has any knowledge that there is a suspicion of wrongdoing. The best source of such information is likely to be employee communication or testimony. Employees are the most likely source due to their position within the company to report any wrongdoing, but it is questionable whether they are obliged to report violations to the employer.

Does the employee have to report violations to his/her employer? If there is an **ongoing employment relationship**, then yes, the employee is generally obliged to report any imminent damage or danger to the employer immediately. This obligation to report compliance-relevant matters to the employer is generally based on the employee's duty of loyalty. If this duty is not stipulated in the employment contract at all, the intensity of the duty of loyalty depends on the hierarchical position of the employee in the company.

However, apart from this general case, the duty of disclosure arises from the employee's duty of work if the imminent damage or danger is directly related to the employee's specific work process.

1174 **Sensitivity in Reporting**

Great sensitivity is required in violation reporting. The employee is in principle not obliged to report **every trivial matter** to the employer. There should not be a climate of distrust in the company (→ mn. 1102). The employee's duty of loyalty does not go so far as to implicitly spy on colleagues.

1175 The employee's duty of disclosure does not apply absolutely, because in some cases the interests of the employee must also be taken into account. The obligation to report violations begins when an employee is **strongly suspected** of having committed a criminal offence or an otherwise serious breach of duty towards the employer, and where, without due notification, the employer would suffer great damage. If the employee therefore has knowledge that colleagues have already committed or will commit criminal offences against the employer (e.g. theft of company property, misappropriation of company funds), then there is an obligation for the employee to notify the proper party. If the employee does not comply with this duty of disclosure, this violation may under certain circumstances constitute grounds for dismissal.

1176 ► In order to avoid misunderstandings, corresponding reporting obligations should be set out in writing in the employment contract and trained accordingly in compliance training courses.

If one looks at the importance of interviewing employees in internal company investigations, it should be noted that an employee is obliged to cooperate on the basis of his/her employment contract with the company. Accordingly, the employer has a right to pose questions to the employee. However, it is questionable to what extent the employee has an obligation to answer the employer's questions. This will be clarified later. 1177

11.4.2.2 Collective Perspective

From the point of view of collective labour law, the main question is whether a works council must be involved in internal investigations, particularly in employee surveys. 1178

A closer look at the legal situation has to be taken, depending on the legal system in which it is taking place. Internal investigations are usually investigations related to specific occasions. Because these investigations are a form of **ad-hoc controls**, and not permanent monitoring measures, the consent of the works council may not be required. 1179

However, if technical systems for monitoring employees or periodic monitoring measures are introduced in the company, the employer has to obtain the consent of the works council or the employees if these measures or systems affect human dignity. In this respect, the introduction of such control systems may lead to a corresponding passage to be included in the **works agreement**. The central question here is the extent to which human dignity is affected by the proposed monitoring systems. 1180

- Examples of a violation of human dignity are introducing omnipresent camera surveillance devices at the workplace, in the changing room, in first-aid rooms, etc.

Overall, control measures that do not affect human dignity at all are in principle free to be implemented without a process of approval. Control measures that affect human dignity must be approved either by the employees or (if applicable) by the works council. In contrast, ad hoc controls relating to specific events—depending on the legal situation—may generally not be dependent on approval. 1181

11.4.3 Data Protection Law

Internal investigations are intended to provide information about internal wrongdoings (or criminally behaviour) within a company. For this reason, personal data are often processed in internal investigations. Data collection also plays an important role, especially in computer forensics investigations. Therefore, data protection law is of great importance.²⁶ 1212

²⁶Keßler A and Köhler A (2018), 111–134; Thüsing G (2021).

- 1183** The relevant normative standard for EU member states (e.g. Germany, Austria) is the General Data Protection Regulation of 2016 (→ mn. 714), which also sets de facto standards for non-EU member states (e.g. Switzerland, Liechtenstein, → mn. 143). Since the material scope of application of this regulation concerns the processing of personal data (see Art. 2 para. 1 GDPR), and the geographical scope of application is characterised by the principle of domicile or market location (see Art. 3 GDPR), the provisions of this regulation must be observed in internal company investigations.
- 1184** For a better understanding, some definitions of terms are needed in the basic data protection regulation.

Article 4 GDPR

- Personal data shall mean any information relating to an identified or identifiable natural person. An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. In the case of internal company investigations, a natural person is the interviewed employee.
- If a company carries out internal investigations or has them carried out by forensic services, it is a form of control within the meaning of the DPA: “Controller” is the natural or legal person, authority, institution or other body which, alone or jointly with others, decides on the purposes and means of processing personal data.
- Data processing is understood very broadly by the legislator. Processing means any operation or set of operations, carried out with or without the aid of automated means, concerning personal data, such as collection, recording, organisation, filing, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

- 1185** When processing personal data, the principles of Art. 5 GDPR and Art. 6 GDPR (see below) must be observed. Art. 5 GDPR provides information on the legally binding principles for data processing.²⁷ The focus is on the principles of “lawfulness, processing in good faith, and transparency”. However, the outlined measures of the purpose limitation (lit. b), data minimisation (lit. c), accuracy (lit. d), memory limitation and integrity (lit. e) and confidentiality (lit. f) must also be observed.
- 1186** Art. 6 GDPR provides for six elements of authorisation for processing personal data. For internal investigations and the relevant legal framework for data processing, there are two possible grounds for authorisation, namely

²⁷ See Dangl K and Wess N (2019), 136, 138–139.

