Corruption as Business Practice?
Corporate Criminal Liability in the European Union

Wolfgang Hetzer
Adviser to the Director General. European Anti-Fraud Office (OLAF)

1. Introduction
In November 2006 the front page of a highly respected German newspaper carried the following headline:

200 million undeclared earnings at Siemens

These sort of sums at least are said to have been paid into covert funds. According to press reports on the available findings, the total amount of money ‘diverted’ could be far greater. It is suspected that the funds are used to pay bribes all over the world. Several Siemens employees – some in senior positions – have been arrested. Initial reports alleged that the culprits had formed a ‘gang’ to set up slush funds.¹ A short while later, the same newspaper carried the following headline:

Board knew bribes were being paid

According to the press, senior management at the company had been informed that Siemens was engaging in bribery. If the statements made by a long-serving staff member who was arrested are true, a former Board member knew about the covert funds and the company’s corrupt practices.² As far as one commentator

is concerned, these accusations have turned the case into a declaration of moral bankruptcy for the company and its management. The question is being openly asked as to how a whole group of senior managers could perform their dirty deeds for years on end without being discovered. The company's defensive response to the case is equally puzzling. Although Siemens had learned about crucial investigations by the Swiss Public Prosecution Service early and had conducted its own internal investigations, the company seems to have thought it unnecessary to notify the German PPS.3 The journalists are unanimous in their views. The company's crisis management inspires no more confidence than the practices of a management board that otherwise sings the praises of the free market. The thought process leading to this conclusion is simple and convincing:

Corruption runs contrary to the rules, to obligations and prosperity, and it does not pay. Anyone who gives a bribe paralyses market forces. He disregards the consequences for society and his own company.4

Then there is the question of whether Siemens has drafted cheap ethical principles in total contradiction of what appears to be the company's culture. In any event, at the end of November 2006 the first consequences were seen, with several employees being released from their duties and suspended in response to the allegations after a new 'ombudsman' (the lawyer Jordan from the Beckstein practice) had confirmed supposedly 'sufficient grounds for suspicion'. It is immaterial whether these measures were prompted by reports that the American Securities and Exchange Commission (SEC) were interested in the case. What is certain is that the company's future prospects looked uncertain. The SEC can base its activities on the Foreign Corrupt Practices Act (FCPA) of 1977 and can go as far as to withdraw access to the stock exchange if bribery and covert funds are brought to light. The adoption of the Sarbanes-Oxley Act in 2002 to combat fraudulent accounting gave the American law enforcement agencies additional powers that they can also deploy against foreign public companies. This makes the claims recently published in the final report by the Committee on Capital Markets Regulation all the more remarkable. The Committee, which consists of 22 leaders from the investor community, business, finance, law, accounting, and academia, argues that the United States is in danger of losing its position as the world's leading financial centre. It contends that the competitiveness of American capital markets is restricted by overly strict laws and rules, and that this drives up the cost for companies of raising capital.


4) H. Leyendecker, Süddeutsche Zeitung No 278, 2/3 December 2006, p. 25.
Among the Committee’s recommendations is a call for the reform of the criminal prosecution of offences, whether committed by managers or by the company as a whole. Companies should be punished as entities only as a final resort and only where they ‘have become criminal enterprises from top to bottom.’5

It is a matter of public conjecture that the above suspicions have effects that go far beyond Siemens. The revelations brought to light a serious problem that is not confined to German industry. Abroad, companies apparently still see corruption as a peccadillo or necessary evil. The top of the bribery statistics league table tends to be dominated by companies involved in major projects, such as power stations, dams or airports.

There are sound reasons for Public Prosecutors to be stepping up their fight against corruption: bribes may oil the wheels of business for some multi-national corporations, but for the economies most affected in Africa, Asia, Eastern Europe and Latin-America they have devastating consequences. Bribery and baksheesh clog up the works whenever attempts are made to escape poverty. Corruption fosters organised crime, undermines democracy and acts as a brake on economic growth. In African countries it has apparently already led to capital flight on a massive scale. According to the United Nations, the cost of investment in corrupt States is 20% higher.6

Other commentators argue that given the considerable sums involved it is reasonable to suspect that the corrupt practices employed by the offenders to obtain contracts for Siemens while enriching themselves at the same time are part of a system. The Siemens scandal shows, they claim, how high the price of contracts is, when the line between right and wrong is blurred right up to the upper echelons of the company.7 Experienced specialist journalists do not see the revelations made public so far as a neat detective story; they see the episode as an ‘interminably tangled and unsavoury muddle that may involve members of the global player’s senior management.’ The original story of a gang in the company’s basement that had devised cunning methods of getting their hands on millions is clearly fiction. There are serious indications that a ‘Siemens system’ did in fact exist. While they may not be legal experts, these observers realise that the offence cannot be described solely in terms of the concept of individual responsibility – with its perpetrator and victim – that provides the framework for classical criminal law. They even believe that the case could revive the calls by ‘corruption busters’ for a recasting of corporate criminal law. In the final analysis, the problem of the criminal liability

5) For further details see Frankfurter Allgemeine Zeitung No 281, 2 December 2006, p. 14.
of companies has still not been solved. Outsiders need time to gain even a vague idea of the diversity in the corruption biotope of a major international company. And it would seem that those on the inside either do not know what is happening or do not wish to know.  

