Criminal Sanctions against Corporations?

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Most European countries impose criminal sanctions on corporations. This article argues that whereas administrative sanctions should be provided for by law to deter offences in the course of business, there is no benefit in criminalising corporate wrongdoing. If administrative sanctions against corporations and other business enterprises apply, the law might forgo the criminal responsibility of natural persons.

I. Toward Corporate Criminal Liability in German and European Law

1. Traditional Arguments

There are no criminal sanctions against corporations and other business enterprises in German, Greek, or Italian law.[1] They have been discussed in Germany since the 1950s[2] but the majority of legal scholars was and still is heavily opposed.[3] In 2001, a commission on the reform of the law of criminal sanctions appointed by the Federal Government voted 12 to 1 against the introduction of a criminal responsibility of corporations.[4] Others, however, favour criminal sanctions against corporations for business crimes.[5] If the damages caused by illegal conduct are severe, e. g. in antitrust or tender cases, they argue that criminal law should apply to clarify the degree of wrongdoing.

The main arguments have not changed much since the 1950s: A corporation or firm is unable to commit a criminal act. And thus, a corporation's personal culpability is inconceivable. There is "no soul to damn and no body to kick",[6] vice versa the corporation is not capable to kick itself or to decide on its own to choose the proper or criminal path. There are necessarily humans acting on behalf of the

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[1] *M. Engelhart*, Unternehmensstrafbarkeit im europäischen und internationalen Recht, The European Criminal Law Associations' Forum (eucrim) 2012, p. 110, 122; for Italy see *G. M. Vagliasindi*, Liability of Legal Persons and Collective Entities for Environmental Crimes in Italian Law, eucrim 2012, p. 131 et seq.; *P. Kuhlmann*, Verbandssanktionierung in Italien: Das decreto legislativo 8 giugno 2001 n. 231 im Vergleich mit europäischen Vorgaben und dem deutschen Recht, 2014, p. 33-35.

[2] Discussion of the 40. Deutscher Juristentag, 1953.

[3] Cf. *M. Jahn/F. Pietsch*, Der NRW-Entwurf für ein Verbandsstrafgesetzbuch – Eine Einführung in das Konzept und seine Folgefragen, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2015, p. 1, 3.

[4] Bericht der Kommission zur Reform des strafrechtlichen Sanktionenrechts, https://www.bib.uni-mannheim.de/fileadmin/pdf/fachinfo/jura/absclussber-der-komm-strafreform.pdf.

[5] *A. Erhardt*, Unternehmensdelinquenz und Unternehmensstrafe, 1994, p. 215 et seq.

[6] *J. C. Coffee,* "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Michigan Law Review, p. 386 (1981).

company. They are to blame and thus may be held responsible for their deeds committed in the course of business. The worker opening a valve so that the leaking wastewater poisons a river will be punished for a willful or negligent crime against the environment. If a criminal act was ordered by the head of business or the management they may be held personally responsible as well, either as perpetrators or for aiding or abetting.

In support of this view is an argument based on the interpretation of Article 1 of the German Constitution by the Federal Constitutional Court. This Article protecting human dignity demands that somebody may be held criminally responsible only if he can be blamed for committing the crime. Culpability in the Article's meaning is based on the personal responsibility of man, his ability to act self determinedly and to choose between right and wrong. Thus, a criminal sanction against somebody not personally blameworthy is a violation of his dignity. This rule is considered to be a sacrosanct imperative of the Constitution's identity.[7]

2. New Developments

The topic, therefore, seemed to be dead. But it is on the agenda again. In 2011, the Attorney Generals of the German states supported a proposal by North Rhine-Westphalia to discuss the issue again in order to fight white-collar crime more effectively. Since November 2013, we have a Model Corporate Penal Code[8] submitted by North Rhine-Westphalia's Attorney General. This model code has been called a "zombie of legal policy",[9] but may become the law in the near future, nevertheless.