- the processing is necessary for the **performance of a contract** to which the data subject is party or in order to implement pre-contractual measures taken at the request of the data subject (para. 1 lit. b);
- processing is necessary in order to protect the **legitimate interests** of the controller or of a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject, in particular where the data subject is a child (para. 1 lit. f)

11.4.4 Fundamental Rights

Fundamental rights generally govern the relationship between the state and the citizen (→ mn. 214, 216). They are mainly perceived as rights of defence. Fundamental rights thus serve to **secure the freedom of the individual** from interference by the state and its power. For this reason, the state has to justify interventions in the freedom of the individual (e.g. in the criminal law context through searches, inspections, confiscation of property) on a legal basis through concrete proceedings.

Fundamental rights are also seen as the **state's duty to protect**. They guarantee the right to property and the right to personal and physical freedom. The state has to take appropriate precautions to ensure that these fundamental rights can actually achieve their effect. Only if corresponding laws implement the right to property in everyday life accordingly, are basic rights of the individual sufficiently protected. This is where the positive duties of the state to protect are evident.

Until now, fundamental rights have always been discussed in the relationship between the citizen (as an individual) and the state. Fundamental rights therefore regulate this essential relationship. But for some time now, fundamental rights have also been given a further effect, namely the **relationship between citizens among themselves**.

Lüth Judgement 1958

The so-called Lüth judgement of 15 January 1958 was ground-breaking in Germany:²⁸ according to the judgement of the Federal Constitutional Court, fundamental rights constitute an objective set of values which are intended to have an impact on all legal relations. No legal relationship may be in conflict with fundamental rights. For this reason, fundamental rights radiate not only on the state-individual relationship, but also on the relationship among citizens themselves.

²⁸ Jahn M and Kirsch S (2015), 1153, 1163–1164.

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- 1191** In the relationship between citizens, therefore, fundamental rights also have an impact.²⁹ This happens through the effect of state laws that were enacted to fulfil fundamental rights protection obligations, i.e. through the state's obligations to protect. As the citizens themselves are at the centre here, it leads to the so-called "**third-party effect of fundamental rights**"—because the usual effect of fundamental rights concerns the relationship between state and individual.³⁰ In case law in various countries, fundamental rights are also included in the weighing up of interests, for example in employment relationships even if it is purely a relationship between citizens (employer and employee). When weighing up the fundamental rights to freedom of employment and protection of property on the **employer's side** and the fundamental right to privacy and protection of human dignity on the **employee's side**, the civil law, labour law and data protection elements must be taken into account.

11.5 Course of Internal Investigations (Overview)

- 1192** There are three basic phases of internal investigations, namely the opening (phase 1), the conduct (phase 2) and the closure (phase 3).

11.5.1 Phase 1

- 1193** In the initiation phase, the suspicion is examined. This suspicion has been reported via the system by whistle-blowers or by appropriate contact points. In this phase it is to be clarified whether the grounds for suspicion are substantiated.
- 1194** The question that arises in this process is whether **formal notification** of internal investigations is even required. In the case of small and medium-sized enterprises, no formalised procedure is usually required. In larger companies, on the other hand, it is often inevitable to communicate the start of an investigation by means of a formal file in order to provide transparency.
- 1195** Step one is to draw up the investigation plan and then to present this to management, the client or the investigators. The **investigation strategy** must be defined and documented. Without a strategy, there is a risk that the investigation will not reveal the abuses and that systematic misconduct will continue. If this were to happen, then it means management has not sufficiently complied with its duty of supervision and sanctions could be a threat to both the company and management. If it turns out at a later stage that the investigation did not follow up on all suspicions, the sanctions may be more far-reaching than if the internal

²⁹ Jahn M and Kirsch S (2015), 1153, 1164–1204.

³⁰ Engle E (200), 165–173.

investigation had been carried out carefully. The risk of a major loss of reputation has to be considered as well.

Questions that Need to Be Answered When Defining the Investigation Strategy³¹

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- What is the purpose of the investigation and what should be investigated?
- Who should conduct and lead the investigation? How large is the investigative team?
- How far reaching should the investigation be? Are there any restrictions for certain branches of the company or a restriction on certain countries or companies?
- Should the investigation be conducted covertly or openly?
- Who reports on the status of internal investigations to whom? Through which person and through which channels does internal communication run?
- What financial reserves are to be established?
- What is the final date of the investigation?