2. Wishful Thinking and Structural Problems

This new (or old) impenetrability, which could be described as 'organised irresponsibility' make us all the more grateful for clear indications as to the way forward. This time the path has been mapped out by the Chairman of Germany's Social Democrat Party (SPD), Kurt Beck, who stated at a Party conference on economic affairs in November 2006 that he could not accept that such practices were 'quietly becoming part and parcel of reality and, as a reality, a form of behaviour that was accepted with a nod and a wink':

We must not go down that road, and that is something Siemens managers should also know.  

Germany's Chancellor, Angela Merkel, also provides significant markers for the way forward whenever she points out that politics starts with the study of the real situation.

Both statements show that what follows are not simply questions of judicial policy or criminal law theory; they are also intrinsic problems of perception. It is impossible to decide from Kurt Beck's words whether he is concerned about a risk ahead or an existing reality. It is no longer correct to say that corrupt practices are gradually ('quietly') becoming reality. By the same token, the question is no longer whether we will be able to go down this road. Many companies that want to survive in the world of international competition went down this road a long time ago and are heading ever more rapidly in that direction. In the past it was not just Siemens that came off the rails. To put it more simply, companies all over the world are suspected of having been awarded contracts in part or primarily because they bribed the people taking the decisions. This is not, as Kurt Beck appears to believe, a 'creeping process.' Hard facts have been unearthed in the course of investigations and penalised in enforceable judgments. In our context we no longer need to speculate like Robert Musil in his novel The Man without

9) Quote taken from N. Bovensiepen, Süddeutsche Zeitung No 274, 28 November 2006, p. 5.
Qualities about the 'sense of multifarious possibilities'. A truism says it all, namely that reality is always really real.

The principle of the presumption of innocence in no way alters business, criminal and social reality. It is also a current-day reality that leading management figures in other major international companies—such as Volkswagen AG—are at least suspected of corruption. Some of the suspicions have already been confirmed in detailed confessions. In the 'real world' it is also the case that these charges are not levelled solely at the above companies. The list of actual corrupt practices and networks at various levels in business (including the unions), the administration and the world of politics is far longer. So we are faced with successful and apparently systemic corrupt practice in Germany and all over the world. The point at which we could turn a blind eye, which Kurt Beck may still see as an option for the future, is in fact long gone. It is open to debate whether the statements quoted are due to a simple misunderstanding of a reality we can find everywhere or a facet of the wishful thinking that is also widespread among politicians.

The view put forward by the Chancellor—that political action should be based on the prior detection and analysis of existing situations—is not only correct; it is also necessary. Yet all too often politics does not start with an observation of the real situation; it begins with taking up positions and formulating wishes and promises. Even in Germany this process is not always characterised primarily by a grounded and objective approach. The reasons are obvious. There is therefore no need to examine the differences and similarities on which much attention has focused recently between the party (i.e. its manifesto) and its living a lie. It is more important to examine whether the law as it stands is in a position to prevent and prosecute a kind of corporate crime that causes damage over and above the amounts of money involved.

Literature on the subject steadfastly maintains that Germany's legal armoury is equal to the task of combating corruption and corporate crime. According to one standard work on the Administrative Offences Act (Ordnungswidrigkeitengesetz—OWiG), 'all in all, the scope and severity of the range of penalties applicable to bodies corporate in Germany can stand international comparison'. The debate
on the 'punishment of companies' or 'companies as offenders' has in fact been going on for a long time. However, although European law and foreign legal systems have been blazing a trail for some considerable time, German law has lagged behind. Although it once appeared in the 1950s that the discussion had died down for the time being, it flared up some time in the mid-eighties and has been with us ever since.

Some think that the negative recommendations presented by the Commission on the Reform of Criminal-Law Penalties in March 2000 helped to restore a degree of calm. One of the reasons this is welcomed – leaving aside any question of legal policy or pragmatic content – is because there is a view that the wide range of implications for criminal-law theory are still unresolved or at least open. The differences of opinion, particularly with regard to criminal procedure and the prevailing view of liability, are seen as too great and it is felt that they result in incompatibilities that are hard to resolve. Against this backdrop, core criminal law is still governed by the traditional principle of societas delinquere non potest. It is still widely claimed that core criminal law is characterised solely by individual actions. Where criminal actions are linked to corporate activity, section 14 of the Criminal Code and the corresponding provisions of section 9 OWiG can be applied as a method of closing loopholes in criminal law. In the process the aim is to take more drastic measures with regard to the liability of natural persons. According to what is supposedly the 'generally prevailing view', legal persons or bodies corporate are not capable of committing criminal offences or being held liable for them under criminal law. Consequently, no penalties may be imposed on them. It is, however, recognised that the Constitutional Court has not definitively