In addition, there is a more important player in the field: the Commission of the European Union. For example, European law requires in the case of crimes against the environment that the law of the member states includes rules that hold corporations responsible for such crimes. Article 7 of the directive on the protection of the environment through criminal law states that the necessary measures have to be taken to ensure that legal persons held liable for violations are punishable "by effective, proportionate and dissuasive penalties". This does *not* mean that these penalties necessarily have to be criminal penalties. But in other fields, in particular

[7] Entscheidungen des *Bundesverfassungsgerichts*, BVerfGE 123, p. 267 margin no 364.

[8] Https://www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5Gesetzentwurf.pdf. For a discussion of the model code see *W. Mitsch*, Täterschaft und Teilnahme bei der Verbandsstraftat, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (NZWiSt) 2014, p. 1 et seqq.; *E. Hoven/R. Wimmer/S. Schwarz/T. Schumann*, Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzes – Kritische Anmerkungen aus Wissenschaft und Praxis, NZWiSt 2014, p. 161 et seqq., 201 et seqq., 241 et seqq.; *E. Hoven,* Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzbuchs – Eine kritische Betrachtung von Begründungsmodell und Voraussetzungen der Straftatbestände, ZIS 2014, p. 19 et seqq.; *B. Schünemann*, Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie, ZIS 2014, p. 1 et seqq.; *F. Zieschang,* Das Verbandsstrafgesetzbuch. Kritische Anmerkungen zu dem Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, Goltdammer's Archiv für Strafrecht (GA) 2014, p. 91 et seqq.; *M. Engelhart,* Verbandsverantwortlichkeit – Dogmatik und Rechtsvergleichung, NZWiSt 2015, p. 201 et seqq.

[9] *Schünemann*, ZIS 2014, p. 1.

in securities law,[10] it is quite evident that the Commission favours criminal sanctions. The guess is that for the time being the Commission restrains itself from making criminal sanctions against corporations mandatory because the German Federal Constitutional Court might hold them unconstitutional and therefore inapplicable in Germany. But the majority of the European countries impose criminal sanctions on corporations and some of them with legal systems similar to the German system have changed their respective criminal laws over the last years: Austria, Spain[11] and Switzerland[12].[13] The United States Supreme Court upheld criminal sanctions against corporations in *New York Central & Hudson River Railroad Co. v. United States* as early as 1909.[14] Thus, it is said that in the meantime Germany almost stands alone in rejecting criminal sanctions against corporations.[15] German law might be outdated and it could be only a matter of time that the law will change.

II. Administrative versus Criminal Fines

I have not told the whole story yet. There are no criminal sanctions against corporations according to German law, but legal persons and partnerships may be held liable for infringements of the law by penalties if a director, partner or another person managing the affairs of the enterprise commits a crime or offence (Ordnungswidrigkeit) violating the firm's business duties or acting to enrich the corporation. The penalty is an administrative fine. Thus, the corporation may have to pay when managing employees commit a business crime.

1. Internal Measures to Avoid the Fine

The quite simple idea behind this is that the corporation will employ internal measures to avoid having to pay the fine and thus will see that the business is conducted in compliance with the legal regulations.[16] Crimes and other offences are deterred. Of course, there is no guarantee that the concept of deterrence

[10] *A. Schork/T. Reichling*, Neues Strafrecht aus Brüssel? – Europäische Kommission forciert Verschärfung des Kapitalmarktstrafrechts und Einführung eines Unternehmensstrafrechts, Strafverteidiger Forum (StraFo) 2012, p. 125 et seqq.; *F. Zieschang,* GA 2014, p. 91, 97.

[11] *J. L. de la Cuesta/A. I. Pérez Machío*, Auf dem Weg zu einem Strafrecht für juristische Personen – das spanische Strafrecht, in: Festschrift für Klaus Tiedemann, 2008, p. 527 et seqq.; *C. Mateu,* Die strafrechtliche Verantwortlichkeit juristischer Personen: Überlegungen zur „Dogmatik" und zum System der Reform des spanischen Strafgesetzbuchs 2010, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 123 (2011), p. 331 et seqq.; *J.-M. Silva Sánchez*, Die strafrechtliche Haftung von juristischen Personen nach spanischem Strafrecht, in: E. Kempf/K. Lüderssen/K. Volk (eds.), Unternehmensstrafrecht, 2012, p. 59 et seqq.