In order to establish an investigation strategy, the objectives of the investigation must also be clearly defined.

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The Objectives of Internal Investigations Are:³²

- to obtain certainty about past company processes;
- to identify and sanction employees responsible for misconduct;
- to assess and minimise liability risks for the company;
- to implement preventive measures to ensure that misconduct is not repeated in the future;
- to safeguard evidence to better defend against sanctions

It must also be decided whether to implement **amnesty or leniency programs** in internal investigations.³³ This decision is the sole responsibility of the employer. Amnesty programs can be particularly useful if employees have behaved in a criminal manner or have systematically violated their duties. Out of fear of being sanctioned under labour law or criminal law, employees may be unwilling to speak up and thus jeopardise the success of internal investigations. Therefore, it can be beneficial if the company initiating an investigation assures employees who are willing to cooperate that certain sanctions won't apply if

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³¹ Grützner T (2013), 305, 341.

³² Grützner T (2013), 305, 341.

³³ Graf T (2020); Majer C (2018b), 69–74.

the employees help to clarify the facts of the case. The promise can, for example, include a waiver of the right to assert sanctions or claims in court by drawing up a corresponding contract, so that the employee is protected even if the employer initiates legal proceedings despite the promise of amnesty.³⁴ The amnesty program must be target-oriented; it is not possible to waive sanctions against all employees across the board who were involved in violations.³⁵

1199 **Siemens Scandal—Case**

During the investigation by the U.S. law firm Debevoise & Pimpton, Siemens, in coordination with U.S. authorities and the Munich public prosecutor's office, offered amnesty to employees below the top management level. It was limited in time from October 31, 2007 to February 29, 2008 and was subject to the condition that the employee fully cooperated with the investigation and disclosed relevant facts of corruption. The **offer of amnesty** included a waiver of claims for damages and a unilateral termination of the employment relationship by the company. In total, 123 employees registered under the amnesty program. The majority of them provided valuable information for the clarification of past compliance violations and therefore received amnesty.³⁶ ◀

11.5.2 Phase 2

1200 Investigation teams are then set up and, and if necessary, reinforced with external persons such as specialised lawyers. These preparations are followed by officially **conducting investigations**. This is carried out in phase 2 as follows:

- Interviewing employees
- Review of company data and documents as well as e-mail traffic
- Checking of files, letters, e-mails, or documents of employees
- Possible use of video or telephone surveillance
- Evaluation upon completion of investigations

1201 The investigations end with the **preparation of a final report**. There the course and results of the investigations are recorded. The final report may also contain recommendations on sanctions to be imposed on employees, such as disciplinary measures

³⁴Wilkens R (2020), 470–486; Cf. Graf T (2020), 39–47.

³⁵Grützner T (2013), 305, 407–408.

³⁶Moosmayer K (2015), mn. 400.

or criminal charges.³⁷ Furthermore, recommendations may also be made with regard to self-reports by the company.

11.5.3 Phase 3

The final stage is the **conclusion of the investigation**. The information that was uncovered has to be communicated to the competent and affected departments of the company. The measures taken are required to be documented so that they can be followed up on if necessary. For example, it must be clarified how the information obtained is to be handled from a data protection perspective (archiving, storage).

In addition, the defence costs of those employees who cooperated in the internal investigations and who were promised financial support for legal fees resulting from this cooperation can be covered. If necessary, claims for damages can also be made against company management, those responsible for the affected areas or specific employees.³⁸

In the end, the final report must also be used to determine enhancements to be made to the compliance system. New protective mechanisms must be analysed and implemented to see to what extent the new measures are more effective in protecting against such misconduct that led to the investigations.³⁹

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11.6 Interviews: Interrogation of Employees

Employee surveys are interviews between an employee of a company and a respondent within the framework of internal investigations. The interview leader can be either an internal or external investigator.⁴⁰ In any case, the interviewer is assigned to the employer, i.e. the company that has the internal investigations carried out or commissioned the investigation.

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This is one of the **most important investigative measures** for clearing up suspicious cases, even if the measure itself is declared to be a harmless interview. Employee interviews are the most efficient means of establishing facts in internal investigations. This is because it allows not only the interviewee's view of the facts to be evaluated, but also the credibility (by assessing reactions and behaviour) of the respondent. Through the survey, the employee is questioned and checked by the employer or a representative with regard to his/her work performance. This control is permissible within the framework of the employment relationship. If a criminal offence is committed in the employment relationship, the clarification by the company within the framework of internal investigations is

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³⁷ Cf. Wauschkuhn A (2018), 75–87.

³⁸ Cf. Gropp-Stadler S and Wolfgramm C (2018b), 135–144.

³⁹ Cf. Majer C (2018c), 103–110.