---

14) <http://www.bmj.de/media/archive/137.pdf>.
16) A corporate body may not commit a wrongful or criminal act.
concluded that bodies corporate are not punishable under criminal law. This makes the question of whether, as far as the Constitution is concerned, there is room for manoeuvre in Germany all the more interesting. Thus far, only a minority have been inspired. The majority fall back on the existing legal state of play, arguing that supplementary criminal-law provisions are the sole *sedes materiae* in relation to the imposition of penalties on companies. A key function is attributed to section 30 OWiG, which has been beefed up by legal developments (including legislation to combat corruption) and contains its own sanctions. In this situation, we have to look at the range of legal instruments available for dealing with corporate crime, but we will have to broaden the perspective. Any insistence on traditional theoretical (self-)limitations and the predicaments (or perhaps even clichés) of 'liability theology' would be analytically wrong, intellectually boring and overly conservative in terms of crime policy. If not particularly unusual, this would be bad enough in itself. However, this approach has become objectively dangerous. It has not only led Germany to become divorced from the rest of the world; the failure to innovate to get to grips with especially dangerous types of crime creates risks that some legal experts and liability theoreticians do not wish to see or fail to grasp.

The situation becomes more critical if we are forced to view corruption as business practice. As the number and seriousness of allegations against senior employees at multinational corporations continue to grow, it needs to be established whether this form of crime can still be confined to the company or subcompany level. An all-embracing and profound structural problem may have developed at global level that extends far beyond the scope of criminal law. This is why we must do more than examine the existing legal situation. We must also discuss legal policy initiatives undertaken so far and future strategic options for dealing with corporate crime.

3. The Legal Starting Point

It must be stressed that section 30 OWiG sets out the penalties applicable to legal persons and bodies corporate consistently and definitively for all cases in question. German criminal law and law on administrative offences makes no provision for

---

8) Official Collection of Decisions of the German Constitutional Court 20, pp. 323, 331, 335 (the Bertelsmann-Lesering ruling).
other punitive-type measures applicable specifically to legal persons and bodies corporate, such as the prohibition of certain activities or the closure of a plant.\textsuperscript{22} Under certain circumstances, the section allows a fine to be imposed on a legal person or body corporate. The possibility arises where an action by a natural person constitutes a criminal or administrative offence. German law targets different categories of persons:

(a) Bodies entitled to represent a legal person or a member of such a body;

(b) The board of an association without legal personality or member of that board;

(c) Members of a corporation of persons with legal personality who are entitled to represent the organisation;

(d) Fully authorised representatives of a legal person or body corporate;

(e) Holders of a general power of attorney or general agents of a legal person or body corporate occupying executive positions;

(f) Other persons responsible for the running or operations of a legal person or body corporate, including management supervision or the exercising of any other top-level supervisory powers.

The action of these categories of natural persons must have been contrary to the duties incumbent on the legal person or body corporate. A fine may also be imposed if the legal person or body corporate has benefited or was intended to benefit financially (§30(1) OWiG). Where the criminal act has been wilfully committed a fine of up to €1 million may be imposed, while the maximum fine for acts of negligence is €500 000 (§30(2) OWiG).

Corporate fines may also be imposed on foreign entities responsible for the undertaking, where the basic offence is punishable under German law and the articles of association of the foreign entity responsible for the undertaking are comparable with those of the legal person or body corporate from a legal point of view. In practical terms, however, fines are imposed only where the company is based or has assets in Germany.\textsuperscript{23} Legal persons include all ‘social organisations’ endowed with legal personality under the legal system, most notably:

- Public limited companies;

- Private limited companies;

\textsuperscript{22} E. Göhler, \textit{op. cit.}, note 2.

\textsuperscript{23} E. Göhler, \textit{op. cit.}, § 30, note 1.
- Cooperative societies;
- Registered associations;
- Foundations;
- European companies.

As bodies corporate, partnerships with legal personality and partnerships without legal personality are treated in the same way as legal persons. The law does not exclude legal entities set up under public law. However, the general view is that corporate fines will not often need to be imposed, although in specific cases it may be necessary to use the penalties provided by section 30 OWiG to require the management of legal entities established under public law (e.g. water or energy utilities) to act in accordance with the law. This is why there is theoretically no compelling reason not to permit the imposition of a fine.24 Fines imposed on legal persons and bodies corporate have a number of purposes:

(a) To ensure that the same punishment is applied as would be imposed on natural persons;

(b) As an appropriate response to the seriousness of the offence to ensure that duties are properly performed in future;

(c) To encourage members of legal persons/bodies corporate to base the designation of the bodies or the people acting for them on propriety as well as business acumen (general preventive objective);

(d) To create the possibility of imposing penalties under section 130 OWiG in all cases where the actual offence (the underlying offence) is committed below the level of the legal representation (representative body, senior management level) of the body corporate;

(e) To render operative the links between sections 9, 30 and 130 OWiG.