[12] *G. Heine*, Das kommende Unternehmensstrafrecht, Schweizerische Zeitschrift für Strafrecht (ZStrR) 121 (2003), p. 24 et seqq.; *idem,* Schweizerische Zeitschrift für Wirtschaftsrecht (SZW) 2005, p. 17 et seqq.

[13] Cf. also *E. Weigend/B. Namysłowska-Gabrysiak*, Die strafrechtliche Verantwortlichkeit juristischer Personen im polnischen Recht, ZStW 116 (2004), p. 541 et seqq.; *C. Partsch*, Hundert Jahre Erfahrung mit einem Unternehmensstrafrecht in den USA, in: Kempf/Lüderssen/Volk (fn. 11), p. 55 et seqq.

[14] *New York Central & Hudson River Railroad Co. v. United States*, 221 U. S. 481 (1909).

[15] *W. Frisch*, Strafbarkeit juristischer Personen und Zurechnung, in: Festschrift für Jürgen Wolter, 2013, p. 349, 351.

[16] Cf. *Schünemann*, ZIS 2014, p. 1, 17.

actually works in all cases all the time. But that is the same in criminal law as otherwise there would be no crimes. In a business context the assumption seems to be fair that if chances of future gains and losses have to be regarded by the corporation in order to be economically successful, the possibility of having to pay a fine will be taken into account. Some persons acting for the corporation may not realize the looming dangers, they will misjudge risks or take irrational risks, but generally it is not probable that the corporation will intentionally shoot itself in the foot by not avoiding an avoidable fine and thus incurring a financial loss.

So it might be argued that if the corporation fears having to pay a fine and tries to avoid it, it is simply irrelevant if the fine is called criminal or administrative – relevant is only that the corporation has to pay when breaking the law. The deterrent effect depends on the amount of the fine and the probability that it will actually be imposed and not on its nature or name. To put it more bluntly: One might argue that German law is cheating.[17] It contains sanctions against corporations. They taste and smell and work like criminal sanctions, yet they are not called that.

2. Deterrent Effects of Criminal and Administrative Sanctions

North Rhine-Westphalia's Attorney General argues, however, that there is a difference between an administrative fine and a criminal sanction. Administrative sanctions for example are imposed for traffic violations: park in a no parking zone and you get fined twenty euros. This, so the argument goes, is no big deal, whereas a criminal sanction as a consequence for disobeying the law is much more severe because it carries a reproach of wrongdoing. A criminal deed is different from an administrative offence. As an American colleague put it, the subject of criminal law should be "something more than the equivalent of spitting on the sidewalk".[18]

I believe that the American colleague is correct, and that the Attorney General is simply wrong. His argument does not hold because the amount of the fine is regardless of whether a crime or an offence has been committed. The picture he paints is not the existing law. Of course, it would be a bad joke if a DAX-corporation were to be fined 20 (or for that matter 2 million) euros for breaking antitrust or environmental laws, maybe hoping to make a huge profit by doing so undetected. But in the case of competition law we have fines up to billions of euros based on Article 15 Council Regulation 17/1962 and its successor Article 23 Council Regulation 1/2003 – European law directly applicable in Germany since 1962. In December 2013, six top level banks paid fines of 1.71 billion euros for manipulating key interest rates.[19] The Deutsche Bank paid more than 900 million

[17] For Italian law see *Kuhlmann* (fn. 1), p. 34 et seq.

[18] *J. C. Coffee*, Paradigms Lost: The Blurring Of The Criminal And Civil Law Models, And What Can Be Done About It, 101 Yale Law Journal, p. 1875, 1881 (1992).

[19] Handelsblatt, December 4, 2013, http://www.handelsblatt.com/unternehmen/banken-versicherungen/libor-kartell-eu-laesst-banken-fuer-zins-manipulationen-bluten/9167088.html.

dollars.[20] Thus, the fines imposed do *not* have the character of traffic tickets. They are multiple times higher than the highest criminal fine the German Penal Code allows. They only have to be large enough to be effective. It may be necessary to enforce fines against corporations more effectively. This may be granted but it has nothing to do with the fine's nature.