⁴⁰ Kraus PA (2016), 41–69.

quite permissible. In fact, the employee is obliged to participate in the questioning because of his/her employment relationship with the company. If he/she refuses to cooperate, he/she will risk being dismissed.⁴¹

- 1205** According to Art. 8 para. 1 of the Swiss Federal Act on Data Protection, [a]ny person may request information from the controller of a data file as to whether data concerning them is being processed.” Thus, the employee has a right to disclosure of the data collected by their employer during the investigation.
- 1206** The admissibility of an employee survey is virtually undisputed and the employee is required to participate in it in the process of internal investigations.⁴² Nevertheless, the question arises to what extent the employee is **obliged to answer questions truthfully and completely**. The regulations of labour law do not provide an answer to the question of an employee’s obligation to provide information or reporting.
- 1207** • However, the duty to testify could arise directly from **performing the required work** if grievances arose during its course. After all, one must bear in mind that it is necessary for an employee to answer questions from the employer so he/she can give the employee appropriate instructions within the framework of their employment relationship. Therefore, there could be an obligation to provide information or a report based on the work to be performed.
- 1208** • It must also be kept in mind that if the subject of the survey is not the actual work performance, the obligation to make a statement could nevertheless arise from the employee’s **duty of loyalty** to the employer (→ mn. 1170). This is particularly true if the employer has an interest in uncovering criminal activities within the company or in eliminating abuses. If these come to the attention of the employee and are likely to cause further damage to the employer, then the employee’s duty of loyalty to the employer can be interpreted as an obligation to give evidence.
- 1209** There are also particularly difficult questions. For example, the question of whether the employee has a **right to consult a lawyer** during the internal investigation and whether the employer is obliged to inform the employee in detail about the consequences before the interview. This depends on the specific provisions in the respective legal systems.⁴³
- 1210** However, arguably the most important and explosive question in practical terms is whether the **employee is obliged to provide information that incriminates himself or herself** in the course of internal company investigations—in other words, the employee himself/herself would have to admit the commission of criminal acts.⁴⁴ This is where the

⁴¹ Wilkens R (2020), 225-

⁴² Jahn M and Kirsch S (2015), 1153, 1171–1174.

⁴³ Jahn M and Kirsch S (2015), 1153, 1174–1177; Wilkens R (2020), 402–419.

⁴⁴ For information on the Austrian law, see Birklbauer A (2021), 21–35; Staffler (2018), 174, 176–177; for information on German Law, see Wilkens R (2021), 236–247; for information on the laws in Switzerland and Liechtenstein, see Teichmann F and Galliker F (2020), 190, 198–209.

greatest difference lies between interrogations by the state criminal prosecution authorities and private investigations.

For example, in criminal proceedings, the principle applies that no one can be forced to incriminate themselves (*nemo tenetur se ipse accusare*, → mn. 415). Furthermore, the state authorities must inform the accused or witnesses about certain rights and powers they have protected by law (→ mn. 416).

So, while state authorities cannot force the accused or even a witness to reveal incriminating information against himself/herself, this is not quite so clear in the case of an internal investigation, particularly from the point of view of labour law.

In many countries, labour law provides that the employee can also be **forced to make a statement** by threatening labour law sanctions.⁴⁵ This obligation of the employee to provide information exists not only towards the company itself, but also and at the same time towards a law firm commissioned by the company to question employees.

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Of course, this puts the employee in a dilemma. While the employee is forced to testify during internal investigations from the point of view of labour law, these statements can later be brought to the attention of public prosecutors as part of the cooperation between the company and the law enforcement authorities. In this case, the employee who has already incriminated himself/herself in the internal questioning will not benefit from the right to refuse to testify in criminal proceedings because the information is already available to the prosecution authorities.

It is therefore essential to know to what extent there is an obligation to testify at all and to what extent this obligation is fulfilled.⁴⁶

In some jurisdictions, this **obligation to make a statement and report** in the context of internal investigations is affirmed.

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In Germany, for example, the prevailing literature and case law denies employees the right to refuse to provide information as part of the company's self-regulation process.⁴⁷ The basis for this duty of disclosure is the employee's duty of loyalty to his/her employer. In this case, the employee must also report on facts for which he/she is criminally liable. The threat of severe sanctions under labour law, such as dismissal, is then permissible under certain circumstances.

In other countries, however, this obligation to provide information is denied. The employee must not be forced to incriminate himself/herself—he/she may refuse to testify and cooperate without being subjected to corresponding sanctions.

All in all, there is no general release from the employee's duty of disclosure to the employer. Nevertheless, depending on the legal system, there will be differences as to the extent to which individual questions must be answered, which can be critical for determining the employee's decision-making power.

⁴⁵Wilkens R (2020), 265–283, 451.

⁴⁶Momsen C (2011), 508–516.

⁴⁷Baranowski CL (2021), 40–64; Jahn M and Kirsch S (2015), 1153, 1172; Wilkens R (2020), 229–265.