There are a number of underlying considerations:25

- The imposition of the same penalties as would be imposed on a natural person prevents the legal person, which can only act through its bodies, from benefiting from activities undertaken in its interests without having to face the disadvantages of a failure to comply with the law when the act was

24 E. Göhler, op. cit., note 2.
25 E. Göhler, op. cit., before § 29a, notes 8-11.
committed, which would be the case if no penalties could be imposed. This would place legal persons at an advantage in relation to natural persons;

- A fine based on the personal circumstances of the person acting on behalf of the legal person or body corporate would inevitably be insufficient. Members of the body corporate would not be put under sufficient pressure to counter a desire for gain that generates dishonesty and a failure to comply with legal requirements and prohibitions. The risk involved in reoffending would be seen as small;

- It is one of the functions of general preventive objectives that, where there may be a conflict with the law, management should be deterred from electing to commit the offence for the sake of the economic benefits accruing to the body corporate;

- There is a close relationship between section 30 OWiG and the breach of the duty of supervision under section 130 OWiG, as section 130 OWiG makes it possible to impose penalties on legal persons or bodies corporate in cases where the actual (underlying) offence is committed below the level of the legal representation (representative body, senior management level) of the body corporate;

- It must be borne in mind that, in the case of repeat offences, which can be characterised by the personal traits of the company owner, it is section 9 OWiG that makes the initial offence committed by a member of the legal person or body corporate the underlying offence.

In Germany it is assumed that corporate fines are compatible with the constitutional principle that applies to punitive-type measures, namely *nulla poena sine culpa*. The legal person may only act through natural persons who have assumed responsibility for it; their liability may be attributed to the legal person.

In the literature, the majority of legal experts reject academic concerns regarding corporate fines. While fines are considered to have a repressive character and can therefore be imposed only in response to unlawful conduct, they must not necessarily be imposed in response to unethical conduct, as fines are not considered expressions of ethical condemnation. Attempts to justify the imposition of corporate fines are based on a variety of considerations, including the need to deter future violations and to provide a means of compensating victims. However, the effectiveness of fines in achieving these objectives has been questioned, and there is ongoing debate about the appropriate use and application of such penalties.
of penalties on legal persons or bodies corporate on the basis of 'necessity arising from legal interests' or to consider them legal measures to ensure commercial supervision are also rejected as incompatible with the Constitutional Court's interpretation of grounds for imposing penalties on legal persons. Ultimately, attempts to derive and develop independently penalties for criminal conspiracy from 'corporate power and corporate responsibility' run contrary to the Court's interpretation. This approach assumes that all breaches of the law are committed by the body corporate where they are committed in pursuance of its own interests and where it does not prevent them. Generally speaking, corporate fines are seen as independent penalties. German law has long abandoned the notion that they should be classified as 'side effects' of a body's actions.

4. Legal Policy Initiatives

In Germany, the introduction of corporate penalties under criminal law has been rejected, not least because of the effect of recent developments that have drawn a demarcation line between administrative offences and criminal law. The view was taken that the aims of penalising legal persons and bodies corporate could also be achieved by imposing fines. It was argued that the imposition of a penalty under criminal law was incompatible with the law on criminal liability, which requires charges to be brought on socio-ethical grounds. It is also seen as incompatible with the 'essence' of liability, which expresses censure on socio-ethical grounds. And socio-ethical charges cannot be brought against legal persons. Given the alarming recent cases of social and economic failure by numerous companies and groups all over the world, however, this conclusion appears outmoded. It is a fact that some of these conglomerates have developed into centres of excellence for crime and this kind of romantic definition cannot really impinge upon their operations. As this distorted view of the delicately chased building of liability theory appears to


29) Such a necessity is deemed to exist where there is no other way to protect legal interests and where the safeguarding of the legal interests under threat is considered more important than the losses caused to the body corporate.


31) E. Göhler, op. cit., notes 13 and 14, which provide further references.

allow no more than the conclusion that only the ‘value-free’ penalty of fines may
be applied to legal persons and bodies corporate, it is all the more remarkable that
a large number of people are now advocating corporate penalties, and in many
countries corporate penalties are a standard part of the range of punishments un-
der criminal law. Nevertheless, they are vigorously opposed in Germany. One
critic goes as far as to argue that modern criminal law no longer has any character
at all. It curries favour with almost all the other areas of law and allows itself to
be abused to paper over the cracks left by political failure. He contends that the
ultima ratio has largely become the prima ratio. While it is recognised that in-
ternational developments have made the subject an area for political initiatives, it
is also claimed that corporate penalties as provided in foreign legal systems offer
a blurred and hazy picture.