It is argued that there is a special deterring effect connected with a criminal sanction as opposed to other sanctions no matter how much money has to be paid.[21] It is the reproach of wrongdoing expressed by a judge declaring the offender guilty of a crime.[22] This argument does not fly either. Suppose there is an administrative fine of 1000 impending for a violation of business rules and assume further that from the corporation's point of view there is a probability of 30 % that the violation will be detected and the fine will actually be imposed. A rational person acting on behalf and in the interest of the corporation will not commit the offence if the corporation's financial advantage by breaking the law is 300 or less. There is no advantage in committing the crime.[23] As argued above, this is true regardless of the sanction's criminal or non-criminal nature.

Suppose that the corporation's agent still tries to act in the corporation's best interest but he commits the offence nevertheless. His behaviour would then be simply irrational because the impending fine is higher than the benefit he tries to gain for the corporation. He must be nuts. If he is nuts, we would have to believe that the threat of a criminal sanction in contrast to an administrative sanction (that works for rational people but not for him) makes him an individual who is acting rationally again. While that would be nice, I do not believe that the threat of a criminal sanction has this effect. Because the person is acting irrationally, he cannot be deterred by a criminal sanction either. Anyway, a more probable explanation for an employee acting like this is that he intends to damage the corporation by causing the fine to be imposed. But then the offence would no longer be a corporate offence anymore. For deterrence purposes, we would have to look for personal consequences for this person and not for a corporate sanction.

III. Imprisonment and other Sanctions

Only monetary sanctions have been approached up to now. The sanction we associate with criminal law in the first place, imprisonment, seems to be wholly inappropriate in our context. You cannot throw a corporation into jail. On second thoughts, the idea is not that ridiculous. A natural person having to serve a sentence is deprived of his liberty to go where he would like. Legal persons are

[20] New York Times, April 9, 2015, http://www.nytimes.com/2015/04/10/business/dealbook/deutsche-bank-nears-plea-deal-over-libor-manipulation.html?ref=business&_r=1.

[21] For details: *A. Ransiek*, Überlegungen zur strafrechtlichen Verantwortung des Unternehmensträgers, in: Kempf/Lüderssen/Volk (fn. 11), p. 285, 288 et seqq.

[22] *A. Ransiek*, Zur strafrechtlichen Verantwortung von Unternehmen, NZWiSt 2012, p. 45, 47; *W. Stree/J. Kinzig,* in: A. Schönke/H. Schröder, StGB, 29th ed., 2014, Vorbem. §§ 38 et seqq., margin no 37 et seq.

[23] Cf. also *Ransiek*, NZWiSt 2012, p. 45, 46 et seq.

going nowhere but they may be deprived of their liberty to choose their range of business. Restrictions could apply to do business in certain areas, e. g. arms dealing.

Other sanctions could be specifically invented and enacted for corporate crimes: a corporation involved in crimes more often could be placed under receivership;[24] a firm convicted of a crime could lose the right to submit bids for public contracts for a certain time, it could lose public subsidies[25]; or vice versa: a corporation in compliance with legal regulations may receive a bonus. And even the "death penalty" is an option: A corporation being involved in crimes over and over again, being a threat to public safety concerns for the future, may be dissolved. All these sanctions are not new; most of them are provided for by existing laws. They are just not criminal sanctions and there is no reason why they should become part of the criminal law. The dissolution of companies by court or by a government agency's decision, e. g., is governed by various German company acts. This has been the law for corporations since 1937, for closed corporations since 1892. Thus, North Rhine-Westphalia's model penal code's idea to enable criminal courts to dissolve corporations is definitely old news.[26] In brief, there is no need for criminal law when special sanctions against corporations are devised.

IV. Distinguishing Personal Culpability and Corporate Liability

I do not have any doubts that the dissolution of a company is a legitimate measure if there is no other remedy left to eliminate severe dangers for the public good caused by the corporation. It is beside the point that the German Constitution as well as Protocols to the Convention for the Protection of Human Rights[27] explicitly outlaw the death penalty. It is not a cruel and unusual punishment forbidden by the 8th Amendment to the U. S. Constitution if you dissolve a corporation. The protection of human dignity does not apply when a business enterprise is forced to shut its doors forever. A corporation does not have human dignity that could be protected by these prohibitions and rights. Thus, you could inflict criminal sanctions on corporations without violating their human dignity because they do not have human dignity. It is quite clear that there is a difference between humans and legal persons; and because there is a difference, imposing a

[24] *B. Schünemann*, Strafrechtliche Sanktionen gegen Wirtschaftsunternehmen?, in: Festschrift für Klaus Tiedemann, 2008, p. 429, 446 et seq.