- 1213** In practice, therefore, it has to be clarified on a **country-specific basis** to what extent an employee being interviewed for an investigation has a far-reaching duty of disclosure to his/her employer.⁴⁸ If such an obligation to provide information exists, the question arises for the employee as to whether the principle of freedom from self-incrimination in criminal proceedings would prevent the criminal prosecution authorities from using statements made in internal company investigations. Again, there is no uniform picture in the legal landscape. Advocating a ban on exploitation by state prosecution authorities could help the principle of freedom from self-incrimination to be maintained.

11.7 Inspection of Data Files and E-Mails

- 1214** Today's world of work depends largely on the use of computers. It therefore stands to reason that employees leave traces in the company-owned computers when they commit crimes. This raises the question of whether and to what extent an employer or a delegated mediator can access files created by an employee that are stored on the company's computer or on a company hard disk. The answer to this question must be considered in a differentiated way on a case-by-case basis.
- 1215** In general, a private investigator is not liable to prosecution for viewing files that are not protected by passwords. Official files that are password-protected are also in the private investigator's accessible domain. It only becomes problematic when files are **marked as private**. Private files that are not password protected can be viewed by the private investigator without sanctions. However, in certain cases the right to inspect may be outweighed by the employee's personality right. Private files that are protected by a password may not be inspected because otherwise the private investigator or company who spied would be liable to prosecution. A controversial and not sufficiently clarified case is that of an employer who has completely prohibited his/her employees from using company computers for private purposes.⁴⁹
- 1216** A special case concerns the **use of the internet and e-mail**. The use of internet and e-mail at the workplace is one of the realities of the working world. If crimes are committed, it is obvious that e-mail traffic and internet history must be evaluated in order to clarify the facts of the case. From a technical point of view, monitoring and inspecting e-mail and internet use is possible without great effort. Nevertheless, various legal boundaries are drawn here. These limits include not only the personality rights of the employee, but also data protection law. In the following, the problem of e-mails will be addressed first, before the analogous regulations on internet use are dealt with.⁵⁰

⁴⁸ See Graf DK (2016), 39–44.

⁴⁹ Wilkens R (2020), 516–537.

⁵⁰ Wilkens R (2020), 550–551; cf. Wybitbul T (2015), 59–77.

Essentially, the authority to inspect e-mails depends on the extent to which an employer has regulated or not regulated the private use of an e-mail account. If there are **no explicit regulations** in a company about using the internet, private use may be accepted by the employer under certain circumstances as company practice. This is the case in a large number of companies.

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If there are no explicit rules for the use of the internet, the consequence is that general control of what is done on it is prohibited. This prohibition can be lifted, if there is a concrete suspicion that a serious abuse of the system exists or serious offences have been committed (e.g. betrayal of business secrets, bullying, danger of viruses). The employer or a private investigator may inspect the contents of the system in accordance with the principle of proportionality.

The case is different if the private use of e-mail is **expressly regulated**.⁵¹ If an employee is only permitted to use it for business purposes, the employer has to be able to take note of communication by e-mail in business transactions to the same extent as of communication by official mail. This applies both to the internal exchange of e-mails within the company and to e-mails sent outside the company.

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Thus, if the employer has **prohibited private use** prior to the use of the e-mail account, the employer is generally permitted to check the content of e-mails and to print them. In doing so, the employer has the right to check randomly whether the employee's surfing or e-mail traffic is of an official nature. If there is a reason or a concrete suspicion of abuse of the system or of the commission of criminal offences, there is no doubt from the employer's point of view that the content of the e-mails can be inspected. However, the whole situation changes if private e-mail traffic takes place despite the prohibition of private use. For example, if the subject line is marked private or the e-mail traffic is stored in a folder that is clearly marked as private—the prohibition of private use of business internet access does not give the employer the right to inspect the privately marked e-mails. Here, the general personality right dominates in favour of the employee, according to which the inspection of the e-mails has to be necessary and proportionate.⁵² This means that the employer may only at best determine the quantity of use (for example, to ascertain the number of private e-mails, to analyse the amount of data, but not to look at the content).⁵³

If the regulation on private e-mail use expressly stipulates that the employer **allows private use**, the possibilities for control are much more limited. If the employer does not separate permitted private use from business communication, the duty of confidentiality extends to the entire content of the communication and thus also includes business e-mail traffic. All e-mails must therefore be treated legally in the same way as the regulations for private e-mail traffic.⁵⁴

⁵¹ Jahn M and Kirsch S (2015), 1153, 1178–1180; Wilkens R (2020), 551–682, 683–691.

⁵² Jahn M and Kirsch S (2015), 1153, 1180.

⁵³ Wilkens R (2020), 683–691.

⁵⁴ Wilkens R (2020), 551–682.