However, as early as the first half of the 19th century Anglo-American legal circles
recognised that bodies corporate could be held liable for criminal offences and
this notion of criminal liability has increasingly made inroads into legal thinking in
continental Europe.

33) Cf. the summary in F. Zeder, VbVG: Verbandsverantwortlichkeitsgesetz 'Unternehmensstrafrecht' (Vienna 2006) pp. 16 et seq.
34) See, for example, J. Peglau, 'Strafbarkeit von Personenverbänden - Problematic und Ent-
wicklungen', 33 JA (2001) pp. 608 et seq., and id., 'Unbeantwortete Fragen der Strafbarkeit von
36) On France see B. Koch, 'Die Strafbarkeit juristischer Personen nach dem neuen französischen
Code penal', 107 ZStW (1995) pp. 405-416; C. Klein, 'Die neue französische strafrechtliche Unterneh-
353 et seq.; G. Eidam, 'Strafbarkeit von Unternehmen im ausländischen Recht - Teil 1: Schweiz', PHI
(Zurich 2001) pp. 169 et seq. On Austria see C. Bauer, Fragen der Verbandsstrafbarkeit (Linz 2003),
and E. Steininger, Verbandsverantwortlichkeitsgesetz (Vienna 2006); cf. also W. Barfuß, 'Das neue
Unternehmensstrafrecht', 60 ÖfZ (2005) pp. 877-879. On transferability to German criminal law
see L. Knopp/D. Rathmann, 'Aktuelle Entwicklungen beim Unternehmensstrafrecht - Deutschland
und Österreich im Vergleich', 59 JR (2005) pp. 359 et seq. The situation in Poland and Finland is
described by E. Weigend/B. Namysłowska-Gabrysiak, 'Die strafrechtliche Verantwortlichkeit juris-
tischer Personen im polnischen Recht', 116 ZStW (2004), pp. 541 et seq., and R. Lahti, 'Die jüngsten
Entwicklungen im finnischen Strafrecht', 115 ZStW (2003), pp. 753 et seq.

Over the last 10 to 15 years many States have decided to introduce models with a clear criminal
law element, while others have opted for administrative-law and mixed models. Cf. the summaries
provided by F. Zeder, op. cit., pp. 16 et seq. The subject has also been under discussion in China for
From a German perspective, both in terms of the application and scope and of the penalties provided, foreign penal models present a wide and varied picture. Some commentators are unable to identify a convincing theoretical design or a generally viable criminal policy programme. They lament the lack of comparative-law investigations on the implementation and efficiency of criminal-law corporate penalties abroad. Nevertheless, it is recognised that the effective punishment of bodies corporate is permanently on the agenda for discussion by international bodies (such as the EU, the Council of Europe or the OECD). However, it is pointed out that there appears to be no prospect of the Member States reaching a consensus on the introduction of corporate penalties under criminal law. It is also stressed that the German Government has not given any undertaking to this effect. The recommendations by the Committee of Ministers of the Council of Europe of 20 October 1988 (No R (88) 18), which include a catalogue of penalties for examination by the signatory States, are said to be nothing more than recommendations and leave the way free for administrative-law penalties. The same is claimed to apply to agreements and framework decisions on the subject by EU Member States under Article 34 ECT.

Reference is made to the amendment to section 30(2)(4) OWiG, which includes fully authorised representatives of or holders of a general power of attorney or general agents acting for a legal person or body corporate) and thereby greatly extends the circle of persons who can commit underlying offences for which fines may be imposed. The scope has since been generally extended to cover senior management.

The 2002 Act implementing the Second Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests allowed Germany to return to long-held ideas regarding reform. They were based on the
Commission's ideas for combating financial crime and could not be got through the Bundestag at the time.\textsuperscript{42} In the negotiations on the Second Protocol two-thirds of the Member States had openly favoured the introduction of corporate criminal liability throughout Europe.\textsuperscript{43}

It is also remarkable that European business law has long provided for fines to be imposed on undertakings and groups of undertakings, which include legal persons and bodies corporate.\textsuperscript{44} The range of penalties available goes beyond section 30 OWiG. Companies are not only held liable for the actions of their bodies, legal representatives and the senior figures listed in section 30(1)(4) and (5) OWiG; they are also responsible for all persons who have worked for the company. While doubts have been voiced as to whether EC restrictive practice legislation satisfies all constitutional requirements, it is admitted that recent restrictive practices legislation\textsuperscript{45} has incorporated central elements into German law – apparently with the acceptance of grave constitutional risks and blatant breaches in the system with regard to the rest of administrative law.\textsuperscript{46}

In Germany the legal debate on corporate liability flared up yet again over five years ago, when the criminal liability of legal persons became a subject for discussion in the Commission's negotiations on the reform of the penal system. It prepared the ground for its discussions, which took place on 29-30 November 1999, by setting up a subgroup on corporate criminal liability to address the questions of the need for legislative action and of possible penalty models or penalties.\textsuperscript{47} After an extremely heated debate, the group did not put proposals to the vote. There was agreement that international and supranational legislation did not automatically require Germany to introduce criminal-law penalties for bodies corporate. Their introduction would take criminal law in a new direction that would create multi-faceted problems in terms of the Constitution and of criminal and criminal procedural law. Supporters put forward the following arguments:

- there was an international trend towards the introduction of corporate liability;

\textsuperscript{42} E. Göhler, \textit{op. cit.}, note 17.