[25] Cf. *European Court of Justice (ECJ)*, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2012, p. 543 (Bonda); *J. Lacny/M. Szwarc*, Legal Nature of European Union Agricultural Penalties, The European Criminal Law Associations' Forum (eucrim) 2012, p. 170 et seq.; *Ransiek* (fn. 21), p. 285, 292; *Schünemann* (fn. 24) p. 429, 446 et seq. with further references.

[26] Since 1945 no corporation has been dissolved. So § 396 AktG is dead law.

[27] European Treaty Series No. 114 – Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty; European Treaty Series No. 187 – Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all Circumstances.

criminal sanction should be restricted to humans, because only a human can act personally responsible, can be blamed, can be guilty.[28]

There is a distinction the law should make if a baker as a sole proprietor of his bakery personally sells a spoiled slice of cake intentionally poisoning and killing his unsuspecting customer eating the cake or if a big bakery corporation is liable for the customer's death because its salesperson intentionally poisons the customer to make a profit for the bakery. If the baker runs a huge bakery with hundreds of branches as a sole proprietor there is a difference if he personally kills his customer or is liable as a business owner for the damages his employees cause in the course of business.

Legal scholars tend to be stubborn folk: Even if the Attorney General's model code becomes the law and both deeds would carry criminal sanctions against the baker, we would claim that the sanctions only share the same name but are still different sanctions.[29] Only in the first case, personal culpability is involved.

If criminal sanctions apply it stands to reason or is even mandatory that the procedural safeguards connected with (and restricted to) criminal law are applicable for corporations as well, e. g. the self-incrimination privilege.[30] If sanctions against corporations are not criminal sanctions then this is not the case. Both the European Court of Justice[31] and the German Constitutional Court[32] held that the privilege does not protect corporations.[33] Summarizing: criminal sanctions against corporations are a bad idea.

V. Sanctions against Corporations at all?

The most important question remains. It is not criminal versus non-criminal sanctions against the corporation but whether there should be sanctions against companies at all. Since corporations cannot act without human beings acting for them, these human acts and omissions are either considered as acts or omissions of the corporation itself or they are ascribed to the corporation so that it is liable for someone else's fault.[34] Some scholars argue that it is hardly justifiable to impose

[28] BVerfGE 123, p. 267, 413; *BVerfG*, Neue Juristische Wochenschrift (NJW) 2013, p. 1058, 1059.

[29] *G. Heine*, Reform des Kartell(straf)rechts in der Schweiz – Anstöße für Deutschland, in: Festschrift für Hans Achenbach, 2011, p. 127, 128 et seq.; *U. Neumann,* Strafrechtliche Verantwortlichkeit von Verbänden – rechtstheoretische Prolegomena, in: Kempf/Lüderssen/Volk (fn. 11), p. 13, 20; *Ransiek* (fn. 21), p. 285, 288 et seq. with further references.

[30] *K.-H. Krems*, Der NRW-Entwurf für ein Verbandsstrafgesetzbuch – Gesetzgeberische Intention und Konzeption, ZIS 2015, p. 5, 10.

[31] *ECJ*, 18.10.1989, case 374/87 (*Orkem/Commission*), [1989] ECR 3283; 10.11.1993, case 60/92 (*Otto/Postbank*), [1993] ECR I-5683.

[32] *BVerf*GE 95, p. 220, 242.

[33] Cf. also *I. Minoggio*, Das Schweigerecht der juristischen Person als Nebenbeteiligte im Strafverfahren, Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra) 2003, p. 121, 125; *G. Schohe*, Muss die Berufung auf Grundrechte zweckmäßig sein? Zur Aussageverweigerung im europäischen Kartellrecht, NJW 2002, p. 492, 493; for details *E. Kempf*, Die Beschuldigtenrechte in einem Strafverfahren gegen Unternehmen, in: Kempf/Lüderssen/Volk (fn. 11), p. 347 et seqq.