- 1219** The same applies to the **behaviour of employees on the internet** as is viewable through the server. The systematic monitoring and logging of employees' internet activity is not permitted, provided that private use is permitted. In the case of concrete suspicion, however, appropriate action can be carried out by the employer. If private surfing is generally prohibited, the monitoring of user behaviour has to weigh the rights of the employer against the personality rights of employees. In this case, a random check of whether an employee's operating behaviour is actually official can be permitted in principle. Likewise, the use of filter programs which block undesirable pages on the internet may be permissible under the aspect of proportionality. By contrast, a general systematic monitoring goes beyond the limits of proportionality and necessity.⁵⁵

11.8 Video Surveillance

- 1220** Video recording is undoubtedly a very attractive way for an employer to document misconduct. From a technical point of view, the implementation of video surveillance is easy, efficient and even cost-effective. However, it should be noted that the **personality rights** of the employee and the **right to one's own image** set limits to such a measure by the employer. According to these two principles, every person can decide for himself/herself whether video recordings are made of him/her and possibly also be used against him/her.
- 1221** Nonetheless, the right to one's own image, which video surveillance violates, is subject to a restriction. The restriction of the right to one's own image is permissible if video surveillance is justified in order to safeguard the employer's overriding interests worthy of protection.
- Ultimately, no clear statement can be made here about the permissibility of video surveillance.⁵⁶ It depends on the circumstances of the individual case and on weighing the rights of the employer and the rights of the employee. The **weighing process** also takes into account the extent to which milder means can be used so as not to place a disproportionate burden on the interests at stake. Especially with video surveillance, it can happen that unsuspecting persons are also monitored. It should also be noted here that in some legal systems (such as in Germany) the works council must be involved when a decision is to be made on video surveillance.
- 1222** Generally speaking, **open video surveillance** represents a considerable encroachment on the personality rights of the employee. Since obvious video surveillance exposes the employee to increased pressure, as he/she always has to reckon with being filmed, such a measure requires special justification. Such a justification can be affirmed, for example, if the employer has to investigate significant criminal offences (for example, industrial

⁵⁵Wilkens R (2020), 696–725.

⁵⁶Jahn M and Kirsch S (2015), 1153, 1183–1185.

espionage, sabotage or theft). In this case, it is inevitable that there is a concrete suspicion of a crime, and therefore a concrete reason for surveillance. Open video surveillance, on the other hand, is not permitted in order to check whether the employee is simply fulfilling his/her work duty.⁵⁷

Secret video surveillance constitutes a harsher encroachment on the employee's personality rights. For this reason, covert and clandestine video surveillance has to meet higher requirements than open surveillance. In practice, this means that such a measure can only be used if there is a concrete suspicion of a criminal offence or other serious misconduct to the detriment of the employer. This suspicion does not have to focus on a specific employee—but it must at least be spatially and functionally concrete. It must not be a general suspicion that criminal offences have been committed. Furthermore, covert surveillance must be one of the only remaining means of stopping the commission of crimes. Finally, the measure is not to be assessed as disproportionate in the context of an overall picture.⁵⁸

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11.9 Litigation-PR

If business crime is uncovered by state authorities, it does not take long for the media to report on it. Economic criminal proceedings have become attractive to public media.⁵⁹

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Thomas Middelhoff—Case⁶⁰

The German manager was sentenced to 3 years in prison in 2014 for embezzlement and tax evasion. After Middelhoff left the Arcandor Group in 2009, the company filed for insolvency. Middelhoff was reported to the public prosecutor's office in Essen on charges of embezzlement. After it became publicly known that a charge had been brought against Middelhoff, he became the subject of massive reporting. ◀

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To look toward a bright economic future, it is central for all companies to work on their public image. However, public reporting can in fact lead to a company being prejudged by the general public, which in turn can have a negative impact on the company's reputation and ultimately its business activities.

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Various specialised law firms and management consultants therefore offer so-called Litigation-PR.⁶¹ Litigation-PR ("Litigation-Public Relations") has the task of articulating

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⁵⁷ Sieg R (2016), 226–227.

⁵⁸ Sieg R (2016), 227–229.

⁵⁹ For practical examples (i.e. O.J. Simpson, USA; Jörg Kachelmann, Germany) see Herzog A (2014), 162–174.

⁶⁰ Middelhoff T (2020), 35–46.

⁶¹ See Jahn J et al. (2020); appropriate strategies can be found in summary form at Adriaans A (2020), 47–48.

and sharpening the stances of companies involved in business criminal proceedings to the public and stakeholders. Litigation-PR is thus a **specialised communication strategy** that fits into a management's approach to reputation, crisis, internal communication and communication with the outside world. A company coming under media fire wants to present its position in such a way that it is understood by the public.

- 1228** In the context of an internal investigation, it is therefore also important to pursue an appropriate communication strategy.

Litigation-PR Should

- protect the company and its **reputation**, because even if the company wins in court, it can lose and suffer lasting damage in the eyes of the public due to a lack of an effective communication strategy.
- influence or possibly even control the **public discourse** on the company in order to protect the company's interests
- prepare the basis for **out-of-court settlements** with injured parties.