\textsuperscript{44} Article 23 of Council 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 (restrictive practices – \textit{OJ} L 1, 4.1.2003, p. 1).


\textsuperscript{46} According to E. Göhler, \textit{op. cit.}, note 16.

\textsuperscript{47} J. Peglau assesses the final report in 'Unbeantwortete Fragen der Strafbarkeit von Personenverbänden', \textit{34 ZRP} (2001) pp. 406-409 \textit{et seq.}
criminal law operates as a safeguard against the risks of future co-existence;

there were problems in attributing liability and obtaining evidence when prosecuting individuals under criminal law in connection with corporate crime;

other legal instruments failed to offer sufficient protection for collective legal goods (such as the environment).

Opponents used the following arguments:

- a broad range of corporate penalties already existed (sections 30 and 130 OWiG);
- measures could be taken under administrative law;
- confiscation and forfeiture were criminal-law measures;
- there was no need to transfer penal options into criminal law;
- the problems in attributing liability and obtaining proof when prosecuting individuals were exceptional;
- there were constitutional concerns regarding the principles of culpability proportionality.

The working party distinguished between a model that attributed individual liability measured using traditional criteria to the company, the model of original corporate liability based on the direct liability of the company management and a measures model, which did not seek to penalise on the basis of the attribution of liability and provided solely for the imposition of disciplinary measures that had to be devised anew. After a discussion of possible corporate penalties based on the recommendations by the Committee of Ministers of the Council of Europe, the conclusion was reached that most of the penalties listed already existed in Germany, but in the law on minor offences and, above all, administrative law, rather than in criminal law. In the debate on the need for legislative action in the field of criminal law several arguments in support of action were of particular importance:

- given the considerable changes in criminal law in recent years, going back to the 1950s would no longer help;

- companies have a greater responsibility than individuals, a fact that is not reflected in criminal courts with the result that individuals are required to perform duties that can no longer be fulfilled so that they can be punished;

- problems proving breach of duty lead to collusion;
- breaches of duty should be punished where the duty lies (with the company);
- individual criminal law is overburdened as it is now intended to solve problems rather than, as in the past, to punish;
- corporate criminal law needs to be geared more to prevention, and this should be accompanied by improvement in corporate structures;
- civil law penalties are insufficient safeguards of collective legal goods.

Most of the Commission, however, allowed themselves to be convinced by the following arguments:

- there is not enough evidence of loopholes in the penal system and 'organised irresponsibility' cannot be taken as a general rule or practice;
- there are sufficient possible penalties provided by sections 30 and 130 OWiG, by restrictive practices legislation and administrative law (e.g. section 35 of the Trade, Commerce and Industry Regulation Act; sections 20 and 21 of the Pollution Control Act and sections 35 et seq. of the Credit System Act);
- the introduction of corporate criminal liability would impose additional strain on the already overburdened criminal law system;
- a new Code of Criminal Procedure is needed;
- criminal law cannot deal with companies set up specifically for criminal ends, as they are wound up after the offence has been committed, and therefore the individuals behind them still need to be prosecuted;
- it is not the task of the criminal justice system to steer social developments;
- the criminal justice system does not have the wherewithal to reconstruct company practices or to supervise and wind up businesses;
- there are doubts as to whether the principle of culpability can be implemented (the liability of bodies corporate and punishment of innocent shareholders);
- international trends are irrelevant as structures differ (e.g. in Anglo-American legal systems criminal law closes loopholes that exist because administrative law is 'underdeveloped' and no distinction is made between criminal law and minor offences legislation).
After these discussions the Commission came out against introducing corporate liability penalties, but designed its remit so that it could go beyond traditional criminal law and examine whether it would be advisable and appropriate to introduce corporate penalties in other legal fields. In view of the proximity of criminal law, however, it wanted to confine almost exclusively itself to extending the range of instruments available under minor offences legislation. The Commission had, however, already acknowledged that section 30 OWiG needed to be brought into line with international legal instruments. Some Commission members reached the conclusion that a system of original (corporate) liability could close loopholes left by sections 30 and 130 OWiG regarding, for example, 'organised irresponsibility'.

Owing to interpretations of duties for the persons listed in section 130 OwIG by the courts, individual initiation of minor offences has repercussions on individual criminal law in relation to crimes of omission. For the purposes of prevention it would be preferable for companies to bear original liability, especially as the duties mentioned are often overstretched, so that companies could be punished under minor offences legislation. This view is countered by the argument that sections 30 and 130 OWiG effectively allow for no loopholes and that the existing range of instruments has caused very few problems. It is suggested that at most the offence described by section 30 OWiG could be slightly extended (by removing the phrase 'in senior positions', for example) to ease the pressure on section 130 OWiG to extend individual liability. In any event, no further minor offence based on the model of original liability should be added to sections 30 and 130 OWiG.