[34] *K. Schmidt*, Zur Verantwortung von Gesellschaften und Verbänden im Kartell-Ordnungswidrigkeitenrecht, wistra 1990, 130, 133.

sanctions on both the corporation and the offending natural persons and wonder if this constitutes double jeopardy.[35] It is stressed as well that when a corporation is fined, the consequences of this fine have to be borne by wholly innocent people, the shareholders and employees of the corporation.[36]

Taking a side glance at tort law, it is quite clear that mainly the corporation not the corporation's employees is liable for its products and has to compensate for resulting damages. If a motor vehicle is faulty, e. g., the company is responsible for the product. As early as 1915, the German Reichsgericht held a manufacturer of table salt liable for damages caused by splinters of glass contaminating the product regardless of whether the plaintiff could prove how or by whom the splinters got into the salt.[37] It meets no concerns that corporations can be liable in private law. Therefore, it meets no concerns either if they are potential addressees of fines or other sanctions for violating legal rules, e. g. safety standards for their products. If corporations or other business partnerships are granted their own rights by law, especially the right to make a profit, the law may vice versa establish legal obligations for the corporation, conditions that have to be met in order to do business. If a "statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy", it would be unjustifiable if only the private person could be subjected to a fine for violating the statute.[38] It would not be justifiable if the private person's fine would be determined by his enterprise's income, but in the case of a corporation by the acting person's income.

In brief, if the law creates rights in favour of the corporation it may create obligations also. The legal person is a creature of law. Thus, by law, the legal person, not its shareholders or employees, is assigned its own duties which can be enforced by imposing sanctions. The U. S. Supreme Court held the same for criminal sanctions in *New York Central & Hudson River* in 1909: "Congress can impute to a corporation the commission of certain criminal offences and subject it to criminal prosecution therefor."[39]

VI. Sanctioning Offences in the Course of Business

This does not mean that a corporation, partnership, or private manufacturer should automatically be liable for everything going wrong and causing damages in the course of business. The corporation is liable only for business offences, offences in the scope of the acting person's employment, not for all crimes committed on its

[35] *K. Engisch*, Verhandlungen des 40. Deutschen Juristentages, BD II, Teil E, S. E. 38; cf. also *Schünemann*, ZIS 2014, p. 1, 11 et seqq.; *idem*, Unternehmenskriminalität und Strafrecht, 1979, p. 242 et seqq.

[36] *B. Schünemann*, Schuldprinzip und Sanktionierung von juristischen Personen und Personenverbänden – Lehren aus dem deutsch-spanischen Strafrechtsdialog, GA 2015, p. 274, 279; cf. *Ransiek,* NZWiSt 2012, p. 45, 48 with further references.

[37] Entscheidungen des *Reichsgerichts* in Zivilsachen (RGZ) 87, p. 1, 3.

[38] *New York Central & Hudson River Railroad Co. v. United States*, 221 U. S. 481, 495 (1909).

[39] See *New York Central & Hudson River Railroad Co. v. United States*, 221 U. S. 481 (1909).

premises. If an employee steals something from his co-worker or intends to damage the corporation by opening all the valves so that poisonous wastewater runs into a river, the corporation's duties are not involved. Usually, it is irrelevant where a theft takes place. It is a private crime. Nevertheless, the distinction between crimes in the course of business and "private" crimes of employees may be difficult. If the wastewater is extremely dangerous it may be negligent to let one single person be in charge of it. If the employee opens the valves negligently without the intent to damage the corporation he acts in the course of his employment. The German Federal Criminal Court, e. g., had to decide, whether mobbing of a mentally handicapped person by his co-workers was a risk sufficiently related to business activity.[40]

Looking at the Reichsgericht case again, imposing a fine for selling contaminated salt is only reasonable if either the contamination itself or the sale of the contaminated salt was avoidable by reasonable means, e. g. by controlling the purity of the salt before selling it. Threatening somebody to impose a fine for undesired consequences is useless if there is no way to eliminate these consequences. An impending fine cannot induce the manufacturer to take means to avoid the consequences if no such means are available. Thus, there is no preventive effect and the fine is useless. In the Reichsgericht case: If there were nothing one could do to ensure that only uncontaminated salt were put on the market, the only way out would be to shut down the business altogether.