- 1229** Litigation-PR is centrally aimed at protecting the reputation of the company and sustainably increasing the value of the company. Negative consequences resulting from ill-considered public relations work are usually very serious and not easily reversed. A wrong gesture in public, such as the victory sign by the head of Deutsche Bank JOSEF ACKERMANN in the court room, will continue to hang over those affected for years to come.⁶²

11.10 Practical Examples

11.10.1 VW Diesel Scandal

- 1230** In 2005, the Volkswagen Group decided to launch a large-scale offensive for its diesel cars in the USA, in order to establish the technology already used in Europe there as well. A new diesel engine was therefore developed that was powerful and could be produced cost-effectively. In order to circumvent the strict U.S. limits on pollutant emissions, a group of people at the level below the group board of management decided to modify the engine control software. When the software detected that the car was on the test bench, it produced exhaust gas values that differed significantly from the exhaust gas values under normal driving conditions. Ten years after this decision, the U.S. Environmental Protection Agency (EPA) issued a "Notice of Violation" informing the public that exhaust tests on diesel cars from the Volkswagen Group revealed irregularities in nitrogen oxide emissions.

⁶²Bentele C (2016), 82.

This report presented in detail that the company had illegally shut-off devices installed in the engine management systems of diesel vehicles.⁶³

The state authorities in the USA and Europe expected VW to provide comprehensive clarification. In addition to the state investigations, Volkswagen itself was also actively involved from September 2015. VW conducted two different investigations. 1231

First, the investigations were carried out by the **internal group audit department**. Experts from various group companies were brought together in a task force for this purpose. This task force was commissioned by the supervisory board and the executive board to examine relevant processes, reporting and control systems and the accompanying infrastructure in more detail. 1232

Meanwhile, an **internal company investigation** was carried out. US and German attorneys were mandated by the chairman of the supervisory board (after prior authorisation by the supervisory board as a whole) to objectively determine and fully clarify manipulations of exhaust gas values in diesel engines. On the US side, the law firm Jones Day was entrusted with the internal investigations. In accordance with U.S. law, the attorneys continuously informed both VW and the U.S. Department of Justice of the current results of the investigations and at the same time kept VW informed in its cooperation with the judicial authorities. As a result, VW expected that cooperation with the US Department of Justice would ultimately result in a concession to the sentence. The internal investigations included more than 750 interviews with employees and managers identified by Jones Day as relevant information carriers. In addition, around 100 million documents were evaluated to clarify the facts of the case. Based on this, the development of the diesel scandal could be traced. 1233

Since these investigations, VW has carried out **several reorientations in its public crisis communication**. From the start, the company confirmed that it wanted to publish the results of the investigation. This publication was postponed several times, on the grounds that it did not want to sustainably impair cooperation with the US authorities. In the end, VW refrained from publishing the investigation report.⁶⁴ It points out that all results were published in the document “Statement of Facts”, which was negotiated with the US Department of Justice.⁶⁵ This document contains all the findings and facts that are relevant from the point of view of the US authorities. The publication of the final report, on the other hand, was seen as too risky, namely that the scandal might spread or remain in public discussion.⁶⁶ 1234

⁶³ <https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf>

⁶⁴ Lake <https://www.tagesspiegel.de/wirtschaft/bericht-der-kanzlei-jones-day-volkswagen-haelt-interne-aufklaerung-geheim/19283800.html>

⁶⁵ <https://www.justice.gov/opa/press-release/file/924436/download>

⁶⁶ Jedynak O (2019), 30–32.

11.10.2 FIFA Scandal

- 1235** Discussing this as solely the ‘FIFA scandal’ may not be entirely accurate, as it involves several parallel situations.⁶⁷ The scandal deals with two different sets of facts, namely the awarding of the 2018 World Cup to Russia and the 2022 World Cup to Qatar and the criminal proceedings in the USA.
- 1236** On 2 October 2010 the FIFA Executive Committee decided by secret ballot which countries will be allowed to host the FIFA World Cup in 2018 and 2022. Even before the last ballot was cast, allegations of corruption had become known. Following the public discussion and internal investigation, FIFA itself filed a criminal complaint with the Swiss Federal Public Prosecutor’s Office on 18 November 2014, since FIFA has its headquarters in Switzerland. According to FIFA, there appeared to be a suspicion that international transfers of assets had taken place in individual cases, which would have to be investigated by the criminal prosecution authorities. On 10 March 2015, the Office of the Attorney General of Switzerland expressed suspicion that there had been **irregularities in the awarding** of the 2018 and 2022 FIFA World Cups. The specific criminal offence on which the investigations were based was Art. 158 No. 1 (3), the disloyal management of business, but also suspicion of money laundering (Art. 305^{bis} StGB-CH, → mn. 656).
- 1237** Independent of the investigations in Switzerland, the US Attorney General for the Eastern District of New York conducted an investigation into the award of media, marketing and sponsorship rights in connection with the holding of football tournaments in the USA and Latin America. The indictment also accuses 14 senior FIFA officials of bribery for accepting relevant funds and hidden commissions since the early 1990s. The funds were laundered through American banks, which is why the US prosecution is responsible. On the basis of a US request for legal assistance, several FIFA officials were arrested in Zurich (Switzerland) on 27 May 2015 and placed in extradition custody. As a result, FIFA itself had to fear that the US authorities would investigate and prepare charges not only against the individual persons of FIFA officials, but also against the FIFA association itself. The motivation to conduct internal investigations was therefore great.