The debate also covered possible shortcomings in existing minor offences legislation in connection with offences committed abroad and a review of additional penalties under minor offences legislation. Again the recommendations made by the Council of Europe’s Committee of Ministers were taken as the point of reference (R 88/17). Some of the options listed there could (additionally) be envisaged as penalties under minor offences legislation. Lastly, the Commission considered whether existing ceilings on fines imposed on legal persons listed in section 30 OWiG were proportionate with respect to the framework for fines imposed on individual offenders.

---

48 Such as the Second Protocol to the Convention on the protection of the European Communities' financial interests in relation to 'inspectors' and Council of Europe's Convention of 4 November 1998 on the Protection of the Environment through Criminal Law in relation to 'representatives'.
5. Alternative Crime Policy Strategies

The European Council has adopted an impressive volume of legal instruments in the field of judicial cooperation that provide for the harmonisation of certain offences and the liability of legal persons:

- Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;\(^{49}\)

- Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;\(^{50}\)

- Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment;\(^{51}\)

- Council Framework Decision of 13 June 2002 on combating terrorism;\(^{52}\)

- Council Framework Decision of 19 July 2002 on combating trafficking in human beings;\(^{53}\)

- Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence;\(^{54}\)


- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;\(^{56}\)

- Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography;\(^{57}\)


\(^{52}\) OJ L 164, 22.6.2002, p. 3.


\(^{55}\) OJ L 96, 12.4.2003, p. 16.

\(^{56}\) OJ L 192, 31.7.2003, p. 54.

\(^{57}\) OJ L 13, 20.1.2004, p. 44.

Council Decision 2005/211/JHA of 24 February 2005 concerning attacks on computer systems;59

Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.60

The provisions relating to the liability of legal persons are the same in most of the above acts. This is also true of proposals regarding other areas of criminal activity, which range from collusion with regard to public procurement contracts, fraud, corruption and money-laundering to the detriment of the Communities, and racism and xenophobia to trafficking in human organs and tissues.61 They require everyone to introduce ‘effective and dissuasive penalties’. According to case law on the subject, Article 10 ECT requires Member States to take all measures necessary to guarantee the application and effectiveness of Community law. The Member States must take special care to ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance. The penalties must be effective, proportionate and dissuasive.62

The same trend can be seen in the Council of Europe and a large number of international agreements, including the United Nations Convention against Corruption (Article 26). There are a considerable number of factors relating to criminal policy that bolster the argument for extending criminal liability to bodies corporate.63 Steps are in fact being taken all over the world to extend criminal liability.64

---

Neither the revolutionary developments in legal systems elsewhere nor European and international initiatives on criminal law have managed to prod Germany into activity in this field. Whether pointing up recent criminological findings and modern social and business trends will have any impact in the foreseeable future is debatable. This makes it all the more important to remember that Sisyphus was a happy man. However, it should not be forgotten that many years ago crime policy was already awash with prophets with academic pretensions prophesying that corporate liability would arrive in Germany. It was even announced that in 1999 a coup would take place that could lead to a clean break with the old system. Clearly this has still not come about. It is pointless to speculate about the reasons; it may be more useful to examine the current situation more coolly from a criminalistic and crime policy perspective.

It is hard to deny that crime committed in the interests, at the risk and under the influence of bodies corporate does not just pose a greater specific threat. Given the considerable extent of the damage caused to legal interests, the criminal liability of individual bodies cannot take account of the seriousness of the offence or the need for specific and general prevention with regard to a body corporate whose powers and interests are behind the offence. Moreover, in large companies the extensive delegation of tasks to parts of the organisation make it hard to bring anyone to account, and in any case the penalty imposed on the individual is in no way proportionate to the benefits derived by the company. The body corporate simply sees the consequences as costs to be written off. This situation generates a 'preventive vacuum'. The use of penalties for corporate criminal liability would have a significant deterrent effect.