Therefore, the corporation should only be liable if it did not take the adequate and reasonable steps to prevent the violation. By whom these steps had to be taken is irrelevant if the corporation is understood as a unity encompassing all its facilities, equipment, and persons working for the corporation.[41] Thus, the question which single person, a regular employee, a midlevel manager or a board member, actually caused the violation by his or her act or omission should be irrelevant. Relevant is alone if the corporation as a whole, through all its members, could avoid the violation.[42] If the corporation took all the reasonable and adequate steps to comply with the law, there is no corporate liability.

The devil is, of course, in the details because it has to be decided what the necessary and reasonable steps are.[43] To cite the 9th Circuit's Hilton Corporation case[44] as an example, an employee is still acting within the scope of his employment even if he acts contrary to direct orders of his superior and to guidelines by the

[40] Entscheidungen des *Bundesgerichtshofs* in Strafsachen (BGHSt) 57, p. 42.

[41] In principle, the approach of German law is different: Originally, only board members and CEOs could trigger a fine against the corporation. The position presented here is the view of U. S. law, *New York Central & Hudson River Railroad Co. v. United States*, 221 U. S. 481, 491, 495 et seq., and European antitrust law, *ECJ*, 7.6.1983, case 100/80 (*Musique Diffusion francaise et al./Commission*) [1983] ECR 1825, 1903. Since German Law now includes midlevel managers and compliance officers, differences are small at best.

[42] See also *Ransiek*, NZWiSt 2012, p. 45, 50 et seq.; *idem* (fn. 21), p. 285, 299 et seq.

[43] See *W. Beulke/K. Mossmayer*, Der Reformvorschlag des Bundesverbandes der Unternehmensjuristen zu den §§ 30, 130 OWiG – Plädoyer für ein modernes Unternehmenssanktionenrecht –, Corporate Compliance Zeitschrift (CCZ) 2014, p. 146, 151 et seq.: selection and instruction of employees; determination and assessment of risks and dangers; express instructions and education.

[44] *United States v. Hilton Hotels Corporation*, 467 F 2d 1000 (1972).

hotel group's management. If, however, there were not only orders but a system to enforce them as well, it can be argued that these are sufficient steps to prevent the violation. The employee circumventing these measures acts outside the scope of his employment.

When it comes to sentencing German criminal law is quite clear and all arguments are in favour of applying these rules to sanctions against corporations as well. It is a mitigating factor if the corporation newly installs or improves an existing compliance system in order to prevent future violations.[45] The Attorney General's model code provides an express section (§ 5) allowing to abstain from fining the corporation in this case.

VII. Corporate versus Personal Liability

A closing remark: If a corporation or partnership is regarded as a unity and is held liable for business violations, the law can forgo personal criminal liability of the wrongfully acting or omitting persons. For example, in European antitrust law only corporations (undertakings) are liable, not the acting humans. The enterprise has to comply with antitrust law but the acting persons are of no interest. Likewise, it is a better idea to hold responsible, and fine, ship owners for polluting the sea by releasing used oil than threatening single sailors with a criminal sanction. An even better idea is to have no fine or criminal sanction at all but just enough tanks in all harbours, taking care of the oil with little or no cost for the owner. This is not European law, however; European law is: The sailor is to be held criminally liable to protect the environment.[46] To date, nobody has been found who has been convicted.

[45] See *K. Mossmayer/S. Gropp-Stadler*, Der Diskussionsentwurf des Bundesmininisteriums der Justiz zur Änderung der §§ 30, 130 OWiG: Ein Zwischenruf, NZWiSt 2012, p. 241, 242. This does not mean that the mere existence of a compliance program that could not prevent the violation is a mitigating factor. See *P. Krebs/A. Eufinger/S. Jung*, Bußgeldminderung durch Compliance-Programme im deutschen Kartellbußgeldverfahren?, Corporate Compliance Zeitschrift (CCZ) 2011, p. 213 et seqq.; *Engelhart*, NZWiSt 2015, p. 201, 207.

[46] Article 4 Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.