11.10.2.1 Internal Investigations

- 1238** After the vote, there were voices around FIFA to clarify the allegations of corruption in connection with the awarding of the 2018 and 2022 football championships as part of an internal investigation. Within FIFA, the so-called **ethics committee** is responsible for investigating and assessing the conduct of all people’s subject to the FIFA Code of Ethics.
- This ethics committee has no discretionary powers but has a duty to investigate as soon as there are indications of misconduct by FIFA officials. The ethics committee is composed of an investigative chamber and a judicial chamber, which may then impose sanctions such as fines or suspensions. The FIFA Investigatory Chamber decided to review the bidding

⁶⁷ Johnson D (2016), 313–316.

and award procedures. The investigations were led by the chairman of the chamber, Mr. MICHAEL J. GARCIA. During the investigations, representatives of each bidding team, members of the FIFA Executive Committee and FIFA officials were interviewed. Other people who were believed to be information providers were also asked to assist in clarifying the facts of the case.

The **FIFA Code of Ethics** provided the basis for the investigation and cooperation with the investigating committee. Art. 18, par. 2 of these regulations stipulates duties of cooperation and accountability for people's subject to the regulations. These people must, at the request of the ethics committee, contribute to the clarification of the facts of the case and possible offences and, in particular, be accountable for their income. They are also obliged under Art. 41, para. 2, to contribute to the clarification of the facts of the case and in this respect, they are obliged to provide information to the investigating chamber and the judicial chamber. Violations of this duty of cooperation may not only result in warnings being issued but also in disciplinary measures being imposed.

In practice, however, there was widespread reluctance among FIFA officials to cooperate. Only written answers were given, and sometimes it was not possible to establish contact.

All in all, 75 interviews were conducted, with the statements being audio recorded. In addition, a total of around 200,000 documents were requested and evaluated by the investigative teams. The findings culminated in a 300-page report (the so-called Garcia Report) and were presented to the chairman of the FIFA Ethics Committee's Judiciary Chamber in 2014.

Publication of the report was refused due to legal concerns, but a 50-page summary of the report was published on 13 November 2014. Although there had been certain incidents that were likely to damage the integrity of the bidding process for the 2018 and 2022 FIFA World Cups, these incidents were not serious as enough to justify measures such as a reopening of the bidding process. There had been no breach or violation of the relevant rules or regulations, and the allegation of corruption was unfounded. At the same time, it was determined that the investigations had been satisfied and that the assessment of the bidding process for the 2018 and 2020 FIFA World Cups had been completed for the FIFA Ethics Committee.

A few hours after this decision became known, the chairman of the chamber of inquiry complained of numerous incomplete and erroneous statements of facts and conclusions and announced an appeal against this decision, which ultimately remained unsuccessful. As a result, GARCIA resigned from his position within FIFA. In 2017, excerpts from the Garcia Report were sent to a German tabloid magazine and published. As a result, the FIFA Ethics Committee felt compelled to publish the report in full, even though key appendices were excluded from publication.

11.10.2.2 External Investigations

Since not only the Swiss criminal prosecution authorities had begun investigations, but also the US Department of Justice had launched investigations into bribery and corruption,

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FIFA commissioned the US law firm Quinn Emanuel to conduct internal investigations in June 2015. It was therefore not an internal FIFA investigation, but an **external investigation** with mandated lawyers.

Over a period of 22 months, these lawyers examined some 2.5 million documents and conducted a large number of interviews within FIFA. The results were summarised in several reports, comprising a total of over 1300 pages of report and over 20,000 pages of evidence. The report was submitted to the Swiss authorities and the US authorities. In addition, as part of a transparency offensive, the lawyers published interim reports of the internal investigations. These reports paint the picture of how three former senior FIFA officials would have been enriched by annual salary increases, bonus payments and other rewards.

FIFA itself stated in its press release on the interim report of the internal investigation that it was committed to cooperating with the authorities and to its policy of zero tolerance of any misconduct. FIFA considers itself to be an aggrieved party as a result of the investigations and fully cooperated with the authorities, which is why FIFA's management did not make any provisions for fines or other penalties. Nevertheless, provisions in the millions were made in the annual reports to cover costs for various legal matters relating to disputes concerning FIFA's core business.

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