Legal persons and bodies corporate, which include businesses and other bodies in modern industrial societies, have increased their relative economic importance over individuals – above all as a consequence of globalisation – to an extent that defies comprehension. Their potential power and prospects of success also attract the attention of organised crime. As a form of crime committed by businesses, corporate crime has assumed alarming proportions. Over 80 per cent of all serious economic crime is committed under the cover provided by a company, and the amounts involved run into tens of billions.
Over eight years ago Jürgen Meyer and other SPD MPs attempted to shed light on key aspects of corporate crime in a major inquiry. They viewed corporate crime as all offences committed by the staff of a company or committed in its interests. The most important aspects of this kind of crime included aiding and abetting tax evasion by transferring capital abroad through banks and money-laundering by investing the proceeds of crime in lawful business activities. One of the suppositions underlying the major inquiry was the argument that the concept of individual responsibility in classical criminal law— with its perpetrator and victim, who are natural persons— is not effective when it comes to combating crime committed by legal persons and bodies corporate. Numerous other aspects were listed that confirmed the inquirers’ beliefs that this modern development in the world of crime could be combated only by starting with the persons responsible. It is true that only the company itself can address the problem through supervisory and information systems. A systemic flaw has developed as a consequence of years of failure to recognize risks and take preventive measures. It is not possible to go back to specific one-off decisions. Germany’s personal criminal law has reached the limits of what it can attain. The inquirers were therefore right to urge that the problem of corporate criminal liability be addressed without delay.

Although this appeal was made many years ago, legal policy has still not responded. This is hard to understand, since legislation on the assumption of responsibility can be adopted freely. The concept of negligence enshrined in administrative law is more closely linked to social and legal factors and less to personal and moral misconduct than the criminal law concept of liability. This is what has made it possible to bring charges against bodies corporate on social grounds in the form of organisational negligence. Bodies corporate could therefore be brought to account if they fail to run their undertaking in accordance with the law. In such a case it is unnecessary to identify a specific individual as the offender.

Modern corporate criminal law would not impose any unduly heavy new burdens. In fact, it would improve the conditions for competition. Companies employing criminal methods gain a near-insuperable competitive advantage over law-abiding companies. Criminal-law penalties for such conduct could even be a method for exercising control in accordance with the requirements of a market economy.

68) BT-Drs. 13/9682.
71) W. Hetzer, op. cit., pp. 577, 578.
6. Conclusion

In Europe and worldwide, modern crime policy has resulted in the creation of a separate system of penalties for bodies corporate based on criminal law. Renowned exponents of German criminal justice have reached the firm conviction that the nature and emerging significance of corporate crime justify taking this course from both a legal and a law enforcement point of view.\(^{72}\) In the longer term the German legal system will not be able to disregard European and international legal developments. However, as yet it is still impossible to predict whether and when the Union will provide standard definitions and detailed rules in an EU legal act on penal law.

The European Commission’s Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union of 30 April 2004 still confines itself to listing the options, but raises the questions of whether there is a need for generally applicable rules and whether it would be advisable to reduce the differences between the systems in the Member States.\(^{73}\) However, the German legal system is not obliged to wait for detailed proposals from Brussels. Today, we have not only detailed and commendable academic surveys and studies;\(^{74}\) we also have proposals for highly sophisticated and practical models to establish corporate liability under criminal law.\(^{75}\) In the final analysis, we should be able to assume that there is a need – and the time is right – for these questions to be answered on the basis of a large number of constructive and detailed contributions,\(^{76}\) European and international rules, and against the backdrop of the following conclusions:

\(^{72}\) It should be borne in mind that criminal law measures are always accepted when there is a perceived practical need for them. On this subject, see R. Schmitt, Strafrechtliche Maßnahmen gegen Verbände (Stuttgart 1958) p. 230.


\(^{74}\) For example, B. Ackermann, Die Strafbarkeit juristischer Personen im deutschen Recht und in ausländischen Rechtsordnungen (Frankfurt a.M. 1984); E. Müller, Die Stellung der juristischen Person im Ordnungswidrigkeitenrecht (Köln 1983); H.-J. Schroth, Unternehmen als Normadressaten und Sanktionssubjekt (Giessen 1993); G. Heine, Die strafrechtliche Verantwortlichkeit von Unternehmen, 1st edit. (Baden-Baden 1995), and S. Lütolf, Strafbarkeit der juristischen Person (Zurich 1997).

\(^{75}\) For example, E. von Bubnoff, op. cit., pp. 484 et seq.

(a) More and more companies operating worldwide seem to believe that in the competition for contracts they must resort to unlawful actions and bribery to influence decision-taking;

(b) The involvement of staff at all levels of the company in criminally corrupt networks makes it increasingly difficult to draw a clear distinction between bodies corporate and perpetrators;

(c) In some cases companies have transformed themselves into centres of excellence for crime, and behaviour typical of organised crime has become an aspect of standard business practice;

(d) The unlawful use of money and other assets not only damages individual legal goods; as a function of business life and politics it has reached a dimension that threaten the system;

(e) In view of the dangers posed by corporate crime a trend has developed in Europe and worldwide to introduce corporate criminal liability;

(f) In Germany everything works perfectly, and when it doesn't, there is always the Administrative Offences Act;

(g) However, Germany's lonely course cannot meet the modern challenges posed by corporate crime;

(h) The concept of individual liability in classical criminal law – with natural persons as perpetrator and victim – is not effective when it comes to combating crime committed by legal persons;

(i) Corporate criminal liability enshrined in the legal system would not only increase the options for prevention and enforcement; it would also improve the conditions for competition and thus reflect economic thinking more faithfully.
